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Tax governance: acts and decisions of the Commissioner that improve confidence in the South African Revenue Service

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Abstract: In South African society, the Commissioner for the South African Revenue Service (SARS) holds a high position of trust. The Commissioner is responsible for ensuring that SARS collects taxes efficiently and exercises all its powers reasonably. Otherwise, it may harm the tax ecosystem and the fiscus. Taxpayers' well-being is enhanced when the Commissioner's acts and decisions are perceived as reasonable, unbiased, and fair. It is also essential to consider the social contract between taxpayers and the tax authority when considering factors that shape views about SARS governance. These factors include SARS's perceived lack of action or a decline in tax morality. A lack of action by the Commissioner may indicate that SARS needs to manage public finances better. To promote taxpayers' willingness to pay taxes, the Commissioner must actively support the rule of law. This is insofar as tax legislation permits the punishment of non-compliant taxpayers, including fraudulent and corrupt tax activities. The Commissioner's failure to act may cause taxpayers to believe their taxes are wasteful expenditures. This article identifies and explores a résumé of facts about the Commissioner's acts and decisions against the backdrop of case law and online articles. This article examines how taxpayer trust and confidence can be built through the Commissioner's acts and decisions. This can impact trust in SARS. A doctrinal research methodology was employed using the qualitative research method to analyse key factors contributing to tax governance. LexisNexis and the South African Legal Information Institute electronic databases were used to identify applicable case law. The use of a variety of online resources and databases were accessed for information. Several court rulings are analysed through the proverbial "lenses of the judiciary". The study aims to educate taxpayers about the Commissioner's acts and decisions in several tax cases. Since South Africa's fledgling constitutional democracy was inaugurated in 1994, almost three decades have passed. At this time, the Commissioner's acts and decisions should reflect constitutional alchemy. SARS officials and the Commissioner are required by law to acknowledge taxpayers' fundamental human rights. Taxpayers experiencing "extenuating circumstances" deserve compassion, not punishment. SARS can build taxpayer confidence and trust through consistent and properly applied tax laws.

Keywords: Commissioner, Governance, SARS, Taxpayers, Trust.

Introduction

John X Merriman is considered the father of modern income taxation in South Africa (Hattingh, Roeleveld and West 2016) [1]. He was a remarkable parliamentarian with more than five decades of political experience. In 1914, James Bruce Moffat was appointed as the first South African Commissioner of Taxes after the publication of the original Income Tax Act, No. 28 of 1914 (Hattingh *et al* 2016) [2]. In his review of the 1914-1915 year of assessment, Moffat noted that much of the work was devoted to administering the Income Tax Act, of 1914, which cost 2% of income (Hattingh *et al* 2016) [3]. Tax statistics published by National Treasury and SARS for 2020-2021 indicate that SARS spent 0.72% of its income on revenue collection (National Treasury and SARS, 2022) [4]. Although this percentage may not reflect the entire picture, tax administrations worldwide are using technology and robotic process automation to reduce budgetary constraints (OECD 2022) [5]. Global tax administration is evolving, and tax commissioners must understand these changes to improve governance. They must also ensure that the public knows about these changes.

The first SARS Commissioner, Trevor van Heerden, served from 1997 to 1999 and played an integral role in its establishment (SARSa 2022) [6]. Trevor van Heerden was a skilled and dedicated civil employee with 40 years of service in SARS and Inland Revenue (SARSa 2022) [7]. Until SARS, taxes were administered by the Department of Inland Revenue and Customs and later by the Department of Finance (SARSb 2022) [8]. Previous case law shows the Commissioner's titles. These include *Kock v Commissioner for Inland Revenue*, 1954 [9], *Pretoria Town Council v Receiver of Revenue, Pretor*ia, 1931 [10] and *Trust Bank of Africa Ltd v Secretary for Inland Revenue*, 1977 [11].

Government officials' titles have always been crucial to identifying their responsibilities and positions in governance. In Roman times, an elected official with the "provincial governor" title could impose taxes. Rome's public officials did not collect taxes. The task was left to the *publicani* or "outsourced" tax farmers (Gutiérez and Martinez-Estellíer 2022) [12]. Today, SARS or senior SARS officials serve under the direction of the Commissioner. Their work is not "outsourced," but carried out under the Commissioner's direction. A thorough examination of factors that lend confidence in that ability is vital to determine whether the Commissioner can effectively control or direct SARS, regardless of the Commissioner's title.

