



**“‘PAY NOW, ARGUE LATER’ - A LEGAL ANALYSIS OF THE
OBSERVANCE OF TAXPAYERS’ RIGHTS IN ZIMBABWE”**

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ABSTRACT

This study seeks to critically examine the powers given to the Zimbabwe Revenue Authority (herein referred to as 'ZIMRA') in terms of the 'pay now, argue later' principle *vis-à-vis* the taxpayers' rights entrenched in the Constitution of Zimbabwe. This dissertation examines the nature and content of the 'pay now, argue later' rule in terms of section 36 of the Value Added Tax Act and Section 69 of the Income Tax Act *vis-à-vis* the taxpayer's right to access the court as guaranteed in section 69 of the Constitution of Zimbabwe. The study further makes a comparative analysis with South Africa. This study establishes that the 'pay now, argue later' rule *prima facie* infringes the taxpayers right to access of courts and justice as the rule obliges the taxpayer to pay the amount of tax assessed prior to the full airing of the issue before a court of law. The rule prevents the affected taxpayer from obtaining interlocutory relief to suspend the obligation to pay the tax assessed to be due and payable. However, this study concludes that the 'pay now, argue later' serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any tax dispute therefore it constitutes a justifiable limitation of the right to access the court. Be that as it may, the writer is of the view that section 36 of the VAT Act and section 69 of the Income Tax Act need to be reformed. The fact that the said provisions do not provide guidelines on how the Commissioner must exercise his or her discretion leaves a lot to be desired.

List of Acronyms

Commissioner	Commissioner General for the Zimbabwe Revenue Authority
SARS	South African Revenue Authority
TAA	Tax Administration Act
VAT Act	Value Added Tax Act
ZIMRA	Zimbabwe Revenue Authority

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CHAPTER ONE

INTRODUCTION

1.0 Introduction

This study seeks to critically examine the powers given to the Zimbabwe Revenue Authority (herein referred to as 'ZIMRA') in terms of the 'pay now, argue later' principle *vis-à-vis* the taxpayers' rights entrenched in the Constitution of Zimbabwe. ZIMRA is given wide powers in terms of the law to enable it to collect tax efficiently and effectively from the taxpayers. On the other hand, the taxpayer is afforded enumerable fundamental human rights and freedoms in terms of the Constitution of Zimbabwe. The said rights and freedoms may be limited only in terms of a law of general application and the said limitation(s) should be reasonably justified within the context of a democratic society that is based on equality and openness. The study examines whether a satisfactory balance can be achieved between these two competing interests. The study further advances the argument that the 'pay now, argue later' principle potentially infringes upon the taxpayers' rights guaranteed in the constitution.

1.1 Background of the study

Taxation is not a novel practice, instead, it has been practiced worldwide and evolved over a long period. ¹ It is imperative to note that the levying of tax is indispensable for any government to ensure that it achieves its socio-economic objectives.² Tax can only be levied in terms of legislation. It is imposed by the law. There is no common law tax. Section 298(2) of the Constitution of Zimbabwe expressly provides that no taxes can be levied save for situations where the same is provided for in the Constitution or a certain act of parliament.³

¹ V Davies & R Friedman *Egypt Uncovered* (1998) 13

² B. J Croome *Taxpayer's Rights in South Africa*, (2010) 1, see also T. Blackshield & G Williams, *Australian Constitutional Law & Theory-Commentary and Materials* 3rd (2002)100

³ Section 298(2) of the *Constitution of Zimbabwe (Amendment No.20) Act 2013*. However, the Constitution of Zimbabwe does not give a comprehensive definition of tax as it defines tax to include a duty, rate, levy or due. For this study, the definition of tax which was given by the Supreme Court of Zimbabwe in the case of *Nyambirai v NSSA & Ors* 1995(2) ZLR 1(S) will be used. Gubbay CJ after reference to many foreign cases defined tax as follows; "It is a compulsory and not optional contribution, imposed by the legislature and other competent public authority, upon the public as a whole or a substantial sector thereof and the revenue from which is to be utilised for the public benefit or to provide a service in the public interest." *Constantinides v Electricity Authority of Cyprus* (1982) 2 CLR 798.

To enable the efficient and effective collection of taxes in Zimbabwe, section 3 of the Zimbabwe Revenue Authority Act creates ZIMRA⁴. ZIMRA can be understood to be a corporate body that is capable at law of suing or being sued in its own name. ZIMRA is mandated to carry out responsibilities including collecting duties and taxes from the taxpayers and also enforcing the payment of taxes in Zimbabwe⁵ for the benefit of the Consolidated Revenue Fund created in terms of the Constitution.⁶ Almost all taxes and duties ought to be paid into the Consolidated Revenue Fund save for collections expressly excluded by their founding statutes⁷. ZIMRA being an administrative authority is therefore obliged to act lawfully, reasonably and in a fair manner.⁸

To enable ZIMRA to collect taxes efficiently and effectively from taxpayers, ZIMRA is given certain wide powers which includes but are not limited to the ‘pay now, argue later’ rule, powers to garnishee taxpayers accounts and to appoint a third party to enable the efficient and effective collection of tax. The ‘pay now, argue later’ rule entails that the taxpayers’ obligation to pay the tax assessed by ZIMRA and the right of ZIMRA to receive and recover any tax, additional tax, penalty, or interest chargeable in terms of the law shall not, unless the Commissioner so directs, be suspended by an appeal or pending the decision of a court of law. The pay now and argue later principle also extends to the position that, once a tax is assessed and levied by ZIMRA, it ought to be settled. This is regardless of the merit or lack thereof of the tax payer’s argument. This is a position which has made ZIMRA invincible in our jurisdiction, in turn making it easier for ZIMRA’s officials to abuse such position for their own personal gain. Further, the taxpayer’s obligation to pay the tax assessed to be due and payable remains intact despite the noting of an appeal or objection to a court of law.

The colloquial ‘pay now, argue later’ rule is entrenched in section 36 of the Value

⁴ Revenue Authority Act (Chapter 23:11)

⁵ Section 4 of the Zimbabwe Revenue Authority Act (Chapter 23:11). See also *Tregers Industries (Pvt) Ltd v Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H),

⁶ Section 302 of the *Constitution of Zimbabwe (Amendment No.20) Act, 2013* provides for the establishment of and Consolidated Revenue Fund into which all taxes, fees and borrowing are to be paid together with any other forms of government revenues. In the case of *Care International in Zimbabwe v ZIMRA & 2 Ors* SC 76/17 the Supreme Court of Zimbabwe held that ZIMRA as an agent of the state in collecting taxes is afforded the same protection afforded to the government of Zimbabwe and officials of the government of Zimbabwe hence despite ZIMRA being a body corporate capable of being sued or suing in its name, one cannot sue ZIMRA before giving a six days’ notice in terms of the State Liabilities Act.

⁷ Examples of these include the NSSA levy levied by the National Social Security Authority, Standard Levy, and Manpower Levy payable to the Zimbabwe Manpower Development Fund.

⁸ Section 68 of the *Constitution of Zimbabwe (Amendment No.20) Act, 2013* as read with section 3 of the *Administrative Justice Act* imposes on every Administrative Authority an absolute duty to act lawfully, reasonably and in a fair manner.

Added Tax Act and section 69 of the Income Tax Act.⁹ Section 69 of the Income Tax Act is worded in a similar manner with section 36 of the VAT Act. Section 36 of the VAT Act provides as follows,

The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section *forty-six*) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest calculated as provided in subsection (1) of section *thirty-nine*.¹⁰

The ‘pay now and argue later’ rule is however not applied in isolation. This is owing to the notion that having the ‘pay now and argue later’ rule stand on its own would render it largely insignificant. In terms of the VAT Act, the Commissioner was afforded powers meant to ensure payment and enforcement of the ‘pay now and argue later’ rule. To start with, in the event that the taxpayer has failed to meet his or her obligation to pay the tax assessed to be due and payable, the Commissioner is empowered to file a statement that is indicative of the outstanding taxes as well as penalties and interest accrued on the taxes with the clerk of court in any competent national court.¹¹ It is important to note that such a registration with the clerk of court by the commissioner of a certified statement has an effect similar to that of a civil judgement. However, the same falls short of being an actual civil judgement in real sense due to the fact that it does not relate to a tax dispute between a taxpayer and the commissioner.¹² Be that as it may, it does have the effect of a civil judgement in that the property of the taxpayer could be attached by way of writ in order to ensure payment of the tax assessed to be due and payable notwithstanding the noting of an appeal.

Apart from the above, ZIMRA is also permitted by the law to appoint a third party to act as an agent to enforce the payment of the tax assessed to be due and payable.¹³ Section 48 (2) of the VAT Act allows ZIMRA the power to appoint banks or any officer of the public service to act as agent of ZIMRA for the collection of tax. The writer

⁹ Section 36 of the Value Added Tax (*Chapter 23:12*), and section 69 of the Income Tax Act.

¹⁰ Section 36 of the Value Added Tax Act.

¹¹ Section 40 of the Value Added Tax Act.

¹² *Capstone 556(Private) Limited v CSARS 2011 ZAWCHC 297*.

¹³ Section 48(2) of the Value Added Tax.

submits that the logical construction of section 48(2) of the VAT Act is that payment of the tax assessed to be due and payable through the tax payer's agent is through a garnishee placed against any account that the tax payer in questions hold with an agent.

In the case of *ZIMRA v Packers International Private Limited*¹⁴, the Supreme Court of Zimbabwe made reference to the 'sharp end of the Value Added Tax system' which is section 48 of the Act that provides for the appointment of an agent in a bid to ensure that tax can be collected effectively and efficiently. The court further remarked that the 'pay now, argue later' rule serves to ensure that the Commissioner's rights to be paid as well as to collect any tax assessed as being due and payable are safeguarded. Conversely the court acknowledged that the rule is not in place to protect the rights of the taxpayer.¹⁵

The 'pay now, argue later' rule secures the obligation of the taxpayer to pay the tax unless the Commissioner decides to exercise his or her discretion to suspend the payment of the tax in favour of the taxpayer. The writer is of the view that section 48 and section 36 of the VAT Act are inextricably linked as they are meant to ensure efficient and effective collection of tax.

Be that as it may, notwithstanding the importance of levying tax and the need for ZIMRA to collect efficiently and effectively from the taxpayers, the tax assessed to be due and payable, the writer notes that, of equal importance is that every taxpayer's rights entrenched and guaranteed in the Constitution need to be protected. This is so if regard is had to the fact that the relationship between the taxpayer and the government or ZIMRA is imposed by the law.¹⁶ The relationship is not consensual.

The relationship between the taxpayer and the government was aptly described by Croome in his book. The learned author observed the following;

If taxpayers enter voluntarily into a relationship with the fiscus there might be some justification in arguing that they must simply submit to the Commissioner of the South African Revenue Authority and accept that they have few powers.¹⁷

To buttress the above point, reference is made to the Supreme Court decision in the

¹⁴ *ZIMRA v Packers International (Private) Limited SC 28/16.*

¹⁵ *ZIMRA v Packers International (Private) Limited SC 28/16*

¹⁶ Chapter 4 of the *Constitution of Zimbabwe (Amendment No.20) Act, 2013* which provides for fundamental human rights and freedoms of every person.

¹⁷ B.J Croome *Taxpayers' Rights in South Africa* (2010) 1.

case of *Nyambirai v National Social Security Authority & Ors.*¹⁸ The court reasoned that tax is recognised as being a compulsory rather than an optional contribution which is imposed by operation of the law as well as other competent public authorities on the public or population as a whole or a substantial sector of the same and the revenues from the tax is to be applied for the benefit of the public or provision of public service in the best interest of the public.¹⁹ This means that the payment of the tax is imposed by the law. The writer concludes that the relationship between the taxpayer and the government is not voluntary. It is therefore important that checks and balances be put in place to curtail the powers exercised by ZIMRA. ZIMRA being an administrative authority is subject to section 3 of the Administrative Justice Act (Chapter 10:28) (AJA). The taxpayers must be granted their AJA powers and Constitutional rights when dealing with ZIMRA. To whom much is given, much is expected. Because ZIMRA infracts many of the citizens' rights, it must be rendered accountable and ought to adhere to superior standards.

Based on the above considerations, the writer is of the view that it is of paramount importance that the taxpayer's rights are preserved and protected including by ZIMRA as a body. Apart from the above, one can note that there appears to be an imbalance between the powers conferred upon ZIMRA in the quest to efficiently and effectively collect the tax assessed to be due and payable, and the need to protect the taxpayers' rights from the mighty ZIMRA. The above view is in tandem with that of the Davies Tax Committee where it stated thus;

It is common cause that, in balancing the powers and rights of tax authorities against those of taxpayers, there is a disproportionate bias of power and entitlement in favour of tax authorities. This is largely justified to ensure compliance, mainly by taxpayers who would rather not pay their fair share of taxes. This bias overrides taxpayers' rights, which are in most instances unknown to the taxpayers.²⁰

From the above, it is clear that the fiscal laws in Zimbabwe, in particular the colloquial 'pay now, argue later' rule entrenched in section 36 and section 69 of the VAT Act and the Income Tax Act respectively favours ZIMRA at all costs in the quest to efficiently collect and retrieve the tax assessed to be due and payable from taxpayers. This is despite the fact that it is severely detrimental to the taxpayers. It is against this background, that this study examines the taxpayers' rights *vis-a-vis* the powers given to ZIMRA in terms of the 'pay now, argue later rule'. In doing this the

¹⁸ *Nyambirai v National Social Security Authority & Anor* 1995(2) ZLR 1(S)

¹⁹ *Constantinides v Electricity Authority of Cyprus* (1982) 2 CLR 798.

