

Search and seizure in terms of the Tax Administration Act 28 of 2011: The balance  
between taxpayer's rights and tax collection

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## ABSTRACT

The Tax Administration Act 28 of 2011 came into effect on 04 July 2012; with it came a consolidated arsenal of powers previously provided in various statutes. These powers are to enable SARS to achieve its purpose of collecting revenue for the South African government; in particular, the power of search and seizure greatly aids SARS with collecting evidence against those who wish to defraud the state. This allows SARS to enter a premise to search for and collect any material which may be relevant for proving a tax offence or non-compliance with a tax act. The manner in which SARS performs these search and seizure operations limits and impedes a taxpayer's rights. This has left taxpayers feeling aggrieved and are of the belief SARS violates their constitutional rights in performing these operations. In this dissertation, the author will provide the history and development of SARS's powers of search and seizure, to determine whether taxpayers have rights against these powers of SARS, specifically with reference to the rights of privacy, property and access to court. Further, the author attempts to determine whether these rights have been violated to the point at which the powers of search and seizure cannot be deemed constitutional and, finally, whether there is a need for a South African taxpayer's bill of rights. The author starts by analysing the history, development and challenges to SARS's powers of search and seizure. Thereafter, the powers of search and seizure as afforded to SARS, the powers afforded to the SAPS and the powers afforded to a person's civil legal remedy known as an Anton Piller order are compared. The scope and limitations of the taxpayer's rights are determined to develop an understanding of how our courts look to uphold South African's constitutional rights or limit them in favour of the fiscus. Lastly, the Davis Tax Committee's view on the possible need for South Africa to enact a taxpayer's bill of rights is examined.

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# Chapter 1: Introduction, overview of research and chapter exposition.

## 1.1. Introduction

A well-known saying attributed to Benjamin Franklin is, “nothing in life is certain, except for death and taxes.”<sup>1</sup> To ensure this certainty, revenue authorities do their best to guarantee that every cent they believe is due to the state they represent is collected in full.

The South African Revenue Service (SARS) Act<sup>2</sup> provides in Section 3 that the objective of the SARS is the “efficient and effective collection of revenue”. In order to achieve this objective, SARS is empowered by the SARS Act to do all that is “necessary or expedient”<sup>3</sup> to perform its functions and to accomplish this objective.<sup>4</sup>

It is through this objective and the utilisation of its powers, afforded in terms fiscal legislation, that taxpayers have felt their rights have been infringed.<sup>5</sup> Using recent publications on tax administration and taxpayer’s rights, I analyse the manner and means employed by SARS to reach its objective; in particular, the use of search and seizure powers afforded by the Tax Administration Act 28 of 2011<sup>6</sup> (hereinafter referred to as “the Act”).

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<sup>1</sup> F. Shapiro “Quotes Uncovered” <http://freakonomics.com/2011/02/17/quotes-uncovered-death-and-taxes/> (accessed 24 September 2019).

<sup>2</sup> South African Revenue Service Act 34 of 1997.

<sup>3</sup> S 5 South African Revenue Service Act 34 of 1997.

<sup>4</sup> S 4 South African Revenue Service Act 34 of 1997.

<sup>5</sup> C. Fritz “*An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context*” (UP LLD Thesis 2017) (40-53).

<sup>6</sup> S 45 and S 63 Tax Administration Act 28 of 2011 respectively.



## 1.2. Research problem and research questions

To address the past atrocities, South Africa has enshrined the Bill of Rights into its Constitution. The Constitution legislates justifiable infringements against these rights and this dissertation raises the question of whether the rights of taxpayers are unjustifiably infringed upon when the revenue authority exercises its powers of search and seizure in the context of tax collection. Subsequently, the dissertation considers whether South Africa needs a taxpayer's bill of rights to ensure their rights are protected. In service to this, the sequel is broken down to answer the following questions:

- i. What is the history and development behind SARS's powers of search and seizure?
- ii. How does SARS's powers of search and seizure compare to the South African Police Service's (SAPS) powers of search and seizure, and a natural person's right to search and seize?
- iii. Which, if any, rights in the Bill of Rights are infringed by these powers of search and seizure?
- iv. Does the judiciary view these powers and the limitation of taxpayer's rights, as justified in an open and democratic society?
- v. What is the Davis Tax Committee's recommendations for taxpayer's rights in South Africa?

### 1.3. Methodology

To determine the answers to the research problems posed, I compare the rights of taxpayers as set out in the Bill of Rights and the Act to the rights of taxpayers before these institutions. The points of comparison will be drawn from the legislative provisions, case law and scholarly publications governing the revenue authorities' powers of search and seizure and those governing taxpayers' rights.

To understand the contemporary position and how it came to be established in South African law, I examine search and seizure operations in three settings: pre-constitutional South Africa, post-constitutional but pre-Tax Administration Act, and current day under the Act.

From the understanding of search and seizure in terms of the Act, I compare search and seizure operations of SARS, as governed under the Act, to the South African Police Service's search and seizure operations, governed under the Criminal Procedure Act, and a person's civil law tool of Anton Piller orders. From this I consider whether SARS truly has exceptional powers.

Thereafter, I scrutinize the rights of South Africans as laid out in the Bill of Rights to understand the extent in which search and seizure provisions infringe on taxpayers' rights, and how these operations are limited and balanced against the rights on which they infringe.

Lastly, I look at the recent report of the Davis Tax Committee on tax administration and consider their recommendation that taxpayers in South Africa require a taxpayer bill of rights to guarantee their rights when dealing with SARS.

## 1.4. Outline

### 1.4.1. Chapter 1

This first chapter provides the necessary background and context of the research questions posed and an overview of the content for each chapter. From establishing the context, it will be necessary to look at the development of the powers of SARS in relation to a taxpayer's rights as found in South Africa.

### 1.4.2. Chapter 2

SARS have been afforded various powers by legislation to ensure they can be efficient in achieving their objective of tax collection. SARS powers have been challenged in court and afford SARS enhanced rights and/or powers when compared to a person in a same or similar scenario. SARS is afforded powers of search and seizure of information and property of a taxpayer.<sup>7</sup>

The power of inspection is provided for in section 45 of the Act, whereby a SARS official may, without prior notice, perform an inspection at the premises of a taxpayer to deduce certain information of that taxpayer<sup>8</sup>. This power of inspection is enhanced by sections 59 to 63 of the Act, which affords SARS the powers of search and seizure.

SARS is generally required to obtain a warrant to exercise their powers of search and seizure;<sup>9</sup> however, the need for a warrant may be circumvented if certain requirements are met.<sup>10</sup> SARS does not need a warrant to exercise their right of search and seizure if consent from the owner is obtained or a SARS official has a reasonable belief that

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<sup>7</sup> S 45 Tax Administration Act 28 of 2011.

<sup>8</sup> S 45 Tax Administration Act 28 of 2011.

<sup>9</sup> S 59 Tax Administration Act 28 of 2011.

<sup>10</sup> S 63(1)(b) Tax Administration Act 28 of 2011.

there are sufficient grounds to obtain a warrant but doing so would delay the search and seizure to the extent the object of the search and seizure would be disposed of.

In this instance, SARS has full right, without presently having a warrant, to search and seize any relevant material on the premises where the search is being conducted<sup>11</sup>. In the latter scenario, the search and seizure may be performed even if the owner is not present on the premises during the search and seizure.<sup>12</sup>

This chapter expands on and explains the history, manner and extent SARS can utilise its powers of search and seizure to achieve its tax collection objective.

### 1.4.3. Chapter 3

When SARS powers of search and seizure are compared to the powers of the South African Police Service,<sup>13</sup> the similarities in the scope and infringement of rights are evident. The SAPS are empowered generally in terms of the Criminal Procedure Act<sup>14</sup> to search<sup>15</sup> and seize property.<sup>16</sup>

These powers may be utilised when there are reasonable grounds to believe an offence has been, is or will be committed on the premises,<sup>17</sup> and if the search and seizure were to be delayed to obtain a warrant, the “object”<sup>18</sup> of the search and seizure would be defeated. This shows SARS’s powers have a similar scope of application to

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<sup>11</sup> S 63(1)(b) Tax Administration Act 28 of 2011.

<sup>12</sup> S 63(5) Tax Administration Act 28 of 2011.

<sup>13</sup> Herein after referred to as “SAPS”.

<sup>14</sup> Criminal Procedure Act, 51 of 1977 (herein after referred to as “CPA”).

<sup>15</sup> S 25 Criminal Procedure Act, 51 of 1977.

<sup>16</sup> S 20 Criminal Procedure Act, 51 of 1977.

<sup>17</sup> S 25(1)(b) of the Criminal Procedure Act, 51 of 1977.

<sup>18</sup> S 25(3)(b) of the Criminal Procedure Act, 51 of 1977.

ensure tax collection as the SAPS's powers have to ensure the apprehension of criminals.

To understand the extent of the infringement and condonation thereof, one must compare the above to a normal person's legal rights to search or seize property and the process to obtain said right. A person can, in terms of civil procedure, compel a party to disclose certain information and through the process of execution, property may be seized for auction.<sup>19</sup> In these scenarios, the person is required to go through a laborious litigious process to legally compel information,<sup>20</sup> or seize property,<sup>21</sup> where the opposing party defends. An exception to this is an *ex parte* application known as an Anton Pillar order.

An Anton Pillar order affords powers of search and seizure to a person, which are similar to that of SARS and the SAPS. This empowers a person to, without prior notice search and seize property after obtaining an order, if certain requirements are met.<sup>22</sup>

If the Anton Pillar Order is compared to SARS and the SAPS's powers of search and seizure, it can be seen that a natural person does have a legal tool to rival that of SARS and the SAPS, but only up to a point. An Anton pillar order, even though urgent and without prior notice to the opposing party, still requires a judicial officer's approval and for it to be made an order of court. As mentioned above SARS and SAPS can circumvent such requirements.

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<sup>19</sup> Rule 45 and 46 of the Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (GNR.48 of 12 January 1965) (hereinafter referred to as the "Uniform Rules").

<sup>20</sup> Rule 35 of the Uniform Rules.

<sup>21</sup> Rule 45 and 46 of the Uniform Rules.

<sup>22</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A).

#### 1.4.4. Chapter 4

The rights of a taxpayer changed in South Africa with the enactment of the final Constitution of the Republic of South Africa in 1996<sup>23</sup> and the introduction of the Bill of Rights as found in Chapter 2 of the Constitution. Prior to this, taxpayers had limited rights to challenge the fiscus.

The Income Tax Act 58 of 1962 did not afford taxpayers powers to fight the revenue collection authority based on infringement of the taxpayer's rights. Taxpayers at this time had to rely on "common law grounds of administrative action".<sup>24</sup> Now, the Constitution is the supreme law of the country and, as such, all law is subservient to the Constitution.<sup>25</sup> The Bill of Rights gives taxpayers the right to challenge the fiscus or state in general based on an infringement of their rights.<sup>26</sup> In addition, the Bill of Rights provides that

*"the state must respect, protect, promote and fulfil the rights in the Bill of Rights";<sup>27</sup>*

and further provides that

*"the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".<sup>28</sup>*

As discussed above, SARS does, in certain instances, have powers that have been constitutionally scrutinised. This is due to claims that these powers infringe upon the

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<sup>23</sup> Hereinafter referred to as the "Constitution".

<sup>24</sup> B 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* (LLD Thesis UCT 2008) 8.

<sup>25</sup> S 2 of the Constitution of the Republic of South Africa, 1996.

<sup>26</sup> S 33, 34 & 38 of the Constitution of the Republic of South Africa, 1996.

<sup>27</sup> S 7(2) of the Constitution of the Republic of South Africa, 1996.

<sup>28</sup> S 8(1) of the Constitution of the Republic of South Africa, 1996.

constitutional rights of taxpayers. Hence, taxpayers have challenged this alleged infringement on the basis that the powers conflict with the Constitution.<sup>29</sup> These powers were able to survive judicial scrutiny due to the limitation provision found in Section 36 of the Constitution which provides that a person's rights in terms of the Bill of Rights may be limited where such limitation is seen to be "reasonable and justifiable".<sup>30</sup> There are various considerations laid out in Section 36 that are required to be considered before the provision may be applied.<sup>31</sup>

The above provides a framework for taxpayer's rights, as well as the manner in which they are limited. This chapter focuses on how the powers of SARS to search and seize impact on taxpayers' rights and whether they are justifiable limitations of the rights of privacy,<sup>32</sup> to not be arbitrarily deprived of property<sup>33</sup> and the right of access to court.<sup>34</sup>

With regards to the future of taxpayers' rights in South Africa, we look to the Davis Tax Committee. The Davis Tax Committee is an advisory body made up of tax professionals who analyse the "terms of reference"<sup>35</sup> received from the Minister of Finance pertaining to taxation and the administration thereof.<sup>36</sup> The Davis Tax Committee provides a report back to the minister in an advisory capacity.<sup>37</sup> Even though the report of the Davis Tax Committee does not hold any binding judicial authority, it is an important tool for the development of tax law in South Africa.

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<sup>29</sup> *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21.

<sup>30</sup> S 36(1) of the Constitution of the Republic of South Africa, 1996.

<sup>31</sup> The manner and extent taxpayer's rights are limited will be discussed in more detail in the main writing of this dissertation.

<sup>32</sup> S 14 of the Constitution of the Republic of South Africa, 1996.

<sup>33</sup> S 25(1) of the Constitution of the Republic of South Africa, 1996.

<sup>34</sup> S 34 of the Constitution of the Republic of South Africa, 1996.

<sup>35</sup> Davis Tax Commission (2017) Report on Tax Administration 2.

<sup>36</sup> Davis Tax Commission (2017) Report on Tax Administration 2.

<sup>37</sup> Davis Tax Commission (2017) Report on Tax Administration 1.

The Davis Tax Committee's report on Tax administration highlighted the need to protect taxpayers' rights, by means of "balancing of the powers and rights of SARS against those of the taxpayer".<sup>38</sup> In this report, it is suggested that a separate inquiry is needed to scrutinise the manner in which certain pieces of legislation are related to each other including the Constitution, the SARS Act<sup>39</sup> and the Act.<sup>40</sup> This is to confirm that all the acts may be read with one another without conflict, that they comply with the Constitution and, in doing so, these Acts purport good governance of SARS.<sup>41</sup>

In highlighting the need for protection of taxpayers' rights, the report by the Davis Tax Committee considers the possible need for a taxpayers' bill of rights when pressure is placed on tax authorities to collect revenue for their states (especially in countries with slow financial growth),<sup>42</sup> and where there is a disproportionate bias towards the tax authorities to enable the collection of the revenue for the state.<sup>43</sup>

#### 1.4.5. Chapter 5

The final section of this dissertation I summarise and present a conclusion on the research and opinions presented throughout this study. In doing so, I highlight the main points and present shortened comparisons of the discussions encompassed in the previous chapters. This is intended to show simplified and direct answers to the problem statement that forms the base of this dissertation. From this, recommendations are provided which, in my view, would be of value to taxpayers in South Africa.

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<sup>38</sup> Davis Tax Commission (2017) Report on Tax Administration 3.

<sup>39</sup> South African Revenue Service Act 34 of 1997.

<sup>40</sup> Davis Tax Commission (2017) Report on Tax Administration 3.

<sup>41</sup> Davis Tax Commission (2017) Report on Tax Administration 3.

<sup>42</sup> Davis Tax Commission (2017) Report on Tax Administration 63.

<sup>43</sup> Davis Tax Commission (2017) Report on Tax Administration 3.



## Chapter 2: SARS powers of search and seizure to reach its objective of tax collection.

### 2.1. Introduction

SARS has various powers in its arsenal to fulfil its objective of tax collection. SARS, like Magistrates, are creatures of statute and, as such, are bound to the legislation that empowers them.<sup>44</sup> The Act grants SARS enhanced powers of inspection, search, and seizure<sup>45</sup>.

Before the promulgation of the Act, the revenue authority was authorised by the various tax statutes with powers and procedures to enforce compliance in accordance with that specific tax statute.<sup>46</sup> While similarity existed between them, the enforcement and compliance rules differentiated in the different tax statutes. This created confusion, repetition, and uncertainty of interpretation.<sup>47</sup>

The Act consolidates the powers granted to SARS to ensure their objectives are met. An objective of the Act was to enact a single statute that consolidates the various generic administrative provisions found in the different tax statutes and to remove the confusion and repetition found when the statutes are read together.<sup>48</sup>

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<sup>44</sup> F. Moosa. "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (6).

<sup>45</sup> S 45; S 59-63 of the Tax Administration Act, No.28 of 2011.

<sup>46</sup> F. Moosa. "Tax Administration Act: Fulfilling human rights through efficient and effective tax administration" (2018) De Jure 1-16 <http://dx.doi.org/10.17159/2225-7160/2018/v51n1a1> (2).

<sup>47</sup> F. Moosa. "'Tax Administration Act: Fulfilling human rights through efficient and effective tax administration'" (2018) De Jure 1-16 <http://dx.doi.org/10.17159/2225-7160/2018/v51n1a1> (2).

<sup>48</sup> C S. Bovijn, L. van Schalkwyk. "concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act" (2012) Stellenbosch Law Review vol 23 (3) (509) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020) (508).

From SARS, there was a wish for stricter enforcement powers to “*target the increasingly sophisticated and aggressive tax evaders and tax evasion schemes.*”<sup>49</sup>

SARS desired this to increase tax compliance, through equity and creating confidence in the tax collection system.<sup>50</sup> This was needed in the new constitutional era in which South Africa found itself.

The South African government needed and still needs resources to be successful in its transformation objectives. This would be done by achieving social justice through providing the much-needed socio-economic rights.<sup>51</sup> The government would not be able to achieve this without sufficient resources generated by the efficient and effective collection of tax revenue.

Before one can understand and scrutinise the provisions and powers found in the Act today, one must first understand what powers were afforded to the revenue authority and how these impacted the rights of taxpayers, prior to the enactment of the Constitution and after the Constitution but before the Act. This chapter begins by discussing the pre-constitutional legislative provisions and scope of search and seizure operations, as found in the Income Tax Act. Thereafter, it looks at how the Constitution influenced search and seizure operations in the new democratic South Africa. Finally, it illustrates how SARS in current day South Africa conducts search and seizure operations under The Tax Administration Act.

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<sup>49</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>50</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>51</sup> F. Moosa “*Tax Administration Act: Fulfilling human rights through efficient and effective tax administration*” (2018) De Jure 1-16 <http://dx.doi.org/10.17159/2225-7160/2018/v51n1a1> (2).

## 2.2. Preconstitutional search and seizure

Prior to the Act, there were at least seventeen statutes in South Africa that provided for warrantless search operations.<sup>52</sup> In a pre-constitutional South Africa, one of the tax statutes that provided the revenue authority with its search and seizure provisions was the Income Tax Act (ITA).<sup>53</sup>

Section 74 of the ITA provided the Commissioner of the revenue authority the power to unilaterally authorise their officials to conduct operations for search and seizure of information.<sup>54</sup> Section 74(3) provided the commissioner unrestricted power to authorise any revenue official, in an unrestricted manner, to enter any premises, at any time, to search and remove anything the official views as possible evidence of a tax liability.<sup>55</sup> This could all be done simply if the commissioner wishes to obtain full or part of the income information of a taxpayer. The commissioner could even authorise search and seizure operations by way of telegram.<sup>56</sup>

To say this gave the commissioner wide scope to authorise search and seizure operations is a great understatement. This provision contains no safeguards, requirements or restrictions to limit its scope of application or to protect the rights of

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<sup>52</sup> SARS Standing Committee on Finance Briefing Note "*SEARCH WITHOUT WARRANT: CLAUSE 63*" 2011 (2).

<sup>53</sup> Income Tax Act 58 of 1962.

<sup>54</sup> S74(3) The Income Tax Act No 58 of 1962 "provided the Commissioner could authorise an operation to;

a) without previous notice, at any time during the day enter any premises whatsoever and on such premises search for any moneys, books, records, accounts or documents;

b) in carrying out any such search, open or cause to be opened or removed and opened, any article in which he suspects any moneys, books, records, accounts or documents to be contained;

c) seize any such books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax;

d) retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act."

<sup>55</sup> S74(3) The Income Tax Act No 58 of 1962.