Research objectives and contribution

Since the Commissioner must make decisions regarding all taxation matters, it is essential to understand his legal authority. This authority is derived from section 6 of the South African Revenue Service Act, 34 of 1997 (the SARS Act) [13]. This implies that all operational functions of SARS are under the control of the Commissioner and that he is responsible for decisions by SARS employees. This is necessary to address the main research question: how taxpayer trust can be built through the Commissioner's acts and decisions? To understand how the Commissioner and SARS officials exercise their discretionary powers, it is necessary to explore and describe instances – key factors – where such powers are exercised in tax matters. This is consistent with the exploratory-descriptive work using the qualitative approach in research.

These key factors do not function in isolation because of the social harm a person with the designation of "Commissioner for SARS" can cause to the tax authority employees. This is especially true when there is a "personal political agenda" by the Commissioner to exercise undue influence over certain functions within SARS (Daily Maverick 2021) [14]. The primary risk associated with a lack of confidence or trust in the Commissioner is not necessarily his skills and abilities – he has sufficient senior SARS officials to support him – rather, his personal and political agendas will eventually erode the trust between him and SARS employees, and in turn, with the public. This study contributes to the literature by identifying factors affecting tax governance at SARS. It also identifies how they affect confidence and trust in the tax authority.

Methodology

To conduct rigorous academic research, researchers must probe the existing body of knowledge and integrate outcomes and perspectives from several empirical findings to address a research question with a power and a research problem unmatched by any single study (Snyder, 2019) [15]. The researcher must also make the research process explicit (Ngwenyama, 2019) [16]. A descriptive research design, in this instance, therefore, explores characteristics that influence the Commissioner's governance abilities. From a legal perspective, more research is needed to support doctrinal studies by judges (Van Gestel and Micklitz, 2011) [17]. Academics can support these research efforts by conducting doctrinal research. An alternative and evolving method of studying law and legal phenomena may also be socio-legal research, which includes considerations of theory and methodology in social sciences (Banakar and Travers, 2005) [18].

This study followed focal principles of the doctrinal research methodology yet intersected with selected conventions of socio-legal research. In drawing on the strengths of the two traditions, the study posits more robust conclusions about social science phenomena yet is mindful of the framework of law (for example, how the acts and decisions of the Commissioner can improve confidence in SARS). Qualitative data is collected from primary sources, including legislation and case law. An analysis of court decisions is conducted based on legislation and the judges' *ratio decidendi* (reasoning). It is crucial, as the judiciary considers the facts and circumstances of each case to determine the truth (reality). Conference and working papers are explored as secondary sources. Kivunja and Kuyini (2017) [19] argue that the researcher must ensure that the data gathered and analysed – in this case, the qualitative data – provide the most relevant findings. Several databases were accessed to obtain relevant information, including observations related to case law and selected articles that explain crucial factors impacting tax governance. It included LexisNexis, SAFLII, GoogleScholar, Sabinet Online, SAGE Journals, SARS, ScienceDirect and SARS internet sites. The article's structure is based on factors highlighted in legislation, case law, working papers and conferences to explore the Commissioner's decisions and acts that influence trust in the Commissioner.

Key factors that influence trust in the Commissioner

Compared to the purpose described under section 2 of the Tax Administration Act, 28 of 2011 [20], the Commissioner for SARS must exercise his control over SARS effectively (strategically focused) and efficiently (operationally focused). It is implicit in the Commissioner's decision-making powers that his – or a senior SARS official's – decisions can be reviewed in the High Court (*Reed v Minister of Finance and Others*) [21]. The Tax Administration Act has no clear-cut definition or provision of a "decision." When evaluating the meaning of a provision, the Supreme Court of Appeal held in *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* at para 28 [22] that provisions embodied under the Tax Administration Act and relevant rules of interpretation must be taken into consideration.

