

***THE 'PAY NOW ARGUE LATER' PRINCIPLE IN SOUTH AFRICAN TAX  
LAW: ITS DEVELOPMENT, OPERATION, COMPARISON TO SOUTH  
AFRICAN CIVIL DEBT ENFORCEMENT AND CONSISTENCY WITH  
THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS***

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specialising in South African tax, in the Department of Finance and Tax at the University of  
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Date of submission: March 2017

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## **ABSTRACT**

Section 164 of the Tax Administration Act 28 of 2011 (the TAA), previously contained in section 88 of the Income Tax Act 58 of 1962 (the Income Tax Act) and section 36 of the Value-Added Tax (VAT) Act 89 of 1991 (the VAT Act), provides that the payment of tax will not be automatically suspended until the resolution of a dispute regarding the liability for the said tax debt. This is known as the ‘pay now argue later’ principle. The objectives of this research were to analyse the development of the ‘pay now argue later’ principle in South African tax law, to provide an overview of the content and operation of section 164 of the TAA, to compare the principle and its purpose with civil debt enforcement procedures and, lastly, to test the principle against the Constitution of the Republic of South Africa, 1996 (the Constitution), specifically the right of access to courts. The underlying theme of this research is the recognition of taxpayers’ rights in South Africa, specifically the interplay between the powers of the fiscus and the rights of taxpayers.

In order to achieve the abovementioned objectives, this research examined the development of the ‘pay now argue later’ principle from its first appearance in section 88 of the Income Tax Act and section 36 of the VAT Act to its subsequent incorporation into the Tax Administration Bill 11 of 2011 and, ultimately, into section 164 of the TAA. It was concluded that the development of the ‘pay now argue later’ principle, from its first appearance in the Income Tax Act in 1962 and the VAT Act in 1993 until their repeal in 2011, was relatively minor save for in 2009, during which year there was a marked change in the structure of this principle with the inclusion of the so-called ‘suspension rule’. This research provided a practical overview and understanding of the operation of the ‘pay now argue later’ principle in terms of section 164 of the TAA, specifically focusing on the suspension rule. This research further compared the ‘pay now argue later’ principle with civil debt enforcement procedures, specifically provisional sentence and summary judgment. It was concluded that the ‘pay now argue later’ principle is an exception to the ordinary rules governing civil debt enforcement proceedings. Lastly, this research placed the ‘pay now argue later’ principle under constitutional scrutiny, specifically whether its application infringes on the right of access to courts of taxpayers. It was found that the ‘pay now argue later’ principle infringes a taxpayer’s right of access to courts, but this limitation is justified in terms of section 36 of the Constitution.

## **DEDICATION**

For Theo, who makes my days bright.

## **ACKNOWLEDGMENTS**

I would like to acknowledge my parents, Sue and Trevor, without whom this opportunity would not have been possible, as well as my brothers, Rich and Bruce, for their encouragement and support.

Thank you to my colleagues at Edward Nathan Sonnenbergs Incorporated, professors from my alma mater, as well as colleagues in the legal fraternity who either reviewed sections of my research or were happy to take the time to discuss and debate my different ideas and opinions. All of these contributions were vital to the end product of this research. Thanks must also be given to my friend, Kirsti, who assisted with the diagrams in Chapter 2.

My research showed positive growth in depth and understanding under the supervision of Professor Peter Surtees and Dr Beric Croome, both masters in their field and from whom I have been fortunate enough to learn. Their respective knowledge on South African tax, as well as on academic writing and research, has been influential not only on this research, but on my work in the tax field in general.

I would like to acknowledge Theo, for his patience, love and kindness throughout this busy time. Thank you.

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## GLOSSARY AND LIST OF ABBREVIATIONS

<b>Abbreviation or term</b>	<b>Explanations</b>
the Bill of Rights	Chapter 2 of the Constitution
the Constitution	The Constitution of the Republic of South Africa, 1996
the Commissioner	The Commissioner for SARS appointed under section 6 of the SARS Act, currently Mr Tom Moyane
the common law	South African common law is founded on Roman-Dutch law
the fiscus	This term is used to refer to the South African National Treasury, including SARS
Income tax	Direct tax on income or remuneration
the Income Tax Act	The Income Tax Act 56 of 1962
the Interim Constitution	The Constitution of the Republic of South Africa, 1993
PAJA	The Promotion of Administrative Justice Act 3 of 2000
prima facie	‘At first sight’ or ‘on first appearance but subject to further evidence or information’ <sup>1</sup>
a Public Notice	Notices issued in terms of the TAA
SARS	The South African Revenue Service, previously known as the Inland Revenue
the SARS Act	South African Revenue Service Act 34 of 1997

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<sup>1</sup> *Black's Law Dictionary* 8 ed (2004) at the definition of ‘prima facie’.

the TAA	The Tax Administration Act 28 of 2011.
the TAB	The Tax Administration Bill 11 of 2011
a tax Act	A ‘tax Act’ is defined in section 1 of the TAA as including the TAA and any Act referred to in section 4 of the SARS Act, excluding customs and excise legislation. Section 4 of the SARS Act refers to Schedule 1 to the SARS Act, which, in turn, lists the various tax Acts.
the tax board	The tax board is established by the Minister of Finance under section 108 of the TAA. It is not a court as referred to in section 166 of the Constitution, but an administrative tribunal created under the TAA. The Tax Board hears tax appeals involving tax in dispute that do not exceed the amount determined by the Minister under section 109(1)(a) of the TAA, which is, in respect of any appeals noted on or after 1 January 2016 R1 million. <sup>2</sup>
the tax court	The tax court is established by the President of the Republic under section 116 of the TAA. It is not a court as referred to in section 166 of the Constitution, but an administrative tribunal created under the TAA. The tax court has jurisdiction over tax appeals lodged under section 103 of the TAA and may also hear interlocutory applications and procedural matters relating to objections and appeals.
the Uniform Rules of Court	Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.
the VAT Act	The Value-Added Tax Act 89 of 1991
VAT	VAT is an indirect tax on the consumption of goods and services in the economy.

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<sup>2</sup> General Notice 1196 GG 39490 of 17 December 2015.

## 1. CHAPTER 1: INTRODUCTION

The reality is that we don't *pay* taxes. The government *takes* them.<sup>3</sup>

In a perfect world SARS would not need efficient revenue collection and enforcement procedures as taxpayers would voluntary [sic] pay their fair share of the tax burden.<sup>4</sup>

### 1.1. An exordium to the research

The above epigraph serves as an illustration of the divide in thinking regarding fiscal debt recovery. In conducting this research the sharpness of this divide became strikingly apparent.<sup>5</sup> There is definite thinking among the global taxpaying community that taxing authorities have a power of tax enforcement and collection that borders on 'legalized [sic] robbery'<sup>6</sup>. However, as any logistician would argue, '[i]n a perfect world SARS [or any taxing authority] would not need efficient revenue collection and enforcement procedures as taxpayers would voluntary [sic] pay their fair share of the tax burden'<sup>7</sup>. This contrasted thinking speaks to the juxtaposed development, both in South Africa and in international jurisdictions, of increasing powers for taxing authorities, specifically the powers of tax collection and access to information in the furtherance of such collection, accompanied by increasing acknowledgement and awareness of taxpayers' rights by both taxpayers themselves and the taxing authorities. Perhaps, however, in a legalised society, there can never be development of the one without the other.

It is submitted that the procedure that is the point of departure for fiscal debt enforcement and collection procedures in South African tax law is the so-called 'pay now argue later' principle. This principle, as the phrase suggests, denotes paying first and only arguing about it later. It is a colloquial phrase used to refer to the fiscal debt enforcement procedure provided for under section 164 of the TAA, a section labelled *Payment of tax pending objection or appeal*, which, in turn, falls under Chapter 10 *Tax Liability and*

<sup>3</sup> C Rock *Rock This!* (2000).

<sup>4</sup> L Olivier 'Uncertainty regarding the philosophy underlying South African Revenue Service collection procedures' (2003) 2 *Tydskrif vir die Suid Afrikaanse Reg* 382-8 at page 382.

<sup>5</sup> It is not disputed, however, that both thinking may simultaneously be adopted.

<sup>6</sup> C Coolidge cited in TM Block *Happy Returns: The Story of Henry Block, America's Tax Man* (2010) at page 153.

<sup>7</sup> Olivier op cit note 4 at page 382.

*Payment*, specifically Part B *Payment of Tax* of the TAA. Section 164 (previously section 88 of the Income Tax Act and section 36 of the VAT Act) specifically states that ‘the obligation to pay tax... and the right of SARS to receive and recover tax... will not be suspended by an objection or an appeal...’.<sup>8</sup> A taxpayer will, instead, be required, by law, to first pay a tax debt due<sup>9</sup>, unless SARS agrees to suspend the obligation to pay the tax debt in terms of section 164(2), the so-called ‘suspension rule’, and only later argue the liability therefor. In the event that a taxpayer does decide to argue later, the onus of proof rests on the taxpayer to prove, inter alia, ‘that an amount, transaction, event or item is exempt or otherwise not taxable’.<sup>10</sup>

As a crude simplification, the fiscus is a creditor and every South African taxpayer is a debtor for the amount of tax due in respect of that taxpayer. There are fundamental differences between debt enforcement in the civil arena versus that in public administration, the former regulated by procedural law, which controls interactions between civil persons and concerns ‘[t]he rules that prescribe the steps for having a right or duty judicially enforced’<sup>11</sup>, and the latter being regulated by administrative law, which is ‘[t]he law governing the organization [sic] and operation of administrative agencies’<sup>12</sup> which, it is submitted, includes the fiscus. It is contended that, despite this difference, a comparison between fiscal debt enforcement and civil debt<sup>13</sup> enforcement is still possible and necessary on the premise that ‘[o]nce the Commissioner is a creditor, he is entitled to whatever remedy a creditor may have for the enforcement or collection of the debt’, which includes civil debt enforcement procedures.<sup>14</sup> SARS’ power to ‘receive and recover tax’ is a monetary claim and such monetary claims are also, in principle, susceptible to civil debt enforcement procedures. The ‘pay now argue later’ principle is an exception to ordinary civil debt enforcement in that it does not involve court process, which is characteristic of ordinary civil debt enforcement whereby litigation is the procedural step by which a creditor enforces the payment of a civil debt due, but instead occurs automatically by operation of law. There are exceptions to ordinary civil debt enforcement, namely provisional sentence<sup>15</sup> and summary judgment<sup>16</sup>.

The ‘pay now argue later’ principle is a provision in tax administrative law which protects the power of SARS to ‘receive and recover tax’. However, it may be argued that the

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<sup>8</sup> Section 164(1) of the TAA.

<sup>9</sup> A tax debt due to the fiscus is defined in terms of section 169(1) of the TAA which states that it is ‘[a]n amount of tax due or payable in terms of a tax Act’. According to section 170 of the TAA a tax debt is recorded by way of an ‘assessment’, which is defined in section 1 of the TAA as ‘the determination of the amount of a tax liability or refund, by way of self-assessment or assessment by SARS’.

<sup>10</sup> Section 102(1)(a) of the TAA.

<sup>11</sup> *Black’s Law Dictionary* op cit note 1 at the definition of ‘procedural law’.

<sup>12</sup> *Ibid* at the definition of ‘administrative law’.

<sup>13</sup> Throughout this research reference to civil debt is limited to refer to a civil contractual debt.

<sup>14</sup> *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA) at para 17.

<sup>15</sup> The provisional sentence procedure is regulated by the common law and Rule 8(1) of the Uniform Rules of Court and Rule 14A Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa.

<sup>16</sup> The summary judgment procedure is regulated by the common law and Rule 32 of the Uniform Rules of Court and Rule 14 of the Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa.

extent of this protection is so that it places this power in preference of a taxpayer's constitutional right of access to courts<sup>17</sup>. In this regard, the 'pay now argue later' principle has been labelled a 'draconian'<sup>18</sup> procedure and one which infringes taxpayers' rights, however, at the same time it consistently satisfies constitutional scrutiny with regard to its consistency with the right of access to courts<sup>19</sup>. This further illustrates the paradoxes in thinking and development referred to above.

The intention of this research is to expand on existing analyses of the 'pay now argue later' principle by testing its consistency with the Constitution, as well as to compare it against broader debt enforcement in civil procedure. Although the principle has been tested against the Constitution both in a judicial arena, as well as an academic one<sup>20</sup>, comparisons with broader debt enforcement in civil procedure are not common. In the case of *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another*<sup>21</sup>, where the Constitutional Court decided on whether the provisional sentence procedure unjustifiably limits the right of access to courts, Brand AJ made brief mention to an argument raised by the respondent that 'a comparison between provisional sentence and other procedures that were held to pass constitutional muster or that were at least not as yet subjected to constitutional challenge' should be made, the respondent referring specifically to, inter alia, the 'pay now argue later' principle, the provisional sentence and summary judgment procedures.<sup>22</sup> Brand AJ however held that '[t]he constitutionality of each procedure... must be considered separately if and when it is necessary' and thus held that a comparison of such a nature would not be helpful.<sup>23</sup> This research does not focus solely on a comparison of the 'pay now argue later' principle with the provisional sentence and summary judgment procedures in order to determine the constitutionality of the 'pay now argue later' principle, but more as means of showing that the 'pay now argue later' principle is not a peculiarity in broader debt enforcement in South Africa. This research will expand on the 'pay now argue later' principle and will ask and then answer questions about its development, operation, comparability with civil debt procedures and consistency with the Constitution.

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<sup>17</sup> Section 34 of the Constitution.

<sup>18</sup> R C Williams 'The pay-now-argue-later rule festers in our income tax system' *South African Institute of Tax Professionals Technical* 2 December 2011, available at <<http://www.thesait.org.za/news/78404/The-pay-now-argue-later-rule-festers-in-our-income-tax-system-Mobibane-case.htm>>.

<sup>19</sup> For example, see *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) in which case the Constitutional Court held that section 36 of the VAT did not unjustifiably limit a taxpayer's right of access to courts in terms of section 34 of the Constitution.

<sup>20</sup> C Keulder "'Pay now, argue later' rule: before and after the Tax Administration Act' (2013) 16 *Potchefstroom Electronic Law Journal* 125-158; C Keulder *Does the constitution protect taxpayers against the mighty SARS? An inquiry into the constitutionality of selected tax practices and procedures* (unpublished LLM thesis, University of Pretoria, 2012). The former research focuses primarily on the 'pay now argue later' principle in terms of section 36 of the VAT Act, while the latter compared, inter alia, the process of the 'pay now argue later' principle with the civil procedure regulating appeals.

<sup>21</sup> 2011 (3) SA 1 (CC).

<sup>22</sup> *Ibid* at para 62.

<sup>23</sup> *Ibid* at para 63.

## 1.2. The focus and objectives of the research

The focus of this research is on the ‘pay now argue later’ principle in South African law of taxation and in light of various questions, which are set out in *Diagram 1* below. This research addresses questions on how the ‘pay now argue later’ principle developed and how it, with the inclusion of the suspension rule, operates in South Africa. This research further asks and answers questions on the comparison of the ‘pay now argue later’ principle to South African civil debt enforcement procedures and on whether it justifiably infringes a taxpayer’s right of access to courts. All of these areas of focus are important to a thorough analysis of the ‘pay now argue later’ principle in South African tax law.

*Diagram 1: An outline of the specific research questions focused on in this research*

Development of the ‘pay now argue later’ principle	<ul style="list-style-type: none"> <li>❶ How has the ‘pay now argue later’ principle developed from its first appearance in the Income Tax Act and the VAT Act to the TAB and, finally, to the TAA, and what was the nature of the developments?</li> <li>❷ What was the effect, if any, of the advent of the Constitutional era on the development of the ‘pay now argue later’ principle?</li> </ul>
Operation and content of section 164 of the TAA	<ul style="list-style-type: none"> <li>❸ How is an application to suspend the obligation to pay tax brought by a taxpayer in terms of the TAA?</li> <li>❹ What is the meaning and scope of the Commissioner’s ‘discretion’ when approving or refusing an application for the suspension of the ‘pay now argue later’ principle?</li> <li>❺ What, if any, are the remedies available to a taxpayer whose application for the suspension of the ‘pay now argue later’ principle has been refused and are they sufficient?</li> </ul>
Comparison to South African civil debt enforcement procedures	<ul style="list-style-type: none"> <li>❻ How does the ‘pay now argue later’ principle, as a fiscal debt enforcement procedure, compare with ordinary civil debt enforcement in South Africa?</li> <li>❼ Is the rationale underlying the ‘pay now argue later’ principle consistent with exceptions to ordinary civil debt enforcement in South Africa, that is provisional sentence and summary judgment?</li> </ul>
Consistency with the Constitution	<ul style="list-style-type: none"> <li>❽ Are the provisions of the ‘pay now argue later’ principle consistent with the constitutional right of access to courts; if not, then is a limitation on the constitutional right of access to courts justified?</li> <li>❾ Should the ‘pay now argue later’ principle have different applications for VAT and income tax disputes?</li> </ul>

Following the above, there are four predominant research objectives. First, the research aims to analyse the development of the ‘pay now argue later’ principle under the now repealed section 88 of the Income Tax Act and section 36 of the VAT Act into a combination of both under the TAB which later became the TAA. The aim of this is to show how and in what manner this principle developed and provide insight into the nature of the developments. Secondly, the research aims to provide a basic understanding of the ‘pay now argue later’ principle in terms of section 164 of the TAA and to clarify the abovementioned questions regarding the operation of the principle with the inclusion of the suspension rule. Thirdly, the research aims to analyse the ‘pay now argue later’ principle in terms of broader civil debt enforcement procedures in South Africa, as well as to specifically compare the principle with provisional sentence and summary judgment procedures which operate as exceptions to the ordinary South African civil debt enforcement procedure. Fourthly, the research aims to test the principle against the Constitution, specifically the right of access to courts, in order to determine whether this principle unjustifiably restricts a taxpayer’s right of access to courts, taking into account that a different procedure for VAT and income tax may be warranted.

### **1.3. An overview of the research**

The literature review conducted in preparation for this research concentrated on finding answers to the questions posed in *Diagram 1*. The primary purpose of this subsection is to broadly outline the sources used to answer these questions.

***How has the ‘pay now argue later’ principle developed from its first appearance in the Income Tax Act and the VAT Act to the TAB and, finally, to the TAA, and what was the nature of the developments?*** This research question was answered with reference to the legislated amendments in the Amendment Acts<sup>24</sup> relevant to the Income Tax Act, the VAT Act and the TAA (which followed the TAB). In order to obtain a greater understanding of the nature of these amendments, that is the reason and effect of the different amendments, the memoranda of objects and explanatory memoranda<sup>25</sup> which accompanied the TAB, as well as the Amendment Bills, were used. The abovementioned memoranda were, however, not always a useful source of information, as the explanations provided therein were not always consistent with the actual amendment in the Amendment Act or the TAB.

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<sup>24</sup> Amendment Acts are promulgated in order to amend Principal Acts, such as the Income Tax Act, VAT Act, and TAA. Amendment Bills are their predecessors, intended to invite public comment in the process of drafting the amending legislation.

<sup>25</sup> Memoranda of objects accompany administration Bills (section 76 of the Constitution) and explanatory memoranda accompany money Bills (section 77 of the Constitution). According to SARS’ website the above memoranda ‘provide background on proposed new legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary’ available at <<http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Explanatory-Memoranda.aspx>>.

