

**Garnishee orders as a tax collection tool: A critical review
of the South African and Zimbabwean models**

A thesis submitted in partial fulfilment of the requirements for
the degree of

MASTER OF COMMERCE (TAXATION)

of

Rhodes University

By

KUDZANAYI NZOMBE

NOVEMBER 2016

ABSTRACT

Taxation statutes of most jurisdictions contain provisions that deal with defaulting taxpayers. The taxation statutes of Zimbabwe and South Africa have employed the concept of garnishee orders as a method of recovering tax. This method is codified in the respective taxation statutes under the guise of “third party appointments”, or simply “appointment of an agent”. This method is very convenient and expeditious for the tax collection authorities, namely, the Zimbabwe Revenue Authority (ZIMRA) and the South Africa Revenue Service (SARS). Other jurisdictions have also employed this method, with varying degrees of invasiveness into the taxpayers’ constitutional rights.

The concept of garnishee orders can have negative constitutional implications for the taxpayers in both Zimbabwe and South Africa. In Zimbabwe, compared to South Africa, the tax collection field is not as developed in terms of jurisprudence and the legislation. There are lessons that Zimbabwe could learn from South Africa, considering that the latter has experienced more than two decades of constitutional democracy. Therefore, in order to identify areas for development, the two jurisdictions are critically reviewed, with particular attention to the legislative provisions and case law dealing with garnishee orders in the tax collection context.

Approaches employed by other countries in relation to similar concepts and provisions are also analysed. The lessons learned from this analysis could suggest a less invasive method of recovering tax from defaulting taxpayers and an approach to be followed by the tax authorities, ZIMRA and SARS that would allow them to fulfil their responsibilities and mandate with taxpayer-friendly measures.

Keywords: Constitution of South Africa, 1996; Constitution of the Republic of Zimbabwe, 2013; garnishee orders; South African Tax Administration Act; taxation; tax debts; Zimbabwean Income Tax Act.

Acknowledgments

I would like to give special thanks to my supervisor Professor Elizabeth Stack for providing me with valuable and extensive support in the completion of this thesis. Her thorough feedback and well informed input was much valued and appreciated throughout the whole Masters programme.

Special thanks also goes to Professor Wendy Jacobson, her in-depth editing and recommendations were a pivotal part of this thesis. Her words of encouragement and support meant a lot to me especially at times when I felt like giving up.

A special word of thanks is due to Mr Alex Majachani who gave me extensive support and input when I was looking for a field to write my thesis on.

A very special thank you to my parents, Petronella and Michael for their overwhelming and wholehearted support they always continue giving me. I am eternally grateful in a way that I cannot describe for their unyielding love and support.

Last, but by no means the least, my family and friends, who have supported me in this journey. Without your encouragement which came in different degrees and forms, none of this would have been possible. As I cannot thank each and one of you individually, I am truly grateful to you for your support.

Table of contents

Contents

Chapter 1: INTRODUCTION.....	6
1.1 Research context.....	6
1.2 Goals of the research	9
1.3 Methods, procedures and techniques	11
1.4 Outline of the chapters	11
CHAPTER 2: GARNISHEE ORDERS.....	13
2.1 Introduction.....	13
2.2 Garnishee order at common law.....	15
2.3 Legislation.....	16
2.5 Tax Debts.....	22
2.5.1 Tax legislation	23
2.5.2 South African tax legislation.....	23
2.5.3 Prior to the Tax Administration Act	25
2.5.4 Contrasting the civil garnishee order with the tax administration garnishee order.....	26
2.5.5 Case law in connection with garnishee orders.....	28
2.6 Garnishee orders in Zimbabwean tax legislation.....	32
2.7 Conclusion	38
Chapter 3: CONSTITUTIONAL IMPLICATIONS OF GARNISHEE ORDERS IN TAX COLLECTION IN SOUTH AFRICA.....	38
3.1 Introduction.....	38
3.2 Access to courts.....	39
3.3 Civil judgments: Default judgments	44
3.4 Tax administration default judgment	44
3.5 Limitation of the right of access to the courts	46
3.6 Right to property.....	50
3.7 What counts as arbitrary deprivation?	52
3.8 Money	56
3.9 Is the deprivation arbitrary?	56
3.10 Right to privacy	57
3.11 Right to just administrative action	62

3.12 The Constitution	62
3.13 Promotion of Administrative Justice Act	63
<i>A decision</i>	64
<i>Of administrative nature</i>	64
<i>Made in terms of an empowering provision</i>	65
<i>By an organ of state</i>	65
<i>Which adversely affects the rights of a person</i>	66
<i>Has a direct legal effect</i>	66
<i>Is SARS bound?</i>	66
3.14 Does the appointment of a taxpayer's agent constitute administrative action?	68
3.15 Conclusion.....	70
Chapter 4: GARNISHEE ORDERS AND THEIR CONSTITUTIONAL IMPLICATIONS IN TAX COLLECTION IN ZIMBABWE	72
4.1 Introduction.....	72
4.2 The legislation	72
4.3 The Constitution	73
4.4 Constitutional judgment.....	75
4.5 The right to privacy	77
4.6 Right to property.....	78
4.7 Right to a fair hearing	79
4.8 Right to administrative justice.....	81
4.9 The <i>audi alteram partem</i> principle	83
4.10 Practical concerns	89
4.11 Conclusion.....	90
Chapter 5: METHODS EMPLOYED BY OTHER COUNTRIES	91
5.1 Introduction.....	91
5.2 Australia	91
5.3 India	94
5.4 Canada.....	95
5.5 United States of America	96
5.6 Recommendations for SARS.....	98
5.7 Recommendations for ZIMRA	99
5.8 Conclusion.....	101
Chapter 6: CONCLUSION	102

6.1 Aims of the research	102
6.2 Conclusion	103
Bibliography	104

Chapter 1: INTRODUCTION

1.1 Research context

In Zimbabwe, Order 29 of the Magistrate Court (Civil) Rules, 290 of 1980, authorises an application by a judgment creditor (the winning plaintiff in a lawsuit to whom the defendant owes money, as decided by the court) to attach any assets amounting to the equivalent of the debt owed or becoming due to the judgment debtor. A similar provision exists in South Africa under section 72 of the South African Magistrates Court Act, 32 of 1944.

Where the attachment of assets for a debt owing to the judgment debtor is ordered, the garnishee is the person who owes any such debt to the judgment debtor. Thus a garnishee is usually a person or entity, quite often a bank or employer, which receives a court order not to release funds held for or owed to a customer or employee, pending a further order of the court. In other words, a court order of garnishment allows a creditor to take the property of a debtor when the debtor is not in possession of the property. Examples of debts that can be attached include commissions owing to debtors working on a commission-only basis, proceeds of a sale of property held by a conveyancing attorney, money held in bank accounts and money owed to the debtor for contract work done by the debtor.

In the tax context, tax authorities are empowered by their respective statutory instruments to apply the garnishee order for the convenience of tax collection. According to section 58 of the Income Tax Act of Zimbabwe, Chapter 23 of 2006, and section 179 of the Tax Administration Act, 28 of 2011 (as amended) in South Africa, (which operate similarly), tax authorities are given substantial authority. This authority goes as far as to attach any assets with the equivalent value of the debt owed or which will become due to the debtor by a garnishee, without the need of a Court order or any form of judicial oversight.

In South Africa, the main authority regarding garnishee orders, found in section 179 of the Tax Administration Act, as amended, was established in *Hindry v Nedcor Bank Ltd*,¹ (referred to as “*Hindry*”). In his judgment, Wunsh J stated that this section provides for “[a] form of garnishment, such as is available in regard to ordinary civil judgment debts”. The taxpayer in this case contended that section 99 of the Income Tax Act, 58 of 1962 (now section 179 of the Tax Administration Act), was unconstitutional as it infringed on the right to privacy (section 14), the right to administrative justice (section 33) and the right of access to the courts (section 34) of the Constitution of the Republic of South Africa, 1996. The court in *Hindry*, however, found that any limitation of constitutional rights implicit in section 99 (section 179 of Tax Administration Act) is reasonable and necessary in an open and democratic society. In addition, it held that the Commissioner for SARS, not only to recover taxes that are due, but also to recover refunds that are erroneously paid to a taxpayer, could apply section 99. The court thus rejected the taxpayer’s argument that section 99 of the Income Tax Act² violates the contractual relationship between a taxpayer and his bank, and found that it does not infringe on the confidential nature of this relationship.

In Zimbabwe, the most significant case regarding garnishee orders is *Packers International v ZIMRA*,³ (referred to as “*Packers*”). The applicant in this case filed an application challenging the constitutionality of the provision relating to garnishee orders in the tax collection context. The applicant challenged the constitutional status of section 48 of the Value-Added Tax Act [Chapter 23 of 2012], which allows the Zimbabwe Revenue Authority (ZIMRA) to unilaterally access bank accounts of clients or intercept monies of clients from debtors to recover Value-Added Tax debts. Section 58 of the Income Tax Act of Zimbabwe has a similar provision. The applicant argued that ZIMRA should approach the courts first to get a garnishee order before raiding tax defaulter’s bank accounts. The applicant alleged that section 48 denies the firm’s right to equality before the law and equal protection of the law, as enshrined under section 56(1) of the Constitution of Zimbabwe an advantage which at the time was unavailable to businesses.

¹ 1999 (2) All SA 38 (W), 61 SATC 163.

² 58 of 1962.

³ HH-328-14.

Further, ZIMRA had the right and power to access a person's bank account and take money "owed to it", while such a right did not extend to taxpayers when dealing with their creditors, and stated that applicants and respondents are not equal before the law. Packers International won the High Court case that ordered ZIMRA to remove a garnishee order that they had imposed on the company's bank accounts, and to wait seven days before imposing a new order.

According to section 173 of The Constitution of the Republic of South Africa, 1996, "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice". Section 171 of the Constitution of the Republic of Zimbabwe, 2013, states: "The High Court – a. has original jurisdiction over all civil and criminal matters throughout Zimbabwe".

Tapera and Majachani⁴ discuss the constitutionality of the use of garnishee orders by revenue authorities. The authors write extensively on the right to confidentiality and secrecy, and discuss "powers to appoint a third party" with regard to tax collection. The discussion hints at the constitutional challenges that such a practice may provoke. Their discussion, however, is far from exhaustive, and there is a need for a more nuanced and more detailed analytical discussion of the practice.

In a paper discussing whether the South African Constitution protects taxpayers against the South African Revenue Service (SARS), Keulder aims to ascertain whether there are sufficient safeguards and checks for taxpayers, in terms of specific practices and procedures utilised by SARS in its tax collection duties.⁵ Although the concept of garnishee orders is highlighted in the discussion of the *Hindry* case, it is only briefly, and largely inadequately, referred to and discussed in Keulder's thesis.

⁴ Tapera, M. & Majachani, A. F. 2015. *Unpacking Tax Law and Practice in Zimbabwe*, 157.

⁵ Keulder C. 2012. *Does the Constitution protect taxpayers against the mighty SARS? – An enquiry into the Constitutionality of selected tax practices and procedures*. Unpublished LLM Thesis. Pretoria: University of Pretoria.

In a later discussion, however, Keulder and Legwaila provide a lengthy account of garnishee orders and their constitutional implications.⁶ They start their enquiry with the appointment of a third party for purposes of tax collection, as provided for by section 179 of the South African Tax Administration Act. Keulder and Legwaila highlight that SARS' duties do not exist in isolation, but in the context of the taxpayer's rights. In addition, they debate the question whether the appointment of a third party can be "placed on an equal footing with the civil procedure of obtaining a garnishee order".⁷ Despite their detailed account of the constitutional implications of garnishee orders, Keulder and Legwaila do not address the viability of garnishee orders in a liberal market economy guided by Constitutional values, nor do they extend their discussion to an analysis of the practice in other jurisdictions. An analysis of the constitutional status of garnishee orders from a Zimbabwean perspective is therefore appropriate.

Zimbabwe is in a process of realigning its legislation and practices in accordance with its Constitution. 154 Acts out of 396 statutes already aligned, several Bills, including the Electoral Amendment Bill, the National Prosecuting Authority Bill and the Public Debt Management Bill, had been passed into law.⁸ The present research will afford the opportunity to reflect on whether Zimbabwe has learnt anything from the South African experience, if there is anything further to learn and, additionally, to reflect on how far South Africa has developed in that area. It also affords the opportunity to reflect on the two revenue authorities and evaluate whether any safeguards, amendments or readjustments need to be considered in order to fully embrace the value and ideology of the Constitution and support the pillars of an economic liberal climate for business.

1.2 Goals of the research

The research addresses the question of whether the tax garnishees imposed on taxpayers by the tax authority in South Africa and Zimbabwe are reasonably justified in a democratic society. This will be achieved through logical analysis of the rights of taxpayers as enshrined

⁶ Keulder, C. and Legwaila, T. 2014. "The Constitutionality of third party appointments - before and after the Tax Administration Act". *Journal of Contemporary Roman-Dutch Law*, Vol. 77, No ,1 p. 53-71.

⁷ Keulder, C. and Legwaila, T. 2014. "The Constitutionality of third party appointments - before and after the Tax Administration Act", p 67.

⁸ New Ziana, Alignment of Laws with Zimbabwe's new Constitution gathers pace.

<http://www.zimbabweonlinenews.com/alignment-of-laws-with-zimbabwes-new-constitution-gathers-pace/> (accessed March 2, 2017).

in the respective Acts of Parliament and the respective Constitutions. Further, the research seeks to examine the constitutional implications of “third party appointments” by tax authorities without having fully engaged the taxpayer. Through this research, the correct legal standard to which the tax authorities are expected to adhere to is explored.

The study affords the opportunity to reflect upon the practices of the two tax authorities and to evaluate whether any safeguards, amendments or readjustments need to be considered in order fully to embrace the values and spirits of the respective Constitutions. This discussion goes beyond academic pragmatism as it has the impact of educating the ordinary taxpayer as well as the businessman. It is a discussion that bears relevance to two national groups having acknowledged the close symbiotic relations within the region in the past decade or two.

The concept of garnishee orders also has a business impact in that there is confusion between the given concept and that of emolument attachment orders. This can be remedied by highlighting the concepts and their practical differences.

This thesis advocates and advances taxpayers’ knowledge with regard to fair and just administrative processes. It also seeks to influence policy formulation and redress with regard to shaping legislation that is taxpayer-friendly from a constitutional and practical perspective. The overarching goal of this research is to discuss the use of garnishee orders by revenue authorities as well as the constitutional implications of these orders. The research will be guided by the following questions:

1. What is the history of garnishee orders in South African and Zimbabwean taxation laws?
2. Does the concept of garnishee orders in the context of tax collection violate taxpayers’ constitutional rights?
3. What are the alternatives to garnishee orders in tax collection?
4. Is there a model or approach which is taxpayer friendly and suitable to the tax authorities mandate?

1.3 Methods, procedures and techniques

An interpretative research approach will be adopted in this paper as it seeks to understand and describe legal concepts in their contexts.⁹ The research methodology is a doctrinal methodology. This provides a systematic exposition of the rules governing a particular legal category, analyses the relationships between the rules, explains areas of difficulty, and is based purely on documentary data.¹⁰ The approaches adopted by the tax authorities in South Africa and Zimbabwe will be compared.

The documentary data used include the South African and Zimbabwean statutes referred to above, case law and authoritative writings in relation to tax law, and the associated constitutional imperatives.

The research will be conducted as an extended argument and will be supported by documentary evidence. Its validity and reliability will be ensured by:

- adhering to the rules of the statutory interpretation as established in terms of statute and common law;
- placing greater evidential weight on legislation, in particular on case law which creates precedent or which is of persuasive value in its provision of primary data, and the writings of acknowledged experts in the field;
- discussing opposing viewpoints and conclusions, based on a preponderance of credible evidence; and
- the rigour of the arguments.

As all the documentary data are publicly available no ethical issues arise in relation to their use.

1.4 Outline of the chapters

Chapter 2 presents a discussion of the concept of garnishee orders. This discussion ranges from the historical origins until its development into common law. The discussion then expands on the concept, discussing the impact and relevance of garnishee orders in the

⁹ Babbie, E. & Mouton, J. 2009. *The practice of social research*. Cape Town.

¹⁰ McKerchar, M. 2014. "Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation". *eJournal of Tax Research*. p5 – 22. [Online]. Available at <http://ssrn/abstract=1464141> [Accessed 06/01/2016].

current legislation of Zimbabwe and South Africa, with specific reference to tax legislation. The impact of the concept is analysed in the context of South African law.

In Chapter 3 the concept of garnishee orders, which fall under the guise of third party appointments in taxation legislation, is discussed. Chapter 3 examines how third party appointments are being utilised by SARS, the tax collecting authority. The Chapter also discusses whether third party appointments violate taxpayers' constitutional rights in South Africa.

Chapter 4 utilises the same approach taken in Chapter 3, in order to discuss the influence and impact of garnishee orders in Zimbabwean tax law against the backdrop of the taxpayers' constitutional rights. Methods employed by the Zimbabwean tax collecting authority ZIMRA, are compared with South Africa's methods as employed by SARS.

Chapter 5 identifies and briefly discusses approaches and methods employed by other countries, with brief discussions of the approach in India, Canada, Australia and the United States of America with regard to their legal conventions in tax collection from defaulting taxpayers. Based on this, recommendations are made to South Africa and Zimbabwe.

Chapter 6 concludes the thesis by re-stating the goals of the research and how these goals were addressed.

CHAPTER 2: GARNISHEE ORDERS

2.1 Introduction

Central to this research is the concept of garnishee orders. This chapter will provide an in-depth discussion and critical analysis of the use of such orders as practiced in South Africa and Zimbabwe. While describing and discussing this, the chapter will provide a detailed analysis of its development from common law to statutory instrument; which is a government or executive order of subordinate legislation such as the Uniform Rules of Court - and subsequently its influence on tax collection. The influence of garnishee orders on tax collection will constitute the main discussion and provide a background for the chapter that will follow.

In South Africa, different measures, ranging from legislation, policy documents, and tools, have been established and implemented to cater for responsible and ethical debt collection

practices and mechanisms. The National Credit Act,¹¹ the Consumer Protection Act¹² and the Magistrates Court Act of South Africa,¹³ provide conditions, safeguards, mechanisms, and tools for debt collection. One such mechanism of debt collection is a process known as a Garnishee Order.

A Garnishee Order is an attachment of money against a third party ("the garnishee") who owes money to a judgment debtor ("debtor"). The typical scenario is when a debtor fails to pay money, in terms of a judgment, directly to the judgment creditor ("creditor"), in which case a Garnishee Order may be applied for against the garnishee. The term "garnishee" derives from the French "garnir" which means to warn or to prepare¹⁴. Hence the garnishee is the person liable to pay a judgment debtor or to deliver movable property to the debtor.

The concept of garnishee orders was explained lucidly in the South African case of *Paramount Furnishers v Lezars Shoe Store and Outfitters Ltd*,¹⁵ when Trengove J stated:

The effect of [a garnishee] order is that the employer as garnishee is obliged to deduct the amount stipulated from the emoluments accruing to the judgment debtor and to pay them to the garnishor ... But for the garnishee order, the garnishee would ordinarily be obliged to pay the amounts deducted to the judgment debtor as his employee. Ordinarily the garnishee, as employer, cannot discharge his obligation towards his employee by paying emoluments due to him to any third party unless he has some express or implied authority to do so. The garnishee order, however, compels him to pay to the judgment creditor and consequently any such payment operates as a discharge pro tanto of the garnishee's obligation as employer to the judgment debtor as his employee. By operation of law the judgment creditor thus becomes entitled to receive money which would otherwise be payable to the judgment debtor and to that extent he steps into his shoes.

It is a tool used in numerous different jurisdictions, and most countries have begun to codify this common law concept in their legislation. In Botswana garnishee orders are provided for

¹¹ 34 of 2005.

¹² 68 of 2008.

¹³ 32 of 1944.

¹⁴ Singh S, India. A glance on provision of –garnishee order.

<http://www.mondaq.com/india/x/369332/Financial+Services/A+Glance+On+Provision+Of+Garnishee+Order> (accessed 5/2/16).

¹⁵ [1970](3) SA 361 (T).

under section 6(1) of the Deserted Wives and Children Protection Act,¹⁶ which states that “a garnishee order may be issued against future earnings in respect of instalments not due under such maintenance order ...”. In Zambia the Subordinate Courts Act¹⁷ provides for an attachment-of-earnings order.¹⁸

In neighbouring Zimbabwe, the legislation that deals with this aspect of law is the Magistrates Court Act 7:10 of Zimbabwe,¹⁹ as read with Order 29 of the Magistrate Court (Civil) Rules of Zimbabwe.²⁰ For the purposes of the present enquiry, special attention shall be paid to the mechanism, the Garnishee Order, as applied and enforced in Zimbabwe in terms of the Magistrates Court Act.

2.2 Garnishee order at common law

According to Herbstein and Van Winsen,²¹ attachment of debts is a process by means of which a judgment creditor is enabled to apprehend money due to the judgment debtor by a third person.²² This was confirmed in the South African case of *African Distillers Ltd v Honiball and another*.²³ The Judge held:

What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debts, and he has not created a creditor.²⁴

Attachments are made in the hands of a third party and the most frequent ones are those in which salaries and wages of an employee are in the hands of the employer. South African cases that address this are *European Hotel, Pretoria v Beckett*,²⁵ *Spence v Davidson*,²⁶ and

¹⁶ [Chapter 23:08].

¹⁷ 28 of 1970.

¹⁸ Armstrong, A.1992. “Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning. *Studies in Family Planning*”. Vol. 23, No. 4 (Jul. - Aug), 217-228 at 219. <http://www.jstor.org/stable/1966884> (accessed 2/5/16).

¹⁹ Chapter 7:10.

²⁰ 290 of 1980.

²¹ Herbstein and Winsen V. 1997. *The Civil Practice of the Supreme Court of South Africa*, 4th edition, 1997, 768.

²² *African Distillers Ltd v Honiball and another* 1972 (3) SA 135 at 136 D-E.

²³ 1972 (3)SA 135 (R) at 136 D-E.

²⁴ Para 136 H.

²⁵ 1911TPD 31.

Hall and De Beer and Slade v Hall.²⁷ However, other debts owed to the judgment debtor are also similarly capable of attachment. It should be noted that money in the hands of the State cannot be subject to a garnishee order.²⁸ The same principle applies to the salaries and fees of certain persons such as professors, doctors, advocates and soldiers.²⁹

2.3 Legislation

Section 72 (1) of the Magistrates Court Act of South Africa³⁰ reads:

The court may, on *ex parte* application by the judgment creditor or under section 65E (1)(b), order the attachment of any debt at present or in future owing or accruing to a judgment debtor by or from any other person (excluding the State), residing, carrying on business or employed in the area of jurisdiction of the court, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other civil court, and make an order (hereinafter called a garnishee order) against such person (hereinafter called the garnishee) to pay to the judgment creditor or his attorney at the address of the judgment creditor or his attorney, so much of the debt as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court.

This section is read together with the Magistrate Court (Civil) Rules of South Africa,³¹ under section 128. The garnishee order effectively puts the garnishee into the matter between the judgment creditor and the judgment debtor.³² If the garnishee refuses to pay in terms of the garnishee order, the judgment creditor is entitled to attach his or her property or proceed against him or her in terms of section 65A.³³ Magistrates Court Rule 128, read with section 72 of the Magistrates Courts Act, sets out the procedure in terms of which an application for a garnishee order must be made.

²⁶ 1911 WLD 147.

²⁷ 1916 TPD 372.

²⁸ *Ex parte Venter* 1940 TPD 286.

²⁹ *European Hotel, Pretoria v Becket* 1911 TPD 31 and *Meaker NO v Campbell New Quarries (Pvt) Ltd and Others* 1973 (3) SA 157 (R).

³⁰ 32 of 1944.

³¹ 2013, Amendment 12.

³² *Pete, S. et al. 2008. Civil Procedure, A practical Guide, 377.*

³³ *Ibid.*

The Magistrates Court Act now provides that in certain circumstances a judgment for the payment of any amount of money by a division of the High Court (whether or not the amount of the judgment would otherwise have exceeded the jurisdiction of the Magistrates Court) will, upon the filing with the clerk of the Magistrate Court of certain documents, have all the effects of a judgment of a Magistrate Court, and any proceedings may be taken on it as if it were a judgment lawfully given in a Magistrate Court in favour of the judgment creditor.³⁴ Uniform Rules of Court³⁵ regulate the conduct of proceedings of several provincial and local divisions of the High Court. These rules acknowledge and confirm the use of garnishee orders in Higher Courts.

The Uniform Rules of Court under Rule 45 12(a), under things that can be attached, refers to “...debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor”. Sub-rule (12) (a) empowers the sheriff to attach such debts if requested to do so by the judgment creditor.

The Zimbabwean Magistrate Court Act³⁶ provision has the same tenor, in its section 33(1) which reads:

On the *ex parte* application to a court, hereinafter called “the court”, of any person who has obtained in a magistrates court, community court or primary court any judgment for the payment of any money, and upon such evidence as may be required, that such judgment is still unsatisfied and of the amount still payable thereunder, and that any other person living or carrying on business within the jurisdiction of the court is indebted to the person against whom such judgment has been obtained, hereinafter called “the debtor”, the court may order such other person, hereinafter called “the garnishee”, to pay to the messenger, or to the judgment creditor or to his legal practitioner or agent, so much of the debt actually due from him to the debtor as may be sufficient to satisfy the judgment, together with the costs of the garnishee proceedings and any costs previously incurred in attempting to obtain execution of the judgment, or failing such payment, to appear before the court on a day to be named in the order and show cause why he should not pay the debt.