A purposive approach must be considered when considering the meaning of a "decision" under the tax Acts. This is illustrated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* at para 18 [23] where judges must refrain from using "reasonable, sensible or businesslike" words instead of those used in the legislation. It is inferred that nothing else can be read into the meaning of "decision" except that it must be construed as self-explanatory, based on the purposive approach to legislation interpretation in this case. The right of a taxpayer to object to a specific SARS "decision" (for example, an assessment) or to have the decision reviewed by a High Court is based on the concept of just administrative action (section 33 of the Constitution of South Africa, 1996) (the Constitution) and access to the courts (section 34 of the Constitution). [24]. However, litigation is not a game and does not benefit the public purse – therefore, SARS cannot exhibit an "overly formalistic" approach in dealing with taxpayers (*Commissioner for the South African Revenue Service v FP (Pty) Ltd*, paras 64-65) [25].

Appointment and Commissioner's position

The Commissioner's appointment is regulated by the SARS Act [26]. The President of South Africa appoints the Commissioner to hold office as Chief Executive Officer of SARS for five (5) years (section 6 of the SARS Act, 34 of 1997). This period is also renewable under section 6 of the SARS Act. Besides regulating the appointment of the Commissioner, the SARS Act outlines the responsibilities of the Commissioner under section 9(1)(b), namely: (i) making decisions in the exercise of SARS' powers under the various tax Acts; (ii) ensuring SARS performs all its functions, and (iii) exercising any power in terms of any tax or revenue legislation. Most of his responsibilities include decision-making and discretionary powers.

South African society places trust in the Commissioner. This statement was confirmed in President Cyril Ramaphosa's suspension letter for former SARS Commissioner, Tom Moyane, dated 19 March 2018. Fabricius J reviewed the letter in *Moyane v Ramaphosa and Others* – at para 1 [27]. The letter said that SARS' credibility depends on public trust in the Commissioner. It also said that public finances would be compromised if the trust was absent. Thus, the Commissioner's credibility is imperative for tax morality which is implicit in the social contract between taxpayers and the state. Taxpayers want to believe their taxes are used effectively, ensuring satisfactory service delivery. When the results of fraud or corruption are reported, taxpayers' attitude toward SARS and the Commissioner is affected. The South African economy would suffer under poor leadership in the Commissioner, especially if public finances were compromised. This is because SARS oversees taxpayers' taxes, not the National Treasury.

Constitutional obligations imposed on the Commissioner

Section 195(1)(a) of the Constitution requires the Commissioner to have high professional ethics. [28]. SARS itself and its personnel must also maintain a high professional ethics standard. Ensuring SARS integrity is the Commissioner's responsibility and that of all designated officials. The President's discretionary power is to appoint and remove the Commissioner, as he has absolute authority as the head of government and the executive authority of the Republic of South Africa (section 85(1) of the Constitution). Rautenbach and Venter (2018:58) [29] cite the doctrine of separation of powers intended by the Constitution as a safeguard against abuse of power within one department (such as SARS or even a person). The doctrine of separation of powers, as outlined by Rautenbach and Venter (2018), defines a relationship between an Executive Authority (exercising and enforcing laws), a Legislative Authority (making, amending, and repealing laws), and a Judiciary Authority (deciding disputes in accordance with laws).

As the Commissioner for SARS, he has extensive accountability as he is entrusted with the responsibility of ensuring the collection of taxes from the public. He also serves the government's purpose, serving all its citizens. As a result, if the Commissioner's neglectful leadership compromises the country's finances, he will lose his employment contract. This is because the nation's interests outweigh its own. The court in *Moyane v Ramaphosa and Others* confirmed at para 42 [30] that even a highly regarded agency like SARS can sink into a mud lake under the Commissioner's leadership. Considering the corruption and fraud scandals reported in the public realm, many taxpayers question the Commissioner's role and responsibility in protecting taxpayers' money.

As an organ of the state, SARS functions within the public administration and, as a result, is exposed to the public interest. As President Cyril Ramphosa stated in his letter (19 March 2019) to the former Commissioner for SARS, because of his actions, SARS had been fundamentally compromised, and taxpayers had lost confidence in the tax authority [31]. Therefore, the Commissioner must safeguard the tax authority's credibility with the public. SARS' responsibilities, however, fall outside the public service (section 2 of the SARS Act) [32]. The rationale is improved strategic, social and economic intervention by the State and operational autonomy (National Treasury 2002) [33]. Aside from autonomy, the Commissioner and SARS are bound by the Constitution's basic provisions. This includes taxpayers' right to "just administrative action" (section 33 of the Constitution) [34]. All governing laws and public interests must be observed by the Commissioner. The Commissioner must perform all administrative functions conscientiously and lawfully (*Moyane v Ramaphosa and Others* at para 36) [35].

