

https://dspace.org/

The SARS official: an evaluation of the rights and remedies of the taxpayer

Pocock, Wayne H

2018

https://hdl.handle.net/10539/27145

Pocock, Wayne, (2018) The SARS official: an evaluation of the rights and remedies of taxpayer, University of the Witwatersrand, Johannesburg, https://hdl.handle.net/10539/27145

Downloaded from a DSpace repository. https://dspace.org/

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

School of Accountancy

A research report submitted to the Faculty of Commerce, Law and Management in fulfilment of the requirements for the degree of Master of Commerce in the field of Taxation.

The SARS official: an evaluation of the rights and remedies of the taxpayer.

Student: Wayne H. Pocock
Student Number: 0718819k
Supervisor: Prof. AP de Koker

Degree: Master of Commerce (specialisation in Taxation)
Date: 31 March 2018

DECLARATION

I declare that this research report is my work. It is submitted for the degree of Master of Commerce in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

Wayne Pocock

25 March 2018

ABSTRACT

All decisions in the Tax Administration Act, no 28 of 2011 ("**the TAA**"), start and end with a decision taken by the SARS official.

An aggrieved taxpayer must almost always dispute a decision or finding made by the SARS official. However, section 102 of the TAA imposes a heavy evidentiary burden on the taxpayer, being the taxpayer's *onus.* The TAA also allows the SARS official to base decisions on the barest of suspicions and in the absence of facts or evidence of tax delinquency or wrong doing.

This dissertation seeks to evaluate the powers of the SARS official, in particular insofar as it relates to the decision making process. The objective of the analysis is to identify those powers that transgress taxpayer rights and whether such powers survive Constitutional scrutiny in circumstances where South Africa has adopted accountability, the rule of law and the supremacy of the Constitution as values of its democracy.

The dissertation also seeks to identify the taxpayer's remedies in challenging unreasonable conduct of the SARS official and the unchecked abuse of State power and resources in collecting taxes for the *fiscus*.

Keywords: *SARS official, decision, audit, assessments, suspicion, taxpayer, rights, remedies, abuse of process, Constitutional rights, tax liability, onus, burden of proof, Tax Administration Act, 2011*

TABLE OF CONTENTS

INTRODUCTION 6
RESEARCH PROBLEM 8
Statement of the Problem 8
Sub-Problems 8
CHAPTER OUTLINE 9
SIGNIFICANCE OF THE RESEARCH 11
RESEARCH METHODOLOGY 11
SCOPE AND LIMITATIONS 11
CHAPTER 1: THE TAX ADMINISTRATION ACT 12
Chapter 1.1: Introduction 12
Chapter 1.2: The Introduction of the SARS Official 16
Chapter 1.3: Powers of the SARS Official 18
CHAPTER 2: THE LITIGATION PROCESS 20
Chapter 2.1: Civil Litigation Process 20
Chapter 2.2: Tax Litigation Process 22
Chapter 2.2.1: Objection and Appeal Processes 22
Chapter 2.2.2: The Taxpayer's Onus 25
Chapter 2.2.3: Taxpayer's Onus in Court 27
Chapter 2.3: Onus Generally in Civil Litigation 30
Chapter 2.4: The SARS Cause of Action 38
CHAPTER 3: SARS' INFORMATION GATHERING PROCESS 42
CHAPTER 4: SARS ASSESSMENTS 44
Chapter 4.1: Assessments based on an Audit 44
Chapter 4.1.1 The SARS Audit 44
Chapter 4.1.2: The Auditing Profession Act 48
Chapter 4.1.3: International Auditing Standards 49
Chapter 4.1.4: Examples of Flaws in an SARS Audit Process 53
Chapter 4.2: Assessments based on Substance Over Form 56
Chapter 4.3: Conclusion 59
CHAPTER 5: SUSPICION 60
CHAPTER 6: SEARCH AND SEIZURE POWERS 66
CHAPTER 7: PRESERVATION ORDERS 81
CHAPTER 8: TAXPAYER'S PREJUDICE & HARM 87
CHAPTER 9: TAXPAYER'S RIGHTS & REMEDIES 92
Chapter 9.1: Introduction 92
Chapter 9.2: Rights and Remedies found in the Constitutional 94
Chapter 9.3: Rights and Remedies found in the TAA 103
Chapter 9.4: Rights and Remedies found in PAJA 107
Chapter 9.5: Rights and Remedies found in PAIA 116
Chapter 9.6: Rights and Remedies found in the Uniform Rules of Court 120
CHAPTER 10: PROPOSED REMEDIES TO ADDRESS SHORTFALLS 122
Chapter 10.1: Introduction 122
Chapter 10.2: Definition of Audit 122
Chapter 10.3: Introduction of Process to seek Further Particulars 122
Chapter 10.4: Awarding of Punitive Costs 129
CHAPTER 11: CONCLUSION 133
REFERENCES AND BIBLIOGRAPHY 134
Books 134

Journals 134
Statutes 134
Case Authority 134
Periodical 138
Online Resources 138

INTRODUCTION

The SARS official[1] is divinely omnipresent and omnipotent throughout all of the TAA.

This civil servant is SARS' secret weapon: a creature of statute cloaked in immense power, tasked with the effective and efficient collection of tax, custodian of all tax Acts, and undoubtedly the most powerful person in all of tax litigation in South Africa.

The TAA permits the SARS official to base his decisions and findings on the barest of suspicions and in circumstances where there is an absence of objective facts or evidence underpinning suspicions of tax delinquency or wrongdoing. This includes basing decisions on audits conducted by SARS in circumstances where an audit is not defined by the TAA and no formal steps, criteria or guidelines are prescribed by the TAA in conducting an audit, including international norms and standards.

Suspicions in civil proceedings ordinarily arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. Suspicion can take into account also matters which, although admissible, could not form part of a *prima facie* case against the taxpayer. Suspicions and conjecture do not constitute fact or evidence of the allegation of wrong-doing. However, in tax litigation, the SARS official may make decisions on his subjective suspicions which then places the onus on the taxpayer to disprove the suspicion.

The TAA imposes a heavy evidentiary burden upon the taxpayer which is nearly impossibly given that the TAA does not provide for equal information gathering powers. The taxpayer does not have access to mechanisms that force the SARS official disclosure all the facts and evidence in SARS possession and which underpin its case against the taxpayer.

[1] Although the SARS official is genderless, and without any basis other than for the sake of convenience, I refer to the SARS official in the male context.

This inequity stands in a stark contrast to the rights of litigants in a civil court of law where the Uniform Rules of Court provides the equal rights to both side of the litigation fence.

Accordingly, an aggrieved taxpayer must do battle on two fronts: on the one hand, the taxpayer must discharge a heavy evidentiary burden based on an objective measure of the taxpayer's conduct; while on the other, the taxpayer must dispute the subjective suspicions of the SARS official in circumstances where there is no direct or objective evidence of tax delinquency.

The taxpayer's task is enormous and in the absence of information and the details underpinning the SARS official's decision, the process of successfully challenging the SARS official's decision is overwhelming, if not impossible. It can also be financially restrictive given the cost and duration of dispute resolution processes and court litigation.

RESEARCH PROBLEM

Statement of the Problem

The TAA is a relatively new act of legislative and signifies a new regime in the administration of tax in South Africa. However, the TAA introduces the SARS official as the person charged with exercising the powers in the TAA and all decision making in the administration of tax processes. This person is therefore exercising powers and making decisions as an organ of state. The problem that arises is how to measure the reasonableness of the SARS official's conduct insofar as the decision making process and exercise of powers is concerned.

Sub-Problems

The first sub-problem is to evaluated the nature and extent of the SARS official's powers in the TAA and the decision making processes.

The second sub-problem assesses the basis upon which decisions are made by the SARS official including decisions based on mere suspicions or a failed audit and where there is an absence of proof of tax delinquency.

The third sub-problem deals with the taxpayer's *onus* and compares the burden of proof in tax disputes to the burden of proof in civil proceedings.

The fourth sub-problem arises from identifying those powers that amounts to an infringement of the taxpayer's rights.

The fifth sub-problem identifies suitable remedies to protect the taxpayer's rights from conduct that is oppressive or amounts to an abuse of process.

CHAPTER OUTLINE

Chapter 1

This introductory chapter establishes the background and significance of the research, the problems and sub-problems. This chapter deals with the provisions of the TAA and identifies the powers bestowed on the SARS official insofar as initiating processes against the taxpayer. This chapter also deals with the taxpayer's onus.

Chapter 2

This chapter deals with the litigation process and compares the burden of proof in civil litigation to the discharging of the taxpayer's onus in the tax litigation.

Chapter 3

This chapter deals with the generally powers of SARS to gather information related to the taxpayer's affairs.

Chapter 4

This chapter deals with the process of issuing a tax assessment including identifying the shortfalls in the SARS' audit process and SARS reliance on the doctrine of substance over form.

Chapter 5

This chapter deals with the role of suspicion in tax litigation.

Chapter 6

This chapter deals with the SARS official's power to obtain a search and seizure order to raid the taxpayer's premises without notice to the taxpayer.

Chapter 7

This chapter deals with the SARS official's power to obtain a preservation order over the taxpayer's assets without notice to the taxpayer.

Chapter 8

This chapter deals with the potential harm and prejudice to the taxpayer.

Chapter 9

This chapter deals with the taxpayer's rights and remedies and the sources where these may be found.

Chapter 10

This chapter deals with recommendations and additional remedies to deal with the shortfalls in the TAA.

Chapter 11

This chapter will summarise the findings of the research and areas that require further research.

SIGNIFICANCE OF THE RESEARCH

There has been a number of research papers dealing with the TAA and the impact thereof on the taxpayer since its promulgation. The aim of this research is to demonstrate the disparity in litigation powers as between SARS and the taxpayer and the necessity of the implementing a uniform system of rules that apply equally to both sides in a tax dispute.

RESEARCH METHODOLOGY

The approach used in this report was mainly by an examination of the available literature on the subject. The study relies on both primary and secondary sources of information. The primary source references were obtained from domestic legislation in South Africa including precedents as developed by our courts being both the civil and tax litigation sphere. Secondary source references were obtained from various related books, articles and publications which included sources from SARS and other academic sources. Various internet sites have also been consulted in order to obtain relevant and current information.

SCOPE AND LIMITATIONS

The purpose of this research is limited to determine the powers of the SARS official as the key decision maker in the tax enforcement process and to identify the nature and extent of the taxpayer's onus in disputing the decisions and processes taken against the taxpayer. The objective is to ascertain whether the process in tax litigations differs from the general litigation process in civil proceedings. The research is limited to the Tax Administration Act, 2011 although there is a focus on various aspects of civil proceedings and the Uniform Rules of Court.

CHAPTER 1: THE TAX ADMINISTRATION ACT

Chapter 1.1: Introduction

1. The TAA came into force on 1 October 2012.[2]

2. The TAA marked the start of a new dispensation in SARS' powers to administer the collection of tax in South Africa and introduced significant changes to the laws relating to taxation.

3. A short guide was published by SARS[3] to assist in explaining the rationale and motivation and application of the TAA ("the Guide"). The Guide stated that the TAA only deals with tax administration, and seeks to: -

> *"incorporate into one piece of legislation administrative provisions that are generic to all tax Acts and currently duplicated in the different tax Acts; remove redundant administrative provisions; and harmonise the provisions as far as possible."*

4. The Guide states the TAA seeks to promote a better balance between the power and duties of SARS and the rights and obligations of taxpayers and to make this relationship more transparent.

5. It is intended to greatly contribute to the equity and fairness of tax administration. International experience has demonstrated that if taxpayers perceive and experience the tax system as fair and equitable, they will be more inclined to fully and voluntarily comply with it.

6. The Guide states that the TAA seeks in numerous ways to enhance tax compliance to ensure that every person pays his or her fair share. It recognises that the majority of taxpayers are compliant and want a more modern and responsive revenue administration but there is a minority who seeks to evade tax or defraud the government.

---

[2] By Proclamation No. 51 of 2012, published in Government Gazette 35687 on 14 September 2012.

[3] Version 2 dated 5 June 2013

7. The Guide recognises that the information gathering powers of SARS may only be used to obtain relevant material. This relevant material includes information, documents or things that are foreseeably relevant for tax risk assessment, assessing and collecting tax or for determining compliance with a tax obligation.

8. The administration of the TAA includes recognition that SARS is entitled to obtain full information in relation to anything that may affect the liability of a person for tax.

9. The TAA enables SARS to ascertain whether a person has filed or submitted correct returns, information of documents in compliance with the provision of TAA, determining the liability of such person and to collect such tax and to investigate whether a tax offence has been committed.

10. It is recognised that the right to administrative justice under the Constitution is given effect to by the Promotion of Administrative Justice Act ("**PAJA**"). This requires that taxpayer's rights, must in the absence of exceptions provided for in the PAJA, adhere to fairness requirements such as: -

    10.1. prior notice of the intended decision;

    10.2. prior hearing before the decision is taken;

    10.3. clear grounds for the decisions; and

    10.4. adequate notice of the right to request reasons for the decision.

11. Exceptions are only permitted where such departure is reasonable and justifiable.

12. The Guide states that in certain impactful provisions of the TAA, administrative fairness provisions have been codified for example: -

    12.1. SARS may only conduct a field audit or investigation with prior notice;

12.2. At the conclusion of the audit process, SARS is obliged to give prior notice and prior opportunity to respond to the audit findings before the assessment is issues;

12.3. Regarding assessments, SARS must give grounds for the need for a jeopardy assessment or an assessment based on an estimation and an assessment that is not fully based on a return i.e. that is adverse to the tax position taken by the taxpayer.

13. A taxpayer has an expectation that SARS will follow the practice in respect of such taxpayers.

14. The Guide sets out that a Tax Ombud has been created independently from SARS to ensure that a review of a complaint is resolved through mediation and conciliation and that any action by SARS enables the taxpayer to have a fair and cost effective complaint process managed by such Tax Ombud.

