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**The appointment of a SARS official as facilitator in alternative dispute resolution proceedings: is it a violation of a taxpayer's right under section 34 of the Constitution?**

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## PLAGIARISM DECLARATION

I declare that,

**‘The appointment of a SARS official as facilitator in alternative dispute resolution proceedings: is it a violation of a taxpayer’s right under section 34 of the Constitution?’**

**Is my own work and that it has not been submitted before for any degree or examination in any other university, and that the sources I have used or quoted have been indicated and acknowledged as complete references.**



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## **GLOSSARY OF KEY WORDS, EXPRESSIONS AND TERMS**

The following is a list of key words, expressions and/or terms used in this paper:

1. Alternative dispute resolution (“ADR”)
2. Conflict of interest
3. Facilitator
4. Fair dispute resolution proceeding
5. SARS Official
6. Senior SARS Official
7. Tax Administration Act
8. Tax dispute
9. Taxpayer rights



## ABBREVIATIONS AND ACRONYMS

In this paper, the following abbreviations and/or acronyms indicated here shall apply in relation to the statutes or words/terms indicated, unless the context reflects otherwise:

### Statutes

AA	Arbitration Act 42 of 1965
LRA	Labour Relations Act 66 of 1995
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
SARSA	South African Revenue Service Act 34 of 1997
TAA	Tax Administration Act 28 of 2011

### General

AAT	Administrative Appeals Tribunals
ADR	Alternative Dispute Resolution
ATO	Australian Tax Office
BOR	Bill of Rights
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CSARS	Commissioner for the South African Revenue Service
DSD	Dispute System Design
e-JTR	e-Journal of Tax Research
FCA	Federal Court of Australia
HMRC	Her Majesty's Revenue and Customs

NADRAC	National Alternative Dispute Resolution Advisory Council
OECD	Organisation of Economic Co-operation & Development
SARS	South African Revenue Service
SAJHR	South African Journal of Human Rights
THRHR	Tydskrif vir Hedendaagse Romeinse Hollandse Reg





## ACKNOWLEDGMENTS

Indeed, everything is beautiful in God's time, and God's time is the best. As Prophet T.B Joshua pronounced. There is indeed time for everything under the sun, there is a time to be born and a time to die. There was a time to write this research and now it is time for publication.

Indeed, the work that my Lord and Savior Jesus Christ has begun He has seen it to completion. The road has been steep, but today the Lord has made it plain. I thank you Lord for your intervention, without you this would not have been possible. I thank you for the resurrection power that is in the blood of Jesus.

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## ABSTRACT

In each year of assessment, qualifying taxpayers are, by virtue of the relevant provisions of the Income Tax Act 58 of 1962 read with the Tax Administration Act 28 of 2011 ('TAA'), required to submit an income tax return to the South African Revenue Service ('SARS'). In such return, the taxpayer accounts for income received and accrued in order that the SARS may assess the taxpayer for a potential income tax liability. Upon the issuance of an assessment by the SARS, a taxpayer who is dissatisfied may object to it, in whole or in part. The SARS must consider every objection and decide thereon. A taxpayer who is aggrieved by a decision in relation to an objection may lodge an appeal to a competent Tax Board or Tax Court. Pending the latter adjudicative process, the TAA allows a taxpayer to request that the dispute be referred to ADR facilitated by a person duly appointed in accordance with the law.

Section 103 of the TAA empowers the Minister responsible to make rules to govern the procedure for lodging of complaints and appeal against an assessment or decision by SARS and how such appeals would be conducted. Provision is made for possible recourse to ADR in the quest to resolve such dispute in s 103(2) of the same Act. The Rules were first gazetted in July 2014 and amended in March 2023, in which Part C, Rule 16 deals with the appointment of a facilitator for ADR.<sup>1</sup> Rule 1 stipulated that the SARS must create a list of persons who may be appointed as facilitators in the ADR process. That list may include a 'SARS official' within the technical meaning of this term as defined in s 1 of the TAA, namely, an employee of the SARS, the Commissioner of the SARS, and any person contracted by the SARS to perform a service in relation to tax administration. This paper argues that the ADR process envisaged by the rules engages a taxpayer's fundamental right to fair dispute resolution entrenched in s 34 of the Constitution of the Republic of South Africa, 1996 ('Constitution') because an ADR meeting is a 'forum' envisaged by this provision. It argues further that the appointment of

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<sup>1</sup> 'Republic of South Africa' Vol 589 (12) GG 11 July 2014 No 37819 (No 550) available at [www.sars.gov.za/pages.GovernmentGazette](http://www.sars.gov.za/pages.GovernmentGazette) (accessed 26 January 2021).

a SARS official as facilitator limits this right within the contemplation of s 36 of the Constitution. It is further argued that this limitation is neither reasonable nor justifiable in an open and democratic society, based on human dignity, equality and freedom. Consequently, a court of law may, in terms of s 172(1) of the Constitution, review every such appointment and declare same, and the provision in law authorising the appointment of the SARS official as facilitator, to be unconstitutional.



## CHAPTER ONE: BACKGROUND TO THE STUDY

'Without a strong ethical base in both government and amongst tax professionals, the most advanced technology won't achieve its purpose. As the world gets smaller and sources of data loom larger, let's commit to ensuring that we walk the right path and build together towards a fair and just tax administration.' (Trevor Manuel)<sup>2</sup>

### 1.1 Statement of the problem

The Minister is authorised to be accountable and to develop rules to govern the procedure for lodging of complaints and appeals against an assessment or decision by SARS and how such appeals would be conducted.<sup>3</sup> Provision is made for possible recourse to ADR in the quest to resolve such dispute.<sup>4</sup> Taxpayers' rights have developed as a relatively new genre of rights.<sup>5</sup> In 1987, the International Fiscal Association organised a discussion pertaining to human rights in the realm of taxation. In 1990, the Committee on Fiscal Affairs, a sub-committee of the Organisation for Economic Co-operation & Development (OECD), published a report that revealed that taxpayers in OECD member states enjoy a string of basic rights and duties.<sup>6</sup> Different studies have shown that these rights and duties include: (i) the right to appeal an assessment; (ii) the right to be informed, heard and assisted; (iii) the right to certainty;<sup>7</sup> (iv) the right to privacy, to secrecy and confidentiality.<sup>8</sup> Taxpayer duties include: (i) to be co-operative;<sup>9</sup> (ii) to be honest;<sup>10</sup> (iii) to provide absolute and precise information and documents;<sup>11</sup> (iv) to keep records; and (v)

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<sup>2</sup> 'Academic Symposium SARS Speech: SAICA Tax Symposium' 7 October 2019 available at <http://sars.gov.za> (accessed 28 June 2020).

<sup>3</sup> Section 103, TAA.

<sup>4</sup> Section 103(2), TAA.

<sup>5</sup> Sandford C & Wallschulzky I 'Taxpayers' rights: A model Magna Carta?' (1994) 28(11) *Taxation in Austria* 610.

<sup>6</sup> *OECD Taxpayers' Rights and obligations- Practice Note* (2003)3 (OECD 2003) available at [https://www.oecd.org/tax/administration/Taxpayers' Rights and Obligations](https://www.oecd.org/tax/administration/Taxpayers%27%20Rights%20and%20Obligations). Practice Note (accessed 11 September 2022).

<sup>7</sup> Croome BJ & Olivier L *Tax administration* (2010) 7 (Hereafter Croome BJ & Olivier L (2010).

<sup>8</sup> Croome BJ & Olivier L (2010) 576.

<sup>9</sup> Section 72(1), TAA.

<sup>10</sup> *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C) 221B-C.

<sup>11</sup> Section 205(b), TAA.

to pay the correct tax<sup>12</sup>. The OECD report concluded, correctly so it is submitted, that there must be a balance between taxpayer rights and obligations in order to ensure that there is an effective and efficient functioning tax system.<sup>13</sup> South African taxpayers bear rights emanating from the common law, its final Constitution, 1996, and certain statutes. In this context, the Tax Administration Act 28 of 2011 ('TAA') plays a critical role.

Taxpayers' rights, as with other legal rights, involve a right-duty relationship.<sup>14</sup> For purposes of the TAA, this relationship exists between taxpayers and the SARS, being a national organ of state responsible for implementation of the TAA. As regards taxpayers' obligation to submit income tax returns, the TAA impose on taxpayers the duty to be accurate, honest and punctual in their submissions.<sup>15</sup> These are normative standards and values that serve as benchmarks when assessing taxpayer's conduct under the black letter of the TAA. As a result, taxpayer rights conferred by the TAA and the law in general provide a healthy balance by keeping in check the power residing in the hands of tax officials. For this reason, as discussed more fully in chapter two below, it is submitted that taxpayer rights ought to be interpreted generously to ensure that they provide the widest possible protection to taxpayers in their relationship with SARS.

As discussed in chapter three below, a taxpayer intent on appealing an adverse decision by the SARS related to an objection filed against an income tax assessment may then lodge an appeal thereto. However, in any such appeal regulated by the TAA, the appellant taxpayer may indicate a willingness to subject the appeal to ADR, pending the hearing of the tax appeal by the relevant appeal structure catered for in the TAA.<sup>16</sup>

As required by Section 103 of the TAA, Rule 16 of the Rules gazetted in 2014, if the SARS is satisfied that the dispute is suitable for ADR, it will inform the taxpayer accordingly<sup>17</sup>

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<sup>12</sup> Section 205(b), TAA.

<sup>13</sup> For a discussion hereof, see Owens J 'Taxpayers' right and obligations' (1990) 18(11) *Intertax* 554.

<sup>14</sup> Croome BJ & Olivier L (2010) 576-577.

<sup>15</sup> Croome BJ & Olivier L (2010) 577.

<sup>16</sup> For a discussion of the appeal procedure, see Burt K 2019 'Alternative dispute resolution: Improving outcomes: tax talk' available at [www.thesait.org.za](http://www.thesait.org.za) (accessed 06 February 2021) (hereafter: Burt K 2019).

<sup>17</sup> Burt K 2019 (accessed 06 February 2021).



and procedurally, appoint a facilitator to attempt a mediation-style resolution of the tax dispute.

To this end, rule 16(1) is important. It permits a ‘senior SARS official’<sup>18</sup> to create a list of persons who may be appointed as facilitators. In terms of rule 16(1)(a), a ‘SARS official’<sup>19</sup> may be appointed as facilitator. Based on the definition of ‘SARS official’ in s 1 of the TAA, an employee of the SARS, the Commissioner of the SARS (‘CSARS’) and a person contracted by the SARS all qualify to be appointed as facilitators for purposes of mediating a dispute between the SARS and a taxpayer. The 2014 Rules have since been repealed<sup>20</sup> by the Regulation Gazette No. 48188 of 10 March 2023 (“New Rules”). To deal with the perceived lack of independence of the facilitator due to SARS appointing one, the requirement for a SARS official to establish a list of facilitators has been removed by the new rules.<sup>21</sup> The pool from which ADR facilitators can be appointed has also been broadened to include someone who is acceptable to both parties and has appropriate tax experience<sup>22</sup>. The new rule now also requires the facilitator to act impartially and independently.<sup>23</sup> This study outlines the effect of having a SARS official as facilitator in the chapters that follow and proceeds to argue why that provision should be removed for being akin to being as referee and a player in the same sporting game.

The powers of such appointee include, inter alia, the making of non-binding recommendations. In terms of rule 18(1), a ‘facilitator will not solely on account of his or her ... employment by SARS be regarded as having a personal interest or a conflict of

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<sup>18</sup> In terms of s 6(3) of the TAA: ‘Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by— (a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner for this purpose.’

<sup>19</sup> Section 1, TAA, “SARS official” means— ‘(a) the Commissioner, (b) an employee of SARS; or (c) a person contracted by SARS for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner;’

<sup>20</sup> ‘Republic of South Africa’ Vol 693 (10) RG 10 March 2023 No 48188 (No 11554) available at [www.sars.gov.za/pages.RegulationGazette](http://www.sars.gov.za/pages.RegulationGazette) (accessed 3 October 2023).

<sup>21</sup> Musvimba N ‘New tax dispute resolution rules come into effect immediately’ available at <http://sataxguide.co.za> (accessed 16 September 2023).

<sup>22</sup> Chong J ‘Explainer, New tax dispute rules come into effect immediately’ *News 24* June 2023 1 available at <http://news24.com> (accessed 16 September 2023).

<sup>23</sup> Rule 17(b) Republic of South Africa’ Vol 693 (10) RG 10 March 2023 No 48188 (No 11554) available at [www.sars.gov.za/pages.RegulationGazette](http://www.sars.gov.za/pages.RegulationGazette) (accessed 3 October 2023).

interest in proceedings in which he or she is appointed to facilitate'.<sup>24</sup> This provision cannot override the perception of bias in taxpayers' minds. The perception of bias in the ADR process is as dangerous as the existence of actual bias. This undermines the potential efficacy of ADR as a viable means to resolve tax disputes.

Since the SARS is a party to the dispute forming the subject of an appeal referred to ADR, and a person associated with this organisation is appointed by the SARS as facilitator with its associated responsibilities (see discussion below in chapter three), logic and common-sense dictate that an affected taxpayer would have reason to be concerned. A taxpayer may well perceive the appointment of a SARS official as facilitator as giving rise to a situation that potentially, if not actually, favours the SARS at ADR.

