

*WHAT'S GOOD FOR THE GOOSE IS GOOD  
FOR THE GANDER — WARRANTLESS  
SEARCHES IN TERMS OF FISCAL  
LEGISLATION*

CARIKA KEULDER\*

*Lecturer, Department of Mercantile Law, University of Pretoria*

*Both the Tax Administration Act and the Customs and Excise Act provide SARS with the power to conduct a search and seizure without first obtaining a warrant. The justification for a warrantless search is that it enables SARS to act straight away, thus preventing tax evaders from destroying or hiding evidence of their evasion. This article explains that certain circumstances need to be present before a warrantless search may be conducted, and certain guidelines must be adhered to when a warrantless search and seizure operation is conducted. This article, more importantly, demonstrates that the warrantless-search framework of the Customs and Excise Act is inconsistent with the warrantless-search framework of the Tax Administration Act. Consequently, when a taxpayer may be subject to value-added tax (which is collected in terms of the Tax Administration Act) and customs duty (which is collected in terms of the Customs and Excise Act) SARS can elect to conduct a search in terms of the less stringent provisions, resulting in 'provision shopping' on the part of SARS.*

## I INTRODUCTION

'No one likes taxes. People do not like to pay them. Governments do not like to impose them. But taxes are necessary both to finance desired public spending in a non-inflationary way and also to ensure that the burden of paying for such spending is fairly distributed.'<sup>1</sup>

The levying and paying of taxes may not be well liked but the process is essential for the proper functioning of society and government. In South Africa, the South African Revenue Service ('SARS') is tasked with the duty of administering and collecting taxes.<sup>2</sup>

To discharge its duty to collect taxes effectively, SARS has been afforded extensive legal and administrative powers by the legislature.<sup>3</sup> One of these powers is the ability to search and to seize the property of taxpayers in order to verify their compliance with fiscal legislation. In some instances, SARS

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<sup>1</sup> Richard M Bird & Eric M Zolt 'Introduction to tax policy design and development', unpublished draft lecture prepared for a course on Practical Issues of Tax Policy in Developing Countries, World Bank, 28 April–1 May 2003 at 8.

<sup>2</sup> The powers of SARS are conferred by ss 3 and 4 of the South African Revenue Service Act 34 of 1997.

<sup>3</sup> Elzette Muller *A Framework for Wealth Transfer Taxation in South Africa* (unpublished LLD thesis, University of Pretoria, 2010) 63.

does not even have to obtain a warrant to carry out a search and seizure.<sup>4</sup> The justification for a warrantless search is that it enables SARS to act straight away, thus preventing tax evaders from destroying or hiding evidence of their evasion.<sup>5</sup> If SARS were required first to obtain a warrant, tax evaders would have the opportunity to destroy relevant documentation.<sup>6</sup>

The provisions affording SARS the power to search and seize were, until 1 October 2012, contained in, among others, s 74D of the Income Tax Act 58 of 1962 and s 57D of the Value-Added Tax Act 89 of 1991.<sup>7</sup> These provisions applied before the Tax Administration Act 28 of 2011 ('TAA') came into operation on 1 October 2012. The TAA aims to 'provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible'.<sup>8</sup> Consequently, the TAA repealed the search-and-seizure provisions in the Income Tax Act and the Value-Added Tax Act.<sup>9</sup> The provisions for search and seizure are now contained in ss 59 to 63 of the TAA. It must, however, be noted that the search-and-seizure provisions in the Customs and Excise Act 91 of 1964 were not repealed by the TAA.<sup>10</sup> This means that search and seizure by SARS can be conducted either in terms of the TAA or the Customs and Excise Act.

SARS's power to search and seize does not exist in isolation. The taxpayer's constitutional rights to privacy,<sup>11</sup> among others, must be taken into consideration. This right entails that 'every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property . . .'. However, the taxpayer's right to privacy may be limited, provided that the limitation is reasonable and justifiable.<sup>12</sup> Case law relating to the ambit and limitation of

<sup>4</sup> Section 4(4) of the Customs and Excise Act 91 of 1964 and s 63 of the Tax Administration Act 28 of 2011.

<sup>5</sup> *Draft Explanatory Memorandum on the Draft Tax Administration Bill* (2009) para 2.2.5.6. See also author unknown 'SARS and its new powers' *Little Logbook* 4 May 2013, available at <http://bit.ly/18Fcsdf>, accessed on 4 November 2014.

<sup>6</sup> *Draft Explanatory Memorandum* op cit note 5 para 2.2.5.6.

<sup>7</sup> Since s 74D of the Income Tax Act and s 57D of the Value-Added Tax Act are similar, any discussion relating to the one applies mutatis mutandis to the other.

<sup>8</sup> Preamble to the TAA.

<sup>9</sup> Schedule 1 to the TAA.

<sup>10</sup> Section 4(1) of the TAA read with the definition of 'tax Act' in s 1. The Customs and Excise Act is excluded from the TAA because the former Act operates in a different context and is furthermore currently in the process of being redrafted. See National Treasury 'Draft memorandum on the objects of the Tax Administration Laws Amendment Bill, 2013' 2 July 2013, available at [http://www.treasury.gov.za/legislation/draft\\_bills/20130704%20-%20TALAB%202013%20MoO.pdf](http://www.treasury.gov.za/legislation/draft_bills/20130704%20-%20TALAB%202013%20MoO.pdf), accessed on 4 November 2014.

<sup>11</sup> As provided for in s 14 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'). A taxpayer's right to property may also be infringed when property is seized. However, the seizure will take place for evidentiary purposes; it is submitted that this will satisfy the limitation test contained in s 36 of the Constitution.

<sup>12</sup> As provided for by s 36 of the Constitution.

the right to privacy suggests that even though a person's right to privacy is not restricted to the person's home, the right to privacy is less protected when the person moves away from the 'intimate personal sphere' of a home.<sup>13</sup> It has been held that when searches or inspections are conducted to ensure compliance,<sup>14</sup> 'the more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion'.<sup>15</sup>

The matter of *Gaertner & others v Minister of Finance and others*<sup>16</sup> dealt with the tension between SARS's duty to verify compliance and the taxpayer's constitutional rights which arises when SARS conducts a warrantless search. The case resulted in an amendment of the warrantless search-and-seizure provisions contained in the Customs and Excise Act in order to ensure that this tension is alleviated.

This article aims to establish whether the amended warrantless search-and-seizure provisions contained in the Customs and Excise Act are consistent with those contained in the TAA. It is important to determine this issue in instances where there is an overlap between the search-and-seizure provisions contained in the TAA and those contained in the Customs and Excise Act. This will, for example, be the case where imported goods are subject to customs duty, and value-added tax may also be payable.<sup>17</sup> It must be noted that s 4(3) of the TAA indicates that, when there is inconsistency between the TAA and another tax Act, the provisions of the other tax Act should take preference. However, 'tax Act' is defined in the TAA to exclude the Customs and Excise Act. This means that the TAA does not address the situation where there is an overlap, and a possible inconsistency, between the TAA and the Customs and Excise Act. The Customs and Excise Act also does not address such a situation. Therefore, when the two pieces of fiscal legislation overlap, no provision indicates which Act takes precedence over the other. This creates a situation where SARS can elect to conduct a search in terms of less stringent requirements if the provisions contained in the TAA and in the Customs and Excise Act differ. This could result in 'provision shopping' on the part of SARS.

<sup>13</sup> *Bernstein & others v Bester NO & others* 1996 (2) SA 751 (CC) at 484; *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO* 2001 (1) SA 545 (CC).

<sup>14</sup> In *Gaertner & others v Minister of Finance & others* 2014 (1) SA 442 (CC) ('*Gaertner* (CC)') para 36n25 these types of inspections were referred to as 'regulatory inspections'.

<sup>15</sup> *Mistry v Interim National Medical and Dental Council of South Africa & others* 1998 (7) BCLR 880 (CC) at 892.

<sup>16</sup> *Gaertner & others v Minister of Finance & others* 2013 (4) SA 87 (WCC) ('*Gaertner* (HC)') and *Gaertner* (CC) supra note 14.

<sup>17</sup> This will be in terms of s 7(1)(b) of the Value-Added Tax Act and s 39(b) of the Customs and Excise Act.

This article is concerned with the warrantless-search framework created by fiscal legislation. Therefore, a discussion of misuse of this framework does not fall within the scope of the article. Nevertheless, for the sake of completeness, it is important to mention that, in instances of misuse by SARS officials, the taxpayer should challenge the conduct of the officials in terms of the Promotion of Administrative Justice Act 3 of 2000<sup>18</sup> or the principle of legality<sup>19</sup> instead of challenging the validity or constitutionality of the legislation.

This article first examines warrantless search and seizure in terms of the Customs and Excise Act. Then the focus shifts to the warrantless search-and-seizure provisions of the TAA. A comparison between these two pieces of legislation follows before a conclusion is proposed to resolve the overlap.<sup>20</sup>

<sup>18</sup> See also George Kenneth Goldswain *The Winds of Change — An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished PhD thesis, University of South Africa, 2012) 126 and 131, where the difference between attacking the validity (or constitutionality) of legislative provisions and the conduct of a SARS official is discussed.

<sup>19</sup> Contained in s 195 of the Constitution. See Daniel Erasmus 'Section 195 of the Constitution revisited' *TaxTalk* 1 June 2007, available at <http://bit.ly/1iXNBX3>, accessed on 4 November 2014, where it is argued that, in terms of s 4(2) of the South African Revenue Service Act, a legitimate expectation is created that SARS is governed by the basic values and principles of public administration as contained in s 195 of the Constitution. This means that, if the conduct of SARS is not in line with these values and principles, a court can declare the conduct invalid and set it aside. See also G K Goldswain 'Special or unusual defences or "extenuating circumstances" that may be pleaded for purposes of remission of penalties in income tax matters' (2003) 11 *Meditari Accountancy Research* 45 at 56, where the author indicates that SARS's conduct will still be subject to an individual's constitutional rights.

