Constitutionality and the Income Tax Act

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Abstract

Years ago, the Katz Commission questioned the constitutionality of certain provisions of the Income Tax Act, 1962. The purpose of this article is to investigate the general principles of human rights litigation and the progress made to date in respect of rectifying the unconstitutional provisions of the Income Tax Act that were identified by the Katz Commission. It has been established that, although some unconstitutional provisions have been amended, others still prevail, and that, in the light of the factors identified, they will probably not be challenged successfully by taxpayers.

Key words

Bill of rights  Katz Commission
Constitution  Justifiable limitations
Constitutional court  Onus
Constitutionality  Privacy
Discrimination  Recovery of tax
Fundamental rights  Reverse onus of proof
Infringe  Unconstitutional

1 Introduction

The judgement in the recent case of Metcash Trading Limited v The Commissioner for the South African Revenue Service (CCT 3/2000) once again highlighted the constitutionality of particular tax provisions. On 18 November 1994 the Katz Commission stated that the introduction of the 1993 Constitution necessitated a careful analysis of the existing provisions of the Income Tax Act, the Value-Added Tax Act and the Customs and Excise Act in order to ascertain which provisions of these acts were likely to infringe the Constitution and consequently could be found to be unconstitutional by the Constitutional Court. When the 1996 Constitution was adopted, it superseded the 1993 Constitution. However, as De Waal, Currie and Erasmus (1999:4) correctly point out, there is no difference between the 1993 and the 1996 Constitutions in terms of the protection of
fundamental rights. It was stated as a condition that the final constitution should not change or omit the essence of the provisions of the Interim Constitution.

The Katz Commission identified numerous provisions in the above-mentioned three acts that either breach particular provisions of the 1993 Constitution or that should be reconsidered for over-breathness. This article focuses on the provisions of the Income Tax Act that were identified as being unconstitutional by the Katz Commission and investigates the amendments that have been made to date. The general principles of the operation of the 1996 Constitution and the stages of human rights litigation are scrutinised, and the data on Constitutional Court cases concerning challenges on the grounds of the unconstitutionality of the provisions of the Income Tax Act and Value-Added Tax Act discussed. This is followed by a discussion of the specific provisions of the Income Tax Act and a conclusion regarding the question about whether taxpayers can indeed successfully challenge the so-called unconstitutional provisions of the Income Tax Act.

The importance of this question is rooted in the fact that the prevailing low tax morality of taxpayers in South Africa, as identified by Coetzee (1995:12), would be exacerbated if the constitutional protection of the rights of taxpayers were not evident or if it proved not to be a real aid in the elimination of unconstitutional tax provisions. This, in turn, would increase the already high incidence of tax evasion in South Africa that was identified by the Margo Commission in 1987.

2 General principles of the operation of the constitution

The rights of all natural and legal persons are contained in the Bill of Rights in chapter two of the 1996 Constitution. In terms of section 7(2) of the 1996 Constitution, the State shall respect, protect, promote and fulfil the rights contained in the Bill of Rights. However, section 7(3) places a limitation on the rights contained in the Bill of Rights by making the rights subject to the limitations contained or referred to in section 36 or elsewhere in the Bill. If the unconstitutionality of a provision in the Income Tax Act is to be proved, it should therefore be shown that a right in the Bill of Rights has been infringed and that this infringement is not justifiable in terms of the provisions that appear in section 36 or elsewhere in the Bill.

De Waal et al (1999:19) distinguish two stages through which human rights litigation typically proceeds, namely the procedural stage and the substantive stage.

2.1 The procedural stage

A court will initially be concerned with procedural questions on the standing of the applicant, the justifiability of the issue to be decided, the jurisdiction of
the court and the application of the Bill of Rights to the subject matter of the litigation. Only if the court is satisfied that

- the applicant has standing in respect of the particular relief sought;
- the issue to be decided is justiciable;
- the court has jurisdiction in respect of the issues raised in the litigation; and
- the Bill of Rights applies to the particular law or conduct that the applicant alleges to be unconstitutional,

will litigation proceed to the second stage.

2.1.1 Standing

Standing concerns the issue of whether a person who approaches a court is the proper party to present the matter to the court for adjudication (Loots 1996:8-2). Unlike the common law approach, effective enforcement of the Bill of Rights demands a broader approach to the issue of standing. In Ferreira v Levin NO (1996 (1) SA 984 (CC), Chaskalson P stated that –

“... it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.”