***What was the effect, if any, of the advent of the Constitutional era on the development of the ‘pay now argue later’ principle?*** Again the legislated amendments in the Amendment Acts relevant to the Income Tax Act, the VAT Act and the TAA (which followed the TAB) were used to answer this research question. The abovementioned memoranda were also partially relied on where helpful. The research conducted in answering this research question assisted in determining whether the amendments to the ‘pay now argue later’ principle were in line with the increasing focus, both nationally and internationally, on taxpayers’ rights, that is, whether the amendments provided greater scope for taxpayers’ rights or whether they limited such rights. With the advent of the Interim Constitution, an *ex parte* application was brought in 1996 by the then Commissioner: Inland Revenue, Trevor Frederik van Heerden, for direct access to the Constitutional Court, to bring an application for the Constitutional Court to conduct an inquiry into the constitutionality of section 88 of the Income Tax Act, as well as other sections of the Income Tax Act.<sup>26</sup> The affidavit of van Heerden, which was used in support of the application, as well as the *Brief for the Commissioner of Inland Revenue for the Republic of South Africa* drafted by Brian J Arnold in 1995 which was annexed to the affidavit as Annexure “H”, were both served as useful contributions throughout this research.

***How is an application to suspend the obligation to pay tax brought by a taxpayer in terms of the TAA?*** Practical experience in drafting these applications was used in order to answer this research question.

***What is the meaning and scope of the Commissioner’s ‘discretion’ when approving or refusing an application for the suspension of the ‘pay now argue later’ principle?*** In answering this research question, the legislation itself was considered, specifically section 164(2) and (3) of the TAA, as well as commentary thereon by Croome and Olivier.<sup>27</sup> Section 164(2) gives effect to the power of a senior SARS official to suspend a taxpayer’s obligation to pay tax upon an application being filed by such taxpayer and section 164(3) outlines the factors that a senior SARS official may have regard to when deciding whether to accept such an application for the suspension of the obligation to pay tax. Practical experience in drafting these applications was also used in answering this research question.

***What, if any, are the remedies available to a taxpayer whose application for the suspension of the ‘pay now argue later’ principle has been refused and are they sufficient?*** Judicial review in terms of PAJA was the focus in answering this research question, as it is the only form of relief in a situation where an application for the suspension of the ‘pay now argue later’ principle has been refused. Reference was also made to Croome and Olivier and their work together and separately on taxpayers’ rights and tax collection.<sup>28</sup>

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<sup>26</sup> *Ex parte: The Commissioner for Inland Revenue* (unreported case no CCT/22/1996) of 25 April 1996.

<sup>27</sup> Please see Chapter 2 for references of these works.

<sup>28</sup> Please see Chapter 4 for references of these works.

***How does the ‘pay now argue later’ principle, as a fiscal debt enforcement procedure, compare with ordinary civil debt enforcement in South Africa?*** The answer of this question turned on the difference between the nature of a civil debt versus that of a fiscal debt. This comparison was therefore considered in answering this research question, using the fiscal legislation which gives effect to a fiscal debt and authority on the common law which gives effect to a civil contractual debt.

***Is the rationale underlying the ‘pay now argue later’ principle consistent with exceptions to ordinary civil debt enforcement in South Africa, that is provisional sentence and summary judgment?*** In answering this research question, principal case law dealing with the provisional sentence and summary judgment was used, supplemented by commentary from other sources on the purpose for each procedure. For the purposes of this research only a brief outline of provisional sentence and summary judgment was required in order to compare them with the ‘pay now argue later’ principle on certain key areas.

***Are the provisions of the ‘pay now argue later’ principle consistent with the constitutional right of access to courts; if not, then is a limitation on the constitutional right of access to courts justified?*** In answering this research question, principal case law dealing with the provisional sentence and summary judgment procedures was used, supplemented by commentary from other sources.

***Should the ‘pay now argue later’ principle have different applications for VAT and income tax disputes?*** Kriegler JA’s interpretation of the difference between VAT and income tax in *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another*<sup>29</sup>, in which the Constitutional Court decided on whether section 36 of the VAT Act unjustifiably limited the right of access to courts, was the primary source used for answering this research question, supplemented by commentary on this distinction, or lack of distinction, from other sources.

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<sup>29</sup> *Metcash* supra note 19.

## 2. CHAPTER 2: THE DEVELOPMENT OF THE ‘PAY NOW ARGUE LATER’ PRINCIPLE WITHIN SOUTH AFRICAN TAX LAW

[T]he law is never static; it is always changing, being reinterpreted or redefined, as legislators and judges strive, with varying degrees of success, to ensure that the law constantly reflects changes in society itself.<sup>30</sup>

### 2.1. Introduction

The ‘pay now argue later’ principle should, in theory, have developed as a consequence to and in order to reflect the ‘changes in society’<sup>31</sup> had it not already been consistent with them. This principle originally came into effect in 1962 in terms of the Income Tax Act and later, in 1991, in terms of the VAT Act. In 2011, these provisions were repealed by the TAA subsequent to their incorporation in the TAB, which later became the TAA.

The major changes or developments in the South African society can be characterised by the advent of the Constitution in 1994<sup>32</sup> and the increasing awareness of taxpayers’ rights and powers of taxing authorities, both nationally and internationally. In principle ‘[r]evenue laws [were]... no exception’ to the overhaul that the Constitution effected on the legal system of South Africa.<sup>33</sup> As previously mentioned, in 1996, the then Commissioner: Inland Revenue, van Heerden, applied, ex parte, for direct access to the Constitutional Court to bring an application for the Constitutional Court to conduct an inquiry into the constitutionality of section 88 of the Income Tax Act, as well as other sections of the Income Tax Act.<sup>34</sup> Because of the similarity between the Income Tax Act and the VAT Act, it was thought unnecessary to bring corresponding VAT provisions under Constitutional scrutiny, but to amend them in line with findings of the Constitutional Court, should the case be heard, on the impugned provisions in the Income Tax Act.<sup>35</sup> This application arose because of the fear that ‘revenue collection might be seriously jeopardised if taxpayers refused to pay tax on the basis that certain revenue provisions were unconstitutional’<sup>36</sup> and also, it is submitted, to prevent lengthy and costly disputes with taxpayers regarding the constitutionality of certain fiscal

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<sup>30</sup> P Harris *An introduction to law* 8 ed (2016) at pages 3-4.

<sup>31</sup> Ibid at page 4.

<sup>32</sup> The Interim Constitution, and later the Constitution.

<sup>33</sup> L Olivier ‘Tax collection and the Bill of Rights’ (2001) *Tydskrif vir die Suid Afrikaanse Reg* 193-200 at page 193.

<sup>34</sup> *The Commissioner for Inland Revenue* supra note 26.

<sup>35</sup> Olivier op cit note 33 at page 193.

<sup>36</sup> Ibid at page 193.

provisions. However, the application was never heard by the Constitutional Court on the basis that it was not appropriate for direct access.<sup>37</sup> Regardless of this outcome, fiscal provisions, including the ‘pay now argue later’ principle, have still had opportunity to undergo constitutional scrutiny, although this has had little to no impact on the development of the principle.<sup>38</sup>

As mentioned above, a further development in the South African society, as well as in the rest of the world, is the growing awareness and recognition of taxpayers’ rights. This is evidenced by the recommendation for a taxpayers’ charter by the Katz Commission<sup>39</sup> and also Croome’s extensive research into taxpayers’ rights in South Africa, which has been influential in creating greater awareness of the rights of taxpayers in this country.<sup>40</sup> A further illustration of this trend is Waris’ research on whether human rights can be used as a tool for citizens to evaluate fiscal allocations; in other words, whether ‘human rights law, principles and policies’ can be used ‘to link tax revenue to expenditure through re-distribution’.<sup>41</sup>

There has also, as previously mentioned, been a converse development in both South Africa and the world; namely, the expansion of taxing authorities’ powers, specifically powers of access to information and tax collection. An example of this is that SARS is now entitled to request banks to furnish financial information about taxpayers.<sup>42</sup> In terms of section 46(3) of the TAA SARS is permitted to secure information about a taxpayer from third parties, provided that the information gathered is ‘material maintained or kept or that should reasonably be maintained or kept by the person in respect to the taxpayer’. The definition of ‘relevant material’ in section 1 of the TAA gives SARS the discretion to determine what constitutes ‘relevant material’ for the purposes of the TAA. SARS is also entitled to instruct banks to transfer available funds from taxpayers’ bank accounts to SARS, without being permitted to inform their clients beforehand<sup>43</sup>.

In the almost 55 years that have elapsed since its first appearance in the Income Tax Act, the development of the ‘pay now argue later’ principle should, in principle, have mimicked these developments in South African society, had it not been consistent with them to begin with.

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<sup>37</sup> Olivier op cit note 33 at page 193.

<sup>38</sup> Ibid at page 193.

<sup>39</sup> The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa (Katz Commission) which issued various reports under the Commissions Act 8 of 1947 and in accordance with *Government Gazette* 15924, *Regulation Gazette* 5378 of 1994. See specifically the Third Interim Report of the Katz Commission Chapter 12 at page 130.

<sup>40</sup> For example see B Croome *Taxpayers’ Rights in South Africa* (2010).

<sup>41</sup> The work referred to is A Waris *Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights* (2013).

<sup>42</sup> This flows from the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and various bilateral treaties. South Africa has adopted these instruments in compliance with the Constitution and must adhere to them.

<sup>43</sup> Section 179 of the TAA.

## **2.2. The development of the ‘pay now argue later’ principle under section 88 of the Income Tax Act: 1962 to 2011**

The promulgation of the Income Tax Act in 1962 brought with it section 88, which, as it then stood<sup>44</sup>, compelled taxpayers to pay tax due by them regardless of any pending appeal made by them against the obligation to pay the tax due. Section 88 was, originally, only applicable to ‘tax chargeable’ under the Income Tax Act and only to situations which involved an ‘appeal or pending the decision of a court of law’ under section 86 of the Income Tax Act, which dealt with appeals. Excluded from the applicability of section 88 were situations in which an objection to an obligation to pay tax was lodged by a taxpayer<sup>45</sup>. Ipso facto, only situations involving the lodging of an appeal would have resulted in the applicability of the ‘pay now argue later’ principle in terms of section 88. By legal exclusion, ‘[t]he obligation to pay tax and the right to receive and recover any tax’ due by a taxpayer would have been suspended by the lodging of an objection against the liability for the tax due. The Commissioner was permitted to ‘direct’ that section 88 not apply. The circumstances in which the Commissioner could make such a direction or the factors which should have been considered in making such a direction were not elaborated on in the section. Furthermore, it was not clear whether an application had to be made by the taxpayer or whether it was purely the prerogative of the Commissioner to direct that the ‘pay now argue later’ principle not apply. Tax due to Inland Revenue was recoverable from a taxpayer ‘with interest chargeable from the due date’ of the tax until payment thereof. Tax paid in excess, that is, tax found not to be due but paid by a taxpayer in terms of the ‘pay now argue later’ principle, was required to be refunded to such taxpayer ‘with interest from the date of the receipt’ of such tax by Inland Revenue.

The majority of the amendments made to section 88, from its original form up to when it was repealed in 2011, concerned administrative and technical amendments such as the inclusion of provincial taxes to the scope of the ‘pay now argue later’ principle<sup>46</sup>; the alteration of the interest rate to be applied to excess tax paid by a taxpayer<sup>47</sup>; clarification regarding the funding to be used by SARS for paying interest on excess tax paid by a taxpayer<sup>48</sup>; and the inclusion of decisions or appeals by the special tax court and the special tax board to the scope of the ‘pay now argue later’ principle<sup>49</sup>. There were, however, certain

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<sup>44</sup> See *Diagram 2* which, inter alia, displays section 88 in its original form (prior to any amendments).

<sup>45</sup> In ‘Effect of lodging an objection on payment of tax’ (1964) 13-14 *The Taxpayer* 167-168 at 168 it was held that ‘payment of tax cannot be enforced pending the Secretary’s decision on an objection lodged timeously’.

<sup>46</sup> Section 12 of the Income Tax Amendment Act 6 of 1963 read with the Explanatory Memorandum on the Income Tax Amendment Bill, 1963.

<sup>47</sup> Section 44 of Act 85 of the Income Tax Act 85 of 1974 read with the Explanatory Memorandum on the Income Tax Bill, 1974; section 24 of the Income Tax Act 91 of 1982 read with the Explanatory Memorandum on the Income Tax Bill, 1982.

<sup>48</sup> Section 14 of the Revenue Laws Amendment Act 140 of 1993 read with the Explanatory Memorandum on the Revenue Laws Amendment Bill, 1993.

<sup>49</sup> Section 25 of the Income Tax Act 103 of 1976 read with the Explanatory Memorandum on the Income Tax Bill, 1976; section 40 of the Income Tax Act 113 of 1993 read with the Income Tax Bill, 1993.

amendments to section 88 that warrant further discussion, the first of these being the amendment that took place in 1963.

Section 12 of the Income Tax Act 6 of 1963, amended section 88 so as to require a taxpayer, for the purposes of calculating the interest due by SARS on excess tax paid by the taxpayer, to prove the date upon which SARS received the payment of the said excess tax. Such an amendment allowed for a more efficient approach than the one in terms of which SARS would be required to prove the date upon which it received the payment of such excess tax, as it is presumed that such proof is more easily obtainable by the respective taxpayer than by SARS. This amendment thus reduced the administrative burden on SARS.

In 1989, section 17 of the Income Tax Act 70 of 1989 amended section 88 so as to oblige SARS to pay interest on excess tax paid by a taxpayer in circumstances where SARS conceded to an appeal prior to the outcome of the appeal.<sup>50</sup> This amendment limited the extent to which SARS could frivolously enforce the ‘pay now argue later’ principle. Without this amendment SARS had the power to secure payment of tax due by the taxpayer only to later concede to an objection to the obligation to pay the tax by the taxpayer, all the while earning interest on the tax paid by the taxpayer.<sup>51</sup>

In 2009, section 88 underwent a substantial restructuring, which was effected by section 13 of the Taxation Laws Second Amendment Act 18 of 2009. It is submitted that the most important amendment brought by section 13 was the suspension rule, which is still an integral part of section 164 of the TAA. The suspension rule, as effected by section 13, provided a mechanism by which a taxpayer could apply to the Commissioner that the ‘pay now argue later’ rule be suspended. Factors that the Commissioner may have taken into account when considering whether to accept or refuse an application for the suspension of the ‘pay now argue later’ principle were also outlined. Section 13 further provided for ‘interest where a payment [of tax] is made pending [the] consideration of an objection that is ultimately allowed’.<sup>52</sup>

*Diagram 2* below outlines of the development of the ‘pay now argue later’ principle under section 88 up to its repeal, that is, its development for the years 1962 until 2009.

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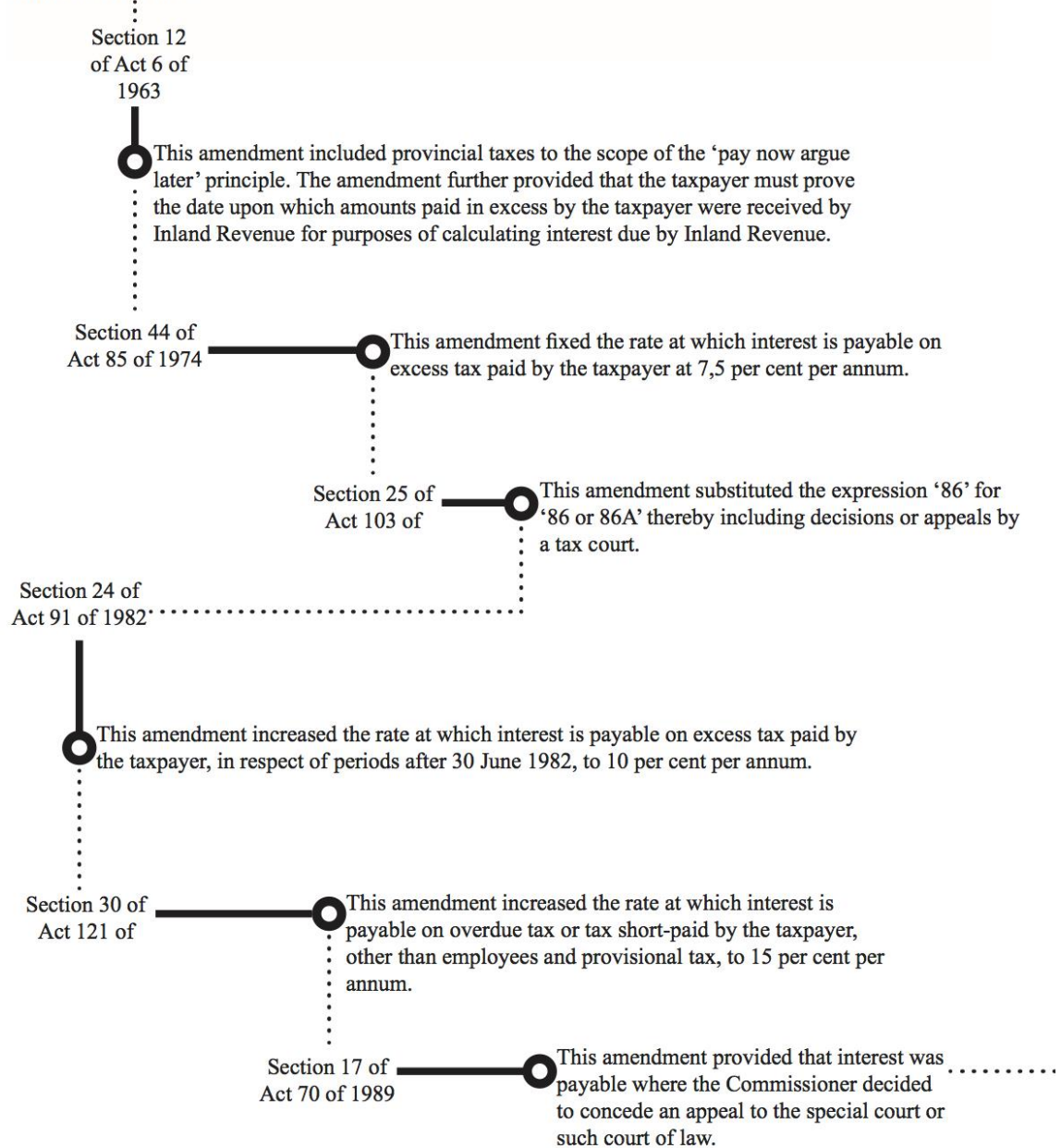
<sup>50</sup> Section 17 of the Income Tax Act 70 of 1989 read with the Explanatory Memorandum on the Income Tax Bill, 1989.

<sup>51</sup> It may be noted that in terms of the Explanatory Memorandum on the Income Tax Bill, 1989 the Supreme Court of Appeal had held that ‘interest is payable to a taxpayer only if his appeal is actually heard and upheld by the court’. It appears, however, that SARS had adopted a practice of paying interest where the Commissioner decided to concede an appeal prior to the court hearing, and therefore the amendment in section 17 of the Income Tax Act 70 of 1989 was made in fairness to the taxpayer.

<sup>52</sup> Memorandum on the Objects of the Taxation Laws Second Amendment Bill, 18 of 2009.