<sup>56</sup> C. Fritz, "*Income Tax-Related Search and Seizure in South Africa: Lessons from Canada and New Zealand*" (2017) South African Mercantile Law Journal vol 29 (2) (242) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (20 October 2020).

taxpayers.<sup>57</sup> It meant SARS was a “law unto itself” with no impartial judicial intervention.<sup>58</sup> It is also notable that the provision of Section 74(3) contains no limitation on the manner or procedure that may be utilised by the officials carrying out the search and seizure operations, this was criticised by authors as being “arbitrary and unfair”.<sup>59</sup>

As there were no restrictions in exercising the powers contained in Section 74(3) at the time, taxpayers’ rights were technically not violated, and the revenue authority could unrestrictedly obtain the information and physical evidence they wished. The only form of rights a taxpayer had in this scenario was to demand proof of the commissioner’s authorisation.<sup>60</sup> This opened the door and allowed for abuse of the search and seizure operations, before it was able to be judicially challenged.<sup>61</sup>

The judicial challenge of Section 74(3) came in the case of *Rudolph and Another V Commissioner for Inland Revenue and Others*.<sup>62</sup> At the time of the case being heard, South Africa had just enacted the interim Constitution<sup>63</sup> and was yet to enact the final

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<sup>57</sup> F. Mosupa “Constitutional validity of search and seizure provisions: perspective on section 74 of the income tax act 58 of 1962.” (2001) Stellenbosch Law Review, vol 12 (2) (319) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (06 November 2020).

<sup>58</sup> B. Croome “Constitutional Law and Taxpayers’ Rights in South Africa – An Overview,” (2002) Acta Juridica (3).

<sup>59</sup> C. S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (509) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>60</sup> S74(4) The Income Tax Act No 58 of 1962.

<sup>61</sup> The search and seizure provisions contained in section 74(3) of the ITA were criticised as being too broad, vague (C. Fritz “An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context” (UP LLD Thesis 2017) 60) and invariably allowed SARS to act as its own judge and jury for determining whether to conduct search and seizure operation. (B. Croome “Constitutional Law and Taxpayers’ Rights in South Africa – An Overview,” (2002) Acta Juridica 3). This is contrary to the *nemo iudex in propria causa* rule, which provides that in natural law no one may be the judge in their own case. (C. Fritz “An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context” (UP LLD Thesis 2017) 61).

<sup>62</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399.

<sup>63</sup> Interim Constitution of the Republic of South Africa, Act No. 200 of 1993. (hereinafter referred to as the “Interim Constitution”).

Constitution. It is important to note that by the outcome of the matter Section 74(3) had been amended by Section 74(D) of ITA.<sup>64</sup>

The facts of the case were a Mr. Rudolph had his home and business searched and various documents seized in October 1993 and April 1994 under the provisions of Section 74(3). The Constitutional Court held that the search and seizure operations were conducted prior to the interim Constitution coming into effect, as such the interim Constitution did not apply to the current matter. The Constitutional Court's finding was based on the fact that the interim Constitution did not apply with retrospective effect. The Constitutional Court thus, referred the matter back to the Appellate Division to have the matter adjudicated based on "*common law grounds of invalidity*."<sup>65</sup> The case was referred to the Supreme Court of Appeal (SCA). Rudolph raised the following points as argument for the matter:

- i. the authorisation for the search and seizure was not issued by the Commissioner personally, but by a subordinate official to whom the power granted to the Commissioner could not lawfully be delegated;
- ii. the authorisation lacked the required clarity and precision; and
- iii. that the search and seizure had been validly executed during October 1993 and could not validly be executed again during April 1994.<sup>66</sup>

The court rejected all the arguments.

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<sup>64</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (1); for discussion on the Rudolph Saga see J. Silke "*Tax Payers and the Constitution: A Battle Already Lost*." (2002) Acta Juridica (282-334) accessed via HeinOnline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>65</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (2).

<sup>66</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (2).

The SCA held that the authorisation of the search and seizure had been correctly delegated, thus the first point of argument by Rudolph was invalid. For the second point of argument the court held that the provisions of Section 74 states not only the Commissioner's powers but also the powers of the official conducting the search and seizure. Section 74, in the court's view empowers the official authorised by the commissioner as follows:

*"Executing officer should search for any documents or other articles and then seize such documents or articles as, in his opinion, may afford evidence material to the assessment of the tax liability of the person1 concerned."*<sup>67</sup>

Thus, the court was of the view that there was:

*"no need for a reference in an authorisation to any specific documents or kinds of documents or to specific articles or kinds of articles."*<sup>68</sup>

The court finally held with the last point of argument raised:

*"There is nothing in the Act which suggests that the mandate conferred by an authorisation under S 74(3) expires once documents or other articles discovered in the course of an authorised search have been seized and retained."*<sup>69</sup>

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<sup>67</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (5).

<sup>68</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (5).

<sup>69</sup> *Rudolph and Another V Commissioner for Inland Revenue and Others* (1997) 59 SATC 399 (5).

To summarise, the SCA found there to be no merit in the common law grounds of invalidity.<sup>70</sup>

If one looks holistically at the powers conferred by Section 74 of the ITA before the Constitution was enacted, it is patently clear that in South Africa, prior to the enactment of the Bill of Rights, the Commissioner of Inland Revenue had wide and far-reaching powers to obtain information and documentation from a taxpayer if these were utilised to determine a tax liability; the taxpayer had near to no legal standing to challenge and succeed against the revenue authorities.

### 2.3. Post-constitutional, but prior to Act, search and seizure operations

The Katz Commission was tasked with investigating the need to reform certain tax provisions, to enable tax legislation to be brought in line with the newly enacted Constitution. In the Katz Commission's interim report of 1994,<sup>71</sup> the commission viewed Section 74(3) as unconstitutional. Section 74(3) was seen as an invasion of a taxpayer's right to privacy and the commission saw a need for Section 74(3) to be justified by the Interim Constitution's limitation clause found in chapter 13 for it to remain valid.<sup>72</sup>

The Katz Commission looked at the Canadian case of *Hunter et al v Southam* (1984), which held that the Canadian provisions of search and seizure (being similar to that of

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<sup>70</sup> J. Silke "Tax Payers and the Constitution: A Battle Already Lost." (2002) Acta Juridica (209) accessed via HeinOnline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>71</sup> The Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa (1994) ISBN 0-621-16386-4.

<sup>72</sup> The Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa (1994) ISBN 0-621-16386-4 (75).

Section 74(3)) were unconstitutional.<sup>73</sup> The Katz Commission was of the view that Section 74(3) was in need of amendments and recommended the following:

- i. that the commissioner of SARS obtains authorisation prior to search and seizure procedures being carried out, if possible in the circumstances;
- ii. that the authorisation be obtained by a judicial official, who can objectively act impartial and neutral; and
- iii. there had to be a belief that a tax offence had been committed and evidence of such offence would be found at the premises being searched. The belief had to be reasonable and based on information provided under oath.<sup>74</sup>

The commission was of the opinion that the Commissioner could not be allowed to have sole and complete authority to authorise search and seizure operations. This was based on the fact that the Commissioner was tasked with the collection of tax revenue for the state. As such, the Commissioner was incapable of acting impartially and neutrally.

Further, the commission believed that if an impartial judicial officer were first to be satisfied that reasonable grounds of an offence were present, before the issuing of the warrant and the conducting the search and seizure operation, a person's right to access to court would be protected. This would prevent SARS from taking the law into their own hands.<sup>75</sup>

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<sup>73</sup> The Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa (1994) ISBN 0-621-16386-4 (75).

<sup>74</sup> The Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa (1994) ISBN 0-621-16386-4 (75).

<sup>75</sup> C. Fritz "An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context" (UP LLD Thesis 2017) (64).



On 30 September 1996, Section 74(3) of the ITA was officially repealed by Section 14 of the Revenue Laws Amendment Act<sup>76</sup> and was replaced with Section 74(D) of the ITA.<sup>77</sup>

It appears that the legislature had taken note of the recommendations of the Katz Commission as Section 74(D) still provided a SARS official with the power to search and seize information and documentation. However, there were now various safeguards and procedural remedies that were afforded to the taxpayer.<sup>78</sup>

These safeguards were seen to legitimise search and seizure operations and to embrace the Constitution.<sup>79</sup> Under Section 74D, a SARS official may at any time search and seize information and documentation found on any premises if the search and seizure will lead to evidence showing a taxpayer's "*non-compliance by any taxpayer with his obligations found in this Act.*"<sup>80</sup>

By accepting the Katz Commission's recommendations, Section 74(D) required that a warrant must first be obtained from a High Court Judge<sup>81</sup> by a SARS official providing information under oath,<sup>82</sup> who must be named in the application.<sup>83</sup> This was a positive step forward as now the Commissioner of SARS no longer held the power to unilaterally act as judge and jury in authorising search and seizure operations.<sup>84</sup>

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<sup>76</sup> Revenue Laws Amendment Act No 46 of 1996.

<sup>77</sup> The Income Tax Act No 58 of 1962.

<sup>78</sup> G.K. Goldswain "*Clean Hands – is this or similar concept used by the courts to determine taxpayer's right to just administrative action?*" (2017) South African Business Review (vol 21) (66).

<sup>79</sup> F. Mosupa "*Constitutional validity of search and seizure provisions: perspective on section 74 of the income tax act 58 of 1962.*" (2001) Stellenbosch Law Review, vol 12 (2) (325) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (06 November 2020).

<sup>80</sup> S 74(D)(1)(a)(ii) of The Income Tax Act No 58 of 1962.

<sup>81</sup> B. Croome "*SARS: Search & Seizures*" (2007) Accountancy SA (46).

<sup>82</sup> S 74(D)(2) of The Income Tax Act No 58 of 1962.

<sup>83</sup> S 74(D)(1) of The Income Tax Act No 58 of 1962.

<sup>84</sup> C. Fritz "*What's good for the goose is good for the gander – warrantless searches in terms of fiscal legislation*" (2015) SALJ (837).

As notice would allow a taxpayer to tamper, remove or destroy evidence, the warrant could still be brought *ex parte* (without prior notice to the taxpayer). It was argued that if the warrant was not brought *ex parte* it would invariably a defeat the reasoning for bringing the warrant for search and seizure.<sup>85</sup>

The Judge in issuing the warrant had to be satisfied that there were reasonable grounds present that the taxpayer had either committed an offence or had failed to comply with an obligation found in the ITA. Further, the Judge had to be satisfied that evidence of an offence or non-compliance would likely be found at the premises named in the warrant.<sup>86</sup>

If one takes the Rudolph saga and Section 74(3) as discussed above into account, it is clear that the amendments to Section 74(3) appear to afford greater safeguards to the taxpayer's rights. The warrant now was required to be issued by a judge, and there had to be reasonable grounds created by the information supplied under oath by the requesting official. This shows that section 74(D) incorporates the recommendations of the Katz Commission.<sup>87</sup> In addition to this, further safeguards were included by requiring the specification of the premises to be searched, reference to the offence committed, and identification of the person who had been alleged of committing an offence or not complying with the provisions of the ITA.<sup>88</sup> This brought the previous Section 74(3) more in line with police search and seizures, which are required to

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<sup>85</sup> B. Croome "Taxpayers' Rights in South Africa" JUTA (2010) (149); *Shelton v Commissioner for South African Revenue Services* 64 SATC 179 (17).

<sup>86</sup> S 74(D)(3) of The Income Tax Act No 58 of 1962.

<sup>87</sup> L. van Schalkwyk "Constitutionality and the Income Tax Act" (2001) *Meditari Accountancy Research Journal* Vol 9 (295).

<sup>88</sup> B. Croome "Taxpayers' Rights in South Africa" JUTA (2010) (141).

specify the person who allegedly committed the offence and further, what the offence allegedly committed was.<sup>89</sup>

Thus, if *Rudolph and Another V Commissioner for Inland Revenue and Others* had been adjudicated on after the amendment to the ITA, it is likely that a different and less dismissive judgment may have been obtained.

Not only did Section 74(D) provide safeguards to taxpayer's subjected to search and seizure operations, it also contained remedies to assist the taxpayer if they wish to oppose the warrant issued. Section 74(D) provided that persons who were aggrieved by the search and seizure provisions may apply to the High Court for the return of any documents or things seized<sup>90</sup> and the court hearing the matter may grant an order it deems fit.<sup>91</sup> It is apparent that the legislature (in enacting Section 74(D)) had taken correct steps in protecting the rights of taxpayers in the new democratic South Africa.

A portion of these safeguards were capable of being circumvented in terms of Section 74(D)(5)<sup>92</sup> and Section 74(D)(6). Where the officer specified in the warrant has "reasonable belief" that documents or information at the premises specified in the warrant or at other premises not specified in the warrant will be removed or destroyed before a warrant may be obtained. The officer, under Section 74(D)(5), was empowered to perform search and seizure operations at a premises not identified in the warrant, without presently having a warrant for that premises, to the extent that the Section provides for search and seizure with a warrant.

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<sup>89</sup> S 21 of the Criminal Procedure Act, No 51 of 1997.

<sup>90</sup> S 74(D)(9)(a) of the Income Tax No 58 of 1962.

<sup>91</sup> S 74(D)(9)(b) of the Income Tax. No 58 of 1962.

<sup>92</sup> S 74(D)(5) of the Income Tax No 58 of 1962.

To perform a search and seizure operation under this section there were added requirements. There must not, in the officer's eye, have been adequate time to obtain the warrant from a judge, before information or documentation identified in the warrant was about to be removed or destroyed at the premise not identified in the warrant.

Section 74(D)(6) extended the powers of SARS officer by allowing that seized material and documents need not be specified in the warrant, if the officer believed on "reasonable grounds" that the objects to be seized would be evidence of a non-compliance or offence under the ITA.<sup>93</sup>

These extensions essentially removed most of the safeguards put in place to protect taxpayers from abuse of power by the revenue authority by circumventing judicial intervention.<sup>94</sup> These extensions of power had been criticised as allowing for abuse of power and suggested it would be better if an authorised official extended the warrant.<sup>95</sup>

Search and seizure under Section 74(D), like its predecessor, was subjected to judicial scrutiny. The first case that will be discussed is the Supreme Court of Appeal matter of *Shelton v Commissioner for South African Revenue Services*.<sup>96</sup> In this matter, the Appellants ("Shelton") had his business premises searched and had documents and other property seized under the provisions of Section 74(D). Shelton applied in terms of Section 74(D)(9) of the ITA to have the seized property returned. Shelton attempted to raise good cause for the property to be returned as required by Section 74(D)(9) on the following grounds:

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<sup>93</sup> S 74(D)(6) of the Income Tax No 58 of 1962.

<sup>94</sup> C. Fritz "An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context" (UP LLD Thesis 2017) (70).

<sup>95</sup> B. Croome "Taxpayers' Rights in South Africa" JUTA (2010) (143).

<sup>96</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179.

- i. the warrant and its application were fatally flawed;
- ii. that prior notice was required before the search and seizure could be conducted;
- iii. material facts had not been disclosed when the warrant was issued; and
- iv. the warrants execution was irregular.<sup>97</sup>

The court accordingly held that the provisions of Section 74(D)(9) provide the courts with wide judicial discretion to return the property seized. This was due to the courts being empowered “*on good cause, make such an order it deems fit*”,<sup>98</sup> and there being no specification as to what would constitute good cause.

The arguments that the warrant was fatally flawed, and material facts were not disclosed were quickly discarded. Judge Streicher held they were of no consequence in the circumstances and did not constitute a material non-disclosure of information.<sup>99</sup>

The court based this on the instance that Section 74(D) of the ITA contained no limitation provisions that the material seized must be owned by the taxpayer.<sup>100</sup>

Goldswain (2017) is of the view that this judgment invariably allowed SARS such a broad scope to seize material, that once permitted by a warrant to search and seize SARS could seize “*the computers of the taxpayer’s wife and even his children.*”<sup>101</sup>

For the argument of notice, Shelton raised insolvency case law stating that a case must be made out for the dispensation of notice and that the commissioner had failed to provide such. The court dispensed with this argument by stating that reasonable

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<sup>97</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179 (1).

<sup>98</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179 (4).

<sup>99</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179 (5).

<sup>100</sup> J. Silke “*Tax Payers and the Constitution: A Battle Already Lost.*” (2002) *Acta Juridica* (292) accessed via HeinOnline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>101</sup> G.K. Goldswain “*Clean Hands – is this or similar concept used by the courts to determine taxpayer’s right to just administrative action?*” (2017) *South African Business Review* (vol 21) (67).

grounds had been established that Shelton had committed an offence in terms of the ITA and accordingly:

*“giving of prior notice of the application for a warrant would have defeated the object and purpose of the section... In the circumstances the section, by necessary implication, did not require the giving of notice.”<sup>102</sup>*

In the light of the above, Shelton’s application was dismissed as no good cause was proven for the seized property to be returned in terms of Section 74(D)(9).<sup>103</sup> This was important at the time, as it reiterated the view that the right to judicial notice could be waived for the revenue authority to fulfil its tax collection objective.

The Shelton case showed that there was still a very literal approach to the interpretation of the safeguards.<sup>104</sup> Further, this case highlighted that the court also had a wide discretion to set aside a warrant issued for search and seizure operations.<sup>105</sup>

In the case of *Ferucci and Others v Commissioner for South African Revenue Service and Another*,<sup>106</sup> the court also dealt with a taxpayer challenging the validity of a warrant authorising a search and seizure operation. The court stated that Section 74(D)

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<sup>102</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179 (6).

<sup>103</sup> *Shelton v Commissioner for South African Revenue Services* 2002 64 SATC 179 (7).

<sup>104</sup> G.K. Goldswain “*Clean Hands – is this or similar concept used by the courts to determine taxpayer’s right to just administrative action?*” (2017) *South African Business Review* (vol 21) (66).

<sup>105</sup> C. Fritz “*An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context*” (UP LLD Thesis 2017) (71).

<sup>106</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (hereinafter referred to as the “Ferucci case”).

contains mechanisms that require compliance prior to the powers being able to be lawfully utilised. This being that a warrant must first be obtained by a judge.<sup>107</sup>

The court elaborated on Section 74(D)(9) by referring to the case of *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others*.<sup>108</sup> In this case, it was shown that under Section 74(D)(9), the court was empowered “to reverse the effect of a warrant in toto”<sup>109</sup> and make additional orders depending on the circumstances the court hearing the matter deems appropriate.

Oosthuizen AJ, in the *Ferucci* case elaborated further, stating that the aggrieved taxpayer may apply to the court to have the warrant authorising the search and seizure to “be set aside on the grounds that it should not have been obtained.”<sup>110</sup> Oosthuizen provided an outline of how matters, where the parties apply for the setting aside of a warrant in terms of Section 74(D) should be adjudicated. Oosthuizen avers that the court must simply be satisfied that reasonable grounds existed that there was an offence committed or a non-compliance in terms of the ITA and that evidence of such would be found at the premises to be searched.<sup>111</sup> In fulfilling these requirements the court stated that for a warrant under Section 74(D) to be valid it must:

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<sup>107</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (5).

<sup>108</sup> *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others* 1998 (4) SA 275 (T) (hereinafter referred to as the “Ferela case”).

<sup>109</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (5); *Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others* 1998 (4) SA 275.

<sup>110</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (6).

<sup>111</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (6).

*“refer to the alleged noncompliance or offence in relation to which it is issued. ....and also to afford the party against whom the warrant is issued an indication of the offence or noncompliance under investigation”.*<sup>112</sup>

This was an important safeguard for the provision to remain constitutional and to not unlawfully infringe the right to privacy.<sup>113</sup>

In showing progress from the past, the court also stated with regards to the warrant that, *“the function of laying down the perimeters within which the search is to occur should be left to the judicial officer issuing the warrant and not to the person executing it”*,<sup>114</sup> as this would not be justifiable in terms of the Constitution.

The court went on to explain that to meet the judicial requirements the warrant had to specify the offence and/or non-compliance with sufficient particularity to satisfy the issuing judge that reasonable grounds exist. This means it would not be acceptable to refer to the sections allegedly contravened without further elaboration. The warrant in this matter did not elaborate on the alleged offences but merely stated the provisions of the ITA. The court recognised these as speculative averments brought by SARS. These averments were in no way a solid argument for SARS’s case.

Commentary indicates that when there is lack of factual substance in SARS bringing the warrant for search and seizure operations is “akin to a legal wrongdoing.”<sup>115</sup> Goldswain based this on the fact that SARS would infringe the privacy of the taxpayer,

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<sup>112</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (6).

<sup>113</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (6).