³⁴ Section 65M of Act 32 of 1944.

³⁵ GN R315 (GG19834).

³⁶ [Chapter 7:10].

As previously stated, this section is read together with Order 29 of the Magistrate Court (Civil) Rules of Zimbabwe.³⁷ It is important to note that in both the South African and Zimbabwean provisions it is within the discretionary power of the court to issue a garnishee order and not a mandatory provision.

Garnishee orders have become an effective tool used in most civil disputes to secure payments of debts as demonstrated by the widespread use of this procedure in Southern Africa, particularly in maintenance cases. In Swaziland the Maintenance Act,³⁸ section 12, provides that the Court may serve notice on an employer requiring him or her to make payments on behalf of the convicted person's salary, wages or any form of remuneration to the Clerk of Court nearest to the place of employment.

The Court may order an employer to make certain payments owed by an employee to a third party.³⁹ For example, if a husband and wife get divorced and the husband is required in terms of a judgment to pay a monthly maintenance to his wife, but fails to do so, the wife can apply to the court for a garnishee order against the husband and his employer. The court may then order the husband's employer to deduct the sum from the husband's salary and pay it into the domestic partner's account instead. Once the order has been made it is a criminal offence for the employer not to comply.⁴⁰

2.3.1 Procedure

How is a garnishee order obtained? When a court has granted a judgment against the debtor and he or she has failed to pay the debt within the specified period of time, the creditor may apply to court for the attachment of a debt (the garnishee order). The Court Application would include a founding affidavit deposed to by the Applicant and supporting documentation, such as proof of the judgment and proof that the judgment debtor has failed, neglected, or refused to settle in spite of the Judgment.⁴¹ In some instances, as in maintenance cases, the application for a Garnishee Order is made at the same time as the application for maintenance is heard, if it is shown that the debtor is likely not to comply with the maintenance order.

³⁷ 290 of 1980.

³⁸ 35 of 1970.

³⁹ Maintenance Amendment Act 21 of 1987.

⁴⁰ Armstrong, A. 1992. "Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning. *Studies in Family Planning*". Vol. 23, No. 4 (Jul. - Aug). 217-228 at 219. <http://www.jstor.org/stable/1966884> (accessed 2/5/16).

⁴¹ Legal Wise, Quick Law Guides, Garnishee Orders, <https://www.legalwise.co.za/help-yourself/quicklaw-guides/garnishee-orders> (accessed 2/5/16).

According to section 65A(1)(a) if a judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable judgment creditor may issue a notice calling upon the judgment debtor to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.

A creditor must make an application to a court of the district in which the garnishee resides, carries on business, or is employed. In other words, the court which has jurisdiction to hear the matter is the court closest to where the debtor is domiciled.⁴² In some cases, however, jurisdiction may be found in the court located in the area in which the cause of action arose and where the contract giving rise to the debt was entered into.⁴³

Thereafter, the debtor would be issued with a Notice informing him or her to appear before the relevant court on a date specified in the Notice. If the court entertains an *ex parte* application by the creditor, the debtor will not be required to appear in court. Such cases are, however, not heard on an *ex parte* basis but on proper notice.

On the hearing date, the court will inquire into the financial position of the debtor and other personal circumstances of the Parties, and make an order as it may deem just and equitable. For example, the court may order payment by instalments or grant but defer operation of the Order. Section 72(2) of the Magistrates Court Act of South Africa, states that:

If, after any such garnishee order in respect of any debt has been granted, it is shown to the satisfaction of the court that sufficient means to maintain himself and those dependent upon him will not, after satisfaction of the garnishee order, be left to the judgment debtor, the court shall set aside the garnishee order or amend it in such manner that it will affect only the balance of the debt over and above such sufficient means.

In Zimbabwe, under Order 29 of the Magistrate Court (Civil) Rules of Zimbabwe,⁴⁴ which can be read concurrently with Order 49 of the Rules of the High Court,⁴⁵ for jurisdictional

⁴² Ibid.

⁴³ Section 28 Magistrate Court Act 32 of 1944. Section 169 of The Constitution of the Republic of South Africa, 1996 & section 19 of the Supreme Court Act 59 of 1959 (which state the inherent jurisdiction of the High Court).

⁴⁴ 29 of 1980.

purposes the same language and intention as are included in South African Legislation can be applied. In South Africa, the issue of jurisdiction was made clear by section 173 of the Tax Administration Act which states that, despite anything to the contrary in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the certified statement referred to in section 172 may be filed with the clerk of the Magistrate's Court that has jurisdiction over the taxpayer named in the statement.

The South Africa Constitutional Court handed down judgment in a matter concerning an application for confirmation of an order of invalidity made by the Western Cape Division of the High Court and an appeal against certain parts of that order that declared certain specified words in section 65J(2) of the Magistrates' Courts Act (Act) inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor. In the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*,⁴⁶ the court focused on judicial oversight of debt recovery practices in South Africa, by loan companies against low-income workers. The court reworded relevant legislation to ensure that no orders to deduct payments from the wages of persons defaulting on small loan payments could be made without proper judicial oversight. In particular, no such order may be issued unless a magistrate, not just a clerk of the court, has authorized the order after being satisfied that the order is just and equitable, and appropriate given a debtor's financial circumstances. The court held that judicial oversight over the issue of an Emolument Attachment Order must be mandatory (rather than being subject to the discretion of the clerk of the court) and must occur when the execution order is issued (not subsequently, when an attempt might be made to have the execution order varied or set aside).⁴⁷

Conclusively, the judgment target section 65 J of the Magistrates Court Act which specifically deals with emolument attachment orders and not strictly garnishee orders as covered by section 65A(1)(a). As shall be discussed later in this chapter, Revenue Authorities follow a slightly different procedure in debt collection as compared to the normal civil debt collection, and as such a decision that affects the normal civil debt collection procedure may not affect them at all unless specifically pointed out by the court.

⁴⁵ 26 of 2005.

⁴⁶ [2016] ZACC 32.

⁴⁷ [2016] ZACC 32 para 84.

2.3.2 Enforcement

The court order against the garnishee includes the amount of the debt (for the past, present and future) and may include interest, legal costs and commission.⁴⁸ A garnishee order can be enforced in the same manner as it would be as a judgment of the court. Should a garnishee default on payment, a warrant of execution may be issued against him or her or the legal entity. If the garnishee disputes the liability to pay, the garnishee must appear in court on the day shown in a notice served, and show cause as to why he she or the entity should not pay the debt.

It does not, however, follow, that if the garnishee fails to make payment to the judgment creditor of the attached debt, that this is of no concern to the judgment debtor (the garnishee's creditor) or that it cannot be relied on by the latter as constituting a breach of contract by the former.⁴⁹ It is and it can. The judgment creditor does not become substituted as creditor of the garnishee. There is no transfer or cession of the debt to the garnishor.⁵⁰ Accordingly, the garnishee's indebtedness to its creditor, the judgment debtor, remains. It is in no way discharged or suspended. Only the method of payment of the debt is altered in the sense that the judgment creditor is now, because of the attachment, to receive the money.⁵¹ On this basis the garnishee's failure to pay remains a breach of his or her obligation to his or her creditor, the judgment debtor.

2.4 Tax collection

In some countries, including Zimbabwe and South Africa, it is public policy that revenue inflows to government should not be interrupted for any reason unless it is unavoidable. Government functions should not be brought to a halt for any reason. Therefore, in addition to the power to levy and collect taxes through enabling legislation, Governments, through legislation, have granted revenue authorities sweeping powers, which include but are not limited to:

1. the power to make tax assessments and even estimates of taxes due from a taxpayer from all available information,
2. the power to levy penalties on taxes due but unpaid,

⁴⁸ Legal Wise, Quick Law Guides, Garnishee Orders, <https://www.legalwise.co.za/help-yourself/quicklaw-guides/garnishee-orders> (accessed 2/5/16).

⁴⁹ *Pestana v Nedbank Limited* (A5023/07) [2007] ZAGPHC 283; 2008 (3) SA 466 (W) para 9.

⁵⁰ *African Distillers Ltd v Honiball* supra at 136G.

⁵¹ *Pestana v Nedbank Limited* (A5023/07) [2007] ZAGPHC 283; 2008 (3) SA 466 (W) para 9.

3. the power to insist on payment of any tax as levied, pending the determination of any objection to, or an appeal against, a tax as charged, and the power to resort to self-help to recover such tax.⁵²

The power to appoint another person to be the agent of a taxpayer where taxable income is due by the agent to the taxpayer, and the power to penalise the agent for any breach of this obligation.⁵³ In South Africa and Zimbabwe, the Revenue Authorities, in terms of the said enabling legislation, actively use garnishee orders to collect tax debts from taxpayers.

Different and to some extent more stringent rules regarding enforcement of or compliance with payment of tax debts exist in some countries; garnishee orders are in use in Finland and Hungary;⁵⁴ banks in the Slovak Republic are legally obliged to investigate the accounts and financial assets of potential tax debtors.⁵⁵ Australia's tax collection methods, with regard to tax debts use "Garnishee Orders" to recoup monies via a third party such as a bank or an employer.⁵⁶ Notably, joint bank accounts cannot be targeted.

In Australia there are two ways of enforcing garnishee orders, firstly by Point-in-time Garnishee Orders which result in the immediate payment of funds, followed by the expiry of the Order.⁵⁷ Standard Garnishee Orders which can also be served, stay in place until monies are paid over a period of time or until the Commissioner of the Australian Tax Office revokes the Order.⁵⁸

2.5 Tax Debts

As alluded to above, tax authorities are empowered by their respective statutory instruments to apply the garnishee order concept for the convenience of tax collection.

⁵² Fairdrop Trading (Private) Limited v Zimbabwe Revenue Authority HC 909/14.

⁵³ Ibid.

⁵⁴ Tully, K. UK Direct Recovery of Debts Legislation—Meaning for UK Taxpayers and Comparison to Other Nations, Performance & Financial Management, International Federation of Accountants. <https://www.ifac.org/global-knowledge-gateway/performance-financial-management/discussion/uk-direct-recovery-debts> (accessed 2/5/16).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

2.5.1 Tax legislation

According to section 58 of the Income Tax Act of Zimbabwe, and section 179 of the Tax Administration Act (which operate similarly), tax authorities are authorised to attach assets to the equivalent value of the debt owed or which will become due to the debtor by garnishee, without the need for a Court order or any form of judicial oversight. The debt in contest need not be due or payable in terms of the strict rules of debts pertaining to “owing and accruing”. A principle interpreted and confirmed in the *Honey & Blanckenberg v Law* case.⁵⁹

2.5.2 South African tax legislation

In South Africa, according to the SARS website,⁶⁰ the Minister of Finance announced in the 2005 Budget Review the drafting of Tax Administration legislation as a project "to incorporate in one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts". One of the main objectives of the said legislation is to provide for the effective and efficient collection of tax and to provide for the recovery of tax. Section 169(1) of the Tax Administration Act⁶¹ states that an amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund. This section establishes SARS as the creditor, the defaulting taxpayer being the debtor.

Section 179 of the Tax Administration Act is headed by the title: “Collection of tax debt from third parties” and the sub-title “Liability of third party appointed to satisfy tax debts”. The section reads as follows:

- (1) A senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage, or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer’s tax debt.
- (2) A person, unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as may be appropriate under the circumstances.

⁵⁹ 1966 (2) SA 43 (R).

⁶⁰ SARS, Tax Administration, <http://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx> (accessed 5/3/16).

⁶¹ 28 Of 2011.

- (3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, that person is personally liable for the money.

Section 179 of the Tax Administration Act operates together with section 172. Section 172 sets out the procedure for obtaining judgment. It states that:

- (1) If a person fails to pay tax when it is payable, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct. This is the same time frame adopted by section 65A(1)(a) of the Magistrates Courts Act, that of 10 days from the time the debt becomes payable.⁶²
- (2) SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the obligation to pay the amount has been suspended under section 164.
- (3) SARS is not required to give the taxpayer prior notice under subsection (1) if SARS is satisfied that giving notice would prejudice the collection of the tax.

This provision gives the Commissioner express powers to enforce a garnishee order without the need to make an application to the Court. The Commissioner may, given the circumstances, declare any person to be an agent of the alleged debtor and the said person shall be an agent for purposes of the Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages, or any other remuneration, which may be held by him or her or due by him or her to the person whose agent he or she has been declared to be.

This section empowers the Commissioner to appoint banks, employers, pension fund managers or similar persons as agents in respect of their clients, members, or employees,

⁶² 32 of 1944.

where such persons or entities hold funds on behalf of a taxpayer, to the extent that there are taxes, penalties, or interest due by that taxpayer to SARS.⁶³

Once appointed by the Commissioner, the third party becomes a representative taxpayer in relation to the person whose funds are under his or her management or control but only in respect of those funds.⁶⁴

2.5.3 Prior to the Tax Administration Act

Prior to the enactment of the Tax Administration Act, so-called “agent appointments” were made under section 99 of the Income Tax Act, 58 of 1962 (the Income Tax Act), or alternatively section 47 of the Value-Added Tax Act, of 1991 (the VAT Act). Section 99, since repealed, provides:

The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.⁶⁵

Attention should be drawn to the fact that section 179 of the Tax Administration Act no longer refers to the concept “agent” but third party. According to the SARS Guide on the Tax Administration Act the term “agent” was considered to be unnecessarily confusing.⁶⁶ Section 179 now states that SARS can require a third party to make payment to it in satisfaction of the taxpayer's tax debt.

In practice, the section 179 collection mechanism is activated through an electronic notice (entitled "Assessed tax – Third Party Appointment") issued to the third party.⁶⁷ The notice is accompanied by a statement (in a spread-sheet format) reflecting, among other things, the

⁶³ ENS Africa. Tax department, the appointment as payment agent by the Commissioner. <https://www.ensafrica.com/news/the-appointment-as-payment-agent-by-the-commissioner?Id=468&STitle=tax%20ENSight> (accessed 5/3/16).

⁶⁴ Ibid.

⁶⁵ Cliffe Dekker Hofmeyr, Tax Administration, 2194. Third party appointments APRIL 2013 – ISSUE 163, https://www.saica.co.za/integritax/2013/2194.Third_party_appointments.htm (accessed 5/3/16).

⁶⁶ Ibid.

⁶⁷ Ibid.

indebted taxpayer's details, a start and end date, the amount due to SARS, and the total amount required to be paid over to SARS by the third party.⁶⁸

One of the most notable changes made by section 179 of the Tax Administration Act is that the third party appointee's obligation to pay money to SARS covers money that it "holds or owes or will hold or owe for or to the taxpayer". The use of the future tense indicates that SARS could apply section 179 with regard to money not yet in the possession of the appointee, but which might be received in future. For example, a bank could be notified under section 179 to pay over money from a fixed deposit coming to maturity. Section 179 can therefore operate prospectively.⁶⁹ Legally, a third party appointed under section 179 is obliged to transfer to SARS such funds as are held in favour of the taxpayer, failing which such agent could be held liable for the outstanding amount. Whereas the debtor could earlier contest the issue of a garnishee order, this is impossible now with regard to section 179 because often the taxpayer could be oblivious that SARS intends to make a third party appointment.

2.5.4 Contrasting the civil garnishee order with the tax administration garnishee order

On application for a garnishee order in civil cases, the court could examine the debtor's financial position and vary, or set-aside, the order accordingly. The process in terms of section 179 of the Tax Administration Act with regard to third party appointment does not provide for such an examination — effectively there is no *audi alterem partem* opportunity (opportunity for the other party's case to be heard) for the impacted taxpayer.⁷⁰

Section 172 of the Tax Administration Act establishes the summary judgment procedure. This procedure maintains some elements of the normal civil procedure, but has its own unique provisions to facilitate an expeditious process. The section reads:

- (1) If a person fails to pay tax when it is due, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ SATC 180,183.

- (2) SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9, unless the obligation to pay the amount has been suspended under section 164.
- (3) SARS is not required to give the taxpayer prior notice under subsection (1) if SARS is satisfied that giving notice would prejudice the collection of the tax. This section is potentially unconstitutional as it is insufficiently justified and may come across like it embraces the concept of a police speed trap within tax collection practice.

In light of the *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*⁷¹ decision it would appear that the provisions of section 179 of the Tax Administration Act would fail the test set out by the Constitutional Court, namely that judicial oversight should be mandatory. Desai J stated, with reference to sections 65J(2)(b)(i) and (ii) of the Magistrates Court Act, that these provisions:

... are in the circumstances constitutionally invalid to the extent that they allow for Emolument Attachment Orders to be issued by a clerk of the court without judicial oversight. This is so both with regard to international law and to the current jurisprudence of the Constitutional Court.⁷²

SARS regularly issues attachment orders requiring banks to transfer client funds to SARS in settlement of tax debts which are owed by the banks' clients. In these instances, the intervention of a court is not required. There appears to be no constitutional checks in place to establish whether these procedures are, in the circumstances, just and equitable.

A civil judgment creditor in collecting a debt hence the different procedures can view the exercise of powers by the State in the collection of taxes differently than the exercise of powers. The decision can be interpreted to have been narrow to the extent of not addressing section 65(A)(1)(a) as well as the merits that justify a revenue authority to subvert normal channels of seeking a court order. However, the judgment signals a landmark ruling and could possibly give hope to the fact that the *Hindry v Nedcor Bank Ltd and Another*⁷³ judgment, the one that ruled the subversion of normal civil rules and procedure in tax collection to be Constitutional (to be discussed in greater detail), could be put aside in the

⁷¹ [2016] ZACC 32.

⁷² Para 85.

⁷³ 61 SATC 163.

near future. As it stands, the judgment from the *Stellenbosch* case is not binding toward tax authorities but the *Hindry* case.

Notably, section 37(1) of the Pension Funds Act⁷⁴ provides that a pension fund benefit may not be liable for attachment, including attachment by garnishee order. Section 179 of the Tax Administration Act specifically empowers SARS to require a third party appointee to pay to SARS "any money, including pension, salary, wage, or other remuneration". This highlights serious conflict between the two primary legislations.

2.5.5 Case law in connection with garnishee orders

Regarding court cases dealing with the concept of garnishee orders in the tax field, that of *Hindry v Nedcor Bank Ltd And Another*⁷⁵ is a good starting point. In the *Hindry* case it was contended by the taxpayer that section 99 of the Income Tax Act⁷⁶ (before it was repealed by section 179 of Tax Administration Act) was unconstitutional because it infringed on the rights to privacy (section 14), the right to administrative justice (section 33), and the right to access to the courts (section 34), as contained in the Constitution of the Republic of South Africa.⁷⁷

The taxpayer objected to the validity of section 99 on constitutional grounds, because it does not require prior notice to the taxpayer nor does it give the taxpayer an opportunity to make representations to influence the Commissioner not to declare a bank to be the taxpayer's agent, or to direct it to make payments of the amounts due by the taxpayer. It was held that the provision that limits the taxpayer's rights is to facilitate and enhance the Commissioner's ability promptly to recover taxes that are due and to avoid the assets of taxpayers being put beyond the Commissioner's reach.

It was held that the Commissioner may use (the now-repealed) section 99 to appoint the taxpayer's banker as the taxpayer's agent for the purposes of the Income Tax Act, and to require the bank to pay over to the Commissioner, from funds in the taxpayer's bank account, an erroneous tax refund that the Commissioner had paid to the taxpayer. This provision may therefore be used by the Commissioner to require such an "agent" to pay from funds held for or due by the latter to the taxpayer not only any tax, interest, or penalty that is due (that is to

⁷⁴ 24 of 1956.

⁷⁵ 61 SATC 163.

⁷⁶ 58 of 1962.

⁷⁷ 108 of 1996.

say, due under an assessment) but also the amount of an erroneous refund of tax. As the *Hindry* decision points out, a court order against that third party is not required, nor is the taxpayer afforded a hearing prior to an appointment of an “agent”.⁷⁸

The court in *Hindry* also held that, to the extent that the section may infringe on a person’s constitutional rights as set out in the Bill of Rights, such infringement is reasonable and justifiable in an open and democratic society and, accordingly, the section was not unconstitutional.⁷⁹ The court stated that the principle contained in (the now-repealed) section 99 was a legitimate limitation of a taxpayer’s rights in terms of the Constitution, as envisaged in section 36 thereof, in that it was a provision directed towards the collection of taxes in the interests of South African society as a whole.

Another case that highlights the use of garnishee orders, its challenges and consequences for third parties, when it comes to tax collection, is the Supreme Court of Appeal judgement in *Nedbank Limited v Pestana*.⁸⁰ The Tax Administration Act⁸¹ was not yet in use and the Court was still referring to section 99 of the Income Tax Act.⁸² The facts of the matter were as follows: Joseph Michael Pestana conducted a current account at the Nedbank Carletonville branch. Another, José Manuel Pestana conducted a similar account at the same branch. When Joseph Pestana's account was in credit for an amount of just under five hundred thousand Rands (R500 000), he requested the branch to transfer an amount of four hundred and eighty thousand Rands (R480 000) from his account to that of José Pestana.

At 11h33 of the morning in question, the branch carried out Joseph's instruction. What the staff at the Carletonville branch were not aware of, is that at 08h44 on the same day, the bank's head office in Rivonia had received a telefaxed notice in terms of section 99 of the Income Tax Act. SARS informed the bank that Joseph was indebted to it in an amount of three hundred and forty million Rands (R340 000 000), appointed the bank as agent for Pestana, and required the bank to make payments to it of the amount due to SARS.⁸³

When the Carletonville branch was informed of this later in the day, after it had already transferred the four hundred and eighty thousand Rands (R480 000) to José's account, it

⁷⁸ SATC 80,83.

⁷⁹ SATC 186.

⁸⁰ 2009 (2) SA 189 (SCA).

⁸¹ 28 of 2011.

⁸² 58 of 1962.

⁸³ 2009 (2) SA 189 (SCA) para 3.

reversed the transfer to José's account and paid the full amount of four hundred and ninety-six thousand Rands (R496 000) to SARS. It did not request the authority of José for the reversal of the transfer. The question of law which the court had to determine was whether the bank, having regard to its appointment in terms of section 99 of the Income Tax Act, was entitled to reverse the payment of four hundred and eighty thousand Rands (R480 000) without authority from José.

The bank's contention was that the act of crediting José's account in its books did not in itself create any liability towards José as the credit in his account had been wrongly made and could be reversed. Their alternative argument was that the bank could not validly adhere to the instruction given to it by Joseph in the light of the notice in terms of section 99 of the Income Tax Act, as the notice had been received prior to the instruction having been given to the bank by Joseph.⁸⁴

The Supreme Court of Appeal looked at issues pertaining to validly reversing a credit and concluded that "absent some legitimate reason for reversal, however, the general principle is that once an amount has been validly transferred by A to the credit of B's bank account, the credit belongs to B and the bank has to keep it at B's disposal; it cannot simply retransfer the money back into the account of A without the concurrence of B". The court stated that on the agreed facts before them there was no suggestion that either José or Joseph were parties to a theft or a fraud or any other improper conduct relating to the money in José's account. As such the bank's conduct was invalid and unlawful.

The bank's argument was that appointment in terms of section 99 of the Income Tax Act was a form of garnishment similar to that which is available in civil judgments, and that it has had an effect similar to a seizure of funds. The Supreme Court of Appeal agreed with the court *a quo* that section 99 of the Income Tax Act did not freeze José's account and it did not transfer or effect a cession of the funds in José's account to SARS.

Essentially the notice in terms of section 99 of the Income Tax Act did not divest José of the four hundred and eighty thousand Rands (R480 000) standing to the credit of his account. The judgment required the bank repay José.⁸⁵

⁸⁴ 2009 (2) SA 189 (SCA) para 12.

⁸⁵ Para 15.

Another case that dealt with the application of garnishee orders in the context of tax collection was that of *The Oceanic Trust Co. Ltd N.O, and the Commissioner for the South African Revenue Service*.⁸⁶ The Western Cape High Court had an opportunity to consider, among other matters, the application of section 99 of the Income Tax Act. In this case, the Commissioner had relied on section 99 of the Income Tax Act to appoint Standard Bank as the agent of the taxpayer in relation to twenty million Rands (R20 000 000) held by it on behalf of the Oceanic Trust.⁸⁷

One of the issues to be decided by the court in relation to section 99 of the Income Tax Act was whether at the time that the Standard Bank transferred the funds to the Commissioner, the taxes and/or interest and penalty were due and payable by the taxpayer. It was argued on behalf of the Commissioner that the word "due" as used in section 99 of the Act means "owing" and does not mean "payable".

In *Oceanic Trust*, the court stated that the meaning of the word "due" depends on the context in which it is used in the Act.⁸⁸ The court held that the context of section 99 of the Income Tax Act is that it constitutes a permissible means for the Commissioner to recover tax and other amounts owed by the taxpayer. Thus, the court found that, logically, because a money debt can only be enforced once it becomes payable, the tax reflected as owing can only be recovered by the Commissioner thereafter.