²⁰ D Davies & D Tickle & T Legal, Report on Tax Administration (2017) 63, available at www.taxcom.org.za. Accessed 29 July 2022.

writer will attempt to establish if a balance between ZIMRA powers and the taxpayers' rights can be achieved.

1.2 Problem Statement

Unlike, an ordinary civil debt, the payment of which is suspended through noting of an appeal and until the debtor's liability has been established by a court of law, ZIMRA is allowed at law to collect a tax amount assessed to be due and payable, notwithstanding an objection or appeal against the assessed amount.²¹ This may possibly plunge the taxpayer into some serious financial difficulty. Apart from the above, the remedies at the taxpayer's disposal do not seem to provide any meaningful protection to the taxpayer because the taxpayers' obligation to pay the amount assessed to be due and payable and the right of ZIMRA to recover the tax assessed to be due and payable remains intact. This means that ZIMRA is entitled and empowered to proceed with the collection of disputed amounts of the assessed tax despite the taxpayer lodging an objection or noting an appeal. Further, there appears to be an imbalance and unjustified inequality between the powers conferred to ZIMRA in its quest to collect the tax assessed to be due and payable and the need to protect taxpayers' rights from the mighty ZIMRA.

The 'pay now, argue later' rule entrenched in terms of section 36 of VAT Act and section 65 of the Income Tax Act, *prima facie* infringe upon the right of taxpayers' to access the court²², as this rule establishes that a taxpayer must pay the amount of tax assessed to be due and payable before disputing the said amount. It is the writer's view that the 'pay now, argue later principle' as provided for under our law negates the taxpayers' rights afforded and entrenched in terms of the Constitution of Zimbabwe, in particular the right to access the court.

The fundamental human rights and freedoms afforded to taxpayers in terms of the constitution may be limited only in terms of law of general application if such limitation is reasonably justified in a democratic society based on openness and equality.²³ Furthermore, it is imperative to note that section 36 of the VAT Act and section 65 of the Income Tax Act do not contain any guidelines and factors on how ZIMRA must exercise discretion against a taxpayer. This is a lacuna in the law which needs to be addressed. Furthermore, in as much as it is important to give ZIMRA the power to efficiently and effectively collect the tax assessed to be due and payable, it is equally important that the rights of the taxpayer be sufficiently protected. The writer will endeavor to establish whether a successful balance can be achieved

²¹ *CIR v NCR Corporation of South Africa (Private) Limited* 50 SATC 9.

²² Section 69(3) of Constitution of Zimbabwe (Amendment No.20) Act 2013.

²³ Section 86 of the *Constitution of Zimbabwe (Amendment No.20) Act, 2013*.

between these competing interests.

1.3 Research objectives

The main objective of this study is to critically examine the taxpayers' rights *vis-a-vis* the powers given ZIMRA in terms of the 'pay now, argue later' rule.

The sub-objectives are;

- i. To discuss the rationale behind the 'pay now, argue later' rule.
- ii. To evaluate the contemporary legal framework on 'pay now, argue later' rule as entrenched under section 36 of the VAT Act and section 69(1) of the Income Tax Act with particular focus on the taxpayers right to access an independent court of law for a remedy as guaranteed in the Constitution of Zimbabwe.
- iii. To make a comparative study with the South African jurisdiction and draw comparisons on how the 'pay now, argue later' rule is applied in South Africa.
- iv. To proffer recommendations on what can be done to achieve balance between the need for ZIMRA as an agent of the State to collect taxes effectively and efficiently and the need for protection of the taxpayers' rights.

1.4 Research Questions

The research questions of this study will include inter alia the following;

- i. What is the rationale behind the 'pay now, argue later' rule.
- ii. What is the state of the contemporary legal framework on 'pay now, argue later' rule as entrenched under section 36 of the VAT Act and section 69(1) of the Income Tax Act with particular focus on the taxpayers right to access an independent court of law for a remedy as guaranteed in the Constitution of Zimbabwe.
- iii. How does the application of the 'pay now, argue latter' rule in Zimbabwe compare to the South African jurisdiction and draw comparisons on how the 'pay now, argue later' rule is applied in South Africa.

- iv. What can be done to achieve balance between the need for ZIMRA as an agent of the State to collect taxes efficiently and the protection of the taxpayers' rights?

1.5 Research Methodology

This study shall make use of a desktop approach. It shall use both primary and secondary sources of the law such as legislation and case law. It shall analyze the relevant provisions of the bill of rights and the legislation governing the levying of a tax in Zimbabwe. An analysis of the 'pay now, argue later' rule will be carried out. Decided case law, articles, books shall be consulted.

1.6 Limitations of the Study

The current study focused mainly on the powers that are afforded to ZIMRA with regards to the 'pay now, argue later' rule as well as the effect of the rule on the rights of the tax payer which are espoused in the Constitution. It is argued by the current study that the 'pay now, argue later' rule does infringe upon the rights of taxpayers to access national courts and be afforded a fair hearing. Other procedures and practices that are afforded to ZIMRA to enable it to collect taxes efficiently and effectively in Zimbabwe for example the arms' length rule and rules relating to the reopening of assessments and garnishing of taxpayers' bank accounts to enforce payment and collection of tax just to mention a few, are specifically excluded from this study, however, they will be related to in passing as these principles are inseparable with the 'pay now, argue later' rule.

1.7 Significance of the Study

There has been an increase in friction and tensions between the taxpayer and ZIMRA. This is largely owing to evidence in history that shows that tax payers often find it hard to successfully litigate in matters relating to tax disputes. This study will help in contributing to the body of knowledge on the taxpayers' rights vis-à-vis the 'pay now, argue later' principle. It will also help in guiding the judiciary in interpreting the law, informing policy and law reform, concerning the tax administration matters and protection of taxpayers' rights in Zimbabwe.

1.8 Chapter Synopsis

Chapter 1

This chapter serves as an introductory chapter that comprises of the introduction,

study background, statement of the problem, study objectives, research methodology as well as limitations of the study. Other aspects that are dealt with in the first chapter include significance of the study together with a brief synopsis of all the chapters of the study. It is the road map of this dissertation.

Chapter 2

The second chapter is a general discussion that relates to origins and significance of the 'pay now, argue later' rule in the country. The second chapter will look at why the 'pay now, argue later' carries so much importance and why the country is adamant about keeping it in our fiscal laws. The chapter begins with a general discussion of the importance of ZIMRA's efficient and effective tax collection. The significance of the Constitution will be emphasized in this chapter. Following that, there will be a brief discussion of the Bill of Rights in the chapter. Finally, this chapter will look at how to go about challenging a violation of one of the rights enshrined in the bill of rights.

Chapter 3

Chapter 3 addresses the 'pay now, argue later' rule as applied in terms of section 36 of the Value Added Tax²⁴ and section 65 of the Income Tax Act.²⁵ The rule as applied in terms of the aforementioned law is fully b n considered and in the same vein, a comparative analysis of the 'pay now, argue later' rule and the general rules applicable in civil appeals is undertaken in a bid to expose the retrogressive nature of the 'pay now, argue later' rule to the taxpayers entrenched rights. In order to gain a better understanding of the rule, the aforementioned chapter undertakes an examination of the practical application of the 'pay now, argue later' rule as provided for in section 36 of the Value Added Tax. This chapter will also consider the constitutionality of the 'pay now, argue later' rule.

Chapter 4

This chapter gives a comparative analysis of South Africa. The chapter will consider the 'pay now, argue later' rule as it has been applied prior to and after the coming into force of the Tax Administration Act.²⁶ This chapter will also consider how the South African Constitutional Court approached and considered the constitutionality of the 'pay now, argue later' in the case of *Metcash Trading Limited v Commissioner for the South African Revenue Service*.²⁷ The South Africa jurisdiction was elected as a

²⁴ Section 36 of the Value Added Tax (*Chapter 23:12*)

²⁵ Income Tax Act (*Chapter 23:06*)

²⁶ The Tax Administration Act 28 of 2011

²⁷ *Metcash Trading Limited v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 (CC)

case study due to the known fact that both South Africa and Zimbabwe are Roman-Dutch law jurisdictions. There are therefore a plethora of similarities between the two jurisdictions. Further, South Africa has also developed an advanced tax law system which balances the interests of the fiscus whilst protecting the taxpayers' rights.

Chapter 5

This chapter contains a summary of the findings of the study. It concludes by providing recommendations on the way forward in as far as the 'pay now, argue later' rule is applied vis-vis the taxpayers' rights as entrenched in the Constitution.

1.9 Conclusion

The chapter served as an introductory chapter that comprises of the introduction, study background, statement of the problem, study objectives, research methodology as well as limitations of the study. Other aspects that are dealt with in the first chapter include significance of the study together with a brief synopsis of all the chapters of the study. It is the road map of this dissertation. The next chapter provides a general discussion that relates to origins and significance of the 'pay now, argue later' rule in the country.

CHAPTER TWO

THE CONSTITUTION OF ZIMBABWE AND TAXPAYERS' RIGHTS

2.1 Introduction

The previous chapter served as an introductory chapter that comprises of the introduction, study background, statement of the problem, study objectives, research methodology as well as limitations of the study. The current chapter provides a general discussion that relates to origins and significance of the 'pay now, argue later' rule in the country. Zimbabwe as a country is a constitutional democracy²⁸ and this means that the Constitution of Zimbabwe reigns supreme to all the laws of the land and that all the other laws cannot be in conflict with the Constitution of Zimbabwe but should rather be consistent with the same. This chapter seeks to highlight the importance of the Constitution of Zimbabwe and the bill of rights. To put this chapter into perspective, the chapter commences by providing a general discussion on the importance of effective collection of tax by ZIMRA. The importance of the Constitution will be highlighted. Moreover, the chapter provides a brief discussion on the bill of rights which is included in the chapter. Finally, the chapter also considers the procedure one may follow in a bid to challenge any sort of infringement of their rights as espoused in the bill of rights.

2.2 The importance of the effective and efficient collection of tax

Taxation is one of the means used by a government to achieve its socio-economic and political objectives. It is integrated with the monetary policy, international economic relations, and other policies to create an ideal mix that ensures proper, efficient and effective management of the economy.²⁹ Beginning of every monetary year, the Minister of Finance in Zimbabwe presents the National Budget for the government

²⁸ See the case of *Smith v Mutasa N.O & Anor* 1989 (3) ZLR 183 (S) wherein Dumbutchena CJ had this to say with regards to the supremacy of the Constitution of Zimbabwe,

"The constitution is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution, but even then Parliament cannot step outside the bounds of authority prescribed to it by the constitution. The difference between the power of the House of Commons and our House of Assembly is that the Constitution of the United Kingdom does not permit the Judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the constitution and all legislation. In Zimbabwe, the judiciary is the guardian of the constitution and the rights of the citizens."

²⁹ H.L Heibroner, *The making of the Economic Society 5th Edition* (1975)161.

before the national assembly wherein he announces the fiscal and monetary policies of the government.³⁰

The levying of tax is important for economies as it helps them in surviving through the financing of government spending and allowing governments to successfully undertake socio-economic and political objective-oriented projects. In analysing the objectives of taxation, it has often been stated that taxation aims to facilitate payment for expenditure by governments, to ensure that the economy runs as smoothly as possible and to enable government to effectively reallocate and redistribute their resources are the main objectives of taxation.³¹ Furthermore, one of the most important and outstanding justifications for the imposition and levying of taxes by governments globally is that taxation is a necessary sacrifice that is made with a view to attain the envisaged and desired kind of society.³² Croome states that the government of the day needs a lot of money to finance its administration and meet specified socio-economic and political obligations imposed by the Constitution, therefore it becomes necessary for the government of the day to levy some taxes on its people either directly or indirectly.³³

The writer is of the view that individuals and entities that are entitled and actually enjoy benefits from the state should be the ones upon whom tax is levied and therefore it is indispensable that the levying and collection of the tax be properly administered to ensure that taxpayers comply with the law so that the government can use the revenue collected to meet the obligations imposed by the Constitution.

To buttress this point, reference is made to the case of *ZIMRA v Packers International (Private) Limited*.³⁴ In that case the Supreme court stated as follows with regards to the importance of efficient collection of tax and the ‘pay now, argue later’ rule;

From an economic point of view, the provisions of the Value Added Tax Act are meant to ensure a steady, accurate and predictable stream of revenue for the *fiscus*. These provisions are an embodiment of the principle “Pay Now Argue Later”, suggesting that an appeal would not have the effect of suspending payment. *The principle is aimed at discouraging frivolous or spurious objections and ensures that the whole system of tax collection in the country maintains its efficacy.* This serves the fundamental public purpose of ensuring that the *fiscus* is

³⁰http://www.zimtreasury.gov.zw/index.php?option=com_phocadownload&view=category&id=67&Itemid=793 accessed on 13th June 2022 at 1624hrs.