Such an approach is expressly provided for in section 38 of the Constitution, which lists five categories of persons that will have standing if:

- there is an allegation that a right in the Bill of Rights has been violated or threatened; and
- the applicants can demonstrate, with reference to the categories listed in section 38(a) to (e), that there is sufficient interest in obtaining the remedy they seek.

2.1.2 Justiciability

An issue is justiciable if a court is not precluded from hearing a case, because the issue has become moot or academic or because it is not yet ripe for decision by a court.

2.1.3 Jurisdiction

The 1996 Constitution provides for jurisdiction to be exercised concurrently by the Constitutional Court, the Supreme Court of Appeal and the High Court in respect of all forms of legislation. In other words, a dispute over the constitutionality of an act of Parliament, provincial legislation or delegated legislation can be heard by any one of the aforementioned courts. However, the High Court is usually the court in which a dispute of this nature will first
be heard. Section 167(5) of the 1996 Constitution determines that the Constitutional Court makes the final decision on whether an act of Parliament, a provincial act or conduct of the President is unconstitutional, and that it must first confirm any order of invalidity made by the Supreme Court of Appeal, the High Court, or a court of similar status, before that order has validity.

2.1.4 Application

Section 8 of the Constitution deals with the application of the Bill of Rights. Two basic questions arise in relation to application. The first concerns the benefits of the Bill of Rights, i.e. who is protected? The second concerns the duties imposed by the Bill of Rights, i.e. who is bound? The latter question entails asking whether the Bill of Rights applies to the law or conduct that has been challenged by the applicant. Section 8(1) states that the legislature, the executive, the judiciary and all organs of state are bound by the Bill of Rights. According to section 8(2), a provision of the Bill of Rights only applies to the conduct of a private person or a legal person to the extent that the provision is applicable, while taking into account the nature of the right and the nature of any duty imposed by the right.

2.2 The Substantive Stage

At the substantive stage, the court is concerned with the substance of the applicant’s allegation that a right has been infringed by law or by the conduct of the other party. The court must first determine whether the conduct of the respondent has infringed a fundamental right of the applicant. A fundamental right is any right listed in sections 9 to 35 of the Bill of Rights.

If the court determines that a law or the conduct of the respondent impairs a fundamental right, it must then consider whether the infringement is nevertheless a justifiable limitation of the right in question. Section 36(1) of the Constitution deals with the limitation of rights and states that the rights in the Bill of Rights may be limited only

- in terms of a 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
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive measures to achieve the purpose.
Summary:

Once it is established that a law of general application infringes a right protected by the Bill of Rights, the state or the person relying on the law may argue that the infringement constitutes a legitimate limitation of that right. Rights are not absolute. They may be infringed, but only when the infringement is committed for a compelling reason. A compelling reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy (Meyerson 1997:36-43). The infringement should, however, not cause costs that are disproportionate to the benefits that are obtained. This will occur when a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are comparatively less important. It will also occur when the law does unnecessary damage to fundamental rights, i.e. damage which could be avoided or minimised by using other means to achieve the same goal (De Waal et al 1999:159).

2.3 Onus

The applicant, i.e. the taxpayer, bears the full onus or burden of proof during the procedural stage. The applicant should therefore show that the Bill of Rights applies to the challenged law or conduct, that he or she has standing and that the issue is justiciable.

The Constitutional Court has dealt with the issue of onus or burden of proof by dividing the substantive stage of human rights litigation into two further substages. These substages are set out by Ackerman J in the following extract from Ferreira v Levin NO (1996 SA 984 (CC) par 44):

"The task of determining whether the provisions of [an] Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages, first, an enquiry as to whether there has been an infringement of the ... guaranteed right; if so, a further enquiry as to whether such infringement is justified under section 33(1) [IC], the limitation clause. The task of interpreting the Chapter 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for the claim of infringement of the particular right in question. Concerning the second stage, [it] is for the legislature or the party who rely on the legislation to establish this justification [in terms of section 33(1)], and not for the party challenging it, to show that it was not justified."