When viewed from the perspective of the TAA's goal, as stated in s 2, namely, to promote efficient and effective tax administration, the appointment of facilitators linked with the SARS is problematic, particularly in the light of the trite principle that justice should not only be done but should manifestly be seen to be done.<sup>25</sup> This is a constitutional value embracing fairness and the rules of natural justice engrained in the rule of law.<sup>26</sup> The fact that rule 18(1) provides that a facilitator's employment with the SARS will, on its own, not amount to a conflict of interest does not resolve the problem identified here.

The foregoing discussion reveals the existence of an unhealthy state of affairs in tax administration as concerns the resolution of tax disputes through ADR. This paper aims to address this legal problem. Based on the arguments outlined herein below, this paper hypothesises that, notwithstanding the express provisions of rule 18(1), the appointment

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<sup>24</sup> Section 7, TAA reads: 'The Commissioner or a SARS official may not exercise a power or becomes involved in a matter pertaining to the administration of a tax Act, if— (a) the power or matter relates to a taxpayer in respect of which the Commissioner or the official has or had, in the previous three years, a personal, family, social, business, professional, employment or financial relationship presenting a conflict of interest; or (b) other circumstances present a conflict of interest, that will reasonably be regarded as giving rise to bias.'

<sup>25</sup> *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources and Others* 2016 ZALCJHB 31 (3 February 2016) para 98.

<sup>26</sup> Klaasen A 'Constitutional interpretation in the so-called 'hard cases': Revisiting *S v Makwanyane*' (2017) *De Jure* 1.



as facilitator of persons associated with the SARS creates a real conflict of interest during ADR processes that offends a trite legal principle, namely, no person may be a judge in his own cause. Thus, it is submitted that rule 18(2) is triggered whenever an official associated with the SARS is appointed as ADR facilitator.<sup>27</sup>

In the absence of a facilitator's voluntary withdrawal or recusal<sup>28</sup> where a conflict of interest exists, rule 16(4)(d) may be invoked. Its provisions entitle a taxpayer to approach a senior SARS official in writing and motivate for the removal of a facilitator on the basis that a conflict of interest exists as contemplated by rule 18. In this respect, taxpayers are at the mercy of SARS as regards ensuring that the ADR proceeding is not only fair but also seen to fair. As a result, this paper argues that rule 16(4)(d) provides cold comfort to taxpayers engaged in ADR facilitated by a person closely associated with the SARS. This deepens the problem identified above in the realm of ADR requiring considered attention.

The legal problem identified above is worsened when due consideration is given to the powers conferred on a facilitator under rule 20. In terms of rule 20(1), a taxpayer and the SARS may, at the commencement of the ADR, agree that, in the absence of settlement, 'the facilitator may make a written recommendation'. As such, a facilitator performs an important quasi-judicial function in ADR. In terms of rule 21(2), unless the disputants agree to an extension of time, a recommendation must be delivered within 30 days of the termination of the ADR proceeding. Although any recommendation is non-binding on the parties, the recommendation carries the potential to have serious *cum* financial implications. This is because rule 21(3) provides:

'A recommendation by a facilitator will not be admissible during any subsequent proceedings including court proceedings unless it is required by the tax court for purposes of deciding costs under s 130 of the Act.'

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<sup>27</sup> Rule 18(2) reads: 'A facilitator must withdraw from the proceedings as soon as the facilitator becomes aware of a conflict of interest which may give rise to bias which the facilitator may experience with the matter concerned or other circumstances that may affect the facilitator's ability to remain objective for the duration of the proceedings.'

<sup>28</sup> Okpaluba MC & Maloka TC 'The fundamental principles of recusal of a judge at common law – some recent developments' (2022) 43(2) *Obiter* 88.

As stated above, the ADR process must not only be fair but must also be seen to be fair. If not, then taxpayers' confidence in ADR and the tax administration processes generally would be dented which, in turn, would undermine ADR as a viable mechanism for dispute resolution in the field of tax administration. The appointment of a SARS employee or other person associated with that organisation as a facilitator for ADR purposes creates tension between, on the one hand, the SARS's duty, as an organ of state, arising from s 8(1) of the Constitution to respect taxpayers' fundamental rights entrenched in the Bill of Rights ('BOR'), and a taxpayer's right to fair dispute resolution entrenched in s 34 of the BOR on the other hand. The existence of this tension is a further problem forming the basis for the discussion below in chapter four read with chapter five.<sup>29</sup>

Rule 16 stipulated:

'Appointment of facilitator (1) A senior SARS official must establish a list of facilitators of alternative dispute resolution proceedings under this Part and a person included on the list- (a) may be a SARS official; (b) must be a person of good standing of a tax, legal, arbitration, mediation or accounting profession who has appropriate experience in such fields; and (c) must comply with the duties under rule 17. (2) A facilitator is only required to facilitate the proceedings if the parties so agree. (3) Where the parties agree to use a facilitator, a senior SARS official must appoint a person from the list of facilitators- (a) within 15 days after the commencement date of the proceedings under rule 15; or (b) within 5 days after the removal of a facilitator under subrule (4) or the withdrawal of a facilitator under rule 18(2); and give notice thereof to the appellant and the SARS official to whom the appeal is allocated. (4) A senior SARS official may not remove the facilitator appointed for the proceedings once the facilitator has commenced with the proceedings, save- (a) at the request of the facilitator; (b) by agreement between the parties; (c) at the request of a party and if satisfied that there has been

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<sup>29</sup> Johannes R *An analysis of the changes introduced by the Tax Administration Act to the dispute resolution process and the effects thereof on the constitutional rights of taxpayers* (unpublished MCom (Taxation) thesis, University of Cape Town, 2014) 1 (hereafter: Johannes R (2014)).

misconduct, incapacity, incompetence or non-compliance with the duties under rule 17 by the facilitator; or (d) under the circumstances referred to in rule 18. (5) A senior SARS official may request a party to submit evaluations of the facilitation process, including an assessment of the facilitator, which evaluations are regarded as SARS confidential information.’

## 1.2 Research aims and questions

In view of the problems discussed under part 1.1 above, the question arises whether an ADR process facilitated by a ‘SARS official’ as statutorily defined in s 1 of the TAA satisfies the norms and standards of fairness in the context of dispute resolution under the TAA as envisaged by s 34 of the Constitution.<sup>30</sup> As a result, the central aim of this paper is to undertake a considered investigation using a desktop methodology and accepted research techniques in relation to the following novel research questions and then, based on established legal *cum* constitutional principles, hypothesise probable answers thereto:

- a. Does rule 16(1)(a) limit a taxpayer’s fundamental right to a fair tax dispute resolution entrenched in s 34 of the Constitution? and
- b. If yes, then does that limitation pass constitutional muster?

## 1.3 Significance of the research

The case law and literature survey reveal that the research questions formulated above have, at the time of writing, not yet been the subject of published research nor judicial pronouncement. Therefore, this study is an important work. It breaks new ground by engaging in detailed research that postulates possible answers on the constitutionality of the subordinate legislation that caters for the appointment of a ‘SARS official’ as a facilitator in ADR. Accordingly, this paper contributes something new to the field of tax administration law and the existing body of literature. As such, it is submitted that this study will potentially be of considerable value to researchers, academics, tax law

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<sup>30</sup> Section 34, Constitution reads: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

students, tax practitioners, taxpayers, and the SARS. This is particularly so in view of the fact that it is based on the law on 28 February 2023. The significance of this study is not undermined by the imminent introduction of new rules of procedure intended to regulate the process of alternative dispute resolution. This is so because the intended new rule 16, as approved for gazetting pursuant to s 103(2) of the TAA read with s 257(1) thereof, is intended to retain the current legal position, namely, that a SARS official (as defined) may be appointed to facilitate an ADR process. Accordingly, the hypothesis advanced in this study will apply equally after the new rules come into force.

#### **1.4 Literature survey**

A literature survey reveals that the research questions forming the core subject of this paper has not been the subject of considered research. As a result, there is a paucity of available literature on the subject. This adversely affected the writer's literature review.

*Taxpayers' Rights in South Africa* (2010) by Croome B is an authoritative work on taxpayer's rights to, *inter alia*, fair dispute resolution processes under s 34 of the Constitution. This work, however, pre-dates the TAA. Therefore, neither its provisions, nor that of the Regulations promulgated thereunder, are considered therein. *LexisNexis Concise Guide to Tax Administration* (2012) by Clegg D is a 'guide' to the TAA. However, it does not critically analyse the TAA, nor does it discuss the ADR process or its rules in any detail. It also does not undertake any considered research on the research questions forming the subject of this paper.

*Tax Law: An Introduction* (2017) by Croome B, Oguttu A and Muller E et al and *Silke: South African Income Tax* (2015) by Stiglingh M (ed), Loekemoer AD and van Zyl L discuss various TAA provisions. However, neither literary work discusses rule 16(1) read with rule 18(1) promulgated under the TAA. This creates a *lacunae* in the available literature which this study aims to fill.

SARS's website ([www.sars.gov.za](http://www.sars.gov.za)) consists of a descriptive guide for the TAA and the regulations promulgated thereunder. The guide only summarises the SARS's understanding thereof. As such, the manual is not the product of rigorous academic



research and, therefore, cannot fulfill the function of being a balanced work in relation to the provisions of the TAA, or the regulations thereunder.

As regards case law, a survey of the available judgments online and in the law, reports reveals that there are as yet no reported cases that considered the constitutionality of the regulations that permit the SARS to appoint a 'SARS official' as facilitator. Although there are several dissertations dealing with the TAA and taxpayers' rights in dispute resolution processes, none deal with the research questions which this paper seeks to answer.<sup>31</sup>

Chapter two: This chapter discusses the rules and modes of statutory and constitutional interpretation. This discussion is necessary for purposes of the interpretive exercises related to, first, certain TAA provisions and rule 16 read with rule 18 discussed in chapter three; secondly, in relation to s 34 and s 36 of the Constitution dealt with in chapters four and five respectively for purposes of determining whether ADR is a 'hearing' in a 'forum' as envisaged by s 34 which is 'limited by a law of general application'.

Chapter three: Answering the research questions require an understanding of the ADR process in their entirety within the dispute resolution framework catered for by the TAA. Accordingly, this chapter will discuss the relevant statutory provisions and rules that apply to ADR. Having regard to the research questions sought to be answered in this paper, a discussion of other mechanisms created by the TAA for dispute resolution fall beyond the remit of this paper and is, accordingly, not undertaken herein below.

Chapter four: This chapter discusses s 34 of the Constitution. The constituent elements of the fundamental right entrenched therein is discussed with a view to understanding the nature and extent of a taxpayer's right to a fair dispute resolution. Its provisions are interpreted with reference to the interpretive rules discussed in chapter two.

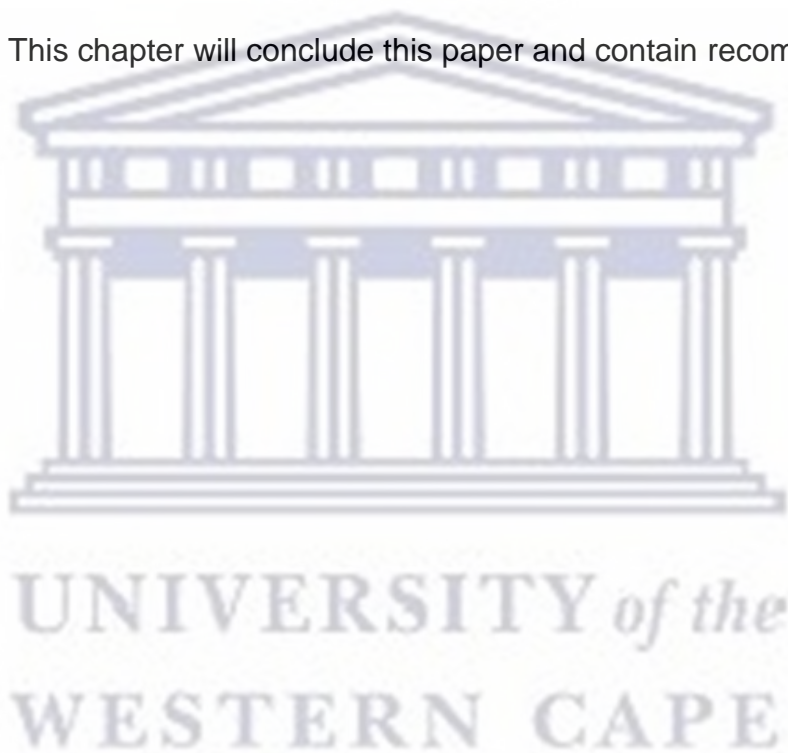
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<sup>31</sup> See, for example, Msisa S *Taxpayer's Powers regarding Tax Clearance Certificates* (unpublished Masters of Management for Accounting Sciences thesis, University of South Africa, 2017) 1; Johannes R (2014) 14-29; Moosa F *The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing Efficient and Effective Tax Administration with Taxpayers' Rights* (unpublished LLD thesis, University of Western Cape, 2017) 263-270 (hereafter: Moosa F (2017)); Kinyanjui K *Evaluating the efficacy of alternative dispute resolution in tax disputes in Kenya*, University of Kenya (unpublished Master of Laws thesis, University of Nairobi, 2016) 62-63.

Chapter five: This chapter discusses s 36(1) of the Constitution and its constituent elements which are relevant when determining if the rules governing ADR as regards the appointment of the SARS employee as a facilitator are valid when tested through the prism of s 36.