The court stated further that, on a purposive construction of section 99 of the Income Tax Act, the legislature cannot be held to have intended that the Commissioner fix a date for payment in an assessment but then be entitled in terms of section 99 of the Act to proceed to collect some or all of the assessed tax before the arrival of the date for payment set in the assessment.⁸⁹

The court in the *Oceanic Trust* case held that while the recovery by the Commissioner of the amount through the mechanism of section 99 of the Income Tax Act, prior to its becoming due, was premature and not lawful.⁹⁰ By the time the matter came before the court, the full amount of assessed tax had fallen due for payment and therefore the court found that it would

⁸⁶ 74 SATC 127 (WC).

⁸⁷ 74 SATC 127 (WC), para 9 and para 73.

⁸⁸ Para 74.

⁸⁹ Para 77.

⁹⁰ Para 79.

serve no purpose to order the Commissioner to repay the amount that had been transferred prematurely to SARS by using section 99 of the Income Tax Act.⁹¹

2.6 Garnishee orders in Zimbabwean tax legislation

With reference to Zimbabwe, section 58 of the Income Tax Act of Zimbabwe⁹² and section 48 of the Value-Added Tax Act,⁹³ allow the Zimbabwe Revenue Authority (ZIMRA) unilaterally to access bank accounts of clients or to intercept monies of clients from debtors to recover Value-Added Tax debts by use of garnishee orders.

Section 58 of the Income Tax Act of Zimbabwe is introduced with the heading “power to appoint agent”, and reads:

1. The Commissioner may, if he 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 tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, 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.
2. For the purpose of subsection (1)— “person” includes—
 - (a) a bank, building society or savings bank; and
 - (b) a partnership; and
 - (c) any officer in the Public Service;
 “tax” includes—
 - (a) interest payable by virtue of subsection (2) of section *seventy-one*, subsection (6) of section *seventy-two* or subsection (3) of section *seventy-three*; and
 - (b) provisional tax referred to in section *seventy-two*; and
 - (c) employees tax referred to in section *seventy-three*; and
 - (d) any additional tax or other penalty payable under this Act;
 - (e) any levy or sum payable in terms of the charging Act.

⁹¹ Para 81.

⁹² [Chapter 23:06].

⁹³ [Chapter 23:12].

Sections 47 and 48 of the Value-Added Tax Act contain the same wording as section 58 of the Income Tax Act. It is interesting to note that the above provisions have strikingly similar wording and elements found in the old section 99 of the South African Income Tax Act which dealt with third party appointments/garnishee orders. The repealed section reads:

The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.

Section 77 of the Zimbabwean Income Tax Act deals with the recovery of tax in terms of the recovery of debts. It reads:

- (1) Any tax shall, when it becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commissioner in the manner and at the place prescribed, and may be sued for and recovered by action by the Commissioner in any court of competent jurisdiction.
- (2) Notwithstanding anything contained in any law relating to Magistrates courts, any amount whatsoever due and payable under this Act shall be recoverable by action in the court of the magistrate having jurisdiction in respect of the person by whom such amount is payable under this Act.

This provision has the effect of declaring the amount due from the taxpayer as a debt of the state, in the same way that it is described in section 169 of the South African Tax Administration Act. It is worth noting the fact that, section 77 of the Zimbabwean Income Tax Act equates to the deleted parts of the South African Tax Act, section 91(1)(a)(b) which state that;

- (a) Any tax or any interest payable in terms of section 89(2) or 89*quat* shall, when such tax or interest becomes due or is payable, be deemed to be a debt due to the State and shall be payable to the Commissioner in the manner and at the place prescribed.

(b) If any person fails to pay any tax or any interest payable in terms of section 89(2) or 89*quat* when such tax or interest becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount of the tax or interest so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.

Importantly section 78 of the Zimbabwe Income Tax Act makes provision for the detailed procedure with regard to the collection of the debt from a defaulting taxpayer. It states:

- (1) Proceedings in any court for the recovery of any tax shall be deemed to be proceedings for the recovery of a debt validly acknowledged in writing by the debtor.
- (2) In any action or proceedings for the recovery of any tax it shall not be competent for the defendant to question the correctness of any assessment, notwithstanding that an objection or appeal may have been lodged thereto.

This provision further enforces the “pay now argue later” principle, as established by *Metcash*, and guarantees the sweeping powers of the tax Authorities as the Court is bound to comply with the Commissioner’s claim regardless of the merit or the quantum. The position is the same in South Africa as promulgated by section 172 of the Tax Administration Act. The striking difference between the Acts is that the Tax Administration Act creates an obligation for the Commissioner to give notice to the defaulting tax payer before filing with the Clerk of Court.

The most significant case regarding garnishee orders in the tax collection field in Zimbabwe, from a Constitutional perspective, is that of *Packers International v ZIMRA*,⁹⁴ (referred to as “Packers”). This case concerns a taxpayer who approached the court for relief after its bank accounts were garnished by the revenue authority on the basis that the effect of the garnishee order would be to force it into liquidation. The question that arose for determination was whether the circumstances are such that this court could intervene and accede to the relief that was sought in the face of certain statutory provisions that appear to give the tax collector

⁹⁴ HH-328-14.

absolute power to impose and collect taxes. This was an urgent chamber application for a provisional order in which the applicant sought the following interim relief:

1. That the respondent uplifts the garnishee order, and/or letter of appointment of agency placed/served to applicant's bank, FBC bank, immediately and forthwith.
2. That the respondent revoke and /or withdraw the appointment of the applicant's FBC bank as its agent in terms of section 58 as read with section 59 of the Income Tax Act [Cap 23:06] immediately and forthwith.
3. That the respondent shall not unlawfully interfere with applicant's business operations and day-to-day activities, including the placing of its officers or agents at applicant's business premises.

In summary, the case concerned a taxpayer who approached the Fiscal Court for relief after its bank accounts were garnished by the revenue authority. The applicant alleged that the respondent's officers, without any prior notice, garnished its bank account for the sum of twenty million United States Dollars (USD \$20 000 000). The applicant alleged that the respondent's officers have advised that officers were due to be posted to all the applicant's branches to monitor the applicant's operations and day-to-day activities. The applicant alleged that it could no longer transact as a result of the garnishee order. The applicant also alleged that such conduct on the part of the respondent was an interference with its business operations and was unlawful as its net effect was to render the business inoperable. The applicant alleged that the respondent's conduct was unconstitutional because the quantum of the garnishee order is arbitrary and was imposed without notice. The applicant alleged that the quantum of the garnishee ought to be in the amount that it admitted to owing, of about nine hundred thousand United States Dollars (USD\$900 000), because, at law, the disputed amount is suspended by the noting of the appeal. It argued that the garnishee order effectively forced it into liquidation. The question that then arose for determination was whether the circumstances were such that the court could intervene and accede to the relief sought by the applicant in the face of the statutory provisions that apparently appeared to give the tax collector absolute power to impose and collect taxes through the appointment of an agent such as a bank.

It was common cause that applicant had appealed to the Fiscal Appeal Court.⁹⁵

The Court made a ruling that:

1. The respondent uplifts and suspends the garnishee order placed on applicant's accounts with FBC bank, immediately and forthwith, until the appeal that is pending before the Fiscal Appeals Court is finalised.
2. The respondent shall allow a period of seven working days to elapse after the upliftment and suspension of the original garnishee order, where-after it shall replace it with a fresh garnishee order for the sum of nine hundred and five thousand dollars eight hundred and one dollar and thirty-two cents United States Dollars (USD\$905 801-32), which shall remain in place until the appeal is finalized or payment is made in full, whichever comes first.
3. The respondent shall not unlawfully interfere with applicant's business operations and its day-to-day activities, including the placing of its officers or agents at applicant's business premises.

The case was an urgent matter and the applicant was interested in securing interim relief. The court acknowledged in passing the constitutional implication and consequences of garnishee orders in tax collection. The court briefly referred to section 48 of the Value-Added Tax Act,⁹⁶ that provision which establishes the power to appoint an agent. The court's interpretation of section 48 of the Value-Added Tax Act was that the Commissioner of Taxes has the discretion to declare any person to be the revenue authority's agent, and that once such a declaration is made, the proposed agent has no choice but to pay any amount of money held on behalf of the taxpayer to the authority, as long as it is required for purposes of fulfilling tax obligations, and must even pay to the authority money that will be held in an account for wages.

Chigumba J explained this interpretation when he stated:

This obligation on the part of the appointed agent is not subject to any other law except section 48. Section 48 overrides anything that is contrary to it which may be set out in any other law. In my view section 48 of the Value-Added Tax Act does not override the Constitution, and the discretion exercised by the Commissioner is

⁹⁵ [Chapter 23:12].

⁹⁶ [Chapter 23:12].

reviewable because of the use of the word ‘may’ which is not peremptory. I hold the firm view that the intention of the legislature was that section 48 protect designated/appointed agents of the respondent from litigation in terms of other laws for the act of forwarding money in their client’s accounts to the respondent. Its purpose is to absolve the designated agents from liability if their act of forwarding their client’s money to the respondent results in loss or prejudice to their clients the account holders. I hold the respectful view that it could not have been the intention of the legislature to put the exercise of discretion by the Commissioner beyond the reach of the law.

Owing to the nature of the proceedings, however, the court did not have the opportunity to address the merits and constitutionality of the garnishee order at length. It was an opportunity missed. The judge did address the purposeful interpretation of the provision at the expense of analysing the Constitutional implications of having such a provision, beyond looking at it at face value. Packers filed an application to the Constitutional Court after it was compelled to settle a contested twenty-four million United States Dollars (USD\$24 000 000) debt in tax arrears by the Zimbabwe Revenue Authority (ZIMRA).⁹⁷ The company was challenging the constitutional status of section 48 Value-Added Tax Act which allows ZIMRA unilaterally to access banks accounts of clients or to intercept monies of clients from debtors to recover Value-Added Tax debts. A similar provision in the Income Tax Act is section 58.

Packers argued that ZIMRA should approach the courts first to get a garnishee order before raiding tax defaulter’s bank accounts. It alleged that section 48 denies the firm’s right to equality before the law and equal protection of the law as enshrined under section 56(1) of the Constitution of Zimbabwe, which is an advantage that is not available to businesses.

Zimbabwe is a new Constitutional state and the Constitution is barely four years old. Most cases that addressed garnishee orders in the tax collection field did not deal with the constitutionality of these orders. Apart from the nature of the proceedings, as urgent matters, it is highly unlikely that the Court was able to make a comprehensive Constitutional judgment.

⁹⁷ Tax Matrix Monthly update, December 2015, p 25. <http://taxmatrix.co.zw/wp-content/uploads/2016/01/December-2015-MTU.pdf> (accessed 14 Jul. 16).

2.7 Conclusion

The concept of garnishee orders comes with legal ambiguity, when it is used and enforced without the consideration of constitutional values and a regard for reasonableness. This is the situation when it comes to tax collection in both South Africa and Zimbabwe.

This chapter has attempted to describe and explain garnishee orders, specifically in relation to tax collection. The chapter describes its historical developments building up to its current stage. The ensuing chapters will highlight the extent to which these orders are intrusive with regard to taxpayer's rights in South Africa and in Zimbabwe respectively. Those chapters will look at the constitutional rights of the taxpayer and the violating nature of these orders when it comes to tax collection practices as adopted by the tax collection authorities. The chapter will identify the specific rights being infringed upon and will discuss the extent of these infringements from a constitutional perspective.

Chapter 3: CONSTITUTIONAL IMPLICATIONS OF GARNISHEE ORDERS IN TAX COLLECTION IN SOUTH AFRICA

3.1 Introduction

This chapter aims to address the constitutional implications of the use of garnishee orders by tax authorities in South Africa. Specific constitutional rights that are either violated or potentially violated will be identified. Each constitutional right will be analysed and discussed and reference will be made to the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution), and to legislation and court decisions. The chapter will assess each constitutional right and whether or not SARS, through the garnishee order as enforced by section 179 of the Tax Administration Act, infringes each particular right. The rights in question are, namely, the right to privacy, to property, to access to the

courts, and to just administrative action. This chapter will focus on constitutional rights in South Africa and the next chapter will focus exclusively on constitutional rights in Zimbabwe.

The concept of rights does not exist in a vacuum. Responsibilities and duties are synonymous with constitutional rights and hence taxpayers' rights are not absolute. Section 36 of the Constitution states the specific grounds and circumstances in terms of which the Constitution permits the limitation of rights. In this chapter, after identifying and discussing a particular right that may be infringed, reference will be made to section 36 of the Constitution to assess whether a limitation of the right is justifiable in an open and democratic society. A balance must be struck between SARS's duty to collect tax on the one hand and the taxpayer's duty to pay tax on the other.

A third party appointment involves the transferring of money or property to SARS without giving the debtor an opportunity to contest the action. With reference to the Bill of Rights,⁹⁸ it may be argued that SARS violates the right to privacy,⁹⁹ property,¹⁰⁰ just administrative action,¹⁰¹ and the right of access to courts¹⁰². Each right will be discussed separately under the ensuing sub-headings.

It is important to note that a garnishee order cannot be used in anticipation of failure to pay tax. As held in *Oceanic Trust Co. Ltd N.O. v Commissioner: SARS*,¹⁰³ the recovery by the Commissioner of the amount through the garnishing mechanism prior to it becoming due is premature and not lawful. A garnishee order may also fail if it is instituted on an agent or third party who owes no money to, or holds no money on behalf of a default taxpayer. Where a customer has an overdraft, the bank may make a payment to the Commissioner on behalf of the taxpayer.¹⁰⁴

3.2 Access to courts

Section 34 of the Constitution of South Africa states that everyone has the right to a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This section can

⁹⁸ Constitution of the Republic of South Africa, 1996.

⁹⁹ As provided for in Section 14 of the Constitution.

¹⁰⁰ As provided for in section 25 of the Constitution.

¹⁰¹ As provided for in section 33 of the Constitution.

¹⁰² As provided for in section 34 of the Constitution.

¹⁰³ 74 SATC 127 (WC).

¹⁰⁴ *The Trustee v Kensington Borough Council*, 1950 2 AER 716 at 718-719.

be read together with section 38 of the Constitution which deals with the enforcement of rights. Section 38 states that anyone listed in this section has the right to approach a competent court, alleging that a right has been infringed or threatened whereupon the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in his or her own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

One of the three components of section 34 is the guarantee of the right of everyone to bring a dispute to a court or tribunal to seek redress (right of access to justice). The other components of the right are for courts, tribunals, or fora that resolve disputes to be independent and impartial in the execution of their duties, and for disputes to be resolved in a fair and public hearing.¹⁰⁵ This is to ensure protection against actions by the state and other persons, which deny access to courts or other fora.¹⁰⁶ The right of access to justice must be interpreted in accordance with this approach for the appropriate interpretation of the Bill of Rights. In terms of the Constitution any interpretation of the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom, must consider international law, and may consider foreign law.¹⁰⁷ The aims reflect the spirit and purpose of the Constitution, and must be taken into consideration when constitutional rights and obligations are interpreted, and when rights are to be limited.

It has been declared that the preamble to the Constitution should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value because it connects up, reinforces, and underlies the text that follows. It establishes the basic design of the Constitution and indicates its fundamental purposes.¹⁰⁸ The Constitution was adopted and a bill of fundamental rights was entrenched not only to avoid a repetition of and to redress

¹⁰⁵ Nyenti, M. 2013. "Access to justice in the South African social security: Towards a conceptual approach" DEJURE 44. http://www.saflii.org/za/journals/DEJURE/2013/44.html#_ftn5 (accessed on 27/05/16).

¹⁰⁶ Currie & De Waal. 2005. *The Bill of Rights Handbook*. Cape Town 704.

¹⁰⁷ Section 39(1)(a)-(c) of the Constitution.

¹⁰⁸ *S v Mlungu* [1995] ZACC 4; 1995 3 SA 867 (CC) par 112.

South Africa's past injustices but also in order to establish a new society based on mutual respect, equality, and freedoms.¹⁰⁹

Before the adoption of the Constitution, the state used various mechanisms to restrict the jurisdiction of the courts. One such mechanism was an outright prohibition against the bringing of legal proceedings against the state.¹¹⁰ The Ciskei Definition of State Liability Decree is an example of this and provides that

. . . no legal proceedings may be brought against the state in respect of any claim arising from any procedural irregularity, abuse of power, maladministration, nepotism, corruption or act of negative discrimination on the part of any member or servant of the Government of the Republic of Ciskei.¹¹¹

Legislation which prevents or inhibits judicial resolution of a dispute, or which constitutes an impediment to a person's constitutional right to have disputes resolved, may be challenged in terms of the access to the courts clause. Loots provides a detailed list of legislation that has been challenged in the South African Courts in terms of the right to the courts clause.¹¹² He states that the legislation that has been challenged in terms of this clause includes provisions for statutory expiry periods for the commencement of civil actions;¹¹³ the Vexatious Proceedings Act,¹¹⁴ which limits access to court of persons declared to be vexatious litigants;¹¹⁵ a rule of court which obliged an applicant for rescission of a default judgment to furnish security for costs as a prerequisite to being able to make the application;¹¹⁶ a provision requiring a dispute to be referred to an administrative tribunal (unsuccessful);¹¹⁷ a provision prohibiting appeals against the decision of an arbitration tribunal unless otherwise agreed to by the parties (unsuccessful);¹¹⁸ and an ouster provision purporting to place certain

¹⁰⁹ Olivier *et al.* 2003. "Constitutional issues" in *Social Security: A Legal Analysis* (ed Olivier) 52.

¹¹⁰ Nyenti, M. 2013. "Access to justice in the South African social security: Towards a conceptual approach" *DEJURE* 44. http://www.saflii.org/za/journals/DEJURE/2013/44.html#_ftn5 (accessed on 27/05/16).

¹¹¹ S 2(1) State Liability Decree 34 of 1990 (CK).

¹¹² Loots, C. 1999. *Access to the Courts and Justiciability*. Revision service 5, 8-1.

http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/8-Access%20to%20the%20Courts.pdf (accessed 27/05/16).

¹¹³ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC); *Baldeo v Minister of Safety and Security* 1997 (12) (BCLR) 1728 (D).

¹¹⁴ Act 3 of 1956.

¹¹⁵ *Beinash v Ernst and Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).

¹¹⁶ *Mthethwa (Khoza) & others v Diedericks & others* 1996 (4) SA 381 (N).

¹¹⁷ *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC); *Baramoto & others v Minister of Home Affairs & others* 1998 (5) BCLR 562 (W).

¹¹⁸ *Patcor Quarries CC v Issroff & others* 1998 (4) SA 1069 (SE), 1998 (4) BCLR 467 (SE).

issues beyond judicial scrutiny.¹¹⁹ The Abolition of Restrictions on the Jurisdiction of Courts Act¹²⁰ amended over a hundred pieces of legislation and removed provisions that constituted a barrier to access to the courts. The guarantee of access to the courts or other fora ensures that whenever there is a dispute that dispute should be resolved by the application of the law.¹²¹

A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct. The rule of law seeks to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters into their own hands.¹²² Section 34 insists on the resolution of legal disputes by fair, independent, and impartial institutions, and prohibits self-help.¹²³

The case of *S v Pennington*¹²⁴ makes it clear that section 34 does not apply to criminal matters but to civil matters. Section 34 provides for disputes that can be resolved by law as well as providing protection against actions by the state and other persons that deny access to courts or other fora. The right of access to courts applies when it comes to the three branches of government, namely, the judiciary, the executive, and the legislature. Ackermann in *Bernstein ao v Bester NO*¹²⁵ rightfully indicated that the purpose of this right was, among others, “the separation of the judiciary from the other arms of the state”. Keulder adds the fact that the link between the right of access to courts and administrative justice must be remembered when dealing with the constitutionality of certain practices and procedures.¹²⁶

Bearing in mind the purpose and objective of section 34 of the Constitution, this chapter discusses the implications of third party appointments, specifically with regard to the fact that the defaulting taxpayers do not receive any notice of such appointments and subsequently lose the opportunity to challenge or dispute the “third party appointment” in terms of merit, or quantum, or payment arrangements. The legislation takes away the taxpayers’ opportunity to be heard by the court, - the *audi alterem partem* principle.

¹¹⁹ De Lille & another v Speaker of the National Assembly 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C).

¹²⁰ Act 88 of 1996.

¹²¹ As put in section 34 of the Constitution.

¹²² Currie, I & De Waal, J. 2005. The Bill of Rights Handbook Cape Town, 704.

¹²³ Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409.

¹²⁴ 1997 (4) SA 1076 (CC).

¹²⁵ 1996 (2) SA 751 (CC).

¹²⁶ Keulder, C.2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master’s thesis. Pretoria. University of Pretoria at 44.

Section 172 of the Tax Administration Act, under “Application for civil judgment for recovery of tax”, states that

- (1) If a person fails to pay tax when it is payable, SARS may, after giving the person at least 10 business days’ notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified as correct by SARS.
- (2) SARS may file the statement irrespective of whether or not the amount of tax is subject to an objection or appeal under Chapter 9 unless the obligation to pay the amount has been suspended under section 164. Section 164 permits senior SARS official to suspend payment of the disputed tax having regard a list of factors.
- (3) SARS is not required to give the taxpayer prior notice under subsection (1) if SARS is satisfied that giving notice would prejudice the collection of the tax.

Section 172(3) of the Tax Administration Act¹²⁷ permits SARS to obtain a summary judgment without advising the taxpayer if it is in the best interests of tax collection and/or debt recovery.

The Commissioner may file a statement with the clerk or registrar of a competent court indicating the outstanding tax, interest, or penalty payable.¹²⁸ Filing of the statement has the same effect as a civil judgment. In essence, this procedure allows SARS to obtain a civil judgment against a taxpayer in the taxpayer’s absence and denies the right to have a justiciable dispute settled by a court of law.¹²⁹ The question arises whether this procedure by SARS constitutes a self-help procedure. As shall be discussed in the ensuing Chapters, SARS becomes a judge in its own matter, without affording the taxpayer- the other party, an opportunity to be heard before a neutral, impartial forum, a court of law. As Keulder puts it: “May a taxpayer rely on section 34 of the Constitution to have this section declared unconstitutional as one of the purposes of section 34 is to prevent self-help?”¹³⁰

¹²⁷ 28 of 2011.

¹²⁸ S 40(2)(a) of the VAT Act and section 91(1)(a) of the Income Tax Act contains similar provisions.

¹²⁹ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master’s thesis. Pretoria. University of Pretoria at 45.

¹³⁰ Ibid.

3.3 Civil judgments: Default judgments

It is important to ascertain how default judgments are obtained in civil proceedings. Against this background the striking differences with the procedure used by SARS and enforced by section 172 of the Tax Administration Act become clear.

With regard to civil judgments, the only time a Court can make a decision in the absence of the other party would be in the case of a default judgment.¹³¹ The plaintiff may apply for a default judgment against the defendant if the defendant fails either to enter an appearance to defend or to plead after being warned that he or she may be barred after failing to do so.¹³² Also, default judgment may be taken against a party who fails to appear at the trial.¹³³ A plaintiff may apply for default judgment when a defendant has failed to serve a notice of intention to defend within the prescribed time or when the defendant has failed to deliver a plea after receiving a notice of bar from the plaintiff. When the prescribed time has lapsed the plaintiff is entitled, without further notice to the defendant, to apply for final judgment against the defendant. In essence, a default judgment amounts to a civil judgment against a party without hearing that party's case. This can be very easy if the applicant is making a liquid claim which is an amount of money that can be determined directly and easily.¹³⁴ An aggrieved party can apply for rescission of judgment within 20 days after receiving notice of default judgment if the party can show good cause for it.¹³⁵

3.4 Tax administration default judgment

Civil judgments in the form of default judgments differ from the procedure SARS utilises. Section 174 of the Tax Administration Act¹³⁶ states that a certified statement filed under section 172 must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.

¹³¹ Pete S, *et al.* 2012. Civil Procedure, A practical guide, 206.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T) at 736.

¹³⁵ High Court Rule 31(2)(b). In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 it was determined that good cause consists of a) a reasonable explanation for default and b) a bona fide defence on the merits that carries some prospect of success. Magistrates' Court rule 49(3) stipulates that in an application for rescission, where the applicant wishes to defend the proceedings, the grounds for the defence must transpire. It is accordingly submitted that in both the High Court and Magistrates' Court a judgment will only be rescinded if the defendant can show good cause.

¹³⁶ 28 of 2011.

With civil default judgments the defaulting party would have the opportunity of receiving notice of trial whereas with the SARS procedure there is no notice of such nature to the defaulting taxpayer. In civil default judgments, the defaulting party will have a judgment against him or her for not properly following and observing procedure. The SARS situation does not entitle the defaulting taxpayer to any Court process. It can therefore be concluded that SARS does not utilise the same procedure that applies for default civil judgments. Legislation has provided SARS with wider powers in terms of its debt collection procedures. The main enquiry is whether such procedures can pass the constitutional muster.