<sup>114</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (8).

<sup>115</sup> G.K. Goldswain “*Clean Hands – is this or similar concept used by the courts to determine taxpayer’s right to just administrative action?*” (2017) South African Business Review (vol 21) (69).



whilst being aware they had no actual evidence to base the operation on.<sup>116</sup> This was held to be unacceptable in the *Ferucci* matter.

*Ferucci* went further and stated that Section 36 of the Constitution should only be upheld where there are no other less drastic options available.<sup>117</sup> The court, in accepting this argument, relied on the Canadian case of *Araujo and Others v The Queen*,<sup>118</sup> which dealt with the Canadian government intercepting private messages.

In *Araujo*, the court held that the people must be protected from fishing expeditions by the government and that there must be no other reasonable alternative method to obtain the required information.<sup>119</sup>

The court, in *Ferucci*, was hesitant to go to the same lengths as in *Araujo* but did agree that if the judge hearing the application to issue a warrant is of the view that a less drastic method may achieve the same objective, then the less drastic option should be followed.<sup>120</sup> The court, accordingly, held that the warrant was invalid and should be set aside. The court agreed that the requirements pertaining to what a warrant must contain was a constitutional safeguard to ensure there were parameters in place given by a judicial official, within which the SARS officials must conduct the search and

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<sup>116</sup> G.K. Goldswain “Clean Hands – is this or similar concept used by the courts to determine taxpayer’s right to just administrative action?” (2017) South African Business Review (vol 21) (69).

<sup>117</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (10).

<sup>118</sup> *Araujo and Others v The Queen* 79 CRR (2d) 1 (SCC) accessed via CanLII at <https://www.canlii.org/en/ca/scc/doc/2000/2000scc65/2000scc65.html> (accessed on 20 April 2020).

<sup>119</sup> *Araujo and Others v The Queen* 79 CRR (2d) 1 (SCC) accessed via CanLII at <https://www.canlii.org/en/ca/scc/doc/2000/2000scc65/2000scc65.html> (accessed on 20 April 2020).

<sup>120</sup> *Ferucci And Others v Commissioner for South African Revenue Service and Another* 2002 65 SATC 47 (8).

seizure.<sup>121</sup> Without these details being required, the provisions of Section 74(D) would hold no meaning.<sup>122</sup>

The *Ferucci* case is important to show how even prior to the Act the Constitution had an impact on the rights of taxpayers and that the provisions for search and seizure had become more constitutionally justifiable by upholding the safeguards contained in the empowering provisions when challenged. It is also important to note that under Section 74(D) there were no provisions allowing for search and seizure operations from the outset to be warrantless, but only provisions to extend the warrant without obtaining a new warrant.<sup>123</sup>

The above, shows that the amended ITA did take steps towards more constitutional search and seizure operations, to the point in which section 74(D) was seen as a valid limitation on taxpayer's rights if SARS complied with the requirements of section 74(D).<sup>124</sup>

#### 2.4. The Act - search & seizure operations

Before the Tax Administration Bill<sup>125</sup> was finalised to be enacted as the Act, SARS released a brief note on the search and seizure provisions contained in the Bill. SARS contended that search and seizure provisions are needed but they require the

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<sup>121</sup> C. Fritz "An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context" (UP LLD Thesis 2017) (69).

<sup>122</sup> B. Croome "Taxpayers' Rights in South Africa" JUTA (2010) (148).

<sup>123</sup> C. Fritz "An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context" (UP LLD Thesis 2017) (82).

<sup>124</sup> B. Croome "Taxpayers' Rights in South Africa" JUTA (2010) (182).

<sup>125</sup> The Tax Administration Bill [B 11—2011].

“*necessary checks and balances.*”<sup>126</sup> The Bill proposed the following requirements before warrantless search and seizure provisions could be followed:

- i. imminent removal or destruction of evidence;
- ii. if a warrant had been applied for it would have been issued;
- iii. if the search and seizure proceedings were delayed it would defeat the purpose of the search and seizure.<sup>127</sup>

These requirements were enhanced by further requiring that:

- i. the search and seizure proceedings are to be conducted within the statutory limits as search and seizure with a warrant; and that
- ii. SARS officials may only enter business premises or the section used for trade or business in a domestic dwelling.<sup>128</sup>

If SARS does not comply with these requirements, an aggrieved taxpayer is entitled to approach the court to apply for relief the taxpayer deems appropriate. Further, the taxpayer may on an urgent basis approach the court for an order to preserve or seal the seized property, pending the outcome of the proceedings pertaining to the search and seizure itself.<sup>129</sup>

With the enactment of the Act, SARS is of the view that their information gathering powers were “supplemented or extended by the Act”<sup>130</sup> and that “taxpayer’s rights

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<sup>126</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>127</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>128</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>129</sup> SARS Standing Committee on Finance Briefing Note “*SEARCH WITHOUT WARRANT: CLAUSE 63*” 2011 (1).

<sup>130</sup> SARS. “*Short Guide to The Tax Administration Act, 2011 (Act No.28 of 2011)*” (2018) (24).

were amplified and made more explicit to counter balance SARS's new information gathering powers."<sup>131</sup>

Critics viewed the warrantless search and seizure provisions found in the Act as being "the most controversial and radical new provision concerning search and seizure in terms of fiscal legislation."<sup>132</sup>

Section 45 of the Act gives SARS the power of inspection. Inspections and searches are not the same. Inspections, under Section 45 (in terms of public benefit), are required to "promote optimal tax assessment and collection,"<sup>133</sup> by using inspections to broaden the tax base and verify taxpayers status.<sup>134</sup> This is done by empowering SARS upon a reasonable belief that a business is operating at an alleged premise, to without prior notice, conduct an inspection.<sup>135</sup>

Section 45 is limited by only allowing SARS officials to arrive at a business premises, but not domestic dwellings, without consent being obtained.<sup>136</sup> Inspections under Section 45 of the Act are fact finding missions to gather information to enhance SARS's ability to identify taxpayers more easily and to obtain preliminary information. The information obtained from an inspection assists SARS in determining whether

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<sup>131</sup> SARS "Short Guide to The Tax Administration Act, 2011 (Act No.28 of 2011" (2018) (24).

<sup>132</sup> C. Fritz. "What's good for the goose is good for the gander – warrantless searches in terms of fiscal legislation" (2015) SALJ (838).

<sup>133</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (4).

<sup>134</sup> SARS "Short Guide to The Tax Administration Act, 2011 (Act No.28 of 2011" (2018) (27).

<sup>135</sup> S45(1) of the Tax Administration Act, No.28 of 2011. This power of inspection is limited to the extent that the inspection may "determine only" the following;

"1) The identity of the occupier of the premises;

2) Whether the occupier is a registered taxpayer; and

Whether the occupier has complied with the Section 29 & 30 of the Act."

<sup>136</sup> S45(2) of the Tax Administration Act, No.28 of 2011.

SARS should proceed with criminal investigations, further audits,<sup>137</sup> inquiry proceedings<sup>138</sup> or with search and seizure proceedings.<sup>139</sup>

Section 45 must be read with Section 31 of the Act.<sup>140</sup> Section 31 provides an obligation on taxpayers to have certain documents and records specified, available to SARS's officials in the event an inspection is carried out.<sup>141</sup> SARS officials' inspections are restricted to only determine the answers to limited questions and such determination must be made from the records of the taxpayer.<sup>142</sup> With reference to Section 45(2), only trade and not enterprise is mentioned, as opposed to Section 45(1).

Moosa is of the view that this was intentionally done to further restrict when domestic dwellings may be entered for inspections.<sup>143</sup> This would further limit SARS's power of inspection to be more in line with the Constitution and the protection of taxpayers' rights as contained in the Bill of Rights.<sup>144</sup>

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<sup>137</sup> S48 of the Tax Administration Act, No.28 of 2011.

<sup>138</sup> S52 of the Tax Administration Act, No.28 of 2011.

<sup>139</sup> S59-63 of the Tax Administration Act, No.28 of 2011, respectively.

<sup>140</sup> S31 of the Tax Administration Act, No.28 of 2011.

<sup>141</sup> S31(1)(b) of the Tax Administration Act, No.28 of 2011.

<sup>142</sup> F Moosa *"Analysing and Comparing Warrantless Tax Inspections and Searches"* (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (6).

<sup>143</sup> F Moosa *"Analysing and Comparing Warrantless Tax Inspections and Searches"* (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (12).

<sup>144</sup> F Moosa *"Analysing and Comparing Warrantless Tax Inspections and Searches"* (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (12-15). To ensure SARS continues to keep the limitations of taxpayers' rights under inspections justifiable, SARS officials must fulfil the reasonable belief criterion. Under Section 45(1) of the Act, this requires the SARS officials to have "reasonable belief that trade or enterprise is being carried on" at the premises which is to be the subject of the inspection.

An objective test is to be applied to each scenario before the SARS official may enter a premise.<sup>145</sup> This test has been defined in the Classen's Dictionary of Legal Words and Phrases as follows:

*“objectively justifiable belief, which is a belief based on reason in which a factual base for the reason exists. Such a belief thus has to be founded upon evidence that might reasonably support the conclusion contended.”*<sup>146</sup>

This definition was drawn from the case of *National Director of Public Prosecutions v Stander*.<sup>147</sup> It requires the SARS official to have factual evidence at their disposal, which creates a reasonable belief before any inspections may occur. It is believed, if the reasonable belief was incorrect, this will not result in the inspection being deemed unlawful.<sup>148</sup>

Section 45 has been criticised as being a possible loophole to conduct a warrantless search without being required to meet the criteria and guidelines for a warrantless search operation in terms of the Act.<sup>149</sup> This is due to a substantially lower standard needs to be met when compared to SARS's power of search and seizure. I now discuss search and seizure.

Search and seizure operations can be performed with or without a warrant if certain requirements are met. For a search and seizure with a warrant, Section 59 requires a senior SARS official to obtain the warrant from a judge or magistrate by way of an

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<sup>145</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (6).

<sup>146</sup> R.D. Classen "Classens Dictionary of Legal Words and Phrases" (2019) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 20 April 2020).

<sup>147</sup> *National Director of Public Prosecutions v Stander & Others* 2008 1 SACR 116.

<sup>148</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (15).

<sup>149</sup> C. Fritz "What's good for the goose is good for the gander – warrantless searches in terms of fiscal legislation" (2015) SALJ (845).

*ex parte* application before the search and seizure may be conducted.<sup>150</sup> This application requires the senior SARS official to provide information under oath to establish facts, to satisfy the court that the warrant for the search and seizure is needed for the administration of a tax act.

The concept of administration of a tax act is broad and is contained in Section 3 of the Act. It includes obtaining full information of anything that may affect the liability of a person for tax, establish the identity of a person, determine the tax liability of a person, collect tax debts, enforce SARS's powers and duties to ensure obligations under a tax act are complied with, etc.<sup>151</sup>

The Act deviated from its predecessors by requiring a senior SARS official to authorise the application prior to the search and seizure operations. Fritz (2017) is of the view that this provision creates an impression that there is a "*screening process*" before the warrant would be issued.<sup>152</sup> Fritz based this on the broad meanings given to administer a tax act and relevant material,<sup>153</sup> and the fact that these requirements of Section 59 of the Act, do not "curb" the powers of SARS in bringing an application for search and seizure and in the warrant being issued.<sup>154</sup>

Section 60 provides that before a warrant will be issued, the application must satisfy the judge that there are "reasonable grounds" present that a person has failed to comply with an obligation found in tax legislation or that a person has committed a tax

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<sup>150</sup> S 59 of the Tax Administration Act, No.28 of 2011.

<sup>151</sup> S 3(2) of the Tax Administration Act, No.28 of 2011.

<sup>152</sup> C. Fritz "*An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context*" (UP LLD Thesis 2017) (73).

<sup>153</sup> Section 1 of the Act defines relevant material as "*any information, document or thing that in the opinion of SARS is foreseeably relevant to the administration of a tax Act as referred to in Section 3*".

<sup>154</sup> C. Fritz "*An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context*" (UP LLD Thesis 2017) (73-74). The section 60 of the Act provides guidelines for the issuing of the warrant.

offence, and there is a likelihood that evidence will be found at the premises stated in the warrant to prove the offence or failure of the person.<sup>155</sup> The information needed is the identity of the person alleged to have committed the offence or failed to comply, specification of the premises itself, and stating the alleged offence or non-compliance that is the basis for the application.<sup>156</sup> This prevents fishing expeditions as explained in *Araujo*.<sup>157</sup>

Where the warrant is obtained and the operation is executed based on factually incorrect information being relied on, the taxpayer is entitled to take the warrant issued on review if the SARS official bringing the application had relied on factually incorrect information, which was material in the Judge or Magistrate issuing of the warrant.<sup>158</sup>

The search and seizure requirements in the Act differ from its predecessor with regard to the details required for the warrant to be obtained. Section 60 of the Act is silent on the requirement of specifying what documents are to be seized; it merely states that “*relevant material is likely to be found on the premises specified in the application*”.<sup>159</sup>

The lack of requiring specification of what may be seized further enhances SARS search and seizure powers when carrying out the operation and causes uncertainty for the taxpayer. This is because the limit on relevant material is extremely broad.<sup>160</sup> This could open up the possibility of abuse by the SARS officials as they could use the vagueness in the scope of the documents to further infringe the taxpayers’ rights

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<sup>155</sup> S 60 of the Tax Administration Act, No.28 of 2011. Section 60(2) of the Act further requires SARS to have obtained certain information to substantiate their allegations and for this information to be provided in the warrant.

<sup>156</sup> S 60(2) of the Tax Administration Act, No.28 of 2011.

<sup>157</sup> C. Fritz “*What’s good for the goose is good for the gander – warrantless searches in terms of fiscal legislation*” (2015) SALJ (839).

<sup>158</sup> S 66 of the Tax Administration Act, No.28 of 2011.

<sup>159</sup> S 60(1)(b) of the Tax Administration Act, No.28 of 2011.

<sup>160</sup> C. Fritz “*An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context*” (UP LLD Thesis 2017) (78).



by arbitrarily depriving the taxpayer of property the taxpayer requires for their business enterprises operations. Due to this a taxpayer would not be able to challenge a specific item seized unless they can prove it is not possibly relevant material to a possible tax offence or non-compliance with a tax act.

Once the warrant has been obtained and produced to the owner or occupier of the premises mentioned in the warrant, the senior SARS officials are empowered by Section 61 of the Act to enter the premises without obstruction and to open, search, remove and retain anything that may be deemed “relevant material”.<sup>161</sup>

Section 61 provides limitations and safeguards to minimise the infringement of the taxpayer’s rights when the search and seizure is being conducted. Section 61 affords the taxpayer the right to refuse access to the SARS official, if the SARS official does not produce the warrant to the taxpayer.<sup>162</sup> This may be circumvented if the owner or occupier of the building is not present or by Section 63 when certain requirements are met.<sup>163</sup>

SARS is required to make an inventory of all the material seized.<sup>164</sup> Further, the SARS officials must exercise strict decency and order when the search and seizure is being conducted, may only search a person if a SAPS member of the same gender is present,<sup>165</sup> and is required to preserve the material once removed.<sup>166</sup> These

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<sup>161</sup> S 61(3) of the Tax Administration Act, No.28 of 2011.

<sup>162</sup> S 61(2) of the Tax Administration Act, No.28 of 2011.

<sup>163</sup> S 63 of the Tax Administration Act, No.28 of 2011.

<sup>164</sup> S 61(4) of the Tax Administration Act, No.28 of 2011. This section further provides the inventory must be provided to the person who allegedly has not complied or committed an offence under tax legislation.

<sup>165</sup> S 61(4) of the Tax Administration Act, No.28 of 2011.

<sup>166</sup> S 61(8) of the Tax Administration Act, No.28 of 2011.

requirements and guidelines were put in place to ensure the affected parties rights are to some degree protected and respected.<sup>167</sup>

The requirements of the warrant being obtained and that the premises to be searched must be stated in the warrant may be circumvented in certain instances. The requirement that a premises must be stated in the warrant may be circumvented only if the senior SARS official has “reasonable grounds” to believe “relevant material” will be found at the premises not specified in the warrant and if there was a delay to obtain the warrant the relevant material would be destroyed or removed, or the object of the search and seizure would be defeated.<sup>168</sup> This is a concerning provision, as it in effect empowers a senior SARS official to perform a search and seizure at a location not specified in the warrant.

Section 62 of the Act deviates from its predecessor found in the ITA, as the provision can be utilised when relevant material “may be removed or destroyed”<sup>169</sup> rather than “about to be removed or destroyed”.<sup>170</sup> Fritz suggests that this change in wording is beneficial to SARS as there is a lower bar to meet before the provision may be utilised, as situations where the relevant material may be removed is more likely.<sup>171</sup> This could cause a greater violation of taxpayer’s rights.

Section 63 takes and enhances a senior SARS official’s search and seizure powers by circumventing the requirement of a warrant in its entirety. The inclusion of warrantless search operations is concerning, as it left discretion entirely in the hands

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<sup>167</sup> F Moosa *"Analysing and Comparing Warrantless Tax Inspections and Searches"* (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (13).

<sup>168</sup> S 62 of the Tax Administration Act, No.28 of 2011.

<sup>169</sup> S 62(2) of the Tax Administration Act, No.28 of 2011.

<sup>170</sup> S 74D(5)(a)(ii) of the Income Tax No 58 of 1962.

<sup>171</sup> C. Fritz *"An appraisal of selected tax-enforcement powers of the South African revenue service in the South African Constitutional Context"* (UP LLD Thesis 2017) (80).

of the senior SARS official, while removing the protection afforded by the warrant and thus, allowing for possible abuse<sup>172</sup> A senior SARS official can circumvent a warrant if:

- i. *“the owner or person in control of the premises so consents in writing; or*
- ii. *if the senior SARS official on reasonable grounds is satisfied that—*
  - a. *there may be an imminent removal or destruction of relevant material likely to be found on the premises;*
  - b. *if SARS applies for a search warrant under Section 59, a search warrant will be issued; and*
  - c. *the delay in obtaining a warrant would defeat the object of the search and seizure.*<sup>173</sup>

Concerns have been raised using the fact that it is the senior SARS official’s own discretion that is the base for the warrantless search and seizure, without any judicial scrutiny.<sup>174</sup> This is due to the senior official’s discretion being subjective and a lack of objective factors that must be taken into account for such discretion to be exercised.<sup>175</sup> This is contrary to the *nemo iudex in propria causa* rule, which prevents any party being the judge of their own matter.

Even though Section 63 provides the senior SARS official with great powers to circumvent the requirement of a warrant, the search and seizure is still limited by the

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<sup>172</sup> S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (514) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>173</sup> S63 of the Tax Administration Act, No.28 of 2011.

<sup>174</sup> S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (509) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>175</sup> C. Fritz “What’s good for the goose is good for the gander – warrantless searches in terms of fiscal legislation” (2015) SALJ (840).

guidelines for the search and seizure operations, as contained in Section 61 of the Act. In addition to this, the SARS official cannot enter any premises not designated for trade without the occupant's consent and must give prior notice to the owner or occupant and inform them of the alleged non-compliance or offence committed.<sup>176</sup> If the occupant or owner are not present at the premises searched, then SARS must notify the owner or occupant as soon as possible after the search and seizure has been conducted.

In the light of the above, if the senior SARS's official is satisfied that there are reasonable grounds that the requirements in provisos (i) to (iii) of Section 63 are present, the warrantless search and seizure operation will be valid. These requirements are known as the "good cause criteria" and assist SARS in justifying the limitation of the taxpayers' rights.<sup>177</sup>

The use of "or"<sup>178</sup> indicates that if the senior SARS official fulfils any of the requirements in the alternative, the senior official may proceed with the warrantless search. This means that the senior SARS official is not required to first attempt to obtain consent in terms of Section 63(1)(a) of the Act, before proceeding to the provisions of Section 63(1)(b) of the Act.

Warrantless search and seizure operations are reserved to be used in situations outside the designated norm. This means that the provisions of Section 63 should not be employed lightly and must be based on legitimate factual information. This factual information must bring to light reasonable grounds to proceed without a warrant.

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<sup>176</sup> S 63(2); S 63(4) of the Tax Administration Act, No.28 of 2011.

<sup>177</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (17).

<sup>178</sup> S63(1)(a) of the Tax Administration Act, No.28 of 2011.