Diagram 2: The development of the ‘pay now argue later’ principle under section 88 of the Income Tax Act: 1962 to 2011<sup>53</sup>

**Section 88 of the Income Tax Act in its original form:** The obligation to pay and the right to receive and recover any tax 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 under section *eighty-six*. However if any assessment is altered on appeal or in conformity with any such decision, a due adjustment shall be made with amounts paid in excess being refunded with interest from the date of receipt and amounts underpaid being recoverable with interest from the due date.



<sup>53</sup> The Amendment Acts read with the Explanatory Memoranda and the Memoranda on Objects relating to the amendments were used in constructing this diagram.

Section 40 of  
Act 113 of

This amendment included reference to 'special board' so that interest would be payable where the Commissioner decided to concede an appeal to the special board as well as to a special court or other such court of law.

Section 14 of  
Act 140 of  
1993

This amendment enabled Inland Revenue to obtain funding for the payment of interest from the State Revenue Fund in respect of the period after 1 April 1993.

Section 60 of  
Act 60 of 2001

This amendment provided for a technical correction, namely reference to a special 'tax' court and a special 'tax' board.

Section 14 of  
Act 32 of 2005

This amendment clarified that the set off provisions relating to refunds would also be applicable in respect of these refunds of amounts paid pending the outcome of an appeal.

Section 17 of  
Act 4 of 2008

This amendment clarified that the exercise of the discretion by the Commissioner to not receive and recover any taxes chargeable does not affect the obligation of a taxpayer to pay any tax chargeable and the imposition of interest on the unpaid tax.

Section 13 of  
Act 18 of 2009

This amendment brought into effect the 'suspension rule' and clarified that a taxpayer must request the Commissioner to suspend the 'pay now argue later' principle. Factors that the Commissioner should take into account when deciding whether to accept or reject such an application were identified.

Section 271 of  
Act 28 of 2011

**REPEALED**

### **2.3. The development of the ‘pay now argue later’ principle under section 36 of the VAT Act: 1991 to 2011**

The promulgation of the VAT Act in 1991 brought with it section 36, a section similar in all material respects to section 88. Section 36, as it then stood<sup>54</sup>, compelled taxpayers to pay VAT due by them regardless of any pending appeal made by them against such obligation to pay the tax due. Section 36 was, originally, only applicable to ‘tax chargeable’ under the VAT Act and only to situations which involved an ‘appeal or pending the decision of a court of law’. Excluded from the applicability of section 36 were situations in which an objection to an obligation to pay tax was made by a taxpayer. Therefore, as with section 88, by exclusion in law, ‘[t]he obligation to pay tax and the right to receive and recover any tax’ due by a taxpayer would have been suspended by the lodging of an objection against the liability for the tax due. The Commissioner was permitted to ‘direct’ that section 36 not apply. The same confusion regarding the circumstances in which the Commissioner could make such a direction, or the factors which should have been considered in making such a direction, were present in section 36. It was, likewise, not clear whether an application had to be made by the taxpayer or whether it was purely the prerogative of the Commissioner to direct that the ‘pay now argue later’ principle should not apply. VAT due to Inland Revenue was recoverable from the relevant taxpayer with penalty and interest chargeable from the due date of the VAT due until payment thereof. VAT paid in excess, that is, VAT found not to be due but paid by the taxpayer in terms of the ‘pay now argue later’ principle, was required to be refunded to the taxpayer with interest from the date of the receipt by Inland Revenue of such amount. The date upon which the excess tax was received by Inland Revenue had to be proved by the taxpayer ‘to the satisfaction of the Commissioner’. The ‘pay now argue later’ principles delineated in section 88 and section 36 were largely similar. This speaks to the approach in South Africa of treating income tax and VAT similarly in this respect, despite their fundamental differences as taxes.<sup>55</sup>

A large number of the amendments pertaining to section 36, from its original form until it was repealed in 2011 by the TAA, concerned, like section 88, administrative and technical amendments such as the inclusion of the suspension of the obligation to pay additional tax, a penalty or interest to the scope of ‘pay now argue later’ rule<sup>56</sup>; the alteration of the interest rate to be applied to the amount of VAT paid in excess<sup>57</sup>; clarification regarding the funding to be used by SARS for paying such interest on excess VAT paid by the taxpayer<sup>58</sup>; and the inclusion of decisions or appeals by the special tax court and the

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<sup>54</sup> See *Diagram 3* which, inter alia, displays section 36 in its original form (prior to any amendments).

<sup>55</sup> This is dealt with more fully in Chapter 5 para 5.4 below.

<sup>56</sup> Section 39 of the Taxation Laws Amendment Act 27 of 1997.

<sup>57</sup> Section 2 of the Value-Added Tax Amendment Act 61 of 1993.

<sup>58</sup> Section 18 of the Revenue Laws Amendment Act 140 of 1993 read with the Explanatory Memorandum on the Revenue Laws Amendment Bill, 1993.

special tax board<sup>59</sup>. Section 22 of the Tax Administration Laws Amendment Act 20 of 1994, amended section 36, increasing the scope of taxpayers' rights. Under this amendment, section 36 was amended so as to oblige SARS to pay interest on the amount of VAT paid in excess in circumstances where SARS conceded to an appeal prior to the outcome of the appeal.<sup>60</sup> Similar to the amendment to section 88 in 2009, section 36 also underwent a substantial restructuring, which was effected by section 13 of the Taxation Laws Second Amendment Act 18 of 2009. Section 13, amended section 36 to, inter alia, include the suspension rule, outline the factors that the Commissioner may have taken into account when considering whether to accept or refuse an application for the suspension of the 'pay now argue later' principle; and lastly, to 'provide for interest where a payment [of tax] is made pending [the] consideration of an objection that is ultimately allowed'.<sup>61</sup>

Section 36 was promulgated in 1991, some 29 years after the promulgation of section 88. It is interesting to note that section 36, which was substantially similar to section 88 as it existed in 1991, was not incorporated with all of the amendments already effected to section 88 by that time, although these were brought into effect at a later stage. For example, the amendment to section 88 obliging SARS to pay interest on the amount of tax paid in excess in circumstances where SARS conceded to an appeal prior to the court hearing the matter took place in 1989<sup>62</sup>, prior to the promulgation of section 36. However, when section 36 was promulgated it lacked this specification, and it was only brought into effect by the amendment in 1994 under section 22 of the Tax Administration Laws Amendment Act 20 of 1994. One can only presume that this was an oversight by the legislature, and that there was no merit in the initial exclusion.

*Diagram 3* below outlines of the development of the 'pay now argue later' principle under section 36 up to its repeal, that is, its development for the years 1991 until 2009.

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<sup>59</sup> Section 22 of the Taxation Laws Amendment Act 20 of 1994 read with the Explanatory Memorandum on the Taxation Laws Amendment Bill, 1994.

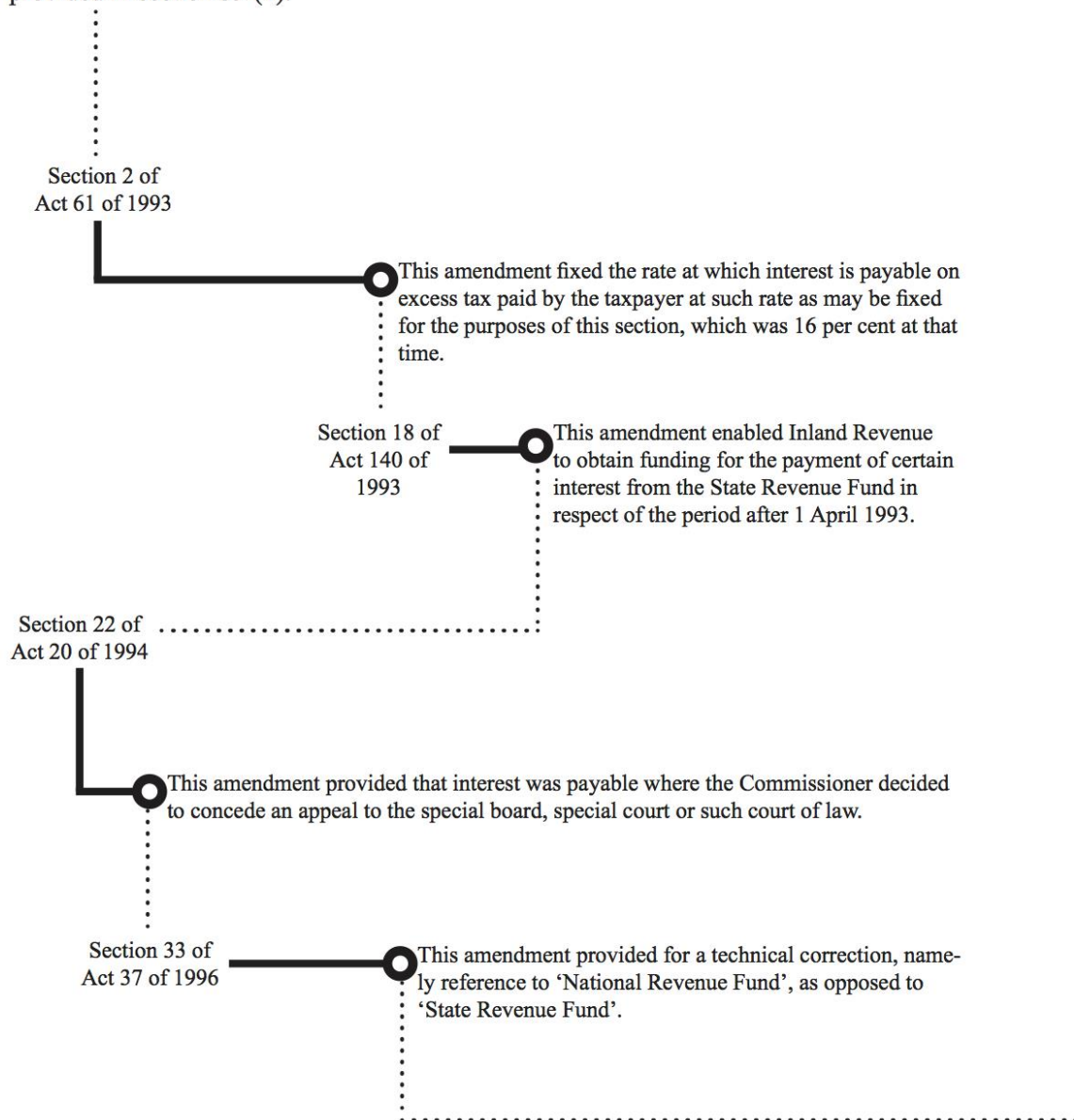
<sup>60</sup> Ibid.

<sup>61</sup> Memorandum on the Objects of the Taxation Laws Second Amendment Bill, 18 of 2009.

<sup>62</sup> Section 17 of the Income Tax Act 70 of 1989.

Diagram 3: The development of the ‘pay now argue later’ principle under section 36 of the VAT Act: 1991 to 2011<sup>63</sup>

**Section 36 of the VAT Act in its original form:** The obligation to pay and the right to receive and recover any tax 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. However if any assessment is altered on appeal or in conformity with any such decision, a due adjustment shall be made with amounts paid in excess being refunded with interest at such rate as may be fixed for the purpose of this section by the Minister from time by time by notice in the Gazette, and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39 (1).



<sup>63</sup> The Amendment Acts read with the Explanatory Memoranda and the Memoranda on Objects relating to the amendments were used in constructing this diagram.

Section 39 of  
Act 27 of 1997

This amendment increased the scope of the 'pay now argue later' principle so as to be applicable to the obligation to pay additional tax, penalties or interest.

Section 164 of  
Act 60 of 2001

This amendment provided for a technical correction, namely reference to a special 'tax' court and a special 'tax' board.

Section 38 of  
Act 18 of 2009

This amendment brought into effect the 'suspension rule' and clarified that a taxpayer must request the Commissioner to suspend the 'pay now argue later' principle. Factors that the Commissioner should take into account when deciding whether to accept or reject such an application were identified.

Section 271 of  
Act 28 of 2011

**REPEALED**

#### **2.4. The development of the ‘pay now argue later’ principle under the section 164 of the TAB and the two Draft Tax Administration Bills preceding the TAB: 2009 to 2011**

Section 164 of the TAB was preceded by two Draft Tax Administration Bills, namely, the version issued on 30 October 2009 and the later one on 29 October 2010. These collectively brought forward a number of important changes to the provisions regulating the ‘pay now argue later’ principle in the Income Tax Act and the VAT Act.

Section 156 of the Draft Tax Administration Bill, 2009 was largely similar to section 88 of the Income Tax and section 36 of the VAT Act after the amendment in 2009<sup>64</sup>, save for the vital change of allowing ‘a senior SARS official’<sup>65</sup> as opposed to ‘the Commissioner’ to consider an application for the suspension of the ‘pay now argue later’ principle and direct whether such application should be accepted or refused.<sup>66</sup> This, it is submitted, allows for a speedier application process. The specific criteria on which a ‘senior SARS official’ was to consider when deciding whether to accept or reject a request for the suspension of the obligation were not amended by the TAB or the Draft Tax Administration Bills preceding it.

Section 164 of the Draft Tax Administration Bill, 2010 made provision for a situation in which a request for suspension of the obligation to pay tax may be made before an objection is lodged.<sup>67</sup> This amendment was made ‘[i]n view of the fact that the due date for the payment of tax under an assessment is normally before the due date for lodging an objection and to cater for pre-objection requests by taxpayers for adequate reasons’ from SARS.<sup>68</sup> However, a later change brought by section 164 of the TAB ensured the automatic lapsing of an approved suspension of the obligation to pay tax in circumstances where no objection was later lodged.<sup>69</sup> This amendment by the TAB also placed an obligation on SARS officials to ‘periodically review’ the suspension of the obligation to pay tax, on a risk basis, ‘during the dispute, and to revoke such suspension in the case of the dissipation of asset risks or delaying tactics employed by the taxpayer’.<sup>70</sup>

Section 164 of the Draft Tax Administration Bill, 2010 amended the provision regulating the ‘pay now argue later’ principle so as to allow a senior SARS official to revoke a previously accepted suspension of the obligation to pay tax. The same criteria that a senior

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<sup>64</sup> Section 13 and section 38 of the Tax Laws Second Amendment Act 18 of 2009.

<sup>65</sup> A ‘senior SARS official’ is defined in section 1 of the TAA as a SARS official as referred to in section 6(3). In accordance with section 6(3), the powers and duties required under the TAA to be exercised by a senior SARS official must be exercised by either the Commissioner, a SARS official who has specific written authority from the Commissioner to do so, or a SARS official occupying a post designated by the Commissioner in writing for this purpose.

<sup>66</sup> Section 156 of the Draft Tax Administration Bill, 2009 read with the Memorandum on the Objects of the Draft Tax Administration Bill, 2009.

<sup>67</sup> Section 164 of the Draft Tax Administration Bill, 2010.

<sup>68</sup> Memorandum on the Objects of the Draft Taxation Administration Bill, 2010.

<sup>69</sup> Section 164 of the TAB.

<sup>70</sup> Memorandum on the Objections of the TAB.

SARS official could take into account when deciding whether to reject an application for the suspension of the obligation to tax, applied to the revocation of an accepted application.

Section 164 of the Draft Tax Administration, 2010 made provision for a grace period following an application for a suspension of the obligation to pay tax preventing SARS from effecting ‘collection proceedings’ for five business days after notice of its decision regarding the application for the suspension of the obligation to pay tax or its decision regarding the revocation of the suspension of the obligation to pay was given to the taxpayer. This was changed in section 164 of the TAB to be extended to 10 business days, to include a situation in which the application for suspension of the obligation to pay tax is revoked, and to refer to ‘recovery proceedings’ and not ‘collection proceedings’. This last change is a relevant point for purposes of Chapter 4 where a distinction is made between debt enforcement and debt collection proceedings forming part of broader debt recovery. It is submitted that, upon this distinction, this amendment broadened the scope of protection offered to taxpayers, so as to include debt enforcement and debt collection procedures in the grace period.

There the two draft versions of the TAB, namely, the version issued on 30 October 2009 and the other on 29 October 2010, and the final TAB, read and compare as seen below in *Diagram 4*.

Diagram 4: A comparison of Draft Bill, 2009 with Draft Bill, 2010 and lastly with the TAB

S 156 of the Tax Administration Draft Bill, 30 October 2009	S 164 of the Tax Administration Draft Bill, 29 October 2010	S 164 of the TAB
<p>(1)Unless a <i>senior SARS official</i> otherwise directs in terms of subsection (3)— (a) the obligation to pay tax chargeable under this Act; and (b) the right of SARS to receive and recover tax (except in the manner described in section 169) chargeable under this Act, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 125.</p> <p>(2)A taxpayer may request a <i>senior SARS official</i> to suspend the payment of any tax or a portion thereof due under an <i>assessment</i> where the liability to pay that tax is disputed.</p> <p>(3)A <i>senior SARS official</i> may suspend payment of the disputed tax having regard to— (a) the compliance history of the taxpayer; (b) the amount of tax involved; (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension; (d) if the taxpayer is able to provide adequate security for the payment of the amount involved; (e) if payment of the amount involved would result in irreparable financial hardship to the taxpayer; (f) whether sequestration or liquidation proceedings are imminent; (g) if fraud is involved in the origin of the dispute, or (h) if the taxpayer has failed to furnish any information requested under this Act for purposes of a decision under this section.</p> <p>(4)A <i>senior SARS official</i> may deny a request in terms of subsection (3) or revoke a decision to suspend payment in terms of that subsection with immediate effect if satisfied that — (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious; (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal; (c) on further consideration of the factors contemplated in (3), the</p>	<p>(1)Unless a senior SARS official otherwise directs in terms of subsection (3)— (a) the obligation to pay tax chargeable under a tax Act; and (b) the right of SARS to receive and recover tax chargeable under a tax Act, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.</p> <p>(2)A taxpayer may request a senior SARS official to suspend the payment of any tax or a portion thereof due under an assessment <b>before the due date of payment in the assessment if the taxpayer intends to dispute the liability to pay that tax.</b></p> <p><b>(3)During the period commencing on the day that SARS receives the request for suspension and ending 5 business days after notice has been given of SARS’s decision, no collection proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.</b></p> <p>(4)A senior SARS official may suspend payment of the disputed tax having regard to— (a) the compliance history of the taxpayer; (b) the amount of tax involved; (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension; (d) <b>whether</b> the taxpayer is able to provide adequate security for the payment of the amount involved; (e) <b>whether</b> payment of the amount involved would result in irreparable financial hardship to the taxpayer; (f) whether sequestration or liquidation proceedings are imminent; (g) <b>whether</b> fraud is involved in the origin of the dispute; or (h) <b>whether</b> the taxpayer has failed to furnish any information requested under this Act for purposes of a decision under this section.</p> <p>(5)A senior SARS official may deny a request in terms of</p>	<p>(1)Unless a senior SARS official otherwise directs in terms of subsection (3)— (a) the obligation to pay tax chargeable under a tax Act; and (b) the right of SARS to receive and recover tax chargeable under a tax Act, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.</p> <p>(2)A taxpayer may request a senior SARS official to suspend the payment of any tax or a portion thereof due under an assessment before the due date of payment in the assessment if the taxpayer intends to dispute the liability to pay that tax <b>under Chapter 9.</b></p> <p>(3)A senior SARS official may suspend payment of the disputed tax having regard to— (a) the compliance history of the taxpayer; (b) the amount of tax involved; (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension; (d) whether the taxpayer is able to provide adequate security for the payment of the amount involved; (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer; (f) whether sequestration or liquidation proceedings are imminent; (g) whether fraud is involved in the origin of the dispute; or (h) whether the taxpayer has failed to furnish any information requested under this Act for purposes of a decision under this section.</p> <p><b>(4)If the payment of tax which the taxpayer intended to dispute was suspended under subsection (3) and subsequently— (a) no objection is lodged; (b) an objection is disallowed and no appeal is lodged; or (c) an appeal to the Tax Board or Court is unsuccessful and no further appeal is noted, the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or</b></p>