Chapter six: This chapter discusses an appointment of facilitators in foreign jurisdictions in comparison to South Africa.

Chapter seven: This chapter will conclude this paper and contain recommendations.



## CHAPTER TWO: PRINCIPLES OF INTERPRETATION

‘The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purposes.’  
(Sachs J)<sup>32</sup>

### 2.1 Introduction

The advent of South Africa’s democracy in 1994 resulted in constitutional supremacy replacing Parliamentary sovereignty which was repressive under apartheid.<sup>33</sup> Parliament is no longer supreme.<sup>34</sup> It is subject to the constitution as is everyone else, including the SARS. The Bill of Rights (BOR) in the Constitution contains a suit of fundamental rights that provides protection to taxpayers who are natural persons. In terms of s 8(4) of the Constitution, the rights in the BOR also protect juristic persons so far as the nature of the right and the nature of the entity permit. Thus, juristic taxpayers are covered.

As stated in chapter one above, to answer the research questions, it is necessary to undertake an interpretation of rules 16(1)(a) read with 18(1), as well as ss 34 and 36 of the Constitution. This requires a discussion of the key interpretive principles. This chapter aims to do so with a view to laying the foundation for the discussion in subsequent chapters of this paper, in particular chapter five where the relevant principles are applied to answer the research questions formulated above in chapter one. To fulfil the aim of this chapter, the ensuing discussion

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<sup>32</sup> *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 112.

<sup>33</sup> Boardman R ‘The significance of the approaches to constitutionalism interpretations in *S v Mhlungu* 1995 (3) SA 867 (CC)’ (unpublished LLM thesis, University of South Africa, 1996) 7 (hereafter: Boardman 1996).

<sup>34</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 57.



focusses on s 39 of the Constitution and the techniques of purposive *cum* contextual *cum* grammatical interpretation emerging from case law.

## 2.2 Modes of interpretation

By virtue of constitutional supremacy and the subservience of all legislation to the dictates of the Constitution, a fundamentally different interpretive approach exists from that followed in the pre-1994 era. As opposed to a subjective process in which Parliament's intention was dominant, the post-1994 interpretive process is objective in its outlook. Interpretation is described as a single, unitary exercise in which a logical meaning is to be given to a law text.<sup>35</sup> A meaning must be avoided that is illogical, or that undermines the purpose of the instrument. An interpreter must also guard against replacing the words actually used by a lawgiver with that which s/he regards as a sensible meaning in the circumstances.<sup>36</sup> This is so because doing so would entail crossing the rubicon from the art of interpretation and going over to the business of legislating by judicial decree.<sup>37</sup> The most important consideration remain the language of the provision being interpreted read in conjunction with the background of the document, its context and purpose.<sup>38</sup> It is to these facets of the interpretive process that attention is turned.

### 2.2.1 Grammatical Interpretation

The new approach does not give effect to the intention of the legislature.<sup>39</sup> In *Natal Joint Municipal Pension Fund* the court echoed the criticism of the use of the 'intention of the legislature' in the interpretive process. It held that the purpose of

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<sup>35</sup> *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (hereafter *Natal Joint Municipal Pension Fund*).

<sup>36</sup> *S v Zuma and Others* 1995 (2) SA 642 (CC) paras 17-18.

<sup>37</sup> *Independent Institute of Education (Pty) Limited and Others* 2020 (2) SA 325 (CC) para 35.

<sup>38</sup> *Chotabhai v Union Government (Minister of Justice) and Registrar Asiatics* 1911 AD 13 at 24.

<sup>39</sup> Du Plessis L 'Re-Interpretation of Statutes' (2007) 143-147 (hereafter: Du Plessis L (2007)). Also, see Fallon R 'Stare Decisis and the Constitution: An Essay on Constitutional Methodology' (2001) 76 *New York University Law Review* 570.

a provision may not necessarily align with that intention and that such intention is only ascertained from the language used.<sup>40</sup>

Interpretation involves, as a starting point, giving words in a law-text their usual, plain, ordinary, dictionary meaning.<sup>41</sup> This is the meaning they possess in ordinary colloquial speech. This is known as 'grammatical interpretation' and it is applicable to statutory and constitutional interpretation.<sup>42</sup> *Natal Joint Municipal Pension Fund* is a *locus classicus* of grammatical interpretation.

*In casu*, Wallis JA summarised the state of the law of interpretation in South Africa. He emphasised that an appropriate interpretation is one that pays homage to the words used in a law text, having regard to the context provided by reading the particular provision(s) in light of the instrument as a whole and the circumstances attendant upon its coming into existence.<sup>43</sup> He held further that whatever the nature of the instrument being construed, consideration must always be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the purpose to which it is directed and the material known to those who produced it. When there is probability of more than one meaning, each option must be balanced in the light of all these factors.<sup>44</sup> When interpreting a law text, a court must achieve a healthy balance that appropriately fits into the particular statutory and constitutional framework without unduly intruding onto the text itself.<sup>45</sup>

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<sup>40</sup> *Natal Joint Municipality Pension Fund* para 21.

<sup>41</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 88 (hereafter: *Bato Star Fishing*). Also, see *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) para 46 (hereafter: *Chisuse*).

<sup>42</sup> *Natal Joint Municipal Pension Fund* para 18.

<sup>43</sup> *Natal Joint Municipality Pension Fund* para 18.

<sup>44</sup> *Rainy Sky SA and Others v Kookmin Bank* (2011) UKSC 50; (2012) Lloyds Rep 34 (SC) para 28 (hereafter: *Rainy Sky SA*).

<sup>45</sup> *Du Toit v Minister for Safety and Security* 2009 (6) SA 128 (CC) para 50 (hereafter: *Du Toit*).

## 2.2.2 Purposivism

Every provision in legislation and the Constitution must be interpreted in a manner that best gives effect to the purpose of the provision in question, having regard to the underlying objective of the instrument in which it is located.<sup>46</sup> A purposive interpretive process gives effect to a meaning that advances the enforcement of the aim of the instrument in which the law text being interpreted appears.<sup>47</sup> Purpose is different from the mischief that a provision seeks to overcome.<sup>48</sup> Although purpose is important when interpreting the meaning of a law text, purpose is also important for s 36 of the Constitution (dealt with below in chapter five) because it requires consideration to be given to the purpose of both the fundamental right at play in a particular case and the purpose sought to be achieved by its limitation in a law of general application.<sup>49</sup>

A purposive mode of interpretation is incompatible with literalism which is a weakness of the pre-constitutional era interpretive methodology.<sup>50</sup> Literalism is a strict, formal approach to the interpretation of a provision that is discouraged in favour of a more liberal (or generous) approach, as the latter is a better means for the protection of fundamental rights entrenched in the Constitution.<sup>51</sup> The purpose of an instrument or provision therein is part of its broader context.<sup>52</sup> Thus, purposive interpretation and contextualism cannot be separated from each other.

## 2.2.3 Contextualism

During the interpretation process, an interpreter must take cognisance of relevant contextual circumstances.<sup>53</sup> This is because words cannot be read literally and in

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<sup>46</sup> *Berti van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* 2010 (2) SA 181 (CC) para 21 (hereafter: *Berti van Zyl*). Also, see Du Plessis L (2007) 96.

<sup>47</sup> Botha CJ *Statutory interpretation: An introduction for students* Reprinted 4 ed (2010) 67.

<sup>48</sup> *Natal Joint Municipality Pension Fund* para 22.

<sup>49</sup> *Natal Joint Municipality Pension Fund* para 23.

<sup>50</sup> Du Plessis L (2007) 102.

<sup>51</sup> Du Plessis L (2007) 102.

<sup>52</sup> *Independent Institute of Education (Pty) Limited and Others* 2020 (2) SA 325 (CC) para 22.

<sup>53</sup> *Aktiebolaget Hassle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1 (hereafter: *Aktiebolaget Hassle*).

isolation.<sup>54</sup> Rather, a law text must be viewed in its proper setting and surrounds.<sup>55</sup> The context shows the appropriate meaning to be given to the words of an instrument. Therefore, one must from the beginning consider the context and the language together, with neither controlling the other. Most words can bear several meanings and to try to establish their meaning in the abstract, separated from the context of their use, is unhelpful for interpretive purposes.<sup>56</sup> During interpretation although the text of a provision is a point of departure, the meaning allocated to the provision must have proper regard to context, even if the language is clear.<sup>57</sup>

Interpreters must contextualise texts by giving meaning to the words actually used therein.<sup>58</sup> Thus, grammatical interpretation works hand in hand with a contextual mode of interpretation.<sup>59</sup> In *De Beers Marine (Pty) Ltd v CSARS*<sup>60</sup> it was held, correctly so it is submitted, that dictionary meanings of words ought not to be adopted wholesale as their conclusive meanings for purposes of the instrument in which they appear. The Court held that the preferred approach is that the dictionary meaning of words ought to be considered when the relevant provisions are examined 'to determine whether there is anything in the context in which the word is used that adds or detracts from its ordinary commercial meaning'.<sup>61</sup>

The meaning of a law text must be harmonised with the purpose of the instrument in which it appears.<sup>62</sup> A purposive interpretive approach focuses beyond the

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<sup>54</sup> See, for example, *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A) at 478A-B.

<sup>55</sup> *Road Traffic Management Corporation v Waymark (Pty) Limited* 2019 (5) SA 29 (CC) para 29; *Cool Ideas 1186 v Hubbard and Another* 2014 (4) SA 477 (CC) para 28. Also, see Du Plessis L (2007) 111.

<sup>56</sup> *Natal Joint Municipality Pension Fund* para 19.

<sup>57</sup> *City of Tshwane Metropolitan v Link Africa (Pty) Ltd and Others* 2016 (1) SA 103 (CC) para 33.

<sup>58</sup> In *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) para 36 it was held: 'This Court has noted on numerous occasions that text is not everything. Unless there is no other tenable meaning, words in a statute are not given their ordinary grammatical meaning if, to do so, would lead to absurdity.'

<sup>59</sup> *Independent Institute of Education (Pty) Limited and Others* 2020 (2) SA 325 (CC) para 24.

<sup>60</sup> 2002 (3) All SA 181 (A) para 2.

<sup>61</sup> *De Beers Marine Pty (Ltd) v CSARS* 2002 (3) All SA 181 (A) para 5. Also, see Sullivan R *Statutory Interpretation* 2ed (2007) 50.

<sup>62</sup> *SARS v Airworld CC and Another* 2008 (2) All SA 593 (SCA) para 146 (Hereafter: *Airworld*).



manifested intention.<sup>63</sup> The interpreter must seek to infer the design and purpose which lies behind the instrument being interpreted.<sup>64</sup> To do this, an interpreter should make use of an unqualified contextual approach which allows unconditional examination of all internal and external *indicia*.<sup>65</sup> Whereas the former includes all relevant internal provisions that aid in the interpretation of the text in question (such as, headings and preamble), the latter includes the Constitution and the background to the instrument itself.<sup>66</sup>

#### 2.2.4 Teleological interpretation

A key change brought about by the Constitution is its provision in s 39 that interpretation must be sensitive to fundamental rights in the BOR (such as, the right in s 34 to fair dispute resolution) and the values underlying the rights and the Constitution. This is referred to as teleological interpretation. It envisions identifying values essential to the Constitution and then interpret a constitutional and statutory provision in a manner that best promotes the value concerned.<sup>67</sup> For present purposes, the relevant provisions of s 39 reads as follows:

- ‘(1) When interpreting the Bill of Rights, a court, tribunal or forum—
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

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<sup>63</sup> *De Beers Marine Pty (Ltd) v CSARS* 2002 (3) All SA 181 (A) para 18.

<sup>64</sup> *Airworld* para 146.

<sup>65</sup> *Jaga v Donges* 1950 (4) SA 653 (A) at 662G; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

<sup>66</sup> *Fraser v ABSA Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) BCLR 219 (CC) para 43.

<sup>67</sup> Boardman R (1995) 7. Also, see Langa P ‘Transformative constitutionalism’ (2006) 17 *Stell LR* 353.

Teleological interpretation requires the interpretive process to be infused with the values upon which a democratic South African society is founded.<sup>68</sup> While some values are stated expressly in the Constitution (such as, human dignity, equality, freedom, rule of law, and constitutional supremacy), others are implied (such as, separation of powers). Thus, a constitutional mode of interpretation is a normative, value-based approach that takes account of the values inherent in the Constitution.<sup>69</sup> The values fall within the ambit of its 'spirit' and ethos.<sup>70</sup>

In *Bato Star Fishing*,<sup>71</sup> the Court emphasised that there are two propositions implicit in the command in s 39(2) of the Constitution: first, any interpretation ascribed to a text must advance at least one identifiable constitutional value; secondly, the statute must be reasonably capable of sustaining the interpretation accorded to it.<sup>72</sup> This decision underscores the key role played by constitutional values in the interpretive process. The values ensure that the interpretation given to a text promotes the fullest possible protection of the constitutional promises.<sup>73</sup>

## 2.3 Conclusion

This chapter shows that the provisions of s 39(2) is peremptory and must be adhered to when rule 16 contained in subordinate legislation is interpreted for purposes of testing its constitutionality under s 36 of the BOR. Furthermore, it was shown that an interpretation of rule 16 read with rule 18 must occur within their narrow internal statutory context and within their broader external context vis a vis the Constitution, bearing in mind at all times that effect ought to be given to these

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<sup>68</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 262.