These grounds must create a scenario where SARS must act with extreme haste to ensure evidence of a tax offence or non-compliance with tax legislation has occurred, the urgency of which cannot be created by SARS.<sup>179</sup> If this occurs, then the onus is on the taxpayer to prove that the search and seizure operations were conducted unlawfully.<sup>180</sup>

*Haynes v Commissioner for Inland Revenue*<sup>181</sup> detailed what is seen as required to meet the reasonable grounds criterion. In this case, the court indicated that the objective jurisdictional facts must be looked at in each case and that the discretion must be exercised *bona fide* and rationally. Further, the discretion must not be applied in an arbitrary manner.<sup>182</sup> The *Haynes* case was an indication to SARS that warrantless search and seizure operations should not be utilised as a normal occurrence but only in exceptional circumstances.<sup>183</sup> Further commentary on the *Haynes* case indicates that, in addition to the requirements contained in the Act having to be complied with, SARS was required “*to make out a cogent case as to why it is required a search to be conducted at the relevant premises*”.<sup>184</sup>

The wording of Section 63(1)(b)(i) of the Act implies that if the warrantless search and seizure operation were to return unsuccessful as a result of the SARS officials’ discretion not being founded on certain facts, the search and seizure operation would

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<sup>179</sup> S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (513) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>180</sup> F Moosa “Analysing and Comparing Warrantless Tax Inspections and Searches” (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (20).

<sup>181</sup> *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (Tk).

<sup>182</sup> *Haynes v Commissioner for Inland Revenue* 2000 (6) BCLR 596 (Tk) (25).

<sup>183</sup> S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (523) accessed via Heinonline <https://heinonline-org.uplib.idm.oclc.org> (18 October 2020).

<sup>184</sup> G.K. Goldswain “Clean Hands – is this or similar concept used by the courts to determine taxpayer’s right to just administrative action?” (2017) South African Business Review (vol 21) (68).

remain lawful. This is the case where the facts leading to the operation were likely or probably true, if looked at objectively when the senior SARS official exercised their discretion.

In the light of the above, if the facts relied on by the senior SARS official could not have (in an objective sense) been likely to find evidence at the premises of an alleged offence or non-compliance with tax legislations, which would have been removed or destroyed had a warrant been obtained, then this would be deemed an unlawful application of the provisions of Section 63.<sup>185</sup> If this is found to be the case, it would be deemed an unlawful violation of the taxpayer's rights and would not be justifiable under the Constitution, further any information obtained during the unlawful search and seizure operation would not be admissible as evidence in any proceedings against the taxpayer. The rights of the taxpayer to challenge search and seizure operations as afforded by the Act will be expanded on in a later chapter.

## 2.5. Conclusion

Search and seizure operations are not new and have been (to an extent) infringing on taxpayer's rights long before South Africa became a democracy. Prior to the Constitution taxpayers could only rely on common law to challenge the revenue authority. The Constitution impacted tax legislation by causing positive developments in taxpayers' rights with the inclusion of guidelines and limitations in the provisions which empower SARS's search and seizure operations. Taxpayers now have far greater legal standing to challenge the revenue authority, as shown in the *Ferucci* case. The chapter ended with elaborating on the search and seizure provisions as

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<sup>185</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (21).

they stand today and the manner in which SARS must act for the search and seizure operations to be valid.

## Chapter 3: SAPS search and seizure operations and a person's legal tool of an Anton Pillar order.

### 3.1. Introduction

The powers of SARS is, of course, are not limited to the Act and Tax Acts. SARS may rely on the powers of the SAPS to undertake search and seizure operations on behalf of SARS. In part one of this chapter, the powers of the SAPS to conduct search and seizure procedures are examined with the purpose of explaining how the SAPS procedure can be utilised by SARS. It is then apt, in part two, to discuss the Anton Pillar order as a person's legal tool which is comparable to that of the SAPS and SARS legislative powers for search and seizure. Thereafter, it is examined whether Anton Pillar orders could be utilised by or against SARS. This will be to determine the strength of SARS search and seizure powers, as contained in the Act, against similar powers afforded to other persons or entities.

### 3.2. The South African Police Service's powers of search and seizure

It is necessary for the SAPS to have the powerful tool of search and seizure operations for assistance in obtaining evidence required to convict criminals of offences they have committed.<sup>186</sup> The SAPS is empowered by various statutes to search and collect various articles that fall within the scope of the statutes that empower the search and

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<sup>186</sup> V. Basdeo "The constitutional validity of search and seizure powers in South African Criminal Procedure" (2009) PER (vol 12) (2).



seizure. The focus of this section is the SAPS's general powers of search and seizure<sup>187</sup> as found in the Criminal Procedure Act (CPA).<sup>188</sup>

Section 21 of the CPA provides the starting point for most SAPS search and seizure operations.<sup>189</sup> In terms of Section 21, articles may only be seized by members of the SAPS (subject to exceptions) if authorised by a warrant.<sup>190</sup> The warrant will only be obtained if a magistrate or justice is satisfied by the information supplied under oath that there are reasonable grounds present to believe articles referred to in Section 20 of the CPA would be found on the premise or person identified in the warrant.<sup>191</sup>

Section 20 of the CPA provides a broad spectrum of articles that may be seized by the state when conducting search and seizure operations.<sup>192</sup> Documents subject to privilege, may only be seized by consent of the holder.<sup>193</sup>

As with the Act, there are various safeguards and requirements that must be met prior to the issuing of the warrant and the conducting of the search and seizure operation. The warrant must be issued by the judicial officer to ensure there is an independent and impartial officer to stand in between the public and the force of the SAPS. In doing so, the judicial officer must have due regard to the provisions of the Constitution.<sup>194</sup>

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<sup>187</sup> V. Basdeo "The constitutional validity of search and seizure powers in South African Criminal Procedure" (2009) PER (vol 12) (3).

<sup>188</sup> Criminal Procedure Act No. 51 of 1977.

<sup>189</sup> J.J. Joubert (Ed), T. Geldenhuys, J.P. Swanepoel, S.S. Terblanche and S.E. Van Der Merwe "The Criminal Procedure Handbook" Juta (11<sup>th</sup> edition) (2014) (152).

<sup>190</sup> S 21(1) of the Criminal Procedure Act No. 51 of 1977.

<sup>191</sup> S 21 (1) (a-b) of the Criminal Procedure Act No. 51 of 1977.

<sup>192</sup> S 20 of the Criminal Procedure Act No. 51 of 1977. The articles that may be seized are those; -  
 a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;  
 b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or  
 c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

<sup>193</sup> J.J. Joubert (Ed), T. Geldenhuys, J.P. Swanepoel, S.S. Terblanche and S.E. Van Der Merwe "The Criminal Procedure Handbook" Juta (11<sup>th</sup> edition) (2014) (152).

<sup>194</sup> *Park-Ross v Director of Serious Economic Offences* 1995 (2) SA 148 (C) 172.

Similarly, within the CPA and Act this is a necessary constitutional safeguard to prevent abuse of the provisions by the state officials. The reasonable grounds criteria are employed by the judicial officer to determine whether the warrant should be issued.

This test was formulated in the case of *Van der Merwe v Minister of Justice*.<sup>195</sup> The test requires that there be an “objective set of facts”<sup>196</sup> which place reasonable belief in the mind of the issuing officer, in the absence thereof, the grounds will not be reasonable but rather vague.<sup>197</sup>

A mere affidavit of a Police official utilising hearsay evidence obtained from an informant is insufficient and would be too low a bar to be justifiable. The hearsay evidence must be placed before an independent judicial officer to be scrutinised.<sup>198</sup>

The court found in the *Van der Merwe* case that the word of a police officer cannot replace a decision from the judicial authority, as the foundation of reasonable grounds must be objective and reviewable.<sup>199</sup>

The warrant itself must only be issued when there is a clear indication of the reasons for the search and the seizure of the articles sought.<sup>200</sup> A decision to issue a warrant must define the reason for the warrant, the alleged offence and with sufficient particularity identify the articles to be seized. A judicial officer issuing a warrant in absence of the above, has not applied their mind sufficiently to justify the invasion of

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<sup>195</sup> *Van der Merwe v Minister of Justice* 1995 (2) SACR 471 (SCC) 29.

<sup>196</sup> V. Basdeo “*The constitutional validity of search and seizure powers in South African Criminal Procedure*” (2009) PER (vol 12) (9).

<sup>197</sup> V. Basdeo “*The constitutional validity of search and seizure powers in South African Criminal Procedure*” (2009) PER (vol 12) (9).

<sup>198</sup> V. Basdeo “*The constitutional perspective of police powers of search and seizure in the criminal justice system*” (UNISA LLM Thesis 2009) (74-75).

<sup>199</sup> *Van der Merwe v Minister of Justice* 1995 (2) SACR 471 (SCC) 89.

<sup>200</sup> J.J. Joubert (Ed), T. Geldenhuys, J.P. Swanepoel, S.S. Terblanche and S.E. Van Der Merwe “*The Criminal Procedure Handbook*” Juta (11<sup>th</sup> edition) (2014) (153-154). In exercising this discretion, the judicial authority will take all relevant facts into account and apply its discretion in a manner which is regular, reasonable and in accordance with the law.

liberties of the parties affected by the warrant.<sup>201</sup> On review, the warrant will be held to be invalid and void.

The courts have long accepted that the authority given by a warrant makes substantial “*in roads upon the rights that have been always protected at common law – amongst which are the rights to privacy and property and personal integrity*”.<sup>202</sup> Due to this, the judiciary has “*always construed statutes that authorise the issue of warrants strictly in favour of the minimum invasion of such rights*”.<sup>203</sup>

It is now accepted that the common law rights that protected the public against unnecessary search and seizure operations are incorporated in the Constitution.<sup>204</sup> If one wishes to challenge a warrant issued for a search and seizure operation, they need to scrutinise the information provided by the SAPS officer on two bases.<sup>205</sup> Firstly, whether the information disclosed reveals sufficient evidence to create reasonable suspicion in the mind of the issuing officer that an offence has or will be committed.<sup>206</sup> Secondly, one must scrutinise whether the powers authorised fall within the ambit of the provisions that empowered the search and seizure operation.<sup>207</sup>

If it is found that the SAPS officers acted beyond the scope of the empowering provision, the warrant would become “overboard”<sup>208</sup> and deemed invalid. This shows that with search and seizure operations in general, there are various safeguards in place to protect the public’s rights from excessive invasion into their privacy. Further safeguards include that the warrant must be executed during the day (unless

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<sup>201</sup> *Smith, Tabata & Van Heerden V Minister of Law and Order and Another* [1989] 1 All SA 103 (E) (9).

<sup>202</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 7.

<sup>203</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 7.

<sup>204</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 8.

<sup>205</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 8.

<sup>206</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 8.

<sup>207</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 8.

<sup>208</sup> *Polonyfis v Minister of Police and Others* 2012 SACR 57 (SCA) 8.

specifically authorised to execute at night by the issuing judicial officer);<sup>209</sup> and a copy of the warrant must be provided to the subjects of the search and seizure operation.<sup>210</sup>

The SAPS are empowered, in certain circumstances, to perform search and seizure operations without first obtaining a warrant. This is seen as a necessary evil to allow the SAPS to perform its criminal investigation duties where the circumstances call for immediate action by the SAPS, failing which the purpose of the search and seizure operation would be defeated.<sup>211</sup>

Section 22 of the CPA provides the circumstances that must be met before a police official may warrantlessly search any person or premises, to seize any article referred to in section 20 of the CPA. These are either that the person consents to the search and seizure being conducted,<sup>212</sup> or where there are reasonable grounds to believe that a warrant referred to in Section 21 of the CPA would be issued, but the delay in issuing the warrant would “defeat the object of the search”.<sup>213</sup>

Section 20 must be read with Section 22, as it provides the scope within which the police official must act and which articles may be seized.<sup>214</sup> If the consent is properly obtained there is lesser chance the search and seizure operation itself will be reviewed in court. However, proper consent is not as simple as it seems for search and seizure

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<sup>209</sup> S 21(3) of the Criminal Procedure Act No. 51 of 1977.

<sup>210</sup> S 21(4) of the Criminal Procedure Act No. 51 of 1977.

<sup>211</sup> J.J. Joubert (Ed), T. Geldenhuys, J.P. Swanepoel, S.S. Terblanche and S.E. Van Der Merwe “*The Criminal Procedure Handbook*” Juta (11<sup>th</sup> edition) (2014) (156).

<sup>212</sup> S 22(1)(a) of the Criminal Procedure Act No. 51 of 1977.

<sup>213</sup> S 22(1)(b) of the Criminal Procedure Act No. 51 of 1977.

<sup>214</sup> A. Kruger “*Hiemstra’s Criminal Procedure – Circumstances in which article may be seized without search warrant*” (2-12) (2020) accessed via Lexis Nexis <https://www.mylexisnexis.co.za> (07 July 2020).

operations. For consent to be seen as sufficient for a warrantless search and seizure operation it must be given voluntarily and be valid.<sup>215</sup>

The case of *Ndlovu v Minister of Police*<sup>216</sup> indicated that consent must be given freely and voluntarily before it would be deemed valid. In this matter, Mr. Ndlovu complied with the police officials request to hand over a vehicle suspected of being stolen which was subsequently impounded. Mr. Ndlovu did the hand over under protest and shortly after doing so sought legal assistance for the return of the vehicle, the court held that there was no valid consent in terms of section 22(a) of the CPA present.<sup>217</sup>

This principle was confirmed in the case of *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another*.<sup>218</sup> Third party individuals alleged that Jin Sweet was selling counterfeit cigarettes. The SAPS conducted a warrantless search and seizure operation, where the SAPS alleged to have obtained consent of the store owner Mr. Ju. The court rejected this averment, as Mr. Ju immediately contacted his attorney for the return of the seized goods. The attorney asserted that Mr. Ju did not understand the police officials and merely complied due to police intimidation. The court found that where a person is complacent in allowing the search and seizure operation due to a lack of understanding, consent is not present.<sup>219</sup>

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<sup>215</sup> For consent to be valid, the consenting subject must be informed of the reason for the search and must be authorised or entitled to give their consent. The case of *S v Motloutsi* 1996 1 SACR 78 (C) demonstrates that when an article is handed over by consent to a police official by a person lacking the right or authority to provide such consent, the seizure is invalid and the article would be required to be returned to its rightful owner or holder.

<sup>216</sup> *Ndlovu v Minister of Police, Transkei, and Others* 1993 (2) SA 91 (Tk) (2).

<sup>217</sup> *Ndlovu v Minister of Police, Transkei, and Others* 1993 (2) SA 91 (Tk) (2).

<sup>218</sup> *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another* (UM228/2019) [2020] ZANWHC 16.

<sup>219</sup> *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another* (UM228/2019) [2020] ZANWHC 16 (10).

One can assume in most instances that a criminal will not consent to members of the police force entering, searching and seizing property when they know there is a possible link between them and a criminal offence. This is without a warrant first being obtained to compel them. Fortunately for the state, this does not stop police officials if certain requirements are met.

Section 22(b)<sup>220</sup> provides these requirements. Should a police official wish to conduct a warrantless search and seizure operation and has reasonable grounds to believe a warrant would be issued,<sup>221</sup> and that if they did not act with sufficient haste the relevant articles would be removed, destroyed, or tampered with, and thus defeat the object of the search and seizure operation itself, then police officials may conduct a warrantless search and seizure operation.<sup>222</sup>

The facts that the police official utilises to perform the search and seizure operation must be objectively justifiable.<sup>223</sup> These facts must be present at the time of the operation,<sup>224</sup> and it is the police official who has the onus of proving that the reasonable grounds existed if the search and seizure operation is challenged in court.<sup>225</sup> If there are not reasonably objective factors present at the time of the search and seizure operation being conducted under Section 22(b) the operation itself is invalid and the evidence cannot be utilised due to the expunged rule under Section 35(5) of the

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<sup>220</sup> S22(b) of the Criminal Procedure Act No. 51 of 1977.

<sup>221</sup> S22(b)(i) of the Criminal Procedure Act No. 51 of 1977.

<sup>222</sup> S22(b)(ii) of the Criminal Procedure Act No. 51 of 1977. A police official performing a warrantless search and seizure operation, without consent must show that the warrant would have been issued and time is a factor to the extent that if obtained the operation would invariably be futile. V. Basdeo "The constitutional perspective of police powers of search and seizure in the criminal justice system" (UNISA LLM Thesis 2009) (109).

<sup>223</sup> J.J. Joubert (Ed), T. Geldenhuys, J.P. Swanepoel, S.S. Terblanche and S.E. Van Der Merwe "The Criminal Procedure Handbook" Juta (11<sup>th</sup> edition) (2014) (156).

<sup>224</sup> A. Kruger "Hiemstra's Criminal Procedure – Circumstances in which article may be seized without search warrant" (2-12) (2020) accessed via Lexis Nexis <https://www.mylexisnexis.co.za> (07 July 2020).

<sup>225</sup> V. Basdeo "The constitutional perspective of police powers of search and seizure in the criminal justice system" (UNISA LLM Thesis 2009) (109).

Constitution, as the right to privacy and others would invariably be unjustifiably infringed.<sup>226</sup>

Section 35(5) dictates that evidence cannot be used against an accused if it was obtained by unlawfully infringing the rights of the accused.<sup>227</sup> In the case of *S v Mayekiso en andere*,<sup>228</sup> it was held that evidence obtained is inadmissible when there were no reasonable grounds present at the time of the search and seizure operation for the police official to believe that a warrant would be obtained.<sup>229</sup>

In the *Jin Sweets* case,<sup>230</sup> the court had to determine the validity of a warrantless search and seizure operation. The court looked at the police officials need to perform the operation with such haste that the warrant could not be obtained as required by section 22. In *Jin Sweets*, the SAPS alleged the cigarettes could easily have been removed and thus, the object of the search and seizure operation defeated. The court held that nothing precluded the police from guarding the store as they greatly outnumbered the occupants.<sup>231</sup>

The court went further relying of the case of *Ideal Trading 458 CC v Minister of Safety and Security N.O and Others*<sup>232</sup> as precedent. The court stated in respect of “haste” that-

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<sup>226</sup> D. Ally “*Determining The Effect (The Social Costs) of Exclusion Under The South African Exclusionary Rule: Should Factual Guilt Tilt The Scales In Favour Of The Admission Of Unconstitutionally Obtained Evidence?*” (2012) PER (15) – DOI <http://dx.doi.org/10.4314/pej.v15i5.13> (496-497).

<sup>227</sup> S35(5) of the Constitution of the Republic of South Africa, 1996.

<sup>228</sup> *S v Mayekiso en andere* [1996] 3 All SA 121 (C).

<sup>229</sup> A. Kruger “*Hiemstra’s Criminal Procedure – Circumstances in which article may be seized without search warrant*” (2-12) (2020) accessed via Lexis Nexis <https://www.mylexisnexis.co.za> (07 July 2020).

<sup>230</sup> *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another* (UM228/2019) [2020] ZANWHC 16.

<sup>231</sup> *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another* (UM228/2019) [2020] ZANWHC 16 (10-11).

<sup>232</sup> *Ideal Trading 458 CC v Minister of Safety and Security N.O and Others* (41422/2016) [2016] ZAGPPHC 546.

*“The police did not seem to have been pressured for time to conduct the search [...] you cannot talk about defeating the object of the search when the police had the information at their disposal before the search... Failure to apply for a search and seizure warrant in the instant case was fatal to the lawfulness of the search.”*

Relying on this precedent the court held that due to the police failing to obtain the warrant the search and seizure operation was invalid and unlawful, as there was no evidence to support the requirement of haste.<sup>233</sup>

In the recent case of *Nombewu v Minister of Police, RSA and Others*,<sup>234</sup> the police with the assistance of Cartrack performed, without consent, a warrantless search and seizure operation where they located and impounded a vehicle. This operation was based on evidence that the tracking device in the vehicle was from a different stolen vehicle and the engine number and body also belonged to different vehicles.<sup>235</sup> The court looked at whether locating the vehicle through a stolen vehicles tracking device amounted to sufficient reasonable grounds being present at the time of the seizure to justify the infringement of the right to privacy caused by the warrantless and without consent search and seizure operation.<sup>236</sup> The court stated that there was a *“constitutional duty to critically regard search and seizure to ensure it is lawfully sanctioned, reasonable and justifiable.”*<sup>237</sup> The court held the evidence of the fitted stolen tracker device itself was acceptable when looked at objectively to cause sufficient reasonable belief of evidence of the commission of an offence or suspected

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<sup>233</sup> *Jin Sweet Supermarket CC v Minister of SAPS N.O and Another* (UM228/2019) [2020] ZANWHC 16 (12).