³¹ R C Williams, *Income Tax in South Africa: Law & Practice 4th Edition* (2003) 3.

³² R C Williams, *Income Tax in South Africa: Law & Practice 4th Edition* (2003) 3.

³³ B J Croome *Taxpayers’ Rights in South Africa*, (2010) 1.

³⁴ *ZIMRA v Packers International (Private) Limited* SC 28/16 p4-5

not prejudiced by delay in obtaining finality in any dispute.³⁵

From the above, it can be seen that it is essential that the levying and collection of tax be properly administered to ensure that taxpayers comply with the law so that the government can use the revenue collected to meet its obligations. Notwithstanding, the express and clearly legitimate purpose and justifications for taxation as highlighted above, the practice of taxation has proven to be a contentious issue as evidenced by the diverging opinions and views on the same issue in different disciplines including ethics, politics and economics.³⁶ Concerning the same, Albert Einstein held the view that incomes tax was the hardest thing to understand in the world.³⁷ In the same vein, Benjamin Franklin was equally candid as he made statements to the effect that nothing around the globe can be purported to be certain and inevitable save for death and taxes. The writer is of the view that to levy a tax is to confiscate the taxpayer's money. To that end, the learned author William is of the view that the 'pay now, argue later' rule is probably the most aggressive, invasive of the taxpayers' rights.³⁸

Given the above views, there is little doubt that ZIMRA and the tax payers are more often than not at loggerheads. It would seem as if payment of taxes as well as the collection of the taxes assessed by ZIMRA to be due and payable is identical to a battle that pits ZIMRA on one and looking to extract as much tax as possible from taxpayers and taxpayers on the other seeking to ensure that they pay as little in taxes as possible all the time. The strive by the taxpayer to pay little or no taxes at all is known as tax avoidance or evasion.³⁹ In our law avoidance is legitimate even though there are rules and laws in place meant to flag tax evasion.⁴⁰

A further observation is that it is common cause that the society in which we live is not an ideal one where taxpayers are always compliant and diligent so as to fulfil their tax obligations. As such the powers that the constitution and the law confers on

³⁵ *Zimra v Packers International (Private) Limited SC 28/16 p4-5.*

³⁶ R C Williams, *Income Tax in South Africa: Law & Practice 4th Edition* (2003) 3.

³⁷ R C Williams, *Income Tax in South Africa: Law & Practice 4th Edition* (2003) 3.

³⁸ R.C Williams, 'The pay now-argue later rule festers in income tax system' South African Institute of Tax Professionals Technical 2 December 2011, Available at <http://www.the.sait.org.za>, accessed 15 August 2018.

³⁹ In the case of *IRC v Duke of Westminster (1936) AC 1*, the learned Lord Tomlin had this to say concerning the legality of tax avoidance or tax evasion;

"Every man is entitled if he can so arrange his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioner of Inland Revenue or his fellow taxpayers maybe of his ingenuity, he cannot be compelled to pay an increased tax."

⁴⁰ Section 98 of the Income Tax Act.

ZIMRA despite being construed as draconian are important in ensuring that tax collection undertaken by ZIMRA is undertaken in an effective and efficient manner. Payment of taxes assessed by the body to be due is thus important and has to be ensured and enforced accordingly. Hence the need for the powers conferred on the tax collector.

2.3 The Constitution of Zimbabwe

The Constitution of the Republic of Zimbabwe is recognised as the supreme law of the land, and all laws must be consistent with the constitution. The supremacy of the Constitution of Zimbabwe is entrenched under section 2 of the Constitution of Zimbabwe.⁴¹ The Constitution unequivocally sets out the rights and obligations of each individual and entity that exists and subsists while also clearly defining the structure that the government should take. Section 2(2) of the Constitution provides as follows.

The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.⁴²

This is an important provision which reiterates the superiority of the national Constitution over all else and is binding on all entities and beings in the republic. Suffice to say, both ZIMRA and taxpayers are effectively bound by the national constitution which confers on all some rights and obligations. This means that regardless of the importance of effective and efficient levying and collection of tax, the fiscal statutory provisions will at no point in time be construed or applied in a manner that makes them immune to the provisions of the Constitution of the Republic. All fiscal statutes must conform to the Constitution and its normative standards. In the premises, the writer submits that ZIMRA as an agent of the state is subject to the constitution of Zimbabwe and must religiously abide to its provisions, in particular the fundamental human rights and freedoms guaranteed in the Constitution. As such, ZIMRA has no legal or moral standing upon which the rights of individuals can be infringed for the benefit of the state in terms of tax collection. Rather whatever activities are undertaken by ZIMRA in line with its mandate need to be within the bounds of the Constitution.

⁴¹ Section 2(1) of the Constitution of Zimbabwe provides as follows, “This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of inconsistency.”

⁴² Section 2(2) of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

2.4 The Bill of Rights

The Constitution of the Republic of Zimbabwe makes important provisions through the Bill of rights.⁴³ Pursuant to this, Section 44 of the Constitution confers on the national government or the state an obligation to the effect that the state and every individual, every institution of the state, every juristic person should at every level strive to promote, protect, respect and fulfil the rights of rights as well as freedoms that are set out in the Chapter of the Constitution.⁴⁴ This essentially means that the rights that are provided in the Bill of rights should not be limited without any justification. The Bill of Rights does stipulate how the government and its respective organs are to interact with the citizens of the country by way of vertical application of the Constitution. The Constitution further provides that every person in the country, every state institution at all levels and juristic persons ought to protect, respect, promote and fulfil all the freedoms and tights that are set out in the Bill of Rights.⁴⁵ Thus the Bill of rights sets out specific rights for all people living in Zimbabwe, the taxpayers included and the rights include the right to justice which is exercised through the courts, access to which should be guaranteed for all.⁴⁶

The Bill of rights in the context of the current study is cast as serving to provide the necessary balance between the powers of the state and the rights of its citizens. Both are equally important and should be exercised in good measure and responsibly. In this regard, the Constitution confers on the state certain powers which the state can exercise while on the other hand, the Bill of Rights serves to check these powers and how they are exercised. The Bill of rights essentially guides the state on how these powers are exercised with a view to ensure that these are not exercised in a manner that is in violation of the rights of citizens while also placing on the state the duty to protect, promote, fulfil and respect the right of all citizens.⁴⁷ Should the state fail to comply with these obligations, it would have acted ultra-vires the supreme law of the land and its acts will be considered unlawful.⁴⁸

2.5 Enforcement of fundamental human rights and the constitutional approach

Section 85 of the Constitution provides for the enforcement of fundamental human rights and freedom. Section 85 of the constitution provides that any person whose fundamental human rights and freedoms have been breached or infringed have

⁴³ Chapter 4 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁴⁴ Section 4 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁴⁵ Section 44 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁴⁶ Section 69 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁴⁷ Section 44 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁴⁸ Currie and De Waal *the Bill of Rights Handbook Sixth Edition* (2013)23.

further rights to recourse and as such can approach the courts and present their case alleging that their fundamental freedoms or rights as provided for in the Chapter have been, is likely to be or is being infringed and when that happens and the case warrants it, the court will grant the most appropriate relief including compensation award or declaration of the rights concerned.⁴⁹ Expounding on the impact of the section 85 of the Constitution, the Constitutional Court of Zimbabwe in its very first judgement post the 2013 Constitution had this to say in the case of **Mwarire v Mugabe N.O & Ors**⁵⁰;

*Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.*⁵¹

The Constitution of Zimbabwe incorporates in section 85 the fundamental constitutional maxim known as, ‘*ubi jus, ibi remedia*.’⁵² To support the above, in the case of **Mudzuri & Anor v Minister of Justice, Parliamentary and Legal Affairs N.O**⁵³ the Constitutional Court of Zimbabwe remarked that the right to a remedy provided for under section 85(1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined in Chapter 4. The right to a remedy enshrined in section 85(1) constitutes a constitutional commitment inherent in Chapter 4 as a whole.⁵⁴ In the case of **Meda v Sibanda & Ors**⁵⁵ the Constitutional Court had this to say about section

⁴⁹ Section 85 of the Constitution of Zimbabwe (Amendment No.20) Act, 2013 provides as follows;

“85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely—

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests, of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

⁵⁰ CCZ01/2013.

⁵¹ Mwarire v Mugabe NO & Ors CCZ01/2013

⁵² Loosely translated to mean that where there is a right there must be a remedy. It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded

⁵³ CCZ 12/15 p12

⁵⁴ *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O & Ors* CCZ 12/15.

⁵⁵ *Meda v Sibanda & Ors* 2016(2) ZLR (CC) p 236B.

85 of the Constitution.

It is clear from the reading of section 85(1) of the Constitution of Zimbabwe that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the court to be seized with the matter. The purpose of this provision is to allow litigants access to the courts on question of violations of fundamental human rights.

However, it should be noted that where parliament has passed a piece of legislation to fulfil a right guaranteed in the bill of rights, the embodiment of the right in the constitution will cease to be the prime mechanism for its enforcement.⁵⁶ This is known as the principle of subsidiarity which is closely related to the doctrine of constitutional avoidance and the doctrine of ripeness.⁵⁷ This means that a taxpayer is barred from approaching the Constitutional Court alleging that his or her right to access the court has been violated prior to approaching the special Income Tax Court.

2.6 Limitation of fundamental human rights and freedoms

The fundamental human rights and freedoms provided for in the constitution are not absolute but are often qualified and subject to reasonable restrictions. Currie and de Waal argues that constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health, and democratic values.⁵⁸ This essentially means that not all infringement of the rights guaranteed in the constitution is unconstitutional. Rights can be limited or justifiably infringed if the reason for infringement is justifiable “in an open and democratic society based on human dignity, equality and freedom.”⁵⁹

⁵⁶ See the case of *Anjin Investments (Private) Limited v The Minister of Mines and Mining Development & Ors CCZ 3/18*, and *Magurure & 63 Ors v Cargo Carriers International (Pvt) Ltd t/a Sabot CCZ15/2016*.

⁵⁷ See the case of *Chawira & 13 Others v Minister of Justice Legal & Parliamentary Affairs & Ors CCZ 3/2017* where the court reasoned as follows;

“The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. That conceptualisation of the law as previously stated finds recognition in the leading case of *Catholic Commission of Justice and Peace in Zimbabwe* (supra) heavily relied upon by the applicants. In that case the applicants waited until they had exhausted their alternative remedies before approaching the Constitutional Court for relief.” At p10 of the cyclostyled judgement.

⁵⁸ Currie and De Waal *The Bill of Rights Handbook Sixth Edition* (2013)23

⁵⁹ Currie and De Waal *The Bill of Rights Handbook Sixth Edition* (2013)23

Section 86 of the Constitution limits the fundamental human rights and freedom provided for in the Constitution. Section 86 is the general limitation clause. The burden and onus of proving that the limitation of a constitutional right is justified, rest on the person invoking the limitation.⁶⁰ The onus is not easily discharged. In order for it to be discharged, the Applicant will have to explain the purpose of the limitation as well as how the limitation shall achieve such purpose. This is because in a constitutional democracy all laws are presumed to be consistent with the constitution until declared invalid by a court of competent authority.⁶¹

Section 86 of the Constitution provides as follows,

- (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons;
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. The nature of the right or freedom concerned;
 - b. The purpose of the limitation, in particular, whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - c. The nature and extent of the limitation;
 - d. The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - e. The relationship between the limitation and its purpose, in particular, whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and

⁶⁰ Currie and De Waal *The Bill of Rights Handbook Sixth Edition* (2013)23

⁶¹ See the case of *Zimbabwe Township Developers (Private) Limited v Louis Shoes (Private) Limited* 1983(2) ZLR 376(S) where the court reasoned as follows;

“Clearly, a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. Because the person alleging unconstitutionality must establish it, a burden may rest on that person to establish factually that an act does not fall within the ambit of constitutionality.”

- f. Whether there are any less restrictive means of achieving the purpose of the limitation”⁶²

The case of *S v Munamela*⁶³ establishes that the factors listed above should not be seen as a mere checklist but should be seen as comprising a balancing act. This means that the court must consider all the factors cumulatively. In determining whether a particular law infringes the right entrenched in the bill of rights, the court follows a two-stage approach in establishing whether the limitation of a fundamental human right is reasonable and justifiable in a democratic society based on openness, equality, justice, and respect of human rights.

In the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*⁶⁴ the two-stage approach was explained as follows.

The question of whether a right in the Bill of Rights has been violated generally involves a two-pronged inquiry. The first inquiry is whether the provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second inquiry is whether the limitation is reasonable and justifiable under section 36(1) of the Constitution. Courts considering the constitutionality of a statutory provision should therefore adhere to this approach to constitution adjudication.⁶⁵

Accordingly, the applicant taxpayer has to prove first that a fundamental human right has been violated by the law or conduct of a state organ. This means that the taxpayer must show that the situation for which the taxpayer pursues constitutional protection falls within the four corners of the meaning of the constitutional right. In addition, the taxpayer will have to show how the particular situation violates the exercise of the constitutionally protected right.⁶⁶ Once this is established, the court will then move on to the second stage, that is a determination whether such limitation is reasonable and justifiable in a democratic society. The writer observes that section 86 clearly shows that not all laws that infringe or violate fundamental human rights are unconstitutional. Sometimes a law of general application may be a justifiable limitation of a particular fundamental human right.