In the matter of *Traco Marketing v Minister of Finance*,¹³⁷ a registered vendor failed to pay Value-Added Tax to the Commissioner and the Commissioner responded by filing a statement with the registrar of the court to obtain a writ of execution. The taxpayer made an urgent application to the High Court to set aside the judgment and writ of execution. The taxpayer contended, among other things, that section 40 of the Value-Added Tax Act was contrary to the constitutional rights to equity, human dignity, administrative fair action, and to have a justiciable dispute settled by court.¹³⁸ Counsel for the Commissioner, however, advised the court of his intention to bring an application for direct access to the Constitutional Court in order to test the procedural provisions of the Value-Added Tax Act against the Constitution. The court decided that the issues in *Traco Marketing v Minister of Finance* case would stand over until a ruling was made regarding the Commissioner's application. The Commissioner, unfortunately, never pursued his application in the Constitutional Court.¹³⁹ This meant that the procedural provisions of the Value-Added Tax Act were never tested against the Constitution in the given matter.

In the matter of *Metcash Trading Ltd v Commissioner for the South African Revenue Service*,¹⁴⁰ the Court discussed the constitutionality of the procedures enforced by SARS in collecting its debts from taxpayers.

SARS, alleging that the applicant claimed fictional input tax deductions, served an assessment of R266 million on the applicant. The applicant's objection to the assessment was subsequently disallowed by SARS. The applicant was also notified that if he did not effect

¹³⁷ [1996] 2 All SA 467; 58 SATC 195.

¹³⁸ Section 34 of the Constitution.

¹³⁹ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master's thesis. Pretoria. University of Pretoria at 49.

¹⁴⁰ (2000) 2 SA 232 (W).

payment SARS would enforce its summary procedure. In response the applicant approached the High Court on an urgent basis contending that the collection procedures utilised by SARS were unconstitutional. The court held that the summary procedure does infringe upon a taxpayer's right of access to courts.¹⁴¹

In *MA Sepataka v Commissioner for the South African Revenue Service*¹⁴² the court was also confronted with the filing of a statement by SARS in terms of section 91(1)(b) of the Income Tax Act (which allowed for the statement procedure before it was repealed by the Tax Administration Act). The Court made important remarks with regard to the given practice and stated:

The provision, however, is draconian and should therefore be exercised with care by properly experienced and suitably qualified personnel since it may otherwise be reduced to an arbitrary guesstimate with grave consequences to the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realise assets including money standing to the credit of the taxpayer's bank account notwithstanding that these actions may jeopardise the taxpayer's cash flow and business.¹⁴³

The Court stated that certain checks and balances must be in place to satisfy the requirements of constitutional proportionality. By employing constitutional proportionality, and in order to find a fair solution, the courts discern a correct balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act.

3.5 Limitation of the right of access to the courts

It should also be borne in mind that the rights entrenched in the Bill of Rights are not absolute. Section 36 of the Constitution contains a limitation clause that can be enforced through a two-stage enquiry. The first stage enquires into whether there has been infringement of any right;¹⁴⁴ if the answer is in the affirmative the next stage questions whether the infringement can be justified as a permissible limitation of a right.¹⁴⁵ The first stage is principally a matter of interpretation of the provisions of the law and of the Bill of

¹⁴¹ Para 242.

¹⁴² 72 SATC 279.

¹⁴³ At 283.

¹⁴⁴ Currie & De Waal. 2005. The Bill of Rights Handbook, 166.

¹⁴⁵ Ibid.

Rights: This requires a demonstration that the situation seeking constitutional protection falls within the ambit of any constitutional right so that the practice that is being challenged would impede the exercise of the protected activity,¹⁴⁶ and that the right or practice he or she wishes to challenge impedes the exercise of the protected activity.¹⁴⁷

The second stage examines whether the limitation is reasonable and justifiable based on concepts of human dignity, equality, and freedom,¹⁴⁸ to ascertain which the court must consider the nature and extent of the limitation, the importance of the purpose of the limitation, as well as the relationship between the limitation and the said purpose.¹⁴⁹

Furthermore, the court must consider if there are less invasive means available, and must also consider the nature of the right that is being limited. If it is a reasonable and justifiable limitation, the impediment will be allowed. In the event that it is not reasonable and justifiable, the practice will be unconstitutional.

Given the SARS statement procedure in enforcing debt collection from taxpayers and the potential constitutional rights violations, the courts have to justify whether the means justify the ends, and will weigh the nature of the infringed right against SARS's obligations and duties. In the two stage enquiry the Commissioner has argued, among other things, that the following reasons create a reasonable and justifiable limitation:

- frivolous objection would be made to delay the payment of taxes;
- fraudulent and dishonest tax returns would be encouraged; and
- South Africa cannot afford taxpayers not paying promptly.¹⁵⁰

SARS argues that, in order to implement an expeditious process in tax collection, the taxpayer must sacrifice some rights for the overall good of the country.

In *Hindry*,¹⁵¹ the court dealt with the constitutionality of a legislative provision in the Income Tax Act¹⁵² that had the effect of allowing for a form of summary garnishment by the

¹⁴⁶ Keulder, C. 2013. Pay now argue later rule- before and after the tax administration act, PER / PELJ (16) 4 at 10.

¹⁴⁷ Ibid.

¹⁴⁸ Section 36(1) of the Constitution.

¹⁴⁹ Section 36(1)(a)-(e) of the Constitution.

¹⁵⁰ Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC), paragraphs 11, 13, 14, 16, 17, 19 and 20.

¹⁵¹ 1999 (2) SA 757 (W), a judgment of a single judge sitting in the same high court.

Commissioner of the credit in a taxpayer's bank account which the court held was justified under section 36 of the Constitution. The court reviewed various constitutional provisions and concluded that the section was not unconstitutional because garnishee provisions are common in open and democratic societies around the world. The court held that such a course of action was reasonable and justifiable in an open and democratic society, and accordingly was not unconstitutional. The court further stated that the limitation of a taxpayer's rights was legitimate in that taxation is beneficial to South African society as a whole.

Later, in *Chief Lesapho v North West Agricultural Bank*, the court had to make a judgment on the validity of section 38(2) of the North West Agricultural Bank Act¹⁵³ which permits the North West Agricultural Bank to seize the property of defaulting debtors with whom it has concluded loan agreements and to sell such property to recover its debt without recourse to a court of law. The Bophuthatswana High Court declared this provision inconsistent with section 34 of the Constitution which provides for the right of access to court. This order was referred to the Constitutional Court which had to decide whether or not to confirm the High Court's finding that section 38(2) of the North West Agricultural Bank Act was unconstitutional and invalid. The Constitutional Court confirmed the Bophuthatswana High Court's order of unconstitutionality.

In a unanimous judgment by Justice Mokgoro the court dismissed the bank's argument that section 38(2) of the North West Agricultural Bank Act is not unconstitutional because it operates only where there is no dispute, whereas a person is entitled to the section 34 right of access to court where there exists a dispute to be adjudicated upon by a court. The court noted that section 38(2) of the North West Agricultural Bank Act entitled the Bank to sell the debtor's property in execution whether the debt alleged to be due is disputed or not.

The court pointed out that section 34 guarantees the protection and safeguards of the court process to any dispute resolvable by law. An important purpose of a court hearing is to provide the institutionalised resolution of disputes, which prevents them from resorting to self-help. The court stated that section 38(2) of the North West Agricultural Bank Act authorises the bank to bypass the courts, allowing it to resort to self-help, thereby becoming a judge in its own cause.¹⁵⁴

¹⁵² Section 99 of the Income Tax Act 58 of 1962.

¹⁵³ 14 of 1981.

¹⁵⁴ At 245 B.

Most importantly the court held that section 38(2) of the North West Agricultural Bank Act was not a reasonable and justifiable limitation of section 34 of the Constitution. Because a stable and orderly society settles legal disputes in a court of law, very powerful considerations would be required for section 34's limitation to be reasonable and justifiable.¹⁵⁵ Although the provision in question intended to provide the bank with a quick, efficient, and inexpensive means of realising its securities by avoiding normal legal procedures, it achieved this purpose minimally while at the same time making serious inroads into the constitutional rights of the bank's debtors. Less invasive remedies are available to the bank to provide for the protection of its resources.¹⁵⁶

The court in *Hindry* declared the methods employed by SARS as constitutional, having passed the limitation clause under section 36 of the Constitution. In a later judgment of *Chief Lesapho v North West Agricultural Bank*, the court does acknowledge the value and significance of section 34 of the Constitution.

In *Contract Support Services & Other v C:SARS*¹⁵⁷ the Commissioner invoked section 47 of the Value-Added Tax Act to declare the taxpayer's bankers to be agents of the taxpayer. Section 47 is the Value-Added Tax equivalent of section 99 of the Income Tax Act. Brett A J held that garnishing provisions were not *ultra vires* the Constitution even if the Commissioner does not comply with the "*audi alteram partem* principle" of issuing the garnishee order notice to the taxpayer. The court rejected this ground for the practical reason that the object of section 47 is to prevent funds being paid to the taxpayer and then spirited away. Any delay would negate the object of the section.

It could be argued that the court in the *Hindry* matter could have given section 34 of the Constitution more weight in its deliberations leading to the findings. The court could have invalidated the section that allowed SARS to utilize its own form of summary garnishment and could have taken the legislature to task by reviewing the wording and impact of section 99 of the Income Tax Act thereby ensuring non-invasive safeguards and mechanisms. SARS should not be permitted to bypass the courts, allowing it to become a judge in its own cause. Recommendations on less invasive methods to balance the duties of SARS and the rights of taxpayers are discussed in the final chapter of this thesis. As it stands SARS's summary judgment, based on Court decisions, passed the Constitutional test.

¹⁵⁵ 242 I—243 A.

¹⁵⁶ 243 G-H.

¹⁵⁷ 61 SATC 338.

3.6 Right to property

Section 179 of the Tax Administration Act primarily deals with recovering money or property to satisfy a debt from a defaulting taxpayer. Section 179(1) of the Tax Administration Act states that a senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage, or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt. On the other hand, section 25 of the Constitution enshrines the right to property. This thesis will discuss the Constitutional right to property in the context of third party appointments; thereafter summary garnishees by SARS, a method to recover debts from a taxpayer without notice or a hearing, will be examined with reference to the right to property.

The court in *Hindry v Nedcor*¹⁵⁸ stated that the garnishment of a debt may be regarded as a seizure of property and reiterated that it is a form of execution available generally to enforce a money judgment. The distinguishing feature of section 99 of the Income Tax Act of South Africa (which has been repealed) is that it may be enforced to recover an amount due under an assessment or an amount due by way of an incorrectly made refund or some other unpaid tax without there being a judgment. The question, then, is whether the recovery procedure that the Act provides for the Commissioner violates basic human rights because of its extra-judicial and summary nature.

In South Africa, property does not refer to land only, but also to corporeal movables, incorporeal things, commercial interests, and intellectual property.¹⁵⁹ De Waal argues that "property" could have three different meanings. First: physical property itself, those things with respect to which legal relations exist between people.¹⁶⁰ Second: the set of legal rules governing relationships between individuals and physical property,¹⁶¹ including property rights such as ownership. Lastly: any relationship or interest having an exchange value¹⁶² which would include the market value of a house. In most jurisdictions, if not all, property is understood as something recognised as property in the existing law of property. Property should be seen as those resources that are generally taken to constitute a person's wealth (including real and personal rights) and are recognised and protected by law.

¹⁵⁸ 61 SATC 163; 1999 (2) SA 757 (W).

¹⁵⁹ Currie, I & De Waal, J. 2005. *The Bill of Rights Handbook*, 536.

¹⁶⁰ Currie, I & De Waal, J. 2005. *The Bill of Rights Handbook*, 537.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

Section 25(1) of the Constitution states that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. The aim of section 25 of the Constitution is twofold: firstly, to protect existing property rights; and, secondly, to allow legislative opportunities to correct the historical and uneven distribution of property in South Africa.¹⁶³ The section serves a multi-purpose that may be embodied under three broad categories namely:

- claims to immunity against uncompensated expropriation of private property,
- a claim of eligibility to hold property, and
- a claim to have property.¹⁶⁴

Section 25 embodies a negative protection of property and does not expressly guarantee the right to acquire, hold, or dispose of property. This was one of the major objections raised against the section and was rejected by the Constitutional Court in the First Certification case.¹⁶⁵ After referring to the wide variety of formulations of the right to property in the constitutions and bills of rights of recognised democracies, the Constitutional Court on that occasion pointed out that no universally recognised formulation of the right to property exists and held that the “protection for the holding of property is implicit in section 25”.¹⁶⁶ Subsection (4)(b) of section 25 makes it plain that for the purposes of the section “property is not limited to land”. When interpreting the section 25 provisions, the protection of property as an individual right is not absolute but is subject to societal considerations. The court in *First National Bank v Commissioner, South African Revenue Service*,¹⁶⁷ lucidly explained the provision by stating:

The meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.

¹⁶³ Currie, I & De Waal, J. 2005. *The Promotion of Administrative Justice Act: A Commentary*, 533. 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC).

¹⁶⁴ Currie, I & De Waal, J. 2005. *The Bill of Rights Handbook*, 536.

¹⁶⁵ *Interim Constitution 1996*.

¹⁶⁶ 2002 (4) SA 768 (CC) para 48.

¹⁶⁷ 2002 (4) SA 768 (CC).

3.7 What counts as arbitrary deprivation?

The wording of section 25(1) shows that the protection of property is not absolute because the use, enjoyment, and exploitation of property can be limited legitimately through uncompensated regulatory deprivation provided that these regulations are not arbitrary.¹⁶⁸ If section 25 is applied to this wide *genus* of interference “deprivation” would encompass all species thereof and “expropriation” would apply only to a narrower species of interference.¹⁶⁹ The idea is not to protect private property from all state interference but rather to safeguard it from illegitimate and unfair state interference.¹⁷⁰ Chaskalson J and Lewis J, using a slightly different idiom and dealing with both the interim and the 1996 Constitutions, put it thus: “expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations”.¹⁷¹

Viewed from this perspective section 25(1) deals with all “property” and all deprivations (including expropriations). If the deprivation infringes section 25(1) and cannot be justified under section 36 that is the end of the matter.¹⁷² The provision is unconstitutional.

When it comes to the issue of “arbitrary” some authors have argued “that a deprivation is arbitrary for purposes of section 25(1) if it follows unfair procedures, if it is irrational, or is for no good reason”.¹⁷³ Chaskalson J and Lewis J contest the view that “arbitrary” in section 25(1) of the 1996 Constitution imputes anything more than non-rationality and rely in this regard on this court’s judgment in the case of *S v Lawrence*.¹⁷⁴ The court stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve.

It can be argued that private ownership is justifiably and inevitably limited by public-interest regulation and therefore the balancing of private property interests against the public interest would not be regarded as an unjustified or illegitimate infringement of existing property

¹⁶⁸ *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 17.

¹⁶⁹ 2002 (4) SA 768 (CC) para 58.

¹⁷⁰ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 33.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Currie, I & De Waal, J. 2005. *The Bill of Rights Handbook* p 422.

¹⁷⁴ [1997] ZACC 11; 1997 (10) BCLR 1348 (CC).

rights, depending on the factors that are taken into account and the way in which the balancing plays out in practice.¹⁷⁵

Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of the law of general application. Van der Walt states that the reference to “law” includes legislation, the common law, and customary law.¹⁷⁶ In terms of section 25(1) deprivation of property may be authorised by either legislation or the common law, provided the authorising law is formally valid and applies generally. Section 25(2) of the Constitution echoes the phrase in section 25(1): property may be expropriated only in terms of the law of general application.

Van der Walt states:

... given the fact that the South African common law does not authorise expropriation, section 25(2) refers to legislation only and not to the common law, but like section 25(1) it also requires the law to be formally valid and to apply generally, in other words to have certain qualities that correspond with constitutional goals.¹⁷⁷

The reference to law of general application (which includes the implicit requirement of validity) reappears in section 36(1) of the Constitution.

The matter of *First National Bank v Commissioner of South African Revenues Services*¹⁷⁸ involved the detention of property by the Commissioner of the South African Revenue Service arising from customs duties owing. Vehicles belonging to the applicant were detained as security for customs duties and penalties owed not by the applicant itself but by certain importers. Section 114 of the Customs and Excise Act¹⁷⁹ permits seizure of goods without requiring prior application to court by the Commissioner. The Commissioner intended to sell the vehicles in question to recover unpaid duties and penalties owed by the importers. It was contended on behalf of the applicant that the detention and anticipated sale of the vehicles amounted to an expropriation and that such expropriation was inconsistent with section 25(1) of the Constitution, and was thus invalid.

¹⁷⁵ A J van der Walt, *Property and the Constitution*, Pretoria University Law Press at 5.
http://www.pulp.up.ac.za/pdf/2012_10/2012_10.pdf (accessed 28/05/16).

¹⁷⁶ A J van der Walt, *Property and the Constitution*, Pretoria University Law Press at 29.

¹⁷⁷ *Ibid.*

¹⁷⁸ 2002 (4)SA 768 (CC) para 46.

¹⁷⁹ 91 of 1964.

After establishing the purpose of section 25 to be both for the protection of existing property rights and serving the public interest the Court stated that section 25(1) must be the starting point for constitutional analysis when considering any challenge under section 25. Once it has been established that deprivation of property has occurred (and the dispossession of an owner of all rights use, and benefit to and of corporeal movable goods is a prime example of deprivation in both its grammatical and contextual sense) the infringement issue is limited to determining whether or not the deprivation of property is “arbitrary”.

The Constitutional Court set out the structure of analysis of direct application of the property clause in the form of a set of questions.¹⁸⁰ The following questions arose:

- (a) Does the law or conduct complained of affect “property” as understood by section 25?
- (b) Has there been a deprivation of such property by the law or conduct?
- (c) If so, is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under section 36 of the Constitution?
- (e) If it is, does it amount to expropriation for the purpose of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?

Any challenge based on the property clause must be adjudicated first by considering whether the law or conduct in question meets the requirements of section 25(1) steps (a) – (d) and then, if it is an expropriation (which will not be discussed in this paper) the requirements of section 25(2) and steps (e) – (g) must be instituted. Therefore, if the deprivation is not arbitrary, the section 25(1) right is not limited and the question of justification under section 36 does not arise. The Constitutional court described the effect of section 114 as arbitrary deprivation of First National Bank’s property. Section 25(1) of the Constitution prohibits any law that provides for arbitrary deprivation of property; therefore, section 114 of the Customs and Excise Act 91 of 1964 was declared unconstitutional and invalid.

¹⁸⁰ Para 46.

Apart from the *First National Bank v Commissioner of the South African Revenue Service* case, other cases which dealt with deprivation of property under section 25(1) are:

- I. Regulations containing restrictive prescriptions regarding the quality, nature, and even appearance of houses in particular areas do not necessarily establish arbitrary deprivation as long as they remain within the ambit of the authorizing statute (*Nyangane v Stadsraand van Pochefstroom*).¹⁸¹
- II. Decisions of local government taken in terms of legislation that regulates buildings and development projects could amount to arbitrary deprivation if they deprive someone of a registered real right (*Oudekraal Estates v City of Cape Town and Others*).¹⁸²
- III. Local ordinances which authorise government to remove illegal structures without permission could amount to arbitrary deprivation and should therefore be interpreted restrictively as if they require a court order for such removal (*African Billboard Advertising (Pty) Ltd v North and South Local Councils*).¹⁸³
- IV. Restraint and forfeiture orders in terms of chapter 6 of the Prevention of Organised Crime Act¹⁸⁴ place extraordinary restrictions on private property. To avoid these orders, arbitrary deprivation of property the Act has to be interpreted restrictively (*Prophet v National Director of Public Prosecutions*).¹⁸⁵
- V. Legislation that restricts land ownership by making landowners responsible for payment of municipal charges for use of water and electricity on the premises does not constitute arbitrary deprivation because the link between the owner, the consumption of services, and the property is close enough (*Mkontwana vs Nelson Mandela Metropolitan Municipality and Another*).¹⁸⁶

As mentioned already in the prior chapters section 172(3) of the Tax Administration Act¹⁸⁷ permits SARS to obtain a summary judgment without advising or giving notice to the taxpayer, a substantial encroachment into the taxpayer's constitutional rights. The Commissioner, who has access to a defaulting taxpayer's creditors and bank accounts is,

¹⁸¹ 1998 (T).

¹⁸² 2004 (SCA).

¹⁸³ 2004 (N).

¹⁸⁴ 121 of 1998.

¹⁸⁵ 2006 (SCA).

¹⁸⁶ 2005 (CC).

¹⁸⁷ 28 of 2011.

through the garnishment order, entitled to claim and deduct the outstanding debt from the taxpayer's bank account or through other sources of the taxpayer's income; and this is without the said taxpayer's knowledge or consent. Based on this discussion, the test as put forward in the *First National Bank v SARS* case with regard to provisions of section 25(1) of the Constitution must be applied. The law does affect an individual's property rights as put forward by section 25(1). On the constitutional issue, it could be argued that section 172(3) of the Tax Administration Act provides for the unilateral appropriation of a taxpayer's property.

3.8 Money

Is the right of the taxpayer infringed when SARS withdraws money from his or her bank account?¹⁸⁸ In terms of section 25 of the Constitution "no person may be deprived of property...". The question arises, however, whether money taken from the taxpayer's bank account can be classified as property? The Constitution of South Africa does not define property but Currie and De Waal are of the opinion that the concept of "property" is very broad. Property does not refer to land only but also to corporeal movables, incorporeal things, commercial interests, and intellectual property.¹⁸⁹ It is thus submitted that money is property and the attachment of money from a taxpayer's bank account constitutes the deprivation of property.

3.9 Is the deprivation arbitrary?

Methods used and adopted by SARS must be considered and determined as to whether they bear any rational relationship to the legislative goal they are intended to achieve. The law and the conduct can be justified by SARS' duty to administer the collection of tax in an expeditious manner. Because methods used by SARS correspond with the goals of the legislation, it can be submitted, with reference to the *Hindry* case, that the purpose for which a person's rights are limited by summary judgment provisions correspond with the responsibilities and duties of SARS as put forward by the Tax Administration Act. This provision makes it possible for SARS to have access to a defaulting debtor's property to facilitate and enhance SARS's ability promptly to recover taxes that are due and to avoid assets of taxpayers being put beyond SARS' reach. Having regard to the need to expedite the

¹⁸⁸ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master's thesis. Pretoria. University of Pretoria at 34.

¹⁸⁹ Currie, I & De Waal, J. 2005. The Bill of Rights Handbook, 536.

collection of taxes and to prevent the frustration of the Commissioner's efforts and steps to that end this useful stratagem is valuable to the State.

A garnishee order, which is intended to prevent prejudice to the fiscus, is also justified when a taxpayer acts negligently, refuses to pay tax, or intends to evade tax. In *Medix Pharmacies (Pvt) Ltd, Tanganda Limited & Meikles Africa Limited v Commissioner-General of ZIMRA & Barclays Bank of Zimbabwe Limited*¹⁹⁰ the Commissioner defended his action to garnishee the taxpayer's bank accounts on the alleged grounds that the applicants had neglected, failed, or refused to withhold the correct amount of PAYE. The Commissioner viewed the default perpetrated by the defendant as amounting to a tax evasion scheme, which if not halted, could have prejudiced revenue owing to the fiscus.

Once a garnishee order has been invoked, a taxpayer's loss of property can be remedied by available legal or administrative relief if there is just cause. The garnishee procedure is recognised in other countries with open and democratic societies based on freedom and equality and which recognise, protect, and enforce human rights. Weighing up all these factors, any limitation of constitutional rights implicit in section 172(3) of the Tax Administration Act is reasonable and necessary in an open and democratic society.

In this subsection, a taxpayer's right to property in terms of section 25 of the constitution has been examined. In the following section a taxpayer's right to privacy will be considered.

3.10 Right to privacy

With regard to third party appointments, the issue of privacy is important in that section 179 of the Tax Administration Act¹⁹¹ infringes on a taxpayer's right to privacy (which includes the right not to have your possessions seized) contained in section 14 of the Constitution. Section 14 of the Constitution states that "everyone has the right to privacy" which includes the right not to have:

- a) his/her person or home searched;
- b) his/her property searched;
- c) his/her possessions seized; or
- d) the privacy of communication infringed upon.

¹⁹⁰ HC 2384/03.

¹⁹¹ 28 of 2011.

Section 14 has two parts. The first guarantees a general right to privacy. The second protects against specific infringements of privacy, namely searches and seizures and infringements of the privacy of communications.

In many countries privacy is now protected by constitutional guarantees or general human rights legislation. Examples are the Kingdom of the Netherlands (Constitution of the Kingdom of the Netherlands, 1989), the Republic of the Philippines (article III, Constitution of the Republic of the Philippines, 1987), and the Russian Federation (article 23, Constitution of the Russian Federation, 1993).¹⁹² While the Constitution of the United States of America does not include an explicit right to privacy the Courts in that country, going back as far as 1891 (*Union Pacific R.R Co v Botsford*¹⁹³), have interpreted the Constitution as providing a right to personal privacy. The United Kingdom has recently enacted general human rights legislation that protects the right to privacy in their Human Rights Act, 1998.