<sup>234</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7.

<sup>235</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7 (4).

<sup>236</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7 (9).

<sup>237</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7 (9).



commission of an offence.<sup>238</sup> Due to this the search and seizure of the vehicle was deemed lawful.<sup>239</sup>

An interesting judgment was handed down by the Supreme Court of Appeal, in the joined matters of *Pakule and Tefani v Minister of Safety and Security*.<sup>240</sup> In both *Pakule* and *Tefani*, the court held that where a search and seizure operation was conducted and articles were seized on grounds that were initially seen as unreasonable, but after the seizure the police discover reasonable grounds of an offence are in fact present during the search the seizure, the operation will be deemed lawful and valid.<sup>241</sup>

The courts acknowledge these operations infringe rights when they are being conducted; however, these infringements are deemed justifiable in terms of Section 36 of the Constitution. This is because these operations serve important roles in obtaining evidence of criminal offences for the SAPS and evidence of tax liability or tax offence for SARS. I now consider Anton Piller orders as a legal tool available to the public that is comparable to the search and seizure powers described above.

### 3.3. Anton Piller orders: the legal tool a person can utilize to compete with SARS search and seizure operations

There is a legal tool at a person's (juristic or natural) disposal, to without notice, conduct a search and preservation operation for evidence held by a party against whom they intend to institute legal proceedings. This is only available when there is a real and well-founded fear or apprehension that vital evidence would be destroyed,

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<sup>238</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7 (10).

<sup>239</sup> *Nombewu v Minister of Police, RSA and Others* (254/2019) [2019] ZAECMHC 7 (10).

<sup>240</sup> *Pakule v Minister of Safety and Security & another; Tefani v Minister of Safety and Security & another* (2011) JOL 27362.

<sup>241</sup> *Pakule v Minister of Safety and Security & another; Tefani v Minister of Safety and Security & another* (2011) JOL 27362 (5).

removed or hidden if normal legal process was followed.<sup>242</sup> Anton Piller orders are for the purpose of preserving identified evidence that is knowingly in the possession of the respondent, where the applicant has already established a cause of action and where the evidence would become unobtainable otherwise.<sup>243</sup> Anton Piller orders have stricter requirements and a higher bar that must be overcome in order to have the Anton Piller order upheld on the return date, as opposed to the requirements for a warrant in terms of the Act to be upheld if reviewed. The higher bar is due to the rigidity the courts impose for the strict compliance necessary to execute the interim order and the operation itself and further, with proving elements of dishonest conduct. This will become apparent as the requirements are dealt with below.

Anton Piller orders were initially developed in British law and became a well-established procedural remedy in the United Kingdom by the late 1970s.<sup>244</sup> This procedural remedy draws its name from the case of *Anton Piller KG v Manufacturing Processes Ltd & Others*,<sup>245</sup> where the nature of the Anton Piller order was determined as permitting an applicant, to without notice search a premises for crucial evidence, to then remove and preserve said evidence to be used in the applicant's legal proceedings that will follow thereafter.<sup>246</sup>

This could be done only where the party desiring to institute legal proceedings had already established a *prima facie* cause of action to pursue, the alleged wrongdoing party had vital evidence needed by the applicant to prove its case in its possession

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<sup>242</sup> M. Dendy "Applications for Anton Piller Orders" De Rebus (2003) issue 426 (26).

<sup>243</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & Others* (1189/17) [2018] ZASCA 189 (12).

<sup>244</sup> O.H. Dean "Anton Piller Orders – Recognition in South Africa" *Businessman' Law* (1986) (vol 15) (186).

<sup>245</sup> *Anton Piller KG v Manufacturing Processes Ltd & Others* [1976] 1 All ER 779 (CA).

<sup>246</sup> D.E van Loggerenberg & E Bertelsmann *Erasmus Superior Court Practice* (2019) (D8-1).

and there was a fear that the evidence would become unobtainable if the search and preservation operation was not conducted.<sup>247</sup>

Anton Piller orders are more commonly involved in actions pursuant to intellectual property infringement, unlawful competition practices, police torture or professional negligence.<sup>248</sup>

South African Anton Piller orders differed from its British origins in that the order is not final. In South Africa, the Anton Piller order is an interim relief until the matter could be heard on a Rule *Nisi* return date. On the return date, the respondent would be given opportunity to argue for the release of the seized property, while the applicant would be required to substantiate the validity of the Anton Piller order.<sup>249</sup> Once the interim order was granted *ex parte* the deputy sheriff along with a representative for the applicant determined by the court would be entitled to search and remove all material evidence from the respondent's premises for preservation until the order was finalised or set aside.<sup>250</sup>

Anton Piller orders were subject to criticism during the early 1980s, as applicants would abuse the legal tool to go on "fishing expeditions" by going through competitors confidential documents with the desire to possibly find incriminating evidence or possible secrets.<sup>251</sup> Coetzee J in the case of *Economic Data Processing (Pty) Ltd and Others v Pentreath*<sup>252</sup> sought the eradication of the Anton Piller order from South

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<sup>247</sup> O.H. Dean "Anton Piller Orders – Recognition in South Africa" (1986) *Businessman Law* (vol 15) (186).

<sup>248</sup> M. Dendy "Applications for Anton Piller Orders" (2003) *De Rebus* issue 426 (26).

<sup>249</sup> O.H. Dean "Anton Piller Orders – Recognition in South Africa" (1986) *Businessman Law* (vol 15) (186).

<sup>250</sup> O.H. Dean "Anton Piller Orders – Recognition in South Africa" (1986) *Businessman Law* (vol 15) (186).

<sup>251</sup> M. Dendy "Applications for Anton Piller Orders" (2003) *De Rebus* issue 426 (26).

<sup>252</sup> *Economic Data Processing (Pty) Ltd and Others v Pentreath* 1984 (2) SA 605 (W).

African domestic law, as it was never found in South African common law<sup>253</sup> and it invaded the respondent's premises, while never requiring that the applicant institute actual proceedings.<sup>254</sup>

Anton Piller orders were similarly criticised by Van Dijkhorst J in the *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* case,<sup>255</sup> by stating that South African courts do not have the jurisdiction to grant an order for the removal of property of another for evidence, where no right of the applicant exists.<sup>256</sup>

The above orders tempered the granting of Anton Piller orders until the *Universal City Studios Inc & others v Network Video (Pty) Ltd*<sup>257</sup> case where Corbett JA changed South African court's perceptions on Anton Piller orders.

With reference to *Cerebos*, Corbett JA agreed that the courts do not have the "*inherent power to create substantive law*";<sup>258</sup> however, it was held that the Supreme Court does, in fact, hold "*an inherent reservoir of power to regulate its procedures in the interests of proper administration of justice.*"<sup>259</sup> Corbett AJ went further, by stating that the court cannot adopt a standoff attitude where there are no alternatives to assist an applicant, as this would show a "defect in our system of justice".<sup>260</sup> This was based on cases where the applicant can show the court they have a *prima facie* cause of action, where there is a desire of the applicant to institute proceedings based on such cause of action, the respondent holds "vital"<sup>261</sup> evidence, that is essential to the applicant's

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<sup>253</sup> *Economic Data Processing (Pty) Ltd and Others v Pentreath* 1984 (2) SA 605 (W) (616).

<sup>254</sup> *Economic Data Processing (Pty) Ltd and Others v Pentreath* 1984 (2) SA 605 (W)(606-607).

<sup>255</sup> *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 140 (T).

<sup>256</sup> *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 140 (T) (173).

<sup>257</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A).

<sup>258</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205).

<sup>259</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205).

<sup>260</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205).

<sup>261</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205(1)).

claim and the applicant fears the evidence will be “spirited away”<sup>262</sup> if normal proceedings were followed. If the applicant proves the above an Anton Piller order may be granted. The court did acknowledge the invasive nature of an Anton Piller order by providing that safeguards must be put in place and that the safeguards would be determined by the judge hearing the matter.

Corbett AJ was of the view that most of the prejudice suffered by the respondent due to the *ex parte* application procedure was “obviated”<sup>263</sup> by the Rule *Nisi* return date allowing the respondent an opportunity to have the order set aside and the seized articles returned.<sup>264</sup>

In the case of *Dabelstein and Others v Hildebrant and Others*,<sup>265</sup> it was confirmed that the courts do have inherent power to grant such orders if it is in the interest of justice.<sup>266</sup> This would require applying a proportionality test and ensure there are sufficient safeguards present.<sup>267</sup> If this is so the Anton Piller order will be seen as a justifiable limitation of the respondent’s rights, as allowed by the limitation clause found in the Constitution.<sup>268</sup>

Anton Piller orders have become firmly established in South African civil procedure, as part of the law of general application, which grants procedural relief to preserve evidence required for pursuing other substantive relief.<sup>269</sup>

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<sup>262</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205(1)).

<sup>263</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205(1)).

<sup>264</sup> *Universal City Studios Inc & others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) (205(1)).

<sup>265</sup> *Dabelstein and Others v Hildebrant and Others* 1996 (3) SA 42 (C).

<sup>266</sup> *Dabelstein and Others v Hildebrant and Others* 1996 (3) SA 42 (C) (69 B-C).

<sup>267</sup> *Dabelstein and Others v Hildebrant and Others* 1996 (3) SA 42 (C) (66 C-E).

<sup>268</sup> *Dabelstein and Others v Hildebrant and Others* 1996 (3) SA 42 (C) (61 H-I).

<sup>269</sup> D.E van Loggerenberg & E Bertelsmann *Erasmus Superior Court Practice* (2019) (D8-1).

The case of *Non-Detonating Solutions (Pty) Ltd v Durie* shows how the requirements for an Anton Piller order have been cemented in our law and must be met before the order may be obtained. In this case, Non-Detonating Solutions sought an Anton Piller order as they had, through information provided by a manufacturer, been informed that a competitor was possibly attempting to develop and manufacture a product which would infringe their new copyrighted product. After the operation was conducted the order was set aside by the High Court due to the scope of the operation being “too wide”,<sup>270</sup> the matter was referred to the Supreme Court of Appeal. Mbha JA re-iterated the requirements of an Anton Piller order as found in the *Universal City Studios* case, and that the purpose of the order was to preserve crucial evidence needed as proof for the applicant’s cause of action, which the applicant intends to pursue.<sup>271</sup> In expanding on the requirement that the applicant must have a *prima facie* cause of action, the court found that the applicant is merely required to show that “evidence, which if accepted will establish a cause of action”.<sup>272</sup>

This appears to set a low evidential bar. This requirement will be met even when the applicant might not have a cause of action which can be pursued, and further only where there is no cause of action or where the cause of action cannot succeed, this requirement would not be met.<sup>273</sup> *In casu*, the court found that there was sufficient evidence before it that the applicant had a *prima facie* cause of action against the respondent based on possible unlawful competition and infringement of its copyrighted property.<sup>274</sup>

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<sup>270</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (13).

<sup>271</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (18-19).

<sup>272</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (21).

<sup>273</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (21).

<sup>274</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (22-26).

For the requirement of a fear that the evidence would be “spirited away” the court found there must be a reasonable existing fear that the crucial evidence would be concealed or destroyed if ordinary procedures or discovery was followed.<sup>275</sup> This would be established where the respondent has shown elements of dishonest conduct.<sup>276</sup> This was found present *in casu*, as the applicant had provided sufficient evidence for the court to view the respondent’s conduct as being duplicitous.<sup>277</sup>

The requirement of adequately specifying the sought materials was found by the High Court to not have been met. The Supreme Court of Appeal held that it had become trite that the applicant must, prior to having the order granted, show that vital evidence to the applicant’s cause of action (it intends to pursue) is in the possession of the respondent and that strict compliance is needed. The court accepted that it was essential to the legality of the operation, as it contained “*potentially draconian and extremely invasive consequences for the respondents*”.<sup>278</sup> The court went further, stating that it is required to apply a proportionality test to weigh up the importance of the evidence to the applicant’s case against the respondent’s constitutional right to privacy.<sup>279</sup> Thus, this requirement will not be met if the order provides for a “blanket search for unspecified documents.”<sup>280</sup>

The court, *in casu*, accepted the test from the *Roamer Watch Co SA and another v African Textile Distributors*<sup>281</sup> case for the identification of documents for an Anton Piller order was that:

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<sup>275</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (27).

<sup>276</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (27).

<sup>277</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (27).

<sup>278</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (30).

<sup>279</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (30).

<sup>280</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (30).

<sup>281</sup> *Roamer Watch Company of SA and others v African Textile Distributors* (1980) (2) SA 254 (W) (272 G –H).

*“there must be clear evidence that the respondent has such incriminating documents, information, articles and the like in possession, or that, at least, there are good grounds for believe that this is the case...the applicant should satisfy the court that he has, as best the subject-matter in dispute permits him to do, identified the subject matter in respect of which he seeks attachment and/or removal, and that the terms of the order which he seeks have been delimited appropriately and are not so general and wide as to afford him access to documents, information and articles to which his evidence has not shown that he is entitled.”<sup>282</sup>*

The court held that the test had been met, as there was no doubt in what was required to be search for and preserved, as the articles were sufficiently defined and limited.<sup>283</sup> In finding that the requirements for the Anton Piller order had in fact been met, the SCA overturned the High Court’s decision to set aside the Anton Piller order.

In the recent case of *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others*,<sup>284</sup> the above requirements and scope were accepted and applied to a scenario where Viziya Corporation provided software services to Collaborit Holdings (Pty) Ltd, who after the expiry of the service agreement was alleged to have utilised confidential information, while the contract was in effect, to develop their own rival software.

For the requirement of *prima facie* cause of action, the court held that it is a “low hurdle” to cross.<sup>285</sup> The court ruled that it cannot permit blanket searches where the evidence

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<sup>282</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (36).

<sup>283</sup> *Non-Detonating Solutions (Pty) Ltd v Durie* (2015) ZASCA 154 (40).

<sup>284</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189.

<sup>285</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189 (28).



or documentation has not been identified for specified. This forms an important part of the test for balancing the rights of the applicant and respondent, where there is a possibility these specified documents could be lost or concealed.<sup>286</sup> The court held that the execution of the Anton Piller order by Viziya Corporation merely amounted to a “fishing expedition”.<sup>287</sup> This was based on the court finding that the order Viziya Corporation had obtain was different to the normal underlying premise of an Anton Piller order, being that evidence is sought to be preserved and not that evidence is sought.<sup>288</sup> The court emphasised that there must be an attempt by the applicant to identify the documents and information sought, and where an order is sought for broad category of evidence it must be justified.<sup>289</sup>

### 3.4. Anton Piller orders in the context of SARS

To date there has been no reported instances of SARS utilising Anton Piller order operations. Anton Piller orders are by their very nature unpredictable and varying. Each Anton Piller application depends on the facts of the specific matter, the scope of the order the presiding officer is willing to grant and the wording of the draft order drafted by the applicant’s legal representation.

The wording of the draft order is particularly important, if an applicant goes even slightly beyond the scope of the wording of the order it can be grounds for the order to be set aside, this is done to restrain the applicant to not abuse the great power afforded by an Anton Piller order, without fear of repercussion.<sup>290</sup>

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<sup>286</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189 (32).

<sup>287</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189 (37).

<sup>288</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189 (37).

<sup>289</sup> *Viziya Corporation v Collaborit Holdings (Pty) Ltd & others* [2018] ZASCA 189 (38).

<sup>290</sup> *Retail Apparel (Pty) Ltd v Ensemble Trading 2243 CC and others* 2001 (4) SA 228 (10).

Non-compliance with the specific wording of the order in its execution may even result in punitive costs.<sup>291</sup> In the case of *Corruseal Corrugated (Gauteng) (Pty) Ltd v Van Niekerk and Another*,<sup>292</sup> the court showed displeasure in the operation being conducted by more personnel than permitted in the draft order itself and was one of the factors which lead the court to set aside the Anton Piller order.<sup>293</sup>

The scope of search and seizure operations afforded to SARS under the Act is far broader, as the SARS officials can seize anything foreseeably relevant to the administration of a tax act.<sup>294</sup> The scope of an Anton Piller order operations has been seen as extremely narrow, as opposed to a search operation being seen as a trawl net.<sup>295</sup>

Anton Piller order operations require strict limitation to specific documents<sup>296</sup> to preserve evidence being essential to an intended action.<sup>297</sup> It is essential to the legality of Anton Piller orders.<sup>298</sup> This is due to the requirement that the applicant must have a specific action that is intended to be pursued, the order cannot permit preserving more evidence than is vital for the intended action.<sup>299</sup> If it is found that there is any obscurity in the order itself it will be deemed fatally flawed.<sup>300</sup> Anton Piller operations have no room to act beyond the order for sake of practicality or convince, this will again be

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<sup>291</sup> D.E van Loggerenberg & E Bertelsmann *Erasmus Superior Court Practice* (2019) (D8-6).

<sup>292</sup> *Corruseal Corrugated (Gauteng) (Pty) Ltd v Van Niekerk and Another* (J1270/08) [2009] ZALC 51 (31).

<sup>293</sup> *Corruseal Corrugated (Gauteng) (Pty) Ltd v Van Niekerk and Another* (J1270/08) [2009] ZALC 51 (31-37).

<sup>294</sup> F Moosa "Analysing and Comparing Warrantless Tax Inspections and Searches" (2019) PER (22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5705> (8).

<sup>295</sup> *Web Call (Pty) Ltd v Botha* (A 50/2014) [2014] ZAWCHC 179 (13).

<sup>296</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (211).

<sup>297</sup> *Web Call (Pty) Ltd v Botha* (A 50/2014) [2014] ZAWCHC 179 (13).

<sup>298</sup> *Web Call (Pty) Ltd v Botha* (A 50/2014) [2014] ZAWCHC 179 (13).

<sup>299</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (212).

<sup>300</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (209).

grounds for the setting aside of the Anton Piller order, as was in the case of *Web Call (Pty) Ltd v Botha*.<sup>301</sup>

In *Web Call (Pty) Ltd v Botha*, an IT technician suggested a more practical manner to perform the operation after the order was granted, the court held that the parties executing the order have no discretion to deviate from the wording of the order, if the applicant desires to do so the court must be approached to vary the order itself.<sup>302</sup>

The manner in which the search and seizure operations conducted by SARS are prescribed under the provisions of the Act<sup>303</sup> and do not vary as with Anton Piller operations, thus SARS officials will have greater certainty in what they can and cannot do during the execution of the operation itself, creating a lesser chance that the warrant would be set aside due to the execution of the operation.

The courts have also formulated the opinion that the applicant and their legal representative should not be immediately entitled to peruse the evidence removed for preservation in terms of an Anton Piller order.<sup>304</sup> It has been found that the applicant does not have the entitlement to study the information, but merely to ensure the evidence is adequately preserved.<sup>305</sup>

The supervising attorney is required to provide an independent account of the execution of the Anton Piller order, failing to do so may result in the setting aside of

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<sup>301</sup> *Web Call (Pty) Ltd v Botha* (A 50/2014) [2014] ZAWCHC 179.

<sup>302</sup> *Web Call (Pty) Ltd v Botha* (A 50/2014) [2014] ZAWCHC 179 (21).

<sup>303</sup> S61 of the Tax Administration Act, No. 28 of 2011.

<sup>304</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (214). This was confirmed by the SCA which held that for the validity of an Anton Piller order, they require safeguards in the form of an independent supervising attorney to perform the operation in accordance with the order granted, and that the applicant and the applicant's legal representatives do not form part of the operation itself, see *SA Memory Institute v Hansen* 19 2004 2 SA 630 (3).

<sup>305</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (214).

the Anton Piller order.<sup>306</sup> In *Hall and Another v Heyns and Others*, the court raised the point that the Anton Piller operation was not an early form of discovery before the applicant institutes the intended action.<sup>307</sup> In the light of the above, the applicant will not be entitled to immediately peruse the information contained in the preserved evidence. A SARS official has nothing to prevent the immediate perusal of the seized documents, this additional time could be the difference between success and failure, in convicting a tax offender of a tax offence or ensuring tax funds are seized by SARS.