15. The Guide also states that a taxpayer maybe requested to submit a certificate or statement recording the extent of the examination by the preparer of the accounts.

16. The scope and ambit of the TAA is set out in section 4 as follows: -

> *"Section 4: - (1) this Act applies to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS. (2) If this Act is silent with regards to the administration of a tax Act and it is specifically provided for in the relevant tax Act, the provisions of that tax Act apply. (3) In the event of any inconsistency between this Act and another tax Act, the other Act prevails."*

17. The definition of a "*tax Act*" is defined in the TAA to mean: -

> *"this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding the Customs Act."*

18. The TAA therefore applies to the following statutes which compromise the full compendium of tax legislation applicable in South Africa ("**the tax Acts**"): - [4]

18.1. The Transfer Duty Act, 1949;

18.2. The Estate Duty Act, 1955;

18.3. The Income Tax Act, 1962;

18.4. The Value-Added Tax Act, 1991;

18.5. The Skills Development Levies Act, 1998;

18.6. The Unemployment Insurance Contributions Act, 2002;

18.7. The Diamond Export Levy Act, 2007;

18.8. The Diamond Export Levy (Administration) Act, 2007;

18.9. The Securities Transfer Tax Act, 2007;

18.10. The Securities Transfer Tax Administration Act, 2007;

18.11. The Mineral and Petroleum Resources Royalty Act, 2008;

18.12. The Mineral and Petroleum Resources Royalty (Administration) Act, 2008; and

18.13. The Voluntary Disclosure Programme and Taxation Laws Second Amendment Act, 2010.

19. Significantly, the TAA does not apply to the Customs and Excise Act, 1964, unless the Act expressly provides that a provision applies in respect of customs or excise matters.

[4] SARS Short Guide to the TAA (5 June 2013)

Chapter 1.2: The Introduction of the SARS Official

20. The TAA introduces for the first time in South Africa the concept of the SARS official.

21. Section 1 of the TAA defines a "SARS official" as: -

> *"**SARS official means** — (a) the Commissioner; (b) an employee of SARS; or (c) a person contracted or engaged by SARS, other than an external legal representative, for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner."*

22. The TAA seeks to introduce a new framework for decision-making that ensures that powers and duties that have far-reaching impact are only delegated to suitable qualified and experienced SARS officials and are exercised directly by the SARS official or under that official's direct supervision.[5]

23. The administration of the TAA is divided into three tiers being the Commissioner, the senior SARS official and the SARS official.[6]

24. The majority of functions and powers under the tax Acts will be performed and executed by the SARS official. A reference to officer in a tax Act where used in the context of a person who is engaged by the Commissioner in carrying out the provisions of the relevant tax Act, also means a SARS official as defined in the TAA.[7]

25. From the delegation of authority, a SARS official is authorised to institute or defend legal proceedings on behalf of the Commissioner as envisaged in section 11 of the TAA. In this regard, section 11 provides as follows: -

> ***"11. Legal proceedings involving Commissioner —** (1) No SARS official may institute or defend civil proceedings on behalf of the Commissioner unless authorised to do so under this Act or by the Commissioner or by the person delegated by the Commissioner under section 6 (2). (2) For purposes of subsection (1), a SARS official who, on behalf of the Commissioner, institutes litigation, or performs acts which are relied upon by the Commissioner in*

[5] SARS Short Guide to the TAA (5 June 2013)
[6] SARS Short Guide to the TAA (5 June 2013)
[7] SARS' Short Guide to the TAA (5 June 2013)

litigation, is regarded as duly authorised until proven to the contrary. (3) An amount due or payable as a result of a cost order in favour of SARS recovered by the State Attorney resulting from any civil proceedings under this Act must be paid to the National Revenue Fund. (4) Unless the court otherwise directs, no legal proceedings may be instituted in the High Court against the Commissioner unless the applicant has given the Commissioner written notice of at least one week of the applicant's intention to institute the legal proceedings. (5) The notice or any process by which the legal proceedings referred to in subsection (4) are instituted, must be served at the address specified by the Commissioner by public notice."

26. The authority to "*institute or defend civil proceedings on behalf of the Commissioner*", as provided for in section 11(1) of the TAA, includes the authority to appoint attorneys and counsel for that purpose.

27. This process is supported by the following provisions of the South African Revenue Service Act, 1997 ("**the SARS Act**"):

27.1. Section 1 which provides that SARS is established as an organ of state, but that it falls outside the public service;

27.2. Section 5(1)(i) which provides that it may perform legal acts, institute or defend legal action in its own name (as opposed to having to do so in the name of the Minister of Finance); and

27.3. Section 5(1)(c) which provides that it may obtain the services of any person to perform any specific act or function.

28. In other words, the SARS official is not obliged to make use of the service of the State Attorney and it is therefore entitled to appoint external attorneys to represent it in legal matters. Section 11(2) of the TAA also provides that a SARS official who perform acts which are relied upon by the Commissioner in litigation is regarded as duly authorised until proven to the contrary.

29. The recent decision by the Eastern Cape Division of the High Court in **C:SARS v J Brown (Case No: 561/2016*)*** supports this view where the court found *inter alia* that:-

29.1. Section 11(2) of the TAA explicitly places the *onus* on the party disputing the deponent's authority, and merely denying that such a person is authorised without providing any factual basis for the allegation is insufficient.

29.2. A SARS official's authority to act on the Commissioner's behalf in legal proceedings is a fact deemed by statute; and

29.3. A Court is constrained to the presumption of regularity[8] insofar as an official act is presumed to be in compliance with the statutory formalities.

30. Accordingly, in the absence of proof to the contrary, the Court must presume that the SARS official was duly authorised to depose to the affidavit on behalf of SARS and/or to initiate court proceedings on SARS' behalf.

Chapter 1.3: Powers of the SARS Official

31. The powers of the SARS official are found in section 6 of the TAA and provides: -

> ***"6. Powers and duties: —****(1) The powers and duties of SARS under this Act may be exercised for purposes of the administration of a tax Act. (2) Powers and duties which are assigned to the Commissioner by this Act must be exercised by the Commissioner personally but he or she may delegate such powers and duties in accordance with section 10. (3) Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by — (a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose. (4) The execution of a task ancillary to a power or duty under subsection (2) or (3) may be done by a SARS official under the control of an official referred to in subsection (3) (a), (b) or (c). (5) Powers and duties not specifically required by this Act to be exercised by the Commissioner or by a senior SARS official, may be exercised by a SARS official. (6) The Commissioner may by public notice specify that a power or duty in a tax Act other than this Act must be exercised by the Commissioner personally or a senior SARS official."*

32. If regard is had to the provisions in the TAA, the powers bestowed on the SARS official are enormous and includes *inter alia* the following: -

[8] omnia praesumuntur rite esse acta

32.1. The SARS official may inspect, investigate, verify or audit the taxpayer's affairs;

32.2. The SARS official may obtain an order for a tax enquiry (*section 50 of the TAA*);

32.3. The SARS official may obtain an order for a warrant to raid a taxpayer's premises (*section 59 of the TAA*);

32.4. The SARS official may obtain an order to appoint a *curator bonis* to preserve the taxpayer's assets (*section 163 of the TAA*);

32.5. The SARS official may accept or decline a request for instalment payment agreement (*section 167 and 168 of the TAA*);

32.6. The SARS official may appoint a third party to satisfy the tax debts of the taxpayer (*section 179 of the TAA*);

32.7. The SARS official may consider a proposal to compromise a taxpayer' tax debt (*section 200-206 of the TAA*);

32.8. The SARS official may consider a proposal to write-off a taxpayer' tax debt (*section 195-199 of the TAA*);

32.9. The SARS official has extensive information gathering powers (*chapter 5 of the TAA*);

32.10. The SARS official also has the power to issue assessments (*chapter 8 of the TAA)*;

32.11. The SARS official participates in the dispute resolution process (*chapter 9 of the TAA*); and much more.

33. The SARS official's decision making process based on these powers are all encompassing and relate to virtually all aspects of the taxpayer's affairs.

CHAPTER 2: THE LITIGATION PROCESS

Chapter 2.1: Civil Litigation Process

34. Generally, the onus and the burden of proof between litigants is crucial. It determines not only the burden of proof but also the duty to begin.

35. There are the following two civil litigation processes in the High Court: -

35.1. The first process is an application process between an applicant and a respondent wherein the applicant's case is pleaded under oath on affidavit. A brief summary of the process is set out as follows: - [9] [10]

35.1.1. The applicant initiates the process by notice of motion supported by a founding affidavit.

35.1.2. The respondent files an answering affidavit in response to the allegations made by the applicant.

35.1.3. Thereafter the applicant files a replying affidavit to the respondent's defence.

35.1.4. All evidence in support of the applicant and respondent's case must be attached to their respective affidavits as annexures.

35.1.5. The court weighs up the versions based on the allegations contained on affidavit. There are no witnesses in an application process (unless the matter is referred oral evidence or trial which is generally an exception).

35.1.6. Because an affidavit is signed under oath, the parties may not amend an affidavit.

---

[9] Rule 6 of the Uniform Rules of Court

[10] This is not an exhaustive account of the process for motion proceedings

35.2. The second process is an action process between a plaintiff and a defendant. A brief summary of the process is set out as follows: -[11] [12]

35.2.1. A dispute is initiated by summons supported by the plaintiff's cause of action which is pleaded in a particulars of claim. The pleadings must contain a clear and concise statement of the material facts relied on with sufficient particularity to enable to other side to respond thereto.[13]

35.2.2. The defendant must file a plea within twenty days of filing a notice of intention to defend the Plaintiff's claim.

35.2.3. If necessary, the Plaintiff is permitted to file a replication to the Defendant's plea.

35.2.4. The pleadings in an action do not contain evidence. The evidence is presented by way of viva voce (oral) evidence of witnesses at the trial which includes documentary evidence.

35.2.5. After the filing of pleadings, the matter reaches the status called *litis contestatio* being when the issues have been crystallised and the parties joined. The parties may apply for trial date once the pleadings have closed.

35.2.6. After close of pleadings, a party may, within 20 days, deliver notice requesting further particulars as are strictly necessary for him to prepare for trial.

35.2.7. The parties may by notice amend their pleadings. Generally, an admission may not be withdrawn.

[11] Rule 17 and 18 of the Uniform Rules of Court
[12] This is not an exhaustive account of the process for motion proceedings
[13] Rule 18

35.2.8. Discovery is the process by means of which the opposing party is obliged to disclose (on affidavit) what relevant documents it has in its possession and which will be used as evidence at the trial.

36. The Uniform Rules of Court are applicable to both action and application proceedings which govern the litigation process between the parties.

37. The Uniform Rules of Court also applies equally to both parties and there are various remedies afforded to litigants in order to compel compliance with the Uniform Rules of Court.

Chapter 2.2: Tax Litigation Process

Chapter 2.2.1: Objection and Appeal Processes

38. The tax litigation process by and large commences with SARS raising an original assessment, or an additional assessment, a reduced assessment or a jeopardy assessment.

39. An aggrieved Taxpayer may in these instances initiate the tax dispute resolution process with SARS which typically commences with an objection.

40. Section 104 of the TAA provides as follows: -

> *"**104. Objection against assessment or decision**. – "(1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. (2) The following decisions may be objected to and appealed against in the same manner as an assessment—(a) a decision under subsection (4) not to extend the period for lodging an objection; (b) a decision under section 107 (2) not to extend the period for lodging an appeal; and (c) any other decision that may be objected to or appealed against under a tax Act. (3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'. (4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection. (5) The period for objection must not be so extended—(a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in*

lodging the objection; (b) if more than three years have lapsed from the date of assessment or the 'decision'; or (c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'."

41. Further, section 106 of the TAA also provides the following: -

> *"**106. Decision on objection**. — "(1) SARS must consider a valid objection in the manner and within the period prescribed under this Act and the 'rules'. (2) SARS may disallow the objection or allow it either in whole or in part. (3) If the objection is allowed either in whole or in part, the assessment or 'decision' must be altered accordingly. (4) SARS must, by notice, inform the taxpayer objecting or the taxpayer's representative of the decision referred to in subsection (2), unless the objection is stayed under subsection (6) in which case notice of this must be given in accordance with the 'rules'. (5) The notice must state the basis for the decision and a summary of the procedures for appeal. (6) If a senior SARS official considers that the determination of the objection or an appeal referred to in section 107, whether on a question of law only or on both a question of fact and a question of law, is likely to be determinative of all or a substantial number of the issues involved in one or more other objections or appeals, the official may— (a) designate that objection or appeal as a test case; and (b) stay the other objections or appeals by reason of the taking of a test case on a similar objection or appeal before the tax court, in the manner, under the terms, and within the periods prescribed in the 'rules'."*

42. The appeal process is set out in section 107 of the TAA which provides as follows: -

> *"**107. Appeal against assessment or decision**. — "(1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'. (2) A senior SARS official may extend the period within which an appeal must be lodged for— (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or(b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days. (3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid. (4) If an assessment or 'decision' has been altered under section 106 (3), the assessment or 'decision' as altered is the assessment or 'decision' against which the appeal is noted. (5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'. (6) Proceedings on the appeal are suspended while the alternative dispute resolution procedure is ongoing. (7) SARS may concede an appeal in whole or in part before— (a) the matter is heard by the tax board or the tax court; or*

(b) an appeal against a judgment of the tax court or higher court is heard."

43. The Rules applicable to the TAA provides the taxpayer with a mechanism to request reasons from SARS for the assessment. The taxpayer is not obliged to do so and may initiate the grievance procedure immediately by lodging an objection.