<p>suspension should not have been given; or (d) there is a material change in any of the factors described in subsection (3), upon which the decision to suspend the amount involved was based.</p> <p>(5) If an <i>assessment</i> is altered in accordance with— (a) an objection or appeal; (b) a decision of a court of law pursuant to an appeal under section 125; or (c) a decision by SARS to concede the appeal to the <i>tax board</i> or the <i>tax court</i> or that court of law, a due adjustment must be made, amounts paid in excess refunded with interest at the <i>prescribed rate</i>, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid being recoverable with interest calculated as provided in section 179(1).</p> <p>(6) The payment by the <i>Commissioner</i> of any interest under the provisions of this section shall be deemed to be a drawback from revenue charged to the National Revenue Fund.</p> <p>(7) The provisions of Chapter 13 apply with the necessary changes in respect of any amount refundable and any interest payable by the <i>Commissioner</i> under this section.</p> <p>(8) The provisions of <b>section 191</b> apply with the necessary changes in respect of any amount refundable and any interest payable by the <i>Commissioner</i> under this section.</p>	<p>subsection (3) or revoke a decision to suspend payment in terms of that subsection with immediate effect if satisfied that— (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious; (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal; (c) on further consideration of the factors contemplated in (3), the suspension should not have been given; or (d) there is a material change in any of the factors described in subsection (3), upon which the decision to suspend the amount involved was based.</p> <p>(6) If an assessment is altered in accordance with— (a) an objection or appeal; (b) a decision of a court of law pursuant to an appeal under section 133; or (c) a decision by SARS to concede the appeal to the tax board or the tax court or <b>other</b> court of law, a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid <b>are</b> recoverable with interest calculated as provided <b>in section 187(1)</b>.</p> <p>(7) The payment by the <i>Commissioner</i> of any interest under the provisions of this section <b>must be regarded as</b> a drawback from revenue charged to the National Revenue Fund.</p> <p>(8) The provisions of <b>section 191</b> apply with the necessary changes in respect of any amount refundable and any interest payable by the <i>Commissioner</i> under this section.</p>	<p><b>any extension of the relevant time period under this Act.</b></p> <p>(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of that subsection with immediate effect if satisfied that— (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious; (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal; (c) on further consideration of the factors contemplated in (3), the suspension should not have been given; or (d) there is a material change in any of the factors described in subsection (3), upon which the decision to suspend the amount involved was based.</p> <p><b>(6) During the period commencing on the day that – (a) SARS receives the request for suspension under subsection (2); or (b) a suspension is revoked under subsection (5), and ending 10 business days after notice has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.</b></p> <p><b>(7) If an assessment or decision referred to in section 104(2) is altered in accordance with— (a) an objection or appeal; (b) a decision of a court of law pursuant to an appeal under section 133; or (c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law, a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187(1).</b></p> <p>(8) The provisions of section 191 apply with the necessary changes in respect of any amount refundable and any interest payable by SARS under this section.</p>
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## 2.5. The development of the ‘pay now argue later’ principle under section 164 of the TAA: 2011 to date

The promulgation of the TAA in 2011 brought with it section 164, a section analogous to the TAB. Section 164 in its original form<sup>71</sup> was applicable to ‘tax’ and to situations which involve ‘an objection or appeal or pending decision of a court of law’ under section 133 of the TAA, which concerns appeals against decisions of the tax court. This is still the case today. Section 164 in its original form made provision for the suspension rule that a senior SARS official, upon ‘request’ by the taxpayer, is authorised to suspend the application of the ‘pay now argue later’ principle, and included factors that a senior SARS official may have regard to when deciding whether to accept or reject such an application.

Section 164 of the TAA has undergone three amendments since its promulgation in 2011. The initial amendment was in 2012 and constituted merely a technical correction for purposes of clarity.<sup>72</sup> The words ‘payment of’ were included between the word ‘suspend’ and ‘the amount’, thus resulting in ‘suspend the payment of the amount’.<sup>73</sup> The second amendment took place in 2013 in terms of section 58 of the Tax Administration Laws Amendment Act 39 of 2013, and provided that the amount of tax under an assessment that is subject to a dispute may be partially suspended.<sup>74</sup> The amendment further provided a technical correction in order to clarify that section 164 caters for scenarios for suspension where the taxpayer ‘intends to object but is waiting, for example, for reasons requested under the rules or needs more time to formulate the grounds of objection, and where the taxpayer has already lodged an objection’.<sup>75</sup> The third amendment to section 164 simplified the criteria that SARS may consider when presented with a request for the suspension of the obligation to pay tax and also clarified that these criteria must be considered in addition to other relevant factors.<sup>76</sup> In terms of the Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2014, that an ‘initial proposal was to include the merits of the matter’ as one such criterion, however, ‘this was recognised to be in error as the purpose of the ‘pay now argue later’ principle is precisely to separate the adjudication of the merits of the matter, which happens before the tax court, and the payment and recovery of the tax debt’.<sup>77</sup> *Diagram 5* below outlines of the development of the ‘pay now argue later’ principle under section 164, that is, its development for the years 2011 to date.

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<sup>71</sup> See *Diagram 5* which, inter alia, displays section 164 in its original form (prior to any amendments).

<sup>72</sup> Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2012.

<sup>73</sup> Section 64 of the Tax Administration Laws Amendment Act 21 of 2012.

<sup>74</sup> Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013.

<sup>75</sup> Ibid.

<sup>76</sup> Section 50 of the Tax Administration Laws Amendment Act 44 of 2014 read with the Memorandum on the Objects of the Taxation Administration Laws Amendment Bill, 2014.

<sup>77</sup> Ibid. However, in *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and Another, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and Another* 2011 (6) SA 65 (WCC) it was held that section 164 does indirectly provide for the consideration of merits in situations of rejecting or revoking an application for the suspension of the ‘pay now argue later’ principle. This is dealt with more fully in Chapter 3 below.

*Diagram 5: The development of the ‘pay now argue later’ principle under section 164 of the TAA: 2011 to date*<sup>78</sup>

**Section 164 of the TAA in its original form:**

(1) Unless a senior SARS official otherwise directs in terms of subsection (3)— (a) the obligation to pay tax; and (b) the right of SARS to receive and recover tax, will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

(3) A senior SARS official may suspend payment of the disputed tax having regard to— (a) the compliance history of the taxpayer; (b) the amount of tax involved; (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension; (d) whether the taxpayer is able to provide adequate security for the payment of the amount involved; (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer; (f) whether sequestration or liquidation proceedings are imminent; (g) whether fraud is involved in the origin of the dispute; or (h) whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

(4) If the payment of tax which the taxpayer intended to dispute was suspended under subsection (3) and subsequently— (a) no objection is lodged; (b) an objection is disallowed and no appeal is lodged; or (c) an appeal to the tax board or court is unsuccessful and no further appeal is noted, the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

(5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of that subsection with immediate effect if satisfied that— (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious; (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal; (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend the amount involved was based.

(6) During the period commencing on the day that— (a) SARS receives a request for suspension under subsection (2); or (b) a suspension is revoked under subsection (5), and ending 10 business days after notice of SARS’ decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

(7) If an assessment or a decision referred to in section 104(2) is altered in accordance with— (a) an objection or appeal; (b) a decision of a court of law pursuant to an appeal under section 133; or (c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law, a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that .....

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<sup>78</sup> The Amendment Acts and the Explanatory Memoranda and the Memoranda on Objects relating to the amendments were used in constructing this diagram.

Section 64 of  
Act 21 of 2012

This amendment was a technical correction in order to enhance clarity. The words 'payment of' were included between the word 'suspend' and 'the amount', thus the end result being 'suspend the payment of the amount'.

Section 58 of  
Act 39 of 2013

This amendment provided that the disputed amount under an assessment may be partially suspended, therefore avoiding an 'all-or-nothing' approach. The amendment also provided a correction to clarify that section 164 caters for suspension of the obligation to pay tax where the taxpayer intends to object but is waiting, for example, for reasons requested under the rules or needs more time to formulate the grounds of objection, as well as where the taxpayer has already lodged an objection.

Section 50 of  
Act 44 of 2014

This amendment simplified the criteria that SARS may, in considering a request for the suspension of disputed tax, consider. The amendment clarified that these are to be considered in addition to relevant factors.

## 2.6. Conclusion

The development of the ‘pay now argue later’ principle from its first appearance in the Income Tax Act in 1962 and the VAT Act in 1993, until their repeal in 2011, was relatively minor save for a marked change in the structure of the ‘pay now argue later’ principle in 2009, which brought with it the suspension rule. Following this amendment in 2009, the principle largely maintained its form in its incorporation into the TAB and, later, into the TAA. The dawn of the constitutional era in South Africa, as well as the rise in recognition of taxpayers’ rights, have, interestingly, not affected the development of the ‘pay now argue later’ principle in South Africa to any significant degree. Had the Constitutional Court heard the application brought by Van Heerden it is unlikely that the ‘pay now argue later’ principle would have changed, considering that subsequent constitutional challenges to the principle have been unsuccessful, that is the principle has been found to be constitutional<sup>79</sup>.

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<sup>79</sup> See Chapter 5 for further detail.

### 3. CHAPTER 3: THE CONTENT AND OPERATION OF SECTION 164 OF THE TAA

From the plain language of [the ‘pay now argue later’ principle] ... [a] taxpayer has nothing to lose as he is to be refunded the excess amount paid together with interest thereon.<sup>80</sup> (own emphasis)

#### 3.1. Introduction

Section 164 of the TAA begins by giving effect to the ‘pay now argue later’ principle in section 164(1). As previously mentioned, section 164(1) provides that the obligation on a taxpayer to pay tax and the right of SARS to ‘receive and recover tax’ from a taxpayer is not automatically suspended by the filing of an objection or an appeal, or pending the decision of a court of law pursuant to an appeal, against a decision of the tax court. The substance of section 164 concerns the procedure relating to the application for and the effect of a decision for the suspension of the obligation to pay tax by a senior SARS official.

Following the reasoning of Tsoka J in *Modibane v South African Revenue Service*<sup>81</sup> in the epigraph above, a taxpayer has, according to the plain language of section 164 (then section 88), ‘nothing to lose’ from the operation of the ‘pay now argue later’ principle. Objectively this may be true, as there is supposed restoration of the taxpayer to their original position should they be found not liable for the tax debt. This position is concurred by Arnold, who states that ‘[o]bviously, if a taxpayer is successful in disputing the amount of tax assessed, the amount should be refunded with interest so that, as much as possible, the taxpayer is restored to the situation he would have been in if the tax had been correctly assessed in the first place’.<sup>82</sup> However, according to Olivier, the operation of the ‘pay now argue later’ principle could result in the ‘inability to expand or pay debts, or to the destruction of liquidity, all of which also have a detrimental effect on a taxpayer’s ability to pay [tax]’.<sup>83</sup> The TAA does provide for minimal relief for a taxpayer to alleviate the consequences of the ‘pay now argue later’ principle, namely, the suspension rule, as dealt with below. Furthermore, besides the relief in terms of the TAA, a taxpayer dissatisfied with a decision refusing the suspension of the ‘pay now argue later’ principle may pursue judicial review in

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<sup>80</sup> *Modibane v South African Revenue Service* (unreported case no 09/9651) of 20 October 2011 at para 12.

<sup>81</sup> *Ibid.*

<sup>82</sup> BJ Arnold ‘Brief for the Commissioner of Inland Revenue for the Republic of South Africa’ as Annexure “H” to the application for *The Commissioner for Inland Revenue* supra note 26 at page 22.

<sup>83</sup> Olivier op cit note 33 at 196.

terms of section 6 of PAJA,<sup>84</sup> has the option of entering into an instalment payment agreement<sup>85</sup> in certain circumstances, and is entitled to the refund of interest accumulated on the amount of excess tax paid to the extent that the taxpayer is found not to be liable for the tax debt.<sup>86</sup>

### 3.2. The procedure for an application for the suspension of the ‘pay now argue later’ principle: Section 164(2), (4), (5) and (6)

S 164(2) gives effect to the power of a senior SARS official to suspend a taxpayer’s obligation to pay tax upon the application by such taxpayer. In practice, a request by a taxpayer for the suspension of the obligation to pay tax due under an assessment takes the form of a letter setting out such taxpayer’s compliance with the criteria identified in section 164(3), as well section 164(5) (dealt with in paragraph 3.3 below). Currently, there is no prescribed form for such an application and it is not possible to submit a request for suspension via eFiling. SARS, however, intends to enhance eFiling for this purpose so that it will be able to better track requests for suspension of payment.

*Diagram 6: The provision giving a senior SARS official the power to suspend the ‘pay now argue later’ upon application by a taxpayer*

**Section 164(2)** provides that ‘[a] taxpayer may request a senior SARS official<sup>❶</sup> to suspend the payment of tax or a portion thereof<sup>❷</sup> due under an assessment if the taxpayer intends to dispute or disputes<sup>❸</sup> the liability to pay that tax under Chapter 9 [Dispute Resolution]’ (own emphasis).

❶	In practice, a letter of application for the suspension of the ‘pay now argue later’ principle is sent by the taxpayer to the relevant SARS contact centre, as well as, if applicable, to any SARS official with whom the taxpayer may have had dealings.
❷	This phrase provides for a situation in which a taxpayer may concede to the liability of a portion of the tax due under an assessment, but disputes or intends to dispute the liability to pay the remaining portion of the tax due under the assessment. The request for suspension of the obligation to pay tax thus only applies to the latter and the balance not disputed would need to be paid to SARS.
❸	As previously mentioned, section 164 allows for the suspension of the obligation to pay tax where the taxpayer ‘intends to object but is waiting, for example, for reasons requested under the rules or needs more time to formulate the grounds of objection,

<sup>84</sup> B Croome & L Olivier *Tax Administration 2* ed (2015) at page 578.

<sup>85</sup> Section 167 of the TAA.

<sup>86</sup> Section 164(7) of the TAA.

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and where the taxpayer has already lodged an objection'.<sup>87</sup> Therefore section 164 caters not only for situations in which the taxpayer has already lodged an objection. In practice, the request for the suspension of the obligation to pay tax is often submitted simultaneously with a notice of objection against the relevant assessment.

There are two ways in which a revocation of a decision to suspension of the 'pay now argue later' principle occurs. Section 164(4) concerns the revocation of the suspension of the obligation to pay tax by operation of law. This section does not impose a discretion on a senior SARS official to revoke the decision to suspend the obligation to pay tax. Revocation takes place 'with immediate effect' upon the occurrence of three events, namely, no objection is lodged; an objection is disallowed and no appeal is lodged; or an appeal to the tax board or court is unsuccessful and no further appeal is noted. Section 164(5) concerns the revocation of the suspension of the obligation to pay tax at the discretion of a senior SARS official. In this scenario, the same factors that are considered in the rejection of an application for the suspension of the 'pay now argue later' principle will be considered when a senior SARS official decides whether to revoke the suspension of the 'pay now argue later' principle. On the interpretation of the wording of section 164(5), the senior SARS official making the decision whether or not to revoke the suspension of the 'pay now argue later' principle need not be the same senior SARS official who made the decision to suspend the obligation to pay tax in the first instance.

Section 164(6) makes provision for a grace period for taxpayers following a request for a suspension of the 'pay now argue later' principle or where a senior SARS official revokes the suspension of the 'pay now argue later' principle. In terms of this provision, SARS may not effect recovery of tax due under an assessment within ten business days following a decision made on a request for suspension of the obligation to pay tax or the revocation of the suspension of the obligation to pay tax. This provides some protection to taxpayers. However, the abovementioned grace period may not be adhered to in the limited circumstances where SARS has a reasonable belief that there is a risk of dissipation of assets by the taxpayer. Unfortunately, SARS does not always adhere to the period prescribed in the law and the taxpayer's only recourse would be to apply to the High Court for relief or to seek the intervention of the Office of the Tax Ombud.<sup>88</sup>

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<sup>87</sup> Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013.

<sup>88</sup> See *Part F* of the TAA.

### 3.3. The ‘discretion’ of a senior SARS official to approve or reject an application for the suspension of the ‘pay now argue later’ principle: Section 164(3) and 164(5)

A senior SARS official is not obliged, upon a taxpayer’s request, to suspend the obligation to pay tax due under an assessment even if the criteria under section 164(3) are met. It remains within the absolute discretion of a senior SARS official to accept or reject such a request.<sup>89</sup> Section 164(3) outlines the factors that a senior SARS official may take into account when deciding whether to accept such an application for the obligation to pay tax to be suspended. The section states that a senior SARS official must, in exercising his or her discretion, have ‘regard to relevant factors’. It is submitted that, in practice, it is the taxpayer who will bring the relevant factors to the attention of the senior SARS official in the letter of application for the suspension of the ‘pay now argue later’ principle. There is no case law or guidance from the legislature or SARS as to the nature of the list of ‘relevant factors’ provided for in section 164(3), that is, whether the list of factors is exhaustive or the importance that should be placed on the different factors. However, in accordance with Croome & Olivier’s interpretation of the provision, ‘it is apparent that SARS needs to consider the factors stated in s 164[3] and may also take account of other factors which are not stated in the section’.<sup>90</sup> It is interesting to note that section 164(3) refers to ‘the disputed tax’ and not, as in section 164(2), to both disputed tax and the tax which the taxpayer intends to dispute. It is submitted, however, that section 164(3) should be interpreted as applying to both scenarios.

*Diagram 7: The factors that may be considered by a senior SARS official in approving an application for the suspension of the ‘pay now argue later’ principle*

**Section 164(3)** provides that ‘[a] senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including— (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets<sup>❶</sup>; (b) the compliance history of the taxpayer with SARS<sup>❷</sup>; (c) whether fraud is prima facie involved in the origin of the dispute<sup>❸</sup>; (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered<sup>❹</sup>; or (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus<sup>❺</sup>’ (own emphasis).

❶ In order to satisfy this criterion, the taxpayer may rely on the provision of security for the payment of the disputed tax or the tax intended to be disputed. Provision of

<sup>89</sup> Arnold op cit note 82 at page 24 stated that ‘[t]he Commissioner’s discretion in this regard is important because there may be legitimate circumstances in which taxpayers cannot pay their taxes pending an appeal without significantly adverse consequences’.

<sup>90</sup> Croome & Olivier op cit note 84 at page 379.