The right to privacy is also dealt with in various other international instruments such as the United Nations Convention on the Rights of the Child,¹⁹⁴ the International Covenant on Civil and Political Rights,¹⁹⁵ and the United Nations Convention on Migrant Workers.¹⁹⁶

In South Africa the right to privacy is protected by both common law and the Constitution. The Constitutional Court has emphasised the interdependency between common law and the constitutional right to privacy.¹⁹⁷ The *locus classicus* for the recognition of this independent right to privacy is considered to be *O'Keeffe v Argus Printing and Publishing*.¹⁹⁸ In this case Watermeyer AJ interpreted *dignitas* so widely as to include the whole legally protected personality, except corpus (bodily integrity) and *fama* (reputation). As such, *dignitas* includes not only a single right of personality but all "those rights relating to . . . dignity". Although not explicitly stated by the court the judgment leaves no doubt that the right to privacy is

¹⁹² Anonymous. Chapter 2, Right to Privacy. <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> (accessed 5/30/2016).

¹⁹³ 141 US 251 11 S.Ct 1000, 35 L.Ed 734 (1891).

¹⁹⁴ United Nations Convention on the Rights of the Child adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990. Art 16 of the United Nations Convention on the Rights of the Child.

¹⁹⁵ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23 1976. Art 17.

¹⁹⁶ Art 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of December 18, 1990.

¹⁹⁷ *Bernstein ao v Bester* NO ao 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at 787 ff.

¹⁹⁸ 1954 (3) SA 244 (C).

included as one of these "rights".¹⁹⁹ In *Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd*,²⁰⁰ Davies J stated: "It is clear that there is a qualified right to privacy." In this decision, the definition of privacy as deduced from paragraph 867 of the American Restatement of the Law, was accepted. Privacy is, namely, a person's "interest in not having his affairs known to others or his likeness exhibited to the public . . .". In 1996 Harms JA accepted the following definition of privacy in *National Media Ltd v Jooste*:²⁰¹

Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself or herself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private²⁰² (translation from the Afrikaans).

In *Klein v Attorney-General*,²⁰³ the Court held that the list in section 14 of the Constitution is therefore not exhaustive. It extends to any other unlawful method of obtaining information or making unauthorised disclosures, for example, the unlawful restoration of computer information which has been erased by its owner, and handing it over to the state for use in a criminal prosecution.

De Waal identifies three related concerns that the right to privacy seeks to protect:

- a) the right to be left alone;
- b) the right to development of the individual personality; and
- c) informational privacy.²⁰⁴

This right to privacy applies to all persons, natural and juristic. In the *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* case,²⁰⁵ the Court held that although juristic persons are not the bearers of dignity they are entitled to the right

¹⁹⁹ This conclusion was also reached in *Gosschalk v Rossouw* supra at 490-491. Corbett J stated with reference to O'Keeffe: "The rights relating to dignity include, it would seem . . . a qualified right to privacy".

²⁰⁰ 1974 (4) SA 508 R para 512.

²⁰¹ 1996 (3) SA 262 (SCA).

²⁰² At 645.

²⁰³ 1995 (3) SA 848 (W) at 865.

²⁰⁴ Currie, I & De Waal, J. 2005. *The Bill of Rights Handbook*, 270.

²⁰⁵ [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) (SA) 545 (CC).

to privacy although their privacy rights “can never be as intense as those of human beings”.²⁰⁶ Exclusion of juristic persons from the right to privacy are those that -

. . . would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons.²⁰⁷

It is also clear that the right to privacy is not absolute. As a common law right of personality it is necessarily limited by the legitimate interests of others and the public interest.²⁰⁸ As a fundamental right it can be limited in accordance with the limitation clause of the Bill of Rights (section 36), that is, by a law of general application which includes other fundamental rights. In each case a careful weighing up of the right to privacy and opposing interests or rights will have to take place.

In the matter of *The Queen v Trans Gas Limited & Mid-Plains Contractors Ltd*,²⁰⁹ one of the issues in the case was the constitutionality of a garnishee provision in the Income Tax Act,²¹⁰ in relation to section 8 of the Canadian Charter of Rights and Freedoms. Section 224(1.2) enabled the Minister to garnish amounts owing to a person who had failed to pay over withheld payroll taxes. Section 8 of the Charter of Rights and Freedoms reads: “Everyone has the right to be secure against unreasonable search and seizure.”

Speaking for the Court Tallis JA considered that there was no invasion of privacy in the case in which the Minister had garnished amounts owing to a taxpayer and that section 8 of the Charter did not extend to pure economic interests. He continued:

However, if one assumes that garnishment under sub-section 224(1.2) does involve 'intrusion' of interests protected under section 8, then the question arises whether such garnishment provision is reasonable.

²⁰⁶ para 18.

²⁰⁷ *Ibid.*

²⁰⁸ Anonymous. Chapter 2, Right to Privacy. <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> (accessed 5/30/2016).

²⁰⁹ (1993) CTC 280.

²¹⁰ SC 1970-71-72, namely s 224(1.2).

In *Hindry v Nedcor*,²¹¹ after quoting from a case in which section 8 was considered by the Supreme Court in relation to another provision in the Income Tax Act - *R v McKinlay Transport Ltd*²¹² - Tallis JA concluded:

. . . we hold that (section 224(1.2) does not infringe s 8 of the Charter. The section is an instrument for collection of federal taxes. Since it would be impractical to require a government to resort to a court to collect such taxes, Parliament has established an expedient means whereby "withheld" tax deductions may be collected through administrative means.

The Court rejected the Charter challenge.

In *Hindry* the court had to deliberate on whether the methods of tax collection adopted by SARS through garnishee orders were constitutional or not. The court stated that the overseas cases were consistent with the view that section 99 of the Income Tax Act, now repealed and replaced by section 179 of the Tax Administration Act, is a justified measure for the collection of amounts due to the fiscus and therefore refused to declare it unconstitutional.

It is thus submitted that a taxpayer would find it difficult to prove that section 179 of the Tax Administration Act is unconstitutional. As already discussed, the right to privacy is critical and crucial in forwarding and advancing the rule of law in South Africa. In the given circumstances, as section 36 of the Constitution would dictate, limits have to be placed on certain rights in certain circumstances. The right to privacy can be limited and the courts, based on the discussion above, seem to be willing to limit the given right in order to expedite the recovery of debts from taxpayers.

In this and previous sub-sections of the present chapter a South African taxpayer's rights, including access to the courts and rights to property and privacy, were discussed in terms of whether these rights would protect a taxpayer against certain practices and procedures of SARS, specifically the procedures related to garnishee orders, that is, third party appointments, in accordance with section 179 of the Tax Administration Act. In the following sub-section, the right to just administrative action will be discussed.

²¹¹61 SATC 163; 1999 (2) SA 757.

²¹²(1990) 1 SCR 627, (1990) 2 CTC 103, 90 DTC 6243.

3.11 Right to just administrative action

With regard to natural justice there are two terms synonymous with the practice: *audi alteram partem* and *nemo iudex in propria causa*. Natural justice implies fairness, equity, and equality.²¹³ The Latin term *audi alteram partem* embodies the concept in law that no person should be condemned unheard; it is akin to due process. The notion that an individual whose life, liberty, or property is in legal jeopardy has the right to confront the evidence against him or her in a fair hearing is one of the fundamental principles of Constitutional Law.²¹⁴ It is a firmly established rule of common law that a judge or anyone exercising a judicial function must hear both sides of every case: not only the plaintiff or prosecutor, but also the defendant, must be heard.²¹⁵ This upholds the rule of fair hearing that no one should be condemned unheard.

Nemo iudex in propria causa constitutes the rules against bias, meaning no one should be made a judge in his own cause.²¹⁶ Bias means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. The rule against bias flows from the following two principles:

- a) No one should be a judge in his or her own cause
- b) Justice should not only be done but manifestly and undoubtedly be seen to be done.²¹⁷

3.12 The Constitution

Section 33 of the Constitution guarantees that administrative action will be reasonable, lawful, and procedurally fair, and ensures that people have the right to ask for written reasons when administrative action has a negative impact on them. Section 33 of the Constitution states that:

²¹³ Maskhija AK, Principles of natural justice.

<http://www.lawpact.org/uploads/PRINCIPLES%20OF%20NATURAL%20JUSTICE.pdf> (accessed 30/05/16).

²¹⁴ The free dictionary by Farlex, <http://legal-dictionary.thefreedictionary.com/constitutional+law> (accessed 5/30/2016).

²¹⁵ Kelly, J. "Audi Alteram Partem Rule: Note". (1964) Natural Law Forum. Paper 84.

http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1083&context=nd_naturallaw_forum (accessed 30/05/16).

²¹⁶ Maskhija, AK. Principles of natural justice.

<http://www.lawpact.org/uploads/PRINCIPLES%20OF%20NATURAL%20JUSTICE.pdf> (accessed 30/05/16).

²¹⁷ Ibid.

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

Section 33(3) gave rise to the promulgation of the Promotion of Administrative Justice Act²¹⁸ which ensures procedurally fair administrative actions and providing the right to request reasons for administrative actions and decisions and to have such actions reviewed in court. It is legislation that seeks to promote accountability; it demands that procedures followed in taking administrative actions be clearly stated and that those affected be given notice of the right to review or appeal decisions as well as be provided with the reasons why decisions were made.

3.13 Promotion of Administrative Justice Act

Section 1 of the Promotion of Administrative Justice Act (PAJA) defines administrative action as: any decision taken, or any failure to take a decision, by:

- (a) an organ of state, when
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

²¹⁸ 3 of 2000.

which adversely affects the rights of any person and which has a direct external legal effect.

Section 1 can be broken down as follows:

- a decision (or failure to make a decision);
- of an administrative nature;
- made in terms of an empowering provision;
- by an organ of state or a natural or juristic person;
- which adversely affects the rights of any person;
- and has a direct external legal effect.

A decision

Hoexter²¹⁹ argues that not every official act is a decision. This view was supported in *Bhugwan v JSE Ltd*²²⁰ wherein a series of steps was proposed by counsel for the respondent and accepted by Claassen J. In summary the steps are as follows:

1. Except where an authority acts of its own accord a final application, request, or claim must have been addressed to the authority to exercise its public power in relation to a set of factual circumstances applicable to the subject.
2. All relevant information must have been gathered and placed before the authority.
3. There must have been an evaluative process in which information was considered.
4. A conclusion must have been reached by the authority as to how its powers should be exercised.
5. There must have been an exercise of power based on the conclusion reached.

Of administrative nature

In *Sokhela v MEC for Agricultural and Environmental Affairs (KZN)*,²²¹ Wallis J suggested that the phrase serves two important and related purposes. It emphasises first that the

²¹⁹ Hoexter, C. 2015. *Administrative Law in South Africa*, 2nd ed, 199.

²²⁰ 2010 (3) SA 355 (GSJ) para 10.

²²¹ 2010 (5) SA 574 (KZP) para 61.

identification of administrative action does not occur by default but requires a positive finding and, secondly, that the diagnosis of administrative action is not a mechanical process or something to be interfered with because that action does not fall under the list of exclusions.²²²

Made in terms of an empowering provision

Hoexter states that the definition of empowering provision may be very wide; it may mean a law, rule of common law, customary law, or an agreement, instrument, or other document in terms of which an administrative action was purportedly taken.²²³ In the matter of *Marais v Democratic Alliance*,²²⁴ a case concerning the removal of a Mayor and the subsequent termination of his membership of a political party, Van Zyl J held that the actions were *ultra vires* the party's constitution and could not qualify as an administrative action because, being *ultra vires*, they lacked an empowering provision.

By an organ of state

Organs of the state are capable of performing administrative actions when they exercise powers in terms of the Constitution, a provincial constitution, or legislation.²²⁵ The organ's exercise of any power in terms of the necessary and appropriate law will qualify, while exercises of power or performances of functions in terms of legislation are restricted to public powers and public functions.²²⁶

In *Van Zyl v New National Party*²²⁷ the court held that a party's decision to recall a delegate to the National Council of Provinces was the exercise of public power and had a strong "public component", since it would affect the constitution of various bodies and impact on the community at the local and provincial level. On the note of public interest, *National Horseracing Authority of Southern Africa v Naidoo* can be referred to.²²⁸ Considering the government's strong interest in sport, the monopolistic control wielded by regulatory bodies in sports like horse-racing and the substantial amount of money generated by the sport, the

²²² Para 61.

²²³ Hoexter, C. 2015. *Administrative Law in South Africa*, 2nd ed, 205.

²²⁴ 2002 (2) BCLR 171 (C) para 52-5.

²²⁵ Hoexter, C. 2015. *Administrative Law in South Africa*, 2nd ed, 206.

²²⁶ *Ibid.*

²²⁷ 2003 (10) BCLR 1167 (C) para 76.

²²⁸ 2010 (3) SA 182 (N) paras 22-3.

court could not exclude sporting bodies from PAJA and found no reason why Parliament should have overlooked them when enacting the statute.²²⁹

Which adversely affects the rights of a person

The decision taken must impose a burden on a person in order to qualify as “adversely affects”.²³⁰ Accordingly, if a person has a legitimate expectation, albeit from a regular practice or a reasonable expectation, the person will, in accordance with this doctrine, be able to acquire a legal remedy.

Has a direct legal effect

This phrase indicates that the decision has a “discernible effect on an individual” and seems to be related to the term “adversely affects”.²³¹

Is SARS bound?

In the case of *Carlson Investments Shareblock (Pty) Ltd v Commissioner for the SA Revenue Service*²³² it was held that SARS does indeed perform administrative acts as described in section 33 of the Constitution. As a result of the aforementioned *ratio decidendi* SARS is subject to section 33 of the Constitution which encapsulates the *audi alteram partem* rule and the duty to act fairly.²³³ Accordingly SARS has to adhere to the principle of *audi alteram partem* and has to act fairly.

Section 179 of the Tax Administration Act reads:

- (1) A senior SARS official may by notice to a person who holds or owes or will hold or owe any money, including a pension, salary and wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer’s tax debt.

The Constitutionality of the appointment of a taxpayer’s agent or third party will be discussed as this decision by SARS can be seen as a unilateral appropriation with no notice or

²²⁹ Ibid.

²³⁰ Hoexter, C. 2015. Administrative Law in South Africa, 2nd ed, 220.

²³¹ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master’s thesis. Pretoria. University of Pretoria at 18.

²³² 2002 (5) BCLR 521 (W) at 531.

²³³ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master’s thesis. Pretoria. University of Pretoria at 18.

²³³ 2002 (5) BCLR 521 (W) at 13.

opportunity to the taxpayer to state his or her case, which seems to violate the principle of the *audi alteram partem* rule.

As discussed in the previous chapter the garnishee order issued by SARS is significantly different from a normal civil garnishee order. The one utilized by SARS has more far-reaching consequences by comparison to the civil garnishee order. SARS does not require judicial supervision and the Courts never get the opportunity to exercise discretion compared with the civil garnishee order, in which the Court has an unfettered discretion regarding garnishee orders and may vary or set aside a garnishee order if it can be proven that the judgment debtor may not be able to maintain him or herself and his or her dependants after satisfaction of the garnishee order.²³⁴

Keulder states that in obtaining a garnishee order a Court order is a prerequisite, unlike in the appointment a taxpayer's agent.²³⁵ Therefore when a garnishee order is obtained the judgment debtor would have been given ample opportunity to defend the action before judgment is granted, for instance by filing a notice of intention to defend. Keulder reiterates that in the event that a garnishee (or in the Magistrates' Court also a judgment debtor) is not satisfied with the garnishee order issued the reasons must be heard in a Court application.²³⁶ When a taxpayer's agent is appointed the agent is legally bound to transfer funds in favour of the taxpayer to SARS. Accordingly, there is no opportunity for the taxpayer or an agent to provide reasons not to comply with the appointment.²³⁷ Further if the agent notifies the taxpayer after the transfer of money it is merely a matter of courtesy.²³⁸

Keulder concludes by remarking:

It therefore seems that SARS enjoys almost draconian powers to effect speedy collection of taxes which seems to be to the detriment of the *audi alteram partem*, and likewise to the right to just administrative action.²³⁹

It is submitted that SARS's powers, when appointing a taxpayer's agent or third party, exceeds the powers available to other litigants in obtaining a garnishee order.

²³⁴ Section 65J (6) of the Magistrates' Court Act 32 of 1944.

²³⁵ Keulder, C. 2012. Does the constitution protect taxpayers against the mighty SARS? – an inquiry in to the constitutionality of selected tax practices and procedures. Unpublished Master's thesis. Pretoria. University of Pretoria at 31.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

3.14 Does the appointment of a taxpayer's agent constitute administrative action?

For a taxpayer to rely on the right to just administrative action, it must be proven that the decision to appoint a third party amounts to and constitutes an administrative action. For an action to be an administrative action there needs to be a decision (or failure to make a decision) of an administrative nature made in terms of an empowering provision by an organ of state which adversely affects the rights of any person and has a direct external legal effect.²⁴⁰

Is the right of a taxpayer infringed when SARS withdraws money from a taxpayer's bank account? As discussed above money does constitute as property and as such SARS would be violating a taxpayer's right to property as entrenched under section 25(1) of the Constitution.

Based on that discussion, a decision by SARS to appoint a taxpayer's agent or third party would constitute administrative action and the taxpayer would accordingly be able to rely on the right to just administrative action, which includes the principle of *audi alteram partem*.

In the case of *Hindry v Nedcor*,²⁴¹ one argument was that section 99 of the Income Tax Act, now replaced by section 179 of the Tax Administration Act, infringed on the right to just administrative action (i.e. such action that is reasonable and procedurally fair). The applicant argued that he was not given a hearing before the notice in terms of section 99 of the Income Tax Act was issued and that, when issuing it, the Commissioner had not stated his reasons for doing so. The applicant went on to argue that the provisions to issue garnishee orders:

. . . empowered the Commissioner . . . to issue and serve an assessment on one day, to make it payable the next, to take judgment in effect and without notice to the taxpayer on the third and to launch sequestration proceedings against the taxpayer on the fourth, while the taxpayer is throughout this period denied the right to challenge the merits of the Commissioner's assessment before the ordinary courts.²⁴²

Wunsh J stated that the *audi alteram partem* principle may in appropriate cases be satisfied by a party's being heard after an adverse decision has been taken, and he made references to

²⁴⁰ Section 1 of PAJA.

²⁴¹ 1999 (2) SA 757 (W).

²⁴² 910 E-F.

cases in which the view was shared.²⁴³ In his opinion, it was implicit in the provisions of the Act that if, for example, it were subsequently found, as a result of representations to the Commissioner or any other reconsideration by him of the claim or a decision on appeal, that any amount paid to the Commissioner by the agent was not due, the taxpayer would be entitled to repayment of what was recovered from its “agent” or third party and, in some cases with interest.

The court held that even though the attachment of a taxpayer’s money from a bank account may be regarded as a seizure of property, this form of execution is generally available to enforce a judgment sounding in money and that it is essential that a taxpayer does not receive notice prior to the issuing of a notice to appoint another person, in this instance a bank, as it would frustrate the Revenue Service’s ability to recover due taxes.²⁴⁴

Wunsh concluded that the Commissioner for the Revenue Service provided overwhelming evidence that section 99 of the Income Tax Act is a reasonable and necessary limitation of a taxpayer’s right to just administrative action and property and that the taxpayer’s problems with section 99 of the Income Tax Act were, in this case, strictly academic as the taxpayer was informed of the appointment of the agent.²⁴⁵ He held that the appointment of a taxpayer’s agent is necessary for speedy collection of taxes and acts as a weapon of great importance to the State.

In *Mpande Foodliner CC v Commissioner for South African Revenue Service* the court set aside notices issued under section 47 of the Value-Added Tax Act on the basis that the denial of the *audi alteram partem* principle before issuing notices under section 47 of the Value-Added Tax Act infringed section 33 of the Constitution.²⁴⁶ In *Contract Support Services (Pty) Ltd and Others v Commissioner: SARS and Others*,²⁴⁷ the taxpayer applied for the setting aside of notices issued under section 47 of the Value-Added Tax Act on the basis that the *audi alteram partem* principle had not been observed. The court refused to allow the challenge to the notices issued pursuant to section 47 of the Value-Added Tax Act because the notices were not *ultra vires* the Constitution. In *Smartphone SP (Pty) Ltd v ABSA Bank*

²⁴³ (Cabinet for the Territory of South West Africa v Chikane and Another [1989 \(1\) SA 349 \(A\)](#) at 379F - G; Administrator, Transvaal and Others v Traub and Others [1989 \(4\) SA 731 \(A\)](#) at 748G - H).

²⁴⁴ Para 55.

²⁴⁵ Para 59.

²⁴⁶ 63 SATC 46.

²⁴⁷ 1999 (3) SA 1133 (W).

*Ltd and Another*²⁴⁸ the court referred approvingly to the comments made by Judge Brett in the *Contract Support and Others v Commissioner: SARS and Others* case. The court pointed out that in determining whether the taxpayer's right to administrative justice had been violated, it is necessary to take account of the circumstances of each case and it was unable to support the decision in *Mpande Foodliner CC v Commissioner for South African Revenue Service*. Thus the courts have held that the issue of notices under section 99 of the Income Tax Act (repealed and replaced by section 179 of the Tax Administration Act) or section 47 of the Value-Added Tax Act do not unlawfully violate the taxpayer's right to administrative justice as envisaged in the Promotion of Administrative Justice Act.

3.15 Conclusion

This chapter has discussed the constitutional rights of a taxpayer and found four rights to which to pay specific attention. These are the rights to privacy, property, access to the court and the right to administrative justice. The chapter reviewed the implication of garnishee orders in relation to each right separately. As pointed out in discussion the degree and extent of infringement of the said rights were different.

Croome states that it does not appear that section 99 (now section 179 of the Tax Administration Act) violates the rights of taxpayers enshrined in the Constitution.²⁴⁹ Clearly, where SARS has not issued an assessment to a taxpayer, or has otherwise abused its powers, the taxpayer would be entitled to approach a court for relief and should be entitled to recover damages from SARS.²⁵⁰

Before the Commissioner issues the garnishee order SARS must firstly issue an assessment to the taxpayer reflecting an amount payable to SARS.²⁵¹ Section 96(1) of the Tax Administration Act states that SARS must issue to the taxpayer assessed a notice of the assessment made by stating; the name of the taxpayer; the taxpayer's taxpayer reference number, or if one has not been allocated, any other form of identification; the date of the assessment; the amount of the assessment; the tax period in relation to which the assessment is made; the date for paying the amount assessed; and a summary of the procedures for lodging an objection to the assessment.

²⁴⁸ 66 SATC 241.

²⁴⁹ Croome, B. 2010. Last resort for SARS to effect collection of dues. https://www.ensafrica.com/Uploads/Images/news/10_08_10%2001%2001lr1008LAW_AL_12.pdf (accessed 31/05/16).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

According to general practice, the taxpayer would typically also receive a statement of account reflecting the amount payable to SARS whereupon SARS would issue letters of demand or notices to the taxpayer requesting payment of the sum reflected within a specified period.²⁵² More often than not SARS would also telephone the taxpayer to advise that the amount remains payable and that collection steps will be taken should the tax not be paid within a further period of time.²⁵³ SARS therefore only uses section 179 of the Tax Administration Act once the taxpayer has failed to engage with SARS either to dispute the assessment or to make arrangements for imbursement. SARS makes use of the garnishee order as a last resort. It has been established that the appointment of a taxpayer's agent is not unconstitutional. The use of garnishee orders - third party appointments - still has intrusive elements and in the last chapter of this thesis recommendations will be discussed that could render SARS debt collection easy, convenient, and constitutionally speaking, taxpayer-friendly. The next chapter will adopt the same approach of reviewing the extent to which the taxpayer rights are infringed by third party appointments but from a Zimbabwean perspective.

²⁵² *Ibid.*

²⁵³ *Ibid.*

Chapter 4: GARNISHEE ORDERS AND THEIR CONSTITUTIONAL IMPLICATIONS IN TAX COLLECTION IN ZIMBABWE

4.1 Introduction

From the outset, it should be noted that Zimbabwean constitutional jurisprudence is not as imbedded and comprehensive as is South Africa's, and this significantly limits any extensive constitutional discussion of Zimbabwean law. In Zimbabwe the tax authorities, the Zimbabwe Revenue Authority (ZIMRA), have the power to appoint a third party, known as an "agent", in order to enforce the collection of tax which is due and payable. The taxpayer's creditors and/or accounts are garnished to satisfy the debt payable to ZIMRA. The Commissioner is empowered and authorised by statute to resort to garnishee orders in order to collect debt. This has constitutional implications as the taxpayer has rights, which may be infringed in the process.

This chapter discusses the concept of third party appointments by tax authorities in debt collection in Zimbabwe. Particular attention will be paid to the constitutional implications of such a practice, and specific constitutional rights will be considered in the light of this practice concluding with an assessment of whether a violation of a given right is reasonable and justifiable in a "democratic" society.

4.2 The legislation

The Income Tax Act of Zimbabwe,²⁵⁴ in section 58, which falls under the heading "Power to appoint an agent", states:

- (1) The Commissioner may, if he 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

²⁵⁴ [Chapter 23:06].

to the contrary contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account or savings account or from any other moneys, 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.

The Zimbabwean courts have confirmed the need for the given provision. The decision in *Edgars Stores Limited v Commissioner of Taxes*²⁵⁵ supports the proposition that the Commissioner may utilise section 58 of the Act for the purposes mentioned above.

Section 48 of the Value-Added Tax Act uses similar wording and a similar heading, “Power to appoint an agent”, and states:

- (1) For the purpose of subsection (2) “person” includes (a) a bank, building society or savings bank; and (b) a partnership; and (c) any officer in the Public Service; and (d) any prescribed person in relation to a prescribed service.
- (2) The Commissioner may, if he 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 current account, deposit account, fixed deposit account or 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.