44. When a taxpayer contests an assessment, the first step would be for the taxpayer to lodge an objection to the assessment. If SARS does not accept the objection and refuses to alter the assessment, the taxpayer then lodges an appeal to the Tax Court or the Tax Board. In this regard: -

44.1. The Tax Board consists of an attorney and an advocate. The Tax Board may hear tax appeals in disputes involving tax that does not exceed R200,000. The unsuccessful party may appeal to the tax court.

44.2. The Tax Court consists of a judge of the High Court, an accountant and commercial member. An unsuccessful litigant may appeal to the High Court or the Supreme Court of Appeal.

45. The parties in tax disputes, including SARS or the Taxpayer, may thereafter lodge a further appeal to the High Court and the Supreme Court of Appeal.

46. Objections[14] and appeals by the taxpayer is only against assessment grievances. A taxpayer may also object to: -

46.1. a decision by SARS not to extend the period for objection or appeal in circumstances where the taxpayer requested an extension;

46.2. any decision that may be objected to or appealed against under a tax act;

46.3. a decision not to authorise a refund or not to remit an administrative non-compliance penalty or not to remit an understatement penalty.

[14] Section 104 – 106 of the TAA

47. Significantly, the TAA prescribed strict time periods for the taxpayer to institute the aforesaid processes which periods are, in most instances, onerous and restrictive. The taxpayer who may not versed in tax or legal litigation is expected to obtain advice from a tax expert and/or a legal expert during these time periods. Thereafter papers are to be prepared and settled. The entire process is burdensome and costly.

Chapter 2.2.2: The Taxpayer's Onus

48. In all of these processes, section 102(1) of the TAA provides as follows insofar as the taxpayer's *onus* is concerned: -

> *"**102. Burden of proof.** - "(1) A taxpayer bears the burden of proving— (a) that an amount, transaction, event or item is exempt or otherwise not taxable; (b) that an amount or item is deductible or may be set off; (c) the rate of tax applicable to a transaction, event, item or class of taxpayer; (d) that an amount qualifies as a reduction of tax payable; (e) that a valuation is correct; or (f) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect. (2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS."*

49. The taxpayer's *onus* is not new. It has been the norm in previous legislative dispensations. In the now repealed section 82 of the Income Tax Act 58 of 1962, the burden of proof was defined as follows: -

> *"The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act; shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off . . . and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."*

50. Accordingly, and in terms of the Income Tax Act, the *onus* was on the taxpayer to show on a preponderance of probability that the decisions of SARS against which it appealed were wrong.[15] The taxpayer had to prove whether an amount was taxable or exempt or that an amount was allowable as a deduction under the Income Tax Act.

[15] Commissioner for Inland Revenue v SA Mutual Unit Trust Management Co Ltd 1990 (4) SA 529 (A) at 538D

51. Similarly, the now-repealed section 37 of the VAT Act 89 of 1991 used to provide the following with regards to the burden of proof: -

> ***"37. Burden of proof.***—*The burden of proof that any supply or importation is exempt from or not liable to any tax chargeable under this Act or is subject to tax at the rate of zero per cent or that any value upon which tax is chargeable under this Act or any amount of tax chargeable under this Act is subject to any deduction or set-off or that any amount should be deducted as input tax, shall be upon the person claiming such exemption, non-liability, rate of zero per cent, deduction or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."*

52. Section 102(2) does place an onus on SARS however only in circumstances where an understatement penalty is imposed against the taxpayer under chapter 16 of the TAA. This onus would require SARS to justify the penalty. In litigation in the Tax Court, SARS would have the duty to begin and carry a burden of proof.

53. In all other disputes, such as say for example where the taxpayer disputes an amount is deductible or nor or is exempt or not, the onus and the burden of proof lies with the taxpayer. The taxpayer would thus commence proceedings first in the Tax Court and would have to discharge his duty at the close of his case.

54. There is precious little in the TAA regarding the measure of the taxpayer's onus.

55. In terms of section 223 of the TAA, SARS may impose certain penalties against the taxpayer. In the context of penalties, the Guide provides the following when considering the taxpayer's intention and the discharge of an onus: - [16]

> *"to evade tax includes actions that are intended to reduce or extinguish the amount that should be paid, or which inflate the amount of a refund that is correctly refundable to the taxpayer"*
>
> and goes on further to state: -
>
> *"[the] most important factor is that the taxpayer must have acted with intent to evade tax. Intention is a willful act, that exists when a person's conduct is meant*

[16] at page 81

to disobey or wholly disregard a known legal obligation, and knowledge of illegality is crucial."

56. It bears noting at this juncture that, generally, the taxpayer and SARS, as parties to court proceedings or tax disputes, are required to pay their own legal costs. In this regard, section 130 of the TAA does provide the following exception: -

> ***"130. Order for costs by tax court**. — "(1) The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if— (a)the SARS grounds of assessments or 'decision' are held to be unreasonable; (b)the 'appellant's' grounds of appeal are held to be unreasonable; (c)the tax board's decision is substantially confirmed; (d)the hearing of the appeal is postponed at the request of the other party; or (e)the appeal is withdrawn or conceded by the other party after the 'registrar' allocates a date of hearing. (2) The costs awarded by the tax court under this section must be determined in accordance with the fees prescribed by the rules of the High Court. (3) The tax court may make an order as to costs provided for in the 'rules' in— (a) a test case designated under section 106 (5); or (b) an interlocutory application or an application in a procedural matter referred to in section 117 (3)."*

57. The taxpayer would have to make out a case that satisfies the requirements for a cost order against SARS including the scale of such legal costs.

Chapter 2.2.3: Taxpayer's Onus in Court

58. The taxpayer's *onus* has been developed in South African courts over the years and has been described as follows: -

58.1. In **Commissioner for Inland Revenue v Goodrick 12 SATC** the *onus* to be discharged by the taxpayer was stated at 296 as follows: -

> *"What is required from the taxpayer to discharge this onus is affirmative evidence which satisfies the court on a preponderance of probability that the amount received was not income."*

58.2. In **Bitcon v Rosenberg (1936) AD** the Court stated at 396 the following with regards to the weighing of probabilities: -

"The trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men but he is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they are."

58.3. In **Commissioner for Inland Revenue v Goodrick 12 SATC** the taxpayer's *onus* was explained at 296 as follows: -

"What is required from the taxpayer to discharge this onus is affirmative evidence which satisfies the court on a preponderance of probability that the amount received was not income."

58.4. The weighing of probabilities was described in **Bitcon v Rosenberg (1936) AD** at 396 as:-

"The trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men but he is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they are."

58.5. In **Commissioner, South African Revenue Services v Pretoria East Motors (Pty) Ltd [2014] 3 All SA 266 (SCA),** the Court stated at para 8 as follows: -

"It is so that the taxpayer's ipse dixit will not lightly be regarded as decisive. But it must be considered together with all of the other evidence in the case. And, given the unfavourable position of having the onus resting upon it – a "formidable and difficult" one to discharge ….The interests of justice require that the taxpayer's evidence and questions of its credibility be considered with great care. Indeed, the taxpayer's evidence under oath and that of its witnesses must necessarily be given full consideration by the court, and the credibility of the witnesses must be assessed as in any other case that comes before the court. …. It thus remains the function of the court to make a determination of the issues that arise for decision on an objective review of all of the relevant facts and circumstances. Not the least important of the facts, according to Miller J (ITC 1185 (1972) 35 SATC 122 (N) at 124): "will be the course of conduct of the taxpayer in relation to the transactions in issue, the nature of his business or occupation and the frequency or otherwise of his past involvement or participation in similar transactions. The facts in regard to those matters will form an important part of the material from which the court will draw its own inferences against the background of the general human and business probabilities."

58.6. In **X v C;SARS, ITC case 13380** it was stated: - [17]

> *"Counsel for SARS argued that the ultimate responsibility to submit the correct tax return timeously is that of the taxpayer. That is indeed so and there can be no exception to this at all… She had a duty not to leave all her financial affairs in the hands of her attorney and her accountant, without overseeing their actions and ascertaining that all her taxes were paid timeously. She cannot rely on the fact that she thought they had dealt with her tax returns."*

58.7. Although the court attributed the onus to the taxpayer on the basis that the taxpayer is responsible for his own tax affairs, the Court was slow to attribute blame to the taxpayer for the inactions of his auditor. The Court went on to say:-

> *"The question is whether the appellant should be punished for Mr Z's dilatory behaviour, or only because she did not make enough enquiries as to whether the correct tax return had been submitted timeously and making sure that all was done to have the correct tax return furnished to SARS timeously… The court has to be careful, especially in this instance, not to punish the appellant for her accountant's actions, but has to consider her actions in isolation in this regard."*

58.8. In **ABC (Pty) Ltd v C:SARS, ITC case 0038/2015**[18] the taxpayer sought condonation on the basis of exceptional circumstances. The court stated inter alia the following with regards to the Taxpayer's onus: -

> *"I am sympathetic to any taxpayer who is confronted with an enormous amount of tax to be paid in terms of an assessment where it was the ignorance of the taxpayer which led to his or her failure to comply with the provisions of the TAA. But the taxpayer, whose assessed liability runs to millions of Rands, should have taken its tax responsibilities seriously enough to seek tax advice from a firm of attorneys specializing in such matters as soon as the assessments were levied in December 2014 when it became apparent that the November 2014 representations of his auditor had not been successful. The lapse of time from mid-December 2014 to June 2015 is not satisfactorily explained - let alone sufficiently to discharge the onus of proving 'exceptional circumstances'."*

59. The question that arises is this: is the taxpayer's onus in terms of the TAA any different to the onus on litigants in civil litigation.

---

[17] The case is dated 27 January 2016

[18] The case is dated 4 March 2016

Chapter 2.3: Onus Generally in Civil Litigation

60. In civil proceedings, the "burden of proof" is the duty which one or the other of the parties bear of finally satisfying the court that he or she is entitled to succeed on the claim or defence.

61. The general rule on onus is that he who asserts must prove.[19] If a defendant tries to avail himself of an exception, then he bears the onus. Similarly, if a defendant wishes to rely on a special defence, he must prove that defence.

62. In **Tregea v Godard 1939 AD 16**, the Court held that the determination of the overall onus of proof is a matter of substantive law. The overall onus is sometimes referred to as 'the risk of non-persuasion'.

63. The overall legal onus is fixed by pleadings and never changes.[20]

64. Rule 39(13) of the Uniform Rules of Court provides that if the onus of adducing evidence on one or more of the issues is on the plaintiff, and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issue is respect of which the onus is upon him, and may then close his case.

65. If absolution is not granted, it is the defendant's turn to adduce evidence in respect of all the issues in which the onus is on him. Rule 39(14) provides that, if the duty to adduce evidence is on the defendant, he or she has to begin.

66. The writer demonstrates the operation of the onus in civil litigation with the following examples: -

66.1. With regard to delictual claims,: - [21]

[19] Pillay v Krishna 1946 AD 946

[20] Klaassen v Benjamin 1941 TPD 80

[21] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 3: The standard and burden of proof and evidential duties in civil trials.

66.1.1. The plaintiff generally has to prove the act (including voluntariness), fault and the nature and extent of damage.

66.1.2. In **Mabaso v Felix 1981 3 SA 865 (A)** it was held that in actions for damages in respect of delicts affecting the plaintiff's personality and bodily integrity, such as assault, the defendant bears the onus of proving the excuse or justification which he raises.

66.2. In contractual matters,: - [22]

66.2.1. a plaintiff who sues on a contract must prove that it was concluded and all the express and implied terms of it, even if that may involve the proof of a negative.

66.2.2. The plaintiff must also prove the enforceability of his contract, including that he performed his own contractual obligations or that he suffered damages.

66.2.3. But if a defendant alleges his due performance (e.g. payment), he must prove it or prove that circumstances exist which exonerates him from liability.

66.2.4. A defendant must prove facts which prevent enforceability of a contract, e.g. lack of contractual capacity, fraud perpetrated by the plaintiff, the illegality of the contract or a provision rendering it contrary to public policy as well as release, waiver, novation or prescription.

66.3. In constitutional matters,: - [23]

66.3.1. the burden falls on the party to justify an infringement of a right under section 36[24] is not an ordinary onus;

---

[22] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 3: The standard and burden of proof and evidential duties in civil trials.

[23] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 3: The standard and burden of proof and evidential duties in civil trials.

66.3.2. failure by a party, which is normally the government, to submit the requisite factual material, policy considerations and legal argument may tip the scales against that party, but there may be cases where despite the absence of such information on the record, a court may nevertheless uphold a claim of justification based on common sense and judicial knowledge.

66.3.3. Further, section 9(5) has a provision that discrimination on one of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

66.4. In cases of defamation: -

66.4.1. the onus is on the plaintiff to prove that the article in question was published and that it is defamatory;

66.4.2. the test for whether it is defamatory is whether it would lower the reputation of the plaintiff in the eyes of the reasonable public, or specific section of the public.

66.4.3. once the plaintiff has discharged his onus to prove publication and the statement's defamatory nature, the presumption that the publication is unlawful and that the defendant was at fault i.e. had the *anumius iniuriandi* becomes operative.

66.4.4. The onus is then on the defendant to prove a justification which would negate the unlawfulness, such as privilege, fair comment or truth and public interest.[25]

67. Accordingly, in civil litigation the concept of an *onus* has been formulated as follows depending upon the dispute at hand: - [26]

---

[24] The general limitation clause

[25] Neethling v Du Preez 1994 1 SA 708 (A); National Media Ltd v Bogoshi 1998 4 SA 1196 (SCA)

[26] Amlers, 7th Edition, Pleadings

67.1. A claim based on a contract is to be put within the four corners of the agreement. A proper setting out of the cause of action requires an averment of the fulfilment of such conditions as the agreement might attach to the obligation sought to be relied upon.