<sup>20</sup> The present article focuses on the procedure relating to warrantless searches. Therefore, a discussion of the right to privacy and the application of s 36 of the Constitution does not fall within the ambit of the article. For a discussion of search and seizure and a taxpayer's right to privacy, see Beric Croome *Taxpayers' Rights* (2010) 21; B J Croome *Taxpayers' 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 Courts* (unpublished PhD thesis, University of Cape Town, 2008) 103; Silke Bovijn *Warranted and Warrantless Search and Seizure in South African Income Tax Law: The Development, Operation, Constitutionality and Remedies of a Taxpayer* (unpublished MCom (Taxation) dissertation, University of Stellenbosch, 2011) 108; Mosupa Frank 'Constitutional validity of search and seizure provisions: A perspective on section 74 of the Income Tax Act' (2001) 12 *Stellenbosch LR* 317; Jonathan Silke 'Taxpayers and the Constitution: A battle already lost' (2002) 17 *Acta Juridica* 282 at 291; Silke Bovijn & Linda van Schalkwyk 'Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act' (2012) 3 *Stellenbosch LR* 507 at 517.

## II WARRANTLESS SEARCHES IN TERMS OF THE CUSTOMS AND EXCISE ACT

The matter of *Gaertner & others v Minister of Finance & others*<sup>21</sup> brought the constitutionality of s 4(4) to (6) of the Customs and Excise Act to the fore and also paved the way for an amendment of the section. The amended section contains guidelines to alleviate the tension that arises when a warrantless search is conducted.

In order to understand the amended provisions in context, it is necessary briefly to mention the general workings of the Customs and Excise Act before focusing on the search-and-seizure provisions prior to amendment. I do so below. Then, I discuss *Gaertner* and refer to the amendments.

### (a) *Customs and Excise Act — general purpose*

The Customs and Excise Act provides, inter alia, for the levying of customs duty and the control of importation.<sup>22</sup> In terms of this Act, a duty is payable by a person who wants to import goods for consumption into South Africa.<sup>23</sup> This duty furnishes the fiscus with revenue, and also protects local industry by increasing the cost of imported goods.<sup>24</sup>

Understandably, the movement of imported goods until customs duty has been paid is regulated. The reasons are twofold: first, SARS may want to examine the goods in order to verify the information provided (such as the value, nature and quantity of the goods) so as to calculate the duty payable; and, secondly, it would be more difficult for SARS to recover the duty once the goods have been released.<sup>25</sup>

Goods subject to customs duty must be placed in a regulated environment such as a transit shed,<sup>26</sup> container terminal,<sup>27</sup> container depot,<sup>28</sup> state warehouse<sup>29</sup> or customs warehouse.<sup>30</sup> Only once the prescribed forms and documentation have been completed and the customs duty has been paid does the commissioner issue a prescribed certificate or invoice.<sup>31</sup> This constitutes due entry and the goods may then be removed from the regulated environment to the domestic domain.<sup>32</sup>

The Customs and Excise Act contains various provisions to ensure compliance with the Act.

<sup>21</sup> *Gaertner* (HC) supra note 16; *Gaertner* (CC) supra note 14.

<sup>22</sup> SARS 'Legislative framework' available at <http://bit.ly/1heTgUD>, accessed on 4 November 2014.

<sup>23</sup> Section 47(1) of the Customs and Excise Act.

<sup>24</sup> M Stiglingh (ed) *Silke South African Income Tax 2013* (2013) 1089.

<sup>25</sup> *Gaertner* (HC) supra note 16 para 20.

<sup>26</sup> Section 6(1)(g) of the Customs and Excise Act.

<sup>27</sup> Section 6(1)(hA) of the Customs and Excise Act.

<sup>28</sup> Section 6(1)(hB) of the Customs and Excise Act.

<sup>29</sup> Section 17 of the Customs and Excise Act.

<sup>30</sup> Section 19 of the Customs and Excise Act.

<sup>31</sup> Section 38(4) of the Customs and Excise Act.

<sup>32</sup> *Ibid.*

*(b) Warrantless searches*

Section 4(4) to (6) is an example of the provisions contained in the Customs and Excise Act which ensure compliance with the Act. In terms of these provisions, an officer<sup>33</sup> is allowed to search premises and to seize the relevant documentation.<sup>34</sup>

*(i) Section 4(4) to (6) of the Customs and Excise Act*

Before being amended, s 4(4) provided that an officer could, without *any* prior notice, enter *any* premises and make enquiries as he or she deemed necessary.<sup>35</sup> In addition, this section stated that the officer could request a person to furnish him or her with relevant documentation that was kept in terms of the Act or which related to matters dealt with in the Act.<sup>36</sup> The officer could also scrutinise and make copies of or attach relevant documentation and request explanations regarding entries in the documentation. Attachment could only take place in instances where the officer was of the opinion that the documentation constituted evidence of any matter dealt with in the Act.<sup>37</sup> Lastly, s 4(4) indicated that an officer could be assisted by an assistant or police service member.<sup>38</sup>

Section 4(5) stated that any person whose business was conducted on the premises and any employee had to provide the facilities required by the officer to enter the premises and exercise his or her search-and-seizure powers.

If an officer declared his or her capacity, provided the reason for required admission and demanded such admission, s 4(6)(a) of the Customs and Excise Act empowered him or her to break open windows and doors or break through walls in order to enter the premises if he or she was not admitted to the premises. If this occurred during the night, the officer could only obtain forced entry in the presence of a member of the police service. An officer or person assisting the officer could furthermore break up any ground or open any room, safe, box or package if the keys were not produced on demand.<sup>39</sup>

*(ii) Gaertner & others v Minister of Finance and others*

In the matter of *Gaertner*, the question was raised whether s 4(4) to (6) of the Customs and Excise Act created an unjustifiable limitation on a taxpayer's right to privacy.

<sup>33</sup> Section 1 of the Customs and Excise Act defines an 'officer' as 'a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner, whether such order has been given or such concurrence has been expressed before or after the performance of the said duty'.

<sup>34</sup> For purposes of this discussion, 'relevant documentation' includes books and things.

<sup>35</sup> Section 4(4)(a)(i) of the Customs and Excise Act.

<sup>36</sup> Section 4(4)(a)(ii) of the Customs and Excise Act.

<sup>37</sup> Section 4(4)(a)(iii) of the Customs and Excise Act.

<sup>38</sup> Section 4(4)(b) of the Customs and Excise Act.

<sup>39</sup> Section 4(6)(b) of the Customs and Excise Act.

In this case, SARS suspected fraudulent activities on the part of Orion Cold Storage ('OCS') and decided to conduct a search of OCS's premises in terms of s 4(4) of the Customs and Excise Act.<sup>40</sup> On the first day of the search, between 20 and 30 SARS officials conducted a search at OCS's premises. Gaertner, a director of OCS, was under the impression that it was a routine inspection, but later, when the entrance to the premises was sealed off, Gaertner was informed that the search was due to possible under-declaration of imported goods and that a warrant was not required, as the search was being conducted in terms of s 4(4) of the Customs and Excise Act.<sup>41</sup> When Gaertner's attorney had not arrived after 25 minutes, SARS officials proceeded to conduct the search. The officials notified Gaertner that any obstruction of the search would constitute an offence and that the police service would be contacted in such an event. People were only allowed to leave the premises once their person and vehicle had been searched. This search continued for five hours, during which several documents were copied, but no inventory was provided of the copies made.<sup>42</sup>

On the following day, SARS returned for a further search, this time of nine hours in duration. A request to define the search parameters was not acceded to by SARS, but the officers agreed that the data would be sealed and retained pending extraction of the data in the presence of OCS and its legal representatives.<sup>43</sup>

On the third day, a search was conducted at Gaertner's private dwelling. During this search, the house, cellar, garages and storerooms were combed. The SARS officials also accessed home computers, but could not find any relevant documentation.<sup>44</sup>

Gaertner applied for an order to declare s 4 of the Customs and Excise Act unconstitutional on the grounds that it allowed non-routine searches to be conducted without any judicial involvement.<sup>45</sup> Even though a settlement was reached in terms of which SARS returned all seized material and paid the applicants' costs, the applicants proceeded with an application to have s 4 declared unconstitutional.<sup>46</sup>

SARS and the Minister of Finance averred that, even if there had been an infringement of a taxpayer's rights, it was a justifiable limitation in terms of s 36 of the Constitution. In the alternative, they alleged that, in the event of the sections being declared invalid, such invalidity should not apply retroactively and that an opportunity should rather be given to Parliament to rectify the situation.<sup>47</sup>

<sup>40</sup> *Gaertner* (HC) supra note 16 para 2.

<sup>41</sup> *Ibid* para 3.

<sup>42</sup> *Ibid* para 4.

<sup>43</sup> *Ibid* para 5.

<sup>44</sup> *Ibid* para 6.

<sup>45</sup> *Ibid* para 1.

<sup>46</sup> *Ibid* para 8.

<sup>47</sup> *Ibid* para 10.