The two sections, namely section 48 of the Value-Added Tax Act and section 58 of the Income Tax Act contain similar wording and aim to facilitate the collection of debt and to address the same mischief.

4.3 The Constitution

Zimbabwe enacted a codified Constitution on 21 May 2013.²⁵⁶ This Constitution, the second of its kind in the post-independence era, was preceded by the 1979 Lancaster Constitution

²⁵⁵ 1996 (2) ZLR747 (SC).

²⁵⁶ Constitution of Zimbabwe Amendment Act 20 of 2013.

which ushered in political independence and sustained the Zimbabwean legal system for three decades.²⁵⁷ It is noteworthy that the Zimbabwean Constitution reads very much like the South African Constitution, arguably the backbone of that country's transition to a constitutional democracy based on constitutionalism.

It is recognized in the Constitution that no individual is above the law to the extent that section 2(2) provides that the obligations imposed in the 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.²⁵⁸

The Constitution contains the Declaration of Rights in Chapter 4.²⁵⁹ Amongst other rights, the Constitution of Zimbabwe protects the right to privacy,²⁶⁰ and the right to property,²⁶¹ and the right to a fair trial.²⁶² A particularly important right in this regard, deserving of separate mention, is the right to administrative justice in section 68 of the Constitution. This right, more directly than most, allows the public to institute judicial review proceedings to challenge state decision-making on the grounds of lawfulness, promptness, efficiency, reasonableness, proportionality, impartiality, and substantive and procedural fairness.²⁶³ In this way, the right ensures that the state remains accountable to the citizenry at all times.

The Constitution is the supreme law in Zimbabwe and section 175(4) of the Constitution states:

If a constitutional matter arises in any proceedings before a court the person presiding over that court may and if so requested by any party to the proceedings, must, refer the matter to the Constitutional Court unless he or she considers the request merely frivolous or vexatious.

This section can be read together with section 85(1) under the heading “Enforcement of fundamental human rights and freedoms” which provides as follows:

²⁵⁷ Madebwe, T. 2014. “Constitutionalism and the new Zimbabwean Constitution”. [Midlands State University Law Review Vol.1], 8. <http://www.zimlil.org/zw/zw/journals/MSULR%20Vol%201-%20October%202014.pdf> (accessed 12 July 2016).

²⁵⁸ Madebwe, T. 2014. Constitutionalism and the new Zimbabwean Constitution, 13.

²⁵⁹ Section 85.

²⁶⁰ Section 57.

²⁶¹ Section 71.

²⁶² Section 69.

²⁶³ Section 62.

1. Any of the following persons, namely,
 - a. any person acting in his or her own interests;
 - b. any person acting on behalf of another person who cannot act for his or herself;
 - 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.

Any of the persons listed above 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.

This means that if a taxpayer believes that his or her constitutional right has been infringed the taxpayer should approach the Court for redress. With regard to the appointment of third parties known as “agents” in order to recover debts, ZIMRA does violate certain taxpayers’ rights, and it is up to the Commissioner to justify whether such conduct is constitutional and whether it is in the public interests.

4.4 Constitutional judgment

One of the most important constitutional cases is *Packers International (Private) Ltd v ZIMRA*, in which the applicant filed an application to the Constitutional Court after it was compelled by the Zimbabwe Revenue Authority (ZIMRA) to settle a contested twenty-four million United States dollars (US\$24 000 000) debt in tax arrears.²⁶⁴ The company was challenging the constitutional status of section 48 of the Value-Added Tax Act, which allows ZIMRA unilaterally to access bank accounts of clients or to intercept monies of clients from

²⁶⁴ Tax Matrix Monthly update, December 2015, 25. <http://taxmatrix.co.zw/wp-content/uploads/2016/01/December-2015-MTU.pdf> (accessed 14 Jul. 16).

debtors to recover Value-Added Tax debts. A similar provision in the Income Tax Act is section 58.

Packers argued that ZIMRA should approach the courts to get a garnishee order before raiding tax defaulters' bank accounts. It alleged that section 48 of the Value-Added Tax Act denies the firm's right to equality before the law and to equal protection of the law as enshrined under section 56(1) of the Constitution of Zimbabwe, an advantage that is not available to businesses.

Further, ZIMRA has the right and power to access bank accounts and to take money "owed to it", in spite of the fact that such a privilege is not extended to taxpayers when dealing with their creditors. This position may imply that ZIMRA and the taxpayers are not equal before the law, and that ZIMRA is the privileged entity. The position in South Africa under section 172(1) of the Tax Administration Act²⁶⁵ states:

If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified by SARS as correct;

Unlike the South African position, the Income Tax Act and the Value-Added Tax Act of Zimbabwe makes no provision for judicial authority and oversight during the garnishee procedure.

Packers wanted section 48 of the Value-Added Tax Act removed from the statute books, claiming that it violates the Constitution and specifically the right to administrative justice. In 2014, Packers International won a High Court case that ordered ZIMRA to remove a garnishee order that they had imposed on the taxpayer's bank accounts, to wait seven days to impose a new order and to desist from "unlawfully interfering with applicant's business operations and its day to day activities, including the placing of its officers or agents at applicant's business premises."

Whether section 48 of the Value-Added Tax should be scrapped to allow equality at law between ZIMRA and other citizens is a matter to be decided by the courts. Equally applicable is the scrapping of section 58 of the Income Tax Act. It is *prima facie* that these sections

²⁶⁵ 28 of 2011.

violate a taxpayer's right of access to courts and the right not to be arbitrarily deprived of property.²⁶⁶

4.5 The right to privacy

Section 57 of the Zimbabwean Constitution states that:

- (1) Every person has the right to privacy, which includes the right not to have-
 - (a) home, premises, or property entered without permission;
 - (b) person, home, premises, or property searched;
 - (c) possessions seized;
 - (d) the privacy of their communications infringed; or
 - (e) his or her health condition disclosed.

Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity and is fundamental to most, if not all, democratic societies.²⁶⁷

In May 2013 the Zimbabwean government took a significant step towards affirming citizens' fundamental right to privacy by including in the newly approved Constitution a specific guarantee of the right to privacy. In doing so, the government brought the country into line with international best practice regarding constitutional rights, and indeed the Constitutional guarantee represented a significant improvement to those rights set out by international covenants and declarations that had already been ratified by the country, such as the African Charter on Human and People's Rights (ACHPR), which does not contain a specific right to privacy.²⁶⁸

A primary challenge as far as the promotion and protection of the right to privacy in Zimbabwe is concerned is caused by the lack of effective domestic judicial oversight mechanisms, and the lack of effective recourse with which to redress breaches. A significant

²⁶⁶ Ibid.

²⁶⁷ Stakeholder Report Universal Periodic 26th Session: The Right to Privacy in Zimbabwe at 3. https://www.privacyinternational.org/sites/default/files/zimbabwe_upr2016.pdf (accessed 13 Jul. 16).

²⁶⁸ Submissions by the Zimbabwe Human Rights NGO Forum. The Right to Privacy in a Digital Age, General Assembly Resolution 67/167. <http://www.ohchr.org/Documents/Issues/Privacy/ZimbabweHumanRightsForum.pdf> (accessed 13 Jul. 16)

problem that must be addressed is the lack of separation between judiciary and political roles.²⁶⁹

It should, however, be noted that section 45(2), as read with section 86, shows that there is no absolute right to privacy. Section 86(2) of the Constitution on “Limitation of rights and freedoms” provides that a fundamental right may be limited in terms of the law of general application and to the extent that the limitation is fair, reasonable, necessary, and justifiable in a democratic society, based on openness, where it is necessary for “public interest”, e.g. tax. Therefore, the right to privacy is not an absolute right and needs to be balanced with the goals and objectives of the Revenue Authority. The collection of taxes is paramount to the public interests and in some instances the right to privacy may need to be limited in order that the public interest be protected.

4.6 Right to property

Property rights can be defined as “the exclusive right of possessing something” or “rules governing the use of resources”.²⁷⁰ In its most basic form, a “property right” is visualized as “a defensible claim to a particular place or thing”.²⁷¹

Everyone has the right, in any part of Zimbabwe, to acquire, hold, and dispose of all forms of property, either individually or in association with others irrespective of their sex, gender, or marital status.

Section 71(2) of the Constitution states that, subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease, or dispose of all forms of property, either individually or in association with others. This is subject to section 72, which deals with agricultural land, given the sensitivities surrounding the land issue and the historic significance of the land question.

The SADC Tribunal Judgment in *Mike Campbell (Pvt) Ltd et al. v. the Republic of Zimbabwe*,²⁷² found that Amendment 17 of the Zimbabwe Constitution had eliminated the

²⁶⁹ Submissions by the Zimbabwe Human Rights NGO Forum. The Right to Privacy in a Digital Age, General Assembly Resolution 67/167.

²⁷⁰ Ensminger, J. 1992. *Making a Market: The Institutional Transformation of an African Society*. Cambridge: Cambridge University Press.

²⁷¹ Rugadya, M.R. 2009. *Natural Resource Rights and Biodiversity Protection: Guidelines for Policy and Strategies to strengthen Local Governance Systems* paper presented at Best Practices for Land Tenure and Natural Resource Governance in Africa March 1-7, 2009, Nairobi, Kenya, located at <http://www.afdresearch.org/files/LandResearch/001.pdf>, p1, (accessed on 13 Jul. 16).

²⁷² (2008) AHRLR 199 (SADC 2008).

applicants' access to the domestic courts and deprived them of their right to a fair hearing. Amendment 17 effectively vests in the respondent the ownership of agricultural lands compulsorily acquired under section 16B(2)(a)(i) and (ii) of Amendment 17 and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisitions. The Court held that everyone will be entitled to approach a court to ascertain the legality of any appropriation by the State as well as to seek adequate compensation.

In a South African matter of *Hindry*²⁷³ the court held that the appointment of an “agent” is constitutional. It held that the appointment does not violate the right of the taxpayer not to be arbitrarily deprived of property, and the provision is extrajudicial and summary in nature. On the issue pertaining to the requirement for notification before a garnish order can be effected the court held that there was no need for a prior hearing as the taxpayer knew from the correspondence that SARS wanted the money to be paid.

Depending on the circumstances, however, the courts may ascertain a different outcome. In *Ferucci and Others v C: SARS and Another*²⁷⁴ the court held that “the rule of natural justice must be considered and prior notice should be given to the taxpayer when it involves property deprivation”.

Similar to the right to privacy, the right to property does not exist in isolation. The right to property, depending on the circumstances, may need to be regulated for the public good. With constitutionalism comes the demand for responsibility and duties, which means that for all to enjoy their rights, all taxpayers need to take a certain level of responsibility. As is evident in these cases, if one defaults in paying tax, there is a chance, *albeit* limited, that some, if not all property could be forfeited in order to satisfy the given sum.

4.7 Right to a fair hearing

Section 69 of the Zimbabwean Constitution safeguards the right to a fair hearing. It states:

- (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
- (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy, and public hearing within a reasonable time before an independent and impartial court, tribunal, or other forum established by law.

²⁷³ 1999 (2) SA 757 (W).

²⁷⁴ 65 SATC 470.

- (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.
- (4) Every person has a right, at his or her own expense, to choose and be represented by a legal practitioner before any court, tribunal, or forum.

The right to a fair trial includes the right to be heard, as discussed in the case of *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe*,²⁷⁵ a case in which the respondent State did not want the victim to be heard in the Supreme Court. To ensure that this happened the respondent State deported him before the date scheduled for the hearing effectively preventing him from being heard. Admittedly, the victim still could have proceeded against the respondent state from wherever he was deported, but by suddenly deporting him the respondent State frustrated the judicial process that had been initiated. To this extent, the respondent State was found to have violated article 7(1)(a) of the African Charter.²⁷⁶

The brief facts around the issue were that, the Immigration officers refused, or failed, to produce Mr Meldrum as was ordered by the court. By doing so they denied him the right to be heard by a competent and impartial tribunal. Instead they acted under the Immigration Act without affording him an opportunity to defend himself. The actions of the respondent State amounted to a conclusion that Mr Meldrum was guilty of the allegations against him, contrary to the presumption of innocence. The Commission found that the conduct of the respondent State amounted to a violation of article 7(1)(b) as alleged by the complainants.

The complainants argued that the deportation of Mr Meldrum violated article 7(1)(a) and (b). Article 7(1) of the Charter provides that every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against acts violating fundamental rights as recognised.

In South Africa, in the matter between *Contract Support Services (Pty) Ltd And Others v C:SARS and Others*,²⁷⁷ the court held that “not all administrative acts require the application of the *audi alteram partem* rule before they are effective, especially where a prior hearing would defeat the very purpose of the notice or render the proposed act nugatory”. The right to fair hearing is a right which is context based and may mean a different thing depending on

²⁷⁵ (2009) AHRLR 268 (ACHPR 2009).

²⁷⁶ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁷⁷ 61 SATC 338.

the context. In the context of debt collection, the main argument is the fact that a defaulting taxpayer is not given the opportunity to challenge a garnishee order or the figure being garnished. The counter argument is that the same taxpayer can approach the courts after the garnishee is implemented and can still seek redress. Rights do not operate in isolation but within the context of multiple rights, each of which may play a role in a given situation. The taxpayer has a safe guard put in place by the Constitution which is to approach the courts for redress. The taxpayer is not being barred from a fair hearing, merely delayed. In the light of the nature and duties of the Revenue Authority, as well as making reference to court judgments, this seems a justified limitation of the right to fair hearing.

4.8 Right to administrative justice

Section 68 of the Zimbabwean Constitution states;

1. Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial, and both substantively and procedurally fair.
2. Any person whose right, freedom, interest, or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
3. An Act of Parliament must give effect to these rights, and must--
 - a. provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
 - b. impose a duty on the State to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

This section led the Parliament to enact legislation which would activate the spirit and purpose of the section. In Zimbabwe, the Administrative Justice Act [Chapter 10:28] regulates the use of administrative authority and those remedies available in the case of misuse thereof. In terms of section 3 of the Administrative Justice Act any administrative

authority responsible for or empowered to take any action affecting the rights, interests, or legitimate expectations of any person must act lawfully, reasonably, and fairly.²⁷⁸

The Zimbabwe Administrative Justice Act²⁷⁹ was enacted in order to set standards for good administration. Section 2(d) of the Act defines administration authority as any person or body authorised by any enactment to exercise or perform any administrative power or duty. Any person acting in the capacity of a tax collecting officer in Zimbabwe falls under this definition. This means that the said official is bound to the demands and obligations set out by section 68 of the Constitution as well as the to the obligations articulated in the Administrative Justice Act.

Section 3 of the Administrative Justice Act sets out obligations for public authorities. The section states:

- (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests, or legitimate expectations of any person shall-
 - (a) act lawfully, reasonably, and in a fair manner; and
 - (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
 - (c) where it has taken the action, supply written reasons therefore within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
- (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)
 - (a) adequate notice of the nature and purpose of the proposed action;
 - (b) a reasonable opportunity to make adequate representations; and
 - (c) adequate notice of any right of review or appeal, where applicable.

²⁷⁸ Mushoriwa, F. 2009. Securing administrative justice in Zimbabwe: a constitutional dimension required? <https://thecorporatelawyer.wordpress.com/2009/06/12/securing-administrative-justice-in-zimbabwe-a-constitutional-dimension-required-by-farai-mushoriwa/> (accessed 14 July 2016).

²⁷⁹ [Chapter 10:28].

The effect of this provision is to enforce the *audi alteram partem* principle. For any administrative action taken the affected party has to be given adequate notice of such action together with an opportunity to present his or her case in court. Importantly section 3(3) of the Act makes provision for circumstances in which the administrative official can deviate from the stated obligation.

The Administration Justice Act,²⁸⁰ provides that an administrative authority which has the responsibility or power to perform any action which may affect the rights of any person should act lawfully, within reasonable time, and be in a position to furnish written reasons for the action taken.²⁸¹ In *Packers International Limited v ZIMRA*,²⁸² the court pointed out that when the Commissioner overrules a taxpayer's objection to an assessment, the Commissioner is expressly required to notify the taxpayer in writing of this decision before taking any action that would adversely affect the affairs of the taxpayer.

4.9 The *audi alteram partem* principle

Above and beyond the effect of the Administrative Justice Act, the courts remain bound by concepts of natural justice. One of these concepts, the *audi alteram partem* principle, states that a party involved in the matter should be given proper opportunity to present his or her case before the administrative decision-maker concludes the process. Because *audi alteram partem* means "hear the other side",²⁸³ there is no fixed period of time under this principle. The notice period should be reasonable, however, depending on such factors as the complexity of the case and the degree of its seriousness.²⁸⁴ In the case of *Crow v Detained Mental Patients Special Board*²⁸⁵ the court held that the spirit encapsulated in the precepts of "natural justice" is applied neither rigidly nor blindly but fluidly and flexibly, taking into account not only considerations of the individual but those of the government as well. This is to be undertaken with a mature outlook and the recognition that in some cases the public interest may legitimately supersede that of the individual.

²⁸⁰ [Chapter 10:28].

²⁸¹ Section 3 (1).

²⁸² HH-328-14.

²⁸³ Feltoe, G. 2012. A guide to administrative and local govern law in Zimbabwe, 52.

http://ir.uz.ac.zw/xmlui/bitstream/handle/10646/662/Administrative_Law_Guide.pdf;jsessionid=996531534AE9F8484F0FBFD5A535F417?sequence=1 (accessed 14 Jul. 16).

²⁸⁴ *Ford v Law Society of Rhodesia* 1977 (2) ZLR 40 (A) at 55-56. *Rwodizi v Chegutu Municipality* 2003 (1) ZLR 601 (H).

²⁸⁵ 1985 (1) ZLR 202.

Irrefutably, the main purpose of the *audi alteram partem* principle is to ensure accurate, informed, and fair decision-making that inspires public confidence in administrative action.

In the matter between *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors*,²⁸⁶ the court held that the concept of administrative justice is now embedded in the Constitution. It provides the skeletal infrastructure within which official power of all kinds affecting individuals must be exercised. The elements are: (1) lawfulness, in that official decisions must be authorised by statute, prerogative, or the Constitution; (2) rationality, in that official decisions must comply with the logical framework created by the grant of power under which it was made; (3) official decisions must apply legal rules consistently to all those to whom the rules apply; (4) official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected person/s an opportunity to be heard; (5) good faith in the making of decisions in that the official must make the decision honestly and with conscientious attention to the task at hand having regard to how each decision affects those involved.

Where an administrative authority makes a decision that renders nugatory the right of the affected party to appeal, that decision cannot be said to be in accord with these dictates of administrative justice. It cannot be rational and neither can it be fair; in fact, it borders on unlawfulness.

In another Zimbabwean matter, between *A-G v Mudisi & Ors*,²⁸⁷ in which the court discussed the inter-dependency between the *audi alteram partem* rule and the provision under section 3 of the Administrative Justice Act, the court stated that one of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right of every person to be heard or afforded an opportunity to make representations before any decision is taken that might impinge upon his or her rights, interests, or legitimate expectations.

This precept of the common law forms part of the larger duty imposed upon every administrative authority to act legally, rationally, and procedurally and is now codified in section 3(1)(a) of the Administrative Justice Act²⁸⁸ as the duty to “act lawfully, reasonably and in a fair manner”. The obligation to act in a fair manner is further expanded in section 3(2) to require the giving of “adequate notice of the nature and purpose of the proposed action” and “a reasonable opportunity to make adequate representations” as well as “adequate notice of any right of review or appeal where applicable”. The Attorney-General was an

²⁸⁶ HH-446-15.

²⁸⁷ S-48-15.

²⁸⁸ [Chapter 10:28].

administrative authority as defined in section 2 of the Act and was subject to the requirements of section 3(1)(a) as read with section 3(2). An employer, whether under a contract of employment or under a secondment arrangement, has the common law right summarily to dismiss an employee who is insubordinate or wilfully disobedient to the extent of undermining or destroying the core and substratum of their relationship. The appellant reacted with undue haste by immediately withdrawing the respondents' prosecutorial mandate. He leapt to the conclusion, from the inchoate letters penned by the respondents and their lawyers, that they had admitted all the allegations against them. He made no attempt to substantiate the allegations against them or to have these allegations investigated by means of a disciplinary inquiry as he could have done by instructing the Director of Public Prosecutions, *qua* head of department, to institute disciplinary proceedings in terms of the applicable Public Service Regulations. The Court held that on the facts, the applicant had manifestly been in breach of the school rules. The respondent had been entitled to discipline him. Before it had done so, it had called for an explanation. This had been ignored. The school had then taken measures in an effort to get a response. It had withheld applicant's entitlement to attend the leavers' dance. That had been the only event of significance still remaining for the applicant at the school. There was no fault in the measures taken by the respondent, which had been what the exigencies of the situation had demanded. The applicant had spurned the opportunity that he had been afforded to explain his absenteeism. The application failed on this basis alone.

In the case of *Mangenje v TBIC Investments (Pvt) Ltd & Ors*,²⁸⁹ the court was given the opportunity to decide a matter that included the principle of *audi alteram partem* as well as section 3 of the Administrative Justice Act.

The applicant in these two amalgamated cases had been given an "offer letter" by the Minister (first respondent in the second case) in respect of a farm. The original owner had sub-divided the farm and sold two portions of it, retaining a little over half of the original farm. The remainder was then sold to the first respondent in the first case (TBIC), who leased it to the second respondent (the tenant) in that case. The following year, 2000, the whole property was identified for compulsory acquisition for resettlement, in spite of part of it having been sold previously. At that time, the period of validity of a notice of acquisition was one year. The acquisition of the property was not subsequently confirmed in court in

²⁸⁹ HH-377-13.

accordance with the provisions of section 8 of the Land Acquisition Act.²⁹⁰ Another notice of acquisition was published in 2003, again referring to the full original property. This notice was withdrawn after about 10 weeks. A third notice of acquisition was published and withdrawn. In spite of these withdrawals, and the expiry of the first notice, the property was listed in Schedule 7 on the Constitution of Zimbabwe 1980. This Schedule had 157 preliminary notices that had been published in the Government Gazette. They listed properties that had been “identified” for acquisition. The two notices of 2000 and 2003 were on the list. On 3 November 2005 the original title deed for the whole and original property was endorsed by the Registrar of Deeds in line with section 16B (4) of the Constitution to the effect that the farm was now State land.

In August 2006 the Minister, in terms of the standard term “offer letter”, allocated the remainder of the farm to the applicant. The applicant accepted the offer in February 2007. When he tried to occupy the farm he found the tenant in occupation. The tenant refused to move. In 2009 TBIC somehow managed to take transfer of the remainder of the farm, in spite of the endorsement by the Registrar of Deeds. The applicant sought a declaratory order that the compulsory acquisition of the property by government had been valid, as well as several other orders: the nullification of the transfer of the property to TBIC; the nullification of TBIC’s lease of the property to the tenant; and the eviction of the tenant and anyone else claiming occupation through TBIC. About four months before the date of hearing the Minister gave the applicant a written notice of the immediate withdrawal of the offer letter. This letter was said to be in terms of the conditions of offer attached to the offer letter. The applicant was required forthwith to cease all operations on the property and to vacate it immediately. The withdrawal letter concluded by inviting the applicant to make representations, if he so wished, within seven days of the receipt of the letter. The reasons for the withdrawal letter were that the property was owned by an indigenous entity, that it was not the policy of the ministry to dispossess indigenous owners of land, and that therefore the applicant could not insist on enforcing his rights against TBIC. An alternative piece of land in another district was offered, but the applicant found it unsuitable for his purposes. The Minister’s withdrawal letter was not motivated by any breach by the applicant of the conditions contained in the offer letter. The Minister did not specify any such condition.

The applicant then brought a second case, this one against the Minister. He sought the setting aside of the withdrawal letter and the reinstatement of the offer letter on the grounds that the

²⁹⁰ [Chapter 20:10].

withdrawal letter had offended against the rules of natural justice in that he had not been afforded an opportunity to make representation before the Minister had taken an adverse decision against him. He also argued that the Minister had failed to act fairly and had therefore breached the Administrative Justice Act.²⁹¹ The Minister and TBIC argued that it was a mistake that the property was included on Schedule 7 of the Constitution as the listing notices had either lapsed or had been withdrawn.

Mafusire J held that, the *audi alteram partem* principle holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that it is often termed a rule of natural justice. The legitimate expectation doctrine is an extension of the *audi alteram partem* principle. Fairness is the overriding factor in deciding if a person may claim a legitimate entitlement to be heard. An administrative decision made in violation of “natural justice” can be set aside, especially if it is to be implemented immediately. Once a decision in violation of natural justice has been reached, even if it has not been implemented, a subsequent hearing cannot be a meaningful substitute. The prejudicial decision will be set aside as procedurally invalid and this way the human inclination to adhere to the decision is avoided. There are some limited situations in which a subsequent hearing will constitute compliance with “natural justice”, but only if, in all the circumstances, it is sufficiently fair thereby having the effect of curing the failure to hold a previous hearing. The Minister had not observed the rules of natural justice when he issued the withdrawal letter.