67.2. These conditions must be of the nature of prerequisites for the coming into existence of an obligation or its enforceability, such as conditions precedent, suspensive conditions or terms, reciprocal obligations of which prior or simultaneous fulfilment is required, and like. In other words, a litigant relying on a contract, which is subject to a condition, has to plead and prove the condition and its fulfilment.[27]

67.3. A party wishing to claim damages resulting from a breach of contract must allege and prove:

67.3.1. the contract;

67.3.2. breach of the contract (for example, that the other party was in *mora*), or repudiation of the contract;

67.3.3. that the claimant has suffered damages;

67.3.4. a causal link between the breach and damages;

67.3.5. that the loss was not too remote.

67.4. A defendant who is *prima facie* liable for damages resulting from the breach of the contract and wishes to rely on a contractual provision exonerating him or her from liability is, in effect, confessing and avoiding. Such a defendant bears the onus of establishing the defence by bringing herself or himself within the terms of the provision concerned.[28]

---

[27] Kate's Hope Game Farm (Pty) Limited v Terblanchehoek Game Farm (Pty) Ltd 1998 (1) SA 235 (SCA)

[28] Strijdom Park Extension 6 (Pty) Ltd v Abcon (Pty) Ltd 1998 (4) SA 844 (SCA)

67.5. A party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly.[29] The onus is the ordinary civil onus, bearing in mind that fraud is not easily inferred.[30]

67.6. The onus rests on the party relying on a waiver to allege and prove the waiver on a balance of probabilities.[31]

67.7. To establish a tacit contract, it is necessary to allege and prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was agreement. In deciding whether a tacit contract was concluded, the law objectively considers the conduct of both parties and the circumstances of the case generally.[32]

68. Direct evidence of a fact is the assertion of that fact by a person who claims to have perceived it with his own senses, and is generally made orally in court. It may be contrasted with circumstantial evidence which is any fact inferred from other facts which are proved by direct evidence, i.e. it is facts the existence of which is made probable by other facts. Circumstantial evidence is not necessarily less cogent than direct evidence.[33]

69. The ultimate proposition which has to be inferred is called the *factum probandum*, and the facts which prove these are the *facta probantia.* A *factum probandum* is one that, in light of the allegations in the pleadings is essential for one side to prove to succeed. A *factum probans* is only relevant insofar as it is capable of proving a *factum probandum.*[34]

70. In **R v Blom 1939 AD 288**, the court stated that the two cardinal rules of logic governing the use of circumstantial evidence in a criminal trial are: -

---

[29] Courtney-Clarke v Bassingthwaighte 1991 (1) SA 684 (Nm) 689
[30] Gilbey Distillers & Vintners (Pty) Ltd v Morris NO 1990 (2) SA 217 (SE)
[31] Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A)
[32] Standard Bank of SA Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A) 292
[33] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 4 and 5: Direct and Circumstantial Evidence
[34] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 4 and 5: Direct and Circumstantial Evidence

70.1. the inference drawn must be consistent with all the proven facts; and

70.2. the proven facts must exclude every reasonable inference save the one to be drawn.[35]

71. In **Ocean Accident & Guarantee Corporation Ltd v Koch 1963 (4) SA 147** (A), the court held that the inference must be plausible and natural. The court stated inter alia: -

> *"the inference which the court seeks to or may draw may be a non sequitur or it may overlook the possibility of other inferences which are equally probable or at least reasonably possible. It may happen that the trier of fact is so pleased at having thought of a theory to explain the facts that he or she may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and which thus cannot legitimately be inferred."*

72. In the case of **Casswell v Powell Duffryn Associated Collieries Ltd 1939 (3) All ER 722** at 733 as follows:

> *"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish" ... "But if there are no positive approved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."*

73. The term '*prima facie*' case means that the party who had first adduced evidence has led enough evidence upon which a reasonable man might (not ought) find for him when he closes his case.[36] In other words, the party who has not yet led any evidence runs the risk of judgment being given against him if he leads no evidence to combat the *prima facie* case. It does not mean that judgment will automatically be granted against him.

74. *Prima facie* evidence can mean: -

---

[35] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 4 and 5: Direct and Circumstantial Evidence

[36] Gascoyne v Paul and Hunter 1917 TPD 170; Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA).

74.1. evidence upon which a reasonable man could find in favour of the party adducing it, and his opponent would run the risk of losing if he offers no evidence (i.e. it is evidence requiring an answer); or

74.2. *prima facie* evidence is evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply, which is better referred to as *prima facie* proof.

75. The standard of proof is proof on a balance of probabilities, that is, it must carry a reasonable degree of probability. If the evidence is such that the Court can say 'we think it is more probable than not' then the burden is discharged, but if the probabilities are equal, then it is not.[37]

76. The primary rule of admissibility is the rule of relevance. When it is said that evidence is admissible, it means that the court must consider it in deciding the factual issues. Evidence must not only be logically relevant to be admissible, but must also be legally relevant, that is, sufficiently relevant to receive in view of the disadvantages that may be attendant on that evidence.

77. Fact-finders must weigh up: -

77.1. the probative value of the evidence; against

77.2. the aggregate of the disadvantageous factors attendant on the evidence to decide if it's legally relevant.

78. If the probative value is sufficiently great to outweigh the prejudicial effect of the evidence or the practical disadvantages of receiving it, then the evidence is legally relevant.[38]

79. Section 210 of the Criminal Procedure Act states that: -

[37] Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A)

[38] The South African Law of Evidence, Zeffertt, 1st Ed. Chapter 7: Relevance and Admissibility

"No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduct to prove or disprove any point or fact at issue in criminal proceedings."

80. The civil test is virtually identical.

81. Section 34 of the Constitution makes it clear that parties to a civil action are entitled to a fair hearing. Evidence obtained in an unconstitutional manner ought therefore also to be excluded in civil matters, though courts likely retain a discretion on the matter. Because there may be greater parity between the parties in a civil matter, evidence will not be excluded on such a broad basis as in criminal matters.

82. Two aspects to be considered are: -

82.1. why the evidence was obtained in an unconstitutional manner and not by existing procedures; and

82.2. the nature of the evidence, could it be lawfully obtained in the ordinary course? If not, likely not admitted.

83. There are 3 forms of evidence: -

83.1. Oral evidence including evidence given in written form in an affidavit. Evidence given in words in court either spoken by a witness, or given in affidavit under affirmation and subject to the rules of evidence relating to admissibility and cogency;

83.2. Real evidence being things that exist in the physical universe, excluding documents; and

83.3. Documentary evidence.

84. The admissibility of data or information stored in electronic form is regulated by sections 12 – 19 of the Electronic Communications and Transactions Act 25 of 2002.

Chapter 2.4: The SARS Cause of Action

85. As stated above, the dispute process normally commences with an assessment by SARS where after the taxpayer may objections and appeals against assessment grievances.

86. In this regard, section 91 of the TAA provides as follows: -

> *"**91. Original assessments**. — (1) If a tax Act requires a taxpayer to submit a return which does not incorporate a determination of the amount of a tax liability, SARS must make an original assessment based on the return submitted by the taxpayer or other information available or obtained in respect of the taxpayer. (2) If a tax Act requires a taxpayer to submit a return which incorporates a determination of the amount of a tax liability, the submission of the return is an original self-assessment of the tax liability. (3) If a tax Act requires a taxpayer to make a determination of the amount of a tax liability and no return is required, the payment of the amount of tax due is an original assessment. (4) If a taxpayer does not or is not required to submit a return, SARS may make an assessment based on an estimate under section 95 if that taxpayer fails to pay the tax required under a tax Act. (5) If a tax Act requires a taxpayer to submit a return— (a) the making of an assessment under subsection (4) does not detract from the obligation to submit a return; (b) the taxpayer in respect of whom the assessment has been issued may, within 30 business days from the date of assessment, request SARS to issue a reduced assessment or additional assessment by submitting a complete and correct return; and (c) an assessment under subsection (4) is not subject to objection or appeal unless the taxpayer submits the return and SARS does not issue a reduced or additional assessment. (6) A senior SARS official may extend the period referred to in subsection (5) (*b*) within which the return must be submitted, for a period not exceeding the period."*

87. Section 92 of the TAA provides as follows: -

> *"**92. Additional assessments**. — If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice."*

88. Section 93 of the TAA provides as follows: -

> *"**93. Reduced assessments**. —(1) SARS may make a reduced assessment if — (a) the taxpayer successfully disputed the assessment under Chapter 9;*

(b) necessary to give effect to a settlement under Part F of Chapter 9;
(c) necessary to give effect to a judgment pursuant to an appeal under Part E of Chapter 9 and there is no right of further appeal;
(d) SARS is satisfied that there is a readily apparent undisputed error in the assessment by— (i)SARS; or (ii)the taxpayer in a return; or (e) a senior SARS official is satisfied that an assessment was based on— (i)the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act; (ii)a processing error by SARS; or (iii)a return fraudulently submitted by a person not authorised by the taxpayer.
(2) SARS may reduce an assessment despite the fact that no objection has been lodged or appeal noted."

89. Section 94 of the TAA provides as follows: -

*"**94. Jeopardy assessments**. — (1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy. (2) In addition to any rights under Chapter 9, a review application against an assessment made under this section may be made to the High Court on the grounds that— (a) its amount is excessive; or (b) circumstances that justify a jeopardy assessment do not exist. (3) In proceedings under subsection (2), SARS bears the burden of proving that the making of the jeopardy assessment is reasonable under the circumstances."*

90. Section 95 of the TAA provides as follows: -

*"**95. Estimation of assessments**. — (1) SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate if the taxpayer— (a) fails to submit a return as required; or (b) submits a return or information that is incorrect or inadequate. (2) SARS must make the estimate based on information readily available to it. (3) If the taxpayer is unable to submit an accurate return, a senior SARS official may agree in writing with the taxpayer as to the amount of tax chargeable and issue an assessment accordingly, which assessment is not subject to objection or appeal."*

91. Finally, section 96 of the TAA provides the following: -

*"**96. Notice of assessment**. — (1) SARS must issue to the taxpayer assessed a notice of the assessment made by SARS stating— (a) the name of the taxpayer; (b) the taxpayer's taxpayer reference number, or if one has not been allocated, any other form of identification; (c) the date of the assessment; (d) the amount of the assessment; (e) the tax period in relation to which the assessment is made; (f) the date for paying the amount assessed; and (g) a summary of the procedures for lodging an objection to the assessment. (2) In addition to the information provided in terms of subsection (1) SARS must give the person*

assessed— (a) in the case of an assessment described in section 95 or an assessment that is not fully based on a return submitted by the taxpayer, a statement of the grounds for the assessment; and (b) in the case of a jeopardy assessment, the grounds for believing that the tax would otherwise be in jeopardy."

92. In addition to the above assessments, a taxpayer may also object to: -

92.1. a decision by SARS not to extend the period for objection or appeal in circumstances where the taxpayer requested an extension;

92.2. any decision that may be objected to or appealed against under a tax act;

92.3. a decision not to authorise a refund or not to remit an administrative non-compliance penalty or not to remit an understatement penalty.

93. Notwithstanding, most taxpayer grievances and tax disputes lie with assessments issued by SARS as a result of its audit findings.

94. SARS' cause of action against the taxpayer stands in stark contrast to a cause of action pleaded in civil proceedings. As previously stated, the protagonist in a civil matter with either an applicant in motion proceedings or a plaintiff in action proceedings.

95. In both scenarios, the cause of action is regulated by the Uniform Rules of Court.

96. The following guidelines have been developed in South African in understanding what constitutes a cause of action between parties and how the protagonist's onus is discharged. In **McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD** the following definition of a *'cause of action'* was adopted by the Appellate Division: -

". . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

97. In action proceedings, pleading setting out a cause of action in a summons and particulars of claim is regulated by Rule 18. Whereas in motion proceedings, a pleading setting out a cause of action on affidavit is regulated by Rule 6.

CHAPTER 3: SARS' INFORMATION GATHERING PROCESS

98. The TAA provides SARS and the SARS official with mechanisms in order to obtain the necessary facts and evidence in order to formulate its cause of action against the taxpayer.

99. In this regard, Chapter 5 of the TAA sets out the information gathering processes available to SARS.

100. The TAA increases SARS information gathering powers as: -

100.1. The SARS official may conduct unannounced but limited inspections at business premises to verify that a person has complied with the formal obligations such as registering and maintaining proper records;

100.2. The SARS official may request information that concerns previous, current and future tax periods or taxable events known as real time audits;

100.3. The SARS official may request information in respect of an objectively identified taxpayer;

100.4. The SARS official may conduct audits on a random or risk assessment basis;

100.5. The SARS official may obtain information for purposes of revenue estimation;

100.6. The SARS official may ask a taxpayer to attend an interview at a SARS office to clarify issues of concern;

100.7. The SARS official may seek authority to conduct a search and seizure.

101. Relevant material may be required by the SARS official to administer a tax act such as verifying whether a return is correct, auditing a person's tax affairs, establishing a person's correct tax liability and investigating and collecting evidence whether a person has committed a tax offence.

102. It is required that the SARS official keep the taxpayer informed of the audit and the findings in respect thereof. It is recognised that the SARS official may arrive and inspect premises without prior notice.

103. The SARS official may wish to clarify matters during interview with the persons concerned, in the hope of rendering further verification or audit unnecessary.

104. The Guide recognises that SARS may conduct a field audit and request relevant material and ask questions and examine systems and download relevant material as part of conducting their audit.

105. The Guide sets out the rights of the SARS official under search and seizure and the controls in respect thereof.

106. In Chapter 8 of the Tax Administration Act provision is made for a jeopardy assessment, which can be issued without following the ordinary ordered route on the basis that it is believed that the collection of taxes is in jeopardy.

107. It is also recognised that an assessment based on an estimate may be raised where a taxpayer fails to submit a return or an inadequate return is provided or the taxpayer fails to provide the relevant information.

108. It is recognised that the TAA provides that SARS must consider a valid objection in the manner and within the period prescribed under the Act and the rules.