In SARS's heads of argument, however, it was conceded that subsecs 4(4) and (6) were invalid.<sup>48</sup> The remaining points of contention between SARS and the applicants were the reasons (and therefore the extent) of the invalidity and the effect the declaration of invalidity would have until the invalidity could be rectified.<sup>49</sup>

SARS argued that the relevant subsections were invalid in that the searches had been conducted at premises which were not designated.<sup>50</sup> Designated premises, according to SARS, referred to pre-entry facilities such as transit sheds, container terminals, container depots and licensed warehouses.<sup>51</sup> The court expressed the opinion that designated premises probably also included rebate stores.<sup>52</sup>

While SARS argued that the invalidity of the subsections related to the nature of the premises being searched, the applicants contended that the invalidity was based on the nature of the search, whether routine or non-routine.<sup>53</sup> A non-routine search was described as a search of specific premises arising out of a belief or suspicion that material that would indicate a contravention of the Act would be found on the premises. A routine search, by contrast, referred to another type of search where officers conducted a random search to verify compliance with the Act and where no suspicion of contravention was present.<sup>54</sup> The applicants asserted that warrantless, non-routine searches should be struck down owing to their invalidity.<sup>55</sup>

The court referred to *Magajane v Chairperson, North West Gambling Board*,<sup>56</sup> where the constitutionality of a warrantless inspection in terms of s 65(1) and (2) of the North West Gambling Act 2 of 2001 was challenged.<sup>57</sup> In *Magajane* the court held, inter alia, that all inspections conducted in terms of legislation would limit a person's right to privacy.<sup>58</sup> As a result, when dealing with inspections or searches, an evaluation in terms of s 36 of the Constitution was required to determine whether the limitation was reasonable and justifiable.<sup>59</sup>

In *Gaertner* (HC) the court therefore had to establish whether the search and seizure in terms of the Customs and Excise Act could be seen as a justifiable limitation of a taxpayer's right to privacy. It had to do so by

<sup>48</sup> Ibid para 14. See also PwC 'SARS's powers of search and seizure in terms of the Customs and Excise Act' *Synopsis* April 2013, available at <https://www.pwc.co.za/en/assets/pdf/synopsis-april-2013.pdf>, accessed on 4 November 2014.

<sup>49</sup> *Gaertner* (HC) supra note 16 para 14.

<sup>50</sup> Ibid para 16.

<sup>51</sup> Ibid para 77.

<sup>52</sup> Ibid para 100.

<sup>53</sup> Ibid para 15.

<sup>54</sup> Ibid para 81.

<sup>55</sup> Ibid para 86.

<sup>56</sup> 2006 (5) SA 250 (CC).

<sup>57</sup> Ibid para 1.

<sup>58</sup> Ibid para 59, referred to in *Gaertner* (HC) supra note 16 para 56[b].

<sup>59</sup> *Magajane* supra note 56 paras 59–60, referred to in *Gaertner* (HC) supra note 16 para 56[c].

considering the justification factors contained in s 36(1)(a)–(e) of the Constitution. It held that the factors contained in s 36(1)(a), (b) and (d) are fairly uncontroversial. In applying the factor contained in subpara (a), which relates to the nature of the right, the court held that the right to privacy is an important right as it is considered to be part of the ‘indispensable freedoms’.<sup>60</sup> The factor contained in s 36(1)(b), that is the purpose of the limitation, requires the court to consider the purpose of conducting a search. The court identified the purpose of the search as being to ensure compliance with the Customs and Excise Act, and held that this purpose is essential because non-payment of taxes would impede government from achieving its objectives and goals. Thus, the effective settlement of tax debts is in the public’s interest.<sup>61</sup> The fourth, and last uncontroversial, justificatory factor (contained in s 36(1)(d)) stipulates that there should be a relationship between the limitation and its purpose. The court held that there is a strong relationship between limiting a person’s right to privacy by conducting a search and obtaining information to ensure that taxes are duly declared and paid.<sup>62</sup>

Then the court scrutinised the justification factors it considered to be conclusive in this matter by focusing on s 36(1)(c) and (e) of the Constitution. The court applied the principles that emerged in *Magajane*. Regarding the factor contained in subpara (c), that is the nature and extent of the limitation, three principles emerged. First, a person’s expectation of privacy is less in respect of commercial property than in respect of residential property.<sup>63</sup> Secondly, when the investigation (or search) is aimed at criminal prosecution or enforcement, the limitation is more intrusive.<sup>64</sup> Thirdly, when determining the extent of the limitation, it must be borne in mind that the broader the inspection or powers of search, the greater the limitation is.<sup>65</sup>

Applying these principles to the present matter, the court in *Gaertner* (HC) found that s 4(4)(a) of the Customs and Excise Act contained no limitation regarding the premises that could be searched and the time when they could be searched.<sup>66</sup> Even the fact that the search could only be conducted ‘for purposes of the Act’ did not assist in restricting the extent of the limitation to a specific type of premises. This was due to the fact that the scope of the Act

<sup>60</sup> *Gaertner* (HC) supra note 16 para 70. Here the court indicated that the importance of this right was already established in *Magajane* supra note 56 and other cases.

<sup>61</sup> *Gaertner* (HC) supra note 16 para 70. The court cited *Mpande Foodliner CC v Commissioner for the South African Revenue Service & others* 2000 (4) SA 1048 (T) and *Metcash Trading Ltd v Commissioner for the South African Revenue Service & another* 2001 (1) SA 1109 (CC) as authority.

<sup>62</sup> *Gaertner* (HC) supra note 16 para 70.

<sup>63</sup> *Magajane* supra note 56 paras 66–7, referred to in *Gaertner* (HC) supra note 16 para 56[e].

<sup>64</sup> *Magajane* supra note 56 para 69, referred to in *Gaertner* (HC) supra note 16 para 56[e].

<sup>65</sup> *Magajane* supra note 56 para 71, referred to in *Gaertner* (HC) supra note 16 para 56[e].

<sup>66</sup> *Gaertner* (HC) supra note 16 para 71.

was extremely wide<sup>67</sup> and the Act was so lengthy that the schedules were not even printed as a standard publication.<sup>68</sup> This meant that it could not simply be argued that when searches were conducted in terms of s 4 of the Customs and Excise Act the expectation of privacy was less, as it was possible that the search could be conducted at premises other than a commercial one.

The court also held that the aim of these searches was not concerned with criminal contraventions. Furthermore, the court held that, even though participants in a regulated field, such as customs, must tolerate routine searches to ensure compliance with the Act, this did not mean that these participants should tolerate non-routine searches which violated their privacy based on unfounded suspicions.<sup>69</sup> The court accordingly agreed to some extent with the applicants that the invalidity of the sections related to the nature of the searches.

The court nonetheless also, to some extent, agreed with the respondents that the invalidity of the sections related to the nature of the premises searched. The court differentiated between two categories: one category, it held, dealt with searches conducted at designated premises, and the other with instances where searches were conducted at premises which related to the business of a person who had registered or applied for a licence in terms of the Customs and Excise Act.<sup>70</sup>

In combining the two grounds for invalidity, that is, the nature of the search and the nature of the premises, the court held as follows:

- (a) When a warrantless, routine search is conducted at designated premises or at premises of a registered or licensed person, it will be valid. The court went as far as stating that there is no particular reason why a routine search should ever be done with a warrant, because there are no particular facts that must be furnished to the judicial officer, as this is a mere random inspection.<sup>71</sup>
- (b) Warrantless, non-routine searches at designated premises are justifiable under the Act.<sup>72</sup>
- (c) Warrantless, non-routine searches conducted at the premises of a registered person will be invalid unless these premises are also designated premises.<sup>73</sup>
- (d) A warrant must be obtained when the search is conducted at the premises of an unregistered and unlicensed person.<sup>74</sup> This type of search

<sup>67</sup> Ibid para 72.

<sup>68</sup> Ibid para 18.

<sup>69</sup> Ibid para 83.

<sup>70</sup> As required by s 59A, chap VIII and s 75 of the Customs and Excise Act. See *Gaertner* (HC) supra note 16 para 84.

<sup>71</sup> Ibid para 87. With this remark the court seems to have moved away from *Magajane* supra note 56 paras 73–7, where it was held that warrantless searches should never be the norm.

<sup>72</sup> *Gaertner* (HC) supra note 16 para 103.

<sup>73</sup> Ibid para 103.

<sup>74</sup> Ibid.

will always be a non-routine search and will accordingly always require a warrant.<sup>75</sup>

As for the matter of whether less invasive means are available to achieve the purpose of the limitation — the factor contained in s 36(1)(e) of the Constitution — the court in *Magajane* indicated another principle, namely that searches without a warrant should occur only in exceptional circumstances, and should never become the norm. In instances where warrantless inspections would pass constitutional scrutiny the legislation ought to provide an adequate substitute for a warrant, and guidelines as to how the search should be conducted.<sup>76</sup> It must be highlighted that, in taking cognisance of the principles that broader inspection or powers of search would lead to a greater infringement of a person's rights and that, in the absence of a warrant, legislation must provide adequate guidelines, the court held that certain guidelines must be incorporated when a warrantless search in terms of (a), (b) and (c)<sup>77</sup> above is conducted. These guidelines should have the objective of ensuring that a proper balance is achieved between taxpayers' rights to privacy and SARS's interests.

The following guidelines were provided:

- (a) Entry should occur only during business hours, unless the officer is of the reasonable opinion that entry at another time is necessary for purposes of the Act.
- (b) Whether it is a routine or non-routine search should be communicated to the person in charge at the premises. If a warrant is not needed, the person in charge should be furnished with a written statement indicating the purpose of the search. If it is a matter of urgency, this can be communicated orally.
- (c) The person in charge should be entitled to be present and witness the search.
- (d) A list of all copies made and of things removed from the premises should be provided.
- (e) The search proceedings should be conducted in an orderly and decent manner.<sup>78</sup>

The declaration of invalidity of non-routine searches at the premises of an unlicensed or unregistered person, and of searches at the non-designated premises of a registered or licensed person, was held not to have retroactive

<sup>75</sup> *Ibid* para 85.

<sup>76</sup> *Magajane* supra note 56 paras 73–7, referred to in *Gaertner* (HC) supra note 16 para 56[g].

<sup>77</sup> When the search is conducted at designated premises.

<sup>78</sup> *Gaertner* (HC) supra note 16 para 105. See also PwC 'SARS's powers' op cit note 48; Philip de Bruin 'SAID se mense het nog te veel mag' *Beeld* 3 May 2013 at 3; André Erasmus 'Can SARS customs enter premises without a warrant?' *Tax ENSight* April 2013, available at <http://www.ensafrica.com/news/Can-SARS-customs-enter-premises-without-a-warrant?Id=979&STitle=tax%20ENSight>, accessed on 4 November 2014, for a discussion of the high court decision.

effect. The declaration was suspended for a year and a half to allow the legislature to bring the provisions in line with the Constitution.<sup>79</sup>

In terms of s 167(5) of the Constitution, the Constitutional Court has to confirm an order declaring legislation invalid before the order comes into effect; hence, the matter of *Gaertner* was referred to the Constitutional Court for confirmation.