The court went further by stating that the Administrative Justice Act²⁹² requires an administrative authority to observe the rules of natural justice whenever it makes an administrative decision or takes an administrative action adverse to vested rights or legitimate expectations. The Minister was undoubtedly an “administrative authority” according to the meaning of section 2 of the Act. His withdrawal letter was an “administration action.” The Minister breached section 3 of the Act in relation to the manner in which the withdrawal letter was issued. He failed in his duty to act in a fair manner; he failed to give the applicant any notice of the nature of his action: and he gave the applicant no opportunity to make adequate representations before he implemented his decision, let alone before making it.

²⁹¹ [Chapter 10:20].

²⁹² [Chapter 10:20].

In the matter of *Hutchings v St John's College*,²⁹³ the applicant, a pupil at a boys' senior school (the respondent), had been denied the right to attend the school leavers' dance to be held at the end of the last term of the school year. He complained that he had not been charged with any offence, and was being unfairly punished. He claimed that the respondent had violated the rules of natural justice and was meting out the most severe punishment without having charged him with any offence, let alone having afforded him the chance to be heard. The applicant further alleged that the respondent had violated the school's code of conduct. The respondent said that the applicant would not be barred or hindered from completing whatever remained of his schooling component but that the leaver's dance was a privilege, not a right which had been withdrawn because of the applicant's conduct which included indiscipline, disobedience to school rules, and deceit.

The court stated that the *audi alteram partem* principle holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule requires public officials, judicial and quasi-judicial officers, and anyone entrusted with the power to make decisions or the power to take action affecting others adversely to exercise such powers fairly. The rule has been extended to the realm of private contracts between a private individual and a private entity. In all cases fairness is the overriding consideration.

The court was to reiterate the fact that the legitimate expectation doctrine is an extension of the *audi alteram partem* principle. Although it is now finding expression in statutes, for example section 3 of the Administrative Justice Act,²⁹⁴ it is a product of judicial activism designed to replace a lacuna in the law. The legitimate expectation doctrine extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body.

Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. The *audi alteram partem* principle, and its extension, the doctrine of legitimate expectation, are flexible tenets. Their proper limits are not precisely defined. A formal charge followed by a formal hearing and culminating in a formal verdict and a formal penalty are not always absolute pre-requisites. The exigencies of the matter determine the situation

²⁹³ HH-416-13.

²⁹⁴[Chapter 10:28].

In South Africa, in the matter between *Mpande Foodliner CC v C: SARS and Others*,²⁹⁵ the court stressed the requirement for notice. It held generally that the denial of the *audi alteram partem* principle before issuing the agency notices infringed the right to just administrative action (but the taxpayer was in good standing and had properly laid out his grounds, also the decision was referred to the “lone voice” in the case *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another*).²⁹⁶

4.10 Practical concerns

ZIMRA points out that it will only resort to garnishing accounts when a taxpayer has failed to pay tax when due or when he or she has neglected, refused, or failed to pay the tax or when he or she intends to evade tax and the action is intended to stop further prejudice of the fiscus.²⁹⁷ It has been pointed out that the taxpayer has the right to fair administrative action as well as the right to property. These rights are not absolute and section 86(2) of the Constitution makes it clear and states that a right might be limited if in the public interest. Further, with regard to the actual seizure of the taxpayer’s money entrusted to a bank for safe keeping, as held in *Hindry v Nedcor*,²⁹⁸ there can be no valid complaint of unfairness or the non-application of the *audi alteram partem* principle if the claim had been the subject of considerable correspondence and the Commissioner had explained the basis of the claim and how the claim had been arrived at, and that the applicant had been given opportunity to pay.²⁹⁹

The appointment of an “agent” can be so harsh that a business may be forced to close and clients and employees financially compromised. In *Fairdrop Trading (Private) Limited*,³⁰⁰ the applicant was a company that runs a hospital. It said it was fighting for its life, for its employees and its patients, especially its cancer patients. It claimed that the situation was dire: unless the exorbitant tax assessments for the period 2010 to 2013 were set aside in the long run, and unless the garnishees imposed on its revenue sources were uplifted in the interim, it would be forced to liquidate.

²⁹⁵ 63 SATC 46.

²⁹⁶ 66SATC 241.

²⁹⁷ *Medix Pharmacies (Pvt) Ltd. Tanganda Limited & Meikles Africa Limited vs. Commissioner-General of ZIMRA & Barclays of Bank of Zimbabwe Limited* HH 102-2003.

²⁹⁸ 1999 (2) SA 757 (W).

²⁹⁹ Tapera, M and Majachani, A. 2015. *Unpacking Tax Law and Practice in Zimbabwe*, 496.

³⁰⁰ HH-68-14.

In this case, the record showed that from 2010 the respondent had been tussling with the applicant for alleged non-payment of taxes. The respondent complained that the applicant had not provided useful information on the financial aspects of the hospital project that would enable a meaningful assessment of the payable tax. The respondent made an assessment of the tax due by the applicant for the years 2010, 2011, 2012 and 2013. Inclusive of penalties the total amount required from the applicant was three million two hundred and fifty-three thousand six hundred and forty-six United States dollars and sixty-two cents (US\$ 3 253 646-62).

On 16 January 2014 the respondent appointed the applicant's bank, Stanbic Bank Zimbabwe, as the applicant's agent in terms of s 58 of the Income Tax Act. It imposed the last of the garnishees. In arriving at the decision, Mafusire J had this to say:

I find nothing peculiar in the circumstances of the applicant to warrant a treatment that is different from the rest of the other taxpayers that may find themselves with objectionable tax assessments against which they will have appealed. The garnishees may worsen the applicant's bad situation. But regrettably, those are some of the natural consequences of the application of the law. I have found nothing outrageous or grossly unreasonable in the respondent's conduct. The applicant was offered the chance to avert the garnishees by offering an acceptable payment plan. Before it filed the urgent chamber application none had been submitted. The one submitted after the launch of the application was rejected by the respondent. The respondent made a counter offer. The applicant said the counter offer was way beyond its means. But that does not make the conduct of the respondent, grossly unreasonable in any sense.

Furthermore, the applicant had defaulted on a previous payment plan. Admittedly there would have been reasons for such default. But in such circumstances I am unable to find fault with the respondent's conduct, let alone anything that would amount to conduct so grossly outrageous in its defiance of logic or accepted moral standards as to be liable to impeachment by the court.

4.11 Conclusion

This chapter's goal was to review the constitutional implications of appointing an "agent" in the collection of tax in Zimbabwe. This is a method widely employed by tax authorities in

a bid to recover debts. Constitutional rights were reviewed separately. Based on the discussions cited, it seems that there are constitutional violations made by the tax authorities, but those violations are justified and reasonable according to the terms of the Constitution of Zimbabwe. The public interest comes before individual rights as discussed in the chapter.

It is clear, that most of these businesses and entities had to close as a result of the appointments of “agents”. These appointments were accompanied by many difficulties and challenges for both employees and workers who in turn lost their jobs, not to mention the negative implications that may arise for the unstable economy of Zimbabwe. In some instances, ZIMRA makes wrong assessments and business would be disrupted or would shut down, which is undesirable. In the next chapter, recommendations will be made to ZIMRA for alternative and sustainable methods to secure debt, which at the same time would respect the rights of taxpayers. This discussion will be facilitated through brief assessments of other jurisdictions and by analysing whether they could be suitable for both ZIMRA and SARS to adopt.

Chapter 5: METHODS EMPLOYED BY OTHER COUNTRIES

5.1 Introduction

Garnishee orders are undeniably an effective way of recovering tax debts without too much effort on the part of the revenue collector. The tax collector’s duty does not exist in isolation because the taxpayer’s constitutional rights must be taken into consideration. These rights include the right to property, privacy, access to the courts, and the right to just administrative action. In relation to the constitutional implications, it is important to assess briefly how third party appointments are carried out in other countries that share similar tax collection provisions.

5.2 Australia

The garnishee notice in Australian law is a notice issued by the Tax Commissioner to a third party, such as a bank, compelling it to pay funds held on a taxpayer’s behalf to the Australian

Taxation Office “ATO” to recover a debt.³⁰¹ Sections 260-5 of Schedule 1 of the Taxation Administration Act, 1953, allows the Commissioner of Taxation to collect taxes by issuing a written notice to a third party who owes or will owe money to the taxpayer and requiring that third party to pay to the Commissioner the amount owed up to the amount of the relevant tax debt. A notice issued by the Commissioner of Taxation (Commissioner) under section 260-5 of Schedule 1 to the Taxation Administration Act, 1953, is essentially a statutory garnishee. This means that third parties that fail to comply with the Commissioner's notice are liable to be prosecuted for committing a criminal offence.³⁰² Garnishee notices can be issued to:

- Any bank account in your name, if you have an investment account that has not matured, the garnishee notice will remain in place until maturity
- Debtors who owe or may later owe you money
- Your superannuation fund, although it will not be effective until the benefit is payable
- Life insurance policies, although it will not be effective until monies become payable
- A company in which you hold shares (your dividends could be targeted)
- Your solicitor, for money held in a trust account on your behalf
- Be applied to sale proceeds
- A third party, for money paid before you received the notice.

In *Commissioner of Taxation v Park*³⁰³ the Federal Court considered the operation of a notice served by the Commissioner of Taxation under section 260-5 of Schedule 1 of the Taxation Administration Act and its interaction with the rights of a registered mortgagee regarding a sale of land by the mortgagor. The majority judgment was that, once the mortgage was released to allow settlement, the Commissioner's notice applied in relation to the purchase

³⁰¹Van der Walt, J. 2013. Third party appointments – an Australian cat amongst the pigeons. 20 January 2013. <http://www.thesait.org.za/news/114307/Third-party-appointments--an-Australian-cat-amongst-the-pigeons.htm> (accessed 26 July 2016).

³⁰² Ibid.

³⁰³(2012) FCAFC 122 C.

consideration receivable by the seller or taxpayer.³⁰⁴ In respect of salaries or wages the ATO'S policy is to seek to garnishee no more than 30cents in the dollar of the amount of salary and wages payable to a tax debtor.³⁰⁵ In *Edelstein v Wilcox*,³⁰⁶ an order to a taxpayer to pay in effect 100% of his income in settlement of a tax liability was declared unreasonable.³⁰⁷ The court stated that the "garnishee" provisions are an important power given by Parliament to assist the Commissioner in recovering unpaid tax, but that care needs to be taken to ensure that this recovery power is not abused or perceived as being abused; for example, it should not be used to prejudice to a significant degree the business of a debtor who is pursuing avenues of appeal against assessments that raised the debt.³⁰⁸ The court in this case reiterated that the significant power given to the Commissioner is designed to protect the revenue, but is not intended to subvert the principle that has been established at least since *Magna Carta*³⁰⁹ that a citizen's property should not be subject to arbitrary seizure.³¹⁰

In terms of Australian law, to ensure fairness of process, any decision to issue a garnishee notice needs to be based on the best information available. Some considerations to be taken into account when considering whether to issue a "garnishee" notice are:

- whether a debt has been established and the value of that debt including additional charges for late payment;
- the financial position of the debtor and the steps taken to make payment in the shortest possible timeframe having regard to the particular circumstances of the debtor;
- the extent of any other debts owed by the debtor;
- whether the revenue is placed at risk because of the actions of the debtor, such as:
 - evidence or suggestion of the debtor's dissipating assets,

³⁰⁴ Van der Walt, J. 2013. Third party appointments – an Australian cat amongst the pigeons .20 January 2013. <http://www.thesait.org.za/news/114307/Third-party-appointments--an-Australian-cat-amongst-the-pigeons.htm> (accessed 26 July 2016).

³⁰⁵ McMillan, J. 1996. Recent Themes in judicial review of federal executive action, 355 <http://www.austlii.edu.au/au/journals/FedLRev/1996/14.pdf>. (accessed 07 August 2016).

³⁰⁶ 88 ATC 4484 at 4495.

³⁰⁷ McMillan, J. 1996. Recent Themes in judicial review of federal executive action, 355 <http://www.austlii.edu.au/au/journals/FedLRev/1996/14.pdf>. (accessed 07 August 2016).

³⁰⁸ *Edelstein v Wilcox* 88 ATC 4484 at 4497.

³⁰⁹ Originally issued by King John of England (r.1199-1216).

³¹⁰ *Ibid.*

- deliberate and continued efforts by the debtor to frustrate legal recovery action; the debtor making payment to other creditors in preference to paying the Commissioner,
- where the issue of a writ has proven to be unsuccessful, but information obtained indicates that “garnishee” action may be appropriate in relation to the debtor's employment, bank and/or building society deposits and the like;
- the past compliance history of the debtor, including whether there has been previous non-payment;
- whether there are better alternatives to obtain payment;
- whether the use of a “garnishee” notice could be perceived as an abuse of power;
- the steps taken by the debtor to acknowledge indebtedness and accept the responsibility to pay;
- the likely implications of issuing a notice on a debtor's ability to provide for a family or on the debtor's employment or business;
- the quantum of the amount required to be forwarded if the notice is looking to a regular contribution (the maximum amount to be deducted from gross salary or wages should not exceed thirty cents (AUD\$ 0.30) in the Australian dollar where the debtor's only income is that salary or wage); and
- whether the debtor has requested the Commissioner to issue a ‘garnishee’ notice.

5.3 India

In India section 226 of the India Income Tax Act,³¹¹ which deals with other modes of recovery of income tax by the authorities of the Revenue Service, provides for a garnishee notice. In terms of section 226(3)(i) of the Act, the assessing officer is empowered to send a notice in writing, demanding that any person from whom money is due or may become due to the person assessed, or to any person who holds or may subsequently hold money for or on account to pay to the assessing officer. In terms of section 226 of the Income Tax Act an Indian taxpayer or garnishee as the case may be is given an opportunity to admit or deny liability before the money is attached.

³¹¹ 43 of 1961.

*Surinder Nath Kapoor vs Union of India and ORS*³¹² dealt with a garnishee order that was passed by the Income Tax officer under section 226(3) for payment of a fictitious sum, without notice under section 226(3), and whether a sale of property pursuant to such an order is null and void. The court asserted that though the action before court could not be termed illegal in terms of the statute, it had however “touches of rationality and certainly smacks of procedural impropriety”.³¹³ The court in this case held that there can be no doubt that when an order is made for the payment of a fictitious sum without giving any opportunity to a person, against whom the order is made, to show cause against the passing of such an order for the said sum, the order is a nullity.³¹⁴ In other words, in the eyes of the law it will be deemed that there was no existence of such an order and any step taken pursuant to or in enforcement of such an order will also be a nullity. Thus in terms of Indian law attachment under a garnishee is deemed null and void when there has been no prior notice to the taxpayer.

5.4 Canada

Section 224 (1) of the Canadian Income Tax Act³¹⁵ provides that:

where the Minister has knowledge or suspects that a person is or will be within one year liable to make payment to another person who is liable to make a payment under the Act, the Minister may in writing require the person to pay forthwith, where the moneys become liable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General of the tax debtor’s liability under the Act.³¹⁶

In Canada, the Canadian Revenue Agency (CRA), unlike other countries, can impose a garnishment of wages without a court order and the garnishment can happen without warning. Fifty percent of a person’s earnings can be deducted to be paid to the Receiver of Revenue and hundred percent of other earnings.

In *Trasgas v Mid-Plains Contractors Ltd*³¹⁷ the constitutionality of the garnishment provision found in section 224(1.2) of the Income Tax Act was challenged. The court held that the purpose of the impugned provision is clear, that is, to effect the expedient collection of

³¹² 1988 AIR 1777, 1988 SCR Supl. (2) 211.

³¹³ *Surinder Nath Kapoor vs Union of India* 1988.

³¹⁴ *Surinder Nath Kapoor vs Union of India* 1988.

³¹⁵ R.S.C., 1985, c. 1 (5th Supp.).

³¹⁶ Wolters, K. 2010. Canadian Income Tax Act with Regulations, Annotated 89th edition.

³¹⁷ CanLIII 4413 (SK CA).

withheld tax money and thereby prevent its misappropriation or diversion to the tax debtor's other creditors.³¹⁸ As such, it is part of the general scheme established by the Government of Canada for the collection of taxes and falls squarely within section 91(3) of the Canada Constitution Act.³¹⁹ The provision is “necessarily incidental” to the exercise of the federal power. The provision enables the Minister to collect withheld taxes by garnisheeing funds payable to the delinquent employee, funds that would not have been available to other creditors if they had been remitted as required by law.³²⁰ In order to ensure the collection of “withheld” tax money, the government enacted this garnishment provision with the result that it constitutes an integral and essential part of the collection scheme designed to attack the problem of tax deficiencies due to conversion or other types of misappropriation at the source of the deductions.³²¹

Another issue the court had to consider was the challenge by the complainants that these provisions violated the Constitutional right to be secure against unreasonable search and seizure, more specifically unreasonable seizure.³²² With regard to the issue of unreasonable seizure, the court stated that given the clear purpose of section 8 of the Canadian Charter of Rights and Freedoms enshrined in the Canadian Constitution Act of 1867; its scope could not be extended to cover pure economic interests.³²³ Even assuming that garnishment under section 224(1.2) does involve “intrusion” of interests protected under section 8, such garnishment provision was held to be reasonable.³²⁴

5.5 United States of America

In the United States of America, the Internal Revenue Code (IRC) authorizes levies to collect delinquent tax.³²⁵ United States Code section 6331(a) provides that:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax and such further sum as shall be sufficient to cover the expenses of the levy. By levy upon all property and rights to property belonging to such person or on which there is a lien provided in this chapter

³¹⁸ *Transgas V Mid-Plains Contractors Ltd* CanLIII 4413 (SK CA).

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² Canadian Constitution, 1867.S8 of the Charter of Rights and Freedoms.

³²³ *Transgas V Mid-Plains Contractors Ltd* CanLIII 4413 (SK CA).

³²⁴ *Ibid.*

³²⁵ US Code 6331.

for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer of such officer, employee, or elected official.

An Internal Revenue Service levy thus permits the legal seizure of property to satisfy a tax debt.³²⁶ Levies are different from liens in that a lien is a legal claim against property to secure payment of the tax debt, while a levy actually takes the property to satisfy the tax debt.³²⁷ In terms of this levy it can garnish wages, take money in a bank or other financial account, and seize and sell vehicles, real estate and other personal property. In addition, in order to effect its levy, other than in circumstances where the collection of the tax is in jeopardy, the government must notify the defaulting taxpayer of its intention to levy.³²⁸ It then makes its demand on the party in possession of the taxpayer's property, or right to property, to surrender it to the federal government.³²⁹ That party is obliged to do so, or to become liable for the amount of the property up to the amount of the tax owed, as well as any related penalties.³³⁰

The terms of the procedure section 6331(d)1 and section 6331(d)2 of the United States Internal Revenue Code states there must be a written notice to the taxpayer indicating that tax will be levied in this manner thirty (30) days after notice. During the provided 30 days the taxpayer could make representations to the Secretary in order to uplift the attachment of salary or money held by a third party. It thus appears that once the notice is issued to the taxpayer, the money is attached but the transfer of the money to the revenue service will only take place once the thirty (30) days have passed.³³¹ In addition to the Internal Revenue Code the United States of America has the Taxpayer Bill of Rights Act that gives taxpayers overt rights. The Taxpayer's Bill of Rights³³² provides the means by which abuses of power by the Internal Revenue Service can be prevented.

³²⁶ The Code of Federal Regulation of the United States of America 512.

³²⁷ The Code of Federal Regulation of the United States of America 512.

³²⁸ U.S.C s6331(a) and (d) 3.

³²⁹ U.S.C s6332(a).

³³⁰ Ibid.

³³¹ Greenbaum, A. 1997. "Taxpayers' Bill of Rights 1 and 2: A Charter to be followed by the Rest of the World or Just Another Attack on the Tax Authority? Revenue Law Journal: Vol. 7: Iss. 1, Article 7.

<http://epublications.bond.edu.au/rlj/vol7/iss1/7> at 352. (accessed 15 August 2016).

³³² IR-2014-72.

5.6 Recommendations for SARS

The court in *Hindry v Nedcor Bank Ltd*³³³ looked at other countries that have similar tax provisions and concluded that there is no general need for provision of notice, intimating that the limitation of constitutional rights implicit in section 99 is reasonable and necessary in an open and democratic society.³³⁴ By scrutinising decisions taken by SARS in such instances it is clear that SARS is in an unequal relationship with the taxpayer, who is not necessarily notified of the appointment of a third party.³³⁵ Moreover the revenue service will always be favoured when balancing the duty to collect tax against the taxpayer's rights, due to the fact that taxpayers would evade tax if the revenue service did not have the necessary power to efficiently collect tax and to implement harsh penalties for non-compliance. Even though the appointment of a third party was held to be constitutional, the manner in which the Commissioner exercises this collection power is of utmost importance hence the need to examine conditions in other countries. This would provide guidelines on how South African tax practices could be adapted to ensure that its methods become less invasive of taxpayer's rights than at present.

In terms of Canadian law, it has been held that the invasion of rights is justified to ensure the expedient collection of taxes. There is significant overlap and similarity in design and intent between the Australian third party notice provisions and those found in section 179 of the South African Tax Administration Act. At the core of both sets of provisions is the Commissioner's right to give a third party notice to pay to the fiscus money in fulfilment of a taxpayer's debt.³³⁶ In Australia, before third party appointments are effected, various considerations have to be taken into account, as listed above. They ensure that decisions remain within the taxpayer's capacity and that there is no adverse effect, for instance by being denied the right to property, because of the percentage limit to the amount that can be garnished. Given the South Africa socio-economic climate, the Australian model could be very instructive. In Indian law, the emphasis is on ensuring that the taxpayer is made aware of

³³³ 1999(2) SA 757 (W).

³³⁴ *Ibid* at 166.

³³⁵ Croome, B. 2010. *Taxpayer's Rights in South Africa*. Juta and Co. LTD: Cape Town.

³³⁶ J van der Walt. 2013. Third party appointments – an Australian cat amongst the pigeons. 20 January 2013. <http://www.thesait.org.za/news/114307/Third-party-appointments--an-Australian-cat-amongst-the-pigeons.htm> (accessed 26 July 2016).

the decision to garnish and is given an opportunity to dispute the claim if need be before garnishment can be effected in those cases in which the taxpayer is disputing the assessment.

The United States of America emphasises the importance of the taxpayer's rights. This is evident the Taxpayer's Bill of Rights Acts 1 and 2 which enable the legislator to advance the rights of taxpayers. The IRC, as has been noted, requires a thirty (30) day notice to the taxpayer before garnishment.³³⁷ The Taxpayer Bill of Rights has seen the codification of information included in assessment notices. Assessment notices are statements by the tax administration of a taxpayer's taxable income and of taxes owed or refund payable. Such notices in the United States system must be accompanied by information regarding the "tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice".³³⁸ In the event that the notice does not have all the required information, the notice will be considered invalid. The effect of a declaration of invalidity is that no action regarding collection may be effected unless and until a valid notice is served.³³⁹ The reasoning behind codification is the advance of taxpayer's rights and the promotion of principles of fairness, which are essential to an efficient tax administration.³⁴⁰ This reduces the cost of further litigation and increases confidence in the tax administration. In this respect the United States of America system can be very instructive for South Africa.

5.7 Recommendations for ZIMRA

As discussed in the earlier chapter, the Income Tax Act and the Value-Added Tax Act of Zimbabwe do not provide procedural safeguards for taxpayers as established by the South African Tax Administration Act section 172, as amended, which establishes the summary judgment procedure. This procedure maintains some elements of the normal civil procedure and retains its own unique provisions to facilitate an expeditious process. The section reads:

- (1) If a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent

³³⁷ IRC s6331(d) 1 and 2.

³³⁸ Greenbaum, A. 1997. "Taxpayers' Bill of Rights 1 and 2: A Charter to be followed by the Rest of the World or Just Another Attack on the Tax Authority? Revenue Law Journal: Vol. 7: Iss. 1, Article 7. <http://epublications.bond.edu.au/rlij/vol7/iss1/7> at 139. (accessed 15 August 2016).

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

court a certified statement setting out the amount of tax payable and certified by SARS as correct.³⁴¹

The Tax Administration Act creates an obligation for the Commissioner to give notice to the defaulting taxpayer before filing with the Clerk of Court. Such a procedural safeguard needs to be established and implemented in the Zimbabwean legislative system. This notice is crucial, especially for a constitutional state that guarantees the right to fair administrative action as well as abiding by the demands of natural justice under the principle of *audi partem alteram*. Since Zimbabwe's tax legislation is almost a carbon copy of South Africa's, the first step would be to adopt the developments introduced by the Tax Administration Act, specifically the provisions of section 172, which deals with steps to be taken in securing judgment.

The model under which the United States of America operates is able to balance taxpayers' rights and the tax collector's responsibility. In terms of procedure, section 6331(d)1 and section 6331(d)2 of the United States Internal Revenue Code clearly lays down the time framework. The sections state that there must be a written notice to the taxpayer indicating that tax will be levied in this manner thirty (30) days after notice. During this time taxpayer could make representations to the Secretary in order to uplift the attachment of salary or money held by a third party. It thus appears that once the notice is issued to the taxpayer the money is attached but the transfer of the money to the revenue service will only take place once the thirty (30) days have lapsed.³⁴²

For taxpayers in a challenging developing economy such as that of Zimbabwe, a thirty (30) day notice providing an opportunity to arrange one's affairs, is to be recommended. It is worth noting that the Courts have the power and authority to refer problematic sections of the Act(s) back to Parliament for amendments, corrections, additions, and to strike out problematic provisions. A mechanism in the Act(s) should be established, to strike a balance between respect for and adherence to taxpayer rights, against the expeditious nature of a case.