<sup>69</sup> *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E) at 635-637. Also, see Erasmus G 'Limitations and Suspension' in Van Wyk D, Dugard J and de Villiers B *et al* *Rights and Constitutionalism: The new South African Legal Order* (1994) 630.

<sup>70</sup> Moosa F 'Understanding the Spirit, Purport and Objects of South Africa's Bill of Rights' (2018) 4 *Journal of Forensic, Legal and Investigative Sciences* 3.

<sup>71</sup> Paragraph 89.

<sup>72</sup> Also, see Currie I and De Waal J *The Bill of Rights Handbook* 5 ed (2005) 59 (hereafter: Currie I and De Waal J (2005)).

<sup>73</sup> Moosa F (2017) 52.

provisions which best aligns with their purpose and wording. Finally, with a view to the discussion in chapters four and five below, this chapter has demonstrated how s 34 of the Constitution ought to be interpreted for purposes of its application to rule 16(1) which form the basis of the ensuing discussion in chapter three.





## CHAPTER THREE: RESOLUTION OF TAX DISPUTES THROUGH ADR

'Dialogue is the most effective way of resolving conflict.' (Tenzin Gyatso – 14<sup>th</sup> Dalai Lama)<sup>74</sup>

### 3.1 Introduction

Lord Steyn famously stated that, 'in law, context is everything'.<sup>75</sup> As shown in chapter two, context is an important feature of the process involved in statutory and constitutional interpretation. Any interpretation of rule 16(1)(a) read with rule 18(1) cannot take place in the abstract - it must occur against the backdrop of their internal context in the rules read as a whole in conjunction with the scheme of the TAA viewed holistically.<sup>76</sup> Thus, for purposes of advancing a key argument of this paper, namely, that ADR in the field of tax administration is a 'hearing' as contemplated by s 34 of the Constitution, this chapter discusses the dispute resolution mechanism concerned in the context of disputed income tax assessments issued by the SARS.

Regarding the International law on mediation, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of 2018 provides in Article 6(4) that when appointing a mediator regard shall be had of securing an independent, impartial, neutral third party/mediator. The UNCITRAL Model Law, as adapted into Schedule 1 to the International Arbitration Act 15 of 2017, applies in South Africa subject to the provisions of the International Arbitration Act. Trite that international law becomes law in the SA once enacted into law by national legislation.<sup>77</sup>

Mediation has been utilised in countries like the USA as early as the 1800s and 1900s to resolve its labour disputes initially<sup>78</sup> and later permeated into the resolution of family

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<sup>74</sup> Renew Leadership 'Conflict Management' available at <http://renewleadership.com/conflict-management> (accessed 06 October 2022).

<sup>75</sup> *R v Secretary of the Home Department, Ex parte Daly* [2001] 3 All ER 433 (HL) at 447a. Cited with approval in *Aktiebolaget Hassle* para 1.

<sup>76</sup> See *Chisuse* para 48.

<sup>77</sup> Section 231(4), Constitution of the Republic of south Africa, 1996.

<sup>78</sup> Noble M 'Mary Parker Prophet of Management: A Celebration of Writings' (1996) 71.

disputes.<sup>79</sup> To-date mediation has become an intergral part of resolving the USA's civil matters mostly accredited to a conference held by Judges and lawyers advocating for alternative resolution of disputes including mediation.<sup>80</sup> A party to mediation feeling aggrieved by the process due to the inappropriateness (lack of independence, impartiality and conflict of interest of the facilitator) would recourse to the courts.<sup>81</sup> The study opines Impartiality and independence of the facilitator have been key requirements for mediation to be successful.

By 2013 South Africa had at least 49 statutes that recommended or made mediation or conciliation mandatory in resolving disputes.<sup>82</sup> The Labour Relations Act stands out as a flagship institutionalisation of mediation as a default alternative dispute resolution avenue through the setting up of the Commission, Conciliation, Mediation and Arbitration (CCMA) in section 112. The Act requires that the facilitator be independent when addressing unfair

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<sup>79</sup> Menkel-M 'Mothers & Fathers of Invention: The Intellectual Founders of ADR (2000) *Ohio St. J on Dis Resol* 1; Fiss M 'Against Settlement' (1984) 93 *The Yale Law Journal Co Inc* 1080.

<sup>80</sup> Moffitt M 'Before the Big Bang: The Making of an ADR Pioneer' (2000); See also Menkel M 'Mothers & Fathers of Invention: The Intellectual Founders of ADR (2000) *Ohio St. J on Dis Resol* 8; Fiss M 'Against Settlement' (1984) 93 *The Yale Law Journal Co Inc* 1080.

<sup>81</sup> *Ainsworth v Wilding* (1896) 1 Ch. 673; *Kinch v Walcott* (1929) AC 482; *Wilding v Sanderson* (1897) 2 Ch. 534 (CA).

<sup>82</sup> Antarctic Treaties Act 60 of 1996; Child Justice Act 75 of 2008; Children's Act 38 of 2005; Commission on Gender Equality Act 39 of 1996; Companies Act 71 of 2008; Constitution of the Republic of South Africa, 1996; Consumer Protection Act 68 of 2008; Development Facilitation Act 67 of 1995; Electricity Regulation Act 4 of 2006; Estate Agency Affairs Act 112 of 1976; Extension of Security Tenure Act 62 of 1997; Financial Advisory and Intermediary Services Act 37 of 2002; Financial Services Ombuds Scheme Act 37 of 2004; Further Education and Training Colleges Act 16 of 2006; Gas Act 48 of 2001; Health Professions Act 56 of 1974; Higher Education Act 101 OF 1997; Human Rights Commission Act 54 of 1994; Income Tax Act 58 of 1962; KwaZulu-Natal Ingonyama Trust Act 3 of 1994; Labour Relations Act 66 of 1995; Land Reform (Labour Tenants) Act 3 of 1996; Local Government: Municipal Finance Management Act 56 of 2003; Local Government: Municipal Systems Act 32 of 2000; National Credit Act 34 of 2005; National Environmental Management Act 107 of 1998; National Forests Act 84 of 1998; National Land Transport Act 5 of 2009; National Land Transport Transition Act 22 of 2000; National Payment System Act 78 of 1998; National Ports Act 12 of 2005; National Sport and Recreation Act 110 of 1998; National Water Act 36 of 1998; Pan South African Language Board Act 59 of 1995; Pension Funds Act 24 of 1956; Petroleum Pipelines Act 60 of 2003; Post Office Act 44 of 1958; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Probation Services Act 116 of 1991; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Promotion of National Unity Act 34 of 1995; Public Protector Act 23 of 1994; Recognition of Customary Marriages Act 120 of 1998; Rental Housing Act 50 of 1999; Restitution of Land Rights Act 22 of 1994; Short Process Courts and Mediation in Certain Civil cases Act 103 of 1991; Skills Development Act 97 of 1998; South African Institute for Drug-Free Sport Act 14 of 1997; State Information Technology Agency Act 88 of 1998; Telecommunications Act 103 of 1996.

dismissals and labour practices.<sup>83</sup> Common requirement in these pieces of legislation is that the appointed mediator should be an independent third party. Mentioned below are the provisions provided for appointment of facilitators in select legislation.

The Prevention of Illegal Eviction from unlawful Occupation of Land Act 19 of 1998, was created to provide for the prohibition of unlawful eviction and to provide the lawful procedure for eviction of unlawful occupiers. The Act provides for mediation by the municipality in whose area of jurisdiction the land is situated and empowers it to appoint a facilitator for the mediation process.<sup>84</sup> The only requirement of such a facilitator is that they possess expertise in dispute resolution. The parties may, at any time and by agreement appoint a facilitator of their own choice according to the Act.<sup>85</sup>

Alternative dispute resolution under the Consumer Protection Act 68 of 2008 provides that an ombud, an agent providing mediation services, or a consumer court.<sup>86</sup> The consumer may refer the matter to the above for facilitating dispute resolution. In other words, the consumer chooses who should mediate.

The Companies Act 71 of 2008 provides for voluntary resolution of disputes through ADR.<sup>87</sup> Either the Companies Tribunal, an accredited juristic person or association of persons, or an organ of state. Prerequisite is that the ADR process be conducted in good faith. Of even greater importance is that it is 'the person would be entitled to apply for relief or file a complaint in terms of this Act' that may refer (akin to appoint) to the facilitator.<sup>88</sup>

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<sup>83</sup> Section 191, Labour Relations Act 66 of 1995.

<sup>84</sup> Section 7, Prevention of Illegal Eviction Act 19 of 1998.

<sup>85</sup> Rule 17(b) 'Republic of South Africa' Vol 693 (10) RG 10 March 2023 No 48188 (No 11554) available a [www.sars.gov.za/pages.RegulationGazette](http://www.sars.gov.za/pages.RegulationGazette) (accessed 3 October 2023).

<sup>86</sup> Section 70 (a)-(b), Consumer Protection Act 68 of 2008.

<sup>87</sup> Section 166, Companies Act 71 of 2008.

<sup>88</sup> Section 166 (1) Companies Act 71 of 2008.

In *Future Business Advice and Services CC*, the court reiterated that the nature of mediation in legal parlance is a dispute resolution process used in matters of this nature where a *neutral third party* is brought into the fold to mediate between the parties to come to an agreement.<sup>89</sup> In the case the applicant's claim was found to be premature on the basis that once the parties failed to resolve the dispute the matter should have been referred to mediation as per contractual agreement. Only after the mediation had failed then the parties would be entitled to recourse to the court.<sup>90</sup>

It was held in *Kalagadi Manganese (Pty) Ltd and others*, that the working definition of Mediation as per Rule 41A (1) Uniform Rules of Court provides mediation as "a voluntary process entered into by agreement between the parties to a dispute, in which an *impartial and independent person, the mediator....*" The case involved an application by the Industrial Development Corporation (IDC) to place Kalagadi Manganese under business rescue, and an application by Kalagadi for acceptance of a restructuring arrangement, led to the parties concluding a mediation agreement.<sup>91</sup> The court examined the nature of mediation, and the provisions of Rule 41A of the Uniform Rules of Court which regulates the mediation process. Rule 41A encourages mediation through a mild-mannered approach. The court held that bad faith was not proved.<sup>92</sup>

The sum total and the foregoing points to the fact that facilitators ought to be impartial, independent and avoid conflict of interest directly or indirectly.<sup>93</sup> The appointment of a facilitator involves choosing an amicable and appropriate facilitator and this is the key of ensuring the success of facilitation. Facilitators display the highest integrity standards, competence and fairness.<sup>94</sup> Facilitators in their demeanor act with diligence and are

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<sup>89</sup> *Future Business Advice and Services CC v The Premier of the Free State* (2008) ZAFSHC 30 (4 March 2010) para 6.

<sup>90</sup> *Future Business Advice and Services CC v The Premier of the Free State* (2008) ZAFSHC 30 (4 March 2010) para 7.

<sup>91</sup> *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020) ZAGPJHC 127 (22 July 2021) para 8.

<sup>92</sup> *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020) ZAGPJHC 127 (22 July 2021) para 18.

<sup>93</sup> Saice 'Code of Conduct for the Saice President's list of alternative dispute resolution amicable settlement Facilitators' available at <https://saice.org.za/2022/1/> (accessed 16 September 2023).

<sup>94</sup> Steadman F 'Conflict dynamics: The use of facilitation for conflict management and dispute prevention accessed 22 September 2023) available at <https://www.conflictdynamics.com> (accessed 22 September 2023).



available civil, efficient and they ensure that they comply with any confidentiality and non-disclosure obligations.<sup>95</sup> Facilitators should refrain from being influenced by self-interest, fear of criticism, political considerations, outside pressure and public clamor. In addition, to that facilitators should refrain from allowing ongoing or past financial, professional, business family or social relationships to affect their conduct or judgment. They must not use their position to their benefit or private interest directly or indirectly incur a duty or accept a benefit that would interrupt or appear to intervene with the performance of their duties.<sup>96</sup>

The appointment by the SARS goes against the independence, impartiality and neutrality principle required by the international law, local case law and legislation. Concerns have arisen that if the parties agree to the appointment of a facilitator from the SARS, the practice is to suit the SARS, instead of the taxpayer irrespective that it might be beneficial.<sup>97</sup> There is a notion among taxpayers that a facilitator who is an employee of the SARS has a conflict of interest. This as a result may cause taxpayers to doubt the legitimacy of the ADR process.<sup>98</sup> A facilitator employed by the SARS will not be perceived as having a conflict of interest. Furthermore, an assertion that there does not exist a conflict of interest does nothing to dismiss a perception regarding the legitimacy of the ADR process, which taxpayers could perceive as biased because facilitators are the SARS employees.<sup>99</sup> Case law and legislation has favoured the involvement of a neutral third party who is brought into the fold to mediate between the parties to come to an agreement. Appointing the SARS official is going against the ideal notion of independence and impartiality that the precedence brings to the fore.

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<sup>95</sup> Steadman F 'Conflict dynamics: The use of facilitation for conflict management and dispute prevention accessed 22 September 2023) available at <https://www.conflictdynamics.com> (accessed 22 September 2023).

<sup>96</sup> Saice 'Code of Conduct for the Saice President's list of alternative dispute resolution amicable settlement Facilitators' available at <https://saice.org.za/2022/1/> (accessed 16 September 2023).