While *Gaertner* sought confirmation of the high court order declaring certain sections invalid and approving the interim reading in of guidelines, he did not agree with the high court in so far as it permitted warrantless, non-routine searches of designated premises.<sup>80</sup> The Minister of Finance and the Commissioner for the South African Revenue Service ('C:SARS') conversely contended that the differentiation drawn by the high court between routine and non-routine searches was not helpful, and was also impractical.<sup>81</sup> Furthermore, the Minister opined that the guidelines that were provided were too detailed.<sup>82</sup>

In its judgment, the Constitutional Court reiterated that warrantless searches must always be the exception, as obtaining a warrant is not merely a rubber-stamp exercise.<sup>83</sup> Making an application for a warrant allows the judicial officer to ensure that the required parameters are in place in order to limit the invasion of a person's privacy.<sup>84</sup>

The court agreed with the Minister of Finance and C:SARS about the distinction relating to the types of searches. The court further indicated that even the distinction between the different types of premises was a difficult one to understand.<sup>85</sup> Owing to this difficulty, the court held that the task of differentiating between the nature of searches and the nature of the premises must be left to the legislature.<sup>86</sup>

The Constitutional Court agreed with the high court that a search conducted in terms of the impugned provisions limits the right to privacy and that it should consequently be determined whether this limitation is reasonable and justifiable.<sup>87</sup> Therefore the justificatory factors contained in s 36(1) of the Constitution must be considered.

First, the court indicated the importance of the right to privacy, as this right encompasses the right to be 'free from intrusions and interferences by the state'.<sup>88</sup> The court also reiterated the principle which was mentioned in

<sup>79</sup> *Gaertner* (HC) supra note 16 para 119.

<sup>80</sup> *Gaertner* (CC) supra note 14 paras 20 and 25.

<sup>81</sup> *Ibid* paras 28 and 33.

<sup>82</sup> *Ibid* para 28.

<sup>83</sup> This fact was initially stated in *Magajane* supra note 56 para 74 and echoed in *Gaertner* (HC) supra note 16 para 56[g].

<sup>84</sup> These parameters are set, as indicated in *Gaertner* (CC) supra note 14 para 69, as the warrant governs the time, place and ambit of the search.

<sup>85</sup> *Gaertner* (CC) *ibid* para 75.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* para 21.

<sup>88</sup> *Ibid* para 48.

the court a quo and in *Magajane*, namely that a person's expectation of privacy will be diminished when he or she moves into public activities as opposed to activities in the 'inner sanctum of the home'.<sup>89</sup> It should be noted that the expectation of privacy diminishes but is not abolished.<sup>90</sup>

Furthermore, the purpose of the limitation (provided for in s 36(1)(b) of the Constitution) must be considered. The Constitutional Court acknowledged that the primary purpose of customs and excise duty is to raise revenue, which serves an important public purpose. Searches assist in achieving this purpose as they monitor and prevent tax evasion. In addition to raising revenue, these searches are also important to ensure excise and customs control.<sup>91</sup>

When the court dealt with the factor contained in s 36(1)(c) of the Constitution (that being the nature and extent of the limitation) it applied the three principles which emerged in *Magajane*. First, the court indicated that when determining the level of reasonable expectation of privacy, commercial activities are regulated by the state to ensure that they are exercised in accordance with public interest. The extent to which the state regulates or controls these activities depends on the nature of the specific industry. In this case, participants in the customs and excise industry cannot expect 'a wholesome right to privacy', as they may be subject to regular inspections. Therefore the court held that the right to privacy is attenuated when dealing with business premises, but not when dealing with a private home. The court drew attention to the fact that because the Customs and Excise Act does not differentiate between searches conducted at business premises and private homes it does not adhere to this principle.<sup>92</sup>

The second principle deals with the fact that an investigation or search which relates to criminal prosecution or enforcement may be more intrusive than a search aimed at compliance. The Constitutional Court observed that, for this reason, it is important to determine whether a search is aimed at enforcement or compliance. In this instance the court found that the searches related to enforcement, which meant that the invasion of a person's right to privacy would be greater.<sup>93</sup>

The last principle considered by the court when it dealt with the nature and extent of the limitation concerns the breadth of the relevant provisions. The court held that the provisions were too broad as (a) the time when a search may be conducted was not restricted; (b) the type of premises subject to a search was not limited; and (c) the scope of the search was not curbed.

<sup>89</sup> Ibid para 49. See also *Magajane* supra note 56 paras 66–7; *Gaertner* (HC) supra note 16 para 56[e].

<sup>90</sup> Ibid.

<sup>91</sup> Ibid paras 53–5.

<sup>92</sup> Ibid paras 60–4.

<sup>93</sup> Ibid para 65.

This led the court to conclude that SARS officials had far-reaching powers to conduct searches at any time and any place without a reasonable suspicion.<sup>94</sup>

When considering s 36(1)(d) of the Constitution, the court held that there is indeed a relation between the limitation of a person's right to privacy and regulating compliance with the Act.<sup>95</sup>

The last justification factor the court had to consider was whether less invasive means are available to achieve this purpose. In this regard the court focused on two aspects: (a) inspections or searches of a private home; and (b) the circumstances in which warrantless searches should be conducted. Discussing searches of private homes specifically, the court indicated that it failed to see why these searches would be necessary to achieve the purposes of the Customs and Excise Act. It continued that the mere fact that the Act was in the public interest did not diminish the need to protect and uphold the right to privacy and that this right should not be attenuated in any manner when it related to private homes.<sup>96</sup>

Considering the second aspect, the court supported the finding in *Magajane* that a search without a warrant should not become the norm.<sup>97</sup> The court considered a warrant to be a restriction on the infringement on a taxpayer's right to privacy, as it indicated how the search should be conducted and assured the taxpayer of the legality of the search.<sup>98</sup> For this reason, a search should be conducted without a warrant in exceptional circumstances only, and the legislation should provide guidelines as to how this search should be conducted.<sup>99</sup> The court concluded that less invasive means were available to achieve the purpose of the Customs and Excise Act. The court mentioned conducting searches of private homes with a warrant and conducting searches subject to certain time, place and scope demarcations as two examples of less invasive means.<sup>100</sup>

The Constitutional Court accordingly held that the impugned sections of the Customs and Excise Act unreasonably limited the right to privacy.<sup>101</sup> The court further supplied interim reading-in provisions. These provisions were far removed from the specific guidelines provided by the high court. In terms of the decision of the Constitutional Court, the only aspect that had to be read in is that, when a search is conducted at a private residence, a warrant must be obtained. This warrant will only be issued by a judge or magistrate if he or she is satisfied that (i) reasonable grounds to suspect a contravention of the Act exist; (ii) a search of the premises will supply information relating to

<sup>94</sup> *Ibid* para 66.

<sup>95</sup> *Ibid* para 67.

<sup>96</sup> *Ibid* para 68.

<sup>97</sup> *Magajane* supra note 56 para 74, referred to in *Gaertner* (CC) supra note 14 para 69.

<sup>98</sup> *Hyundai* supra note 13 para 40, referred to in *Gaertner* (CC) supra note 14 para 69.

<sup>99</sup> *Gaertner* (CC) supra note 14 paras 70–71.

<sup>100</sup> *Ibid* para 73.

<sup>101</sup> *Ibid* para 74.

the contravention; and (iii) the search is reasonably necessary for purposes of the Act. A warrantless search of a private residence will be allowed if the officer reasonably believes that (i) a warrant would have been issued if the officer had applied for it;<sup>102</sup> and (ii) a delay in order to obtain the warrant is likely to defeat the purpose of the search.<sup>103</sup>

The court held that the interim provisions must be read in for a period of six months in order to allow the legislature an opportunity to deal with this matter.<sup>104</sup>

(iii) *The amendment of warrantless searches in terms of the Customs and Excise Act*

The legislature dealt with the amendment of the abovementioned provisions by way of the Tax Administration Laws Amendment Act 14 of 2013, which came into operation on 16 January 2014.<sup>105</sup>

The amended provisions contain the principles which emerged in *Magajane* and trickled down to the *Gaertner* (HC) and *Gaertner* (CC) judgments. First, the amendment adheres to the principle that conducting a search without a warrant should not be the norm. This is apparent as warrantless searches are now allowed only in prescribed narrow situations,<sup>106</sup> which is a clear departure from the situation prior to the *Gaertner* (CC) judgment. The general rule is that an officer may only enter premises under authority of a warrant.<sup>107</sup> The warrant will be issued to conduct a search of premises, in respect of which it is suspected that an offence has been committed, if the judge or magistrate is satisfied that (i) there are reasonable grounds to suspect that an offence in terms of the Customs and Excise Act has been committed; (ii) a search is likely to produce documents which can be used as evidence; and (iii) the search is reasonably necessary for the purposes of the Act.<sup>108</sup>

Exceptions may be made in circumstances where either the objective criterion or the requirement relating to the SARS officer's discretion is met.<sup>109</sup> The objective criterion is met if a search is conducted at licensed premises, the business premises of a registered person or premises operated by the state, or with the consent of the person in charge of the premises.<sup>110</sup> This amendment appears to be in line with another *Magajane* principle, namely that the expectation of privacy is lower at commercial premises than at residential premises. The only instance contained in this objective criterion

<sup>102</sup> Thus complying with the three requirements mentioned before.

<sup>103</sup> *Gaertner* (CC) supra note 14 para 88.

<sup>104</sup> Ibid paras 82–5.

<sup>105</sup> GN 14 GG 37236 of 16 January 2014.

<sup>106</sup> Deloitte 'The wide entry, search and seizure powers of customs officials may finally be limited' available at <http://bit.ly/1heWPu1>, accessed on 2 September 2013.

<sup>107</sup> Section 4(4)(aA) of the Customs and Excise Act. See also National Treasury op cit note 10.

<sup>108</sup> Section 4(4)(e)(i)–(iii) of the Customs and Excise Act.