In his address to delegates on 24 March 2023 at the National Conference on the Constitution, President Ramaphosa said the following words about celebrating democracy and the Constitution: "Without the rule of law, our country is vulnerable to chaos, violence, rampant corruption, violation of human rights, persistent inequality and the collapse of state institutions" (Khoza 2023) [36]. To ensure SARS does not collapse as a state institution, the Commissioner must uphold the rule of law [37] and act through transformative leadership, transparency, and integrity.

Administrative and other governance obligations imposed on the Commissioner for SARS

Section 4(1) of the SARS Act defines SARS' functions as a government institution. Thus, the Commissioner's position must exemplify competent leadership, which means he does things correctly (integrity), provides transparency in the way things are done (ethically) and gains the trust of taxpayers and the larger public (excellent leadership). So, the Commissioner's position will influence SARS' stability as an organisation and taxpayer tax morality. Therefore, the Commissioner should be an apolitical appointment, as the Commissioner must not be answerable to any constituency and must inspire confidence across the tax-paying spectrum (National Treasury 2019) [38].

When Commissioner Kieswetter was appointed in 2019, the selection panel [39] considered the Nugent Commission appointment criteria. The appointment criteria recommended: (i) unblemished integrity; (ii) excellent leadership experience; and (iii) a person not aligned with any political affiliation. The importance of these criteria is underpinned by the future challenges faced by the Commissioner, renewed commitment to revenue collection and organisational change of SARS. As the new Commissioner inherited a dysfunctional enforcement tax regime due to maladministration, it was an inherent recommendation in the Nugent Report that the new Commissioner moves taxpayers and SARS toward a culture of compliance and a moral tax regime (Naidoo and Monteiro, 2019) [40].

In arriving at its recommendations, the selection panel noted that the appointed Commissioner should be able to lead "the SARS of tomorrow" (page 6 of the Report by the selection panel to the Minister) [41]. In the selection panel's recommendations for the new Commissioner, several factors were accentuated by the selection panel, namely: the Commissioner's management style should leave an engrained mark on the character of SARS; there should be decisive and transformative leadership by him; there is a need to develop a succession plan and pipeline for future leaders; to balance the interests of all stakeholders; possess a strong orientation to technology and innovation; to have excellent interpersonal skills; a talent for managing difficult stakeholder relationships and the ability to resist external pressures. These recommendations similarly indicate two special practices – succession planning and leadership development – to create an enduring process for managing talent by getting the right skills in the right place (Conger & Fulmer, 2003) [42].

The Organisation for Economic Co-operation and Development (OECD) Forum on Tax Administrations, held at Santiago, Chili, identified several building capacity programmes for tax commissioners (2019), which include a strong global tax administration, human resource needs in digital transformation (institutional change), gender balance in leadership positions, maturity models (for determining quality and maturity levels of a tax function), e-learning, knowledge-sharing platforms (for more effective collaboration between tax administrations) and tax inspectors without borders programme [43]. It is implicit that tax commissioners of tomorrow will be technology and innovation-driven to meet digital transformation requirements. This influences tax administrations' information-gathering powers as tax commissioners have also become information owners.

The Commissioner's responsibility to ensure SARS functions as an effective tax administration

Edward Kieswetter, who was appointed as SARS Commissioner in 2019, stated there is a need "to broaden the tax base by developing a single view of the taxpayer across tax types" (Tax Talk, 2019) [44]. This administration simplification aligns with the tax commissioners' decision at the OECD Tax Administration Forum in Santiago, Chile.

This plight of moving tax agencies towards a global tax administration system also indicates Commissioner Kieswetter's new vision and strategy. This vision is of SARS being “connected” to the world and operating in line with the fourth industrial revolution globally [45]. Besides the fact that SARS operations require updated skilling of its officials to be proficient in technology and big data analyses, there is also the need to transform the culture within the organisation, such as heightened respect, professionalism, and high performance and service delivery, according to Commissioner Kieswetter. SARS ultimately must fulfil its Higher Purpose of enabling the government to build a capable state ensuring the well-being of all its citizens (SARS 2020) [46].