### 3.5. Anton Piller orders in the context of a taxpayer

To date there also has been no reported cases of a taxpayer instituting Anton Piller proceedings against SARS. There is a valid reasoning for this: SARS is a state entity obligated under the Act to furnish the information of a taxpayer to the taxpayer upon request.<sup>308</sup> A taxpayer is entitled to the information held by SARS that relates to the taxpayer.<sup>309</sup> The information SARS officers utilises to obtain a warrant and justify the search and seizure operation, must be presented to the court on review of the warrant, otherwise the warrant would be set aside.<sup>310</sup>

I am of the opinion that a taxpayer would not intend to institute proceedings against SARS, where SARS has not taken tax compliance or related steps against the taxpayer. Taking this into account, it would theoretically be near impossible to prove to the court when, either applying for the Anton Piller order or justifying it on the return date, that SARS has vital evidence in its possession required for the taxpayer to institute proceedings against SARS, and that SARS has acted in a dishonest manner

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<sup>306</sup> D.E van Loggerenberg & E Bertelsmann *Erasmus Superior Court Practice* (2019) (D8-8).

<sup>307</sup> *Hall and Another v Heyns and Others* [1991] 3 All SA 204 (C) (214).

<sup>308</sup> S73 of the Tax Administration Act, No.28 of 2011.

<sup>309</sup> S73(1) of the Tax Administration Act, No.28 of 2011.

<sup>310</sup> S60 of the Tax Administration Act, No.28 of 2011.

to justify the inference that the evidence would be spirited away if the matter were to proceed in the ordinary course.

### 3.6. Conclusion

Some similarities exist between the search and seizure in terms of the Act, a SAPS search and seizure, and an Anton Piller procedure. With reference to SARS search and seizure operations compared to the SAPS's, both in the normal course require that a warrant must be obtained *ex parte* by an impartial judicial officer prior to the operation being conducted. To obtain the warrant both operations require the official applying for the warrant must satisfy the judicial officer with information supplied under oath, that there are substantiated reasonable grounds present that the operation is required.

For SARS they must show reasonable grounds of a failure to comply with a tax obligation or a tax offence has been committed, which has been identified. For SAPS they must show reasonable grounds of a criminal offence has or will be committed and must specify which offence or possible offence has or will be committed.

SAPS are only empowered to seize articles as defined in Section 20,<sup>311</sup> while SARS are not limited in what they may seize if it is found to be for the administration of a tax act. This affords SARS slightly greater powers than SAPS as they are entitled to seize a greater scope of possible evidence, which makes the operation itself harder to take on review.

Both SARS and the SAPS may circumvent the requirement as a last resort if the officer who intends to carry out the search and seizure operation has reasonable grounds

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<sup>311</sup> S 20 of the Criminal Procedure Act No. 51 of 1977.

present that a warrant would be issued but if the officer delayed the operation the purpose of the operation itself would be defeated or if they obtain consent. This shows that both government agents of the SAPS and SARS are similarly empowered and limited when applying for and conducting search and seizure operations. Due to this, SARS may have the SAPS assist in the conducting of tax search and seizure operations, but SARS officials would not hand over the operation to SAPS members as to ensure that the operation is conducted, and evidence seized falls within the empowering provisions.

If one compares Anton Piller orders to SARS search and seizure operations one can see there are also similarities. They both are normally obtained *ex parte* and allow the parties to remove evidence. The Anton Piller order on the one hand has the purpose of preserving evidence required for a cause of action the applicant intends to pursue, while as SARS operations are performed to obtain evidence as proof of a non-compliance or offence by a taxpayer. For Anton Piller orders the applicant must prove that there is a *prima facie* cause of action it intends to pursue, that the respondent has evidence which is crucial to the applicant's case and there is a real and well-founded fear that if the applicant does not proceed by way of Anton Piller order that the evidence will be destroyed or removed.

As a starting point for both operations, the Anton Piller order requirement of a cause of action the applicant intends to pursue is a lower benchmark than the reasonable grounds criterion required by SARS. Anton Piller orders subsequent requirements and limitations provide a harder testing level than those for a SARS search and seizure operation with a warrant.

SARS is required to simply identify the person, premises and the alleged offence, but does not have to specify the evidence sought. Anton Piller orders require that the material is adequately identified, and the scope limited to what can be evidence vital to the applicant's cause of action, failing which the Anton Piller order will be invalidated. In addition to this the applicant must show that the respondent has shown elements of dishonest conduct to justify the invasiveness into the privacy of the respondent. These requirements cause the Anton Piller order to have a more difficult threshold to meet on the return date, than if a SAPS or SARS operation were to be taken on review. It is for these reasons that it would be unlikely that SARS would utilise Anton Piller orders against a taxpayer.

## Chapter 4: Taxpayer's rights in South Africa and the Davis tax committee report on tax administration.

### 4.1. Introduction

Previous chapters have discussed and shown the scope and extent that SARS, SAPS, and a person in his personal capacity may lawfully conduct search and seizure operations. This showed that the courts do allow the infringement of rights where there is a greater objective to be achieved. This chapter discusses and expands on various rights that are infringed by search and seizure operations. In doing so, it shows the extent to which these rights must be upheld before they can be justifiably infringed by search and seizure operations.

Most modern constitutions contain some fundamental rights, the incorporation of which a government based on democracy is dependent upon.<sup>312</sup> It is well known that the Bill of Rights is the “cornerstone of democracy in South Africa”.<sup>313</sup> The rights contained in the Bill of Rights are held to be part of the supreme law of the country and all law to be subservient to it.<sup>314</sup>

In basic terms the Bill of Rights can be seen as “rules governing the limits and sometimes content of other rules”.<sup>315</sup> This is not always the case. The Constitution

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<sup>312</sup> Cheadle M.H & Davis DM, “*South African Constitutional Law: The Bill of Rights – 1.1 Introduction*” (2020) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 19 July 2020).

<sup>313</sup> Rautenbach I.M. “*Introduction to the Bill of Rights - Introduction*” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 2 October 2020) (1A4).

<sup>314</sup> Rautenbach I.M. “*Introduction to the Bill of Rights - Introduction*” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 2 October 2020) (1A36).

<sup>315</sup> Cheadle M.H & Davis DM, “*South African Constitutional Law: The Bill of Rights – 1.1 Introduction*” (2020) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 19 July 2020).



itself provides in Section 36 that the rights contained in the Constitution can be limited if certain criteria are met.<sup>316</sup>

SARS, in exercising its vast powers, is bound to do so in a manner that does not violate the rights of the taxpayer.<sup>317</sup> Goldswain is of the view that no government body intrudes into a person's private dealings more than SARS.<sup>318</sup> To determine whether the rights of taxpayers are violated by SARS search and seizure operations, it is necessary to first understand these rights as set out by the Bill of Rights.

#### 4.2. The right to privacy

The right to privacy is found in Section 14 of the Constitution<sup>319</sup> and has itself been subjected to much debate and, as shown, rights are not absolute; this appears "to apply more to privacy than any other right".<sup>320</sup> This right is seen as "amorphous and elusive".<sup>321</sup>

The aim or objective of the right to privacy as found in the Bill of Rights is to protect an individual's dignity while in their own space, against invasions by the state and other persons.<sup>322</sup> This protection is seen as necessary to ensure one is able to be fully

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<sup>316</sup> Section 36 of The Constitution of the Republic of South Africa, 1996.

<sup>317</sup> Croome. B & Croome J. "*Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa*" (2017) Juta (6).

<sup>318</sup> G.K. Goldswain "*The purposive approach to the interpretation of fiscal legislation – the winds of change*" (2003) Meditari Accountancy Research (vol 16) (107).

<sup>319</sup> Section 14 of The Constitution of the Republic of South Africa, 1996 – "Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;  
 (b) their property searched;  
 (c) their possessions seized; or  
 (d) the privacy of their communications infringed."

<sup>320</sup> V. Basdeo "*The constitutional validity of search and seizure powers in South African Criminal Procedure*" (2009) PER (vol 12) (4).

<sup>321</sup> Price A. "*Search and Seizure without Warrant*" (2015) Constitutional Court Review (Juta) ISSN:2073-6215 (1): *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (65).

<sup>322</sup> Croome. B & Croome J. "*Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa*" (2017) Juta (6).

comfortable in their own space, to enable a person to have their own identity.<sup>323</sup> The right goes further and prevents the state from exercising full control over an individual's daily life, as it ensures one is able to conduct themselves (lawfully) as they desire.<sup>324</sup>

If the state were to restrict a person's right to privacy based on a state preference (religious or otherwise) to uphold the state's views, this would be seen as an "erosion of democracy".<sup>325</sup> The state has a duty placed upon it to promote, respect and protect the rights in the Bill of Rights.<sup>326</sup>

The ground breaking case of *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*<sup>327</sup> showed that where the state or majority of the public desire restrictions on freedoms of privacy to uphold offenses which unfairly discriminate other group of persons, the right to privacy places "*responsibility on the state to promote conditions in which self-realisation can take place*".<sup>328</sup>

Similarly, it was held *Case and another v Minister of Safety and Security and others*,<sup>329</sup> with reference to pornographic material (which was banned at the time), "*What erotic material I may choose to keep within the privacy of my home [...] is nobody's business but mine. It is certainly not the business of society or the state*".<sup>330</sup>

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<sup>323</sup> Cheadle M.H & Davis DM, "South African Constitutional Law: The Bill of Rights – 9.3 Purpose" (2020) accessed via LexisNexis <https://www.mylexisnexus.co.za/Index.aspx> (accessed on 19 July 2020).

<sup>324</sup> Rautenbach I.M. "Introduction to the Bill of Rights – Protected conduct and interest, and bearers of the right" (2018) accessed via LexisNexis <https://www.mylexisnexus.co.za/Index.aspx> (accessed on 2 October 2020) (1A62.1)(1).

<sup>325</sup> Cheadle M.H & Davis DM, "South African Constitutional Law: The Bill of Rights – 9.3 Purpose" (2020) accessed via LexisNexis <https://www.mylexisnexus.co.za/Index.aspx> (accessed on 19 July 2020).

<sup>326</sup> Section 7 of the Constitution of the Republic of South Africa, 1996.

<sup>327</sup> *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* (1998) JOL 3801 (CC) (114).

<sup>328</sup> *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* (1998) JOL 3801 (CC) (114).

<sup>329</sup> *Case and another v Minister of Safety and Security and others* (1996) ZACC 7.

<sup>330</sup> *Case and another v Minister of Safety and Security and others* (1996) ZACC 7 (91).

Thus, from the above it is apparent that even if the state does not approve of an individual's conduct, the state cannot restrict or penalise a person from being themselves, if done within the privacy of one's own home.

The right to privacy is not limited to natural persons, it includes juristic persons,<sup>331</sup> as such SARS will be required to fulfil the requirements contained in the Act and Section 36 of the Constitution if it intends to perform search and seizure operations against a business or a natural person. It is important to understand the scope of the right to privacy to understand when and if a person (juristic or natural) can challenge an infringement of their right to privacy.

The Constitutional Court, in the matter of *Bernstein and Others v Bester and Others*,<sup>332</sup> laid down the understanding for the scope of the right to privacy. In this case, the court saw the right to privacy being separated into spheres, the right being stronger as one moves towards a person's "intimate personal sphere of life"<sup>333</sup> to the point in which "there is a final untouchable sphere of human freedom that is beyond the interference from any public authority."<sup>334</sup> It is at this point the court held that there is no justifiable limitation which can occur to this sphere of privacy. The court also indicated that where a person leaves the deeper intimate private spheres through interaction with other persons, said person moves to a social sphere of privacy which may then be limited if the circumstances permit.<sup>335</sup> An issuing officer in the normal course will not issue a

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<sup>331</sup> *The Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others In re: Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* (2000) JOL 7338 (CC) (15).

<sup>332</sup> *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

<sup>333</sup> *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (77).

<sup>334</sup> *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (77).

<sup>335</sup> *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (77).

warrant where the operation invades the intimate private sphere of a person and will require convincing to do so.<sup>336</sup> In determining this, the court in *Bernstein* indicated there must be an expectation to privacy of the person.<sup>337</sup>

The Constitutional Court, in the case of *Mistry v Interim National Medical and Dental Council and Others*, indicated that where a warrantless search and seizure operation is conducted at a person's private household and their personal belongings are rummaged through, this would breach the right of a person's privacy by intruding upon a person's "inner sanctum" and would require justification.<sup>338</sup> *Mistry* reiterated that the right to privacy of a person is weakened when a person steps into a public and more regulated domain, in doing so search and seizure operations are deemed less invasive.<sup>339</sup>

This view has been held to be the foundation for "jurisprudence on privacy" in the Constitutional Court for the minority judgment in *S v Jordan*.<sup>340</sup> In the majority judgment handed down by Ngcobo J, the court refused to uphold the protection of the right to privacy of sex workers, as one cannot rely on its protection when committing crimes in private, which can only be committed in private.<sup>341</sup> There is no certainty on an individual's right to privacy's and its protection, it depends on the circumstances of

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<sup>336</sup> Price A. "Search and Seizure without Warrant" (2015) Constitutional Court Review (Juta) ISSN:2073-6215 (3).

<sup>337</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (75).

<sup>338</sup> *Mistry v Interim National Medical and Dental Council and Others* (CCT13/97) [1998] ZACC 10 (23); (CCT13/97) [1998] ZACC (23); *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (67).

<sup>339</sup> *Mistry v Interim National Medical and Dental Council and Others* (CCT13/97) [1998] ZACC 10 (23); (CCT13/97) [1998] ZACC (27).

<sup>340</sup> *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 6 SA 642 (79).

<sup>341</sup> *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 6 SA 642 (28).

each matter and the closeness the infringement is to the inner core of a person's inner sanctum.<sup>342</sup>

To understand how our courts perceive, uphold or limit the right to privacy, I consider several constitutional court judgments. In the case of *Magajane v Chairperson, North West Gambling Board*,<sup>343</sup> the Constitutional Court determined the validity of provisions in the North West Gambling Act (NWGA),<sup>344</sup> which authorised warrantless inspections for the purpose of obtaining evidence of criminal offenses relating to gambling activities.<sup>345</sup> Section 65 of the NWGA empowered inspectors to enter any premises if they suspect gambling activities are being performed,<sup>346</sup> to perform various tasks including seizing and impounding equipment or supplies for the purposes of examination without a warrant.<sup>347</sup>

The court, in applying the above, looked to determine the privacy interests being infringed and whether this was a reasonable and justifiable infringement in terms of Section 36 of the Constitution.<sup>348</sup> The court found that the expectation of privacy of an owner of a gambling premise is low; however, Section 65 was so broad that it permitted warrantless searches at private homes where there was no criminal activity.<sup>349</sup> These provisions gave the inspectors too great discretion, without impartial intervention and

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<sup>342</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (67).

<sup>343</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (1).

<sup>344</sup> The North West Gambling Act 2 of 2001.

<sup>345</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (1).

<sup>346</sup> S 65(1)(a) of The North West Gambling Act 2 of 2001.

<sup>347</sup> S 65(1)(b) and (d) The North West Gambling Act 2 of 2001.

<sup>348</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (33).

<sup>349</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (94).

was seen to possibly endanger the privacy of property owners and occupiers.<sup>350</sup> The court found no valid reasoning a warrant could not be obtained before the search, as this would allow the purpose of the statute to be achieved, while affording an appropriate level of protection to a person's privacy.<sup>351</sup> Thus, due to "*an absence of proportionality between the extent of the limitation of the right to privacy.... and the purpose and effect of Section 65*", as well as the fact that the purpose could be achieved by less restrictive means, Section 65 was deemed unconstitutional.<sup>352</sup>

In the case of *Gaertner & others v Minister of Finance & others*,<sup>353</sup> the Constitutional Court was tasked with determining the validity of search and seizure provisions contained in the Customs and Excise Act.<sup>354</sup> SARS performed the search and seizure operation under Section 4 of the Customs and Excise Act, which empowered officers of SARS to at any time warrantlessly search and seize, anything at any premises.<sup>355</sup> In performing the operation, SARS was empowered in fulfilling the purpose of the search to break open or break up any windows, doors, flooring, etc.<sup>356</sup> The provisions of Section 4 were so broad that SARS would be entitled to search the premises of any person in connection to the subject of the search, this includes employee's, clients, service providers, *et cetera*.<sup>357</sup>

The court, in describing the nature of the right to privacy, indicated it includes the "*right to be free from intrusions and interferences by the state and other's in one's personal*

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<sup>350</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (94).

<sup>351</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (94).

<sup>352</sup> *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (95).

<sup>353</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442

<sup>354</sup> Customs and Excise Act 91 of 1964.

<sup>355</sup> S4(4)(a)(i)-(ii) of The Customs and Excise Act 91 of 1964.

<sup>356</sup> S 4(6) of The Customs and Excise Act 91 of 1964.

<sup>357</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (38).

*life*".<sup>358</sup> The court reiterated that the right to privacy is weakened but not diminished where one moves "into communal relations and activities".<sup>359</sup> The court, quoting the *Magajane* case, determined that when looking at the provisions limiting the right to privacy, the court must look at:

- i. the level of the reasonable expectation of privacy;
- ii. the degree to which the statutory provisions resembles criminal law; and
- iii. the breadth of the provision.<sup>360</sup>

The court found that the business' expectation to the right to privacy had been severely dampened, due to the nature of the commercial activities and the regulations it was subjected to; however, the privacy rights for individual's homes remained strong.<sup>361</sup> The search was seen to resemble traditional criminal law enforcement searches, which are more invasive and cause greater limitation to the right to privacy, and in doing so the breadth of the provisions were overboard.<sup>362</sup> The court found that there were less restrictive means to achieve the purpose.<sup>363</sup> The court emphasised the need for a warrant as a "*mechanism employed to balance an individual's right to privacy with public interest in compliance with and enforcement of regulatory provisions*".<sup>364</sup> A warrant ensures prior to the intrusion of the right to privacy the scope and limitations of the search and seizure operation are scrutinised and justified before an impartial

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<sup>358</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (47).

<sup>359</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (49).

<sup>360</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (57); *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 5 SA 250; 2006 2 SACR 447 (66).

<sup>361</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (62-63).

<sup>362</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (65-66).

<sup>363</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (73).

<sup>364</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (69).

judicial officer, to minimise the infringement on the right to privacy.<sup>365</sup> The court did acknowledge warrantless searches may be appropriate where “the need for the state to protect the public interest compels an exception”.<sup>366</sup> The court found that the legislation lacked in providing the manner to conduct the operation, as well as limiting the operation to a set scope, times, and places and accordingly could not be seen as reasonable and justifiable, as required by the Constitution.<sup>367</sup> Taking all of this in to account the court held that the provisions of Section 4 of the Customs and Excise Act were invalid and unconstitutional.

The above shows that the right to privacy is clearly seen as an important right worthy of being upheld when it relates to a person’s intimate private spheres, such as their private dwellings. At this point, SARS or other government organisations require great substantiation to intrude. As a person moves away from this inner sphere, it becomes easier for the state to justify intrusions for purposes of search and seizure. It has been accepted that SARS can intrude on a person’s right to privacy in their search and seizure operations, as this is seen as justifiable for a legitimate government purpose, but only if there are safeguards and compliance with these safeguards. This is to ensure SARS officials do not overstep the bounds of the justifiable limitation of the rights of the taxpayers when executing their operations.

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<sup>365</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (69).

<sup>366</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (70).

<sup>367</sup> *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 1 SA 442 (72).



### 4.3. The right to property

When the alleged evidence is found, SARS's officials seize the material and remove it from the premise; this act could be deemed to infringe on the right to property. The right to property is contained in Section 25 of the Constitution<sup>368</sup> which provides

*“No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.”*<sup>369</sup>

The remaining subsections of Section 25 provides for the expropriation of property in the law of general application. This must be for a valid public purpose and requires compensation (currently). Further, the section provides for land reform and access to land.<sup>370</sup> A discussion on the expropriation of property as a subset of deprivation of property<sup>371</sup> falls outside the scope of this study. As it stands, there is no set and definitive meaning that has been assigned to property when referring to the constitutional right.<sup>372</sup>

The Constitutional Court in *Shoprite Checkers v MEC for Economic Development, Eastern Cape*<sup>373</sup> indicated that when assessing if something (in this case interest in a liquor license) constitutes property, our courts must have regard to the history of the country and Section 25 itself.<sup>374</sup> The court went further and indicated that to define

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<sup>368</sup> S25 of The Constitution of the Republic of South Africa, 1996.