<sup>109</sup> Deloitte op cit note 106 labelled the scenarios in which the exceptions will apply the 'objective criteria' and 'SARS officer discretion'.

<sup>110</sup> Section 4(4)(aA) of the Customs and Excise Act. See also National Treasury op cit note 10.

which does not deal with commercial premises is where a person in charge of premises consents to a search without a warrant. However, it is submitted that if a person consents to the invasion of his or her privacy, his or her consent should be considered a reasonable limitation of the right to privacy.

Entry to premises without a warrant is also allowed when a SARS officer reasonably believes that a warrant would have been obtained, but a delay in order to obtain the warrant would defeat the purpose of the search.<sup>111</sup> This exception is in keeping with the requirements mentioned by the court in *Gaertner* (CC) regarding the circumstances in which a search at residential premises may be conducted without a warrant.<sup>112</sup> It also, to some extent, emulates the requirements provided for in the TAA as to when a search can be carried out without a warrant.<sup>113</sup>

The Tax Administration Laws Amendment Act further reiterates the guidelines provided in *Gaertner* (HC) by providing the following in respect of the situation where a search is conducted without a warrant:

- (a) The officer should enter the premises during ordinary business hours, unless he or she is of the reasonable opinion that entry after business hours is necessary for purposes of the search.
- (b) Upon entering the premises, the officer must inform the person in charge of the premises of the purpose of the search.
- (c) In the event that the purpose of the entry is due to suspected offences being committed in terms of the Customs and Excise Act<sup>114</sup> or if, after gaining entry to the premises, the officer decides to search for documents in respect of which an offence in terms of the Customs and Excise Act is suspected to have been committed, the following *modus operandi* applies:
  - (i) The officer must provide a written statement indicating that a search will be conducted, unless he or she is of the opinion that this might frustrate the search if the search is delayed in order to provide the written statement.
  - (ii) The officer's search parameters are restricted to what is reasonably necessary for the purpose of the search.
  - (iii) The person in charge, or an appointed representative, has the right to be present and to observe the search.
  - (iv) An inventory of all documents removed from the premises and a schedule of copies made during the course of the search must be drawn up. A copy of the inventory and schedule must be signed by the officer before leaving the premises and must be handed to the person in charge.

<sup>111</sup> Section 4(4)(aB) of the Customs and Excise Act. See also National Treasury op cit note 10.

<sup>112</sup> *Gaertner* (CC) supra note 14 para 88.

<sup>113</sup> The difference between the provisions in the Customs and Excise Act is discussed in part IV(a)(i) below.

<sup>114</sup> That is, in instances where the subjective criteria are met.

- (d) The officer must conduct the search in an orderly and decent manner.<sup>115</sup>
- (e) An officer may be assisted by another person or by a member of the police service. The presence of an assistant or police officer is, however, restricted to instances where a SARS official deems this necessary for purposes of the search.<sup>116</sup>

It is submitted that the above guidelines, which must be adhered to when a warrantless search is conducted, ensure that the remaining two principles of *Magajane* are adhered to. This submission is based on the fact that the guidelines restrict the power of SARS when a warrantless search is conducted. Therefore its powers are not as broad as before; consequently the infringement on a person's right to privacy will not be as invasive as it was prior to the *Gaertner* judgments and the amendment of the relevant section. Also, the principle which recognises that a search aimed at enforcement or criminal sanction is more invasive than a search aimed at verifying compliance has been considered, because the guidelines demand compliance with even more requirements when a SARS official suspects that an offence has been committed.

Consequently, the amended provisions conform to the principles that emerged in case law regarding warrantless searches.<sup>117</sup>

Deloitte, however, points out that, because a SARS official is required to apply a 'reasonability test', two important matters should receive attention. First, the officers must receive the required training to ensure that they are able to form their opinions reasonably. Secondly, affected persons must be educated so that they know in which circumstances a SARS officer is allowed to conduct a warrantless search.<sup>118</sup>

Confusion and possible misuse of SARS's search-and-seizure powers will, however, arise if the instances in which a warrantless search can be conducted and the guidelines in the Customs and Excise Act pertaining to a warrantless search are not harmonised with other fiscal legislation dealing with warrantless searches.

### III WARRANTLESS SEARCHES IN TERMS OF OTHER LEGISLATION

Warrantless searches in terms of fiscal legislation are also conducted under the TAA. Before the enactment of the TAA, warrantless searches and seizures were also regulated by the Income Tax Act and the Value-Added Tax Act. Therefore, a brief discussion of warrantless searches before the promulgation

<sup>115</sup> Section 4(4)(AC)(c) of the Customs and Excise Act. See also National Treasury op cit note 10.

<sup>116</sup> Section 4(4)(AC)(b) of the Customs and Excise Act.

<sup>117</sup> See *Magajane* supra note 56; *Gaertner* (HC) supra note 16; *Gaertner* (CC) supra note 14.

<sup>118</sup> Deloitte op cit note 106.

of the TAA follows below; then the situation in terms of the TAA is examined.

(a) *Prior to the TAA*

Before being amended,<sup>119</sup> s 74(3) of the Income Tax Act and s 57(1) of the Value-Added Tax Act afforded the commissioner the power to authorise members of staff to conduct a search and seizure without a warrant from a judge or magistrate.<sup>120</sup> However, after the enactment of the Constitution of the Republic of South Africa Act 200 of 1993, the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa (later known as the Katz Commission) made a few recommendations in order to align these provisions with the constitutional rights.<sup>121</sup> The commission recommended that:

- (a) where possible, prior authorisation be obtained in order to execute a valid search and seizure;
- (b) this authorisation be granted by neutral and impartial persons capable of acting judicially; and
- (c) the minimum requirement before the impartial person may issue the warrant is that, on reasonable and proper grounds established by information given under oath, he or she must believe that an offence has been committed and that evidence will be found at the place of the search.<sup>122</sup>

<sup>119</sup> Section 74 of the Income Tax Act was amended by s 14 of the Revenue Laws Amendment Act 46 of 1996 and s 57 of the Value-Added Tax Act by s 24 of the Revenue Laws Amendment Act.

<sup>120</sup> See Bovijn *Warranted and Warrantless* op cit note 20 at 18; Croome *Analysis and Evaluation* op cit note 20 at 84–6; Croome *Taxpayers' Rights* op cit note 20 at 136; Beric Croome & Lynette Olivier *Tax Administration* (2010) 120; Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 509 for a discussion on the initial s 74.

<sup>121</sup> *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa RP 1994* (1994). In *Rudolph & another v Commissioner for Inland Revenue & others* NNO 1994 (3) SA 771 (W), the taxpayer argued that the search carried out by the commissioner was unconstitutional. However, in this case, the warrant was issued before the enactment of the Constitution and consequently was not subject to constitutional evaluation. A discussion of search and seizure in terms of the fiscal legislation before the Constitution does not fall within the ambit of this article. For a detailed discussion of *Rudolph v Commissioner for Inland Revenue* supra, *Rudolph & another v Commissioner for Inland Revenue & others* 1996 (2) SA 886 (A), *Rudolph & another v Commissioner for Inland Revenue & others* 1996 (4) SA 552 (CC) and *Rudolph & another v Commissioner for Inland Revenue & others* 1997 (4) SA 391 (SCA) see Croome *Taxpayers' Rights* op cit note 20 at 139; Croome & Olivier *Tax Administration* op cit note 120 at 120; Silke op cit note 20 at 284; Lynette Olivier 'The new search and seizure provisions of the Income Tax Act' 1997 *De Rebus* 195 at 195.

<sup>122</sup> *Interim Report of the Katz Commission* (1994) chap 6 entitled 'Implications of the Constitution of the Republic of South Africa Act 200 of 1993 for the Tax System' 73. See Croome *Analysis and Evaluation* op cit note 20 at 84; Croome *Taxpayers' Rights* op cit note 20 at 137; Croome & Olivier *Tax Administration* op cit note 120 at 122 who mention the findings of the Katz Commission.

Subsequently, s 74 of the Income Tax Act and s 57 of the Value-Added Tax Act were repealed and substituted by a new s 74 and s 74A to D and s 57D respectively. The amended sections enabled SARS to conduct a search and seizure only once a warrant had been issued by a judge<sup>123</sup> supported by information supplied under oath by the applicant (ie SARS).<sup>124</sup> The judge was empowered to issue this warrant if he or she believed on reasonable grounds that (i) a person had either failed to comply with obligations in terms of the Income Tax Act or had committed an offence in terms of the Act; (ii) information, documents or things were likely to be found to afford evidence of the failure or offence; and (iii) such information, documents or things were likely to be found at the premises specified in the application.<sup>125</sup> Section 74D furthermore provided that the warrant should indicate the premises, person and property SARS intended to search.<sup>126</sup>

The effect of this amendment was that SARS was no longer judge and jury in determining whether a warrant would be issued to enable it to search a taxpayer's premises.<sup>127</sup> A warrant would only be issued once a judge was satisfied, on a balance of probabilities, that an offence in terms of the fiscal statutes had been committed.<sup>128</sup> Furthermore, the court subsequently held that an unspecified warrant (a warrant not specifying the objects subject to the search and seizure) was unconstitutional.<sup>129</sup>

Consequently, there was a shift away from an absolute discretion on the part of the commissioner to conduct a warrantless search to a situation where independent and objective authorisation had to be obtained prior to a search.<sup>130</sup> This shift embodied the Katz Commission recommendations.

<sup>123</sup> Section 74D(1) of the Income Tax Act.

<sup>124</sup> Section 74D(2) of the Income Tax Act.

<sup>125</sup> Section 74D(3) of the Income Tax Act.

<sup>126</sup> Section 74D of the Income Tax Act. See also Croome *Analysis and Evaluation* op cit note 20 at 86; Croome *Taxpayers' Rights* op cit note 20 at 141; Croome & Olivier *Tax Administration* op cit note 120 at 123; Silke op cit note 20 at 291 for a discussion on s 74D and relevant case law.