⁶² Section 86(2) of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

⁶³ *S v Munamela* 2000(3) SA (1) CC.

⁶⁴ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009(4) SA 222(CC).

⁶⁵ 2009(4) SA 222(CC) at para 41.

⁶⁶ S Woolman & H Botha ‘Limitations’ Chapter 34 in S. Woolman et al (Eds) *Constitutional Law of South Africa* (2007) at 345.

2.7 Conclusion

In conclusion, it is essential that the levying and collection of tax be properly administered to ensure that taxpayers comply with the law so that the government can use the revenue collected to meet its obligations. Notwithstanding, the manifest legitimate purpose and justifications for taxation, taxation has been subject of diverging views and opinions in various disciplines. Further, the Constitution of Zimbabwe is the supreme law of the land. It is the benchmark to which all other laws have to adhere to. The Constitution provides all citizens with fundamental human rights and freedoms including the right to access the court. It is clear that the government and any state organ, including ZIMRA, have an obligation not to infringe any rights described in the bill of rights, rather they must respect, promote, fulfil, and protect these fundamental human rights and freedoms. However, as highlighted above, human rights entrenched in the constitution may be limited if such limitation is reasonable and justifiable in a democratic society as provided for in the Constitution. The next chapter will analyse the 'pay now-argue later' rule to determine whether or not this rule is a justifiable limitation of the right to access the courts.

CHAPTER THREE

THE 'PAY NOW AND ARGUE LATER' RULE AND THE RIGHT TO ACCESS TO THE COURT

3.1 Introduction

The previous chapter provides a general discussion that relates to origins and significance of the 'pay now, argue later' rule in the country. This chapter focuses on the 'pay now, argue later' rule as applied in terms of section 36 of the Value Added Tax⁶⁷ and section 69 of the Income Tax Act⁶⁸ vis-a vis the taxpayer's right to access the courts. The main objective of this chapter is to critically analyze the 'pay now, argue later' rule. The writer also makes a comparative analysis of the 'pay now, argue later' rule and the general rule in the context of general civil appeals exposing the retrogressive nature of the 'pay now, argue later' rule to the taxpayers entrenched rights. This chapter will also consider the constitutionality of the 'pay now, argue later' rule. This chapter starts by giving a general overview on the right to access the court.

3.2 The Right to Access to Court

As highlighted in Chapter Two, Zimbabwe as a country is based on a constitutional democratic governance system in which the national Constitution reigns supreme above all else. As such any other laws of the land are expected and required to conform to the provision of the Constitution. Based on the national constitution, the right to access the courts is a fundamental human right that is enshrined in the Constitution and as such should be always respected and fulfilled. It is provided for in section 69(3) of the Constitution. Section 69 (3) of the Constitution of Zimbabwe provides as follows:

69. Right to a fair hearing

.....

(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.'⁶⁹

Section 69 of the Constitution of the Republic of Zimbabwe affords a taxpayer with a right to adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It is settled law that the right to access the court must not be

⁶⁷ Section 36 of the Value Added Tax (*Chapter 23:12*)

⁶⁸ Income Tax Act (*Chapter 23:06*)

⁶⁹ Section 69 (3) of the Constitution of Zimbabwe

unreasonably limited as it is an important aspect of the rule of law upon which a constitutional democracy is founded.⁷⁰ The writer is of the view that the ‘pay now, argue later’ as entrenched under section 36 and 69 of the VAT Act and the Income Tax Act respectively violates section 69 of the Constitution as it allows ZIMRA through the Commissioner to be the judge and executioner in its own case. The ‘pay now, argue later’ rule allows self-help.

It has been stated that the right to access the court prevents self-help in a constitutional democracy in that it ensures that an open, independent court hears the matter and decides the dispute between the parties based on the facts presented to it. The right to access the court is a cardinal right. In the case of **Chief Lesapo v North West Agricultural Bank & Anor**⁷¹ the Constitutional Court of South Africa defined the right to access to the courts as follows;

The right to access of the court is indeed foundational to the stability of an orderly society. It ensures peaceful, regulated, and institutionalized mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of rule of law and the principles of self-help, access to court is indeed a cardinal importance.⁷² As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.⁷³

From the above, the right to access the court is a cardinal right in a constitutional democracy. It is meant to prevent self-help. In addition, the learned authors, Currie, and De Waal put forward the argument that any person has the right to challenge as law or conduct in a court of law and that this is the essence of the right to access the courts.⁷⁴

In the context of the current discussion, this applies also to tax payers as these are either persons or entities that are able to sue and can be sued in their own name. As such the right to access the courts is also provided for them by the Constitution. From the above it becomes clear that the taxpayer should be given an opportunity to challenge the amount of tax assessed to be due and payable before paying the same.

However, the ‘pay now, argue later’ rule is an antithesis of the above position. It is the writer’s view that the ‘pay now, argue later’ rule negates the right to access the court. The reasoning here is that by obligating a taxpayer to settle whatever amount

⁷⁰ *Brummer v Minister for Social Development* 2009(6) SA 323.

⁷¹ *Chief Lesapo v North West Agricultural Bank & Anor* 2000(1) SA 409 (CC) at 418 para 22G.

⁷² *Brummer v Minister for Social Development* 2009(6) SA 323.

⁷³ *Chief Lesapo v North West Agricultural Bank & Anor* 2000(1) SA 409 (CC) at 418 para 22G.

⁷⁴ Currie & Dewaal, *The Bill of Rights Handbook* (2005) 704.

is assessed by ZIMRA as being due and payable to the state, the taxpayer loses their right to be heard in the event that they are not in agreement with the assessment by ZIMRA. This is the case given that the taxpayer will have not been allowed to exercise their right to a fair hearing before any competent court, but rather is required to settle the tax bill with no objections prior to doing so.

The right to access the courts also serves the purpose of segregating the powers of the judiciary from those of the other organs of the state. This is done in terms of the constitutional provisions relating to the principle of separation of powers, hence the importance of the right to access the court cannot be understated.

3.3 The general rule vis-a -vis the ‘pay now, argue latter rule’ rule

Before discussing the application of the ‘pay now, argue later’ rule as provided for in section 36 of the VAT Act and section 69 of the Income Tax Act, a brief discussion on the general rule with regards to the effect of noting an appeal would be sensible to understand why the ‘pay now, argue later’ rule afforded to ZIMRA is retrogressive. As a general rule, the noting of an appeal suspends the enforcement of a civil judgement except in exceptional cases. This means that once an appeal has been noted, the same effectively suspends the enforcement of any prior civil judgement handed down by the court. However, this is not absolute as there are exceptions to the rule relating to the suspension of enforcement. These exceptions include where the court has expressly ordered that noting of an appeal does not suspend the operation of the judgement.⁷⁵ In the case of *Zimbabwe Mining Development Corporation Limited & Anor v African Consolidated Resources PLC & Ors*⁷⁶ the Supreme Court of Zimbabwe stated as follows,

The law on the effect of noting an appeal against a judgement is now settled. At common law the noting of an appeal suspends the operation of the judgement. It is also trite that at common law the court granting the judgement enjoys the inherent jurisdiction to order the execution of that judgement despite the noting of the appeal.⁷⁷

⁷⁵*Zimbabwe Mining Development Corporation Limited & Anor v African Consolidated Resources PLC & Ors* 2010(1) ZLR 34(S).

⁷⁶ *Zimbabwe Mining Development Corporation Limited & Anor v African Consolidated Resources PLC & Ors* 2010(1) ZLR 34(S).

⁷⁷ *South Cape Corporation (Private) Limited v Engineering Management Services (Private) Limited* 1977(3) SA 534(A) the court remarked as follows;

‘Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby’s Cash Store (Pty) E Ltd v Estate Marks & Anor* 1961 (2) SA 118 (T) at pp 1203), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the

The aforementioned statement means that the court that passes a civil judgement is empowered to also make provision for an exception to the suspension effects of an appeal being noted. In such an event, enforcement or execution goes ahead despite an appeal having been noted. Suspension of the judgement would mean that the judgement debtor will not have to perform in terms of judgement until the appeal has been finalised by the court. Further an appeal testing the substantive correctness of the judgement can only be taken after judgement has been passed that is at the end of the trial or hearing.⁷⁸ The writer submits that this procedure gives a party to these proceedings sufficient opportunity to make their case in an open court before the court hands down its judgement. The writer is of the view that this enables a party to exercise his or her right to access the court as guaranteed in the constitution. Thus here a party is allowed to make their case and they are only obliged to pay if they are adjudged to be liable for such payment by the court.

On the other hand, the ‘pay now and argue later’ entrenched in section 36 of the Value Added Tax Act and section 69 of the Income Tax Act becomes operational the moment an assessment is issued by ZIMRA. The obligation to pay is thus not triggered by any judgement of the court. Further, the taxpayer’s objection or noting an appeal to the court does not suspend the obligation of the taxpayer to pay the tax assessed to be due and payable or the right of ZIMRA to recover the assessed tax from the taxpayer.

This means that in terms of the ‘pay now and argue later’ rule, the taxpayer would have to pay the amount of tax assessed to be due and payable without any opportunity to raise objections through exercising their right to access the courts. Holding all the other factors constant, this operation of the rule is tantamount to infringement of the taxpayer’s right to access the courts. The writer is of the view that the ‘pay now and argue later’ rule negates the right to access the court since the taxpayer is obliged to pay the assessed tax despite the noting of an appeal against the same therefore there is need to determine the constitutionality of the rule altogether.

3.3.1 Nature and content of the ‘pay now, argue later’ rule

It can be argued that the ‘pay now, argue latter’ rule is one of the most offensive

noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. *To obtain such leave, the party in whose favour the judgment was given must make special application*” (emphasis added)”

⁷⁸ *Marsay v Dilley* 1992(3) SA 944 (A).

aspect in the context of the taxpayer's rights to access the courts.⁷⁹ Section 36 of the VAT Act and section 69(1) of the Income Tax Act are an embodiment of the colloquial 'pay now and argue later' rule. Section 36 of the VAT Act provides as follows.

The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section *forty-six*) and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest calculated as provided in subsection (1) of section *thirty-nine*.⁸⁰

The 'pay now, argue later' rule entrenched in the above provision entails that noting of an appeal by the taxpayer does not exonerate the taxpayer of his or her obligation to pay the tax assessed by ZIMRA to be due and payable.⁸¹ The objective of this principle is to discourage frivolous or spurious objections by taxpayers. The rule, it has been argued, is meant to ensure that the efficacy of the whole national tax collection and tax administration system is optimised at all times. The writer therefore acknowledges that the 'pay now and argue later' rule serves an indispensable fundamental public purpose in ensuring that the fiscus is not prejudiced by the delay in obtaining the recovery of the assessed tax.

Section 36 of the VAT Act makes provisions for the obligation of the taxpayer to pay the amount assessed as being due and payable and the right of ZIMRA to recover or receive any outstanding tax, interest, additional tax or penalty that is chargeable under the statute. Such obligation and rights will not be suspended due to the noting of an appeal lodged in a court of law save for situation where the Commissioner directs as such.⁸² Section 69 of the Income Tax Act is also couched in similar terms to section 36 of the VAT Act.⁸³ Section 38 of the VAT Act secures the obligation of the

⁷⁹ R.C Williams 'The *pay now -argue later rule festers into our Income Tax System*' (2011) *South African Institute of Tax Professionals Technical*.

⁸⁰ Section 36 of the Value Added Tax Act.

⁸¹ *Triangle Limited & Anor v ZIMRA & Ors* SC 82/21 p 3.

⁸² Section 36 of the Value Added Tax Act.

⁸³ Section 69 of the Income Tax Act provides as follows.

"69 Payment of tax pending decision on objection and appeal

(1) The obligation to pay and the right to receive any tax chargeable under this Act shall not, unless the Commissioner otherwise directs and subject to such terms and conditions

taxpayer or operator to pay the amount of tax assessed as due and payable.⁸⁴ With regards to the Income Tax Act, the obligation to pay income tax assessed to be due and payable is imposed by section 71(1) of the Income Tax Act.⁸⁵ Section 36 and 46 is clear and unambiguous. The provisions are intended to remove any doubt in the mind of the taxpayer, as to whether an appeal to the court, or a decision of a court, would have the effect of suspending the obligation to pay the tax assessed by ZIMRA as due and payable.

The nature and content of the ‘pay now and argue later’ rule was succinctly described by the Supreme Court in the case of ZIMRA v Packers International (Private) Limited⁸⁶ where the court had this to say,

In considering the VAT collection system in general the following emerge. *Section 36 does not serve to protect any right of the taxpayer but to preserve the right of the Commissioner to be paid and to collect the revenue.* It also secures the obligation of the operator to pay unless such obligation is suspended by the Commissioner. As a consequence, the discretion to suspend payment in terms of the said section is that of the Commissioner.⁸⁷

From the above remarks unequivocal remarks by the Supreme Court, a conclusion can be drawn that the ‘pay now and argue later’ rule entrenched under section 36 and 69 of the VAT Act and the Income Tax Act respectively pays little or no regard to the taxpayers’ rights entrenched in the constitution. The writer advances the argument that a balance between the need to protect taxpayers’ rights and the duty of ZIMRA to efficiently collect tax needs to be achieved, however, the law as it stands in terms of the ‘pay now and argue later’ rule obliterates the taxpayers right to access the court.