De Waal et al (1999:24) submits that neither the term 'onus' nor the term 'burden of proof' is entirely satisfactory. In constitutional litigation, the facts are rarely in dispute. At issue is the interpretation of the Constitution, whether it protects particular conduct or a set of activities of the applicant and whether a law or the conduct of the respondent has breached the Constitution. Principally, all these issues are legal issues rather than issues of fact. A better explanation of the incidence of the burden of proof in...
constitutional litigation might be the American term 'showing'. An applicant for relief under the Bill of Rights has to make a showing (i.e. present an argument) that a right in the Bill of Rights has been breached by a law or by conduct of the respondent. The respondent can, in turn, deny the infringement, or can attempt to show that the infringement is justifiable in terms of the limitation clause.

In the résumé: A taxpayer challenging an alleged unconstitutional section or provision in the Income Tax Act is therefore required to institute proceedings and bear the burden of proof during both the procedural stage and substage one of the substantive stage. The party relying on the legislation (South African Revenue Services) is only required to prove that the infringement is nevertheless a justifiable limitation of the right in question in terms of section 36(1) of the Constitution.

3 Data on constitutional court cases

3.1 Discussion of cases

Only two Constitutional Court cases relating to challenges on the grounds of unconstitutionality of provisions of the Income Tax Act, and one that challenged the constitutionality of provisions of the Value-Added Tax Act, have been heard and decided since the 1996 Constitution came into effect on 4 February 1997.

The first one was the case of Rudolph and Another v Commissioner for Inland Revenue and Others (1996 (7) BCLR 889 (CC)) in which the constitutionality of section 74(3) of the Income Tax Act (before being amended by section 14 of Act 46 of 1996), relating to the search and seizure procedures, was challenged. It was held that the question whether section 74(3) of the Income Tax Act is contrary to the provisions of Chapter 3 of the interim Constitution is irrelevant for determination of the case, because the acts of issuing authorisations and of searching for and seizing the documents in question were all completed before the interim Constitution came into effect, and the Constitution accordingly does not apply to the matter before the Appellate Division. The Constitutional Court therefore refrained from deciding on the constitutionality of this provision.

The second case was that of Mmampobane Elizabeth Motsepe v The Commissioner for Inland Revenue (1997 (2) BCLR 898 (CC)). The constitutionality of the provisions of sections 92 and 94 of the Income Tax Act was challenged. These provisions relate to the fact that the correctness of an assessment on which a statement filed in terms of section 91(1)(b) cannot be questioned and to the conclusiveness of evidence regarding assessments. Once again the Constitutional Court refrained from deciding on the constitutionality of the challenged provisions. It was held that the referral of the case to the Constitutional Court was defective, because the unconstitutionality of sections 92 and 94 is not decisive for the sequestration
application and because the taxpayer had failed to exhaust her non-
constitutional procedures and remedies.

The only Constitutional Court case in which judgement was given on the
constitutionality of tax provisions was that of *Metcash Trading Limited v The
Commissioner for the South African Revenue Service* (CCT 3/2000), in
which the constitutionality of the provisions of sections 36(1), 40(2)(a) and
40(5) of the Value-Added Tax Act was challenged.

Metcash Trading Limited (the applicant) based its application, which
contested the constitutionality of the collection mechanisms of the
Commissioner, on an alleged infringement of the fundamental right provided
in section 34 of the Constitution, namely access to courts. The
Commissioner argued that:

- Firstly, section 36(1) of the Value-Added Tax Act does not entail
  any infringement of a constitutionally protected right. The
  Commissioner listed four opportunities for a hearing on an
  assessment that are preceded by the very submission of the VAT
  return by the taxpayer; and
- Secondly, in the alternative, that in the event of it being held that
  there is an infringement of a constitutionally protected right by any
  of the relevant sections, such infringement is justified in terms of
  section 36 of the Constitution on the basis of five facts submitted in
  evidence by the Commissioner and the Minister of Finance.

The Constitutional Court held that the three provisions of the Value-Added
Tax Act make up the “pay-now-argue-later” rule:

(a) The first states that payment of an assessment is not suspended by
    an appeal;
(b) The second empowers the Commissioner to enforce payment by
    filing a statement with a court, which acts as a civil judgement; and
(c) The third puts the correctness of the assessment beyond challenge
    in such proceedings.