³⁴¹ Tax Administration Laws Amendment Act, 39 of 2013.

³⁴² Greenbaum, A. 1997. "Taxpayers' Bill of Rights 1 and 2: A Charter to be followed by the Rest of the World or Just Another Attack on the Tax Authority?", *Revenue Law Journal*: Vol. 7: Iss. 1, Article 7. <http://epublications.bond.edu.au/rlij/vol7/iss1/7> at 352. (accessed 15 August 2016).

Instead of the garnishee order, equally effective methods can be used to achieve the desired ends. An expeditious, and less invasive, procedure could be implemented by a legislative instrument. There are already common law means and mechanisms of ensuring that the taxpayer does not dispose of his assets or money, at the same time securing the taxpayer's presence in court, such as the Knox D'Arcy procedure. It is also known as the *Mareva* Injunction/anti-dissipatory interdict.³⁴³ In Commonwealth jurisdictions, this is a court order that freezes assets so that a defendant to an action cannot dissipate his/her assets placing them beyond the jurisdiction of a court so as to frustrate a judgment. The justification of the interdict is based on the Court's desire to prevent an unsuccessful defendant from concealing or getting rid of funds or assets with the intention of not paying the successful plaintiff.³⁴⁴ Through this procedure ZIMRA could embrace such a method while securing attendance to the hearing.

In conclusion, even though it may be an after-the-fact remedy, a taxpayer may act against ZIMRA for any damages suffered, on the grounds that the garnishee order provisions were improperly invoked. A garnishee order must be instituted when tax is due and the taxpayer must be served with a notice of assessment (except in circumstances when notice of assessment is not required, i.e. collection of employees' tax). One can also attack a garnishee order on the grounds of administrative justice if the said taxpayer has not received an assessment or an incorrect assessment was made.

5.8 Conclusion

Comparative studies are a key component in policy development. In this chapter the starting point was to explore the countries that make use of the garnishee order as a tool for tax collection. As was demonstrated in the chapter, these countries have different uses and application of the same tool with regard to collecting tax from defaulting taxpayers. The objective of the comparisons was to find alternative methods to tax collection which are less invasive to the taxpayer. As the discussions show, recommendations were made separately to South Africa and Zimbabwe. Zimbabwe's recommendations were not as far reaching as South Africa's, as there was need to be mindful of other factors such as scalability and the availability of resources. Most of the recommendations for Zimbabwe would come from the South African current model. With regard to South Africa, the current system employed by

³⁴³ *Mareva Compania Naviera SA v International Bulkcarriers* [1980] 1 ALL ER 213 (CA).

³⁴⁴ *Knox D'Arcy Ltd and Others v Jameson and Others* 1996 (4) SA 348 (A) at 351 D-E.

the United States of America would come across as more instructive. The South African current model will not be strained if it is to adopt some of the practices used in United States. Most importantly, with regard to the South African economy, the United States current model would seem ideal for the South African taxpayers in terms of its less invasive nature as well as the cushioned financial implications.

Chapter 6: CONCLUSION

6.1 Aims of the research

The research addresses the question of whether the tax garnishees imposed on taxpayers by the tax authority in South Africa and Zimbabwe are reasonably justified in a democratic society. It seeks to examine the constitutional implications of “third party appointments” by tax authorities without having fully engaged the taxpayer. The overarching goal of the thesis is to explore alternative ways of collecting tax from defaulting taxpayers using methods which are not invasive, taxpayer friendly at the same time allowing the tax authorities to fulfil their mandate.

The significant point of departure was the fact that the Tax Administration Act of South Africa and the Income Tax Act of Zimbabwe provide the South African Revenue Service (SARS) and the Zimbabwe Revenue Authority (ZIMRA) respectively with substantial powers in relation to important administrative aspects of tax, such as the collection of

information and the imposition and recovery of tax.³⁴⁵ The courts made rulings in favour of the tax authorities, citing the fact that these provisions in question are constitutional. The courts did however, advise the tax authorities to exercise caution in their application of the provisions in question.

In South Africa, statistics reveal that of the approximately 15 million workers and/or registered individual taxpayers, about 6,5million recorded taxable income above the annual income tax threshold of seventy-five thousand Rands (R75 000) per year, with the remaining eight million five hundred thousand people (8 500 000), earning a taxable income of below that threshold.³⁴⁶ The SARS debt book has risen to above 47,5% of the annual turnover,³⁴⁷ which means that there is a need for the revenue collector to find effective ways of ensuring that taxes and tax debts are paid.

The thesis sought to address the fact that the tax collector's duty does not exist in isolation because the taxpayer's constitutional rights must be taken into consideration. These rights include the right to property, privacy, access to the courts, and the right to just administrative action. The thesis focused on each of the rights stated above and evaluated how they have been treated in Zimbabwe and South Africa with regard to tax collection from defaulting taxpayers. The discussions show that the legislative provisions empowering the tax authorities do pass the constitutional muster.

6.2 Conclusion

The thesis explored alternative methods the tax authorities could adopt. These alternative methods should be enabling for the tax authorities to fulfil their primary obligations and simultaneously be less invasive to the taxpayers. The systems employed by other jurisdictions were reviewed and briefly analysed. Recommendations were made to South Africa with regard to other considerations they could employ from other jurisdictions in order to make the current procedure less invasive on taxpayers. Recommendations we also made to Zimbabwe, with most of the practices being informed by the current South African model.

³⁴⁵ Croome, B. 2008. Taxpayer's rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to the courts at 16.

³⁴⁶ 2015 Tax Statistics A joint publication between the National Treasury and the South African Revenue Services.

<http://www.treasury.gov.za/publications/tax%20statistics/2015/TStats%202015%20Inside%20WEB.pdf> (accessed 03 September 2016).

³⁴⁷ 2015 Tax Statistics SARS.

There is a viable, alternative method the tax authorities can employ in order to fulfil their mandate of collecting taxes. These methods allow the defaulting taxpayers to sort out their affairs and address any possible chances of overwhelming debt; if it is a business entity, the possibility of liquidation owing to garnishee orders can be alleviated and addressed. Garnishee orders in tax collection can affect a taxpayers' financial position significantly and if there are procedures available which are not in conflict with the tax authorities' obligations, then they ought to be employed.

Bibliography

- Anonymous. Chapter 2, Right to Privacy. <http://old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf> (accessed 5/30/2016).
- Armstrong, A. 1992. "Maintenance Payments for Child Support in Southern Africa: Using Law to Promote Family Planning. *Studies in Family Planning*". Vol. 23, No. 4 (Jul. - Aug), pp. 217-228. <http://www.jstor.org/stable/1966884> (accessed 2/5/16).
- Babbie, E. & Mouton, J. 2009. *The practice of social research*. Cape Town: Oxford University Press Southern Africa.
- Becatti, F. 2015. SARS Doesn't Want Your Money. *Tax Bulletin*. 13 November 2015.

- Cliffe Dekker Hofmeyr, Tax Administration, 2194. Third party appointments. https://www.saica.co.za/integritax/2013/2194_Third_party_appointments.htm. (accessed 06 June 2016).
- Croome, B. 2008. Taxpayer's rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to the courts. Published Thesis, Doctor in Philosophy. Cape Town; University of Cape Town.
- Croome, B. 2010. Taxpayer's Rights in South Africa .1st ed. Cape Town: Juta and Co. Ltd.
- Croome, B. Last resort for SARS to effect collection of dues. https://www.ensafrica.com/Uploads/Images/news/10_08_10%2001%2001r1008LAW_AL_12.pdf (accessed 31/05/16).
- Currie, I & De Waal, J. 2005. The Bill of Rights Handbook. Cape Town: Juta and Company (Pty) Ltd.
- Currie, I & De Waal, J. 2005. The Promotion of Administrative Justice Act: A Commentary 2nd ed. Cape Town: Siber Ink (2007).
- ENS Africa. Tax department, "The appointment as payment agent by the Commissioner". <https://www.ensafrica.com/news/the-appointment-as-payment-agent-by-the-commissioner?Id=468&STitle=tax%20ENSight> (accessed 5/3/16).
- Ensminger, J. 1992. Making a Market: The Institutional Transformation of an African Society. Cambridge: Cambridge University Press.
- Feltoe, G. 2012. A guide to administrative and local govern law in Zimbabwe. http://ir.uz.ac.zw/xmlui/bitstream/handle/10646/662/Administrative_Law_Guide.pdf;jsessionid=996531534AE9F8484F0FBFD5A535F417?sequence=1 (accessed 14 Jul. 16).
- Greenbaum, A. 1997. "Taxpayers' Bill of Rights 1 and 2: A Charter to be followed by the Rest of the World or Just Another Attack on the Tax Authority? Revenue Law Journal: Vol. 7: Iss. 1, Article 7. <http://epublications.bond.edu.au/rlj/vol7/iss1/7>. (accessed 03 June 2016).

- Hebstain and Winsen, V. 1997. *The Civil Practice of the Supreme Court of South Africa*, 4th edition. Cape Town: Juta and Company (Pty) Ltd.
- Hoexter, C. 2015. *Administrative Law in South Africa*, 2nd ed. Cape Town: Juta and Company (Pty) Ltd.
- Kelly, J. 1964. “Audi Alteram Partem Rule: Note”. *Natural Law Forum*. Paper 84. http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1083&context=nd_natural_law_forum (accessed 30/05/16).
- Keulder, C. 2012. *Does the Constitution protect taxpayers against the mighty SARS? – An enquiry into the Constitutionality of selected tax practices and procedures*. Unpublished LLM Thesis. Pretoria: University of Pretoria.
- Keulder, C. 2013. Pay now argue later rule- before and after the tax administration act, PER / PELJ 2013(16) 4.
- Keulder, C. and Legwaila, T. 2014. “The Constitutionality of third party appointments - before and after the Tax Administration Act”. *Journal of Contemporary Roman-Dutch Law*, Vol. 77, No ,1.
- Legal Wise, Quick Law Guides, Garnishee Orders, <https://www.legalwise.co.za/help-yourself/quicklaw-guides/garnishee-orders> (accessed 2/5/16).
- Loots, C. 1999. Access to the Courts and Justiciability. *Revision service* 5, 8-1. http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/8-Access%20to%20the%20Courts.pdf (accessed 27/05/16).
- Madebwe, T. 2014. *Constitutionalism and the new Zimbabwean Constitution*. [Midlands State University Law Review Vol.1]. <http://www.zimlii.org/zw/zw/journals/MSULR%20Vol%201-%20October%202014.pdf> (accessed 12 July 2016).
- Maskhija, A.K. 1996. Principles of natural justice. <http://www.lawpact.org/uploads/PRINCIPLES%20OF%20NATURAL%20JUSTICE.pdf> (accessed 30/05/16).
- McKerchar, M. 2014. “Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation”.

eJournal of Tax Research. p5 – 22. [Online]. <http://ssrn/abstract=1464141> [Accessed 06/01/2016].

- McMillan, J. 1996. “Recent Themes in judicial review of federal executive action”. <http://www.austlii.edu.au/au/journals/FedLRev/1996/14.pdf>. (accessed 12 June 2016).
- Mushoriwa, F. 2009. Securing administrative justice in Zimbabwe: a constitutional dimension required? <https://thecorporatelawyer.wordpress.com/2009/06/12/securing-administrative-justice-in-zimbabwe-a-constitutional-dimension-required-by-farai-mushoriwa/> (accessed 14 July 2016).
- National Treasury. Tax Statistics. 2015. “A joint publication between the National Treasury and the South African Revenue Services”. <http://www.treasury.gov.za/publications/tax%20statistics/2015/TStats%202015%20Inside%20WEB.pdf>. (accessed 20 July 2016).
- New Ziana, Alignment of Laws with Zimbabwe’s new Constitution gathers pace. <http://www.zimbabweonlinenews.com/alignment-of-laws-with-zimbabwes-new-constitution-gathers-pace/> (accessed March 2, 2017).
- Nyenti, M. 2013. "Access to justice in the South African social security: Towards a conceptual approach". DEJURE 44. http://www.saflii.org/za/journals/DEJURE/2013/44.html#_ftn5 (accessed 27/05/16).
- Olivier, M.P. Kalula, E.R & Smi, N. 2003. “Constitutional issues” in Social Security: A Legal Analysis. Cape Town: LexisNexis Butterworth.
- Pete, S. Hulme, D. du Plessis, M. Palmer, R. 2008. Civil Procedure, A practical Guide. Cape Town: Oxford University Press.
- Rugadya, M.R. 2009. Natural Resource Rights and Biodiversity Protection: Guidelines for Policy and Strategies to strengthen Local Governance Systems paper presented at Best Practices for Land Tenure and Natural Resource Governance in Africa March 1-7, 2009, Nairobi, Kenya. <http://www.afdresearch.org/files/LandResearch/001.pdf>, p1, (accessed 13 Jul. 16).

- SAICA. Integritax. APRIL 2013 – ISSUE 163. https://www.saica.co.za/integritax/2013/2194_Third_party_appointments.htm (accessed 5/3/16).
- SARS Tax Administration.
<http://www.sars.gov.za/Legal/TaxAdmin/Pages/default.aspx> (accessed 5/3/16).
- Singh, S. India. 2015. A glance on provision of –garnishee order. <http://www.mondaq.com/india/x/369332/Financial+Services/A+Glance+On+Pr+ovision+Of+Garnishee+Order> (accessed 5/2/16).
- Stakeholder Report Universal Periodic 26th Session: The Right to Privacy in Zimbabwe. https://www.privacyinternational.org/sites/default/files/zimbabwe_upr2016.pdf (accessed 13 Jul. 16).
- Tapera, M. & Majachani, A. F. 2015. Unpacking Tax Law and Practice in Zimbabwe. Harare: Tax Matrix (Pvt) Ltd.
- Tax Matrix Monthly update, December 2015. <http://taxmatrix.co.zw/wp-content/uploads/2016/01/December-2015-MTU.pdf> (accessed 14 Jul. 16).
- The free dictionary by Farlex, <http://legal-dictionary.thefreedictionary.com/constitutional+law> (accessed 5/30/2016).
- Tully, K. 2015. UK Direct Recovery of Debts Legislation—Meaning for UK Taxpayers and Comparison to Other Nations, Performance & Financial Management, International Federation of Accountants. <https://www.ifac.org/global-knowledge-gateway/performance-financial-management/discussion/uk-direct-recovery-debts> (accessed 2/5/16).
- Van der Walt, A.J. 2012. Property and the Constitution, Pretoria University Law Press. http://www.pulp.up.ac.za/pdf/2012_10/2012_10.pdf (accessed 28/05/16).
- Van der Walt, J and Le Roux, D. 2012. “Third party appointments – an Australian cat amongst the pigeons”. <http://www.thesait.org.za/news/108884/Third-party-appointments-by-SARS-under-the-TAA.htm>. (accessed 23 July 2016).
- Van Eeden, R. Tax Administration Act/15 Minutes “An *amendment to a somewhat odd provision*”. <http://hdl.handle.net/10520/EJC186282>. (accessed 12 June 2016).

- Wolters Kluwer, 2010. Canadian Income Tax Act with Regulations, Annotated 89th ed. Spring.
- Zimbabwe Human Rights NGO Forum. The Right to Privacy in a Digital Age, General Assembly Resolution 67/167. <http://www.ohchr.org/Documents/Issues/Privacy/ZimbabweHumanRightsForum.pdf> (accessed 13 Jul. 16).

Case law

- Union Pacific R.R Co v Botsford 141 US 251 11 S.Ct 1000, 35 L.Ed 734 (1891).
- Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A).
- African Billboard Advertising (Pty) Ltd v North and South Local Councils 2004 (N).
- African Distillers Ltd v Honiball and another 1972 (3) SA 135 (R).
- A-G v Mudisi & Ors S-48-15.
- Baldeo v Minister of Safety and Security 1997 (12) (BCLR) 1728 (D).
- Baramoto & others v Minister of Home Affairs & others 1998 (5) BCLR 562 (W).
- Beinash v Ernst and Young 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC).
- Bernstein ao v Bester NO ao 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).
- Bhugwan v JSE Ltd 2010 (3) SA 355 (GSJ).
- Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A).
- Carephone (Pty) Ltd v Marcus NO & others 1999 (3) SA 304 (LAC), 1998 (10) BCLR 1326 (LAC)
- Carlson Investments Shareblock (Pty) Ltd v Commissioner for the SA Revenue Service 2002 (5) BCLR 521 (W).
- Chetty v Law Society, Transvaal 1985 (2) SA 756.
- Chief Lesapo v North West Agricultural Bank 2000 (1) SA 409.
- Commissioner of Taxation v Park 2012) FCAFC 122 C.

- Contract Support Services (Pty) Ltd and Others v Commissioner: SARS and Others 1999 (3) SA 1133 (W).
- Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202.
- De Lille & another v Speaker of the National Assembly 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C).
- Edelsten v Wilcox 88 ATC 4484 at 4495.
- Edgars Stores Limited v Commissioner of Taxes 1996 (2) ZLR747 (SC).
- European Hotel, Pretoria v Beckett 1911 TPD 31.
- Ex parte Venter 1940 TPD.
- Fairdrop Trading (Private) Limited v Zimbabwe Revenue Authority HC 909/14.
- Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T).
- Ferucci and Others v C: SARS and Another 65 SATC 470.
- First National Bank v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC).
- Ford v Law Society of Rhodesia 1977 (2) ZLR 40 (A).
- Hall and De Beer and Slade v Hall 1916 TPD 372.
- Hindry v Nedcor Bank Ltd and Another, 1999 (2) All SA 38 (W), 61 SATC 163.
- Honey & Blanckenberg v Law 1966 (2) SA 43 (R).
- Hutchings v St John's College HH-416-13.
- Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) (SA) 545 (CC).
- Klein v Attorney-General 1995 (3) SA 848 (W).
- Knox D'Arcy Ltd and Others v Jameson and Others 1996 (4) SA 348 (A).
- MA Sepataka v Commissioner for the South African Revenue Service 72 SATC 279.
- Mangenje v TBIC Investments (Pvt) Ltd & Ors HH-377-13.

- *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C).
- *Mareva Compania Naviera SA v International Bulkcarriers* [1980] 1 ALL ER 213 (CA).
- *Meaker NO v Campbell New Quarries (Pvt) Ltd and Others* 1973 (3) SA 157 (R).
- *Medix Pharmacies (Pvt) Ltd, Tanganda Limited & Meikles Africa Limited vs. Commissioner-General of ZIMRA & Barclays Bank of Zimbabwe Limited* HC 2384/03.
- *Metcash Trading Ltd v Commissioner for the South African Revenue Service* (2000) 2 SA 232 (W).
- *Mike Campbell (Pvt) Ltd et al. v. the Republic of Zimbabwe* 2008) AHRLR 199 (SADC 2008).
- *Mkontwana vs Nelson Mandela Metropolitan Municipality and Another* 2005 (CC).
- *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).
- *Mpande Foodliner CC v Commissioner for South African Revenue Service* 63 SATC 46.
- *Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd* 1974 (4) SA 508 R.
- *Mthethwa (Khoza) & others v Diedericks & others* 1996 (4) SA 381 (N).
- *National Horseracing Authority of Southern Africa v Naidoo* 2010 (3) SA 182.
- *National Media Ltd v Jooste* 1996 (3) SA 262 (SCA).
- *Nedbank v Pestana* 2009 (2) SA 189 (SCA).
- *Nyangane v Stadsraand van Pochefstroom* 1998 (T).
- *O'Keeffe v Argus Printing and Publishing* 1954 (3) SA 244 (C).
- *Oudekraal Estates v City of Cape Town and Others* 2004 (SCA).
- *Packers International v ZIMRA*, HH-328-14.
- *Paramount Furnishers v Lezars Shoe Store and Outfitters Ltd*, 1970 (3) SA 361 (T).

- Patcor Quarries CC v Issroff & others 1998 (4) SA 1069 (SE), 1998 (4) BCLR 467 (SE).
- Pestana v Nedbank Limited (A5023/07) [2007] ZAGPHC 283; 2008 (3) SA 466 (W).
- Prophet v National Director of Public Prosecutions 2006 (SCA).
- R v McKinlay Transport Ltd (1990) 1 SCR 627, (1990) 2 CTC 103, 90 DTC 6243.
Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC).
- Rwodizi v Chegutu Municipality 2003 (1) ZLR 601 (H).
- S v Lawrence [1997] ZACC 11; 1997 (10) BCLR 1348 (CC).
- S v Mlungu [1995] ZACC 4; 1995 3 SA 867 (CC).
- S v Pennington 1997 (4) SA 1076 (CC).
- Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another 66 SATC 241.
- Sokhela v MEC for Agricultural and Environmental Affairs (KZN) 2010 (5) SA 574 (KZP).
- Spence v Davidson 1911 WLD 147.
- Surinder Nath Kapoor vs Union of India and ORS 1988 AIR 1777, 1988 SCR Supl. (2) 211.
- Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors HH-446-15.
- The Oceanic Trust Co. Ltd N.O, and the Commissioner for the South African Revenue Service. 74 SATC 127 (WC).
- The Queen v Trans Gas Limited & Mid-Plains Contractors Ltd (1993) CTC 280.
- The Trustee v Kensington Borough Council, 1950 2 AER 716.
- Traco Marketing v Minister of Finance [1996] 2 All SA 467; 58 SATC 195.
- Tragas v Mid-Plains Contractors Ltd CanLIII 4413 (SK CA).
- Union Pacific R.R Co v Botsford 141 US 251 11 S.Ct 1000, 35 L.Ed 734 (1891).

- University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others [2016] ZACC 32.
- Van Zyl v New National Party 2003 (10) BCLR 1167 (C).
- Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe (2009) AHRLR 268 (ACHPR 2009).

Legislation

- African Charter OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- Botswana. Deserted Wives and Children Protection Act of Botswana, Chapter 23:08.
- Canada Constitution Act, 1867.
- Canadian Charter of Rights and Freedoms, 1982.
- Canadian Income Tax Act 1988 AIR 1777.
- India Income Tax, 43 of 1961.
- International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of December 16, 1966, entry into force March 23 1976. Art 17.
- Magna Carter Originally issued by King John of England (r.1199-1216).
- Netherlands. Constitution of the Kingdom of the Netherlands, 1989.
- Republic of the Philippines. Constitution of the Republic of the Philippines, 1987.
- Russia. Constitution of the Russian Federation, 1993.
- South Africa. Value-Added Tax Act, Act 89 of 1991, as amended.
- South Africa. Abolition of Restrictions on the Jurisdiction of Courts Act, 88 of 1996.
- South Africa. Constitution of the Republic of South Africa.
- South Africa. Consumer Protection Act, Act 68 of 2008.
- South Africa. Customs and Excise Act, Act 91 of 1964, as amended.

- South Africa. Government Gazette 19834. Dated 12 March 1999. Government Notice R315.
- South Africa. Income Tax Act, Act 58 of 1962, as amended.
- South Africa. Magistrate's Court Act, Act 32 of 1944, as amended.
- South Africa. Magistrate Courts (Civil) Rules, 2013 Amendment 12.
- South Africa. Maintenance Amendment Act, Act 21 of 1987.
- South Africa. National Credit Act, Act 34 of 2005.
- South Africa. Pension Funds Act, 24 of 1956.
- South Africa. Prevention of Organised Crime Act, Act 121 of 1998.
- South Africa. Promotion of Administrative Act, Act 3 of 2000.
- South Africa. State Liability Decree 34 of 1990 (Ck).
- South Africa. Supreme Court Act 59 of 1959.
- South Africa. Tax Administration Act, Act 28 of 2011, as amended.
- South Africa. Vexatious Proceedings Act, 3 of 1956.
- Swaziland. Maintenance Act of Swaziland, 35 of 1970.
- United Kingdom Human Rights Act, 1998.
- United Nations Convention on Migrant Workers adopted by General Assembly resolution 45/158 of December 18, 1990.
- United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990. Art 16 of the United Nations Convention on the Rights of the Child.
- United States of America Taxpayer's Bill of Rights, IR-2014-72.
- United States of America, Internal Revenue Code 6331.

- United States of American Code of Federal Regulation of the United States of America U.S. Government Printing Office, 2006.
- Zambia. Subordinate Courts Act of Zambia, 23 of 1970.
- Zimbabwe Human Rights NGO Forum. The Right to Privacy in a Digital Age, General Assembly Resolution 67/167.
- Zimbabwe. Administrative Justice Act, Chapter 10:28.
- Zimbabwe. Constitution of the Republic of Zimbabwe, 2013.
- Zimbabwe. Constitution of Zimbabwe Amendment Act, Act 20 2013.
- Zimbabwe. Income Tax Act [Chapter 23 of 2006], as amended.
- Zimbabwe. Land Acquisition Act of Zimbabwe [Chapter 20:10].
- Zimbabwe. Magistrate Court (Civil) Rules, 290 of 1980, as amended.
- Zimbabwe. Rules of the High Court, 26 of 2005.
- Zimbabwe. Value-Added Tax Act. [Chapter 23 of 2012], as amended.