According to Commissioner Kieswetter, an inclusive approach to rebuilding trust and improving morale starts within the organisation (SARS) itself and is not about making big promises to staff but by doing many small things such as “there can be no once-off wonders” (Naidoo and Monteiro 2019) [47]. One example of revitalising and strengthening confidence within the organisation is the revised recruitment policy to recruit senior employees who left SARS for various reasons (SARS 2019) [48]. In this regard, several matters were highlighted, including the redesign of the Large Business Centre, the re-established Illicit Trade capacity unit in the Enforcement Division, the re-established Compliance Unit, the re-constitution of the High Court Litigation Unit, a stabilised Information Technology (IT) division, a re-established Integrity Unit and the resourcing of required critically skilled resources for the IT Division (SARS 2019) [49].

The Commissioner should make every reasonable effort to ensure the proper administration of South African tax legislation, including appointing suitably qualified officials. One example would be specific actions reserved for senior SARS officials only and designated by the Tax Administration Act. These actions include duly deemed authorisation – section 11(2), the right of appearance in court proceedings – section 12(1), surreptitious or veiled audits – section 42(5) or referrals for criminal investigations – section 43(1) [50]. Above and beyond rebuilding SARS trust, improving taxpayer and revenue recovery is a top priority. Ultimately, the Commissioner can affect taxpayer morale through effective tax governance practices.

Is the Commissioner’s decision final in tax matters?

SARS performs all its functions, such as revenue collection locally and abroad, under the direct control of the Commissioner. The Commissioner is not a judicial person; his powers and responsibilities are derived from the SARS Act. As per section 9(1)(a) of the SARS Act, the Commissioner remains responsible for ensuring SARS fulfils all its functions (see SARS Act). Since the Commissioner must deal with many cases in which he must exercise his discretion *bona fide*, courts will only intervene if the Commissioner misuses his discretion (*ITC* 1295 42 SATC 19) [51]. A competent court may, however, review the Commissioner's decision as he is not a judicial officer.

Although a Tax Court will hear a matter de novo (afresh), it was questioned by the taxpayer whether a review of a decision taken by the Commissioner could be heard in a Tax Court (*South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* at para 22) [52]. The court's view in *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service*, that it could review a decision by SARS, was interpreted differently in *Commissioner for the South African Revenue Service v FP (Pty) Ltd* [53], which noted that amended section 105 of the Tax Administration Act has in effect changed the review procedure. A taxpayer can dispute a decision by SARS in a Tax Court – for example, an assessment – unless a High Court orders otherwise (this implies proceedings for a review of the legality of a SARS decision are brought in the High Court – see Cloete J’s discussion in *Commissioner for the South African Revenue Service v FP (Pty) Ltd* at paras 42 to 62). “Extenuating circumstances" allow a High Court to determine otherwise and hear a tax matter *de novo* (afresh). At para 3 of *Pacific Solar Technologies (Pty) Ltd v Commissioner of the South African Revenue Service* [54], the Supreme Court of Appeal held that since the High Court had heard the tax dispute *de novo*, a formal determination and order needed to follow its dismissal. It must be shown that a good case for departing from the default rule must be made in the proper exercise of the High Court's discretion after considering all the facts before it, as the Supreme Court of Appeal held in *CSARS v Rappa Resources (Pty) Ltd* [2023] ZASCA 28 at para 24, [55]. It does not follow that merely saying to the Tax Court that the dispute is not covered by section 104 or over which it lacks jurisdiction is sufficient. It is up to the High Court to decide whether a direction under section 105 of the Tax Administration Act should be issued.

The Tax Administration Act states that the Commissioner must control SARS' administrative functions (section 3). One of SARS's main administrative actions is to gather information about persons to ensure they comply with their tax obligations – section 3(2)(a) of the Tax Administration Act. SARS must keep taxpayer information confidential as the right to taxpayer privacy supersedes the right to taxpayer information requests (SARS) [55]. If arbitrarily applied, it could impede privacy. Due to taxpayers' privacy rights, SARS’ discretion must be exercised with care. As this implies cautious decision-making, SARS administrative functions must be fulfilled under the Commissioner's guidance. International tax treaties must give effect to international tax standards under the Commissioner's direction

– section 3(3) of the Tax Administration Act. The Commissioner, therefore, acts as the "governor" of various tax laws, both domestically and internationally.