109. It would appear that the TAA provides various less invasive powers to SARS and the SARS official to obtain information from the taxpayer in order to estimate the tax due.

110. However, the question is whether the SARS official is compelled to exhausted these less invasive powers before resorting to more invasive powers such as, for example, a search and seizure order or a preservation order.

111. The writer is of the opinion that the only manner to make such a determination would be based on the test of reasonableness which is based on the factual circumstances and the existing relationship between the SARS official and the taxpayer at the time.

CHAPTER 4: SARS ASSESSMENTS

112. In this chapter, the writer deals with the principles applicable to assessments as a basis for the exercise of the SARS' official's powers

Chapter 4.1: Assessments based on an Audit

Chapter 4.1.1 The SARS Audit [39]

113. The TAA refers to the rights of the SARS official to include, *inter alia,* the ability to conduct an audit.

114. The writer believes that the most abused power available to the SARS official is the SARS audit for the reasons that follow.

115. Section 48 of the TAA provides as follows: -

> *"**48. Field audit or criminal investigation**. — (1) A SARS official named in an authorisation referred to in section 41 may require a person, with prior notice of at least 10 business days, to make available at the person's premises specified in the notice relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to the person or another person. (2) The notice referred to in subsection (1) must— (a) state the place where and the date and time that the audit or investigation is due to start (which must be during normal business hours); and (b) indicate the initial basis and scope of the audit or investigation. (3) SARS is not required to give the notice if the person waives the right to receive the notice.(4) If a person at least five business days before the date listed in the notice advances reasonable grounds for varying the notice, SARS may vary the notice accordingly, subject to conditions SARS may impose with regard to preparatory measures for the audit or investigation. (5) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant."*

116. Further, section 49 also provides: -

> *"**49. Assistance during field audit or criminal investigation**. — (1) The person on whose premises an audit or criminal investigation is carried out and any other*

[39] Allan Greyling from Accountants@Law

person on the premises, must provide such reasonable assistance as is required by SARS to conduct the audit or investigation, including— (a) making available appropriate facilities, to the extent that such facilities are available; (b) answering questions relating to the audit or investigation including, if so required, in the manner referred to in section 46 (7); and (c) submitting relevant material as required. (2) No person may without just cause—(a) obstruct a SARS official from carrying out the audit or investigation; or(b) refuse to give the access or assistance as may be required under subsection (1). (3) The person may recover from SARS after completion of the audit or criminal investigation (or, at the person's request, on a monthly basis) the cost for the use of photocopying facilities in accordance with the fees prescribed in section 92 (1) (b) of the Promotion of Access to Information Act."

117. Significantly, the TAA does not define an audit. This has been, and remains, an extremely vexed area insofar the exercise of powers by the SARS official is concerned and for the reasons set out below.

118. SARS' has however stated on its official website that an audit is: -

> *"It is an examination of the financial and accounting records and/or the supporting documents of the taxpayer to determine whether the taxpayer has correctly declared his/her tax position to SARS. Where the taxpayer has not made a declaration or filed a return, it is an investigation regarding whether the taxpayer's actions complies with the provisions of the relevant tax legislation."* [40]

119. SARS' External Guide on Access to Audit Files[41] provides as follows:-[42]

119.1. The aim of a statutory audit is to express an opinion on the financial statements as a whole. The opinion only provides reasonable assurance and is issued for the use of all interested parties, including SARS.

119.2. The aim of a tax audit is to determine if the taxpayer has complied with the relevant legislation administered by SARS. The tax auditor does not express an opinion, but rather makes a determination as to the correctness of a declaration. These tax audits are normally based on risk(s) identified in a specific

[40] http://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Being-Audited.aspx
[41] undated
[42] http://www.sars.gov.za/AllDocs/OpsDocs/Guides/GEN-AU-14-G01%20-%20Guide%20on%20access%20to%20audit%20files%20-%20External%20guide.pdf

declaration made by a taxpayer. The financial statements are an important source of supporting evidence for declarations made by taxpayers.

119.3. Despite the different objectives of statutory auditors and tax auditors, both audits should be of a high standard and be conducted effectively and efficiently. In both audits sufficient and appropriate audit evidence must be gathered to support the opinion/determination of the auditor;

119.4. In terms of section 46 of the TAA SARS can only request relevant material for purposes of the administration of a tax Act which includes information, documents or things that in the opinion of SARS are foreseeably relevant for the administration of a tax Act.

119.5. SARS will generally exhaust all options to request relevant material from the taxpayer directly;

119.6. In the process of administration of a tax Act, SARS may consider it necessary to gain an understanding of the taxpayer's operating environment in order to focus its audit efforts. This can be obtained from the audit file of the statutory auditor.

119.7. Furthermore, in circumstances where the taxpayer's declaration is incomplete or insufficient, or the taxpayer or independent third parties are unable to provide SARS with the information required, access to the statutory auditor's audit file could be considered necessary in order to ensure sufficient and appropriate audit evidence is gathered to support the assessment by the tax auditor.

119.8. Lastly, in instances where the taxpayer withholds information, SARS might deem it necessary to obtain the information it needs from the statutory auditor's audit file.

120. An audit conduct in terms of the TAA is only deemed to commence once a formal Notification of Audit by a specific auditor is issued to the taxpayer.

121. If relevant material such as supporting documents is requested by SARS in the notification, the taxpayer should submit the relevant material to SARS within 21 business days from the date on the letter.

122. The SARS official may make arrangements with the taxpayer to conduct a field audit and photocopy costs can be recovered from SARS where a field audit is conducted, provided that certain requirements are met. The required relevant material will differ depending on the tax type and scope of the audit.

123. SARS can also obtain relevant material from any third party.

124. The following steps are provided by the SARS official in conducting its audit: -

124.1. The Notification of Audit will indicate the initial scope of the audit;

124.2. The SARS Auditor will produce an Authorisation Letter where a field audit is conducted; and

124.3. Progress reports of the stage of the audit will be issued at intervals of 90 business days from the date of the notification of the audit.

125. The audit could be completed within anything from 30 business days to 12 months, or even longer, depending on the complexity of the matter, the volumes of transactions involved and the level of co-operation by the taxpayer.

126. SARS can request additional or further relevant material throughout the audit.

127. Chapter 5 deals with information gathering and section 40 notes that SARS may select a person for inspection, verification and/or audit. However, given the absence of a definition of an audit, one must look beyond the prescripts of the TAA and to other recognised sources.

Chapter 4.1.2: The Auditing Profession Act

128. The TAA does not provide a definition of an audit and no formal norms, standards or guidelines are prescribed by the TAA.

129. The Auditing Profession Act No. 26 of 2005 ("**Auditing Profession Act**") provides for the establishment of the Independent Regulatory Board for Auditors ("**IRBA**") to provide education, training and professional development of registered auditors, to provide accreditation of professional bodies and to regulate the conduct of registered auditors.

130. The definitions of the Auditing Profession Act include "*an appropriate regulator*" which, in relation to any entity means "*any national government department or authority established to regulate, oversee and ensure compliance with any legislation*."

131. Auditing Profession Act defines an audit means the examination of, in accordance with prescribed or applicable auditing standards of:-

131.1. "financial statements (or other financial information) or generically the subject matter, with the objective of expressing an opinion as to their fairness or compliance with an identified financial reporting framework and any applicable statutory requirements", or

131.2. "financial and other information, prepared in accordance with suitable criteria with the objective of expressing an opinion on the financial and other information."

132. The purpose of an audit is to provide an enhanced level of assurance to the reader of the subject matter. Auditing pronouncements mean those standards, practices, guidelines and circulars developed by IRBA in the performance of an audit.

133. The Auditing Profession Act provides for reportable irregularities to be reported, which mean any unlawful act or omission committed by any person responsible for the management of an entity which has caused or is likely to cause material financial loss to the entity or to any partner, member, shareholder, creditor or investor of the entity in

respect of his/her dealings with that entity or any fraudulent amounts or theft or any material breach fiduciary duties.

134. Although SARS and the SARS official are not auditors in the general sense as contemplated by the Auditing Profession Act, one would expect them to comply with proper auditing standards of best practice, when performing an audit in terms of the TAA or any other related Act.

Chapter 4.1.3: International Auditing Standards

135. The relevant international norms for measuring the performance of auditors is regulated by the International Auditing and Assurance Standards Board (the "**IAASB**"), which publishes International Standards on Auditing ("**ISAs**").

136. The glossary of terms published by the IAASB do not define an audit but define an assurance engagement as "an engagement in which a practitioner aims to obtain sufficient, appropriate evidence in order to express a conclusion designed to enhance the degree of confidence of the intended users (other than the responsible party) about the subject matter information."[43]

137. To the extent that SARS are conducting an audit and relying on the results thereof to apply to Court for an *ex-parte* search and seizure application, or a preservation order, the requirement of what constitutes a reasonable audit as promulgated by the IAASB is a useful benchmark.

138. The ISA200 are described as: -[44]

> *"This International Standard on Auditing (ISA) deals with the independent auditor's overall responsibilities when conducting an audit of financial statements in accordance with ISAs. Specifically, it sets out the overall objectives of the independent auditor, and explains the nature and scope of an audit designed to enable the independent auditor to meet those objectives. It also explains the scope, authority and structure of the ISAs, and includes requirements establishing the general responsibilities of the independent auditor applicable in*

[43] http://www.ifac.org/system/files/downloads/b003-2010-iaasb-handbook-framework.pdf
[44] http://www.ifac.org/system/files/downloads/a008-2010-iaasb-handbook-isa-200.pdf

all audits, including the obligation to comply with the ISAs. The independent auditor is referred to as "the auditor" hereafter."

139. ISA200 sets out the overall objectives of the independent auditor and the conduct of an audit in accordance with international standards on auditing.

140. The objectives as set out in ISA200, confirm that the purpose of an audit is to enhance the degree of confidence of intended users in the financial statements or subject matter information.

141. When SARS state that they have conducted an audit in submitting affidavits for an *ex-parte* application, one would expect that they are conveying to the Court that they are enhancing the degree of confidence in the assertion that there is certainty in their findings. Given that the TAA does not prescribe any standards and norms for an audit, let alone a definition of an audit, it is highly unfair to rely only on says-so of SARS.

142. ISA200 sets out that in conducting an audit, the overall objectives are to obtain reasonable assurance about whether the financial statements (or in this matter, the tax liability representation) are free from material misstatement, whether due to fraud or error.

143. ISA200 requires that the auditor must obtain sufficient appropriate audit evidence to support these opinions in conducting such audit. It is required that the auditor plan and perform an audit with professional scepticism, recognising that circumstances may exist that cause the conclusion to be materially misstated.

144. Detailed ISAs dealing with particular matters support the overall framework and objectives as set out in ISA200.

145. ISA230 deals with audit documentation.[45] It is recognised that audit documentation serves a number of purposes including ensuring that the engagement team is accountable for its work and to enable external inspections in accordance with applicable legal regulatory and other requirements to be complied with.

[45] http://www.ifac.org/system/files/downloads/a011-2010-iaasb-handbook-isa-230.pdf

146. ISA500 deals with audit evidence.[46] It is required that an auditor shall design and perform audit procedures that are appropriate in the circumstances for the purposes of obtaining sufficient, appropriate audit evidence. In obtaining appropriate audit evidence, the auditor must have consideration of the accounting records including invoices, contracts, the general and subsidiary ledgers, journal entries and other adjustments to financial statements, records and worksheets that support allocations, computations, reconciliations and disclosures. Audit evidence includes inspection, observation, external confirmation, recalculation, re-performance, analytical procedures, and enquiry in order to ensure that sufficient appropriate audit evidence supports the conclusion drawn by the auditor on the subject matter.

147. The international benchmarks for judging the reasonableness of a successful audit are the various pronouncements by the IAASB, which include ISAs covering the following areas: -

147.1. ISA200: setting out the overall objectives of the independent auditor and the conduct of an audit in accordance with ISAs;

147.2. ISA210: agreeing the terms of an audit engagement;

147.3. ISA220: quality control for audits of financial statements;

147.4. ISA230: audit documentation;

147.5. ISA240: the auditor's responsibilities relating to fraud in audit of financial statements;

147.6. ISA250: consideration of laws and regulations in the audit of financial statements;

147.7. ISA260: communication with those charged with governance;

[46] http://www.ifac.org/system/files/downloads/a022-2010-iaasb-handbook-isa-500.pdf

147.8. ISA265: communicating the deficiencies in internal controls to those charged with governance;

147.9. ISA300: planning an audit;

147.10. ISA350: identifying the risk of material misstatement when conducting an audit;

147.11. ISA 320: determining the materiality when conducting an audit;

147.12. ISA330: the auditor's response to assessed risks;

147.13. ISA500: audit evidence;

147.14. ISA 520: conducting an audit using analytical procedures to corroborate audit findings;

147.15. ISA530: audit sampling;

147.16. ISA540: audit accounting estimates;

147.17. ISA550: auditing considerations with related parties;

147.18. ISA560: consideration of subsequent events;

147.19. ISA570: going concern issues;

147.20. ISA580: written representations from various parties;

147.21. ISA600: using the work of other experts; and

147.22. ISA700: forming an opinion on conclusion of the audit.

Chapter 4.1.4: Examples of Flaws in an SARS Audit Process[47]

148. The following serves as examples the type of anomalies and inconsistencies in the methodologies and assumptions adopted by SARS in an audit to ascertain the taxpayer's estimated tax liability.

149. What follows is not an exhaustive list but merely an illustration of the type of flaws that occur in a SARS audit.

150. In instances where the taxpayer has been known to operate dozens of bank accounts, the SARS official may only conduct spot checks and spot analysis of a few the bank accounts. SARS does not audit all the taxpayer's bank accounts. The SARS official takes these short cuts due to a lack of resources to properly and meaningfully analyze large volumes of transactions. The lack of analysis raises questions as to the reasonableness of the methodology used by the SARS official. This is particularly relevant in relation to transactions on loan account between related parties that may not have been appropriately treated under the SARS official approach.