	<p>security serves to mitigate the concerns that a senior SARS official may have with regard to whether the suspension of the obligation to pay the disputed tax, or tax intended to be disputed, will put the recovery of the tax in jeopardy, as well as neutralising the risk that the taxpayer will dissipate the assets prior to the payment of the tax due under an assessment, to the extent that the taxpayer is ultimately held liable for such tax.</p>
②	<p>A history of non-compliance will decrease the prospects of a successful outcome of a request for the suspension of the ‘pay now argue later’ principle by the taxpayer and, it is submitted, rightly so. From practice it appears that the failure to file income tax and VAT returns is regarded as ‘non-compliance’ by SARS and a request for suspension will thus be refused should such a failure be present.</p>
③	<p>A taxpayer must satisfy the senior SARS official that fraud was not ‘involved in the origin of the dispute’, which, according to Croome &amp; Olivier, effectively means that the ‘dispute is genuine’.<sup>91</sup> It is good practice to include in the letter of application for the suspension of the ‘pay now argue later’ principle that SARS has not alleged that fraud was involved in the origin of the dispute, should this be the case.</p>
④	<p>This criterion quintessentially depicts the battle between the rights of a taxpayer and the powers of SARS. In practice, it is argued in the letter of application for the suspension of the ‘pay now argue later’ principle that the deferred payment of the tax due to SARS would not negatively affect SARS or the fiscus, to the extent that the taxpayer is ultimately held liable for such tax<sup>92</sup>. The reason for this is that such funds would be recoverable by SARS from the taxpayer with interest, as provided for in the TAA. The provision of security by the taxpayer is also helpful in this regard. According to Croome &amp; Olivier, ‘[t]o show irreparable hardship [to the taxpayer] is difficult but a taxpayer should not be forced to sell his or her assets which he or she has held as an investment for a long period of time and be compelled to realise such asset within a short period of time by way of a forced sale, which will cause the taxpayer financial loss which may never be recovered’.<sup>93</sup></p>
⑤	<p>As is evident from above, the provision of security, although not an absolute requirement, is imperative, in most circumstances, in order to succeed with a request for the suspension of the obligation to pay tax. This is burdensome on the taxpayer and not always possible. The question arises as to whether the suspension of the obligation to pay tax would be condoned in a situation in which the taxpayer is unable to provide security. Croome &amp; Olivier provide examples of different types of security, namely, mortgage bonds over immovable property, ‘which is often accepted</p>

<sup>91</sup> Croome & Olivier op cit note 84 at page 379.

<sup>92</sup> Interestingly this, which is an argument that is commonly used in practice, is the reverse of the quote made in *Modibane* supra note 79.

<sup>93</sup> Croome & Olivier op cit note 84 at page 379.

by SARS as constituting adequate security’, a ‘bank guarantee’, a guarantee from ‘a holding company to issue a guarantee in favour of SARS securing payment of the subsidiary’s tax debts’ or ‘a cession of loan accounts or a pledge of listed or unlisted shares’.<sup>94</sup>

Section 164(5), on the other hand, provides that a senior SARS official may deny an application for the suspension of the obligation to pay tax provided he or she is satisfied that the various factors listed in section 164(5) are present. A senior SARS official is not obliged to deny a request for the suspension of the obligation to pay tax due under an assessment even if the factors under section 164(5) are met. As previously mentioned, it is within the absolute discretion of such senior SARS official to accept or reject such a request. PAJA provides for judicial review of a decision by a senior SARS official to reject an application to the suspension of the ‘pay now argue later’ principle, as more fully discussed below in paragraph 3.5.

*Diagram 8: The factors that may be considered by a senior SARS official in denying an application for the suspension of the ‘pay now argue later’ principle*

**Section 164(5)** provides that ‘[a] senior SARS official may deny a request in terms of subsection (2)... if satisfied that— (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious<sup>❶</sup>; (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal<sup>❷</sup>; (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given<sup>❸</sup>; or (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based<sup>❹</sup>’ (own emphasis).

- ❶ In practice, seeking professional advice assists in proving that this criterion is not present. A ‘frivolous’ objection or appeal would be one which is ‘[l]acking a legal basis or legal merit’<sup>95</sup> and a ‘vexatious’ objection or appeal would be one ‘without reasonable or probable cause or excuse’.<sup>96</sup> According to Croome & Olivier ‘[t]his is to prevent taxpayers from filing objections that are without substance and with one purpose in mind and that is to delay the inevitable payment of the tax, which is lawfully due to SARS’.<sup>97</sup> In *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and Another, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and Another*<sup>98</sup> Binns-Ward J held that section 164

<sup>94</sup> Croome & Olivier op cit note 84 at page 378.

<sup>95</sup> *Black’s Law Dictionary* op cit note 1 at the definition of ‘frivolous’.

<sup>96</sup> *Ibid* at the definition of ‘vexatious’.

<sup>97</sup> Croome & Olivier op cit note 84 at page 381.

<sup>98</sup> *Capstone 556 and Kluh* supra note 77.

	‘expressly refers to the merits of the appeal as a relevant consideration’ due its incorporation of section 164(5)(a) <sup>99</sup> ‘which authorises the Commissioner [now a senior SARS official] to refuse a request if he or she is satisfied that the appeal is frivolous or vexatious’. <sup>100</sup> This is in contrast to the Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2014 where it was stated that a decision was made against including the merits of the case as a criterion to be considered by a senior SARS official when deciding whether to accept or reject an application for the suspension of the ‘pay now argue later’ principle.
②	In practice, seeking professional advice assists in proving that this criterion is not present. Seeking professional advice, although an obvious thing to do, may lead SARS to conclude that the taxpayer is employing delaying tactics, that the taxpayer is merely applying for the suspension of the obligation to pay tax in order to delay the payment of the tax debt.
③	In practice, this is not mentioned in the letter of application for the suspension of the ‘pay now argue later’ principle. This is left to be decided by the senior SARS official.
④	In practice, this is not mentioned in the letter of application for the suspension of the ‘pay now argue later’ principle but is left to a decision by the senior SARS official. A ‘material change’ refers to a substantial change in the factors referred to in section 164(3).

### 3.4. The effect of the alteration of the tax debt: Section 164(7) and (8)

The provisions contained in section 164(7) and (8) are concerned with the procedure following the resolution of a dispute regarding the liability of a tax debt. Section 164(8) provides for the procedure regarding refunds and set-off following the alteration of a tax debt. It provides that the ‘provisions of section 191 apply with the necessary changes’. Section 191 concerns refunds subject to set-off and deferral and allows SARS to set off from an outstanding tax debt of the taxpayer any amount of tax that is refundable, including interest thereon. Section 164(7) outlines the implications of interest on amounts short-paid or paid in excess following the alteration of a tax debt.

*Diagram 9: The procedures regulating amounts paid in excess, as well as amounts short-paid, and the payment of interest out: an in-depth analysis of section 164(7)*

**S 164(7)** provides that ‘[i]f an assessment or a decision referred to in section 104(2)① is altered in accordance with— (a) an objection or appeal②; (b) a decision of a court of law pursuant to an appeal under section 133③; or (c) decision by SARS to concede the appeal

<sup>99</sup> At the time this case was heard the section referred to was section 164(4)(a) of the TAA.

<sup>100</sup> *Capstone 556 and Klüh* supra note 77 at para 32.

to the tax board or the tax court or other court of law<sup>④</sup>, a due adjustment must be made<sup>⑤</sup>, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid<sup>⑥</sup>, and amounts short-paid are recoverable with interest calculated as provided in section 187(1)<sup>⑦</sup>. (own emphasis)

①	A decision referred to in section 104(2) of the TAA refers to decisions to extend the period for lodging an objection, a decision not to extend the period for lodging an appeal, and any other decision that may be objected to or appealed against under a tax Act.
②	This is a matter of fact.
③	This is a matter of fact and refers to the decision of a court of law pursuant to an appeal against a decision of the Tax Court.
④	This is a matter of fact.
⑤	SARS has no discretion in this regard. A due adjustment is made by operation of law, provided the circumstances in section 164(7) are met.
⑥	It is interesting to note that amounts paid in excess are refunded to the taxpayer with interest that is calculated at a lesser interest rate than amounts that are short-paid by a taxpayer to SARS. In addition, interest received by the taxpayer is taxable <sup>101</sup> , whereas interest paid by the taxpayer is not deductible. <sup>102</sup>
⑦	This refers to the general rules regarding interest that are applicable to SARS.

### 3.5. The potential remedy for the refusal of an application for the suspension of the ‘pay now argue later’ principle: judicial review

According to Croome & Olivier:

When SARS refuses a taxpayer’s request to postpone payment [of tax] subject to objection or appeal, the taxpayer may not object or appeal against that decision under the provisions of the TAA. The taxpayer would be required to pursue the matter in the High Court on the basis that SARS has not complied with its obligations under the [PAJA]. SARS, in determining whether a taxpayer should be granted a suspension of payment, must adhere to the rules of administrative justice and where it fails to do so, a taxpayer should succeed in having the decision reviewed and set aside by the High Court.<sup>103</sup>

<sup>101</sup> See the definition of ‘gross income’ in section 1(1) of the Income Tax Act.

<sup>102</sup> Section 23(d) of the Income Tax Act.

<sup>103</sup> Croome & Olivier op cit note 84 at 381.

Section 164 does not provide for a procedure in which a taxpayer may object or appeal against the decision of a senior SARS official to reject an application for the suspension of the payment of tax, or for a procedure in which the taxpayer may request that such senior SARS official provides reasons for such a decision. PAJA, however, does. PAJA was promulgated in order to ‘promote an efficient administration and good governance... [and to] create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of public function, by giving effect to the right to just administrative action’.<sup>104</sup>

Following from the definitions in PAJA of ‘administrative action’<sup>①</sup> and a ‘decision’<sup>②</sup> below, it is submitted that a decision made by a senior SARS official to approve or reject the application by a taxpayer to suspend the ‘pay now argue later’ principle in terms of section 164(2) is administrative action and is thus subject to regulation by PAJA.

**① S 1 of PAJA defines ‘administrative action’ as ‘any decision taken, or any failure to take a decision, by – (a) an organ of state, when – (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...’.** (own emphasis)

**② A ‘decision’ is defined in terms of s 1 of PAJA as ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to – (i) making, suspending, revoking or refusing to make an order, award or determination; (ii) giving, suspending, revoking or refusing to give certificate, direction, approval, consent or permission; (iii) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (iv) imposing a condition or restriction; (v) making a declaration, demand or requirement; (vi) retaining, or refusing to deliver up, an article; or (vii) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly...’.**

Furthermore, this was confirmed with the finding in *Metcash* (supra)<sup>105</sup>, with regard to section 36 of the VAT Act, a finding, which, it is submitted, is equally applicable to circumstances involving income tax. Kriegler J held that:

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... The Act<sup>106</sup> gives the Commissioner the discretion to suspend an obligation to pay... The Commissioner must,

<sup>104</sup> Preamble to PAJA.

<sup>105</sup> In *Metcash* supra note 19, the Constitutional Court decided on whether section 36 of the VAT Act unjustifiably limited the right of access to courts. This is dealt with in more detail in Chapter 5.

<sup>106</sup> Reference here is made to the VAT Act.

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.<sup>107</sup>

Section 6 of PAJA provides for so-called ‘[j]udicial review of administrative action’. In principle, this allows a court or tribunal to judicially review administrative action if, inter alia, the administrator who took the decision was not authorised to do so by the empowering provision<sup>108</sup>, the administrative action was procedurally unfair<sup>109</sup>, or the action was taken because irrelevant considerations were taken into account or relevant consideration were not considered<sup>110</sup>. However, judicial review proceedings have been argued to be limited in nature.<sup>111</sup> Therefore, although the remedy of judicial review exists for a taxpayer whose application for suspension of the ‘pay now argue later’ principle was rejected, it is criticised for not being effective. According to Olivier:

The question may be asked whether the review procedure is worth anything when a taxpayer cannot question the validity of the assessment on which the statement is based. Often the ground on which a decision is taken on review is that it is so grossly unreasonable that the decision-maker failed to apply his mind to the matter. However, to prove this, the correctness of the underlying assessment often has to be dealt with.<sup>112</sup>

It is submitted that judicial review is not a sufficient remedy for a taxpayer whose application for the suspension of the ‘pay now argue later’ principle has been refused. It has been suggested that ‘it might be appropriate to provide taxpayers with a right of appeal if the Commissioner decides not to exercise his discretion’.<sup>113</sup> However, the downside of this is that this may result in the very situation which the ‘pay now argue later’ principle is aimed at preventing, that is, lengthy disputes and delayed payment of tax to the fiscus.

### **3.6. Conclusion**

Although objectively ‘[f]rom the plain language of [the ‘pay now argue later’ principle] ... [a] taxpayer has nothing to lose as he is to be refunded the excess amount paid together with

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<sup>107</sup> *Metcash* supra note 19 at para 42.

<sup>108</sup> Section 6(2)(a) of PAJA.

<sup>109</sup> Section 6(2)(c) of PAJA.

<sup>110</sup> Section 6(2)(e)(iii) of PAJA.

<sup>111</sup> Olivier op cit note 33 at page 197.

<sup>112</sup> Ibid at page 197.

<sup>113</sup> *Arnold* op cit note 82 at pages 56-7.

interest thereon'<sup>114</sup>, subjectively the operation of the 'pay now argue later' principle may result in pecuniary loss to the taxpayer. Paying the tax due could result in unjustified financial hardship for the taxpayer, taking into account that the taxpayer may not in fact even be liable for this tax. Paying the tax may also, in certain circumstances, restrict the taxpayer from disputing the liability of the tax debt due to a lack of funds after having satisfied the tax debt.

The suspension rule does, in principle, provide relief for the taxpayer against the operation of the 'pay now argue later' principle. Furthermore, in the event that an application for the suspension of the principle is refused, the taxpayer is entitled to take such decision on judicial review in terms of PAJA. However, the decision to apply for the suspension of the 'pay now argue later' principle must be taken mindful of the effect of an alteration of the tax debt referred to above in paragraph 3.4, namely, that 'when a taxpayer chooses not to pay the tax, they will need to apply for the postponement of payment under section 164 of the TAA, and in the event that their objection does not succeed they will be liable for interest from the second date of the assessment issued to them'.<sup>115</sup> The interest can, if the taxpayer does not succeed with their objection and appeal, amount to a significant amount of money where the dispute takes a few years to finalise.

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<sup>114</sup> *Modibane* supra note 80 at para 12.

<sup>115</sup> *Croome & Olivier* op cit note 84 at page 371.

#### **4. CHAPTER 4: A COMPARISON OF THE ‘PAY NOW ARGUE LATER’ PRINCIPLE WITH SOUTH AFRICAN CIVIL DEBT ENFORCEMENT PROCEDURES**

[T]he ordinary way of securing execution in settlement of debts due is through the court process.<sup>116</sup>

##### **4.1. Introduction**

It is necessary for purposes of this research to make a distinction between debt enforcement and debt collection. Both form part of broader debt recovery. However, it is submitted that the former speaks to an initial step in the debt recovery process of securing in law the liability of a disputed debt, that is, establishing that the debt is enforceable in law and that the said debtor is liable therefor, whereas debt collection refers to the actual execution processes<sup>117</sup> effected after liability for the debt has been duly ascertained<sup>118</sup>.

In civil procedure, debt enforcement must, ordinarily, precede debt collection. However, in tax administration the operation of the ‘pay now argue later’ principle results in debt enforcement and debt collection running in reverse of or concurrently with each other; hence the term ‘pay now argue later’ is used. Essentially this principle removes from debt recovery the step of securing in law the liability of a disputed debt, which is, in civil procedure, a vital component of and precursor to debt collection. It is submitted that the basis for this difference in chronology is that a fiscal debt and the liability thereof arises *ex lege*, that is, by operation of law, unlike a civil debt. After the tax debt becomes due, recorded in the form of an assessment, it is protected and enforced through the ‘pay now argue later’ principle and the collection of tax is ensured. The ‘pay now argue later’ principle therefore provides for a shorter and quicker debt enforcement procedure than that of the ordinary debt enforcement process in civil procedure by removing the need to first establish the liability for the disputed tax debt.

It is submitted that the ‘pay now argue later’ principle is a *sui generis* debt enforcement procedure in that it does not take the form of litigation, which is characteristic of ordinary civil debt enforcement whereby litigation is the procedural step by which a creditor

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<sup>116</sup> *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para 19.

<sup>117</sup> See *Ibid* at para 13 where Mokgoro J held that ‘[e]xecution is a means of enforcing a judgment or order of court and is incident to the judicial process’.

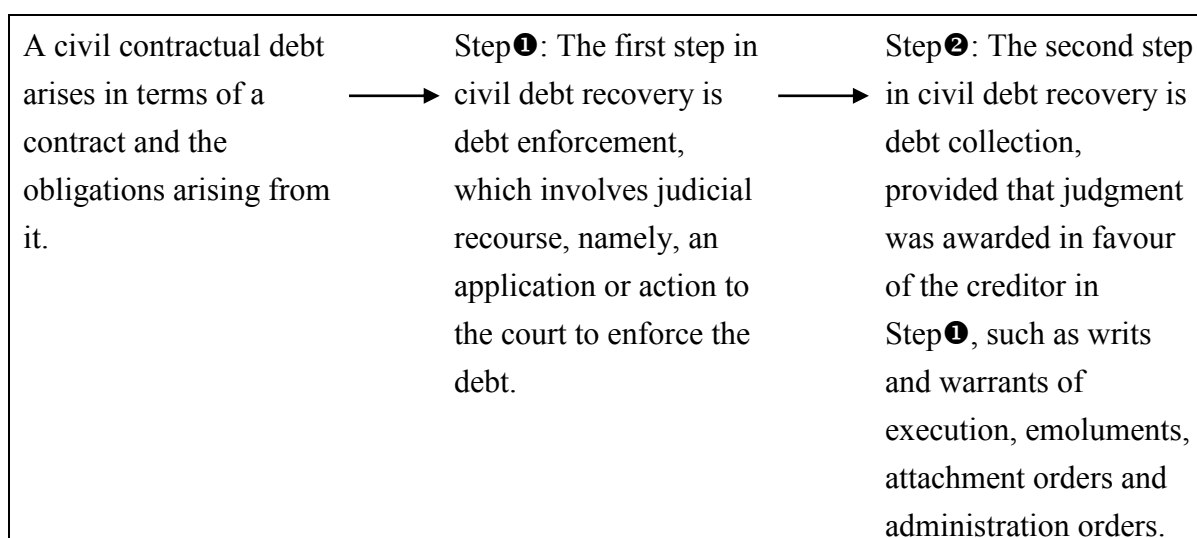
<sup>118</sup> See *Ibid* at para 11 where Mokgoro J held that ‘[a] trial or hearing before a court or tribunal is not an end in itself [but]... is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation...’.

enforces the payment of a civil debt due, but instead occurs automatically by operation of law. This brings about not only a departure from the ordinary sequence of events in debt recovery in civil procedure, but also borders on self-help<sup>119</sup> in that the fiscus is permitted to take the debt recovery process into its own hands without recourse to the judiciary, being an independent third party. Should the taxpayer dispute the liability for a fiscal debt, this is dealt with separately and is removed from the fiscal debt recovery process.<sup>120</sup> To the extent that the judgment is awarded in favour of the taxpayer, a dispute regarding the liability for the fiscal debt will result in civil debt collection procedures being available to the taxpayer. As stated in the epigraph, ‘the ordinary way of securing execution in settlement of debts due is through the court process’.<sup>121</sup> However, the ‘pay now argue later’ principle secures debt collection without the need for recourse to the judiciary. Therefore, on the face of it, the ‘pay now argue later’ principle is an unusual and peculiar departure from the normal rules regulating debt enforcement procedures.

*Diagram 10* below provides an overview of the comparison in civil debt recovery and fiscal debt recovery procedures in South Africa.