Notwithstanding the above, it is imperative to note that section 36 of the VAT Act as well as section 69 of the Income Tax Act state that the noting of an appeal has no effect on the obligation to pay. Thus even after lodging an appeal with the court, a taxpayer still has to pay the payment as assessed by ZIMRA. As has already been stated, the noting of an appeal further does not suspend the taxpayer’s obligation to

as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act.

(2) If any assessment or decision is altered on appeal, a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded and amounts short paid shall be recoverable.”

⁸⁴ Section 38 of the Value Added Tax Act.

⁸⁵ Section 71(1) of the Income Tax Act.

⁸⁶ SC 28/16

⁸⁷ Per Gowora JA in ZIMRA v Packers International (Private) Limited SC 28/16 p 8.

pay tax assessed to be due and payable. The provisions at the same time however create a remedy for the amelioration of possible financial hardship which might be faced by the taxpayer. They give the Commissioner the discretionary power to suspend the taxpayer's obligation to pay the tax assessed to be due and payable. In the case of Mayor Logistics (Private) Limited v ZIMRA⁸⁸ Malaba DCJ (As he was then) remarked as follows;

Whilst section 36 of the VAT Act and 69(1) of the Income Tax Act provides, that the occurrence of any of the specified events, shall not suspend the taxpayer's obligation to pay the tax assessed to be due and payable, they at the same time create a remedy for the amelioration of possible financial hardships faced by an individual taxpayer. They give the Commissioner the discretionary power to suspend the obligation pending the determination of the appeal by the Fiscal Appeals Court or pending the decision by a court. Failure to fulfil an obligation may be due to a variety of circumstances. *The legislature decided to place the responsibility of deciding whether or not the particular circumstances of a taxpayer, entitle him or her to a directive suspending the obligation to pay the assessed tax, on the Commissioner. A court of law would be acting unlawful if it usurped the discretionary powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending determination of an appeal by the Fiscal Appeal Court.*⁸⁹

The Mayor Logistics gave clarity on the application of the 'pay now, argue later' rule in Zimbabwe. Malaba DCJ (As he was then) established the following in relation to the rule,

- a. Section 36 of the Value Added Tax Act and section 69(1) of the Income Tax Act entrenches the 'pay now, argue later' rule hence ZIMRA is entitled to demand payment of the tax pending the appeal unless the Commissioner has exercised his discretion to suspend the order.
- b. By creating a remedy for the amelioration of possible financial problems that may be faced by the individual taxpayer, section 36(1) of the VAT Act and section 69(1) of the Income Tax Act balances two competing interests. The judge stated that section 36 of the VAT Act and section 69(1) of the Income Tax Act make provision for a remedy, compliance with which is designed to give effect to the protection of the fundamental rights like access to the court.
- c. A court of law will be adjudged to have acted unlawfully if it usurps the discretionary power that the Commissioner enjoys by way of ordering the

⁸⁸ *Mayor Logistics (Private) Limited v ZIMRA* CCZ 7/2014.

⁸⁹ N88 above. 10

suspension of an obligation to pay an amount assessed by ZIMRA as being due and payable pending the determination of an appeal by the Fiscal Appeal Court. This is so because the legislature has placed the responsibility of making decisions regarding whether or not a taxpayer's particular circumstances entitle him or her to a directive suspending that taxpayer's obligation to pay the assessed amount.

- d. The taxpayer has the obligation to place before the Commissioner facts which will enable the Commissioner to exercise his or her discretion to the taxpayers advantage. This is so because the facts that lay a roadmap on the Commissioner's discretion are within the exclusive knowledge of the taxpayer.⁹⁰ Suspension of the operation of the 'pay now, argue later' rule can be decided and should be decided by the Commissioner. The Commissioner cannot exercise his or her discretion *mero muto*.

From the above, it is observed that the Commissioner only exercises his or her discretion after full consideration of the facts that are presented to them by the taxpayer who wishes to raise objections and benefit from the Commissioner exercising his or her discretionary powers.⁹¹ A clear conclusion that can be drawn is that the 'pay now and argue later' rule is meant to guarantee that the fiscus enjoys an accurate, predictable and steady revenue stream, it is there unlikely for the Commissioner to exercise the discretion to suspend the taxpayer's obligation to pay the tax assessed by ZIMRA.

3.3.2 Practical application of section 36 of the VAT Act and section 69 of the Income Tax Act

The 'pay now and argue latter' rule is not necessary applied in isolation. This is due to the notion that applying the rule in isolation would dampen its importance. In terms of the VAT Act the Commissioner is granted further powers and these are granted to him or her with a view to ensure that payment of tax is done and that the 'pay now and argue latter' rule is dully enforced. To start with, in the event that the taxpayer has failed to meet his or her obligation to pay the tax assessed to be due and payable the Commissioner may file a certified statement with a clerk of court which

⁹⁰ It is imperative to note that the judgement by Malaba DCJ (As he was then) in Mayor Logistics was made in chambers therefore it's not necessarily binding however it correctly captures the position of the law in relation to the 'pay now, argue later' rule as provided in section 36(1) of VAT Act and the section 69(1) of the Income Tax Act. The only challenge is there are no guidelines on how the Commissioner must exercise his discretion to suspend the obligation to pay the tax assessed to be due and payable.

⁹¹ZIMRA v Packers International (Private) Limited SC 28/16, see also Mayor Logistics (Private) Limited v ZIMRA CCZ 7/2014 p10.

lays out the taxes outstanding, penalties due, interest payable and any additional tax.⁹² Once the Commissioner files such a certified statement and the same is registered by a competent court, it's in effect becomes like a civil court judgement. However it is not in nature related to a dispute between ZIMRA and a taxpayer. This means that the registration cannot be held to be a civil judgement in real sense for this reason.⁹³ Be that as it may, it does have the effect of a civil judgement in that the property of the taxpayer could be attached by way of writ in order to ensure payment of the tax assessed to be due and payable notwithstanding the noting of an appeal.

Apart from the above, ZIMRA is also permitted by the law to appoint a third party to act an agent to enforce the payment of the tax assessed to be due and payable. Section 48(2) provides as follows,

The Commissioner may, if he or she thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any amount of tax, additional tax, penalty, or interest due from any moneys in any amount of tax, additional tax, penalty, or interest due for any moneys in any current account, deposit account, fixed deposit account or savings account or any savings account or any other moneys-

- (a) Including pensions, salary, wages, or any other remuneration, which may be held by him for, or due by him to, the person whose agent he has been declared to be or
- (b) That the person so declared an agent receives as an intermediary from the other person.⁹⁴

This section affords ZIMRA the power to appoint banks or any officer of the public service to act as agent of ZIMRA for the collection of tax. The writer submits that the logical construction of section 48(2) of the VAT Act is that payment of the tax assessed to be due and payable through the agent is by means of a garnishee against any account to the taxpayer's credit held with the agent. In the case of **ZIMRA v Packers International Private Limited supra** the Supreme Court of Zimbabwe described section 48 of the VAT Act as the sharp end of the VAT system. The section provides for the appointment of agents to act on behalf of ZIMRA as the tax collector on behalf of the state. In this regard, the Commissioner is empowered to appoint

⁹² Section 40 of the Value Added Tax Act.

⁹³ *Capstone 556(Private) Limited v CSARS* 2011 ZAWCHC 297.

⁹⁴ Section 48(2) of the Value Added Tax.

agents which may be any entity or person to collect or hold funds that are expected to go towards settlement of any outstanding amount owed by a taxpayer. Section 48 of the VAT Act and section 36 of the VAT Act are inextricably linked. This is because section 48 of the VAT Act is concerned with the Commissioners' power to appoint an agent for the purposes of recovery of tax, section 36 of the same act enshrines the taxpayers' duty to pay tax.

The court further reasoned that section 48 of the Act constitutes a reasonable limitation of the right, as the appointment of the agent while potentially infringing on the rights of a taxpayer was a necessary undertaking that served to ensure that the payment of taxes by taxpayers is speedy and this makes it a very potent tool in the hand of ZIMRA and the state. This tool serves to ensure that the state is not at any point deprived of taxes due to it by any taxpayer.

Thus based on the above, it is safe to state that section 36 and section 48 of the VAT Act are designed and put in place to ensure that the payment of tax amounts assessed as due and payable by ZIMRA are immediately secured. That notwithstanding, while it is admittedly crucial that ZIMRA has the necessary powers to ensure effective and efficient collection of all taxes due to the state, the study submits that the power that the law gives to ZIMRA through the provisions of section 36 of the Act does infringe on the rights of taxpayer to access to courts. Just in the same way that the obligation to pay become operational upon issuing of an assessment, the powers of an entity or person declared an agent become operational upon the declaration and money due to a taxpayer can be expropriated without them having any opportunity to object or make a case. Thus section 48 potentially infringes on taxpayers' rights.

3.3.3 Constitutionality of the 'pay now, argue later' rule

The right to access the court is a fundamental human right contained in the bill of rights. As highlighted above, the the right to access of the court is a fundamental rights that underpins the stability of any orderly society by ensuring that individuals and entities can coexist peacefully and justly. Suffice to say the right ensures that disputes can be effectively settled through regulated, peaceful and institutionalized mechanisms thereby precluding parties from resorting to self-help. Absence of such right would culminate in the existence of a highly disorderly and chaotic society. Suffice to say that the right to access to court serves as a bulwark against any sort of vigilantism and self-help that may culminate from the desire for justice albeit without any mechanism for ensuring that the same is obtainable to all. Be that as it may, **Croome** states that it is the assumption by most taxpayers that their right to access to

courts provided for in the constitution cannot in any way be infringed;⁹⁵ yet reality couldn't be farther from this. This is so given that as the study highlighted in chapter 2, all fundamental human rights and freedoms may be limited according to section 86 of the Constitution of Zimbabwe.

Section 86 of the Constitution is clear that the fundamental human rights and freedoms provided for in the Constitution should not be construed as being absolute. Rather they should be viewed as being limited if such limitation is a reasonable and justifiable limitation.⁹⁶ However, it is important to note that the burden and onus of proof that the limitation that is sought to be invoked is reasonable and justified rests with the entity or individuals seeking to limit the rights or freedoms concerned.⁹⁷ This is because in a constitutional democracy all laws are presumed to be consistent with the constitution until declared invalid by a court of competent authority.⁹⁸

In establishing whether or not a particular conduct is unconstitutional or otherwise, the approach is a two pronged one. First is a consideration by the court whether a particular section or law infringes the right to access the court as entrenched in the Bill of Rights. The second consideration is whether the justification is enjoined by section 86 of the Constitution. The foregoing shows that while there limitation to certain freedoms and rights provided for in the constitution, these limitations have to be deemed justifiable and reasonable. No person or entity can thus limit the rights provided for in the constitution without reason as this is no permissible.

In the determination of the question whether section 36 of the VAT Act and section 69 of the Income Tax Act infringes the taxpayers right to access the court, the court applies the two-stage approach as provided for under section 86 of the Constitution. The two-stage approach entails that the taxpayer has the onus to prove that whatever protection they seek from the courts does indeed fall within the scope and meaning of the rights provided for in the Constitution and that there is indeed a blatant infringement on the right that they are referring to.⁹⁹ The taxpayer who approaches the courts is thus tasked with proving the most important test which relates to where there are rights being infringed. This is an important aspect which is also at the centre of the current study's main argument.

The second stage is the determination of whether the limitation or infringement on the rights of the taxpayer is justifiable and reasonable at law. This is the onus that

⁹⁵ B.J Croome, *Taxpayers' Rights in South Africa*, 2010 p10.

⁹⁶ Currie and De Waal *The Bill of Rights Handbook Sixth Edition* (2013)23

⁹⁷ Currie & De Waal(N 96 above)

⁹⁸ *Zimbabwe Township Developers (Private) Limited v Louis Shoes (Private) Limited* 1983(2) ZLR 376(S).

⁹⁹ Currie & De Waal, *the Bill of Rights Handbook* (2010) 185.

falls on the shoulder of the tax collector (in this case ZIMRA). The justification and reasonability of a certain infringement should be in relation to the values of equality, freedom and human dignity all of which underpin all the other rights that the constitution affords citizens. In the event that it is seen that the limitation is reasonable and justifiable then such limitation will be allowed.¹⁰⁰ Any practice or infringement that the court deems unjustifiable and unreasonable will be adjudged to be unconstitutional. In terms of section 86 of the Constitution, in order to ascertain whether the limitation is reasonable or justifiable, the court looks at the following factors;

- a. The nature of the freedom or right concerned;
- b. The purpose for which limitation is sought, in particular whether the same is necessary in the interest of public safety, public order, public health, regional or town planning, public morality or defence;
- c. The nature and extent of the limitation;
- d. The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- e. The relationship between the limitation and its purpose, in particular, whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- f. Whether there are any less restrictive means of achieving any less restrictive means of achieving the purpose of the limitation.¹⁰¹

From the above, one can note that the ‘pay now and argue later’ rule entrenched under section 36 of the VAT Act and section 69 of the Income Tax Act prima facie infringes on the taxpayers right to access the court as guaranteed in section 69 of the Constitution in that it allows self-help, the rule allows ZIMRA to be the judge and executioner in its own case. That notwithstanding the writer is of the view that it is unlikely for section 36 and 69 of the VAT Act and the Income Tax Act to be declared unconstitutional for the following reasons outlined hereunder.