151. In instances where adjustments are made by the SARS official in respect of loan accounts payable and loan accounts receivable by the taxpayer, these adjustments may be done by way of analysis of the difference between the opening and closing balance for each year and making an adjustment in respect of the difference, where appropriate. However, adjustments of this nature contains a fundamental flaw in that it may only consider year-end balances only and not the detailed transactions that may have taken place during the year.

152. In instances where the taxpayer may render certain categories of supplies that are zero-rated, meaning that they attract VAT at 0%. This aspect of the VAT legislation is complex and it is possible that taxpayers may classify supplies incorrectly as between standard-rated and zero-rated. The flaw is that the SARS official may not make allowance for such errors. The allocation as between standard-rated supplies and zero-

[47] These examples are sourced from the writer's experience in representing taxpayers in litigation against SARS

rated supplies also has an impact on the calculation by the SARS official of income tax under-declared.

153. In other instances, the SARS official may underestimate the expenditure that may be allowed to the taxpayer as a deduction for income tax purposes. Examples of valid deductions for income tax purposes that the SARS official may fail to take into account include finance costs, depreciation, any foreign exchange losses, any cash losses, property rates, bad debts in relation to zero-rated supplies, and so on.

154. Following an analysis of the taxpayer's bank accounts, the SARS official may rely on his own myriad of Excel spreadsheets analysing the cash flows of the taxpayer's bank accounts. However, in most instances: -

154.1. SARS may fail to provide supporting documentation to verify the Excel spreadsheet calculations.

154.2. SARS may also fail to provide their internal Excel spreadsheets to an independent person duly qualified and experienced to assess the basis on which the values as computed by the SARS official in these annexes are determined.

155. SARS may rely on bank statement descriptions only and as appears from the taxpayer's statements. This is inadequate to obtain a reasonable determination of any tax liabilities. The descriptions may be incomplete or incorrect for purposes of an audit.

156. The SARS official may fail to conduct a sufficient analysis of the taxpayer's detailed general ledger loan accounts that could impact the receipts that SARS alleges are subject to tax.

157. The SARS official may make certain incorrect and flawed assumptions on the taxpayer's business. This flaw is often attributable to SARS' failure to communicate and/or engage the taxpayer during its audit process.

158. The SARS official may fail to obtain the audited financial statements of the taxpayer, as well as audit management reports applicable to the audited financial statements.

159. The SARS official may also fail to obtain detailed supporting general and subsidiary ledgers in order to investigate these including a comparison to the bank statements which should also be tested by SARS.

160. The SARS official may also fail to obtain explanations and documents or data from the taxpayer's management and the taxpayer's auditors or bookkeepers to explain any inconsistencies or anomalies as identified by SARS in its preliminary audit process. The SARS official ought to interview the taxpayers and it staff in order to properly understand and satisfy itself as to the nature of the taxpayer's business including its accounting systems and methods.

161. The SARS official may also fail to conduct a thorough analysis of the taxpayer's affairs, and simply treat transactions as income where it is unable to trace the transaction or the source of funds.

162. The SARS official may use inconsistent and contradictory methodologies over different tax years when calculating the taxpayer's income tax and VAT liabilities. In other words, the methodologies are inconsistently applied across the tax years under review.

163. The SARS official may include inflows into the bank accounts of the taxpayer as taxable income without having regard to *inter alia*:-

163.1. Outflows from the bank accounts of the taxpayer;

163.2. Inter account transaction;

163.3. Loan advancements and repayments; and / or

163.4. The nature of the transaction.

164. The SARS official may fail to conduct a comparative analysis between various years of assessment as a check of the reasonableness of his findings.

165. SARS greatest' limitation is its lack of resources and manpower. It is no secret that over recent years there has been a mass exodus of staff from SARS. As such, SARS may not have the necessary skills, expertise and resources to conduct an audit on the taxpayer's business.

166. Finally, and depending on the complexity of the taxpayer's affairs, SARS' audit process and conducting further analysis may take many years through which time subjects the taxpayer to enormous inconvenience, uncertainty and prejudice not to mention costs.

Chapter 4.2: Assessments based on Substance Over Form

167. SARS raises assessments against the taxpayer on the basis of the principle of substance over form.

168. Where SARS is of the view that the written agreement between contracting parties does not reflect their true intention, it invokes the 'substance over form' doctrine.

169. This doctrine seeks to tax the transaction with reference to its 'substance', thereby disregarding what was meticulously set out in writing.

170. To achieve this, the SARS official must show that the parties had "*... a real intention, definitely ascertainable, which differs from the simulated intention*."

171. The principle was encapsulated in **Zanberg v Van Zyl 1910 AD 302**. After defining the principle, the court went on to state the following: -

> *"The court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstance that the same object might have been attained in another way will not necessarily make the arrangement other than what it purports to be."*

172. The substance over form principle finds its application by our courts to transactions between parties who are the same, or are essentially similar.[48]

173. The SARS official's substance attack is appropriate where contracting parties deceive in relation to their real intention and in doing so advance an intention to obtain some tax advantage not available to them.

174. The deception, constitutes: - [49]

> *"... a dishonest transaction: dishonest, in as much as the parties to it do not really intend it to have, inter partes, the legal effect which its terms convey to the outside world ... The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax."*

175. However, the SARS official use of the doctrine is not without controversy.

176. In **Mpande Foodliner CC v Commissioner for the South African Revenue Service and Others 2000 (4) SA 1048 (T),** the Court said the following with regards to substance over form: -

> *"[22] The four requirements must co-exist before s 73 can be invoked by the [SARS]. Therefore, if the scheme is not abnormal then the statutory provision cannot be applied even if the scheme has the effect of granting a tax benefit and that that was the vendor's main purpose. Similarly, if tax benefit is not the vendor's sole or main purpose then the statutory provision cannot be applied even if the scheme has the effect of granting a tax benefit and is abnormal since one of the essential requirements (that is, tax-avoidance) is absent."*

> *"[23] [SARS] merely had an impression that the transfer of the obligations of the feeding scheme program from Tivetonkhe to [the taxpayer] may have been a scheme designed to grant a tax benefit (amounting to tax avoidance) to [the taxpayer]. In Hicklin v Secretary for Inland Revenue, in the context of s 103 of the Income Tax Act, Trollip JA observed at 494in fine - 495C: 'When the ''transaction, operation or scheme'' is an agreement . . . it is important . . . to determine first*

[48] see SIR v Geustyn, Forsyth and Joubert 33 SATC 113 and CIR v Louw 45 SATC 113

[49] Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd, 33 SATC 48

whether it was concluded ''at arm's length''. . . . For ''dealing at arm's length'' is a useful and often easily determinable premise with which to start the inquiry. It connotes that each party is independent of the other and, in so doing, will strive to get the utmost possible advantage out of the transaction for himself. . . . Hence, in an arm's length agreement the rights and obligations it D creates are more likely to be regarded as normal than abnormal in the sense envisaged. . . . And the means or manner employed in entering into it or carrying it out are more likely to be normal than abnormal in the sense envisaged. . . . The next observation is that, when considering the normality of the rights and obligations so created or of the means or manner so employed, due regard has to be paid to the surrounding circumstances."

"[25] In R v Inland Revenue Commissioners, ex parte Matrix Securities Ltd[9] Lord Templeman remarked: 'Every tax avoidance scheme involves a trick and a pretence.' There was neither a trick nor a pretence on [the taxpayer] part either to unduly enjoy a tax benefit or engage in tax-avoidance. Therefore, it was an erroneous assumption on [SARS'] part to have regarded the transfer of the feeding scheme program to the applicant by a cession as a tax-avoidance scheme. It was manifestly unreasonable for [SARS] simply to have formed an impression that there was indeed a tax-avoidance ploy, although the second respondent appointed [the taxpayer] as 'a temporary measure' upon Tivetonkhe's cessation of business. No reasonable person in the circumstances could have formed the impression or come to the conclusion that [SARS] came to had [SARS] applied her mind objectively to the substance and the surrounding circumstances of the transaction between [the taxpayer] and Tivetonkhe."

177. In **The Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd 2014 (5) SA 231 (SCA)** the Court criticized the use of substance over form and the following to say about SARS assessments: -

"[11] As best as can be discerned, [this] approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the tax court that she was wrong. [This] approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under-declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the

assessment is wrong. This erroneous approach led to an inability on [SARS's] part to explain the basis for some of the additional assessments and an inability in some instances to produce the source of some of the figures she had used in raising the assessments…."

Chapter 4.3: Conclusion

178. None of the international benchmarks set out above are prescribed by the TAA. Very few, if any, of the audits performed by the SARS official comply or adhere to these standards. It is recognised that in obtaining audit evidence regarding the taxpayer's affairs from different sources or of a different nature, the SARS official may reveal that there are inconsistencies which require further investigation.

179. The question that arises is this: has the SARS official complied with best audit practice, as set out in terms of ISAs, when fulfilling its function of an audit for purposes of making a decision in terms of the TAA?

180. It is apparent from the detailed and rigorous standards set in terms of ISAs that the TAA does not prescribe any internationally recognised audit process that ensures that an audit is conduct in a professional and formal manner for purposes of the exercise of powers and decision making by the SARS official.

181. It is the writer's opinion that the failure to define an audit in the TAA is a source of potential abuse of power. There is simply no regulatory check or balance of the work conducted by the SARS official.

182. The taxpayer's prejudice is enormous. The SARS official substantially increases the taxpayer's income tax and VAT liabilities and thus materially alters the taxpayer's tax status in circumstances where there is no certainty as to the methods and processes adopted by the SARS official.

183. It would be difficult, if not impossible for a taxpayer to discharge his onus in the absence of an audit complying with recognised standards and norms.

CHAPTER 5: SUSPICION

184. In this chapter, the writer deals with the principles of suspicion as a basis for the exercise of the SARS official's powers in particular where such reasons relate to suspicions of fraud or any similar suspicions of corporate or tax delinquency.

185. The SCA has repeatedly endorsed and adopted Lord Devlin's statement that:- [50]

> *"suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect, but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end".*

186. In **Powell NO v Van der Merwe NO 2005 (5) SA 62 (SCA)** at [36], Cameron J adopted the distinction between suspicion and *prima facie* proof:

> *"prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all…suspicion can take into account also matters which, although admissible, could not form part of a prima facie case."*

187. The individual pieces of evidence that must not be judged in isolation. "*It is the total picture that is relevant" which is "an impression formed on the basis of diverse factors, including facts and pieces of information falling short of fact, such as allegations and rumours*".[51]

188. Therefore, context is everything: the SARS official's grounds of believe is nothing more than a suspicion.

189. The test is whether the suspicion is reasonableness. That in turn would depend on the facts and information in the official's possession, either (i) as obtained independently, or (ii) as provided to SARS by the taxpayer.

---

[50] Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 819I

[51] Powell NO at [35]

190. The reasonableness of a suspicion was dealt with in **Duncan v Minister of Law and Order 1986 (2) SA 805 (A),** where the court found, at 814D – E, said the following with regards to section 40(1)(b) of the Criminal Procedure Act 51 of 1977 (as amended): -

> *"It was also common cause that a question whether the peace officer ''reasonably suspects'' a person of having committed an offence within the ambit of s 40(1)(b) of the Act is objectively justifiable. And it seems clear that the test is not A whether the policeman believes that he has reason to suspect, but whether, on an objective approach, he in fact has reasonable grounds for his suspicion."*

191. In dealing with the concept of reasonable suspicion, Cameron JA **in Powell NO and Others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA)** [52] endorsed the formulation adopted by Lord B Devlin in **Shaaban Bin Hussien and Others v Chong Fook Kam and Another [1970] AC 942 (PC) ([1969] 3 All ER 1626)** at 948:

> *"[36] 'This Court has endorsed and adopted Lord Devlin's formulation of the meaning of ''suspicion''. ''Suspicion, in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.''*
> *"[37] To the passage already adopted, I would add the sentence that immediately follows, since it has bearing on the present: ''When such proof has been obtained, the police case is complete; it is ready for D trial and passes on to its next stage.'' Ferreira and Swanepoel were not ready to charge Powell or Nell. Prima facie proof was as yet lacking. Lord Devlin went on to point out ''another distinction between reasonable suspicion and prima facie proof: Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters E which, although admissible, could not form part of a prima facie case."*

192. In **Gates v Gates 1939 AD 150** at 155; **Motswai v Road Accident Fund** 2014 (6) 360 (SCA) at [46] –

> *"... There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such*

[52] at paras [36] - [37]

conduct are stronger than they are against conduct which is not immoral or criminal."

193. The Courts have recognised that it is appropriate, in certain instances, to apply the method of reasoning by inference.

194. This principle was restated by the Supreme Court of Appeal in **Hülse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA)** where the Court considered whether the requirement of a prima facie case in relation to attachments to found or confirm jurisdiction had been satisfied. The Court stated as follows: [53]

> *"What is clear is that the "evidence" on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. (See Govan v Skidmore 1952 (1) SA 732 (N) at 734B–D as explained by Holmes JA in Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159B–D). While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory."*

195. The legal principles applicable to reasoning by inference in a civil case were considered by the Court in **Macleod v Rens 1997 (3) SA 1039 (E),** in the context of evaluating whether the defendant had been negligent, and in circumstances where there was no direct evidence on this issue and not all the facts of the accident were known.

196. The Court concluded that in civil cases, the rules stated in **R v Blom**[54] were to be stated as follows:-[55]

> *"1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. 2. The proved facts should be*

---

53 at paragraph 14

54 1939 AD 188, at 202-203

55 1049A-B

such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail."