As chief executive officer of SARS, the Commissioner must ensure an efficient administration system while enforcing discipline throughout the organisation. As the Commissioner must administer diverse tax Acts, all his decisions are carried out through SARS officials' powers. Their conduct binds the Commissioner. As an accounting officer, the Commissioner is responsible for all income and expenditure of SARS – section 9(3) of the SARS Act. Importantly, section 9(3)(d) obliges the Commissioner to implement the Public Finance Management Act (the PMFA) [56] at SARS, emphasising government finance accountability. Therefore, unless a competent court directs otherwise, there is a consensus that the Commissioner has the final discretion in tax matters as a duly elected official.

In the Commission of Inquiry into Tax Administration and Governance final report (Nugent Commission Report 2018) [57], Nugent J at, para 48, notes the critical importance of sound leadership and governance at the tax authority "that demands leadership of the highest integrity and character, deeply conscious of their duty to account for their management of SARS". This reflects the need for a person who possesses the leadership qualities to lead a large organisation such as SARS, who will act on national challenges timeously, who lives by an ethical Code and who will always answer for his management of the tax authority (Nugent Commission Report 2018 at para 52) [58].

One example of a national challenge faced by the Commissioner was his contesting in the court of the Public Protector's application to acquire a subpoena to obtain taxpayer information, citing that "there is a fundamental issue of taxpayer confidentiality which I am compelled to uphold" (Khumalo 2019) [59]. Protecting taxpayer confidentiality is an example of a principled standard consistent with human rights and infused with constitutional alchemy. The Commissioner is thus obliged to refer a constitutional dispute to judicial resolution where no settlement is otherwise conceivable. Unless a court's jurisdiction is involved, the Commissioner has the final say on tax matters.

The Commissioner: leadership and governance

SARS' credibility as an innovative tax authority depends ultimately on the Commissioner's trustworthiness and ethical decision-making (McCarthy and Parent 2015) [60]. The Commissioner must uphold the values of the Constitution in all matters of taxation, including taxpayer confidentiality (*Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Services and Others*) [61] and should portray this through excellent leadership in a rapidly changing environment. SARS officials depend on the Commissioner for leadership, organisational change, and future needs, such as IR4 and digital technology advancements. Auto-assessment for taxpayers was implemented in 2021 and represents a reimagined tax authority (SARS 2021) [62]. Thus, the Commissioner's acts and decisions reflect SARS' institutional image. The next generation of Commissioners will need diverse leadership abilities, including gender-balanced, technology and innovation-focused, succession creators, and information owners.

Acting on behalf of the Commissioner

The Commissioner may delegate in writing duties to SARS officials with the appropriate skills (section 10(1) of the SARS Act). This does not divest the Commissioner of responsibility related to SARS officials' powers and duties (section 10(2) of the SARS Act). Even the SARS (Advisory) Board, which acts as an advisory and consultative body for both the Minister of Finance and the Commissioner, cannot interfere with the powers and functions of the Commissioner regarding the exercise of his discretion under the tax Acts. For example, section 13(3)(b) of the SARS Act stipulates that the Commissioner's discretion regarding tax legislation or agreements solely rests with him, and the Board cannot interfere. The SARS Board was established under section 11 of the SARS Act. The SARS Board advises the Commissioner concerning the administration of the revenue collection system. In accordance with section 22 of the SARS Act, the Commissioner, as an accounting officer, accounts for all tax authority income and expenditures. This includes all revenue collected by it.

It is common cause that the Commissioner's position is not ordinary. The SARS Act confers extraordinary discretionary powers on the Commissioner. This, in turn, requires outstanding decision-making skills from officials because of the pivotal role SARS fulfils regarding the South African economy and the public at large. As shown before, the Commissioner shapes and refines SARS' status as a tax authority. If it is in the public interest of the Commissioner to restore SARS' credibility, he must rely on SARS officials to act in good faith. This can only happen when SARS officials receive the appropriate training, and all material facts are known before making a decision.