The Constitutional Court unanimously confirmed the constitutionality of the
three provisions, holding that the High Court had erred and that none of the
sections unjustifiably infringed the right of access to courts. The following
three additional features that were considered by the Court persuaded it that
any possible limitation of the right entrenched in section 34 of the
Constitution is justifiable within the meaning of section 36 of the
Constitution:

- The public interest in obtaining full and speedy settlement of tax
debts in the overall content of the Act is significant.
- The "pay-now-argue-later" principle is one that is adopted in many
  open and democratic societies (United States: *Phillips et al,*
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Executors v Commissioner of Internal Revenue (283 US 589 (1931)), Australia: Deputy Commissioner of Taxation v Richard Walter Pty Ltd (127 ALR 21) and Canada: Lambert v The Queen (1975) 58 DLR (3d) 74).

- The effect of the “pay-now-argue-later” principle on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation in circumstances that it considers to be appropriate.

Media Release no. 27 of 2000 of the South African Revenue Service explained the judgement and the SARS’ viewpoint in this regard as follows:

“The Constitutional Court held that the value-added tax system requires vendors themselves to collect and pay tax on their transactions, which means that an assessment in terms of section 31(1) of the Value-Added Tax Act necessarily involves a finding of dishonesty (or error) on the part of the vendor. The Special Court is geared to deal with such cases and a ‘pay-now-argue-later’ rule is not unfair. In any event, to the extent that there is a restriction on the right of access, it is only partial and temporary and is subject to at least some judicial control. Having regard to the pressing national interest in enforcing honest and prompt payment of value-added tax, such limitation of the right of access to courts as the ‘pay-now-argue-later’ rule may constitute, is justified under section 36 of the Constitution. SARS accept that, on this issue, the highest court in the country has spoken. SARS will proceed with collection in terms of existing mechanisms provided by the legislature, now upheld as constitutional.”

In light of the numerous provisions of the Income Tax Act and the Value-Added Tax Act that the Katz Commission identified seven years ago as possibly being in breach of the provisions of the Constitution, it is disturbing that only three cases have been heard and decided by the Constitutional Court in this regard. Moreover, none of the provisions identified has to date been declared unconstitutional by the Constitutional Court. The aforementioned facts again highlight the questions regarding tax morality and tax evasion. These facts also cast doubt upon the possibility that a taxpayer’s could successfully challenge an alleged unconstitutional provision of the Income Tax Act.

3.2 Possible effect of Metcash on income tax

Sections 88(1), 91(1)(b) and 92 of the Income Tax Act contain almost identically worded provisions in respect of the three sections of the Value-Added Tax Act challenged in the Metcash case. It is evident from a comparison of the sections that the drafters of the Value-Added Tax Act borrowed freely from the Income Tax Act, the terminology of which is frequently echoed. The inevitable question that arises is whether the Constitutional Court will give a similar judgement if the constitutionality of the sections in the Income Tax Act is challenged.
A submission in this regard will to a great extent be influenced by the following important differences between income tax and value-added tax:

- Value-added tax is a multi-stage tax with both continuous self-assessment and predetermined periodic reporting and paying. Income tax gives rise to liability only after the Commissioner has made an assessment.
- The Commissioner will only make a value-added tax assessment when the vendor fails to submit a VAT return, when the Commissioner is not satisfied with a return or has reason to believe that VAT is due but has not been paid. The Commissioner should therefore invariably have made an adverse credibility finding before a VAT assessment is made. On the other hand, income tax assessments can elicit genuine differences of opinion about accounting practices, legal interpretation and the like.

Based on the above-mentioned persuading features considered by the Constitutional Court in the *Metcash* case, it can be submitted that the Constitutional Court will probably also rule that any possible limitation of the right entrenched in section 34 of the Constitution that is caused by the three sections in the Income Tax Act is justifiable in terms of section 36 of the Constitution.

However, the differences between income tax and value-added tax mentioned above, together with the circumstances of a specific case, could lead to a different judgement if a taxpayer should challenge the constitutionality of the three analogous income tax provisions.

### 4 Katz Commission: Specific Income Tax Act provisions found to be unconstitutional

The Katz Commission has identified numerous provisions in the Income Tax Act that breach particular provisions in the 1993 Constitution. Some of these provisions have been amended by the Taxation Laws Amendment Acts that have been passed since the Katz Report was issued, while the proverbial sword of unconstitutionality still hangs over other provisions. A closer look reveals the following:

#### 4.1 Distinctions based on gender and marital status

The Katz Commission submitted (1994:73) that discrimination based on gender is probably unconstitutional in all circumstances and that discrimination based on marital status could be unconstitutional in the context of income tax legislation, and once again in general terms.