*Diagram 10: A comparison of civil and fiscal debt recovery*

### **The ordinary civil debt recovery process**

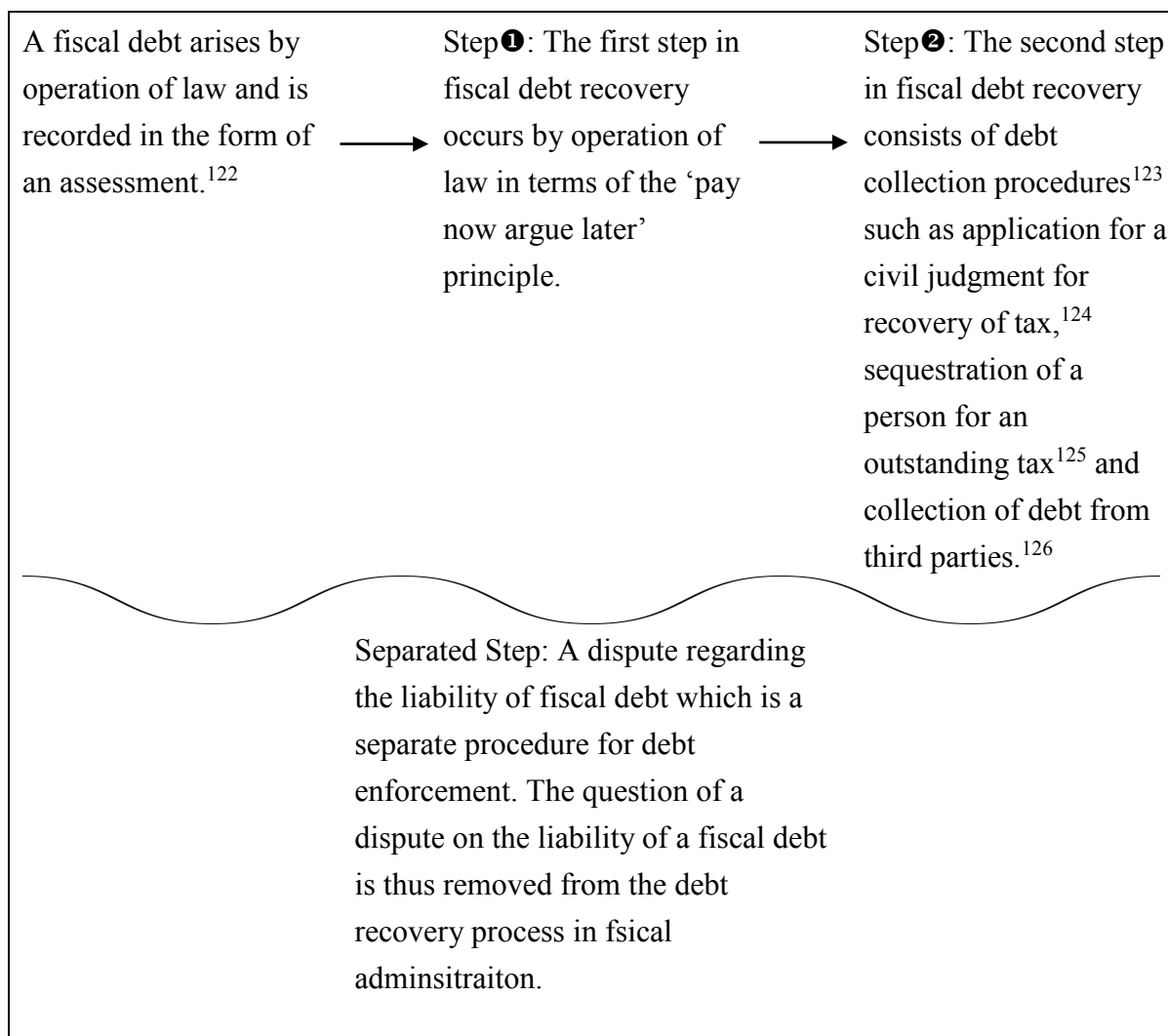


<sup>119</sup> This is discussed in *Metcash* supra note 19 – although the Constitutional Court found that it did not amount to self-help. This is discussed in greater detail in Chapter 5.

<sup>120</sup> In the event that a taxpayer does decide to ‘argue later’, the onus rests on the taxpayer in terms of section 102(1) of the Tax Administration Act to prove, inter alia, ‘that an amount, transaction, event or item is exempt or otherwise not taxable’.

<sup>121</sup> *Lesapo* supra note 116 at para 19.

## The fiscal debt recovery process



It is accepted that there are debt enforcement procedures both in civil procedure and fiscal administration which operate as legal exceptions to ordinary debt recovery in civil procedure. As mentioned in Chapter 1, these include provisional sentence procedure and summary judgment procedure.

<sup>122</sup> Sections 169 and 170 of the TAA.

<sup>123</sup> The debt collection procedures relating to sequestration, liquidation, winding up of a person for an outstanding tax and collection of debt from third parties also only involve recourse to and supervision by a senior SARS official. However, this will not be dealt with in this research.

<sup>124</sup> Section 172 of the TAA.

<sup>125</sup> Section 177 of the TAA.

<sup>126</sup> Section 179 of the TAA.

## 4.2. Nature of a civil debt versus a fiscal debt

As previously mentioned, the reason for the difference in chronology between civil debt recovery and fiscal debt recovery is that a fiscal debt and the liability thereof arises *ex lege* unlike a civil debt. This speaks to the nature of the different debts.

The nature of a civil debt in terms of a contract is founded on two sources, first, the existence of a contract and, secondly, that the obligations arising from the contract are enforceable in law.<sup>127</sup> An obligation, as referred to in this context, creates a ‘legal relation’ between two or more persons, by the creation of a *vinculum iurus*, a ‘legal tie or bond’.<sup>128</sup> The legal relation is twofold in that it places a duty to perform on one person and the right to receive such performance by another.<sup>129</sup> The legal basis underlying most civil claims for recovery of a contractual debt is a claim for specific performance, with specific performance for the payment of the debt in terms of the contract being listed as a prayer in the summons submitted to court.<sup>130</sup> Specific performance is defined as a claim for ‘[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree’.<sup>131</sup> A claim for specific performance by a creditor is founded on the contract itself, not on the breach thereof by the debtor.<sup>132</sup> To elaborate on this, a creditor is entitled to claim specific performance provided a valid contract exists and the debtor’s obligation in terms of the contract is enforceable in law.<sup>133</sup> The debtor need not be in *mora*, that is, the debtor need not be in default, for a claim for specific performance to be valid.<sup>134</sup> The rationale underlying a claim for specific performance is to stay with the agreement, thereby upholding the maxim of *pacta servanda sunt*, namely, that a contract must be honoured or that an agreement must be kept.<sup>135</sup>

It is worthwhile at this juncture to elaborate briefly on the ordinary civil debt enforcement procedure, which, as previously mentioned, is, in most cases, brought on the ground of specific performance for the payment of a debt in terms of a contract. The creditor is required to bring an action to court in order to bring effect to the right to claim specific performance. However, as is consistent with debt enforcement in civil procedure, it does not take place automatically by operation of law as with the ‘pay now argue later’ principle. In the Appellate Division in *Benson v SA Mutual Life Assurance Society*<sup>136</sup>, Hefer JA asserted that the granting of an order of specific performance is ‘entirely a matter for the discretion of

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<sup>127</sup> Professor Lubbe, G F, Personal correspondence on 09-01-2017.

<sup>128</sup> Van Huysten, Lubbe & Reinecke *Contract General Principles* 5 ed (2016) at page 2.

<sup>129</sup> *Ibid* at page 2.

<sup>130</sup> A summons is a step in civil procedure.

<sup>131</sup> *Black’s Law Dictionary* op cit note 1 at the definition of ‘specific performance’.

<sup>132</sup> See *Ridley v Marais* 1939 AD 5 at page 9 where it was held by Watermeyer JA that ‘[t]here seems to have been some confusion of thought in the mind of the pleader who drafted the exception which is displayed by the concluding words “so as to put him in mora”’.

<sup>133</sup> See *Farmers’ Co-operative Society (Reg.) v Berry* 1912 AD 343.

<sup>134</sup> Van Huysten et al. op cit 128 at page 367.

<sup>135</sup> *Ibid* at page 11; *Black’s Law Dictionary* op cit note 1 at the definition of at the definition of ‘pacta sunt servanda’.

<sup>136</sup> 1986 (2) All SA 30 (A).

the Court’ and that, ‘a-part [sic] from the rule that the discretion is to be exercised judicially upon a consideration of all the relevant facts... no rules can be prescribed to regulate the exercise of the Court’s discretion’, as ‘any curtailment of the Court’s discretion inevitably entails an erosion of the... [creditor’s]... right to performance’.<sup>137</sup> Relevant factors that a court should take into account are, inter alia, the interests of both contracting parties as well as any third parties involved<sup>138</sup> and whether specific performance is objectively and subjectively possible<sup>139</sup>.

The nature of a fiscal debt is that it arises by operation of law. According to section 169 of the TAA, ‘an amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund’. A tax debt due to the fiscus is in terms of section 169(1) of the TAA ‘[a]n amount of tax due or payable in terms of a tax Act’. According to section 170 of the TAA a tax debt is recorded by way of an ‘assessment’, which is defined in section 1 of the TAA as ‘the determination of the amount of a tax liability or refund, by way of self-assessment or assessment by SARS’. According to *Singh v Commissioner for the South African Revenue Service*<sup>140</sup> SARS cannot try and collect tax before there is an assessment.<sup>141</sup> It was held further by Cloete JA and Heher AJA in *Singh* that ‘s 36... recognises that an obligation to pay and the right to recover already exist; it does not create such obligations’<sup>142</sup>, such obligations are instead, it is submitted, created ex lege in terms of the section 169. An assessment is a necessary notification or recording of the debt which is, according to the Supreme Court of Appeal in *Singh*, a necessary requirement before collection can be effected.

Therefore, although the respective tax Act is subject to different interpretations it is by operation of law that the fiscal debt arises. In essence, a claim for a fiscal debt is also rests on an underlying claim for specific performance. SARS’ right to ‘receive and recover tax’ tax is a monetary claim and such monetary claims are also, in principle, susceptible to specific performance as a remedy for the collection of debt. An example of where SARS specifically refers to using specific performance is a compromise agreement where it has been stipulated ‘that in the event of a breach, SARS could cancel the agreement and claim the full tax debt owing before the compromise agreement was entered into, or claim specific performance of the compromise agreement’.<sup>143</sup> However, by virtue of the ‘pay now argue later’ principle, enforcement of the fiscal debt occurs by operation of law and without the need for recourse to courts, as is the case with ordinary claim of specific performance in civil procedure.

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<sup>137</sup> *Benson* supra note 136 at para 10 and 15-6.

<sup>138</sup> *Haynes v Kingwilliam’s Town Municipality* 1951 (2) SA 371 (A) at pages 378-9.

<sup>139</sup> Van Huysten et al. op cit 128 at pages 369-70 and footnote 24.

<sup>140</sup> 2003 (4) SA 520 (SCA).

<sup>141</sup> *Ibid* at para 34. Unless there is a so-called ‘jeopardy assessment’ in terms of the TAA.

<sup>142</sup> *Ibid* at para 11. It is submitted that this is equally permissible to section 164 of the TAA.

<sup>143</sup> *Malema v Commissioner for the South African Revenue Service* (unreported case no 76306/2015) of 29 April 2016 at para 23.

### 4.3. Civil debt enforcement procedures

#### 4.3.1. *The 'provisional sentence' procedure*

The civil debt enforcement procedure of provisional sentence arms a creditor with recourse to claim full and immediate payment of a debt, more specifically, the payment of the provisional judgment debt of the provisional sentence, prior to a final judgment being made in the principal case<sup>144</sup> regarding the liability for the alleged debt.<sup>145</sup>

There are four inherent characteristics of the provisional sentence procedure. First, the provisional sentence procedure is an action only available to a creditor who can evidence a civil debt claim against a debtor by using a so-called liquid document.<sup>146</sup> A liquid document is defined as a document which 'evidences by its terms, and without resort to evidence extrinsic thereto... an unconditional acknowledgement of indebtedness in an ascertained sum of money, the payment of which is due to the creditor'.<sup>147</sup> An example of a liquid document is a cheque, an acknowledgment of debt, a promissory note, a mortgage bond, a bill of exchange, a guarantee or 'an architect's certificate certifying that a builder has performed work in terms of a building contract'.<sup>148</sup> Secondly, a provisional sentence procedure can only result in 'a provisional or interlocutory order', that is '[f]inal judgment is still to be considered in the principal case' which means that, '[i]n the final instance, the claim against the... [debtor]... can still be dismissed'.<sup>149</sup> Thirdly, is that 'while on the one hand it entitles the... [creditor]... to payment of the judgment debt immediately, that is, before entering into the principal case, on the other hand it affords the... [debtor]... the right to insist on security for repayment pending the final outcome'.<sup>150</sup> Lastly, according to rule 8 of the Uniform Rules of Court and rule 14A of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, which outline the procedure for a provisional sentence, provide that a debtor against whom a provisional sentence has been granted is prohibited from entering into the principal case if such debtor fails to satisfy the amount of the judgment of provisional sentence and costs; likewise the creditor may not enter into the principal case if security has not been provided.<sup>151</sup>

In response to the issue of a provisional sentence summons, a debtor can either immediately pay the claim plus interest, or the debtor can decide to oppose the case.<sup>152</sup> In the

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<sup>144</sup> 'The 'principal case' is a phrase used to refer to the underlying transaction between the parties as a result of which a negotiable instrument has been issued, the merits of the underlying transaction now bring in dispute' in Stephan Pete, David Hulme & Max du Plessis, et al. *Civil Procedure: A Practical Guide* 2 ed (2011) at page 375 footnote 41.

<sup>145</sup> Ibid at page 375.

<sup>146</sup> *Twee Jonge* supra note 21 at para 15.

<sup>147</sup> *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H.

<sup>148</sup> Pete et al op cit note 144 at 378.

<sup>149</sup> *Twee Jonge* supra note 21 at para 16.

<sup>150</sup> Ibid at para 16.

<sup>151</sup> This forms the crux of the constitutional debate in the *Twee Jonge* supra note 21.

<sup>152</sup> Pete et al op cit note 144 at 378.

latter circumstance the debtor has two options, namely, to deny liability of the alleged debt on the basis of issues relating to the validity or liquidity of the liquid document itself, for example ‘the authenticity of the... [debtor’s]... signature’<sup>153</sup>; or to deny liability of the alleged debt on the basis of issues external to the liquid document.<sup>154</sup> A debtor ‘who relies on a defence which goes beyond the liquid document is required to produce sufficient proof of that defence to satisfy the court that the probability of success in the principal case is against the... [creditor]... before provisional sentence can be refused’.<sup>155</sup> Therefore it is submitted that there is a dual burden of proof, or a so-called ‘shifting onus’ on the creditor and the debtor in a claim for provisional sentence and should the debtor decide to challenge the allegation of liability in the provisional sentence summons.<sup>156</sup>

Like with the ‘pay now argue later’ principle, the provisional sentence procedure is a departure from the ordinary rules of debt enforcement in civil procedure in that a final determination of liability occurs after the receipt of the disputed debt by the creditor. The theory underlying the provisional sentence procedure ‘is that it is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court [and provided the Court is] provisionally satisfied that the creditor will succeed in the principal suit.’<sup>157</sup> Pete et al. state in the book *Civil Procedure: A Practical Guide* that the purpose of the provisional sentence procedure is ‘to provide a... [creditor]... – who, on the face of it, has a cast-iron case in that his claim is based on a liquid document – with a *short cut* to a kind of provisional or temporary judgment’ and furthermore ‘[i]t is a speedy procedure, which allows... [creditors]... whose claims are based on liquid documents to avoid the more lengthy and expensive mechanics of an ordinary trial action’.<sup>158</sup>

It is understood that a departure from ordinary civil debt enforcement is justified because there is a sense of reassurance that there is a debt and that such debt is legally enforceable. The same is true for a fiscal debt. It is presumed that the fiscal debt is due by operation of law and that SARS, as an organ of state, correctly administered it in accordance with the applicable tax Act. The provisional sentence procedure allows for an expedited debt enforcement procedure on the basis that there is a contract.<sup>159</sup> Owing to the fact that it can be proven that one of the two sources comprising the nature of a contractual debt exists in circumstances where there is a valid liquid document and where the court is satisfied that the creditor is likely to succeed, on a balance of probabilities, in the principal case a provisional judgment is awarded on an accelerated but provisional basis.

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<sup>153</sup> *Twee Jonge* supra note 21 at para 20.

<sup>154</sup> Pete et al op cit note 144 at 378.

<sup>155</sup> *Twee Jonge* supra note 21 at para 21.

<sup>156</sup> Pete et al op cit note 143 at page 379 at footnote 68.

<sup>157</sup> *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 728C.

<sup>158</sup> Pete et al op cit note 144 at 375.

<sup>159</sup> In the form of a liquid document.

#### 4.3.2. The 'summary judgment' procedure

Summary judgment is defined as '[a] judgment granted on a claim or defense [sic] about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as matter of law [and]... it allows the speedy disposition of a controversy without the need for trial'.<sup>160</sup> It provides a mechanism to 'short-cut the usual procedures, and obtain judgment without having to go to trial'.<sup>161</sup> It is available to a creditor who has a 'clear-cut claim'.<sup>162</sup> Such a creditor may apply to court for summary judgment provided it is clear that the debtor 'has no valid defence' to the claim for the payment of a debt and that 'an appearance to defend' submitted by the debtor was only done for the purposes of delay.<sup>163</sup>

Rule 32 of the Uniform Rules of Court and rule 14 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa enable a creditor to apply to court for summary judgment in respect of four categories of claims: a claim based on a liquid document; a claim for a liquidated amount in money; a claim for the delivery of specified movable property; or a claim for ejectment. All of these indicate a clear-cut claim. A summary judgment allows a person to 'obtain a final judgment when there was no *bona fide* defence to an action'.<sup>164</sup> The burden of proof carried by the debtor in the provisional sentence procedure is more onerous than in the case of the procedure for summary judgment in that '[w]ith summary judgment, the defendant has merely to show that he has a *prima facie* defence'.<sup>165</sup> With provisional sentence, however, the debtor 'must show that the *probabilities* are that his defence will be successful', which is regarded as 'the normal civil burden of a preponderance of probabilities'.<sup>166</sup>

The summary judgment procedure is a departure from the ordinary rules of debt enforcement in civil procedure in that a final determination of liability does not involve a trial, however, the collection of the debt is still permitted. The purpose of the summary judgment procedure has been held to be 'to prevent the... [debtor]... from delaying the proceedings when he has no real defence to the [creditor's] claim' and to 'balance two conflicting interests'.<sup>167</sup> In this regard, Pete et al state in the book *Civil Procedure: A Practical Guide* as follows:

On the one hand, the... [creditor]... should not be forced, in circumstances which amount to an abuse of the process of court, to suffer the delay and expense of a trial. On the other hand, summary judgment is a severe and

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<sup>160</sup> *Black's Law Dictionary* op cit note 1 at the definition of 'summary judgment'.

<sup>161</sup> Pete et al op cit note 144 at page 215.

<sup>162</sup> *Ibid* at page 206.

<sup>163</sup> *Ibid* at page 206.