197. The application of the second rule was demonstrated by the Supreme Court of Appeal in **Cooper v Another NNO v Merchant Trade Finance Ltd** 2000 (3) SA 1009 (SCA) where the SCA found:-[56]

> *"[7] It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the 'two cardinal rules of logic' referred to by Watermeyer JA in R v Blom... is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof. Viljoen JA put the matter as follows in AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A), at 614G-H:'Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings.' Selke J expressed the matter in Govan v Skidmore 1952 (1) SA 732 (N), at 734C-E thus: [57] '. . . (I)n finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence 3rd ed para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.' Holmes JA in Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147, at 159C-D explained that he understood 'plausible', in the context of the remarks of Selke J, to mean 'acceptable, credible, suitable'."*

198. Finally, there is the SARS official's suspicion insofar as it relates to fraud.

---

[56] at 1027-1028

[57] Approved in, for instance, South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA708 (A), at 713E-G and Smit v Arthur 1976 (3) SA 378 (A), at 386B-D.

199. Fraud is an offence that affects the taxpayer's good name and reputation and has serious consequences for him particularly in the business world.

200. In matters where charges of criminal or immoral conduct are made, it is a requirement that such charges must be provided by the clearest evidence, or clear and satisfactory evidence or some similar phrase.[58]

201. Fraud will not lightly be inferred because as explained in **Gates v Gates**, supra:-

> *"... There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."*

202. The Dictionary of Legal Words and Phrases states that a misrepresentation is: -

> *"a false statement of fact made by one party to another before a contract is entered. Such a statement may be innocent or fraudulent…"*

203. The meaning of the term "misrepresentation" therefore refers to an expression of facts as opposed to a mere expression of opinion or interpretation of law.

204. Accordingly, it requires a positive statement to have been made by the taxpayer which is false.

205. In the case of **SIR V Trow 43 SATC 189**, the Appellate Division had to consider whether the prescription period in section 79 applied to an additional assessment issued by the Secretary to the taxpayer in circumstances where the taxpayer had, in reply to the question in his tax return whether he had sold any property during the tax year in question, answered no, when in fact he had realized a capital profit upon the sale of certain land. The court stated that:

[58] Gates v Gates 1939 AD 150 at 155; Motswai v Road Accident Fund 2014 (6) 360 (SCA) at [46]

> *"It follows, in the circumstances of this case, that the additional assessment could only have been raised if the Commissioner were to have satisfied himself (1) that there had been a non-disclosure of material facts by the taxpayer, and (2) that the fact that the profit in question was not assessed to tax prior to the expiration of the relevant period of three years was due to such non-disclosure, i.e., that the non-assessment was causally related to the non-disclosure of material facts."*

206. With the above as a background, the writer deals next with various provisions in the TAA that permits the SARS official to make decisions without proof of wrongdoing.

CHAPTER 6: SEARCH AND SEIZURE POWERS

207. The TAA introduced significant changes to the administration of the laws relating to taxation. Historically, in the old regime, SARS could secure a search and seizure order in terms of the provisions of section 74D of the Income Tax Act or section 57D of the VAT Act. Both of these provisions have now been repealed.

208. There was an important safeguard in place in respect of applications for search and seizure warrants in terms of the old regime. A discretion was conferred on the judge hearing the application. His or her decision would be based on the information presented to him or her under oath or solemn declaration, establishing the facts on which the application was based, as contemplated in section 74D of the Income Tax Act and 57D of the VAT Act.[59]

209. The old regime also conferred on the court a wide discretion to order the return of any information, documents, or things seized in terms of the warrant.60 In effect, the court was empowered to reverse entirely the effect of a warrant.61

210. In the new regime, the SARS official has been granted search and seizure powers that are now set out in Part D of Chapter 5 of the TAA.

211. These provisions replace not only the now- repealed section 74D of the Income Tax Act but also a host of other provisions in the Income Tax Act which are relevant to this reconsideration application. They also replace the now-repealed section 57D of the VAT Act.

212. Section 4 of the TAA deals with the application of the Act. It provides that the TAA applies "*to every person who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS*."[62] The TAA provides further

---

[59] Oberholzer v C: SARS (unreported; Cape of Good Hope Provincial Division, case 8714/1998)
[60] Shelton v C: SARS 2002 (2) SA 9 (SCA)
[61] Shelton v C (supra) at 285H/I-I, 285I/J – 286A-B
[62] See section 4(1) of the Tax Administration Act

that if the TAA "*is silent with regard to the administration of a tax Act and it is specifically provided for in the relevant tax Act, the provisions of that tax Act apply*." [63]

213. Section 59 of the TAA provides as follows: -

> ***"59. Application for warrant**. — (1) A senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant under which SARS may enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.*
> *(2) SARS must apply ex parte to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.*
> *(3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109 (1) (a)."*

214. Section 59(2) embodies a very specific procedure for the seeking and granting of search and seizure warrants: -

214.1. The SARS official in question must make an *ex parte* application without notice to the taxpayer.

214.2. The *ex parte* application must be made to a Judge (the definition of a Judge being "a judge of the High Court of South Africa, whether in chambers or otherwise");

214.3. The application must be supported by information under oath or solemn declaration establishing the facts on which the application is based.

215. The words "or otherwise" in the definition of "Judge" in section 1 of the Tax Administration Act allow for flexibility in respect of the manner in which an *ex parte* application may be made. In particular, it implies that an application could be made to a judge in chambers or a judge in open court.

[63] See section 4(2) of the Tax Administration Act

216. That being so, the SARS official, as protagonist and *dominus litis*, has an election whether to bring the application in chambers or in open court.

217. By choosing to launch the application in this manner, the SARS official assumes the burden of establishing facts justifying the manner in which the application was brought and why it was done in chambers. This flows from the ordinary principles applicable to *ex parte* applications.

218. An important feature, relevant to the manner in which a search and seizure warrant may be sought, is the discretion which must be exercised by a judge considering an application for a warrant. That discretion is dealt with in section 60 of the Tax Administration Act.

219. Section 60 of the TAA provides as follows: -

> *"**60. Issuance of warrant**. — (1) A judge or magistrate may issue the warrant referred to in section 59 (1) if satisfied that there are reasonable grounds to believe that—(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and (b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence. (2) A warrant issued under subsection (1) must contain the following—(a) the alleged failure to comply or offence that is the basis for the application; (b) the person alleged to have failed to comply or to have committed the offence; (c) the premises to be searched; and (d) the fact that relevant material as defined in section 1 is likely to be found on the premises. (3) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown."*

220. The decision of a judge as to whether to issue a warrant involves the exercise of a discretion, as is indicated by the phrase "a judge may issue the warrant". However, the discretion only comes into play once the jurisdictional facts have been established – the judge must be satisfied that there are reasonable grounds to believe that a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence.

221. In **Thint (Pty) Ltd and Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC),**[64] the Constitutional Court held, in the context of a different legislative framework, that:-

> *"there were two jurisdictional facts for the issue of a search warrant: the existence of a reasonable suspicion that a crime has been committed, and the existence of reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises."*

222. It is clear from the text of section 59 of the TAA, and in particular section 59(2) that the same test, with changes necessary for the context, is applicable here. As such, it is a threshold that the SARS official must overcome in order to bring a valid search and seizure application.

223. In determining the existence of "reasonable grounds" in an ex parte application, the judge's decision is based entirely on the information presented to him or her in the papers filed by the SARS official. The difficulty being that, and for the reasons set out above, the SARS official will make out a case based on mere suspicions of wrongdoing, including inferences drawn from a flawed SARS audit. Given that the ex parte application is without notice to the taxpayer, the court is guided entirely by the contents of the SARS official's version as set out in his founding affidavit.

224. If the jurisdictional requirements are not satisfied, a warrant may not be issued.[65]

225. If the jurisdictional requirements are satisfied, the court is not obliged to issue a warrant – it must then exercise a discretion whether or not to grant a warrant in terms of section 59.

226. The Constitutional Court explained the sequence of analysis in **Zuma and Thint**:-[66]

> *"[91] How then should a court faced with a challenge to the issue of a search warrant approach the question? The answer is to be found in this Court's*

---

[64] at para 91

[65] In Minister of Safety and Security v Van der Merwe 2011 5 SA 61 (CC) para 10, the Constitutional Court stated that if a jurisdictional requirement is missing "that should spell doom to the application for a warrant".

[66] 2009 (1) SA 1 (CC)

judgment in Hyundai (supra). The court made plain that there were two jurisdictional facts for the issue of a search warrant: the existence of a reasonable suspicion that a crime has been committed, and the existence of reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises. The court went on to state that once the jurisdictional facts are present, the judicial officer issuing the search warrant then exercises a discretion to issue the warrant. That discretion must be exercised judicially."

"[92] When considering whether a warrant should be set aside, therefore, a court will determine, first, whether on the record the objective jurisdictional facts were present. If they were not, then a court will set aside the search warrant. If the jurisdictional facts were present, then a court will consider the exercise of the discretion by the judicial officer to issue the warrant. In order to determine the approach that a court will take to the exercise of that discretion, it is necessary to classify the type of discretion under consideration."

"[93] One of the core considerations when classifying the discretion is whether in making the decision it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of the discretion. In this case, it seems clear that the discretion to issue the warrant is a matter upon which different judicial officers may reasonably and legitimately disagree. An appellate court, therefore, may not interfere with the discretion simply because it would have reached a different conclusion to that reached by the judicial officer issuing the warrant. It may only set aside the warrant if it is persuaded that the discretion has not been exercised judicially, or flowed from a wrong appreciation of the facts or the law."

227. When it comes to the exercise of a discretion to issue a warrant, the following principles apply: -

227.1. The Constitutional Court has held that a court, when exercising a discretion, must take the Bill of Rights into account.[67]

227.2. In **Mpange and others v Sithole**, the High Court remarked that, "[w]here a court's exercise of discretion implicates constitutional rights, it must be

[67] Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC), and in particular at para 30

interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of Rights". [68]

228. The powers conferred by section 59 of the TAA implicate the right to privacy enshrined in section 14 of the Constitution. As the Constitutional Court said in **Bernstein v Bester NO 1996 (4) BCLR 449 (CC):** - [69]

> *"In South Africa, the right not to be subjected to seizure of private possessions forms part of every person's right of personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy."*

229. In **Bernstein v Bester NO**, Ackermann J also emphasised that the right to privacy applies with particular force in the home space: [70]

> *"The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."*

230. In **Zuma and Thint**, the Constitutional Court made it plain that a judicial officer must exercise "*his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy*".[71]

231. In addition, the powers conferred by section 59 of the TAA implicate the right to dignity enshrined in section 10 of the Constitution.[72] That being so, the discretion whether to issue the warrant must be exercised in the light of the need to promote the right to privacy and the right to dignity enshrined in the Bill of Rights. This approach must,

---

[68] Mpange and others v Sithole 2007 (6) SA 578 (W) at para 49
[69] at 493
[70] at paragraph 67
[71] Thint (Pty) Ltd v NDPP, Zuma v NDPP 2009 (1) SA 1 (CC) para 77
[72] See Khumalo v Holomisa 2002 5 SA 401 (CC) para 27

necessarily, be applicable to the reconsideration of the question whether the warrant ought to have been issued.

232. It is also well-accepted that applications brought on an *ex parte* basis require the utmost good faith.[73]

232.1. The principle is normally traced back to the leading case of **Schlesinger v Schlesinger 1979 (4) SA 342 (W):** -

232.1.1. The respondent had obtained an order, on an ex parte basis, giving her leave to sue the applicant by edictal citation.

232.1.2. The applicant sought an order rescinding that order and costs on the attorney-client scale.

232.1.3. The basis of the application was, in essence, that the respondent had been less than frank with the court when bringing her ex parte application.

232.2. The court held that, if the allegation that the respondent had deliberately withheld material facts and information in her ex parte application was upheld, then this would "*be sufficient to warrant a dismissal or setting aside of the order complained of*." [74]

232.3. The court, having considered certain authorities, established the following approach to non-disclosure in ex parte applications:[75]

232.3.1. in *ex parte* applications all material facts must be disclosed which might influence a Court in coming to a decision;

---

[73] Ex Parte Arntzen (Nedbank Ltd as intervening creditor) 2013 (1) SA 49 (KZP); MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd 2008 (3) SA 585 (SCA) at para 17; Schlesinger at 349A-C.

[74] Schlesinger (supra) at 345G-H

[75] Schlesinger (supra) at 349A-B

232.3.2. the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission; and

232.3.3. the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.

232.4. The court then concerned itself with the question of how to approach the discretion. It considered the case law and held as follows:

> *"It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."* [76]

232.5. The court set aside the order obtained on an ex parte basis and awarded costs on the attorney-client scale. It awarded a punitive costs order because the ex parte application had been brought "*with a reckless disregard for the full and true facts in an effort to obtain some tactical advantage over the applicant*". [77]

233. The question that arises thus is whether the SARS official will in its founding affidavit disclose to the Court all the flaws in its (SARS)'s case against the taxpayer, including highlighting any anomalies in the SARS audit or defects in its cause of action against the taxpayer. It is highly unlikely given the nature of litigation.

234. The decision in **Schlesinger** was approved by the Constitutional Court in **Thint and Zuma (supra)**, where the principle was formulated as follows:[78]

> *"It is our law that an applicant in an ex parte application bears a duty of utmost good faith in placing all the relevant material facts before the court. The duty of good faith requires a disclosure of all material facts within the applicant's knowledge. The Supreme Court of Appeal reiterated in Powell (supra) that an applicant for a search warrant is "under a duty to be ultra-scrupulous in disclosing any material facts that might influence the court in coming to its decision. However, an investigator cannot be expected to disclose facts of which he or she is not aware. The duty is also limited to the disclosure of facts that are*

[76] Schlesinger (supra) at 350B-C
[77] Schlesinger (supra) at 354D-E
[78] Thint and Zuma (supra) at para 102

material. In a complex and vast case such as the present, there can be no crystal clear distinction between facts which are material and those which are not. There will always be room for debate. It follows that, in cases such as the present, an applicant for a search and seizure warrant will inevitably have to make a judgment as to which facts might influence the judicial officer in reaching its decision and which, although connected to the application, are not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that renders it practically impossible for the State to comply with its duty of disclosure, or that will result in applications so large that they might swamp ex parte judges."