The Commissioner amended the Income Tax Act in respect of all but one of the discriminations based on gender identified by the Katz Commission. Provisions amended include the deletion of the definition of "married
person”, the introduction of the same tax rates and rebates for all natural persons, the same deduction for retirement annuity fund contributions, the same section 10(1)(x) R30 000 exemption for all natural persons that fulfil the same age and other requirements, and the amendment to the former section 57(1) in respect of donations made by a married woman.

The one provision (section 68(3)(a)) that has not been amended reads as follows:

“Every parent shall be required to include in his return any income received by or accruing to or in favour of any of his minor children either directly or indirectly from himself or his wife, together with such particulars as may be required by the Commissioner.” (Author’s emphasis.)

It is submitted that this section discriminates against women on the grounds of sex and/or gender and therefore constitutes an infringement of the fundamental right contained in section 9(3) of the 1996 Constitution.

### 4.2 Distinctions based on age

Section 6(2)(b) of the Income Tax Act (previously section 6(3)(e) as identified by the Katz Commission) still provides for a secondary rebate for taxpayers over the age of 65 years. The Katz Commission (1994:72-73) submitted that the constitutionality of this rebate is more doubtful (as the one in section 18(2)(a) - see below), because it would have to be justified on the basis that elderly persons are more likely to be pensioners and therefore to have a lesser income and should therefore be treated preferentially. Furthermore, it was submitted that this conclusion is debatable and that attention should be given to the wisdom of the continuation of the rebate.

Section 18(2)(a) still allows taxpayers over the age of 65 years to deduct all their medical and dental expenses. The Katz Commission submitted (1994:72) that it was likely that a court would uphold this distinction on the grounds that the old were more likely to incur medical expenses.

It is submitted that neither of these distinctions, which are based on age will be found to constitute unfair discrimination, but if it were to be found to constitute unfair discrimination, the State would be able to justify it in terms of section 36(1) of the Constitution.

### 4.3 Provisions impacting on the right to privacy

Section 14 of the Constitution states *inter alia* that everyone has the right to privacy, which includes the right not to have –

(a) their person or home searched;
(b) their property searched;
The Income Tax Act recognises the right to privacy. In section 4(1), every person employed in the carrying out of the provisions of the Income Tax Act is required to preserve secrecy with regard to all matters that come to his or her knowledge in the performance of his or her duties.

The Katz Commission (1994:73) found to be problematic the provisions in section 105A of the Income Tax Act, which empowers the Commissioner to lodge a complaint with the controlling body of a professional association in relation to particular defined conduct of a person over whom such controlling body has the power to take disciplinary action. In particular, section 105A(3), which was found to be too vague. This section provides that the Commissioner may, in lodging a complaint in terms of subsection (2), disclose such information relating to the taxpayer’s affairs as is necessary, in the opinion of the Commissioner, to lay before the controlling body to which the complaint is made. The Commission submitted that it could be struck down for over-breadth, particularly in the light of the unfettered discretion that the Commissioner has. This provision has not been amended at all and it is submitted that this section deserves the careful consideration of the fiscus.

In respect of Section 69 of the Income Tax Act, which imposes a duty on taxpayers to furnish information or returns, the Katz Commission (1994:74) found only one subsection (section 69(1)(f)) that was not justifiable in terms of section 36 of the Constitution. Section 69(1)(f) provides that every person shall, if required by the Commissioner, furnish to him all such information in his possession with regard to the income received by or accrued to or in favour of himself or of any other person as may be required by the Commissioner.

No amendment has yet been made to this subsection and the submission by the Katz Commission (1994:74) that the phrase “all such information” would be unlikely to pass constitutional muster in terms of section 36, is hereby endorsed.

The previous search and seizure provisions, contained in section 74(1) and identified by the Commission to be unconstitutional, have been deleted and a new section 74D, which fulfils the recommendations of the Katz Commission, has been introduced.

4.4 Reverse onus of proof

The constitutionality of the reverse onus of proof, which is created by section 104(2) of the Income Tax Act, has been discussed in detail by Van Schalkwyk (1996:24-26). Section 104(2) is intended to assist the State to discharge the onus of proof against any person who evades assessment or
taxation or assists any person to do so. Only one of the acts listed in section 104(1) as an offence, namely the falsification of returns, books of account or other records, is addressed in section 104(2). Section 104(2) provides that a taxpayer shall be presumed to have made a false statement or entry with the intent to evade assessment or taxation until the contrary is proved.