To start with, the ‘pay now, argue later’ rule can pass the constitutionality test because its effect on the individual taxpayer is ameliorated by the discretionary powers conferred on the Commissioner to suspend the obligation of the taxpayer to pay the tax assessed to be due and payable, should circumstances permit.

In the case of Mayor Logistics Case supra, Malaba DCJ (As he was then) reasoned that section 36 of the VAT Act and section 69 of the Income Tax Act make provision for a remedy, compliance with which is designed to give effect to the rights to access to the court. Be that as it may, the fact the section 36 of the VAT Act and section 69 of

¹⁰⁰ Currie & De Waal, *the Bill of Rights Handbook* (2010) 185.

¹⁰¹ Section 86(2) of the Constitution of Zimbabwe (Amendment No.20) Act, 2013.

the Income Tax Act do not provide for guidelines on how the Commissioner must exercise his or her discretion is a cause for concern. This is a lacuna in the law which needs to be addressed. The absence of such guidelines opens up the exercising of the Commissioner's discretionary rights to constitutional disputes which may actually prove detrimental to both taxpayers and the tax administration systems in Zimbabwe.

Apart from the above, the provisions of section 36 and 65 of the VAT Act and the Income Tax Act respectively are in place to guarantee that the state and the fiscus run uninterrupted, are steady, predictable and that there is an accurate flow of incomes through tax payments by taxpayers. The writer argues that the 'pay now, argue later' rule ensures that the whole system of tax collection in the country maintains its efficacy. Therefore, the principle constitutes reasonable and justified limitation of the right to access the court. Based on the above, the 'pay now, argue later' serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any dispute. Without such a rule in place, the fiscus would be starved of the much-needed income due to different appeals being lodged. This is logical given the time it takes for litigation cases to be settled in courts. There would thus be potential that many would lodge appeals which would thus mean that no payment is made till the matter is decided thereby depriving the state of income.

Last but not least, the 'pay now, argue later' rule as embodied in section 36 and 69 of the VAT Act and the Income Tax Act respectively, is very limited in its scope. It is temporary and subject to judicial review. The writer advances the argument that even though the 'pay now, argue later' rule *prima facie* limits the taxpayers right to access the court, prior to the full airing of the issue before a court of law and also prevents the affected taxpayer from obtaining interlocutory relief to suspend the obligation to pay the tax assessed to be due and payable as per the *ZIMRA v Mayor Logistics Case supra*, the fact that it plays the fundamental public role of making sure that the fiscus is not exposed to prejudice that may emanate from delays in payments of tax due owing to time taken to bring finality to appeals before the courts, constitutes a justifiable limitation of the right to the access the court amongst other reasons discussed above.

3.4 Conclusion

In conclusion, the 'pay now, argue later' rule *prima facie* infringes the taxpayers right to access the court as the rule obliges the taxpayer to pay the amount of tax assessed prior to the full airing of the issue before a court of law. It also prevents the affected taxpayer from obtaining interlocutory relief to suspend the obligation to pay the tax assessed to be due and payable *as per the Mayor Logistics Case supra*. However, the

fact that the 'pay now, argue later' plays the fundamental public role of making sure that the fiscus is not exposed to prejudice that may emanate from delays in payments of tax due owing to time taken to bring finality to appeals before the courts and constitutes a justifiable limitation of the right to access the courts. Be that as it may, it cannot be emphasized enough that section 36 of the VAT Act and section 69 of the Income Tax Act need to be reformed. The fact that the said provisions do not provide for guidelines on how the Commissioner must exercise his or her discretion leaves a lot to desired.

CHAPTER FOUR

COMPARATIVE ANALYSIS

4.1 Introduction

The previous chapter focused on the ‘pay now, argue later’ rule as applied in terms of section 36 of the Value Added Tax¹⁰² and section 69 of the Income Tax Act¹⁰³ vis-a vis the taxpayers right to access to the court. This chapter gives a comparative analysis of South Africa. The chapter will consider the ‘pay now, argue later’ rule as applied in South Africa. It will consider the application of the rule before and after the enactment of the Tax Administration Act.¹⁰⁴ This chapter will also consider how the Constitutional Court of South Africa approached and considered the constitutionality of the ‘pay now, argue later’ in the case of Metcash Trading Limited v Commissioner for the South African Revenue Service.¹⁰⁵ Further, the constitutional perspective and exposition after the Metcash decision will be discussed. The chapter will conclude by drawing lessons which can be implemented to improve the application of the ‘pay now, argue later’ rule in Zimbabwe. The main reason for comparing Zimbabwe and South Africa is the known fact that both jurisdictions are Roman-Dutch law jurisdictions and the that South Africa has also developed an advanced tax law system which balances the interest of the fiscus whilst protecting the taxpayers’ rights.

4.2 The content and application of the ‘pay now, argue later’ rule prior the Tax Administration Act

The ‘pay now, argue latter’ rule or principle ought to have developed as a result of or for the purpose of reflecting changes in the society¹⁰⁶ at least in theory if it wasn’t already consistent with these. The principle initially came into force in 1962 through the operation of the Income Tax Act and later on in 1991 through the operation of the Value Added Tax Act. In 2011 however, the provisions were repealed through the enactment of the TAA as a result of their incorporation in the TAB (which later became the TAA). The most relevant developments in the South African society in the

¹⁰² Section 36 of the Value Added Tax (*Chapter 23:12*)

¹⁰³ Income Tax Act (*Chapter 23:06*)

¹⁰⁴ The Tax Administration Act 28 of 2011.

¹⁰⁵ *Metcash Trading Limited v Commissioner for the South African Revenue Service* 2001(1) SA 1109(CC).

¹⁰⁶ P Harris *An introduction to law* 8 ed (2016) 3-4 31 Ibid at page 4. 32 The Interim Constitution, and later the Constitution. 33 L Olivier ‘Tax collection and the Bill of Rights’ (2001) *Tydskrif vir die Suid Afrikaanse Reg* 193-200 at page 193. 34 The Commissioner for Inland Revenue *supra* note 26. 35 Olivier *op cit* note 33 at page 193. 36 Ibid at page 193. 20 provisions.

context of the principle can be summed up as the advent of the new Constitution of the Republic of South African that happened with the fall of the apartheid government as well as the enhanced awareness of the South African society regarding the powers of tax authorities and the rights of the taxpayer both at national and international level.¹⁰⁷

Revenue laws were in principle not immune to the overhaul that was effected on the South African legal system by the new Constitution of 1994.¹⁰⁸ The year 1994 is the year that South Africa become independent and the same saw various changes being made to the country's governance and other related institutions. It is thus evident that changes were also made to the constitution and the laws relating to tax payment amongst other areas. Fast forward to date, the Constitution of the Republic of South Africa gives the South African Government implied powers to levy taxes on citizens¹⁰⁹ and for this purpose, the South African Revenue Services (hereinafter referred to as SARS) was formed through the South African Revenue Services Act¹¹⁰. SARS was granted powers that would allow it to retrieve and collect taxes assessed to be due and payable, and amongst those powers the 'pay now, argue later' rule is also included entrenched.

In order to understand the application of the 'pay now, argue later' rule as applied presently in South Africa, it is important to critically examine the rule as applied in section 36 of the Value Added Tax Act (the VAT Act).¹¹¹ Section 36 of the VAT is the predecessor to 164 of the Tax Administration Act (the TAA Act).¹¹²The 'pay now, argue later' rule is provided for under section 36 of the VAT Act. Section 36 of the VAT provides as follows,

The obligation to pay and the right receive the tax and recover any tax chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of court of law, but if an assessment is altered on appeal or in conformity with any such decision a due adjustment shall be made, amounts being paid in excess shall be paid with interest at such rate as may be fixed for the purposes of this section by the Minister from time to time in *Gazette*, and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being

¹⁰⁷ Commissioner for Inland Revenue supra note 26.

¹⁰⁸ L Olivier 'Tax collection and the Bill of Rights' (2001) Tydskrif vir die Suid Afrikaanse Reg 193-200 at page 193.

¹⁰⁹ The Constitution of the Republic of South Africa, 1996.

¹¹⁰ The South African Revenue Services Act 34 of 1997.

¹¹¹ Value Added Tax Act 89 of 1991.

¹¹² The Tax Administration Act 28 of 2011.

recoverable with penalty and interest calculated as provided in section 39(1).¹¹³

The import of Section 36 of the VAT is clear and unambiguous. The provisions are intended to remove any doubt in the mind of the taxpayer, as to whether an appeal to the court, or a decision of a court, would have the effect of suspending the obligation to pay the tax assessed by Commissioner to be due and payable. In cases where a taxpayer successfully appeals, section 36 of the VAT Act provides for the necessary adjustments to be made and any amount paid in excess of what was due be refunded to the taxpayer with interest at any prescribed rate. This means that the section provides for the reimbursement of any amount paid that is not due to SARS based on the judgement of the courts. **Keulder** puts forward the view that though the Commissioner's payment of interest on the amount due to be reimbursed to a taxpayer on successful appeal is positive, it does not negate the fact that payment of the assessed amount at the time it is demanded may still financially jeopardise the taxpayer at the time of payment pending appeal.¹¹⁴ This casts the rule as being detrimental to tax payers and being capable of ruining taxpayers financially.

The current study submits that such financial damage does highlight the dangers that are associated with the 'pay now, argue latter rule' and that no benefits may emanate from the same. The 'pay now, argue later rule' is a sharp contrast of the common law general rule with regards to noting of appeals. As discussed in Chapter three, in terms of the general rule, the judgement debtor only settles his or her debt once a judgement is made by an open court. This does not hold true in the case of the 'pay now, argue latter' rule given that in the case of the latter the burden to pay the outstanding taxes assessed as due and payable falls on the taxpayer even prior to any court judgement being made.

Be that as it may, in the event that the taxpayer has failed to meet his or her obligation to pay the tax assessed to be due and payable in terms of section 36 of the VAT Act, the Commissioner may actually file a statement to the effect that the outstanding tax, penalty or interest due and payable, with the clerk of court in any competent national court.¹¹⁵ Where such registration of the certified statement is made by the Commissioner, its effect is the same as that of a civil judgement handed down by a court. It is however important to note that the registration does not qualify as a judgement in the strict sense of the work as it is not made in relation to a

¹¹³ Section 36 of the Value Added Tax Act 89 of 1991. This section is worded verbatim to section 36 of the Value Added Tax Act in Zimbabwe.

¹¹⁴ C. Keulder 'Pay now, argue later rule- before and after the Tax Administration Act' (2013) 16(4) Potchefsroom Electronic Law Journal 125-158.

¹¹⁵ Section 40(2) of the Value Added Tax Act 89 of 1991.

dispute between a taxpayer and the Commissioner.¹¹⁶ Be that as it may, it does have the effect of a civil judgement in that the property of the taxpayer could be attached by way of writ in order to ensure payment of the tax assessed to be due and payable notwithstanding noting of an appeal.¹¹⁷ This clearly shows that the ‘pay now, argue later’ rule is not applied in isolation.

Apart from the above, the Commissioner of SARS is also permitted by the law to appoint a third party to act an agent to enforce the payment of the tax assessed to be due and payable.¹¹⁸ Under the same section, the SARS Commissioner is also empowered to confer agency duties on certain parties which would allow them to funds on for purposes of tax payment and as such can hold funds which would be channelled towards settlement of penalties and interest due on certain taxes.¹¹⁹ In the same context, entities like banks, pension funds and employers may be appointed to act as agency amongst other different entities.

It is imperative to note that the powers granted to the Commissioner under section 47 of the VAT Act are largely discretionary even though unlike other discretionary powers, these powers are not subject to appeal or review.¹²⁰ Suffice to say judiciary review could be sought by a taxpayer in respect of any declaration made by the SARS Commissioner in line with provision of section 47 of the VAT Act. In the case of **Hindry v Nedcor Bank Limited**¹²¹ section 47 of the VAT Act was declared to be a reasonable and necessary limitation of the right to access the court. The court further reasoned that the appointment of the taxpayer’s agent is necessary for the efficient and effective collection to the tax assessed to be due and payable, it is a weapon indispensable to the state. Section 47 of the Act is meant to ensure immediate payment of the tax assessed to be due and payable.

4.3 The Constitutionality of Section 36 of the Value Added Tax Act and the Metcash Trading Limited v Commissioner, South African Revenue Service & Anor 2001(1) SA 1109 (CC)

4.3.1 Factual Background

SARS furnished Metcash Trading Limited (the Applicant) with a tax assessment that

¹¹⁶ *Capstone 556(Private) Limited v CSARS* 2011 ZAWCHC 297.