<sup>369</sup> S25(1) of The Constitution of the Republic of South Africa, 1996.

<sup>370</sup> Venter F. “*Fundamental Rights in South Africa – A Brief Introduction*” JUTA (2015) (42).

<sup>371</sup> Cheadle M.H & Davis DM, “*South African Constitutional Law: The Bill of Rights – 20.4 Does legislation provide for deprivation or expropriation*” (2020) accessed via LexisNexis <https://www.mylexisnexis.co.za/index.aspx> (accessed on 19 July 2020) (3).

<sup>372</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592 (104).

<sup>373</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592.

<sup>374</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592 (37).

property would not be “*judicially prudent*”<sup>375</sup> as this could exclude potential constitutional entitlements and could fail to subject certain property norms to constitutional scrutiny. The court determined property in terms of Section 25 must be derived from the Constitution to enable successful transformation rather than possibly hampering it.<sup>376</sup>

The court applied this in *Shoprite* and found that a wine license falls within the meaning of property and is protected by Section 25 of the Constitution.<sup>377</sup> The courts will accordingly apply general criteria to determine if something is property. This includes the obvious physical property and land, as well as interests, entitlements, enforceable claims, rights or even a relationship with a thing could constitute property under Section 25.<sup>378</sup>

The court will ask if the subject has value, if it is possible to define and identify the subject, if it could be deemed an asset in a person’s estate and if it can be transferred or disposed of to another.<sup>379</sup> These criteria have led to the adoption of a step by step enquiry to determine if the right to property has been infringed, this being as follows:

- i. “*is the interest at stake constitutional protected property?*”
- ii. “*If so, does the legislation provide for deprivation or expropriation?*”

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<sup>375</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592 (104).

<sup>376</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592 (46).

<sup>377</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 6 SA 125; 2016 TSAR 576-592 (70).

<sup>378</sup> Croome. B & Croome J. “*Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa*” (2017) Juta (41).

<sup>379</sup> Rautenbach I.M. “*Introduction to the Bill of Rights – Protected conduct and interest, and bearers of the right*” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 2 October 2020) (1A73.1)(1).

- iii. *If it provides for deprivation, does the legislation meet the requirements of section 25(1)?*
- iv. *If it provides for expropriation, does legislation meet the requirements of sections 25(2) and (3)?*<sup>380</sup>

As can be seen from the enquiry above, after determining if the subject is deemed property in respect of Section 25 it is important to determine whether the person has, in fact, been deprived of the property; whereafter, one must determine if the deprivation is in terms of the law of general application and not arbitrary.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*, the Constitutional Court found there is a wide scope given to the term deprivation being “*any interference with the use, enjoyment or exploitation of private property*”.<sup>381</sup> This has been expanded on to include that the limitation must be of such an impact that it requires constitutional involvement or that the deprivation must substantially interfere with the property itself.<sup>382</sup>

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<sup>380</sup> Cheadle M.H & Davis DM, “*South African Constitutional Law: The Bill of Rights – 20.2 The general structure of the constitutional property clause enquiry*” (2020) accessed via LexisNexis (2) <https://www.mylexisnexus.co.za/Index.aspx> (accessed on 19 July 2020).

<sup>381</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 4 SA 768 (57).

<sup>382</sup> Rautenbach I.M. “*Introduction to the Bill of Rights – The duty not to deprive and justification for not complying with the duty*” (2018) accessed via LexisNexis <https://www.mylexisnexus.co.za/Index.aspx> (accessed on 2 October 2020) (1A73.2.1)(1).

Section 25(1) allows for the limitation of the right “in terms of general law” this mirrors the requirements of Section 36(1).<sup>383</sup> If the deprivation is found to be in terms of the law of general application, the next enquiry is whether it is arbitrary.

The meaning given to the term “arbitrary”, (when dealing with an infringement of the right to property, is not simply limited to illogical deprivation or a lack of a rational connection between the deprivation and purpose for the deprivation.<sup>384</sup> Depending on the context of the legal rule under scrutiny, the scope of the term “arbitrary” can be larger than simply justifying the objective or purpose of the deprivation, it is seen as being “*narrower and less intensive concept than that of the proportionality evaluation required by the limitation provisions of section 36.*”<sup>385</sup> When a court applies the test for arbitrariness and it becomes apparent that the test must go beyond simple lack of rationality, it will apply the guiding factors in section 36(1) (a) to (e)<sup>386</sup> of the Constitution.<sup>387</sup>

In the light of the above, where SARS taxes a taxpayer it causes the value of the estate of the taxpayer to decrease, this is a deprivation of that taxpayer’s property and does infringe the taxpayers right to property; however, this is clearly deemed justifiable as

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<sup>383</sup> Cheadle M.H & Davis DM, “*South African Constitutional Law: The Bill of Rights – 20.4 Does the legislation provide for deprivation or expropriation*” (2020) accessed via LexisNexis (1). <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 19 July 2020).

<sup>384</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 4 SA 768 (65).

<sup>385</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 4 SA 768 (65).

<sup>386</sup> Rautenbach I.M. “*Introduction to the Bill of Rights – The duty not to deprive and justification for not complying with the duty*” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 2 October 2020) (1A73.2.1)(2).

<sup>387</sup> S 36(1)(a) to (e) of the Constitution of the Republic of South Africa, 1996 provides as follows- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –  
 (a) the nature of the right;  
 (b) the importance of the purpose of the limitation;  
 (c) less restrictive means to achieve the purpose.  
 (d) the relation between the limitation and its purpose; and  
 (e) less restrictive means to achieve the purpose.”

it is done to fulfil a legitimate purpose.<sup>388</sup> This extends to when property is seized through search and seizure operations.

It is submitted that where the right to property is unjustifiably infringed through search and seizure operations, even when the right to privacy has not been infringed, it could result in the evidence being deemed unconstitutionally obtained evidence and would not be usable by SARS in bringing their case against the taxpayer.<sup>389</sup> There is a view that practically, factual disputes based on Section 25 will require determination with a sociological evaluation of the alleged infringing legal rule and whether compensation would be required.

An interesting Constitutional Court case shows these above practical considerations and competing constitutional rights is *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*.<sup>390</sup> In this case, thousands of unlawful occupiers took to settle on the farm of Modderklip after being evicted from an informal settlement by the state. Modderklip sought their removal from its land and stated the state had the obligation to do so. The state failed to carry out the large scale eviction, whereafter Modderklip instituted proceedings against the state for failing to uphold the landowners property rights and for failing to provide housing to the unlawful occupiers – after Modderklip had obtained an eviction order it could not enforce.<sup>391</sup>

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<sup>388</sup> Croome. B & Croome J. “*Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa*” (2017) Juta (41-42)

<sup>389</sup> Rautenbach I.M. “*Introduction to the Bill of Rights – The duty not to deprive and justification for not complying with the duty*” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 2 October 2020) (1A73.2.1)(1).

<sup>390</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3.

<sup>391</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (2–17).

The court saw the provisions of the Constitution as being required to assist both the landowner and the unlawful occupiers.<sup>392</sup> The landowners property right here is clear and the court held that it was infringed and was competing against the occupier's right to housing and the state's obligations to provide housing under Section 26 of the Constitution and to uphold constitutional rights.<sup>393</sup> The court decided to uphold both competing rights and found that it was the state who had failed, as the state was:

*“obligated to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court order, thus undermining the rule of law.”<sup>394</sup>*

The court saw it as being unreasonable to force Modderklip to bear the burden of providing housing to the occupiers where the state had failed, and if the state failed to protect Modderklip and other private entities from unlawful occupation it “would be a recipe for anarchy.”<sup>395</sup>

The problem was evicting persons in the tens of thousands would cause “unimaginable social chaos”.<sup>396</sup> The court held that the state had failed in its obligations and had failed to take reasonable steps to uphold the rights of Modderklip. The court ordered the state to compensate Modderklip for the land occupied and that the occupiers be entitled to occupy the land until the state provides the occupiers

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<sup>392</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (41).

<sup>393</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (25).

<sup>394</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (43).

<sup>395</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (45).

<sup>396</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (47).

alternative accommodation.<sup>397</sup> This case showed the obligation on the state to ensure constitutional rights are upheld as far as possible and that where it fails to do so the state can be held liable.

SARS deprives the property of every taxpayer every year when taxpayers are required to pay taxes to the state. This will always be deemed justifiable to achieve the important objective of revenue collection. Where SARS deprives a taxpayer of property by any other means or manner it cannot be without a valid purpose.

If SARS complies with the requirements of the Act when conducting search and seizure operations, it would not be an arbitrary deprivation of property and as such justifiable under Section 25. SARS would be performing the operation in terms of the law of general application and for the enforcement of a tax act or to obtain evidence of a tax offence, these as shown above are legitimate and important objectives of SARS.

#### 4.4. The right to access to court

When SARS performs a search and seizure operation, it is done on an *ex parte* basis without notice to the subjects of the operation, which prevents the subjects from opposing the operation prior to its execution. Section 34 of the Constitution provides:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court”.*<sup>398</sup>

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<sup>397</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 5 SA 3 (68).

<sup>398</sup> Section 34 of the Constitution of the Republic of South Africa, 1996.

This section aims to ensure that no one will have a right limited or denied without due process being followed.<sup>399</sup> This gives effect to protecting people's rights with assistance from the courts and ensures social order by preventing anyone from circumventing the law.<sup>400</sup> It is worth noting that this section applies only to civil and not criminal matters.<sup>401</sup>

The court in *Bernstein and Others v Bester and Others* referred to this right, as contained in the interim Constitution, and indicated the right protects not only the individual but also ensures the separation of power between the judiciary and the state.<sup>402</sup> This separation is required to maintain independent and impartial adjudication of matters, and to prevent those who make the laws from acting as the judiciary.<sup>403</sup>

In the context of tax, Section 34 will apply if a taxpayer wishes to challenge the constitutionality of a section in a tax act, or if the taxpayer wishes to review decisions made by SARS officials.<sup>404</sup> In giving effect to the right to access to court, a party who has interest in a matter must, in the normal course be given notice of the proceedings and an opportunity to defend themselves should the possibility of an adverse order be granted against said parties. This was shown in *Sheriff Pretoria North-East v Flink*,<sup>405</sup>

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<sup>399</sup> Cheadle, M.H. & Davis, D.M. "South African Constitutional Law: The Bill of Rights – 28.1 Introduction" (2020) accessed via LexisNexis (1).

<sup>400</sup> Rautenbach, I.M. "Introduction to the Bill of Rights - Protected conduct and interests, and bearers of the right" (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/index.aspx> (accessed on 13 October 2020) (1A80.1)(1).

<sup>401</sup> Venter, F. "Fundamental Rights in South Africa – A Brief Introduction" JUTA (2015) (58).

<sup>402</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (105).

<sup>403</sup> *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (105); See also Croome. B. & Croome. J. "Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa" (2017) Juta (202)

<sup>404</sup> Croome, B. & Croome, J. "Street Smart Taxpayers – A Practical Guide to Your Rights in South Africa" (2017) Juta (202)

<sup>405</sup> *Sheriff Pretoria North-east v Flink* [2005] 3 All SA 492 (T).



where a punitive cost order was granted against the Sheriff where the Sheriff was not notified of the application prior to the proceedings. On appeal AJ Raath stated:

*“it barely needs to be stated that the right to prior and timeous notification, and then to be heard at a proper judicial hearing, is central to a fair judicial procedure.”*<sup>406</sup>

The court refused the rescission of judgment but overturned the punitive cost order made without the presence of the Sheriff.

The right to access to court is not restricted to notice of proceedings, it includes the right to a fair hearing. The principle that a court should not grant an order against a party who is not present was taken to the Constitutional Court in *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and others*,<sup>407</sup> which looked at the principle of fairness in a hearing. In this case, a firm of attorneys held funds pursuant to a dispute arising from an alienation of land agreement, the attorneys had served a notice to abide and removed themselves as a party to the proceedings. The SCA ordered the attorneys to repay the capital with judgment interest. The Constitutional Court on appeal found that the SCA in granting the adverse interest order against the attorneys, who were not a party to the matter had caused “*the twin notions of procedural and substantive fairness were violated.*”<sup>408</sup> Accordingly, the appeal was upheld and the attorney’s liability to pay the additional interest was expunged.

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<sup>406</sup> *Sheriff Pretoria North-East v Flink* [2005] 3 All SA 492 (T) (507).

<sup>407</sup> *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and others* 2014 (12) BCLR 1465 (CC).

<sup>408</sup> *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and others* 2014 (12) BCLR 1465 (CC) (25).

The right to make representations where proceedings are against you has been seen as part of the foundation of our countries constitutional order.<sup>409</sup> The right to fair hearing incorporates and accepts that the courts and judges who hand down the judgments are not perfect and are not required to be. The case of *Lane and Fey NNO v Dabelstein and Others*<sup>410</sup> expressed that:

*“The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that s 34 of the Constitution does indeed embrace that right, it would be fairness and not the correctness of the court proceedings to which litigants would be entitled.”*<sup>411</sup>

In providing this notion that Section 34 entitles parties to procedural fairness and not correctness, a party is entitled to request the recusal of a judicial officer where there is the chance the judicial officer cannot uphold the principles of impartiality and fairness. Normally where there is a possibility a judicial officer cannot adjudicate on a matter without and fear of favour or prejudice, the judicial officer would remove themselves.<sup>412</sup>

The case of *Bernert v ABSA Bank Ltd*<sup>413</sup> raised allegations of bias when the SCA overturned an order granted in favour of Mr. Bernert. It was held that if a judicial officer sits in a matter where there is a possibility of bias, the judicial officer is in contravention

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<sup>409</sup> *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16.

<sup>410</sup> *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC).

<sup>411</sup> *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) (4).

<sup>412</sup> Rautenbach I.M. “Introduction to the Bill of Rights – Persons and institutions bound by the right and their duties” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 13 October 2020) (1A80.2)(1).

<sup>413</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92.

of the Constitution.<sup>414</sup> The test accepted and applied in this case to determine bias of a judicial officer is:

*“a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court”*<sup>415</sup>

The court in *Bernert* indicated that this test has a double requirement of reasonableness, in that the party alleging the bias and the alleged bias must be seen as being reasonable.<sup>416</sup> The court held that Mr. Bernert had failed to show the presiding judge’s shareholding in ABSA Bank impeded his impartiality in adjudicating on the matter.<sup>417</sup> The court raised various guidelines to determine whether a reasonable apprehension of bias is present.<sup>418</sup>

In addition to the above, the principle of impartiality and fairness requires that no party may preside over their own matter;<sup>419</sup> this is entrenched in our law through the common law principle of *Nemo iudex in sua causa*.<sup>420</sup> This removes arbitrariness and gives substance to the law.<sup>421</sup>

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<sup>414</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92 (28).

<sup>415</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92 (29).

<sup>416</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92 (34).

<sup>417</sup> *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92 (77).

<sup>418</sup> Rautenbach, I.M. “Introduction to the Bill of Rights – Persons and institutions bound by the right and their duties” (2018) accessed via LexisNexis <https://www.mylexisnexis.co.za/Index.aspx> (accessed on 13 October 2020) (1A80.2)(1); *Bernert v ABSA Bank Ltd* [2010] ZACC 28; 2011 3 SA 92 (45)(54)(56-57)(75)(78).

<sup>419</sup> *MEC for Health, Gauteng v Lushaba* [2015] ZACC 16 (14).

<sup>420</sup> *De Lange v Smuts* [1998] ZACC 6 (131).

<sup>421</sup> *De Lange v Smuts* [1998] ZACC 6 (131).

The right to access to court was taken to the Constitutional Court in *Metcash Trading Ltd v Commissioner for the South African Revenue Service*, which looked at the constitutionality of certain provisions in the Value-Added Tax Act (VAT Act).<sup>422</sup>

The provisions entitled the Commissioner of SARS to raise an assessment on a taxpayer and require the taxpayer to make payment of the assessed amount. Only after payment could the taxpayer attempt to appeal the assessment. This is known as the pay-now-argue-later rule.<sup>423</sup> The court found that this rule of ensuring hasty payment from the taxpayer serves an important public purpose in recovery of tax and minimises unmerited objections.<sup>424</sup>

The court held that the relevant provisions of the VAT Act do limit a taxpayer's right to access to court; however, this was seen as justifiable in terms of Section 36 of the Constitution as it serves a legitimate purpose and it does not "oust the jurisdiction of the courts of law."<sup>425</sup> This case has been criticised, as the court did not look to determine less intrusive means to achieve the purpose.<sup>426</sup>

This as shown above is a pertinent question when looking at the legality of legislation. The purpose of a search and seizure operation is to obtain evidence in a manner where the taxpayer cannot hide evidence. Accordingly, and as shown above, this is a legitimate government purpose, which the courts have upheld and will continue to do so, as long as the taxpayer has access to court to review or appeal the operation after

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<sup>422</sup> S 36(1);40(2)(a);40(5) The Value Added Tax Act 89 of 1991.

<sup>423</sup> Fritz, C. "Payment Obligations of Taxpayers Pending Dispute Resolution: Approaches of South Africa and Nigeria" 18 AFR. HUM. Rts. L.J. 171 (2018) (181).

<sup>424</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* (CCT3/00) [2000] ZACC 21 (60).

<sup>425</sup> *Metcash Trading Ltd v Commissioner for the South African Revenue Service* (CCT3/00) [2000] ZACC 21 (72).

<sup>426</sup> Fritz, C. "Payment Obligations of Taxpayers Pending Dispute Resolution: Approaches of South Africa and Nigeria" 18 AFR. HUM. Rts. L.J. 171 (2018) (183).

the fact. Therefore, search and seizure operations do infringe the right of notification of proceedings but will be upheld as the taxpayer has opportunity to set aside the operation after.

#### 4.5. The Davis Tax Committee's report on tax administration

The concept of a taxpayer's bill of rights is not new to South Africa. The Katz commission in 1995 stated that South Africa requires a statement on taxpayers' rights, but suggested principles for SARS governance as opposed to a bill of rights governing the dealings of SARS.<sup>427</sup> The Katz commission's recommendations for the amendment of search and seizure provisions was dealt with in chapter 2.

In 2017, the Davis Tax Committee (the Committee) released a report on tax administration which highlighted protection currently afforded to taxpayers, how their rights are balanced against SARS powers and the possibility of a taxpayer's bill of rights.<sup>428</sup> The Committee considered the extensive powers of SARS; however, it did not discuss SARS's powers of search and seizure specifically.

The Committee emphasised that there is a large bias afforded to SARS's powers that supersede taxpayer rights when performing its tax collection objective.<sup>429</sup> It is argued that the Committee's perception on rights could be applied to any of the powers of SARS which infringe taxpayer's rights. The report viewed that taxpayer's rights should fall within the notion of human rights and admitted there has been progress to incorporate taxpayers' rights into statutes.<sup>430</sup>

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<sup>427</sup> The Joint Standing Committee Report on The Third Interim Report of the Katz Commission Inquiry into Taxation (1996) (26).

<sup>428</sup> Davis Tax Commission. (2017) Report on Tax Administration (3).

<sup>429</sup> Davis Tax Commission. (2017) Report on Tax Administration (63).

<sup>430</sup> Davis Tax Commission. (2017) Report on Tax Administration (63 - 64).

The Committee acknowledges that rights without the possibility of the state upholding them have no value, thus the Committee recommends that the Tax Ombud be given powers that could enable it to uphold and give effect to a taxpayer's bill of rights.<sup>431</sup>

SARS has stated that it values the Tax Ombud's role in addressing taxpayer's rights.<sup>432</sup> If the Tax Ombud were to be given power to uphold these rights (which it currently lacks), it could provide a much needed impartiality to determination of taxpayer rights, without taxpayer's running to costly court proceedings. Thus, the Tax Ombudsman being empowered by an enacted taxpayer's bill of rights with legislative authority, could assist as a watch dog to protect a taxpayer's rights where SARS infringes rights through enforcement of its powers of search and seizure.

The Tax Ombud has also expressed a desire to enact a taxpayer's bill of rights and sees SARS failure to do so as a deficiency.<sup>433</sup> The Tax Ombud considers that a comprehensive taxpayer's bill of rights is needed to enhance our constitutional democracy, accountability of SARS and the administration of the tax system itself.<sup>434</sup>

The Tax Ombud has stressed the need for the education of taxpayers on their rights and with it their obligations.<sup>435</sup> The Tax Ombud agrees with the suggestions of the Committee referring to it and a proposed taxpayer bill of rights, which was incorporated into its strategy plans for 2018 to 2023.<sup>436</sup>

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<sup>431</sup> Davis Tax Commission (2017) Report on Tax Administration (73).