This reverse onus of proof created by section 104(2) infringes the fundamental right contained in section 35(3)(h), which gives every accused person the right to a fair trial, including the right to be presumed innocent. The Katz Commission (1994:78) submitted that section 104(2) is prima facie unconstitutional and that a court is unlikely to uphold the limitation contained in section 36 of the Constitution. It is unlikely because an accused may be convicted for having failed to discharge his onus on a balance of probabilities. He could therefore be convicted despite the fact that he did not intend to make a false statement and that a reasonable doubt exists.

No amendment has been made to section 104(2) to date and the submission made by the Katz Committee is hereby endorsed.

4.5 Recovery of tax

Section 91(1)(b) of the Income Tax Act states that if any person fails to pay tax or interest payable in terms of section 89quat of the Act when such tax or interest becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement, certified by him as correct, setting forth the amount of tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon, as if it were a civil judgement lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

The Katz Commission (1994:75) criticised this section and held the view that:

- this section in essence permits the obtaining of a civil judgement against the taxpayer in his absence; and
- section 91(1)(b) breaches the fundamental right listed in section 34 of the Constitution, namely that every person has a right to have justiciable disputes settled by a court of law.

The similar - and virtually identically worded – provision in the Value-Added Tax Act (section 40(2)(a)) was one of three provisions challenged in the case of Metcash Trading Limited v The Commissioner for the South African Revenue Service (CCT 3/2000) for being unconstitutional and unjustifiably limiting of the right of access to court protected by section 34 of the Constitution. Kriegler, J, with the other ten judges concurring, found that the provision undoubtedly created a short cut in that the Commissioner does not have to follow the court process when initiating a claim for judicial
enforcement of a debt, as is normally the case when a creditor seeks to recover a debt. There need not be service of process when summoning the debtor to court to answer to the claim, as occurs in ordinary litigation.

However, in referring to the case of Chief Lesapo v North West Agricultural Bank and Another (2000:409) on which the judge in the High Court relied heavily in giving the judgement that section 40(2)(a) of the Value-Added Tax Act was unconstitutional, Judge Kriegler found that section 40(2)(a) of the Value-Added Tax Act is the direct reverse of the provision found to be constitutionally unacceptable in the Lesapo case. (The provision being section 38(2) of the North West Agricultural Bank Act 14 of 1981 which provides for a self-initiated, self-driven and self-supervised mechanism whereby the Bank is permitted to be the judge in its own case).

The Honourable Judge found that section 40(2)(a) of the Value-Added Tax Act does not imply or sanction self-help or allow the Commissioner to usurp the inherent powers and functions of the courts by deciding its own claim and relief. On a plain reading of its words, the provision expressly contemplates the involvement of the courts, and the execution process created by the provision specifically goes via the ordinary judicial institutions. It requires the intervention of court officials and procedures. The Constitutional Court therefore declined to confirm the order of unconstitutionality of section 40(2)(a) that had been made by the Witwatersrand High Court.

Although this decision was reached on section 40(2)(a) of the Value-Added Tax Act, and not the virtually identically worded section 91(1)(b) of the Income Tax Act, it is submitted that a taxpayer will, in the light of the Metcash case, have difficulty in proving that his or her constitutional right of access to the courts has been infringed by the provisions contained in section 91(1)(b) of the Income Tax Act.

5 Conclusion

Although some progress has been made in amending the provisions in the Income Tax Act that either breach certain provisions of the 1996 Constitution, or that are not justifiable limitations in terms of section 36 of the Constitution, there are still some provisions that are prima facie unconstitutional.

It is submitted that the high costs involved, the risk of not being able to discharge the onus that rests on the applicant to prove that a specific fundamental right has been infringed and the data of previous Constitutional Court cases, all act as deterrents to taxpayers to challenge an alleged unconstitutional provision in the Income Tax Act.

It is furthermore submitted that, although it is still to be proved by the State, it might be easier in cases concerning income tax to satisfy the limitation
test of section 36 of the Constitution in proving that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it was designed to achieve (the purposes of the law). This submission is based on the fact that the State (in effect the Commissioner) will always, at least, be able to claim that the very functioning of the State is predicated upon its capacity to impose and collect taxes, and that there is a pressing social need in South Africa to implement the reconstruction and development programme in order to correct historical inequalities in all spheres of South African society.

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