<sup>164</sup> *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para 29.

<sup>165</sup> Pete et al op cit note 144 at page 380.

<sup>166</sup> *Ibid* at page 380; *Dickinson v South African General Electric Co. (Pty) Ltd* 1973 (2) SA 620 (A) at 630F.

<sup>167</sup> Pete et al op cit note 144 at page 215.

extraordinary procedure, which circumvents the *audi alteram partem* principle in that a... [debtor]... who wishes to defend a matter may have judgment taken against him without the benefit of a trial ... There are several provisions in the rules which help to keep these competing interests in balance. Summary judgment is a frequently used procedure, and therefore of great importance.<sup>168</sup>

The summary judgment procedure allows for an expedited debt enforcement procedure on the basis that there is a contract<sup>169</sup> and that the obligations arising therefrom are enforceable given that the debtor has no valid defence. Therefore, due the fact that it can be proven that the two sources comprising the nature of a contractual debt have been satisfied a final judgment is awarded on a summary or accelerated basis.

#### 4.4. Conclusion

There are peculiarities of debt enforcement procedure not only specific to fiscal debt, but also found with regard to civil debt. The ‘pay now argue later’ principle being the more drastic departure in that no recourse to the judiciary is required before the debt collection procedures may be invoked,<sup>170</sup> unlike the procedure for provisional sentence and summary judgment where there is still some recourse to a court of law although not to the same extent as the ordinary procedure for debt enforcement in civil procedure, which involves a trial. These exceptions provide for accelerated debt enforcement procedures. Lord Hatherley held in *John Wallingford v The Directors & C. of the Mutual Society*<sup>171</sup> that:

[T]he objects of these short methods of procedure<sup>172</sup> has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never... can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts.<sup>173</sup>

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<sup>168</sup> Pete et al op cit note 144 at page 215.

<sup>169</sup> The four categories of claims mentioned above.

<sup>170</sup> The suspension of the ‘pay now argue later’ principle in terms of section 164(2) of the TAA does provide some relief for taxpayers, however this is not dealt with in detail in this section of the research.

<sup>171</sup> 1880 5 AC 685 (HL).

<sup>172</sup> Reference here was made to summary judgment, however the principle is still applicable to other procedures which provide short cuts.

<sup>173</sup> *John Wallingford* supra note 171 at page 699.

The procedures for provisional sentence and summary judgment are justified on the basis of expediency and judicial efficiency, and on the basis that the elements of the nature of a civil debt can be proved. This can be likened to the need for an effective and efficient fiscal administration. SARS must, in terms of section 4(2) of the SARS Act, perform its functions in the most cost-efficient and effective manner and in accordance with the values and principles contained in the Constitution.<sup>174</sup> The SARS Act lists, under section 3 of the SARS Act and as an objective of SARS, the ‘efficient and effective... collection of revenue’. SARS regards tax revenue as an asset that belongs to South Africa. It is submitted that it is against this premise that the method of fiscal debt enforcement employed by SARS, namely, the ‘pay now argue later’ principle, exists. This is confirmed in *Capstone 556 and Kluh* (supra) Binns-Ward J held that the rationale underlying the ‘pay now argue later’ principle ‘include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes’.<sup>175</sup> It is submitted that both provisional sentence and summary judgment have regard to the merits of the case. In order to avoid provisional sentence being granted the debtor has the opportunity to prove that, on a balance of probabilities, that his or her defence will be successful.<sup>176</sup> In summary judgment, the debtor has to show that he or she has a prima facie case in order to avoid summary judgment being award.<sup>177</sup> As previously mentioned, in *Capstone 556 and Kluh* it was held that section 164 does indirectly provide for the consideration of merits in situations of rejecting or revoking an application for the suspension of the ‘pay now argue later’ principle.<sup>178</sup>

Interestingly, Mkgoro J observed in *Lesapo v North West Agricultural Bank and Another*<sup>179</sup> that ‘[i]f the debt itself is disputed, the seizure of the property in execution of the debt must equally be disputed’.<sup>180</sup> Ordinary debt recovery in civil procedure likewise necessitates a link between the debt and the liability for the debt; a dispute regarding the liability for the debt thus relates to a dispute regarding the collection of the debt. The ‘pay now argue later’ principle severs this link, as does the provisional sentence and summary judgment procedures, albeit to a lesser degree. The greater the ability to evidence liability for the debt without the need for recourse to court processes the more likely that the severing of this link would be justified.

According to Croome ‘[i]f taxpayers enter voluntarily into a relationship with the fisc [similar to two contracting parties entering into a contract] there might be some justification in arguing that they must simply submit to the Commissioner’s powers and accept that they

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<sup>174</sup> In terms of section 195 of the Constitution, public administration must be governed by the democratic values and principles enshrined in the Constitution, including those specifically mentioned under section 195.

<sup>175</sup> *Capstone 556 and Kluh* supra note 77 at para 9.

<sup>176</sup> See Pete et al op cit note 144 at 380.

<sup>177</sup> Ibid.

<sup>178</sup> *Capstone 556 and Kluh* supra note 77 at para 32.

<sup>179</sup> *Lesapo* supra note 116.

<sup>180</sup> Ibid at para 14.

have a few rights'.<sup>181</sup> There is merit in an argument that, because a fiscal debt does not arise from a voluntary agreement but from the operation of law and the administration by an organ of state a limitation of the rights of taxpayers should not be readily condoned. However, it is submitted that this is not the rationale underlying the departure from the ordinary procedure for debt enforcement in civil procedure. A departure is justified when the liability for the debt can be evidenced without the need for fortification through court process, regardless of whether the debt was incurred voluntarily or not. With a fiscal debt, the evidence of the liability is strong<sup>182</sup> in that not only is the debt effected by an organ of state<sup>183</sup>, which carries a greater burden than a civil creditor to ensure that the debt does exist in law and is not fraudulent, but also the debt arises by operation of law in terms of a tax Act, and not in terms of a unique agreement between persons in the civil or non-State arena, which allows for greater interpretation and dispute..<sup>184</sup>

Furthermore, it may be noted that, in certain circumstances, 'the coercive power of the state may be invoked without the sanction of a court'.<sup>185</sup> This is key to the healthy operation of a nation, and is condoned in other settings. For example, the South African Police Service has the right to arrest a person and thereafter detain them in legal custody provided such person has allegedly committed a crime.<sup>186</sup> Therefore, before the accused's liability has been properly ascertained by a court of law, the accused may be arrested and thereafter detained. The analogy with the fiscal procedure 'pay now argue later' is thus apparent.

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<sup>181</sup> Croome op cite note 40 at 1.

<sup>182</sup> In provisional sentence and summary judgment procedures the liability can also be easily evidence without the need for court process.

<sup>183</sup> In the case *Hindry v Nedcor Bank Ltd* 1999 (2) SA 757 (W) Wunsh J held, when referring to the purpose for which a taxpayer's rights are limited in circumstances of section 88 and section 99 of the Income Tax Act (now section 164 and section 179 of the TAA), that '[t]he purpose for which a person's rights are limited... is... according to the undisputed and inherently credible evidence o[f] the Commissioner'

<sup>184</sup> Ibid at page 63.

<sup>185</sup> *Lesapo* supra note 116 at para 12.

<sup>186</sup> Section 50(1)(a) of the Criminal Procedure Act 51 of 1977.

## **5. CHAPTER 5: THE CONSISTENCY OF THE ‘PAY NOW ARGUE LATER’ PRINCIPLE WITH SOUTH AFRICAN CONSTITUTIONAL LAW**

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 [sic]. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes.<sup>187</sup>

### **5.1. Introduction**

Following from Chapter 4, ‘the ordinary way of securing execution in settlement of debts due is through the court process’.<sup>188</sup> This is a principle of debt recovery which is against self-help and is an expression of the constitutional right of access to courts in terms of section 34 of the Constitution. Section 34 gives effect to the right of access to courts and states that ‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’. ‘Everyone’ includes a South African taxpayer. It is submitted that a ‘dispute that can be resolved by the application of law’ covers a dispute regarding the obligation to pay tax for the reason that the meaning of ‘tax’ is defined in section 1 of the TAA as ‘a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act’. Thus, the liability for tax is directly determined by the application of law. A dispute regarding the obligation to pay tax would thus involve the application of law and must thus, according to the Constitution, be decided in a fair public hearing before a court.

The ‘pay now argue later’ principle secures debt collection or execution without the need for recourse to the court process and thus without access to courts, which, it has been argued, borders on self-help and limits a taxpayer’s right of access to courts.<sup>189</sup> A taxpayer is required to pay the disputed tax debt first, unless SARS agrees to suspend payment under section 164 of the TAA, and then later or simultaneously challenge the assessment via the dispute resolution process, which may result in the matter being heard by the tax court or a higher court. Access to courts prevents so-called self-help. For example, litigation to obtain

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<sup>187</sup> *Lesapo* supra note 116 at para 22.

<sup>188</sup> *Ibid* at para 19.

<sup>189</sup> See *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2000 (2) SA 232 (W).

an order for specific performance is a procedural step to obtain the enforcement of a debt and is required because persons are not entitled to resort to self-help to obtain what is due to them. However, there are exceptions to this, namely, the provisional sentence procedure and the summary judgment procedure, which have been argued to restrict access to courts<sup>190</sup>.

The overriding principle in constitutional law is that, in terms of section 9(1) of the Constitution, everyone is equal before the law and has the right to equal protection of and benefit of the law. Therefore, should the ‘pay now argue later’ principle prevent the equal protection of the constitutional right of access to court of a person, in their capacity as a taxpayer, it will be regarded as unconstitutional unless the infringement on the constitutional right can be justified in terms of section 36 of the Constitution.

## **5.2. Treatment of the ‘pay now argue later’ principle by South African courts**

The ‘pay now argue later’ principle has not been considered in terms of the section 164 of the TAA. This research therefore examines the treatment of the ‘pay now argue later’ principle by South African courts contained in section 88 of the Income Tax Act and section 36 of the VAT Act. Although the wording in the now repealed section 88 and section 36 were largely similar in material respects,<sup>191</sup> it is submitted that for the purposes of this research, it is beneficial to analyse separately the way in which the South African courts have approached or dealt with these two sections in regard to their argued infringement of the right to access to courts.

In the case of *The Commissioner of Inland Revenue v NCR Corporation of South Africa (Proprietary) Ltd*<sup>192</sup> the Supreme Court of Appeal decided on the proper interpretation of section 88 of the Income Tax Act. The dispute between the then Commissioner: Inland Revenue and NCR Corporation of South Africa (Pty) Ltd, that is, the taxpayer, began with the Commissioner: Inland Revenue disallowing, in its tax assessment of the taxpayer, a deduction of foreign exchange losses incurred by the taxpayer for its 1973, 1974, 1975 and 1976 years of assessment.<sup>193</sup> The taxpayer objected to this disallowance ‘on the ground that since the losses had been incurred in the production of income and were not of a capital nature they were properly deductible’.<sup>194</sup> The Supreme Court decided in favour of the Commissioner of Inland Revenue. As mentioned above, the Supreme Court of Appeal was tasked with interpreting the wording of section 88. For this purpose, Corbett JA divided section 88, as it then read, into two portions, as seen below.

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<sup>190</sup> See paragraph 5.5 below.

<sup>191</sup> See Chapter 2 on the development of the ‘pay now argue later’ principle.

<sup>192</sup> (unreported case no 5/1988) of 10 March 1988.

<sup>193</sup> *Ibid* at page 2-3.

<sup>194</sup> *Ibid* at page 3.

The obligation to pay and the right to receive and recover any tax 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 under section 86 or 86A, 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 at the prescribed rate (but subject to the provisions of section 89quin), such interest being calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with interest calculated as provided in section 89.

The first portion ‘enacts that the obligation to pay and the right to receive and recover any tax chargeable under the [Income Tax] Act is not suspended, unless the Commissioner so directs, by “any appeal” or “pending the decision of a court [of] law under sec 86 or 86A”’.<sup>195</sup>

‘The second portion provides for the refunding of excess tax paid, together with interest thereon, whenever an assessment is altered “on appeal” or “in conformity with any such decision”’.<sup>196</sup>

Of relevance to this research is the Supreme Court of Appeal’s interpretation of the first portion of section 88, namely, the non-suspension of the obligation on a taxpayer to pay tax. Corbett JA held in this regard that:

The 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 assessment by the Commissioner...<sup>197</sup> (own emphasis)

It is submitted that Corbett JA considered the first portion of section 88, which is primarily responsible for giving effect to the ‘pay now argue later’ principle, as a peculiarity which is not governed by the same category of rules regulating civil procedures.<sup>198</sup> A similar finding in this respect was noted in *Metcash* (supra). The dispute between Metcash Trading Ltd, a registered VAT vendor, and the Commissioner began with the Commissioner disallowing, in its tax assessment of the taxpayer, a deduction of input VAT incurred by the taxpayer for the period July 1996 to June 1997, on the basis that the transactions giving rise to the input VAT relating to ‘alleged divisions’ of Metcash Trading Ltd never occurred.<sup>199</sup> In response to the tax assessment, which, in turn, automatically brought into operation the ‘pay

<sup>195</sup> NCR supra note 192 at page 16.

<sup>196</sup> Ibid at page 16.

<sup>197</sup> Ibid at pages 16-7.

<sup>198</sup> Although explicitly referring to the procedure regulating the execution of a judgment, it is submitted that the same reasoning is applicable to the ‘pay now argue later’ principle.

<sup>199</sup> See Olivier op cit note 33 at pages 194-5 which provides a succinct outline of the facts of *Metcash* supra note 19.

now argue later’ principle, Metcash Trading Ltd ‘approached the high court on an urgent basis to declare the collections provisions [which include the ‘pay now argue later’ principle in terms of section 36] unconstitutional, as they infringe upon a taxpayer’s right to have its disputes settled by a court of law’.<sup>200</sup> Agreeing with Corbett JA in *NCR*, Kriegler J held that:

As in the case of section 88 of the Income Tax Act discussed by Corbett JA... 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.<sup>201</sup> (own emphasis).

Thus, in both *NCR* and *Metcash* it was held that, inter alia, the ordinary rules of civil procedure, which, it is submitted, are consistent with the constitutional right of access to court<sup>202</sup>, do not take precedence over the procedure entrenched by the ‘pay now argue later’ principle.

The judgment in *NCR* took place prior to South Africa’s Constitutional era, which begs the question whether this case, which concerned income tax, would have been decided differently post Constitution. It is submitted that this question can be answered in the negative taking into account that this principle has, subsequent to the Constitution, been upheld by the South African courts. In the unreported case of *King v The Commissioner for the South African Revenue Service (SARS)*<sup>203</sup>, De Vos J held that ‘the principle ‘pay now argue later’ was approved as a general principle of our tax system and this is the case in many open and democratic societies’<sup>204</sup> and further in *Capstone 556 and Klüh* (supra), Binns-Ward J upheld the principle. Furthermore, Arnold, in his *Brief for the Commissioner of Inland Revenue for the Republic of South Africa*, in referring to section 88 of the Income Tax Act, stated that ‘this provision is both reasonable and justifiable in a democratic society’ and ‘that requiring taxpayers to pay taxes under dispute does not negate any fundamental rights’.<sup>205</sup>

Besides the finding above that the ‘pay now argue later’ principle is a ‘special procedure’ which warrants exception of ordinary debt enforcement in civil procedure, it has been held that the ‘pay now argue later’ principle in terms of section 36 ‘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’ and thus ‘[i]t does not afford any authority to circumvent the courts, nor any right to levy execution’.<sup>206</sup> Kriegler J, in referring to the first portion of section 36, which, it is submitted, corresponds to the first portion of section 88 referred to by Corbett JA

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<sup>200</sup> Olivier op cit note 33 at page 195.

<sup>201</sup> *Metcash* supra note 19 at para 36.

<sup>202</sup> Please see Chapter 4.

<sup>203</sup> (unreported case no 12508/02) of 14 May 2002.

<sup>204</sup> *Ibid* at page 8.

<sup>205</sup> *Arnold* op cit note 82 at pages 21-2.

<sup>206</sup> *Metcash* supra note 19 at para 36-7.

in *NCR*, held that ‘[t]he 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.’<sup>207</sup> It is submitted, however, that the ‘pay now argue later’ principle circumvents access to courts at the time that the principle is in operation, that is, upon the payment of tax becoming due by a taxpayer. The determination as to whether this principle infringes the right of access to courts turns on, it is submitted, whether the principle ‘excludes the jurisdiction of the courts at the time it is invoked’.<sup>208</sup> According to Olivier, ‘at the time of payment a taxpayer has no access to a court of law apart from on narrow [judicial] review grounds’.<sup>209</sup> Therefore it is not relevant whether the ‘pay now argue later’ principle specifically refers to anything which can be construed as a prohibition against access to courts, it matters whether at the time the principle is invoked the access to courts remains intact. Furthermore, the debt collection procedures in the TAA, specifically refer to the ‘pay now argue later’ principle in section 164. Therefore, it is difficult to argue that the ‘pay now argue later’ principle does not, as it currently exists, ‘circumvent the courts, nor any right to levy execution’<sup>210</sup>.

The ‘pay now argue later’ principle appears to have been treated as an extraordinary or ‘special procedure’ which requires a departure from the normal rules of civil procedure, like certain debt enforcement procedures in civil procedure do. This results, it is submitted, in an infringement of the right of access to courts, but a justifiable infringement, as is more fully set out below.

### **5.3. Justifiable limitation of the constitutional right of access to courts by the ‘pay now argue later’ principle**

S 36(2) of the Constitution states that ‘[e]xcept as provided in subsection [36](1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights’. Section 36(1) of the Constitution states that:

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;

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<sup>207</sup> *Metcash* supra note 19 at para 37.

<sup>208</sup> Olivier op cit note 33 at page 196.

<sup>209</sup> Ibid at page 196.

<sup>210</sup> *Metcash* supra note 19 at para 36-7.

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

Professor Henry Vorster stated, in a case note on *Metcash*, that, with regard to section 36 of the VAT Act and its limitation on the constitutional right of access to court, ‘the limitation is justifiable in terms of s 36... [as it]... is limited in scope, temporary and subject to judicial review’ and, furthermore, ‘[t]he public interest in obtaining full and speedy settlement of tax debts is significant’.<sup>211</sup> He stated further that:

In order for the rule to work it is necessary to obtain execution against a taxpayer without having first to air the subject matter of the objection. Given the prevalence of the rule in other jurisdictions, it is one which is accepted as reasonable in open and democratic societies as required by s 36 of the Constitution. Finally, the effect of the rule on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation. The existence of this discretion limits the effect of the rule in an appropriate manner.<sup>212</sup>

It is submitted that the limitation created by the ‘pay now argue later’ principle is justifiable in terms of section 36 of the Constitution. Just like the need exists for exceptions to debt recovery in civil procedure, likewise the need exists in tax administrative law. According to Arnold in the *Brief for the Commissioner of Inland Revenue for the Republic of South Africa*, ‘it would not be sensible to eliminate the requirement for taxpayers to pay taxes owing despite disputing the payment of such taxes in the courts’ for the reasons that ‘[i]f taxes under dispute do not have to be paid by taxpayers, there is a clear incentive for taxpayers to dispute tax assessments that they would not otherwise dispute’ and ‘[i]t is very difficult for the courts or the tax authorities to decide whether or not disputes are frivolous’.<sup>213</sup> Furthermore, ‘[i]f taxes are not paid when assessed, there is also the problem of the taxpayer’s not having the necessary funds to pay the taxes when the litigation is finally resolved and the taxes are found to be due and payable’.<sup>214</sup>

#### **5.4. VAT versus income tax: Is a different application for each tax type warranted?**

Kriegler J made important points in *Metcash* regarding the difference between VAT and income tax, namely that:

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<sup>211</sup> Vorster H ‘Self-help and the fiscus’ January 2001 *De Rebus* 47.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Arnold* op cit note 82 at page 22.