¹¹⁷ C. Keulder ‘Pay now, argue later rule- before and after the Tax Administration Act’(2013) 16(4) Potchefstroom Electronic Law Journal 125-158.

¹¹⁸ Section 47 of the Value Added Tax.

¹¹⁹ Section 47 of the Value Added Tax.

¹²⁰ C. Keulder ‘Pay now, argue later rule- before and after the Tax Administration Act’(2013) 16(4) Potchefstroom Electronic Law Journal 125-158.

¹²¹ *Hindry v Nedcor Bank Limited* 1990(2) ALL SA 38(W).

amounted to R266 million and the amount was inclusive of interest, additional tax and penalties all levied in terms of section 36(1) of the Value Added Tax Act.¹²² The Applicant duly lodged an objection with SARS which was subsequently dismissed by the tax collector.¹²³ SARS then went on to notify the Applicant that if payment of tax assessed to be due and payable is not affected, SARS would implement the summary procedure as provided in section 40 of the VAT Act. In response, the Applicant lodged an urgent application with the High Court.¹²⁴ Subsequently, the High Court granted a consent order and the order granted was to the effect that the Applicant was to file a constitutional application to have sections 36(1), 40(2) and 40(5) of the VAT Act to be declared unconstitutional for violating sections 25(1) and 34 of the Constitution of South Africa which guarantees the right to property and the right to access to the court respectively.

4.3.2 Proceedings in the High Court

The legal question that was before the High Court was whether sections 36(1), 40(2) and 40 (5) of the Value Added Tax Act did actually infringe the right to property and the right to access the court as guaranteed in the Constitution.¹²⁵ The Applicant however did not pursue the argument in regard to the possible violation of taxpayer's right to property as set out in section 25(1) of the Constitution of the Republic of South Africa and was only concerned with section 36 of the Constitution.¹²⁶ Accordingly, the court had to deal with whether the 'pay now, argue later' rule as entrenched in section 36 of the VAT Act infringed on a person's right to access the court.

¹²² *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

¹²³ *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

¹²⁴ *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

¹²⁵ *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

¹²⁶ Snyder's J stated as follows;

"Without abandoning the reliance on section 25(1) of the Constitution, counsel for the Applicant did not pursue the argument contained in the heads of argument during oral address. The Respondents persisted in their opposition on this part, which could, broadly speaking, be summarised to be that the 1st Respondent at all relevant times acted in terms of the Act, which is a law of general application and not arbitrarily. *In my view, the point was, rightly not pursued on behalf of the Applicant. The argument on behalf of the Respondents is, clearly, valid.*" This dictum implies that the taxpayer would not succeed in that argument that the Commissioner had violated the taxpayer's right to property as guaranteed in the Constitution.

The High Court stated that the test relating to an infringement on the constitutional rights of the taxpayer or any other persons is an objective test and as such cannot be determined on the basis of reference to any other specific case. The court reasoned that the summary procedure provided for in section 40(2) of the VAT Act allowed SARS to serve as a substitute for the court in the sense that SARS is allowed to carry out a determination of every aspect of liability as well as enforce such liability. This therefore allowed SARS to be both judge and executioner *in suo* in its own case as a result the court found the ‘pay now, argue later’ rule does indeed infringe on the taxpayers’ right to access the court. The court referred to the *Chief Lesapo case supra* in which the Constitutional Court of South Africa held that the right to access the court is aimed at preventing self-help.¹²⁷

The High Court further stated that the ‘pay now, argue later’ rule infringes the right to access the court in that it prevents the taxpayer from obtaining any interlocutory relief from the court given that the court would not be in a position to provide the taxpayer with the relief in between the SARS-issued assessment of the tax due for payment by the taxpayer and the final decision or judgement handed down by the court. In this regard, the court was of the view that the first stage in the context of the constitutional attack was met and triggered the grounds for the court to move on to the examination of whether the alleged infringement could be held as being reasonable and justifiable which it consequently did.¹²⁸

In his response to the foregoing, the Commissioner contended that the limitation on the rights of the taxpayer to access the court was justified and reasonable owing to various reasons including the different frivolous objections that would be put forward all in a bid to delay payment of the assessed tax thereby prejudicing the state. It was argued that potentially, dishonest and fraudulent taxpayers would be encouraged, and that the South African nation could not afford any situation which would see taxpayers not paying the assessed, due and payable tax in a swift manner.

From the above argument by the Commissioner, it can be concluded that SARS was mostly concerned with the possible delay of payment and its potential impact which arguably makes logical sense in the circumstances. That notwithstanding, the High Court ruled that such a delay in payment would not be as impactful on SARS especially considering the national taxation system in South Africa which was the bigger picture.

¹²⁷ *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

¹²⁸ *Metcash Trading Limited v Commissioner for the South African Revenue Services & Anor* 2002(2) SA 232(W) at 237J-238.

Suffice to say the High Court held that the potential negative effects of the curtailment of the taxpayer's right to access the court outweighed by the far the potential impact of the delay in payment on SARS. In the court's view, the infringement on the taxpayer's rights would have far reaching consequences and as such the court weighed heavily against such an infringement. Consequently, the court adjudged the 'pay now, argue latter' rule, the denial of the taxpayer's right to access the court and the statement procedure to be in violation of the provisions of the Constitution. The court therefore referred the matter to the Constitutional Court for confirmation.

4.3.3 Decision of the Constitutional Court

Before the Constitutional Court, the Applicant supported the decision of the High Court which reinforced that they had a right to be accorded a hearing regarding the assessment of the tax that was deemed due and payable. The applicant advanced the argument that in terms of section 36 of the VAT Act, it was obliged to comply with the requirement for payment by making the payment at that particular point in time and only look forward to receiving the money back at a later date. In their argument, the Applicant argued that SARS had other less invasive way available to it that it could put to use to ensure that the taxpayer expeditiously paid albeit without having their right to access the court curtailed or limited. The ways were inclusive of the application of penalties that were lined to time taken to pay, furnishing of security by the taxpayer as well as the imposition of punitive or higher interest rates.¹²⁹ In their response, the Minister of Finance and the Commissioner of SARS argued that the 'pay now, argue latter' rule indeed infringed on the taxpayer's right as espoused in the Constitution of the Republic of South Africa. They thus vehemently opposed the decision taken by the High Court which saw a confirmation order being granted. It was contented that the limitation to the rights of the taxpayer was justifiable and reasonable as the taxpayer still had four different hearing opportunities on an assessment particularly:

- a. An objection to the assessment;
- b. When exercising the Commissioner's discretion in the determination of whether a payment should be suspended pending appeal, the party affected can place facts before the Commissioner
- c. If the Commissioner has failed to exercise his or her discretion properly as indicated above, the decision may actually be taken on review;
- d. There is an automatic right of appeal on merits to the Special Tax Court.¹³⁰

¹²⁹ Metcash Trading Limited v Commissioner, South African Revenue Service & Anor 2001(1) SA 1109 (CC)

¹³⁰ Metcash Trading Limited v Commissioner, South African Revenue Service & Anor 2001(1) SA 1109 (CC)

In its judgement, the Constitutional Court stated that section 36(1) of the VAT Act has two purposes. The first purpose is making sure that the taxpayer's obligation to pay a payment equivalent to the amount assessed by SARS as being due and payable is honoured without any delay owing to an appeal that is pending and that if necessary any amount due back to the taxpayer be paid back to them at a later stage.¹³¹ Further, the court reasoned that owing to this, the 'pay no, argue latter' rule does not in any way reject the jurisdiction of the court and was not mainly concerned with the taxpayer's access to the court. Furthermore, the court reasoned that the functions of the Special Tax Court make it an ordinary court and as such the taxpayer has unfettered access to the court as long as they are able to lodge an appeal with the Special Tax Court.

The Constitutional Court held acknowledged that even though the 'pay now, argue later' rule prima facie limits the taxpayers right to access the court before the full hearing of the matter before a court of law and that while it also prevents the taxpayer in question from being granted interlocutory relief that would in effect suspend their obligation to pay the tax that SARS assessed as being due and payable, the court held the view that the 'pay now, argue latter' rule plays the role of ensuring that whatever is due to the state is paid and that the state is not prejudiced by unnecessary delays in bringing finality to a matter involving a tax and as such it was enough to justify the limitation of a taxpayer's right to access the court.

It was further established by the court that in exercising his or her discretion as provided in section 36(1) of the Value Added Tax Act, the Commissioners' actions would be held to be by nature administrative and therefore reviewable in line with the administrative law.¹³² Because of the above reasoning, the Constitutional Court refused to confirm the ruling of the High Court and accordingly it held that section 36(1), 40(2) and 40(5) of the VAT Act were constitutional.

4.3.4 Critique of the Metcash Trading Limited Case

The *Metcash Trading Limited* case has stood out as a landmark case and as such has received a lot of attention in academia. The attention has largely stemmed from divergent views on the court's decision and whether the same was correct or not. In this regard, the divergence in opinions had some academics express the view that the decision made by the court was erroneous. Notably, Croome holds the view that the Constitutional Court was correct in its ruling. The learned author concurs with the

¹³¹*Metcash Trading Limited v Commissioner, South African Revenue Service & Anor* 2001(1) SA 1109 (CC).

¹³² Promotion of Administrative Justice Act 3 of 2000.

court on the basis that the mere fact that a taxpayer may approach the court seeking review of a matter indicates that the taxpayer actually has the right to access the courts.¹³³ The author further adds that section 88 of the Income Tax Act¹³⁴ if challenged would also be held to be constitutional.¹³⁵

Keulder however makes the point that the court in the Metcash Trading Case (CC) actually drew an unequivocal distinction between Value Added Tax and Income Tax while also at the same time elaborating that the matter before the court was in relation to the ‘pay now, argue latter’ rule as applied to VAT and not in relation to any other fiscal matter.¹³⁶ It is noteworthy that the court underscored that the difference between VAT and Income Tax is that the value added tax arises on a continuous basis whereas on the other hand, Income Tax only arises at the end of a tax year and also that in the case of VAT, the taxpayer undertakes the work of an agent on behalf of SARS.¹³⁷

Keulder moreover indicates that the Metcash Trading Limited (CC) judgement in this case was centrally concerned with the manner in which the ‘pay now, argue latter’ rule was applied specifically, regard being had to the VAT Act and as such it did not have any binding effect on any other legislation relating to tax.¹³⁸ The writer is of the view that owing to the emphasis that the Constitutional Court made with regards to the need for effective and efficient collection of tax that SARS assessed as being due and payable as well as the striking similarity which was between the rule in both the Income Tax Act and the VAT Act, the court will actually be reluctant to issue any judgements contrary to the decision that was made in the Metcash Trading Limited case.

Apart from the above, Olivier¹³⁹ disagrees with the position taken by Croome above. She believed that the Constitutional Court had indeed erred in its findings and decision. This argument is predicated on the following explanations. **Olivier** disagrees with the Constitutional Court decision to the effect that the ‘pay no, argue later’ rule does not oust the jurisdiction of the court given that the taxpayer may appeal to the

¹³³ B. J Croome *Taxpayer’s Rights in South Africa*, (2010) 40.

¹³⁴ Similar provision as section 36(1) of the Value Added Tax Act.

¹³⁵ B.J Croome *Taxpayers’ Rights in South Africa* (2010) 200.

¹³⁶ C. Keulder ‘Pay now, argue later rule- before and after the Tax Administration Act’ (2013) 16(4) Potchefstroom Electronic Law Journal 125-158.

¹³⁷ *Metcash Trading Limited v Commissioner, South African Revenue Service & Anor* 2001(1) SA 1109 (CC)

¹³⁸ C. Keulder ‘Pay now, argue later rule- before and after the Tax Administration Act’ (2013) 16(4) Potchefstroom Electronic Law Journal 125-158.

¹³⁹ L.Olivier ‘Constitutional Review of SARS’s power to Collect Outstanding Income Tax (2010) (43)(1) De Jure 157-168.

Special Tax Court. Rather **Olivier** holds the view that the Applicant's argument was not that the jurisdiction of the court is ousted completely but rather that the court lacks the jurisdiction and this becomes the case the moment the rule is invoked.¹⁴⁰ In agreement with Olivier, **Keulder** emphasises that in the case of *Metcash Trading Limited supra*, the constitutional attack on the rule in question was actually against section 34 of the Constitution and more specifically upon the objective of the rights of access to courts and by extension justice which is meant to prevent self-help.¹⁴¹

The argument therefore is not that the rule serves to prevent the court's jurisdiction in its entirety. Rather it is that the rule creates a situation where SARS acts as a judge in its own case which is contrary to the fundamental tenets of justice. The learned authors advance the argument that the court focused on the wrong aspect in that instead of focusing on the fact that the taxpayer should be allowed to exercise their right to approach the courts prior to being compelled to make a payment of the tax assessed by SARS as being due and payable despite an appeal being noted, the court had concerned itself about whether or not the taxpayer would at some point in future approach the court.¹⁴²

Lastly, **Olivier** concludes that the Constitutional Court erred in that it did not take into consideration the argument that the applicant made to the effect that there are less invasive ways of ensuring that there is effective and efficient collection of all taxes that SARS assesses as being due and payable to the state through SARS.¹⁴³ Thus the applicant had argued that while it is important that taxes due are effectively and efficiently collected, there were ways of ensuring the same albeit without violating any of the taxpayers' rights as enshrined in the constitution and the Bill of Rights. The import here is that when deciding whether or not the fundamental human rights limitation is reasonable and justifiable, courts should take into consideration the possibility of other ways that are less invasive.¹⁴⁴

4.4 Developments posts the Metcash Trading Case and section 164 of the Tax Administration Act

Olivier is of the view that the constitutional disputes on the 'pay now, argue latter'

¹⁴⁰L. Olivier 'Constitutional Review of SARS's power to Collect Outstanding Income Tax (2010) (43)(1) De Jure 157-168.