A culture of accountability and values must be maintained by SARS officials who have been delegated written authority by the Commissioner. This is in addition to upholding the Constitution. This is reflected in section 49(2)(b) of the Public Finance Management Act [63], section 7 of the Tax Administration Act, and sections 50-55 of the SARS Code of Conduct [64]. Among the requirements in the Code of Conduct adopted by SARS in 2013 are mutual trust and respect between officials and taxpayers. This Code of Conduct requires all SARS officials to act within the ambit of the law and enforce taxpayers' rights. The Code sets an even higher standard of conduct for the Commissioner.

As determined by the Constitutional Court in *Public Protector v South African Reserve Bank* [65], public officials are expected to behave better. In this case, it upheld an earlier decision by the High Court that the Public Protector, because of acting in bad faith (*mala fides*) and a grossly unreasonable manner, was ordered to pay costs in her capacity (para 207) [66]. The Constitutional Court affirmed the High Court's determination that the Public Protector had not been honest in her dealings with the South African Reserve Bank. As the evidence presented in court indicated, her conduct constituted an abuse of office (as she intended to undermine the independence of the Reserve Bank). Courts may reprove unacceptable, vexatious or manifestly inappropriate acts by officials whose good faith is required. They may also impose cost orders for persons not coming to court with "clean hands".

What is critical to understand about officials like the Commissioner is that the constitutional duty bestowed upon them must be exercised impartially and without fear, favour or prejudice (section 196(2) of the Constitution) [67]. Importantly, this analogy relates to the Public Protector's office, the Commissioner, and other public officials (*Absa Bank Limited and Others v Public Protector and Others* at para 126) [68]. Decisions can have financial, work-related, and jurisdictional implications for the officials involved and must be properly substantiated. Sufficient consultation is therefore required when a serious decision is taken or when an official acts. In certain circumstances, a public official may be held personally liable for costs (*South African Social Security Agency v Minister of Social Development (Corruption Watch (NPC) RF Amicus Curiae* at para 37) [69]. In the case of *Public Protector v South African Reserve Bank*, it came to 15% of the Bank's legal costs. Furthermore, the legal duties assigned to the Commissioner in a tax Act must be exercised by him. Still, he may delegate the duties in writing to SARS officials – sections 6 and 10 of the Tax Administration Act [70].

Arbitrary acts by officials

In *Nondabula v Commissioner: SARS and Another* [71], SARS arbitrarily dealt with the taxpayer with potentially catastrophic results for the taxpayer, his family, and his employees. Jolwana J stated in para 25 "…but most importantly the values enshrined in the Constitution were not observed by the first respondent". Having failed to comply with its own legislation, the High Court held that SARS acted unlawfully and unconstitutionally. The taxpayer was not provided with reasons or legal grounds for its decision. It is trite in law that no punishment can be administered without legal grounds. As those reasons are a prerequisite for section 96 of the Tax Administration Act to become effective, SARS failed to observe the same law it was entrusted to uphold.

SARS officials' disregard for the law is accompanied by judiciary discontent. Knowledge and interpretation of tax administration legislation and prompt and direct follow-up with the taxpayer by the relevant SARS auditor (official) would have settled the matter effectively and efficiently. Jolwana J held that because SARS exercises public power, it is accountable for exercising it lawfully. If SARS had withdrawn funds from the taxpayer's bank account, it would have shut down the taxpayer's business and shown a complete disregard for legality. As a public administrator, SARS failed to comply with its obligations to promote all the fundamental human rights and values advocated in the Constitution.

Public authorities must have sufficient evidence before exercising administrative powers. Therefore, a rational decision taken by an administrative authority would meet the Constitution's administrative obligations. It could be about the law or the facts before it. Although the principle of legality governs all public power, an official must exercise discretion in good faith. In *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* [72], the court determined what acting in good faith means. The taxpayer mistakenly relied on tax experts' expert advice and, although mistaken in their opinion, they responded fairly. The court at para 48 held that the taxpayer had acted in good faith as there was no intention to deceive SARS. The court stated there was merit in pardoning the taxpayer for relying on expert advice. It remitted the SARS penalties in their entirety.

Remedies for aggrieved taxpayers

The matter may be reviewed if a taxpayer believes that SARS' discretion was not exercised in good faith. However, deciding on the appropriate course of action will depend on the judiciary's view. This was addressed by the Constitutional Court in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* at para 18 [73]. The Constitutional Court determined that the answer lies somewhere between the Constitution of South Africa, 1996 (section 33) and the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) [74], which originated from section 33.