<sup>97</sup> Burt K 'Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation' available at <https://www.thesat.org.za/news/> (accessed 16 September 2023).

<sup>98</sup> Burt K 'Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation' available at <https://www.thesat.org.za/news/> (accessed 16 September 2023).

<sup>99</sup> Burt K 'Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation' available at <https://www.thesat.org.za/news/> (accessed 16 September 2023).

South Africa is a democracy guided by a supreme Constitution which applies equally during all facets of tax administration and dispute resolution under the TAA. Taxpayers are therefore protected by the Constitution against the imposition of unreasonable and unjustifiable encroachments on their fundamental rights. In chapter five above, it was concluded that rule 16 does not pass muster under s 36(1) of the Constitution. The impugned rule 16 is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom and that rule 16 must be declared inconsistent with the Constitution and invalid to the extent of its inconsistency to the BOR.<sup>100</sup>

### 3.2 An overview of objection and appeal process

In terms of s 105 of the TAA,<sup>101</sup> a taxpayer may only dispute a tax assessment, or a decision described in s 104(2) in the manner and forum provided for in Chapter 9 of the TAA, unless a competent division of a High Court directs otherwise.<sup>102</sup> In terms of s 104(1), a taxpayer aggrieved by a tax assessment may object thereto. Similarly, s 104(2) spells out a *numerus clausus* of ‘decisions’ taken by the SARS against which an objection may be lodged, namely, (a) a decision not to extend the period for lodging an objection, (b) a decision not to extend the period for lodging an appeal, and (c) any other decision which may be objected to or appealed against<sup>103</sup> under a ‘tax Act’ as defined in the TAA.<sup>104</sup>

Section 104(3) stipulates that an objection against an assessment or decision must be lodged ‘in the manner, under the terms, and within the period prescribed in the rules. The rules promulgated by the Minister of Finance pursuant to the regulatory authority granted

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<sup>100</sup> *Bertie van Zyl (Pty) Ltd v Minister of Safety Security* 2010 (2) SA 181 (CC) para 20.

<sup>101</sup> For an analysis of s 105 after its 2016 amendment, see *ABSA Bank* paras 23-26.

<sup>102</sup> The institution of legal proceedings against the SARS must be brought in good faith with a genuine desire to challenge the merits of an assessment or decision. It ought not to be vexatious, frivolous, or an abuse of judicial process (such as, where the taxpayer aims to merely delay or frustrate the SARS efforts to recover tax that is lawfully due and payable). See *CSARS v Van der Merwe* (7255/2019) [2021] ZAWCHC 197 (21 September 2021) paras 44 – 56.

<sup>103</sup> For the type of ‘other decisions’ that may be subjected to objection and appeal, see *CSARS v FP (Pty) Ltd* [2021] ZATC 8 (19 October 2021) para 21 (hereafter: *CSARS v FP*).

<sup>104</sup> In terms of the definition of ‘tax Act’ in s 1, the TAA applies to all tax statutes listed there, except the Customs and Excise Act, 1964.

by s 103 of the TAA do not exist independently of the TAA. The rules 'are intended to give procedural effect to its provisions'.<sup>105</sup> In terms of rule 6, objections are to be lodged within 30 days after notice of an assessment is received by a taxpayer, or within 30 days after notice of an objectionable decision is received. However, before lodging an objection, a taxpayer may, in terms of rule 16, request written reasons for an assessment or decision (as the case may be). Until the reasons are furnished, the period for lodging an objection is extended.<sup>106</sup> Once the written reasons are provided by the SARS, a taxpayer ought to be able to formulate a comprehensive objection for lodgment.

If an objection is dismissed, whether wholly or in part, a taxpayer may, in terms of s 107, lodge an appeal to a tax court or tax board created in terms of the TAA.<sup>107</sup> The appeal process is regulated by the Ministerial rules.<sup>108</sup> A senior SARS official has a framework of 21 days to postpone the time period within which an appeal may be lodged when there are reasonable grounds for the delay.<sup>109</sup> In exceptional circumstances, a SARS official may extend the deadline to no more than 45 business days.<sup>110</sup>

A notice of appeal must satisfy the prescribed legal requirements, failing which the notice will be invalid.<sup>111</sup> An appeal may be resolved through ADR regulated by the rules, subject to both the taxpayer and the SARS consenting to that method for dispute resolution.<sup>112</sup> While the ADR process is under way, the appeal is suspended.<sup>113</sup>

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<sup>105</sup> *CSARS v FP* para 43.

<sup>106</sup> Van Schaik R 'An overview of the SARS dispute resolution process' available at [www.thesait.org.za](http://www.thesait.org.za) (accessed 7 February 2021).

<sup>107</sup> Decisions of a tax court and tax board are binding on the affected litigants and do not create binding legal precedent. See *CSARS v FP* para 36.

<sup>108</sup> For a useful exposition of the law governing the making of regulations, see *Minister of Finance v Afri business NPC* (CCT279/2020) [2022] ZACC 4 (16 February 2022) paras 38 – 43, 102 – 124.

<sup>109</sup> Section 107(2)(a), TAA.

<sup>110</sup> Section 107(2)(b), TAA.

<sup>111</sup> Section 107(3), TAA.

<sup>112</sup> Section 107(5), TAA.

<sup>113</sup> Section 107(6), TAA.



### 3.3 Alternative dispute resolution proceedings under the TAA

The TAA recognises several categories of persons who may be appointed as facilitators. As stated in chapter one, a facilitator may be any category of “SARS official” as defined in the TAA. In terms of rule 16(1)(b), a person appointed as facilitator must have good standing and experience in either the tax, legal, arbitration, mediation or accounting profession. In terms of rule 16(2), a facilitator can only be appointed to facilitate the resolution of a tax dispute if the taxpayer and SARS consent to such appointment. In cases where consent is given, then rule 16(3) provides that a senior SARS official must, within the period prescribed therein, appoint an individual from the list of facilitators and then give written notice to both parties of the appointment.

Once appointed, the facilitator must convene a consultation with the taxpayer and the SARS official involved in the ADR proceeding for SARS. In terms of rule 19(1), the facilitator must, within 20 days of the facilitator’s appointment, notify the disputants of the time, date and place set by the facilitator for the ADR proceeding. In terms of rule 19(1)(b), the facilitator should, if necessary, also inform each party in writing as to any written submissions or other document to be submitted or exchanged between them, as well as inform the parties of the timing of any applicable submission or exchange of documents. Rule 19(3) confers a discretion (‘may’)<sup>114</sup> on the facilitator to ‘summarily terminate the proceedings without prior notice’ if any of the requirements in rule 19(3)(a) to (d) are met. In terms thereof, the ADR proceeding may be terminated if any party fails to attend the meeting at the designated time and place;<sup>115</sup> or any party fails to comply with a request made 19(1)(b);<sup>116</sup> or the facilitator opines that the tax dispute cannot be resolved through ADR;<sup>117</sup> or the facilitator may cancel the ADR process ‘for any other appropriate reason’.<sup>118</sup> The latter is a catch-all provision that confers a broad discretion on a facilitator which, it is submitted, must be exercised judiciously for its validity. The only restriction

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<sup>114</sup> For the legal effect of the word ‘may’, see *CIR v I H B King*; *CIR v A H King* 1947 (2) SA 196 (A) at 209.

<sup>115</sup> Rule 19(3)(a).

<sup>116</sup> Rule 19(3)(b).

<sup>117</sup> Rule 19(3)(c).

<sup>118</sup> Rule 19(3)(d).

placed on the facilitator under rule 19(3)(d) is that the reason given for its exercise must be 'appropriate'. The appropriateness thereof must be determined by having regard to the circumstances of the case at hand.

If the ADR proceeding is summarily terminated under rule 19(3), or the tax dispute is unresolved after the ADR proceeding runs its proper course in accordance with rule 20, then, at its conclusion, the suspension of the taxpayer's appeal is lifted, and the appeal process continues to its finality in accordance with the TAA.

The formalities of the ADR proceeding are regulated by rule 20. The procedure before the facilitator must be conducted in accordance with the rules.<sup>119</sup> The facilitator is not required to record the ADR proceeding.<sup>120</sup> Since ADR takes place on a without prejudice basis to the rights of the disputants in the pending tax appeal,<sup>121</sup> rule 20(2) prohibits the ADR proceeding from being recorded electronically. During the ADR proceeding, the taxpayer must be present in person and may be represented by a third party of the taxpayer's choice if SARS agrees thereto.<sup>122</sup> If the taxpayer is unable to attend the ADR proceeding for any reason, then the ADR meeting cannot proceed, unless the facilitator is satisfied that 'exceptional circumstances' is shown to exist which justifies the taxpayer being represented in the taxpayer's absence by a third party of the taxpayer's choice.<sup>123</sup> The rules do not spell out what would qualify as 'exceptional circumstances' in the context of rule 20(4). A case law survey reveals that this term has also not been the subject of judicial interpretation in the context of rule 20(4). Nor has it, in this context, been the subject of discussion in any published research. Consequently, this term will be interpreted here by the employment of the grammatical, contextual and purposive techniques discussed in chapter two. It is evident from a reading of rule 20(4) that the *onus* rests on a taxpayer's representative to establish 'exceptional circumstances' for the

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<sup>119</sup> Rule 20(1).

<sup>120</sup> Rule 20(2).

<sup>121</sup> Rule 22(3)(b).

<sup>122</sup> Rule 20(3).

<sup>123</sup> Rule 20(4).

facilitator to exercise a discretion to permit the ADR meeting to proceed in the taxpayer's absence while the latter is represented by a person of the taxpayer's choice.

The express reference to the word 'exceptional' indicates that a mere 'ordinary' circumstance would not qualify for a lawful invocation of the facilitator's discretion. Something more is needed. It is submitted that the existence of a fact(s) that shows an unusual or extraordinary circumstance prevails at the relevant time of the meeting ought to suffice.<sup>124</sup> No hard and fast rules can, however, be made as to what specifically would qualify as 'exceptional'. Each case would have to be decided on its own merits.

With an eye to protecting the facilitator's independence in the execution of his/her duties without fear or favour, rule 16(4) prohibits the removal of a facilitator after the commencement of an ADR proceeding, except in those narrow instances catered for in rule 16(4)(a) to (d). In terms thereof, a facilitator may be removed at the request of the facilitator personally;<sup>125</sup> or by the consent of the disputants;<sup>126</sup> or at the request of either disputant in circumstances where the senior SARS official 'is satisfied'<sup>127</sup> that the facilitator is guilty of misconduct, or is incapacitated, or there has been incompetence or non-compliance by the facilitator with any of the duties imposed by rule 17;<sup>128</sup> or a conflict of interest exists as contemplated by rule 18<sup>129</sup> (discussed above in chapter one).

Rule 17(a) to (h) regulates the conduct of a facilitator during alternate dispute resolution proceedings. Its provisions are aimed at ensuring that the alternate dispute resolution proceeding is conducted in a manner that is dignified and accords with the law. To achieve its aims, rule 17 imposes obligations which must be complied with, failing which rule

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<sup>124</sup> For a discussion of the meaning of 'exceptional circumstances, albeit in a different context, see *MM v S* [2012] JOL 28379 (ECG) paras 5-6.

<sup>125</sup> Rule 16(4)(a).

<sup>126</sup> Rule 16(4)(b).

<sup>127</sup> For the legal meaning of 'satisfied', see *ITC 1470* (1990) 52 SATC 88 at 92.

<sup>128</sup> Rule 16(4)(c).

<sup>129</sup> Rule 16(4)(d).

16(4)(c) may be triggered and steps taken to remove the facilitator. Rule 17 imposes the following duties on every facilitator:

- to act in accordance with the rules and the law;
- to seek a fair, equitable and legal resolution of the dispute;
- to promote, protect and give effect to the integrity, fairness and efficacy of the ADR process;
- to act independently and impartially during the ADR process.
- to conduct him/herself with honesty, integrity and with courtesy to all parties;
- to act in good faith;
- to decline an appointment or obtain technical assistance when a case is outside the field of the facilitator's competence; and
- to attempt to bring the dispute to an expeditious resolution.

### **3.4 Confidentiality of ADR proceedings**

Generally, litigation is a public matter, but there is a limitation on the distribution of information during settlement discussions.<sup>130</sup> Since the ADR proceeding is geared towards settlement of a pending tax appeal, it operates in a like fashion. To ensure confidentiality of tax information disclosed during an ADR proceeding, rule 22 provides certain protective mechanisms. First, rule 22(3) stipulates that an ADR proceeding 'will not be one of record'. Secondly, rule 22(3)(b) provides that representations made during an ADR proceeding, as well as any document tendered there, 'is made or tendered without prejudice'. As a result, rule 22(3)(c) prohibits any representation made and document disclosed during ADR from being used as evidence in any subsequent litigation, unless any of the exceptions catered for in rule 22(3)(c)(i) to (iv) applies. This includes those instances where the prior consent of the party who tendered the document

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<sup>130</sup> See Richard I 'Confidential settlement agreements in NY? think again law' available at <http://www.law360.com/articles/427899/confidential-settlement-agreements-in-ny-think-again>; (accessed 30 October 2020). Also, see Noussia Kyriaki *Confidentiality in International commercial arbitration: a comparative analysis of the position under English, US, German and French Law* 10 ed (2010) 24; Block M 'The benefits of alternate dispute resolution for International commercial and intellectual property disputes' Stopforth S (2016) 44 *Rutgers Law Record* 7 (hereafter: Block M (2016)).



or made the representation concerned is obtained for the use thereof at a subsequent proceeding.