¹⁴¹ C. Keulder 'Pay now, argue later rule- before and after the Tax Administration Act' (2013) 16(4) Potchefstroom Electronic Law Journal 125-158

¹⁴² C. Keulder 'Pay now, argue later rule- before and after the Tax Administration Act' (2013) 16(4) Potchefstroom Electronic Law Journal 125-158

¹⁴³ L. Olivier 'Constitutional Review of SARS's power to Collect Outstanding Income Tax (2010) (43)(1) De Jure 157-168.

¹⁴⁴ Section 36 of the Constitution of South Africa, 1996.

would be less if grounds upon which the Commissioner could exercise his or her discretion regarding the suspension of payment pending appeal were laid out clearly by the legislature.¹⁴⁵ This means that the prevalence of such constitutional disputes around the rule emanated mostly from certain grey areas and lack of clarity regarding the grounds for the Commissioner's discretion regarding suspending a payment pending appeal before the courts by a taxpayer. In the aftermath of the *Metcash Trading Limited Case supra* judgement, SARS released Media Release 27.¹⁴⁶ According to this release, the Commissioner could exercise his or discretion to suspend the payment of the tax assessed to be due and payable pending appeal. The following factors were resultantly laid out as the factors that the Commissioner needs to take into consideration when exercising his or her discretion:

- a. If the payment of the whole amount would cause irreversible damage if the taxpayer's appeal were too be successful and circumstances of the matter create reasonable doubt; and
- b. Other appropriate circumstances, for instance, an undertaking that the disputed amount in tax will be paid if appeal failed.

In 2009, the Second Taxation Law Amendment Act, 2009 was passed and the same brought about greater clarity regarding the 'pay now, argue later' rule through the amendment of section 88 of the South African Income Tax Act as well as the section 36 of the VAT Act. These amendments to the sections in effect introduced an array of factors which the Commissioner ought to take into consideration when making decisions relating to whether or not payment on appeal should be suspended.¹⁴⁷ In 2012, the Tax Administration Act, 28 of 2011 was promulgated. The Tax Administration Act created a single, modern framework for the common administrative provisions of the tax acts. SARS indicated that the Tax Administration Act is meant to simply offer and ensure coherence in the tax administration in South Africa.¹⁴⁸ Critical to this discussion, the Tax Administration Act endeavours to strike a balance between the rights and obligations between taxpayers in South Africa and SARS as the tax collection body of the state.¹⁴⁹ The writer will now consider the relevant provision in detail hereunder.

4.4.1 Section 164 of the Tax Administration Act (TAA)

¹⁴⁵ L. Olivier 'Constitutional Review of SARS's power to Collect Outstanding Income Tax (2010) (43)(1) De Jure 157-168.

¹⁴⁶ SARS Media Release.

¹⁴⁷ Second Taxation Law Amendment Act 2009

¹⁴⁸ SARS Press Release, October 2012.

¹⁴⁹ Section 164 of the Tax Administration Act, 28 of 2011

One of the main objectives of the TAA is to ensure the effective and efficient collection of tax.¹⁵⁰ The TAA seeks to achieve this purpose by aligning all the existing tax administration legislation into a single comprehensive statute. The TAA applies to all taxes administered by the Commissioner. Section 164 of the TAA retains the ‘pay now, argue later’ rule.¹⁵¹ It provides that that the taxpayer’s obligation to pay the tax assessed to be due and payable will not be suspended unless a senior SARS official decides otherwise. Section 164(3) lays out the factors a senior SARS official must consider when deciding whether or not he must exercise the discretion to suspend the obligation to pay the tax assessed to be due and payable pending the outcome of the appeal or objection. The consideration includes the following factors,

- a. The amount involved;
- b. The taxpayer’s history;
- c. Whether the taxpayer may alienate his or her assets during the postponement of the payment of tax;
- d. The taxpayer’s ability to furnish security;
- e. Whether the payment pending appeal, or an objection would cause irreplaceable financial hardship; and
- f. If there are any imminent sequestration or liquidation proceedings pending.¹⁵²

The writer is of the view that the above considerations seek to balance competing interest that is the need by SARS to efficiently collect the tax and the protection of the taxpayers’ rights. Further, it is noteworthy that section 164(6) of the TAA does prohibit SARs from instituting any proceedings for recovery for a period starting on the day the request for suspension is served on SARs.¹⁵³ This brings certainty on the effect of lodging a request for suspension. The writer is of the view that, even though section 164 of the TAA is a significant development in the South African tax administration legal regime and the application of the ‘pay now, argue later’ rule, the fact that the provision still allows SARS to be the judge in its own case is still problematic.

4.5 Conclusion

It is concluded that, the application of the ‘pay now, argue later’ rule in South Africa is relatively similar to how the same principle is applied in Zimbabwe. This means that it is highly unlikely for the Zimbabwean Constitutional Court to declare the ‘pay

¹⁵⁰ Section 2 of the Tax Administration Act, 28 of 2011.

¹⁵¹ Section 164 of the Tax Administration Act, 28 of 2011.

¹⁵² Section 164(3) of the Tax Administration Act, 28 of 2011

¹⁵³ Section 164(6) of the Tax Administration Act, 28 of 2011.

now, argue later' rule to be unconstitutional. The court is likely to follow the decision in Metcash Trading Limited case if a constitutional challenge is brought before it. Apart from the above, unlike in Zimbabwe where the law is silent on what factors the Commissioner must take into consideration when exercising his or her discretion in terms of section 36 of the VAT Act and section 69 of the Income Tax Act, the South African position is different. The law clearly sets out the factors the tax authority must consider when exercising his or her discretion to suspend the obligation to pay tax pending appeal. Therefore, comparatively speaking, it is closer to the truth stating that taxpayers rights are better protected in South Africa compared to Zimbabwe.

CHAPTER FIVE

CONCLUSIONS & RECOMMENDATIONS

5.0 Introduction

The previous chapter gave a comparative analysis of South Africa. The current chapter provides a summary of findings, conclusions and recommendations.

5.1 Summary of Findings

The main purpose of this dissertation was to critically examine the ‘pay now, argue later’ as applied in the Zimbabwean tax law vis-à-vis the taxpayers’ right to access the court. The essence of the rule is that once ZIMRA assessed the tax to be due and payable, the amount reflected in the tax assessment becomes due and payable to ZIMRA despite the taxpayer noting an appeal or objecting to the assessment. Chapter one commenced the study. It provided the background of the study, the problem statement, the objectives of the study, limitations of the study, significance of the study and the chapter synopsis.

In Chapter Two, it was established that from an economic point of view, the ‘pay now, argue later’ rule is meant to ensure a steady, accurate and predictable stream of revenue for the fiscus. However, it was established that the constitution of Zimbabwe is the supreme law of the land hence it is the benchmark to which all other laws, and conducts must adhere to. This Chapter established that the Constitution provides all citizens with fundamental human rights and freedoms including the right to access the court. Chapter Two further established that the government or any state organ, including ZIMRA, have an obligation not to infringe any rights described in the bill of rights, rather it must respect, promote, fulfil, and protect these fundamental human rights and freedoms. It was also pointed out that fundamental human rights entrenched in the constitution are not absolute. They may be limited if such limitation is reasonable and justifiable in a democratic society as provided for in the Constitution.

Chapter Three established that the ‘pay now, argue later’ rule is not applied in isolation, its strength lies with the methods of the recovery of tax provided for in the VAT Act and the Income Tax Act for example the appointment of an agent to ensure the effective collection of the tax assessed to be due and payable, garnishing of the taxpayer’s bank account and filing of the tax statement with the court. It was established that the rule prima facie infringes the taxpayer’s right to access as the rule obliges the taxpayer to pay the amount of tax assessed tax prior to the full airing

of the issue before the court of law. It highlighted that the rule prevents the affected taxpayer from obtaining interlocutory relief to suspend the obligation to pay the tax assessed to be due and payable *as per the Mayor Logistics Case*. It was pointed out that section 36 of the VAT Act and section 69 of the Income Tax Act takes no cognisance of the taxpayer's rights regardless of the fact that the law allows the taxpayer to object to ZIMRA's decision.

That notwithstanding, it was concluded that the 'pay now, argue later' imposition serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any tax dispute and that it constitutes a justifiable limitation of the right to access the court. Therefore, it is unlikely for the Constitutional Court to declare the 'pay now, argue later' rule to be unconstitutional for infringing the right to access the court. Lastly, it was concluded that section 36 of the VAT Act and section 69 of the Income Tax Act which entrenches the 'pay now, argue later' rule need to be reformed as the said provisions do not provide for guidelines on how the Commissioner must exercise his or her discretion leaves a lot to be desired.

Chapter Four provided a comparative analysis with South Africa. It established that the application of the 'pay now, argue later' rule in South Africa is relatively similar to how the same principle is applied in Zimbabwe. It was pointed out that it is highly unlikely for the Zimbabwean Constitutional Court to declare the 'pay now, argue later' rule to be unconstitutional if a challenge is made. Further, unlike in Zimbabwe where the law is silent on what factors the Commissioner must take into consideration when exercising his or her discretion in terms of section 36 of the VAT Act and section 69 of the Income Tax Act, the South African position is different. It was established that the law clearly sets out the factors the tax authority must consider when exercising his or her discretion to suspend the obligation to pay tax pending appeal. It was therefore concluded that taxpayers' rights are better protected in South Africa compared to Zimbabwe.

5.2 Conclusion

In conclusion, the 'pay now, argue later' rule is not applied in isolation, its strength lies with the methods of the recovery of tax provided for in the VAT Act and the Income Tax Act for example the appointment of an agent to ensure the effective and efficient collection of tax by ZIMRA, garnishing of the taxpayer's bank account and filing of the tax statement with the court. This dissertation concludes that the rule *prima facie* infringes the taxpayer's right to access as the rule obliges the taxpayer to pay the amount of tax assessed tax prior to the full airing of the issue before the court of law. It allows ZIMRA to be the judge and executioner in its own case. That

notwithstanding, the dissertation concludes that the ‘pay now, argue later’ serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any tax dispute therefore it constitutes a justifiable limitation of the right to the access the court. The writer further concluded that it is unlikely for the Constitutional Court to declare the ‘pay now, argue later’ rule to be unconstitutional for infringing the right to access the court. Lastly, it was concluded that section 36 of the VAT Act and section 69 of the Income Tax Act which entrenches the ‘pay now, argue later’ rule need to be reformed as discussed in the above dissertation.

5.3 Recommendations

Notwithstanding, the conclusion that the ‘pay now, argue later’ serves the fundamental public purpose of ensuring that the *fiscus* is not prejudiced by delay in obtaining finality in any tax dispute and is therefore a justifiable limitation of the right to the access the court. The writer is of the view that the rule as applied in Zimbabwe needs to be reformed. The following recommendation is proffered:

5.3.1 The legislature must clearly provide guidelines or factors to be taken into consideration when the Commissioner is exercising his discretion in terms section 36 of the VAT Act and section 69 of the Income Tax Act. The writer is of the view that section 36 of the VAT Act and section 69 of the Income Tax Act need to be reformed. The fact that the said provisions do not provide for guidelines on how the Commissioner must exercise his or her discretion leaves a lot to be desired. The writer takes note that in the case of *Mayor Logistics supra* and *Parkers International supra*, the court highlighted that the obligation is on the taxpayer to present the facts before the Commissioner, so that the Commissioner can exercise his or her discretion. The writer is of the view that given the deleterious consequences on the taxpayer, the payment of tax pending appeal to the court may have, it is important that the law clearly sets out the factors the Commissioner must consider when exercising his or her discretion in terms of section 36 of the VAT Act and section 69 of the Income Tax Act. The following factors are suggested. The considerations on whether the taxpayer should be relieved from paying the tax assessed to be due and payable pending appeal must include the following factors,

- a. The amount involved.
- b. The taxpayer’s compliance history.

- c. Whether the taxpayer may alienate his or her assets during the postponement of the payment of tax;
- d. The taxpayer's ability to furnish security;
- e. Whether the payment pending appeal, or an objection would cause irreparable financial hardship; and
- f. If there are any imminent sequestration or liquidation proceedings pending.

The above recommendation assists the Commissioner to properly exercise his or discretion, as well as assisting the taxpayer to know what to expect when invoking their rights under section 36 and 69 of the VAT and Income Tax Act respectively.

Further, the above considerations achieve a balance between two competing interest that is the need for ZIMRA to efficiently collect the tax and the protection of the taxpayers' right. The writer submits that these guidelines enable the Commissioner to exercise his or her discretion reasonably and fairly as required by the section 3 of the Administrative Justice Act.

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