<sup>127</sup> B J Croome 'SARS search & seizure part II' October 2007, available at <http://bit.ly/18FpG7O>, accessed on 18 March 2010.

<sup>128</sup> Section 74D(3) of the Income Tax Act. For a discussion relating to matters where the court had to determine whether a search conducted in terms of a warrant was valid, see Carika Keulder *Does the Constitution Protect Taxpayers against the Mighty SARS — An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (unpublished LLM dissertation, University of Pretoria, 2012) 88.

<sup>129</sup> *Ferucci v Commissioner: SARS* 2002 (12) JTLR 404 at 414. See Croome *Analysis and Evaluation* op cit note 20 at 97; Croome *Taxpayers' Rights* op cit note 20 at 148; Croome & Olivier *Tax Administration* op cit note 120 at 129 for a discussion of this case.

<sup>130</sup> Robert Gad & Silke Bovijn 'The new Tax Administration Bill introduces new search and seizure provisions' 27 May 2011 *Tax ENSight* available at <http://bit.ly/1m81bHy>, accessed on 4 November 2014.

*(b) The TAA*

A further change to the search-and-seizure provisions in fiscal legislation occurred with the enactment of the TAA. The provisions in respect of search and seizure are now contained in ss 59 to 63 of the TAA, unless the search and seizure relates to customs and excise matters.<sup>131</sup>

The search-and-seizure provisions in the TAA provide for a search in respect of which a warrant must be obtained.<sup>132</sup> In limited circumstances, a search may be conducted without a warrant.<sup>133</sup> The 'warrantless search' has been labelled by some authors as the most controversial and radical new provision concerning search and seizure in terms of fiscal legislation.<sup>134</sup>

*(i) Circumstances in which a warrantless search may be conducted*

A warrantless search may be conducted in terms of s 63 of the TAA first, when the owner or person in control of the premises consents to the search in writing,<sup>135</sup> or, secondly, if a senior SARS official<sup>136</sup> is reasonably satisfied that:

<sup>131</sup> For a detailed comparison of the provisions contained in the Income Tax Act and those contained in the Tax Administration Bill, which later became the TAA, see Bovijn *Warranted and Warrantless* op cit note 20 at 32. Section 267(2) of the TAA indicates that, if a search-and-seizure warrant was obtained prior to the commencement of the TAA, the warrant will be regarded as having been issued under s 60 of the TAA.

<sup>132</sup> Sections 59–61 retain the requirements of obtaining a warrant as provided for by s 74D of the Income Tax Act. Two additional requirements which assist in limiting SARS's power when conducting a search or, stated differently, assist in providing more protection of a taxpayer's rights, have been added. The first is that a warrant must be executed within a period of 45 business days, and the second that the SARS official must produce the warrant when conducting the search. See ss 59(3) and 61.

<sup>133</sup> Section 63 of the TAA.

<sup>134</sup> Bovijn *Warranted and Warrantless* op cit note 20 at 52; Gad & Bovijn 'New tax' op cit note 130. Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 509 indicate that, although the wording of s 63 of the TAA attempts to prevent an irresponsible application of this power, it is questionable whether these measures will be applied in such a manner.

<sup>135</sup> Section 63(1)(a) of the TAA.

<sup>136</sup> In terms of s 6(3) of the TAA, a 'senior SARS official' is defined as '(a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner for this purpose'. See Fareed Moosa 'The power to search and seize without a warrant under the Tax Administration Act' (2012) 24 *SA Merc LJ* 338 at 342 where it is argued that, because a 'SARS official' is, inter alia, defined in s 1 as 'a person contracted by SARS', a SARS official is not necessarily employed by SARS. If it is also taken into consideration that a senior SARS official can be a SARS official who has received written authority from the commissioner or who occupies a designated position, it is possible that a person who is not an employee of SARS can be elevated to the status of a senior SARS official. Moosa indicates that this would be permissible because, even as an independent contractor, such a person would be subject to the provisions of the TAA.

- (a) there may be an imminent removal or destruction of relevant material likely to be found on the premises;<sup>137</sup>
- (b) if SARS applied for a search warrant under s 59, it would be issued; and
- (c) the delay in obtaining a warrant would defeat the object of the search and seizure.<sup>138</sup>

However, when a search is conducted at a private dwelling, the consent of the occupant must be obtained. This is not necessary for a part of the dwelling that is used for purposes of trade.<sup>139</sup>

Obtaining consent to search premises is a criterion which can be objectively verified because the consent should be in writing. It does not involve the complexities associated with the reasonable-grounds criterion. Therefore, the burden of proof may be less onerous because no subjective discretion is necessary.<sup>140</sup>

The second alternative in conducting a search without a warrant is where a senior SARS official is satisfied on reasonable grounds that the stated requirements have been met.<sup>141</sup> 'Reasonable grounds' means that objective facts must be present at the time the discretion is exercised, and not merely a subjective belief on the part of the officer or judge that certain facts do indeed exist.<sup>142</sup>

As stated previously, the senior SARS official must be satisfied on reasonable grounds that the requirements contained in s 63(1)(b) have been met. It is important to note that all three of the requirements must be met before a search can be conducted without a warrant. First, the removal or destruction of relevant material must be impending or threatening. Secondly, if SARS were to apply for a warrant in terms of s 59, the warrant would be issued. This means that SARS would need to place itself in the position of a judge or magistrate in order to determine whether the warrant would have been issued.<sup>143</sup> Therefore, the senior SARS official needs to be sure that a judge or magistrate would have reasonable grounds to believe that:

<sup>137</sup> 'Relevant material' is defined in s 1 of the TAA as 'any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed'.

<sup>138</sup> Section 63(1)(b) of the TAA.

<sup>139</sup> Section 63(4) of the TAA.

<sup>140</sup> Bovijn *Warranted and Warrantless* op cit note 20 at 84. For a discussion of what the requirements for this consent should be, see Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 511.

<sup>141</sup> It must, however, be borne in mind that, unless the occupant has provided consent, a SARS official may not enter a house, except for the part that relates to the carrying on of a trade. Therefore, even though the subjective criteria might be met, if the premises are domestic, consent is required.

<sup>142</sup> Bovijn *Warranted and Warrantless* op cit note 20 at 78. For a discussion of the circumstances which would constitute reasonable grounds, see *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (Tk) at 630; *Shelton v Commissioner for South African Revenue Service* 2003 (3) JTTLR 94 (SCA) 185; Bovijn *ibid* at 78–9.

<sup>143</sup> Bovijn *Warranted and Warrantless* *ibid* at 89.

- (a) a person had failed to comply with an obligation imposed under a tax Act, or had committed a tax offence; and
- (b) relevant material likely to be found on the premises specified in the application could provide evidence of failure to comply or of the commission of the offence.<sup>144</sup>

Thirdly, a delay in obtaining a warrant would defeat the object of the search and seizure. It is submitted that the object of the search and seizure would be to obtain relevant material in order to prove that a person has failed to comply with the provisions of a tax Act or that the person has committed a tax offence.<sup>145</sup> It is further submitted that, in respect of this requirement, time would need to be of the essence.<sup>146</sup>

Commentators have voiced their concerns about these provisions. One of the concerns is that SARS officials might abuse these new powers, as insufficient checks and balances are in place because SARS itself must determine the reasonableness of its view.<sup>147</sup> A further concern is that the grounds on which a SARS official must exercise his or her discretion are subjective and it might be impossible to determine the reasonableness of one's own view.<sup>148</sup> In order to preclude these concerns from becoming a reality, it has been suggested that seized documents be taken to a court for safekeeping, and that the court must approve the seizure before SARS may retain these documents.<sup>149</sup> Addressing these concerns, the Standing Committee on Finance indicated that the requirements for a warrantless search and seizure contained in the then Tax Administration Bill, which later became the TAA, were stricter than the requirements for warrantless searches contained in other South African legislation.<sup>150</sup> Furthermore, regarding the

<sup>144</sup> Section 60(1) of the TAA.

<sup>145</sup> Bovijn *Warranted and Warrantless* op cit note 20 at 89; Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 512.

<sup>146</sup> See Bovijn *Warranted and Warrantless* ibid at 89; Bovijn & Van Schalkwyk 'Concerns' ibid at 513, where it is correctly indicated that SARS cannot carry out a search in terms of s 63 if it has created the urgency.

<sup>147</sup> Gad & Bovijn 'New tax' op cit note 130; SAIPA 'New tax law on the books' *Mail & Guardian* 20 June 2012, available at <http://bit.ly/1iAzOVL>, accessed on 4 November 2014; Standing Committee on Finance 'Report-back hearings, Tax Administration Bill, 11 of 2011' 21 September 2011 *Response Document* 39, available at <http://www.pmg.org.za/files/docs/110921tab.pdf>, accessed on 4 November 2014.

<sup>148</sup> Standing Committee on Finance ibid; Bovijn *Warranted and Warrantless* op cit note 20 at 114; Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 524.

<sup>149</sup> Standing Committee on Finance op cit note 147.