Thirdly, rule 22(1) stipulates that any document disclosed during an ADR proceeding, and any representation made, must be kept confidential by the facilitator and must not be made known to the other party, except with the permission of the party that divulged the information. To this end, the ADR process is similar to mediation. The protection afforded by rule 22(1) is bolstered by rules 22(3)(a) and 22(4). Rule 22(3)(a) stipulates that the confidentiality regime regulated by Chapter 6 of the TAA applies to ADR proceedings. In terms thereof, the privacy of taxpayer information is protected by way of a prohibition against disclosure, except in certain statutorily prescribed circumstances.<sup>131</sup>

On the other hand, rule 22(4)(b) and (c) respectively provides that, unless a court directs otherwise, no person may subpoena a facilitator to compel disclosure of information revealed to the facilitator during an ADR proceeding, or to compel the facilitator to explain the basis for any recommendation made. Rule 22(4)(a) provides that, unless a court directs otherwise, no one may subpoena anyone involved in an ADR proceeding in any capacity to compel disclosure of information given or any document disclosed during an ADR process. This prohibition is expressly stated to operate subject to any of the exceptions catered for in rule 22(3)(c) (such as, where the information is obtained through any lawful means otherwise than through the ADR process,<sup>132</sup> or if a senior SARS official is satisfied that the representation made or document tendered is false).<sup>133</sup>

Fourthly, rule 22(2) provides that a facilitator who is not a SARS official will be regarded as such for purposes of Chapter 6 of the TAA. It is submitted that rule 22(2) advances the protection of taxpayer's privacy on the one hand and, on the other, underscores the importance of confidentiality of taxpayer information during tax administration, including

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<sup>131</sup> For a discussion of the relevant TAA provisions regulating taxpayer confidentiality, see *Public Protector v CSARS and Others* 2022 (1) SA 340 (CC) paras 14-28. Also, see Moosa F 'Protecting taxpayer information from the Public Protector – a 'just cause?' (2020) 6(2) *Journal of Corporate and Commercial Law & Practice* 190.

<sup>132</sup> Rule 22(3)(c)(iii).

<sup>133</sup> Rule 22(3)(c)(iv).



dispute resolution through ADR, a private proceeding conducted behind “closed doors” and, thus, inaccessible to the public. Accordingly, rule 22 is framed in a way that it serves to promote taxpayer confidence in ADR as a mechanism designed to resolve tax disputes speedily and cost effectively, both for the *fiscus* and taxpayers alike.

### 3.5 Conclusion

This chapter outlined the dispute resolution mechanism applying under the TAA. As a result, it demonstrates that ADR in a tax administration context implicates a taxpayer’s fundamental right to fair dispute resolution entrenched in s 34 of the Constitution (as quoted above. When viewed in this light, it is submitted that this chapter lays a firm foundation for the ensuing discussion in chapter four on the nature and extent of the constitutional right concerned. The appointment by the SARS goes against the independence, impartiality and neutrality principle required by the international law, local case law and legislation. Concerns have arisen that if the parties agree to the appointment of a facilitator from the SARS, the practice is to suit the SARS, instead of the taxpayer irrespective that it might be beneficial.<sup>134</sup> There is a notion among taxpayers that a facilitator who is an employer of the SARS has a conflict of interest. This as a result may cause taxpayers to doubt the legitimacy of the ADR process.<sup>135</sup>The ensuing discussion in chapter four is crucial in the broader context of this paper, having regard to the research questions posed above in chapter one.

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<sup>134</sup> Burt K ‘Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation’ available at <https://www.thesat.org.za/news/> (accessed 16 September 2023).

<sup>135</sup> Burt K ‘Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation’ available at <https://www.thesat.org.za/news/> (accessed 16 September 2023).

## CHAPTER FOUR: TAXPAYER'S RIGHT TO FAIR DISPUTE RESOLUTION

'The law is voluminous...[and] has inherent ambiguities. Many of the core concepts are not defined and have been left to the courts to develop. Some are virtually indeterminate. Many have no justification in policy terms. There are numerous disputes.'<sup>136</sup>

### 4.1 Introduction

In terms of s 34 of the Constitution, every natural and juristic person holds a substantive law right to have any dispute that can be resolved by the application of law resolved in a fair public hearing by a court, by an alternative impartial tribunal or forum.<sup>137</sup> For this right to be effective, it must be accessible to the widest array of persons.<sup>138</sup> The right in s 34 consists of procedural guarantees as opposed to particular legal entitlements.<sup>139</sup> It is now trite law that s 34 of the Constitution entrenches the right of everyone, including every taxpayer (both natural and juristic persons), to fair dispute resolution.<sup>140</sup> Undoubtedly, the ADR process discussed above in chapter three is a dispute resolution mechanism which is geared to resolving tax disputes by way of the application of SA's tax laws. A facilitator issues recommendations aimed at bringing an end to a tax dispute which is the subject of a pending appeal. If a facilitator's recommendation(s) is accepted, then a formal appeal hearing is averted, and the dispute is resolved by agreement between the taxpayer and the SARS. Merely because the recommendations are non-binding does not detract from the fact that the facilitator plays a quasi-adjudicative role. In practice, a recommendation is made only after a facilitator has considered all submissions made by both disputants, or their respective representatives. As explained above, a facilitator's recommendation plays a role when a Tax Court considers the question of legal costs at the end of an appeal hearing.

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<sup>136</sup> Waincymer J *Australia income tax: principles and policy* 2 ed (1991) 66.

<sup>137</sup> *Nedbank Ltd v Gqirana NO (and including various other cases)* 2019 (6) SA 139 (ECG) para 40.

<sup>138</sup> *Nedbank Ltd v Gqirana NO* para 42.

<sup>139</sup> Woolman S *Constitutional Law of SA* 2 ed (1996) 59-63.

<sup>140</sup> See *Metcash Trading Ltd and Others v Commissioner of the South African Revenue Service and Another* 2001 (1) SA 1109 (CC) (hereafter Metcash).

## 4.2 ADR as a dispute resolution ‘forum’ for purposes of s 34 of the Constitution

The question which must be answered for purposes of answering the research questions posed in chapter one is whether ADR before a facilitator is process that takes place in a ‘forum’ within the meaning of this term in s 34 of the Constitution. For the reasons given below, it is submitted that the answer to this question is in the affirmative.

Section 34 embraces the principles of natural justice which are at the core of the rule of law, namely, the right to a fair resolution of a dispute by way of the application of law. Enforcement of the right entrenched in s 34 ensures that a just and credible legal order is maintained in a democracy underpinned by a supreme constitution and its foundational values enumerated in s 1. The right in s 34 applies not only to court processes. It also applies to dispute resolution processes in tribunals and forums.<sup>141</sup> A Tax Court and Tax Board operating under the auspices of the TAA are tribunals where the right in s 34 operates for the benefit of affected taxpayers. A facilitator before whom an ADR process is undertaken is, however, not a tribunal envisaged by s 34. The ADR is a private dispute resolution mechanism that takes place in a ‘forum’ away from the public eye. In this sense, it is similar to the position applying to private conciliations, mediations and arbitrations.

Under the Labour Relations Act 66 of 1995 (‘LRA’), provision is made for the resolution of labour disputes at the Commission for Conciliation, Mediation and Arbitration (‘CCMA’).<sup>142</sup> Every Commissioner appointed to adjudicate a labour related dispute must attempt to resolve the dispute by first engaging in an informal process of conciliation or mediation.<sup>143</sup> A dispute is only referred to arbitration for resolution if it remains unresolved after conciliation or mediation has failed. To the extent that the CCMA renders conciliation or mediation services, it operates as a ‘forum’ for dispute resolution as envisaged by s 34 of the Constitution. However, to the extent that the CCMA renders arbitration services it

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<sup>141</sup> Cheadle H, Davis D and Haysom N ‘*South African Constitutional Law the Bill of Rights*’ (2002) 622 available at <http://worldcat.org> (accessed 10 March 2021).

<sup>142</sup> Section 133, Labour Relations Act 66 of 1995.

<sup>143</sup> Section 133, Labour Relations Act 66 of 1995.

is a 'tribunal' envisaged by this provision in the BOR. Consequently, every such process at the CCMA must satisfy the fairness element in s 34 of the Constitution.<sup>144</sup>

Similarly, the courts in *Lufuno Mphaluli and Associates v Andrews*<sup>145</sup> and *Telcordia Technologies Inc v Telkom SA Ltd*<sup>146</sup> held that s 34 of the Constitution apply to both public hearings and private arbitrations. This construction of s 34 accords with the spirit, purport and objects of the BOR discussed above in chapter two which serves to ensure that the right entrenched in s 34 operates very widely for the protection of a broad range of persons, including taxpayers engaged in dispute resolution under the TAA via ADR. Based on all these considerations, it is submitted that s 34 applies equally to private ADR processes occurring between the SARS and taxpayers under the TAA as it applies to tax appeals in civil courts and any dedicated tax appeal tribunal created by the TAA.<sup>147</sup>

### 4.3 The notion of 'fairness' in s 34 of the Constitution

Section 34 of the Constitution enshrines the right to fair resolution of a dispute, whether by way of a formal hearing or other dispute resolution mechanism.<sup>148</sup> Every such dispute resolution process must meet the hallmarks of fairness in every material respect, including procedure and duration. In *New Clicks South Africa (Pty) Ltd*, it was held that delaying a dispute resolution process was both unreasonable and unfair.<sup>149</sup> Section 165 of the Constitution reinforces the independence of courts. Section 165(2) stipulates that the courts are only subject and independent particularly to the Constitution and the law, that in their application they must apply impartiality without fear, favor and prejudice. As regards ADR, it is equally important that facilitators be independent of the SARS. Failing such independence, the entire process would be tainted.

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<sup>144</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 266 (hereafter *Sidumo*).

<sup>145</sup> 2009 SA 529 (CC) (hereafter *Lufuno*) para 69.

<sup>146</sup> 2007 (3) SA 266 (SCA) para 62.

<sup>147</sup> See *Metcash Trading Ltd* para 46.

<sup>148</sup> *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO and Another; Pharmaceutical Society of South Africa and 6 Others v Minister of Health and Another* 2004 ZAWCHC (20) (CC) para 257 (hereafter *New Clicks South Africa (Pty) Ltd*).

<sup>149</sup> *New Clicks South Africa (Pty) Ltd* para 265.



Section 34 of the Constitution deals with fairness as opposed to the substance of arriving at a decision.<sup>150</sup> The Constitution fails to ensure that litigants are protected against poor decision-making.<sup>151</sup> Section 34 embraces the idea that disputes would be resolved by procedures that are fair. In this context, 'fairness' necessitates that a process pertaining to the resolution of a dispute must be just and equitable.<sup>152</sup>

The right in s 34 applies to civil disputes and not to criminal proceedings.<sup>153</sup> As explained above, the right entrenched therein applies to all tax disputes between the SARS and any taxpayer, irrespective whether such dispute plays itself out in mediation, a tax court or tax board or ordinary civil court. Section 34 also applies in proceedings where taxpayers contest the constitutionality of any law (such as, rule 16).<sup>154</sup> All parties involved in a civil proceeding covered by s 34 is entitled to treatment that is fair and courteous, and they must be heard by an impartial adjudicator who adheres to the basic notion of fairness.<sup>155</sup> The right to fair dispute resolution includes the right to be given reasons for a decision or recommendation as it is a form of protection against subjective decision-making.<sup>156</sup>

Section 34 clearly promises the right to a hearing which meets the basic standards of fairness. However, even though fairness is a fundamental theme of the Constitution, what produces fairness differs on the nature of the proceedings.<sup>157</sup> The non-appearance of any reference to the right to a fair hearing was made mention in *Bernstein and Others v Bester*.<sup>158</sup> In this case, the applicants challenged the constitutionality of ss 417 and 418 of the Companies Act which allows the examination and summoning of any person as to

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<sup>150</sup> Croome B and Olivier L (2010) 264.

<sup>151</sup> *Lane and Fey No v Dabelstein* 2001 (2) SA 1187 (CC) para 4.

<sup>152</sup> Cheadle H, Davis D and Haysom N *South African constitutional law: The bill of rights* (2002) 618 available at [books.google.co.za](http://books.google.co.za) (accessed 20 March 2020).

<sup>153</sup> *S v Pennington* 1997 (4) SA 1076 (CC) para 46.

<sup>154</sup> Corder H & Van der Vijver L *Realising Administrative Justice* (2002) 98.

<sup>155</sup> *Mphahlele v First National Bank of South Africa* 1999 (2) SA 667 (CC) para 2. The court held that there is a concerning a challenge pertaining to the long-standing practice of the Supreme Court of Appeal of failing to give reasons for a decision and refusing leave to appeal' (hereafter Mphahlele).

<sup>156</sup> *Mphahlele* para 12.

<sup>157</sup> Section 9, Constitution.