<sup>432</sup> SARS (2018) Report on Commission of Inquiry into Tax Administration and Governance by SARS (186).

<sup>433</sup> Tax Ombud (2018) Strategic Plan 2018 – 2023 (3).

<sup>434</sup> Tax Ombud Annual Report 2018/ 2019 "Tax Ombud Annual Report ITO Section 19 of the Tax Administration Act 28 of 2011 and The Public Finance Management Act 1 of 1999" (12).

<sup>435</sup> Tax Ombud Annual Report 2018/ 2019 "Tax Ombud Annual Report ITO Section 19 of the Tax Administration Act 28 of 2011 and The Public Finance Management Act 1 of 1999" (12).

<sup>436</sup> Tax Ombud (2018) Strategic Plan 2018 – 2023 (3).

The Committee has found the need for the taxpayers' bill of rights to ensure that SARS is accountable in its interactions with taxpayers; in addition to, ensuring the rights of the taxpayers are upheld with enforceable legal effect binding on SARS. This reiterates the desire for SARS to uphold taxpayer's rights, while fearing accountability for its actions when utilising its powers of search and seizure.

The Committee recommended eight rights it believes should be incorporated into a bill of rights.<sup>437</sup> An extensive discussion on the Committee and the rights of a taxpayer falls outside the scope of this dissertation and so only those rights most applicable to search and seizure are examined. The most pertinent of these rights for purposes of this dissertation are the right to privacy and confidentiality, the right not to pay tax amounts in dispute before you have had an impartial review and the right to fair and just tax system.

The Committee views the right to privacy and confidentiality as a fundamental right, the scope of which (as with the above) becomes arguable. The Committee acknowledged that the Constitution and Act do incorporate these rights but deems there a need for specification to ensure SARS do not encroach on the right when performing its duties and by extension utilising its powers.<sup>438</sup>

This right would incorporate search and seizure operations, as this power infringes most upon a taxpayer's right to privacy. As indicated above, the taxpayer's bill of rights

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<sup>437</sup> Davis Tax Commission (2017) Report on Tax Administration (74 – 75). Rights Recommended are;

- 1) The right to finality
- 2) The Right to privacy and confidentiality;
- 3) The right to complete, accurate, clear and timely information;
- 4) The right to pay no more than the correct amount of tax;
- 5) The right not to pay tax amounts in dispute before you have had an impartial review;
- 6) The right to legal representation;
- 7) The right to quality service; and
- 8) The right to fair and just tax system.

<sup>438</sup> Davis Tax Commission (2017) Report on Tax Administration (75).

would attempt to educate taxpayers on their rights, this would hopefully include the rights and limitations when a search and seizure operation is conducted. This will place the taxpayer in a stronger position if SARS attempts to unjustifiably infringe on the taxpayer's rights, as the taxpayer would know what the SARS official can and cannot do.

In the event the recommendations of the Committee are followed, and a search and seizure operation is not conducted, as set out in the taxpayer's bill of rights and Act, the Tax Ombud would be empowered to uphold the taxpayer's rights and give redress to the taxpayer whose rights in the taxpayer's bill of rights (and by extension the Constitution) had been infringed by the search and seizure operation.

The incorporation of the right not to pay tax amounts in dispute before you have had an impartial review is a contentious one, as it would go directly against the pay-now-argue-later rule utilised by SARS. The Committee views the rule as infringing on a taxpayer's right to property and that it discourages objection by the taxpayer, as SARS is seen to have gained the funds before the option to object is afforded to the taxpayer. The Committee views that a partial payment of 40 percent would be more appropriate pending the outcome of the objection, as this would still give effect to the objective of preventing unwarranted appeals and objections without burdening the taxpayer with the full amount.<sup>439</sup>

The right to a fair and just tax system would incorporate the right to access to court. This would weaken SARS powers of pay-now-argue-later while strengthening the taxpayer's right to access to court. The Committee views it would include the right to appeal or review a decision made by SARS, as well as ensuring the appeal or review

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<sup>439</sup> Davis Tax Commission (2017) Report on Tax Administration (74-75).



is done by an impartial and fair entity without the taxpayer being subject to bias of SARS internal processes.<sup>440</sup> This would aid a taxpayer in seeking redress against SARS, should SARS attempt to unconstitutionally supersede the taxpayer's rights when performing a search and seizure operation. This would ensure the taxpayer has a direct avenue to raise their dispute based on their infringement of their rights.

The Committee, with the support of the Tax Ombud, are pushing to finalise a taxpayer's bill of rights. The Tax Ombud has indicated that it has drafted and submitted a proposed taxpayer bill of rights but, to date, SARS has not finalised it.<sup>441</sup>

SARS released a new Service Charter in 2018, which does elaborate on a taxpayers rights and obligation,<sup>442</sup> as well as the service levels one can expect from SARS and information if a taxpayer wishes to dispute an assessment.<sup>443</sup> The Service Charter does not provide or elaborate on the constitutional rights of a taxpayer, it merely provides service expectations. The Tax Ombud has indicated its dissatisfaction with the Service Charter as being insufficient and has stated its desire for SARS to make the taxpayer bill of rights a reality.<sup>444</sup>

The need for a taxpayer's bill of rights has become more and more prevalent as increased pressure is placed on SARS to ensure it meets its objective of tax collection. By consequence, this pressure placed on SARS will result in SARS taking greater measures to collect tax, its powers of search and seizure being one of these measures.

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<sup>440</sup> Davis Tax Commission (2017) Report on Tax Administration (74-75).

<sup>441</sup> Tax Ombud (2018) Strategic Plan 2018 – 2023 (3).

<sup>442</sup> SARS (2018) Service Charter (2).

<sup>443</sup> SARS (2018) Service Charter (7).

<sup>444</sup> Tax Ombud Annual Report 2018/ 2019 "Tax Ombud Annual Report ITO Section 19 of the Tax Administration Act 28 of 2011 and The Public Finance Management Act 1 of 1999" (12).

It is now trite that SARS infringes on taxpayer's rights in utilising their powers of search and seizure.

As indicated by the Tax Ombud, there is nothing enacted that ensures taxpayers rights are adequately described or upheld when SARS performs its search and seizure operations. This is a deficiency to our constitutional democracy, as it requires taxpayers to seek the aid of costly professionals in order to determine if they have any rights that have been infringed and whether that infringement is to such an extent that the taxpayer should go through expensive legal process to appeal or review the search and seizure operations. This option is clearly not available to most South Africans.

If the desired taxpayer bill of rights is enacted with legislative power and the Tax Ombud empowered to uphold it, it will place taxpayers in a far stronger position when attempting to uphold their rights against SARS.

The Ombud aims to provide education and alternative avenues to an aggrieved taxpayer. These alternative avenues would assist the taxpayer in obtaining restitution against SARS for matters relating to taxpayer's rights. This would be applicable when the search and seizure operation goes beyond the justifiable scope of search and seizure provided by the Act.

There is hope that the recommendations of the Committee will be considered, as was with the Katz commission's recommendations when search and seizure operations were amended in the Income Tax Act. This hope is premised on the fact that the Tax Ombud has on various occasions stated its desire to enact a taxpayer's bill of rights, which is incorporated in its strategy plans.

#### 4.6. Conclusion

The rights contained in the Bill of Rights are foundational to the democracy of South Africa and cannot be limited unless the limitation complies with Section 36 of the Constitution or with the limitation provision in the right itself. All the rights described in detail above have been shown, through case law, to be infringed when SARS utilises its powers of search and seizure.

The rights are not taken at face value and are subjected to various considerations to determine if they have been unjustifiably infringed. The right to privacy is determined with reference to the legitimate expectation a person has that the right will be upheld. This right is strongest at a person's private dwelling and is weakened the further said person enters public domains. SARS justifies the infringement on the right to privacy when performing operations by enforcing a tax act or obtaining evidence of a tax offence. Positive steps have been taken to protect the right to privacy by ensuring that safeguards are in place. If the empowering provisions provide too great discretion, the courts have invalidated these provisions.

After the right to privacy is infringed by the search and seizure operations, the evidence taken deprives the taxpayer of their property. Property in terms of the Section 25 has been given an open-ended definition to ensure there is no exclusion or limitation later found to be unconstitutional. The courts have listed guidelines to assist in determining if something can be defined as property where there is uncertainty, as was with licenses in the *Shoprite* case. The deprivation of property from a search and seizure operation is seen as justifiable to achieve SARS's objective of tax collection. Provided this is done in a manner that serves a legitimate purpose, the right to property will not be unjustifiably infringed.

This is similar when compared to the right to access to court with SARS using *ex parte* proceedings to conduct search, and seizure operations. The right is infringed, but as SARS would be hampered in achieving its objectives if notice is given to the parties beforehand, it is justified that no notice is provided, as this serves a legitimate government purpose. The courts view the limitation as constitutional, as the taxpayer may, after the operation, appeal to the court to review or appeal the operation and thus, have their opportunity to be heard by a fair and impartial judicial officer.

The infringement of taxpayer's rights by SARS has not gone unnoticed. The Tax Ombud and the Committee have highlighted the bias afforded to SARS when it utilises its powers to collect revenue for the state. It is due to this and the lack of education on tax and tax rights South African taxpayers receive that leads both to deem a taxpayer's bill of rights to be necessary.

Although the Committee did not specify SARS powers of search and seizure specifically, the rights they incorporated and detailed would have impact upon the manner in which SARS conducts its search and seizure operations, or at the very least on how taxpayers would seek redress when the operation infringes their rights unconstitutionally.

This bill of rights would need to be enacted and enforceable against SARS for it to truly be effective. The Committee and Tax Ombud hope that such a bill would make SARS more conscious of taxpayer's right, as they would finally fear accountability for their actions. This would be achieved by providing more education to taxpayer's on what SARS can and cannot do during search and seizure operations.

In the event SARS do not follow the correct procedure, the taxpayer bill of rights would provide alternative avenues to obtain redress than the current costly court

proceedings. It is contended that SARS would still be able to perform search and seizure operations but that there would be more guidelines to ensure they do not overstep the bounds of justification and cause the taxpayer's rights to be unconstitutionally infringed.

Positive steps have been seen in this regard with the Tax Ombud having already submitted a draft taxpayer's bill of rights and mentioning same in its strategy plans for the coming years.

## Chapter 5: Recommendations and conclusion

### 5.1. Introduction

The problems raised and addressed in this dissertation was whether taxpayer's rights are infringed by SARS's powers of search and seizure to the extent that they cannot be deemed justifiable in attempting to achieve their objective of tax collection, and whether South Africa requires a taxpayer's Bill of Rights to protect taxpayers against abuse of these mighty powers.

It has been highlighted that the courts deem tax collection by SARS vitally important to obtain resources for the government to meet its transformation objectives. There has been development of the provisions empowering SARS to conduct search and seizure operations contained in the expunged provisions of the ITA to the current provisions in the Act.

### 5.2. An historical overview of search and seizure

Taxpayers, prior to the Constitution, were only afforded common law remedies to assist them against SARS. During that time, section 74(3) of the ITA allowed for unrestricted search and seizure operations to be conducted, wherever the Commissioner of SARS saw the possibility of evidence being obtained. There were no safeguards to protect a taxpayer's rights.

The Katz Commission saw these powers as being too broad and over the top and suggested various amendments to bring SARS's powers of search and seizure in line with the newly enacted Constitution. The suggestions of the Katz Commission were that there should be prior authorisation in the form of a warrant placed before an

impartial judicial officer to confirm that there was reasonable belief there had been a tax offence committed and that evidence of such would be likely to be found. Section 74(3) of the ITA was accordingly repealed and replaced with section 74(D) of the ITA. Section 74(D) took the recommendations of the Katz commission and incorporated various safeguards to balance taxpayer's rights against these powers. This being that the SARS official must depose an affidavit where they show reasonable grounds are present that a tax offence or non-compliance of a tax act has been committed. This affidavit must be brought and reviewed by a judicial officer and specify certain details. The provisions also provided that a taxpayer could approach the court for the setting aside of the warrant where the safeguarding provisions had not been complied with.

This showed positive steps taken to incorporate and protect the rights of taxpayer's, as well as provide the taxpayer with a legal remedy should SARS not uphold these safeguards. The Act brought an end to section 74(D) as the powers of search and seizure from various tax statutes were incorporated into it. SARS was of the view that the Act amplified the taxpayer's rights, while supplementing its powers of search and seizure. Critics saw the Act's powers of search and seizure as being controversial.

Search and seizure powers of SARS are now entrenched in the Act, which still incorporates safeguards to ensure SARS do not unjustifiably infringe taxpayer's rights when performing the operations. These being that now only a senior SARS official may authorise a search and seizure operation and such an operation may only be conducted if a warrant is obtained, unless the owner/occupier consent or Section 63 of the Act is applicable. The warrant must have information provided under oath which satisfies a judicial officer that there are reasonable grounds the operation is required for the administration of a tax act. The senior SARS official must provide the identity

of the taxpayer, a description of the premises to be searched and a description of the tax offence.

Further, the Act provides various guidelines of how the operation must be conducted, such as requiring strict decency and order when the operation is being executed and that an inventory of the seized material must be made. If the required information is not provided or SARS does not comply with the guidelines laid out in the Act, the taxpayer will be entitled to review and invalidate the search and seizure operation. If the operation is deemed unlawful due to lack of compliance with the Act's guidelines, SARS will not be able to utilise the evidence obtained, due to Section 35 of the Constitution.

The Act provides that the requirement of the warrant can be circumvented where the SARS officials believe there are reasonable grounds present to show that there will be imminent removal or destruction of material which shows a tax offence or non-compliance with tax legislation. In addition to this, the SARS officials must believe they would obtain a warrant if it was applied for, but due to the haste required to perform the operation the warrant cannot be obtained, as the objective of the search and seizure operation would be defeated.

Even when the requirement of a warrant is circumvented SARS, is still bound by the guidelines and provisions applicable to a warranted search and seizure operation. This is allowed by our courts as it is seen as needed to serve an important governmental objective in collecting revenue and only condoned in exceptional circumstances, as a last resort. The courts have accepted the substantial inroads a warrantless search and seizure operation has on the rights of a taxpayer and will never uphold same in the ordinary course. Thus, although the protection of taxpayer's rights that is afforded



through an impartial judicial officer intervention is circumvented, the operation will be invalidated if the SARS officials do not prove exceptional circumstances and if requirements in the Act are not met. These will have to be proven in the event the warrantless search and seizure operation is taken on review, failing which the operation will be invalidated and SARS will have to return the material, as well as pay the legal costs of the taxpayer. These provisions have been upheld and entrenched in our law during the course of nearly a decade since the Act became operational.

### 5.3. Search and seizure by SAPS and civilians

The powers of search and seizure given to both SARS and SAPS require reasonable grounds and specific information to be brought *ex parte* to a judicial officer to issue a warrant, which will be issued if reasonable grounds are shown to be present.

If the SAPS, like with SARS, overstep the parameters of the warrant the operation will be invalidated. The SAPS is given powers to perform warrantless search and seizure operations where, as with SARS, the SAPS officer must be of the view that a warrant would be issued if applied for and that the object of the operation would be defeated should a warrant be obtained. This comparison shows the state values tax collection and tax offence policing to be on par with the policing of criminal offences.

The closest a person may come to utilising powers similar to SARS's powers of search and seizure is by obtaining an Anton Piller order. The Anton Piller order, as with SARS search and seizure operations, affords a person the power to without notice search a premise specified and to remove material. The difference lies in the requirements for an Anton Piller order and the fact that they only provide for the preservation of evidence and not seizure of evidence. The above has shown preservation of evidence

is to ensure vital evidence of the applicant's cause of action will not be destroyed if ordinary proceedings are followed. Thus, the courts have begun to require supervising attorneys to ensure the operation is conducted in accordance with the order, without the applicant going on fishing expeditions to uncover trade secrets of the respondent.

The Anton Piller order requirements of adequately identifying the material sought and proven element of dishonesty cause compliance with, and justification of, the Anton Piller order to be a more difficult feat on the return date than a search and seizure operation performed by SARS in respect of the Act. It is due to this that SARS would not utilise Anton Piller order proceedings. A taxpayer would unlikely opt to attempt Anton Piller proceedings against SARS, as the evidence utilised by SARS in performing proceedings against a taxpayer must be disclosed to the taxpayer and it would be difficult to prove dishonesty of SARS officials to justify the granting and upholding of the Anton Piller order.

#### 5.4. The taxpayer's rights

It has been shown that SARS infringes on various rights of taxpayers when it performs search and seizure operations. The rights of privacy, property and access to court being but a few. These rights were dissected and shown to each have their own standards required to be met and balanced against the infringing provisions.

The courts will always look at and incorporate Section 36 of the Constitution when determining if a right has been unjustifiably infringed. This requires the limitation to be in terms of the law of general application and justifiable in a democratic society. The courts, when applying this to an alleged infringed right, will look at the purpose of the alleged infringing provision and balance this against the alleged infringed right to

determine if the infringement is justifiable and should be upheld. The courts will also determine if there are less invasive means to achieve the purpose of the infringing provisions.

Where the purpose does not justify the extent of the infringement, or there are less restrictive means to achieve the purpose, the courts will invalidate the provision to the point the infringement is justifiable. The courts have viewed that the requirement of a warrant safeguards a taxpayer's right to privacy. The requirement of preserving the material and drawing up an inventory assists in protecting the right to property. The provisions in the Act that allow for appeal or review of *ex parte* proceedings ensures that SARS does not circumvent the courts and gives effect to the right of access to court. Accordingly, it does not mean that SARS does not infringe a taxpayer's rights to privacy, property and access to courts, but merely that the infringement is deemed justifiable.

The infringement of taxpayer's rights by SARS has not gone unnoticed. The Committee with the support of the Tax Ombud have released reports where they see a taxpayer's bill of rights as necessary to uphold constitutional order and hold SARS more accountable with regard to its interactions with taxpayers. The Committee acknowledged there has been growth in incorporating taxpayer's rights into legislation, but this does not aid those sought to protect, as they either cannot understand or access these laws. The Committee desire for taxpayer's rights to be seen in a similar manner as other human rights. The Committee has highlighted that a taxpayer bill of rights could place more confidence in the tax system, as there would be an inference that SARS would be held accountable for their wrongdoings. The Committee views a taxpayer's bill of rights should be enacted and enforceable against SARS and that the

Tax Ombud be given the power to do so. The Tax Ombud agrees with these submissions and has submitted a taxpayer's bill of rights to SARS, which remains unfinished.

#### 5.5. Recommendations

South Africa is in need of a taxpayer's bill of rights which is enforceable against SARS and where there is an impartial entity upholding these rights. The taxpayer' bill of rights would need to be enacted with legislative authority to ensure SARS are bound to the rights it contains, failing which SARS officials would not take cognisance of the taxpayer bill of rights. This is based upon the evidence that the courts show a bias to SARS and its tax collection objectives.

Further, there is little to no recourse available to a taxpayer currently where SARS infringes a taxpayer's rights through conducting search and seizure operations, except to utilise expensive appeal or review proceedings. The costs incurred in these proceedings, even though theoretically recoverable in the event the taxpayer is successful, are not readily available to most South Africans when the appeal or review is sought.

The lack of tax administration knowledge is also a deficiency of our system, which a taxpayer's bill of rights may address. If the recommendations of the Committee are followed, these rights would be easily accessible in understandable terms. This would assist in aiding those without tax education to at least understand their rights, before incurring costs associated expert tax advice.

This will assist in SARS becoming more of a guardian when it comes to collecting tax, rather than a bully taking what it desires. This is premised on the notion that SARS

does not adequately consider their prospects of success, the infringement on the rights of the taxpayers or how they may hamper the business of the taxpayer when exercising its powers.

## 5.6. Conclusion

This review shows that SARS has tremendous, although not unfettered, powers against taxpayers in respect of search and seizure operations. Despite significant progress made towards the protection of taxpayer rights as afforded by the Act, SARS's powers to conduct search and seizure operations remains disproportional compared to the rights of the taxpayer. The research shows that there is a growing trend and a need for the protection of taxpayer rights. South African taxpayers' rights will be better balanced if the taxpayers' bill of rights, suggested by the Committee and Tax Ombud, is enacted and made a reality.

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