<sup>214</sup> *Ibid* at page 22.

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.<sup>215</sup>

The finding in *Metcash* that section 36 of the VAT Act does not infringe the constitutional right of access to courts may thus not be applicable to income tax. VAT is, according to Kriegler J, simpler to assess in that it is based on a more 'predictable stream of revenue'.<sup>216</sup> A simpler form of tax may result in an less vexatious or shortened dispute. However, it is submitted that this does not necessarily mean that taxpayer involved in a dispute regarding VAT should not be afforded the same access to courts as a taxpayer involved in a disputed regarding income tax. As mentioned above, a departure from debt enforcement procedures in civil procedure is justified when the liability for the debt can be evidenced without the need for fortification through court process, regardless of whether the debt was incurred voluntarily or not. With a fiscal debt arising in terms of the VAT Act the debt can be easily evidenced, which is not so with a fiscal debt arising in terms of income tax. VAT is different as vendor collect VAT from purchasers of its goods and is liable to pay that to SARS, whereas income tax is due on the taxable income at the end of the year. Therefore, there is merit in a distinction between VAT and income tax when it comes to the applicability of the 'pay now argue later' principle.

### **5.5. Treatment of civil debt enforcement procedures by South African courts**

In *Twee Jonge* (supra), the Constitutional Court decided on whether the provisional sentence procedure unjustifiably limits the constitutionally protected right of access to courts. Provisional sentence, as discussed more fully above, is a civil debt enforcement procedure and allows a creditor to claim full and immediate payment of a debt, more specifically the payment of the provisional judgment debt of the provisional sentence, prior to any final judgment being made by the court regarding the liability for the alleged debt.<sup>217</sup> In *Twee Jonge*, the Constitutional Court decided on an application for an order declaring that the

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<sup>215</sup> *Metcash* supra note 19 at para 22.

<sup>216</sup> *Ibid* at para 17.

<sup>217</sup> *Pete et al. op cit* note 144 at page 375.

procedure for provisional sentence is inconsistent with the Constitution, specifically with the constitutional right to a fair hearing<sup>218</sup> and the constitutional right to equality before the law,<sup>219</sup> insofar as it discriminates against alleged debtors who can provide payment of the amount of the judgment of the provisional sentence debt, restricting them from entering into the principal case regarding liability.<sup>220</sup> It was held that the procedure for provisional sentence was inconsistent with the Constitution and invalid to the extent that it does not give courts the discretion to refuse provisional sentence in certain limited circumstances.<sup>221</sup>

In contrast to the above finding in *Twee Jonge*, the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*<sup>222</sup> the Supreme Court of Appeal expressed a different reasoning with regard to the summary judgment procedure. The Supreme Court of Appeal decided on an application for summary judgment, specifically dealing with the allegation that ‘summary judgment is a remedy of an ‘extraordinary and drastic nature’, based on ‘the supposition that the... [creditor’s]... case is unimpeachable and the [debtor’s] defence is bogus or bad in law’.<sup>223</sup> The Supreme Court of Appeal refuted the above allegation by finding that ‘summary judgment proceedings only hold terrors and are ‘drastic’ for a... [debtor] who has no defence’.<sup>224</sup> Navsa JA held that ‘the summary judgment procedure was not intended to ‘shut... [a debtor]... out from defending’, unless it was very clear indeed that he had no case in the action [but was] intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to... [creditors]... who were endeavouring to enforce their rights’.<sup>225</sup>

Interestingly, the reasoning applied by Navsa JA in *Joob Joob* was that the summary judgment procedure ‘is not intended to deprive a... [debtor]... with a triable issue or a sustainable defence of her/his day in court’<sup>226</sup>, is similar to that applied by Kriegler J in *Metcash* that the ‘pay now argue later’ principle in terms of section 36 ‘says nothing that can be construed as a prohibition against resort to such a court’.<sup>227</sup> A test of the constitutionality of the provisions<sup>228</sup> should not, it is submitted, take the form of a subjective test of what was intended or what is read by the provisions, but instead should consider the objective impact of the provisions. Following such an approach it is difficult to refute that the ‘pay now argue later’ principle ‘excludes the jurisdiction of the courts at the time it is invoked’.<sup>229</sup>

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<sup>218</sup> Section 34 of the Constitution.

<sup>219</sup> Section 9(1) of the Constitution.

<sup>220</sup> *Twee Jonge* supra note 21 at para 26.

<sup>221</sup> *Ibid* at para 278

<sup>222</sup> *Joob Joob* supra note 164.

<sup>223</sup> *Ibid* at para 24.

<sup>224</sup> *Ibid* at para 33.

<sup>225</sup> *Ibid* at para 31 referring to Lord Hathaway in *John Wallingford* supra note 171 at pages 699-700.

<sup>226</sup> *Joob Joob* supra note 164 at para 32.

<sup>227</sup> *Metcash* supra note 19 para 36.

<sup>228</sup> Although the test in *Joob Joob* supra note 164 was not one of constitutionality, reference was made to the right of access to courts and the reasoning is still applicable.

<sup>229</sup> Olivier op cit note 33 at 196.

## 5.6. Conclusion

Van Heerden stated that:

By its nature the levying of tax is an invasion of rights of the citizen. On the other hand, the very existence of the state and its institutions is dependent on funds obtained by way of taxes. Tax must be collected, but in accordance with the Constitution as the supreme law.<sup>230</sup>

Van Heerden summarised the situation well in that there is a definite balancing of the rights involved when it comes to revenue enforcement and collection. To be ‘in accordance with the Constitution as the supreme law’ provides for a situation in which there may be a justifiable limitation of a constitutional right. Thus, the ‘pay now argue later’ principle does limit a taxpayer’s right of access to courts at the time that the tax becomes due. However, this limitation is justified. In *Giddey NO v JC Barnard and Partners*<sup>231</sup> O’Regan J held that:

But for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which ... [debtors]... may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a ... [creditor]... or ... [debtor]... being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution.<sup>232</sup>

Similarly, to the need for regulatory rules ‘for courts to function fairly’, the fiscus also requires such rules to function efficiently and effectively. This, it is submitted, provides sufficient justification for the limitation created by the ‘pay now argue later’ principle.

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<sup>230</sup> T Van Heerden ‘Affidavit’ to the application for *The Commissioner for Inland Revenue* supra note 26 at page 13.

<sup>231</sup> 2007 (5) SA 525 (CC).

<sup>232</sup> *Giddey* supra note 227 at para 16.

## 6. CHAPTER 6: CONCLUSION

We have fought for so long that we cannot even remember what we are fighting for.<sup>233</sup>

### 6.1. Introduction

As has been previously mentioned in the preceding chapters, the significance of this research lies in expanding on existing analyses of the ‘pay now argue later’ principle by not only testing its consistency with the Constitution, but also comparing it to broader debt enforcement in civil procedure. This research has analysed the ‘pay now argue later’ principle and has asked and answered questions about its development, operation, comparability to civil debt procedures and consistency with the Constitution. All of these components are important to an in-depth analysis of the ‘pay now argue later’ principle in South African tax law as well as being important for determining whether this principle is an anomaly in the context of broader debt recovery in South Africa.

### 6.2. Specific answers to the research questions

*How has the ‘pay now argue later’ principle developed from its first appearance in the Income Tax Act and the VAT Act to the TAB and, finally, to the TAA, and what was the nature of the developments?* The development of the ‘pay now argue later’ principle from its first appearance in the Income Tax Act in 1962 and the VAT Act in 1993 until their repeal in 2011 was relatively minor save for in the year 2009, during which year there was a marked change in the structure of this principle, with the inclusion of the suspension rule. Following this amendment in 2009, the ‘pay now argue later’ principle substantially maintained its form, save for a few key amendments, during its incorporation into the TAB and, later, into the TAA.

*What was the effect, if any, of the advent of the Constitutional era on the development of the ‘pay now argue later’ principle?* The dawn of the constitutional era in South Africa accompanied by increased recognition of taxpayers’ rights, nationally and internationally, has, interestingly, not affected the development of the ‘pay now argue later’ principle in South Africa to any substantial degree. This has been so despite constitutional

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<sup>233</sup> C Ryan (1481) available at <<http://quotespictures.com/we-have-fought-for-so-long-that-we-cannot-even-remember-what-we-are-fighting-for-let-us-not-search-for-a-reason-to-keep-fighting-but-for-a-reason-to-stop-it-charles-ryan/>>.

challenges taken against the principle. The success of these constitutional challenges indicate that, should the application by van Heerden<sup>234</sup> have been heard by the Constitutional Court, the principle would have remained as is.

***How is an application to suspend the obligation to pay tax brought by a taxpayer in terms of the TAA?*** In practice, a request by a taxpayer for the suspension of the obligation to pay tax due under an assessment takes the form of a letter setting out such taxpayer's compliance with the criteria identified in section 164. Currently, there is no prescribed form for such an application and it is not possible to submit a request for suspension via eFiling.

***What is the meaning and scope of the Commissioner's 'discretion' when approving or refusing an application for the suspension of the 'pay now argue later' principle?*** There is no case law or guidance from the legislature or SARS as to the nature of the list of 'relevant factors' provided in section 164(3), namely, whether the list of factors is exhaustive and the importance that should be placed on the different factors. As confirmed by Croome & Olivier's interpretation of the provision, 'SARS needs to consider the factors stated in s 164 and may also take account of other factors which are not stated in the section'.<sup>235</sup> They go further to state that '[t]his flows from the use of the word 'including'' in the section.<sup>236</sup> It is submitted that it is unlikely that a senior SARS official would be limited to the factors listed in section 164(3), as such an interpretation would curtail the discretion of a senior SARS official in making a decision whether to accept an application for the suspension of the 'pay now argue later' principle, and should the legislature had intended such an interpretation it would have been made clearer in the section itself. Furthermore, the Memorandum on the Objects of the Taxation Administration Laws Amendment Bill, 2014 specifically explains that the criteria listed in section 164(3) must be considered in addition to relevant factors.

***What, if any, are the remedies available to a taxpayer whose application for the suspension of the 'pay now argue later' principle has been refused and are they sufficient?*** Section 164 does not provide for a procedure in terms of which a taxpayer may object or appeal against the decision of a senior SARS official to reject an application for the suspension of the payment of tax, or for a procedure in terms of which the taxpayer may request that such senior SARS official provide reasons for such a decision. However, PAJA does make provision for a remedy for the taxpayer in such circumstances in the form of a judicial review. This has, as mentioned above, been regarded as an insufficient remedy for taxpayers.<sup>237</sup>

***How does the 'pay now argue later' principle, as a fiscal debt enforcement procedure, compare with ordinary civil debt enforcement in South Africa?*** It is submitted that the 'pay now argue later' principle is a sui generis debt enforcement procedure in that it

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<sup>234</sup> *The Commissioner for Inland Revenue* supra note 26.

<sup>235</sup> Croome & Olivier op cit note 84 at page

<sup>236</sup> Ibid at page 379.

<sup>237</sup> Olivier op cit note 33 at page 197.

does not take the form of litigation, which is characteristic of ordinary civil debt enforcement, but instead occurs automatically by operation of law. This brings about a departure from the ordinary sequence of events in debt recovery in civil procedure. Should the taxpayer dispute the liability for a fiscal debt, this is dealt with separately and is removed from the fiscal debt recovery process. As stated above, ‘the ordinary way of securing execution in settlement of debts due is through the court process’.<sup>238</sup> However, the ‘pay now argue later’ principle secures debt collection without the need for recourse to the judiciary. Therefore, on the face of it, the ‘pay now argue later’ principle is an unusual and peculiar departure from the normal rules regulating debt enforcement procedures.

***Is the rationale underlying the ‘pay now argue later’ principle consistent with exceptions to ordinary civil debt enforcement in South Africa, that is provisional sentence and summary judgment?*** It is submitted that the procedures for provisional sentence and summary judgment are justified on the basis of expediency and judicial efficiency, and on the basis that the elements of the nature of a civil debt can be proved. This can be likened to the need for an effective and efficient fiscal administration. It is submitted that ordinary debt recovery in civil procedure necessitates that there be a link between the debt and the liability for the debt; a dispute over the liability for the debt thus relates to a dispute over the collection of the debt. The ‘pay now argue later’ principle severs this link, as do the provisional sentence and summary judgment procedures, albeit to a lesser degree. The greater the ability to evidence liability for the debt without the need for recourse to court processes, the more likely it is that the severing of this link would be justified. With a fiscal debt, the evidence of the liability is strong<sup>239</sup> in that not only is the debt effected by an organ of state, which carries a greater burden than a civil person to ensure that the debt does indeed exist in law and is not fraudulent, but also the debt arises by operation of law in terms of a tax Act, and not in terms of a unique agreement between two or more civil persons, which allows for greater interpretation and dispute.

***Are the provisions of the ‘pay now argue later’ principle consistent with the constitutional right of access to courts; if not, then is a limitation on the constitutional right of access to courts justified?*** The ‘pay now argue later’ principle limits a taxpayer’s right of access to courts at the time that the tax becomes due. However, this limitation is justified, taking into account the factors of section 36 of the Constitution.

***Should the ‘pay now argue later’ principle have different applications for VAT and income tax disputes?*** As mentioned above, a departure from debt enforcement procedures in civil procedure is justified when the liability for the debt can be evidenced without the need for fortification through the court process, regardless of whether the debt was incurred voluntarily or not. With a fiscal debt arising in terms of VAT the debt can be easily

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<sup>238</sup> Lesapo supra note 116 at para 19.

<sup>239</sup> In provisional sentence and summary judgment procedures the liability can also be easily evidenced without the need for ordinary court processes.

evidenced, but this is not the case with a fiscal debt arising in terms of income tax. Therefore, there is merit in a distinction between VAT and income tax when it comes to the applicability of the ‘pay now argue later’ principle.

### 6.3. Conclusion

This research is by no means meant to laud fiscal debt enforcement and collection procedures for their alignment with need and logic; neither is it meant to encourage a revolt by South African taxpayers against their obligation to pay tax in situations where the tax is disputed, but is instead a means of showing that the ‘pay now argue later’ principle is not a peculiarity in broader debt enforcement in South Africa. It is submitted that an appropriate statement to conclude this research is that ‘[w]e have fought for so long that we cannot even remember what we are fighting for’.<sup>240</sup> Other exceptions to the ordinary procedure for civil debt enforcement have underlying rationales similar to that underlying the ‘pay now argue later’ principle, and result in similar restrictions for the sake of expediency when debt is easily evidenced. Furthermore, the ‘pay now argue later’ principle<sup>241</sup> and the other exceptions to the ordinary procedure for civil debt enforcement have been found to be constitutional.<sup>242</sup> By way of a brief comparison, Canadian tax law does not have a comparable ‘pay now argue later’ principle<sup>243</sup>, whereas Australian tax law does<sup>244</sup>. Therefore, although it may not be the norm in international tax debt enforcement, it is not abnormal in debt enforcement procedure in South Africa. The ‘pay now argue later’ principle is more severe than other civil debt enforcement procedures; however, this, it is submitted, is justified in that a party to the debt collection is an organ of state, which carries a greater burden than a civil person to ensure that the debt does indeed exist in law and is not fraudulent. Similar allowances are made, for example and as referred to above, for the South African Police Service, which has the right to arrest a person and thereafter detain them in legal custody provided such person has allegedly committed a crime.<sup>245</sup> Therefore, before the accused’s liability has been properly ascertained by a court of law, the accused may be arrested and thereafter detained.

As a departing remark, it is possible that further inroads into the scope of the power of the fiscus in terms of the ‘pay now argue later’ may be made, the suspension rule being one such reduction. For example, a compromise that could be made is that ‘it might be appropriate to provide taxpayers with a right of appeal if the Commissioner decides not to

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<sup>240</sup> Ryan op cit note 229.

<sup>241</sup> In terms of section 36 of the VAT Act.

<sup>242</sup> The provisional sentence procedure was found to be partly unconstitutional, although this has not changed the rules regulating the procedure. Furthermore, as referred to in Chapter 1, the comparison of the civil debt enforcement procedures with the ‘pay now argue later’ principle is not for our purposes of ascertaining the constitutionality of the principle but more as means of proving that the principle is not a peculiarity in broader debt enforcement.

<sup>243</sup> See *Arnold* op cit note 82 at page 21-2.

<sup>244</sup> R L et al. Deutsch *The Australian Tax Handbook* (2014).

<sup>245</sup> Section 50(1)(a) of the Criminal Procedure Act 51 of 1977.

exercise his discretion'.<sup>246</sup> Furthermore, in the court a quo in *Metcash* (supra), Snyder J proffered, as possible alternatives to the 'pay now argue later' principle, '[h]igher penalties ... the furnishing of security, even higher interest rates or time-linked penalties'.<sup>247</sup> However, this has not been dealt with in detail for the purposes of this research as it lies beyond its scope.

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<sup>246</sup> *Arnold* op cit note 82 at page 56-7.

<sup>247</sup> *Metcash* court a quo supra note 189 at 244E-F.

## APPENDICES

### Extract from the TAA

#### 164. Payment of tax pending objection or appeal.—

- (1) Unless a senior SARS official otherwise directs in terms of subsection (3)—
  - (a) the obligation to pay tax; and
  - (b) the right of SARS to receive and recover tax,
    - will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.
- (2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.
- (3) A senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including—
  - (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
  - (b) the compliance history of the taxpayer with SARS;
  - (c) whether fraud is *prima facie* involved in the origin of the dispute;
  - (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
  - (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.
- (4) If payment of tax was suspended under subsection (3) and subsequently—
  - (a) no objection is lodged;
  - (b) an objection is disallowed and no appeal is lodged; or
  - (c) an appeal to the tax board or court is unsuccessful and no further appeal is noted,
    - the suspension is revoked with immediate effect from the date of the expiry of the relevant prescribed time period or any extension of the relevant time period under this Act.

- (5) A senior SARS official may deny a request in terms of subsection (2) or revoke a decision to suspend payment in terms of subsection (3) with immediate effect if satisfied that—
- (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
  - (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
  - (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or
  - (d) there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.
- (6) During the period commencing on the day that—
- (a) SARS receives a request for suspension under subsection (2); or
  - (b) a suspension is revoked under subsection (5),
  - (c) and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.
- (7) If an assessment or a decision referred to in section 104 (2) is altered in accordance with—
- (a) an objection or appeal;
  - (b) a decision of a court of law pursuant to an appeal under section 133; or
  - (c) a decision by SARS to concede the appeal to the tax board or the tax court or other court of law,
- a due adjustment must be made, amounts paid in excess refunded with interest at the prescribed rate, the interest being calculated from the date that excess was received by SARS to the date the refunded tax is paid, and amounts short-paid are recoverable with interest calculated as provided in section 187 (1).
- (8) The provisions of section 191 apply with the necessary changes in respect of an amount refundable and interest payable by SARS under this section.

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