<sup>158</sup> *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) para 106 (hereafter *Bernstein*).



the affairs of anyone failing to comply with the summons and to submit to examination.<sup>159</sup> At a most basic level, fairness ought to conform to a minimum standard of justice if it serves as a protection against injustice.<sup>160</sup> It is against this background and context that fairness at ADR encompasses equal access to this forum for all taxpayers, independence and impartiality of facilitators, the right to legal representation for taxpayers, the right to be heard (*audi alteram partem*), and the right to receive legal advice. Non-compliance of the wide range of rules on service may create biased restraint on the right to a fair dispute resolution process.<sup>161</sup>

#### 4.4 Conclusion

This chapter shows that taxpayers enjoy the benefits of the right entrenched in s 34 of the Constitution during ADR. The essence of this right is revealed in its text. ADR involves resolving disputes using arbitration, mediation or negotiation as opposed to litigation.<sup>162</sup> It is a forum where a dispute which is the subject of a pending appeal under the TAA may be resolved privately with the aid of a facilitator who, in the execution of his or her functions, applies the tax laws applicable to the dispute at hand. In every ADR, the appointed facilitator is bound by s 39(2) of the Constitution discussed above in chapter two. As a result, the facilitator is compelled to make recommendations after interpreting and applying any tax law relevant to the dispute. Every interpretive exercise contemplated here must occur through the prism of the BOR and its underlying values discussed in chapter two. Failure by a facilitator to comply with this mandatory constitutional duty would have the result of rendering the ADR process unfair by reason of its non-adherence to applicable constitutional norms and standards, including the rule of law. It is against this backdrop that the validity of rule 16(1)(a) discussed in chapter three above is to be tested. That pivotal issue will now be dealt with head-on in chapter five.

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<sup>159</sup> *Bernstein* para 1.

<sup>160</sup> Leach N *The Paralegal and the Right of Access to Justice in South Africa* (unpublished LLD thesis, University of Western Cape, 2018) 132 (hereafter Leach N (2018)).

<sup>161</sup> *Stopforth Swanepoel and Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* 2015 (2) SA 539 (CC) paras 25-31.

<sup>162</sup> Section 133, Labour Relations Act 66 of 1995.

## CHAPTER FIVE: CONSTITUTIONALITY OF RULE 16(1)(a)

'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'<sup>163</sup>

### 5.1 Introduction

The fundamental rights entrenched in the BOR are protected by the Constitution against unlawful interference.<sup>164</sup> The protection is ensured by, inter alia, the general limitation clause in s 36 of the Constitution. Therefore, its provisions play an important role for purposes of this paper. The discussions in chapters two to four laid the foundations for this chapter answering the twin research questions posed in chapter one above. Section 36 reads as follows:

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

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

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

The enquiry as to whether rule 16(1)(a) discussed above in chapter three passes muster under the Constitution must be tested through the provisions of s 36 quoted above. In this context, two key questions arise which this chapter seeks to answer as part of the broader process of answering the research questions formulated in chapter one. First, does the

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<sup>163</sup> Section 2, Constitution of the Republic of South Africa, 1996.

<sup>164</sup> Kruger L 'Retrospective legislation: Do taxpayers have any recourse?' (2014) 5(1) *Business Tax & Company Law Quarterly* 15.

appointment as facilitator for ADR purposes of a person associated with the SARS, whether as employee or otherwise, limit a taxpayer's right to fair dispute resolution entrenched in s 34 of the Constitution within the meaning of the word 'limit' in s 36(1) thereof? This chapter aims to argue that this question ought to be answered 'yes'. As a result, this gives rise to the second sub-question contemplated above, namely, does the limitation pass muster under s 36(1)(a) to (e) having regard to the balancing exercise to be undertaken? For the reasons given below, it is submitted that this question too ought to be answered in the affirmative.

## 5.2 Limitation on the right to a fair hearing

Section 36(1) of the Constitution fails to differentiate between any of the rights in the BOR. Its opening words, namely, '[t]he rights in the Bill of Rights', are sufficiently broad so that it encompasses all rights entrenched in the BOR.<sup>165</sup> Neither the text nor purpose of section 36 stipulates that any right in the BOR is excluded from its scope of operation.<sup>166</sup> Thus, it applies to s 34 discussed above in chapter four. In essence, s 36(1) enforces a common, uniform set of 'primary criteria'<sup>167</sup> applicable to the limitation of fundamental rights generally, including those rights with their own, internal (or built-in) limitations.<sup>168</sup> The appointment of a SARS official to mediate a tax dispute encroaches upon a taxpayer's right to a fair hearing entrenched in s 34 of the Constitution. This is so because, as explained above in chapter four, the fairness of the ADR process as a forum for the resolution of a tax dispute by application of relevant law is violated. To be valid, this restriction on the fundamental right in s 34 must survive scrutiny under s 36(1). This applies equally to subordinate legislation in rule 16 discussed above in chapter three. The fair public hearing right together with a public trial amount to the 'open justice' principle that enjoys Constitutional Court authorisation where the court held:

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<sup>165</sup> *Nortjie and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C).

<sup>166</sup> *FNB* para 110.

<sup>167</sup> *Phillips and Another v DPP, WLD and Others* 2003 (3) SA 345 (CC) para 20.

<sup>168</sup> Currie I & de Waal J (2014) 152 and Iles K 'fresh look limitations: Unpacking s 36' (2007) 23(1) *SAJHR* 68 91-92.

“Courts should in principle welcome public exposure of their work in the courtroom, subject, of course, to their obligation to ensure that the proceedings are fair. The values of accountability, responsiveness and openness underpin both the right to a fair trial and the right to a public hearing. The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honored standards of independence, integrity, impartiality and fairness.”<sup>169</sup>

An understanding of the meaning of ‘limitation’ as used in s 36(1) is a requirement to better the procedure involved in the practical operation of s 36(1). Every restriction of a fundamental right is only valid if it satisfies the prescripts of s 36(1). The word ‘limitation’ may, subject to its setting, accept various meanings.

A limitation can be justified based on s 36 (and is therefore constitutionally valid) or is unjustified (and is, therefore, unconstitutional). Accordingly, in s 36(1) ‘limitation’ refers to a ‘law’ that has the impact of restricting the protected sphere and content of a fundamental right. However, a measure that contradicts a fundamental right by leaving nothing of its core undamaged, is not a ‘limitation’. Reasonably, it is a suppression of the right and that kind of extent cannot pass constitutional muster.

For purposes of s 36(1), a limitation includes both an actual infringement of a fundamental right, and a threatened encroachment thereof. This is clear from the fact that s 38 permits legal proceedings to be launched by persons in cases where a right in the BOR is “threatened”. It is against the actual and threatened infringement of a fundamental right by any law of general application that s 36 of the BOR seeks to provide protection. Under s 38 of the BOR, a taxpayer has *locus standi* to contest a ‘law’ that either interferes with a fundamental right enjoyed by the taxpayer personally, or that threatens to impede a

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<sup>169</sup> *South African Broadcasting Corporation Limited v National Director Public Prosecution and Others* 2007 (1) SA 523 (CC) para 32.



fundamental right held by taxpayers generally on whose behalf or for whose benefit the applicant taxpayer challenges the 'limitation'.<sup>170</sup>

### 5.3 Section 36(1)(b) and (d) of the Bill of Rights applied to rule 16

When assessing the validity of the limitations imposed by rule 16 in relation to SARS' power to appoint the SARS official as a facilitator in ADR proceedings with an assessment through the prism of the BOR, the importance of the limitations' purpose in terms of s 36(1)(b) and the correlation between the limitations and their purpose in s 36(1)(d) are relevant considerations. Except a significant public purpose justifies the limitation as reasonable and justifiable it is not in line with s 36(1)(b).<sup>171</sup> Evaluating the importance of its purpose takes into cognisance of a normative evaluation of the complex balance to be attached to the rights protected by a limitation. In this context, purpose incorporates the benefit that can be achieved by limiting the right and the importance of achieving that benefit in an open and democratic society based on human dignity, equality and freedom.

The existence of a legitimate power fails to be the power that must be noted for balancing purposes, the importance of the purpose for which such powers and competencies are exercised must be determined.<sup>172</sup> The extent of a limitation must be balanced against its purpose, importance and impact to an extent that meets the standard set by s 36 of the BOR. The benefit flowing from allowing an infringement on a right that weighs more as compared to the loss than the infringement will entail, then the law will be recognised by the validity of the infringement.<sup>173</sup>

The limitation enforced by rule 16 will not, for purposes of s 36(1)(d) be regarded as reasonable and justifiable except a strong *lexus nexus* exists between the purpose of the law and the limitations imposed by it.<sup>174</sup> The larger the scope of the limitation, in terms of s 36(1)(c) of the BOR, the greater its purpose must be and the closer the relationship

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<sup>170</sup> *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 232 (CC) para 11.

<sup>171</sup> *Magajane v Chairperson, North West Gambling Board* 2006 (8); 2006 (10) BCLR (CC); 2006 (5) SA; 2006 (2) SACR para 65.

<sup>172</sup> Rautenbach (2001) 2255.

<sup>173</sup> *Midi Television (Pty) Ltd v DPP* (Western Cape) 2007 (3) all SA 318 (SCA) para 11.

<sup>174</sup> *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 para 72.



must be between the means chosen and the results to be achieved.<sup>175</sup> A restriction would be unjustifiable if its purpose is not aligned with the Constitution.<sup>176</sup> This forms part of the principle of legality in the rule of law requiring a limitation to be rationally associated with achieving or furthering a legitimate governmental purpose or the State interest that serves a wider public interest for the benefit of the public.<sup>177</sup> The legality of a limitation may be successfully challenged if an objector reveals the lack of a legitimate purpose or the lack of a rational connection between the scheme used and an advancement of a governmental purpose or State interest.<sup>178</sup> A rational review is an objective enquiry<sup>179</sup> that does not need to show that the provision under consideration is appropriate.<sup>180</sup> In terms of rule 16, the onus is bared by the State to reveal that there is enough *lexus nexus* between the SARS power to appoint a SARS official as a facilitator in ADR proceedings and taxpayers as the case may be and the prevalence of a legitimate purpose or State interest in the defined s 3 of the TAA. Without that connection, the limitations allowed by rule 16 does not pass constitutional muster.<sup>181</sup>

#### **5.4 Section 36(1)(c) of the Bill of Rights: The nature and extent of the limitation**

The 'nature and extent' of the limitation in s 36(1)(c) refers to the information on how the restriction is in terms of the conduct and interests that are protected by the rights. Section 36(1)(c) refers to the nature and the extent of the limitation which refers to the information on how the limitation is in terms of the interest and conduct that is protected by the right. The seriousness of the limitation is also associated with the methods and instruments used to limit the right.<sup>182</sup> The extent of the provision is a key determinant of the extent of the restriction that it imposes.

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<sup>175</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35.

<sup>176</sup> *De Klerk v Minister of Police* 2019 (2) ZACC; BCLR 1425 (CC); 2020(1) SACR (CC) para 123.

<sup>177</sup> *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (12) ZACC; 2006 (12) ZACC; 2007 (1) BCLR 47 para 100.

<sup>178</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 55.

<sup>179</sup> *Association of Regional Magistrates of Southern Africa v President of South Africa and Others* 2013 (7) BCLR (CC) para 50.

<sup>180</sup> *New National Party v Government of the Republic of South Africa and Others* 1999 (5) ZACC; 1999 (3) SA; 1999 (5) BCLR 489 para 24.

<sup>181</sup> Currie I & De Waal J (2005).

<sup>182</sup> Rautenbach IM (2014) 2255-56.

## 5.5 Section 36(1)(e) of the Bill of Rights: Less restrictive means to achieve aim

In circumstances when the law is broad in a way that is not aligned with the Constitution the principles of proportionality apply. Cognisance of whether other less restrictive constitutional means were available than that provided for in the law under review is determined by the less restrictive means of section 36(1)(e) of the bill of rights. The effectiveness of potential other measures is needed as an important prognosis.<sup>183</sup> Fundamental rights may not be infringed more than is reasonably required under section 36 if the harm caused thereby is equal to the State's gain from furthering its specific goal.<sup>184</sup> Justiciability and reasonability means that a restriction must be sensible in the manner of being appropriate to attain a particular goal. Furthermore, it means that any such object must not be conflicting with the principal's integral to a democratic and free society.

Since the rule 16 has been applied to s 36 and each element to the impugned provision has been applied, the limitation does not pass constitutional muster under s 36. The impugned rule 16 enforces 'limitations' under s 36(1), as a result of the powers endowed thereby that are exercised encroach on a taxpayer's fundamental right.

The ADR process does not meet the standard of fairness under common law in terms of section 34 of the Constitution.<sup>185</sup> When the law does not conform to the doctrines of the rule of law, then it is invalid 'law' for the purposes of s 36(1) and (2) of the BOR.<sup>186</sup> Even though Parliament's understanding of taxpayers' fundamental rights grants some guarantee that it conscripted the TAA within the analytical framework of s 36(1). This is no indicator that the impugned TAA provisions of SARS' power to appoint a SARS official as a facilitator in ADR proceedings passes constitutional muster.

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<sup>183</sup> Petersen N 'Proportionality and the incommensurability challenge in the jurisprudence of the African Constitutional Court' (2014) 30(3) *SAJHR* 405.

<sup>184</sup> Rautenbach IM (2014) 2234.

<sup>185</sup> Section 34, Constitution.

<sup>186</sup> *Bertie van Zyl (Pty) Ltd v Minister of Safety Security* 2010 (2) SA 181 (CC) para 100 (hereafter *Bertie van Zyl (Pty) Ltd*).