<sup>150</sup> Other legislation which provides for warrantless searches, as indicated in Standing Committee on Finance op cit note 147, include the Health Professions Act 56 of 1974; Criminal Procedure Act 51 of 1977; South African Police Service Act 68 of 1995; Counterfeit Goods Act 37 of 1997; National Prosecuting Authority Act 32 of 1998; Inspection of Financial Institutions Act 80 of 1998; National Forests Act 84 of 1998; Competition Act 89 of 1998; National Veld and Forest Fire Act 101 of 1998; Nuclear Energy Act 46 of 1999; Firearms Control Act 60 of 2000; Immigration Act 13 of 2002; International Trade Administration Act 71 of 2002; Explosives Act 15 of 2003; Anti-Personnel Mines Prohibition Act 36 of 2003; Second-Hand Goods Act 23

suggested safekeeping by the courts, it was indicated that a taxpayer can apply to have the seizure reviewed. Therefore the process was already subject to the court's control.<sup>151</sup>

(ii) *Guidelines relating to warrantless searches*

The TAA contains guidelines which must be adhered to when searches and seizures are conducted.<sup>152</sup> In terms of these guidelines, a SARS official must, before carrying out a search, inform the person in control or the owner of the premises that the search is to be conducted in terms of s 63, and must also indicate to the person or owner the grounds for the search.<sup>153</sup> Furthermore, the SARS official must provide an inventory indicating the material seized and must preserve the seized material.<sup>154</sup> Moreover, the search and seizure must be conducted with due regard to order and decency.<sup>155</sup> Lastly, the SARS official may, when he or she considers it reasonably necessary, request the assistance of a police officer.<sup>156</sup>

The provisions dealing with the guidelines simply refer to a SARS official who is conducting the search.<sup>157</sup> This creates a conflict with s 63(1) of the TAA, which clearly indicates that the person who is conducting the search must be a senior SARS official. This means that the Commissioner of SARS, a person with the specific written authority of the commissioner or a person designated in such a post by the commissioner should conduct a warrantless search.<sup>158</sup> Moosa argues that s 63(1) should override s 61(3) in instances where these provisions are in conflict. This means that, when a search is conducted with a warrant, the guidelines relating to a SARS official would apply, and that when a warrantless search is conducted in terms of s 63(1), the guidelines relating to a senior SARS official would apply. Moosa bases his opinion, first, on the ground that s 63(1) does not stipulate that a senior SARS official may authorise a SARS official to conduct a warrantless search and also does not delegate such powers. Furthermore, s 6(4) of the TAA states that any power ancillary to those powers assigned to the commissioner or a senior SARS official may be exercised by a person delegated to do so or by

of 2009; and Civil Aviation Act 13 of 2009. See Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 520, where case law regarding warrantless searches conducted in terms of other South African legislation is discussed. See also Bovijn & Van Schalkwyk 'Concerns' op cit note 20 at 514, where the warrantless-search provisions in the TAA are compared with the warrantless-search provisions in s 47 of the Competition Act. These authors, at 524, reach the conclusion that the warrantless-search provisions in the Competition Act are stricter than those contained in the TAA.

<sup>151</sup> Standing Committee on Finance op cit note 147 at 140.

<sup>152</sup> Section 63(3) of the TAA indicates that s 61(4)–(8), which contains the guidelines relating to the carrying out of a search, is also applicable to warrantless searches.

<sup>153</sup> Section 63(2).

<sup>154</sup> Section 61(4) and (8) of the TAA.

<sup>155</sup> Section 61(8) of the TAA.

<sup>156</sup> Section 61(6) of the TAA.

<sup>157</sup> Section 61(3)–(8) of the TAA.

<sup>158</sup> Section 1 of the TAA.

the commissioner or senior SARS official. Lastly, s 6(5) of the TAA cannot apply because the duty of carrying out a search is specifically assigned to a senior SARS official.<sup>159</sup> Based on this argument, the search and seizure in terms of s 63 should therefore be carried out by a senior SARS official.

#### IV WARRANTLESS SEARCHES — ACHIEVING A BALANCE?

The search-and-seizure provisions in the Customs and Excise Act were amended in order to ensure that a balance is achieved between the taxpayer's rights and SARS's duties when a warrantless search is conducted.<sup>160</sup> Likewise, the TAA in general aims to achieve a better balance between the duties and powers of SARS and the taxpayer's rights and obligations.<sup>161</sup> Hence, both Acts, when dealing with warrantless searches, strive to achieve a balance. Accordingly, it is interesting to compare the provisions of the two Acts to identify whether there are any differences. A substantial difference would mean that there is a lack of a uniform approach when dealing with warrantless searches in terms of fiscal legislation, and that this could result in 'provision shopping'.

##### (a) *Comparison between warrantless searches in terms of the Customs and Excise Act and in terms of the TAA*

A comparison between warrantless searches in terms of the TAA and warrantless searches in terms of the Customs and Excise Act can be divided into two broad categories: differences relating to the circumstances in which a warrantless search may be conducted; and differences relating to the guidelines when warrantless searches are conducted. It is, however, important to note that, when comparing the provisions a mere 'checklist approach' does not suffice as these provisions function within a particular context.<sup>162</sup>

##### (i) *Differences relating to the circumstances*

In terms of both pieces of fiscal legislation, warrantless searches may be conducted if either the objective or the subjective criterion has been satisfied. In terms of the Customs and Excise Act, the objective circumstances when a warrantless search may be conducted are those instances where certain types of premises (licensed premises or the business premises of a registered person) are involved or when the person in charge consents. The TAA, by contrast,

<sup>159</sup> Moosa op cit note 136 at 344. Section 6(5) of the TAA states: 'Powers and duties not specifically required by this Act to be exercised by the Commissioner or by a senior SARS official, may be exercised by a SARS official employed or contracted to exercise or perform powers or duties for purposes of the administration of a tax Act.'

<sup>160</sup> Gaertner (HC) supra note 16 para 5.

<sup>161</sup> SARS 'Short guide to the Tax Administration Act, 2011 (Act No 28 of 2011)' 4, available at <http://www.sars.gov.za/AllDocs/OpsDocs/Guides/LAPD-TAdm-G01%20-%20Short%20Guide%20to%20the%20Tax%20Administration%20Act%202011%20-%20External%20Guide.pdf>, accessed on 4 November 2014.

<sup>162</sup> This can be the context in which an Act operates, the context of provisions in the specific Act or the legal context in which these searches function.

only provides for an objective circumstance where the taxpayer consents to a search. It is, however, important to note that, when comparing the provisions, the context of the provisions must be considered. It can be argued that the reason for the broader scope when dealing with the Customs and Excise Act lies in the specific regulated environment of customs and excise, which compels participants in this sphere to tolerate certain searches.<sup>163</sup>

Further differences arise when the subjective criterion is considered. First, a warrantless search in terms of the TAA must be conducted by a senior SARS official, while a customs and excise search may be conducted by a SARS officer. A SARS officer will be a SARS employee who is assigned to the customs and excise division by order or agreement of the commissioner. Furthermore, the assignment of the employee may also be ordered or agreed to after the performance of the said duty.<sup>164</sup> It is prima facie problematic that, in terms of the one Act, a senior SARS official is required, while, in terms of the other Act, this is not necessary. Moosa indicates that the concept of a 'senior SARS official' is a misnomer, because the TAA does not contain any criteria for a person to qualify as a senior SARS official. This means that age, rank, qualifications and expertise do not play a role in conferring the status of a senior SARS official.<sup>165</sup> It is submitted, however, that even though the concept of 'senior SARS official' does not necessarily mean that the official is senior in age, rank, qualifications or expertise, such official still has to comply with an additional requirement in order to be elevated from the status of SARS official to senior SARS official.<sup>166</sup> Consequently, the fact that the Customs and Excise Act does not provide for a senior SARS official to conduct the search is in fact a material difference.

It must, however, be borne in mind that the concept 'senior SARS official' was only created with the enactment of the TAA. Consequently, the Customs and Excise Act (before amendment) could not have referred to a senior SARS official. It is nevertheless submitted that there is no justification for the failure of the amended Customs and Excise Act to provide for a senior SARS official to conduct the search.

Furthermore, the grounds that must be established before conducting a warrantless search are not completely similar. In terms of the TAA, the first ground that must be established when conducting a warrantless search is that there must be an imminent removal of relevant material that is likely to be found at the premises. This requirement is not contained in the Customs and

<sup>163</sup> This idea was touched upon by the court in *Gaertner* (HC) supra note 16 para 83.

<sup>164</sup> Section 1 of the Customs and Excise Act.

<sup>165</sup> Moosa op cit note 136 at 344.

<sup>166</sup> In terms of the definition of 'senior SARS official', the additional requirement will be the commissioner, a person who has written authority from the commissioner or a person designated as such by the commissioner. Support for this argument can also be found in *Bovijn & Van Schalkwyk 'Concerns'* op cit note 20 at 511, where it is indicated that, when considering the definitions of 'senior SARS official' and 'SARS official', it is clear that powers conferred on a 'senior SARS official' are to be exercised by a limited category of persons.

Excise Act. Therefore, in terms of the TAA, warrantless searches will be conducted when time is of the essence, while, under the Customs and Excise Act, this is not the case.<sup>167</sup>

The TAA and the Customs and Excise Act also require that a warrantless search may only be conducted if delaying the search in order to obtain a warrant would defeat the purpose of the search. The question that arises in this regard is why, where no possibility of imminent removal exists (as may be the case in terms of the Customs and Excise Act), delaying the search to obtain a warrant would defeat the purpose of the search. It is submitted that the purpose would not be defeated, as a warrant could be obtained by way of an ex parte application, which would mean that the taxpayer would not receive notice of the warrant application. This is based on the ground that ex parte applications may be utilised when the nature of the relief (in this case to search specific premises) is such that notice would render the relief nugatory.<sup>168</sup>

A similarity in respect of the subjective criterion is that, in terms of both pieces of legislation, the person conducting the warrantless search must reasonably believe that a judge or magistrate would grant a warrant. In both instances, this would be the case if it is believed that a person has committed an offence in terms of the specific tax Act and that relevant material is likely to be found at the specific premises. In addition to these two requirements as to when a warrant will be granted, the Customs and Excise Act also requires the search to be necessary for purposes of the Act. It is indicated above in this article that the purpose of the Act is fairly wide and that the requirement limiting the search to the purpose of the Act therefore does not restrict the application of a warrantless search in any sense.<sup>169</sup> Hence it is submitted that this requirement is not substantially different from the circumstances in which a judge or magistrate would grant a warrant in terms of the TAA.

<sup>167</sup> See part III(b)(i) above.