The taxpayer or their representatives must determine the grounds on which the decision by SARS was based and whether the advanced grounds are reasonable. The exercise of discretion by the Commissioner and his officials is not unfettered, and an objective approach should be adopted to review the “subjective” discretion of SARS officials. This must be based on reasonable grounds as per SARS (*Wingate-Pearse v Commissioner for the South African Revenue Service*) [75]. The taxpayer or their representatives may initiate a request for reasons in the prescribed form and manner.

Conclusion and recommendations

The paper’s methodology respected focal doctrinal traditions, yet, given the nature of the societal ecology in which the Commissioner must act, it also employed elements of an advancing socio-legal convention. As such, the conclusions and recommendations are framed on these more holistic assumptions and offer a modest methodological contribution to the body of knowledge covered by the remit of this paper.

Government officials' titles can help identify their responsibilities and positions in governance. This study demonstrates that the Commissioner for SARS is more than a title. His name inspires confidence in SARS as a tax authority. The main research question of how taxpayer trust can be built through the Commissioner’s acts and decisions was asked at the onset of the study. Key factors affect the Commissioner and SARS’ governance and should be considered. The primary risk associated with a lack of confidence or trust in the Commissioner is his personal and political agendas. This will erode the trust between him and SARS employees. The Commissioner’s authority must be strategically focused and operationally implemented.

The SARS Act regulates the Commissioner's appointment. The Commissioner's responsibilities include using SARS’ powers effectively and efficiently. This includes ensuring that SARS performs all its functions and enforces tax legislation. Most of the Commissioner’s responsibilities are decision-making and discretionary. The South African economy would suffer under poor leadership in the Commissioner's position, especially if public finances were compromised. Section 195(1)(a) of the Constitution requires the Commissioner to have high professional ethics. As the Commissioner, he has extensive accountability to ensure that SARS collects taxes from the public. He also serves the government's purpose, serving all its citizens. The Commissioner's role ultimately is to govern SARS effectively and protect taxpayers' money. It must uphold the rule of law to ensure that SARS does not collapse as a state institution. The Commissioner must act through transformative leadership, transparency, and integrity. The Commissioner can influence SARS' organisational stability and taxpayers' tax morality. As a result, the Commissioner should be appointed without regard to politics.

SARS must properly manage talent by getting the right skills in the right place. Tax commissioners of tomorrow will have to be technology and innovation-driven to meet digital transformation requirements. Likewise, more women in leadership positions in tax administrations could represent different leadership styles. The Commissioner should make every reasonable effort to ensure the proper administration of South African tax legislation. Ultimately, the Commissioner can ensure taxpayer morale through effective governance practices. The Commissioner must refer a constitutional dispute to judicial resolution where no settlement is conceivable. Unless a court’s jurisdiction is involved, the Commissioner has the final say on tax matters. Thus, the Commissioner's acts and decisions reflect SARS' institutional image. The next generation of Commissioners will be succession creators and information owners.

The Commissioner may delegate duties in writing to SARS officials with the appropriate skills. The SARS Board advises the Commissioner concerning revenue collection. What is critical to understand about officials like the Commissioner is that the constitutional duty bestowed upon them must be exercised impartially and without fear, favour or prejudice. In *Nondabula v Commissioner: SARS and Another,* the Commissioner arbitrarily dealt with the taxpayer with potentially catastrophic results not only for the taxpayer and his family but also for his employees. SARS failed to promote the taxpayer’s fundamental human rights advocated in the Constitution.

Kirchler, Hoelzl, and Wahl (2008) [76] identify two factors that affect tax compliance – decision-making powers and trust in the tax authority. Public authorities must have sufficient evidence before exercising administrative powers. Taxpayers can object to a SARS decision allowed under the tax Acts. If a taxpayer believes that SARS’ discretion was not exercised in good faith, the matter may be reviewed by a competent court. Using effective governance practices and enforcing tax laws consistently, SARS officials can lessen "strong-arm tactics." In addition to eroding taxpayer confidence in the fairness of SARS processes, they also undermine trust. Taxpayers experiencing "extenuating circumstances" determined by the courts deserve compassion, not punishment, as they deal with extreme circumstances. A reliable and consistent enforcement of tax laws will ultimately build trust and confidence among the public.

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