## 5.5 Conclusion

This chapter has shown that rule 16(1)(a) restricts the protected scope and content of taxpayers' fundamental right in s 34 of the Constitution. This chapter has shown further that the degree of infringement does not pass constitutional muster. Rule 16 restricts the affected right by limiting its reach in a way that is inconsistent with the public purpose it is intended to advance. Rule 16 is irrational and, for purposes of s 172(1)(a) of the Constitution, it must be declared unconstitutional 'to the degree of its inconsistency' with the Constitution. Rule 16 is not fair and it is invalid in an open and democratic society based on human dignity, equality and freedom. Consequently, the appointment of SARS officials as a facilitator does not pass constitutional muster under the limitation clause in s 36 of the Constitution.



## CHAPTER 6: THE APPOINTMENT OF FACILITATORS IN FOREIGN JURISDICTIONS IN COMPARISON TO SOUTH AFRICA

'The beneficial effect of the Canadian Charter and the South African Constitution is that they provide clear legal parameters within which the revenue laws must operate. This is essential for the guidance of the executive arm of any government as it seeks to maintain its revenue base in an international environment where taxpayers and other governments are trying to erode it for their own advantage. In desperate times, governments take desperate measures. In revenue matters, a bill of rights would ensure the operation of the rule of law.'<sup>187</sup>

In Australia, the government facilitation community of practice is open to anyone with an interest in facilitation in all Australian agents and departments.<sup>188</sup> Whilst in South Africa a facilitator must be a senior SARS official elected and appointed by all parties.<sup>189</sup> In Australia an ADR facilitator in tax matters who has no previous involvement in dispute is allocated to facilitate.<sup>190</sup> In South Africa a facilitator must have experience.<sup>191</sup> In Australia the ADR process provides for facilitative processes, determination processes and advisory processes.<sup>192</sup> However, South Africa on the other side only provides for facilitation.<sup>193</sup> The high number of amendment and undue complexity of tax laws can result to disputes.<sup>194</sup> Taxpayers in dispute ought to remember new rules especially of transitional covering disputes commenced under the existing rules but not yet finalised at

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<sup>187</sup> Bentley D *Taxpayers' Rights: An International Perspective* (1998) *Review Law Journal* 304.

<sup>188</sup> 'The Government facilitators community of practice (Australian) reviews the power of facilitation' 31 May 2022. available at <https://facpower.org> (accessed 8 October 2013).

<sup>189</sup> Luwes D 'New rules for resolving' available at <https://www.fanews.co.za>article> (accessed 08 October 2023).

<sup>190</sup> 'Dispute or object to an ATO decision' available at <https://www.ato.gov.au>.

<sup>191</sup> Luwes D 'New rules for resolving' available at <https://www.fanews.co.za>article> (accessed 08 October 2023).

<sup>192</sup> Mphahlele H and Erasmus H 'A Comparative analysis of the respective tax dispute resolution platforms' Available in South Africa and Australia to conclude on the adequacy of the South African tax dispute resolution platforms available at <http://www.saaa.org.za> (accessed 20 December 2021).

<sup>193</sup> Rule 16(2) 'Republic of South Africa' Vol 589(12) GG 11 July 2014 No 37819 (No 550) available at [www.sars.gov.za/pages.GovernmentGazette](http://www.sars.gov.za/pages.GovernmentGazette) (accessed 26 January 2021).

<sup>194</sup> Thuronyi V & Espenjo I How can an excessive volume of tax disputes be dealt with? Tax Law Note available at <https://www.inf.org>tdisputes> (accessed 05 June 2022).



the time the new rules are promulgated.<sup>195</sup> It is important that tax laws be technically well drafted, with diligence for exact language and policy that avoids legal distinction that results in problems of application.<sup>196</sup> Also, the intention of the tax dispute rules was to give structure to disputes, inspire the SARS and taxpayers, to resolve disputes and curtail dispute periods. However, the reality is different, taxpayers have a duty to manage disputes conducted according to the tax dispute rules or else the dispute process may take a very long time to be finalised.<sup>197</sup>

The ADR meetings in some instances have been held in the absence of the facilitator despite the facilitator being requested.<sup>198</sup> The reason granted by the SARS is to make the process more efficient and or cost effective. However, the parties must agree to the use of a facilitator.<sup>199</sup> The aforementioned practice can disadvantage the taxpayer.<sup>200</sup> The presence of the facilitator would be best in all ADR meetings. However, if it is the SARS idea that the aforementioned is not necessary in all cases as well as being inefficient in some cases, the SARS must provide a policy as to the types of cases in terms of which the SARS deems the absence of a facilitator be necessary, so as to ensure consistency in treatment of taxpayers.<sup>201</sup> Changeability and complexity of tax laws could be a challenge to totally avoid, but should be minimised.<sup>202</sup>

There are delays in the process of finalising agreements. This is at the time when there are requests for additional information from the taxpayer despite the fact that parties to

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<sup>195</sup> Kotze J (2015)252.

<sup>196</sup> Thuronyi V & Espenjo I How can an excessive volume of tax disputes be dealt with? Tax Law Note available at <https://www.inf.org>tdisputes> (accessed 05 June 2022).

<sup>197</sup> Kotze J (2015)252.

<sup>198</sup> Khaki S 'SARS Submission Dispute Process' available at <https://saicawebprstorage.blob.core.windows.net> (accessed 20 December 2021).

<sup>199</sup> Rule 16 'Republic of South Africa' Vol 589 (12) GG 11 July 2014 No 37819 (No550) available at [www.sars.gov.za/pages.GovernmentGazette](http://www.sars.gov.za/pages.GovernmentGazette) (accessed 20 December 2021).

<sup>200</sup> Khaki S 'SARS Submission Dispute Process' available at <https://saicawebprstorage.blob.core.windows.net> (accessed 20 December 2021).

<sup>201</sup> Khaki S 'SARS Submission Dispute Process' available at <https://saicawebprstorage.blob.core.windows.net> (accessed 20 December 2021).

<sup>202</sup> Thuronyi V & Espenjo I How can an excessive volume of tax disputes be dealt with? Tax Law Note available at <https://www.inf.org>tdisputes> (accessed 05 June 2022).



the ADR had reviewed and reached an agreement on the matter.<sup>203</sup> In addition to that the dispute rules fail to provide for such review in circumstances if a decision has already been taken in the dispute hearing.<sup>204</sup> Even though ADR procedure can play an important role in resolving tax disputes, they cannot be considered a replacement for litigation in all circumstances, as one of the fundamental roles of the state is to ensure the principle of legality of taxation and taxpayer's protection within the framework of public law.<sup>205</sup> SARS ought to provide guidelines in terms of when it would be convenient to request more information and perform an additional review of the matter by the committee before an agreement by the parties at the ADR meeting.<sup>206</sup> This would ensure consistency and transparency.

As a result of these core findings, it is recommended that South Africa should follow the example of Australia whose tax administration legislation is recognised globally as progressive. Indeed, elements of the TAA have been influenced by Australian legislation.<sup>207</sup> South Africa should develop into a transformative and contemporary concentrated service provider, just as the Australian Taxation Office (ATO).<sup>208</sup> One of the objectives of ATO is to avoid protracted tax disputes.<sup>209</sup> Furthermore, to ensure the aforementioned the ATO devised dispute management principles, techniques and strategies to avoid, resolve and minimise disputes collaboratively and cooperatively as

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<sup>203</sup> Khaki S 'SARS Submission Dispute Process' available at <https://saicawebprstorage.blob.core.windows.net> (accessed 20 December 2021).

<sup>204</sup> Rule 24 'Republic of South Africa' Vol 589 (12) GG 11 July 2014 No 37819 (No550) available at [www.sars.gov.za/pages.GovernmentGazette](http://www.sars.gov.za/pages.GovernmentGazette) (accessed 20 December 2021).

<sup>205</sup> Thuronyi V and Espenjo I How can an excessive volume of tax disputes be dealt with? Tax Law Note available at <https://www.inf.org>tdisputes> (accessed 05 June 2022).

<sup>206</sup> Khaki S 'SARS Submission Dispute Process' available at <https://saicawebprstorage.blob.core.windows.net> (accessed 20 December 2021).

<sup>207</sup> Johannes R *An analysis of the changes introduced by the Tax Administration Act to the dispute Resolution process and the effects thereof on the constitutional rights of taxpayers* (unpublished MCom Theses, University of Cape Town) 9.

<sup>208</sup> Burton M 'Interpreting the Australian income tax definition of 'ordinary income': ritual incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy? (2018) 16 e-JTR 80 available at <http://www.findanexpert.unimelb.edu.au> (accessed 09 January 2021).

<sup>209</sup> Mphahlele H and Erasmus H 'A Comparative analysis of the respective tax dispute resolution platforms' Available in South Africa and Australia to conclude on the adequacy of the South African tax dispute resolution platforms available at <http://www.saaa.org.za> (accessed 20 December 2021).

soon as possible.<sup>210</sup> In Australia, facilitators involved in tax dispute resolution undergo specific facilitation training through consultation and interaction with legal practitioners and professionals.<sup>211</sup> It is recommended that South Africa should adopt a similar practice for purposes of its ADR processes taking place in the realm of tax administration.<sup>212</sup> South Africa can also draw from (non-structural) design features especially the ADR activities that may be entirely utilised. Nevertheless, probable future research opportunities depend upon bringing commendations for further developing South Africa's tax dispute resolution system, ADR processes from other parts of the world. South Africa should learn from the Dispute System Design principles.<sup>213</sup>



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<sup>210</sup> Mphahlele H and Erasmus H 'A Comparative analysis of the respective tax dispute resolution platforms' Available in South Africa and Australia to conclude on the adequacy of the South African tax dispute resolution platforms available at <http://www.saaa.org.za> (accessed 20 December 2021).

<sup>211</sup> Burton M 'Interpreting the Australian income tax definition of 'ordinary income': ritual incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy? (2018) 16 *e-Journal of Tax Research* available at <http://www.findanexpert.unimelb.edu.au> (accessed 09 January 2021).

<sup>212</sup> Inland Revenue, 'Transforming Inland Revenue' (19 February 2018) available at <http://www.ird.govt.nz/transformation/?id> (accessed 09 January 2021).

<sup>213</sup> Inland Revenue, 'Transforming Inland Revenue' (19 February 2018) available at <http://www.ird.govt.nz/transformation/?id> (accessed 09 January 2021).

## CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

The appointment by the SARS goes against the independence, impartiality and neutrality principle required by the international law, local case law and legislation. Alarms have arisen that if the parties agree to the appointment of a facilitator from the SARS, the practice is to suit the SARS, instead of the taxpayer irrespective that it might be beneficial.<sup>214</sup> There is a notion among taxpayers that a facilitator who is an employer of the SARS has a conflict of interest. This as a result may cause taxpayers to doubt the legitimacy of the ADR process.<sup>215</sup> South Africa should follow the example of Australia whose tax administration legislation is recognised globally as progressive. Indeed, elements of the TAA have been influenced by Australian legislation.<sup>216</sup>

South Africa should develop into a transformative and contemporary concentrated service provider, just as the Australian Taxation Office (ATO).<sup>217</sup> One of the objectives of ATO is to avoid protracted tax disputes.<sup>218</sup> Furthermore, to ensure the aforementioned the ATO devised dispute management principles, techniques and strategies to avoid, resolve and minimise disputes collaboratively and cooperatively as soon as possible.<sup>219</sup> In Australia, facilitators involved in tax dispute resolution undergo specific facilitation training through consultation and interaction with legal practitioners and professionals.<sup>220</sup> It is

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<sup>214</sup> Burt K 'Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation' available at <https://www.thesat.org.za/news> (accessed 16 September 2023).

<sup>215</sup> Burt K 'Alternative Dispute Resolution: Improving outcomes SA Institute of Taxation' available at <https://www.thesat.org.za/news> (accessed 16 September 2023).

<sup>216</sup> Johannes R *An analysis of the changes introduced by the Tax Administration Act to the dispute Resolution process and the effects thereof on the constitutional rights of taxpayers* (unpublished MCom Theses, University of Cape Town) 9.

<sup>217</sup> Burton M 'Interpreting the Australian income tax definition of 'ordinary income': ritual incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy? (2018) 16 e-JTR 80 available at <http://www.findanexpert.unimelb.edu.au> (accessed 09 January 2021).

<sup>218</sup> Mphahlele H and Erasmus H 'A Comparative analysis of the respective tax dispute resolution platforms' Available in South Africa and Australia to conclude on the adequacy of the South African tax dispute resolution platforms available at <http://www.saaa.org.za> (accessed 20 December 2021).

<sup>219</sup> Mphahlele H and Erasmus H 'A Comparative analysis of the respective tax dispute resolution platforms' Available in South Africa and Australia to conclude on the adequacy of the South African tax dispute resolution platforms available at <http://www.saaa.org.za> (accessed 20 December 2021).

<sup>220</sup> Burton M 'Interpreting the Australian income tax definition of 'ordinary income': ritual incantation or analysis, when examined through the lens of early twentieth century linguistic philosophy? (2018) 16 e-Journal of Tax Research available at <http://www.findanexpert.unimelb.edu.au> (accessed 09 January 2021).

recommended that South Africa should adopt a similar practice for purposes of its ADR processes taking place in the realm of tax administration.<sup>221</sup>



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<sup>221</sup> Inland Revenue, 'Transforming Inland Revenue' (19 February 2018) available at <http://www.ird.govt.nz/transformation/?id> (accessed 09 January 2021).



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