<sup>168</sup> D R Harms 'Civil procedure: Superior courts' in W A Joubert (founding ed) *The Law of South Africa* vol 4 3 ed (2012) para 125. Another example of ex parte proceedings being employed because notice to the affected party would render the relief nugatory is an application for an Anton Pillar order. See *Huang v C:SARS (ZAGP-PHC)* unreported case no SARS 4/2013 of 18 November 2013 para 4, where the court confirmed that, when an ex parte application for a warrant is made, the affected taxpayer may, in terms of the Uniform Rule 6(12)(c), set the matter down for reconsideration of the order. In this case, s 66(4) of the TAA was also applied. This section deals with the court's discretion to authorise SARS to retain the seized material, or a copy thereof, whenever a warrant, obtained in terms of s 60(1) of the TAA, is set aside or when the court has ordered the return of seized material in terms of s 66(2) and (3). See also PwC 'The tension between the Tax Administration Act and the Uniform Rules of Court' January 2014 *Synopsis* 2 at 2, available at <https://www.pwc.co.za/en/assets/pdf/synopsis-january-2014v2.pdf>, accessed on 4 November 2014; Caroline Rogers & Megan McCormack 'Unreported judgment with case number: SARS 4/2013' 20 March 2014 *Tax ENSight* available at <http://www.ensafrica.com/news/unreported-judgment-with-case-number-SARS-42013?Id=1357&STitle=tax%20ENSight>, accessed on 4 November 2014, for a discussion of this case.

<sup>169</sup> See part II(b)(ii) above.

It is worthwhile mentioning that the TAA's warrantless-search provisions are contained in chap 5 of the TAA under the heading 'Information gathering'. Another integral part of this chapter is the power of a SARS official to conduct an inspection.<sup>170</sup> The inspection may occur without prior notice if it is conducted for purposes of the administration of a tax Act. The scope of what may be determined during such an inspection is limited to the identity of the occupant; whether the occupant is registered for tax; and whether there has been compliance with ss 29 and 30 of the TAA,<sup>171</sup> which relate to the duty to keep records to indicate that the requirements of the TAA have been adhered to.<sup>172</sup> It is submitted that this inspection, especially when it is conducted in order to determine whether there has been compliance with record-keeping duties, would necessitate the taxpayer providing the SARS official with the required documentation. This means that the SARS official, who is not necessarily a senior SARS official, does not have to comply with the requirements and associated guidelines as to when a warrantless search may be conducted, even though he or she will have the opportunity to scrutinise the taxpayer's records.<sup>173</sup> This could in some instances lead to a search for documents under the pretence of an inspection. This search would occur without a warrant and could occur in the absence of any reasonable grounds. Consequently, a possible loophole is created in terms of which SARS can conduct a warrantless search without complying with the provisions contained in s 63 of the TAA.

However, apart from the loophole created by the power to inspect, once it has been established that a warrantless search is permitted, both pieces of legislation contain guidelines that must be adhered to by the person conducting the search.

(ii) *Differences relating to the guidelines*

In comparing the guidelines, it should be noted that both pieces of legislation state that a search must be conducted with strict regard for decency and order. The first difference, however, relates to the time when a warrantless search may be conducted. As a general rule, the customs and excise provision indicates that it must be conducted during ordinary business hours. Only when the officer is of the reasonable opinion that it is necessary for purposes of the Act, will a search be conducted at another time. The TAA, by contrast, does not contain any time constraints. This difference does not seem to be based on any specific reason and has the effect that, while conducting a warrantless search after-hours will be the exception in customs and excise matters, it may become the rule when the TAA is applied.

<sup>170</sup> Section 45 of the TAA.

<sup>171</sup> *Ibid.*

<sup>172</sup> See ss 29 and 30 of the TAA.

<sup>173</sup> This means that the person scrutinising the taxpayer's records may not be part of the limited group of 'senior SARS officials'. The relevance of this implication is discussed in part IV(a)(i) above.

A further difference relates to informing the taxpayer that a warrantless search is to be conducted. In terms of s 63(2)(a) of the TAA, the SARS official must inform the owner or person in charge of the fact that there is to be a warrantless search and of the grounds for the search. This section does not indicate that the informing must be done in writing; therefore oral communication would suffice. In terms of the Customs and Excise Act, if the warrantless search relates to a suspicion of an offence, a written statement must be furnished to the person in charge. This Act, however, provides for an exception when the furnishing of a written statement would frustrate the search. Once again, the exception in terms of the Customs and Excise Act, namely oral communication, seems to be the general rule in terms of the TAA.

Section 63(2)(a) of the TAA furthermore indicates that the owner or person in charge must be informed before the search is carried out. Nevertheless, s 32(5) indicates that if this person is not present, the SARS official must inform the person as soon as reasonably possible after concluding the search. This creates a confusing situation and results in a watered-down requirement, as the SARS official may, if he or she fails to inform the owner or person present before conducting the search, always do so after the search has been conducted. The Customs and Excise Act is not plagued with the same confusion, as it clearly states that the relevant person must be informed when the premises are entered.

Another issue the Customs and Excise Act provides clarity about is that the person in charge or an appointed representative has the right to be present and observe the search. The TAA, however, fails to clarify this issue and taxpayers subject to a search in terms of the TAA will be unsure if they are allowed to be present during the search.

Furthermore, in terms of the TAA, an inventory must be supplied to indicate which material has been seized, whereas the Customs and Excise Act indicates that the inventory should, in addition to particulars of the seized material, also include details of the copies made.

The last difference relates to obtaining assistance. The Customs and Excise Act provides for assistance by an assistant or a police officer, while the TAA provides for assistance by a police officer only. In both instances, assistance is limited to circumstances in which, in the opinion of the person conducting the search, it is reasonably necessary. Even though the Customs and Excise Act does not provide an indication of when a police officer's assistance would be required and when the assistance of another person would be required, it is submitted that a police officer's assistance would be required in instances which fall within the realm of police officer duties. Therefore, in instances which require assistance to ensure that the search is done in an orderly and decent manner when, for example, there is a threat of violence, a police officer as opposed to another person should support the SARS officer. In other instances, for example where the assistance of a locksmith is required, the SARS officer will request the assistance of such a person and not of a police officer.

It is submitted that assistance in this sense must be construed narrowly to mean supporting the SARS officer to conduct the search and does not include active participation in the search. This construction is advocated since the legislature has not expressly conferred a power actively to search the premises on assistants, and because the guidelines pertaining to searches make no mention of the conduct of assistants. From this it follows that, whenever a police officer actively participates in a fiscal search, this will be done in terms of chap 2 of the Criminal Procedure Act 51 of 1977, which provides for the conducting of searches by police officers. The importance of this conclusion is that s 28 of the Criminal Procedure Act provides that a police officer who acts contrary to a warrant or a provision in chap 2 commits an offence and is liable for damages.<sup>174</sup> Moreover, a police officer must act in accordance with the code of conduct signed by every member of the South African Police Service.<sup>175</sup> This means that the police officer has a specific legal framework within which he or she must carry out his or her duties. Hence, a police officer can be held accountable for misconduct, whereas the same degree of accountability does not exist in the case of other assistants.

Another reason why I am hesitant to accept that another person may assist in customs matters relates to instances where the assistant needs to scrutinise documentation of the taxpayer or classify imported goods. The problem is that, in terms of the Customs and Excise Act, secrecy of a taxpayer's information must be preserved; therefore, other people should not be privy to this information.<sup>176</sup>

## V CONCLUSION

Fiscal legislation affords SARS the power to search and seize property in order to verify compliance. There are, however, instances when a search without a warrant may be essential to ensure that tax evaders are not afforded the opportunity to destroy evidence. Nevertheless, on the basis of the principle that warrantless searches should never become the norm,<sup>177</sup> only in limited circumstances should searches be conducted without obtaining independent oversight by way of a warrant. In these limited circumstances,

<sup>174</sup> On conviction, the police officer will be liable to a fine not exceeding R600 or to imprisonment for a period not exceeding six months.

<sup>175</sup> Regulations relating to the code of conduct for members of the South African Police Service issued under s 24(1)(h) of the South African Police Service Act 68 of 1995. In terms of these regulations, a member of the police service undertakes to uphold and protect the fundamental rights of every person, and to act impartially, courteously, transparently and in an accountable manner.

<sup>176</sup> In terms of s 4(3). See s 4(3) for the limited instances when SARS is allowed to disclose a taxpayer's information in terms of the Customs and Excise Act. The TAA also contains a secrecy provision in s 69. Section 69(2) provides for limited instances when SARS is allowed to disclose a taxpayer's information. However, requiring assistance during a search and seizure does not fall within these limited circumstances.

<sup>177</sup> See part II(b)(i) above.

certain guidelines must be followed. This is essential to ensure that a taxpayer's right to privacy is limited in a reasonable and justifiable manner.

For this reason, the judiciary declared certain sections of the Customs and Excise Act unconstitutional and the legislature amended the sections. Even though this is a step in the right direction, it may be futile in instances where both the Customs and Excise Act and the TAA are applicable. The reason for this possible futility is that, if the provisions dealing with warrantless searches in terms of these two pieces of legislation are not uniform, this may afford SARS an opportunity to conduct a warrantless search in terms of the less stringent requirements. It is clear that there are similarities between the circumstances in which a warrantless search may be conducted. However, there are also differences between the circumstances in which a warrantless search may be conducted in terms of these two Acts. The TAA requires a senior SARS official to conduct the search, and includes a requirement regarding a situation where time is of the essence, whereas, under the Customs and Excise Act, the circumstances in which a warrantless search may be conducted, according to the objective criterion, are broader. It has also been noted that, when an investigation is conducted in terms of the TAA, it is possible for the SARS officials to scrutinise relevant documents without complying with the circumstances or guidelines pertaining to a warrantless search in terms of the TAA.

When comparing the guidelines which must be followed when a warrantless search is conducted, the TAA provisions seem to fall short, as there are aspects of uncertainty and instances where the exceptions in terms of the Customs and Excise Act may possibly be applied as a general rule in terms of the TAA.

Consequently, it is clear that different rules apply in terms of the different fiscal Acts. It is submitted that the provisions should be harmonised to avoid a situation of 'provision shopping' by SARS officials. Until this has happened, we cannot say, when dealing with warrantless searches in terms of fiscal legislation, that 'what's good for the goose is good for the gander'.