235. The SCA has formulated the principle in similar terms. It has held that, because the seeking of an *ex parte* order is necessarily a one-sided process, a party seeking such an order is "*under a duty to be ultra-scrupulous in disclosing any material facts that might influence the court in coming to its decision*." [79]

236. The purpose of rigorously applying the above-mentioned rules and setting aside the decision to authorise a warrant when there has not been proper disclosure, is not to punish but to maintain the legality of the process. [80]

237. Courts in other jurisdictions have adopted a similar approach to search warrants secured on an ex parte basis to that reflected above:

237.1. Lord Denning M. R. said the following about ex parte orders in the case of **Becker v Noel and Another**:[81]

"Not only may the court set aside an order made ex parte, but where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention."

237.2. The point emphasized by Lord Denning M.R. was that, when new information comes before the court, it has an inherent power to revoke any order that it had made: -

---

[79] Powell NO and others v Van der Merwe NO and others 2005 (5) SA 62 (SCA) at para 42. See also Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd and others 2006 (5) SA 306 (W) at para 30; Naidoo and another v Matlala NO and others 2012 (1) SA 143 (GNP) at para 6.

[80] Powell NO v Van der Merwe NO [2005] 1 All SA 149 (SCA), 2005 (1) SA 62 (SCA) per Southwood AJA. Adopted in: National Director of Public Prosecutions v Braun [2007] 1 All SA 211 (C), 2007 (1) SA 189 (C) at 197

[81] [1971] W.L.R. 803

*"In **WEA Records Ltd. v Visions Channel 4 Ltd** [82] Lord Donaldson M.R. said the following: "As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order."*

238. In **Tranz Rail [1983] W.L.R. 721**,[83] the Court of Appeal said: –

"An application for a search warrant in whatever context is almost always made on an ex parte basis – that is, without notice to the party whose premises are to be the subject of the proposed search. For this reason, the judicial officer to whom the application is made is entitled to expect that the applicant will make full and candid disclosure of all facts and circumstances relevant to the question whether the warrant should be issued. A failure to make such disclosure runs the risk that any warrant obtained will be held to be invalid."

239. In **R v McColl (1999) 17 CRNZ 136 (CA),**[84] the duty of disclosure was described as follows: –

"It follows in our view that the applicant should lay before the judicial officer all facts which could reasonably be regarded as relevant to the judicial officer's task. An applicant should not present the judicial officer with a selective or edited version of the facts. There is an obligation on the applicant to be candid and to present the full picture to the judicial officer, not just the conclusion which the judicial officer is asked to draw, supported by so much of the factual background as the applicant chooses to disclose. It is for the judicial officer, on an assessment of all the relevant facts fairly presented, to decide whether the necessary conclusions can be drawn, and thus whether a warrant should issue."

240. Further, any ex parte application properly falls within the terms of rule 6(12)(c) of the Uniform Rules. That rule provides as follows:

"A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

---

[82] at 727

[83] Tranz Rail Ltd v Wellington District Court [2002] 3 NZLR 780 (CA) (Tranz Rail)

[84] (1999) 17 CRNZ 136 (CA)

241. The following principles emerge from the case-law in relation to the reconsideration of ex parte orders in terms of the Uniform Rules of Court: -

241.1. In **Bodasingh v Kissondath (1927) 48 NPD 29**,[85] Matthews J stated that: -

> *"...a person who applies to the Court on motion for relief must disclose, especially on an ex parte application, such material facts as might influence the Court in granting or refusing the application, that is to say that the applicant must observe good faith and must keep back no material fact. As I have said, there was a non-disclosure of a very material fact which might, and probably would, have influenced the Court in granting the interdict, or at any rate in granting it in the form in which it was granted, namely, an interdict in absolute terms until further order. At the most the Court would, if all the facts had been disclosed, have granted a rule only, leaving Kissondath on the return day to set up such facts as would substantiate his claim to continued possession."*

241.2. Concurring in the judgment of Matthews J, Dove-Wilson AJ made the following remarks: -

> *"It is immaterial whether or not the Court would have granted the interdict. It is also immaterial that it is a matter of little or no moment now whether the interdict stands or not. It is sufficient that it was obtained by a suppression of material facts, and a suggestion of what is untrue. The Court must mark its disapproval by setting it aside, with costs."*

241.3. In **Rhino Hotel & Resort (Pty) v Forbes 2000 (1) SA 1180** [86] Joffe J interpreted rule 6(12)(c) as follows: -

> *"The Court that entertains the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent. Accordingly, when the application is re-enrolled by the respondent for consideration, it is a redetermination with the benefit of argument from the respondent."*

241.4. If the SARS official therefore withholds material facts which might influence the court in coming to a decision, a court will be entitled to reconsider and rescind

[85] (1927) 48 NPD 29
[86] at 1182B-E

an order made irrespective of whether the non-disclosure was wilful or mala fide.[87]

241.5. Where such an application is brought ex parte, it is by its nature provisional and subject to subsequent reconsideration after all the parties who have an interest have been heard. [88]

241.6. The court is not confined to the original application when called upon to reconsider an order granted ex parte. In **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 1996 (4) SA 484 (W),**[89] Faber AJ said the following: -

> *"The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order. Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto. The framers of the Rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."* [90]

---

87 National Director of Public Prosecutions v Braun and another [2007] 1 All SA 211 (C) at para 25

88 Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) at paras 2 and 44–48.

89 1996 (4) SA 484 (W) at 486H–487C

90 This passage is supported in National Director of Public Prosecutions v Braun and Another 2007 (1) SA 189 (C) at 194A-E (judgment of Traverso DJP) and Lourenco and Others v Ferela (Pty) Ltd and Others (no 1) 1998 (3) SA 281 (T) at 290E-H (judgment of Southwood J).

241.7. In **Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd [1981] 3 All SA 506 (W)** [91] Margo J said the following: -

> *"It seems to me that, among the factors which the Court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the uberrima fides rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the Court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interests of innocent third parties."*

241.8. In the **Reclamation Group (Pty) Ltd v Smit and Others 2004 (1) SA 215 (SE)**,[92] Froneman J stated as follows: -

> *"The result of all this is that the reconsideration of the matter needs to be done on the basis of a set of circumstances quite different to that under which the original ex parte order was obtained. Reconsideration need not always take this form but Rule 6(12) (C) is widely formulated and in my view permits a reconsideration in this manner. (cf Lourenco and Others v Ferela (Pty) Ltd and Others (no1) 1998 (3) SA 281 (T) at 290A- H). The consequence of this are twofold. The first is that the issues are to be reconsidered in the light of the fact that both sides of the story are now before the court. The second is that the execution of the original order may have had the effect that those issues are not exactly the same as the issues before the Court when the original application was heard."*

241.9. In **Lourenco and Others v Ferela (Pty) Ltd 1998 (3) SA 281 (T)** [93] Southwood J held:

> *"In terms of Rule 6(12)(c) a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. The rule is very widely framed and I have no doubt that the word 'reconsideration' must bear its widest meeting. The Shorter Oxford Dictionary gives the following three meanings for the words 'reconsider'. '1. To consider (a matter or thing) again; to consider (a decision, etc) a second time with the view to changing or amending it; to rescind, alter. 2. To reflect on one's conduct with the view to . . . amendment'."*

---

91 [1981] 3 All SA 506 (W) at 507-8

92 at 218D-F

93 1998 (3) SA 281 (T) at 290C

241.10. In his minority judgment in **Powell NO and others v van der Merwe NO and others**[94] Southwood AJA held as follows: -

> *"In my view, the approach should apply equally to relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for an order (compare Hall and another v Heyns and others 1991 (1) SA 381 (C) at 397B–C) or, as is the case, because they have not been sufficiently investigated. . . . (paragraphs [74]–[75]). The purpose of rigorously applying the rule and setting aside the decision to authorise the warrant is not to punish the director as was stated by the Court below. It is to maintain the legality of the process. Infringement of the right to privacy by a search and seizure warrant is justifiable only if the correct facts have been placed before the judicial officer in an objective manner so that he can properly apply his mind. The process will be fatally flawed if incorrect facts are placed before him."*

241.11. The judgment of the SCA in **Pretoria Portland Cement CO Ltd and another v Competition Commission and Others**[95] is of particular importance in this regard the SCA approved the following remarks of Nugent J (as he then was) in **Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W):** [96]

> *"It must be borne in mind too that an order granted ex parte is by its nature provisional, irrespective of the form which it takes. Once it is contested and the matter is reconsidered by a court, the plaintiff is in no better position in other respects than he was when the order was first sought. (Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd 1982 (3) SA 330 (T) at 332B - D) and there is no reason why he should be in a better position in this respect merely because the defendant was unaware that he was called upon to submit to the court's jurisdiction for the purpose of an impending action."*

241.12. The SCA went on to consider how the **Plascon-Evans**[97] rule should operate in the context of the reconsideration of an ex parte order. Schutz JA remarked that:-

> *"It may be that the onus and the operation of the Plascon-Evans rule is reversed. The fact that the appellant's first affidavit was called a founding and not an*

---

94 2005 (5) SA 62 (SCA) at para 75. Although this was stated in a minority judgment, it is not inconsistent with what was said in the majority's judgment.

95 Supra at paras 44-47

96 at 696D-E

97 The rule in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) is that where a dispute of fact appears on the papers, a final order should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order.

answering affidavit is a matter of form, not substance, and the law is concerned with substance." [98]

241.13. The judgment in **Pretoria Portland Cement** establishes the following: - [99]

241.13.1. The fact that an applicant obtained relief by way of an ex parte application does not create a procedural advantage. It also does not affect the incidence of the onus of proof.

241.13.2. If, for instance, an application is launched for the setting aside of the order, it will be up to the original applicant to show that the order was granted correctly.

241.13.3. The same applies to a rule nisi: it does not shift the onus on the return day.

242. In the light of the judgments to which reference has been made above, the writer submits that the following legal principles are relevant to the exercise of powers by the SARS official:

242.1. SARS has a special duty of fair play when it is a party to litigation. The courts should be particularly astute to avoid allowing the state to "*misuse the mechanisms of the law.*"

242.2. When it comes to *ex parte* applications, the following rules apply: -

242.2.1. All material facts must be disclosed by the SARS official which might influence a court in coming to a decision;

242.2.2. the non-disclosure or suppression of facts by the SARS official need not be wilful or mala fide to incur the penalty of rescission; and

---

[98] Pretoria Portland Cement (supra) at para 48

[99] Pretoria Portland Cement (supra) at para 45; Dole Fresh Fruit International Ltd v MV Kapetan Leonidas 1995 (3) SA 112 (A) at 116

242.2.3. the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.

242.3. The proper approach to the exercise by the court of its discretion whether to set aside an order obtained on the basis of material non-disclosure of fact is as follows: -

242.3.1. Absent very cogent practical reasons for upholding an order, the courts should frown on orders obtained ex parte on incomplete information.

242.3.2. The Court should set them aside even if relief could be obtained on a subsequent application by the same applicant.

243. Because of the extreme consequences that may result from a search and seizure warrant being issued, extreme caution is required by the Court in considering whether to grant such an order.

244. In particular, the discretion conferred on the court whether to grant such a warrant must be exercised in the light of the spirit, purport and object of the Bill of Rights. This obliges courts and the SARS official to consider the effect of an order on the taxpayer's privacy and dignity rights before issuing a warrant.

245. The intrusion constituted by a search of a taxpayer's home is extreme. In weighing up the need for the search and the rights of the victim to domestic privacy, the constitutionally-protected right should weigh heavily. It should only be limited on the clearest and weightiest of grounds.

CHAPTER 7: PRESERVATION ORDERS

246. Section 163(1) as amended provides as follows: -

> *"**163. Preservation order**.— (1) A senior SARS official may, in order to prevent any realisable assets from being disposed of or removed which may frustrate the*

*collection of the full amount of tax that is due or payable or the official on reasonable grounds is satisfied may be due or payable, authorise an ex parte application to the High Court for an order for the preservation of any assets of a taxpayer or other person prohibiting any person, subject to the conditions and exceptions as may be specified in the preservation order, from dealing in any manner with the assets to which the order relates. (2) (a) SARS may, in anticipation of the application under subsection (1) seize the assets pending the outcome of an application for a preservation order, which application must commence within 24 hours from the time of seizure of the assets or the further period that SARS and the taxpayer or other person may agree on. (b) Until a preservation order is made in respect of the seized assets, SARS must take reasonable steps to preserve and safeguard the assets including appointing a curator bonis in whom the assets vest may be made if required to secure the collection of the tax referred to in subsection (1) and in respect of— (a)realisable assets seized by SARS under subsection (2); (b)the realisable assets as may be specified in the order and which are held by the person against whom the preservation order is being made; (c)all realisable assets held by the person, whether it is specified in the order or not; or (d)all assets which, if transferred to the person after the making of the preservation order, would be realisable assets. (4) The court to which an application for a preservation order is made may— (a)make a provisional preservation order having immediate effect; (b)simultaneously grant a rule nisi calling upon the taxpayer or other person upon a business day mentioned in the rule to appear and to show cause why the preservation order should not be made final; (c)upon application by the taxpayer or other person, anticipate the return day for the purpose of discharging the provisional preservation order if 24 hours' notice of the application has been given to SARS; and (d)upon application by SARS, confirm the appointment of the curator bonis under subsection (2) (*a*) or appoint a curator bonis in whom the seized assets vest. (5) A preservation order must provide for notice to be given to the taxpayer and a person from whom the assets are seized. (6) For purposes of the notice or rule required under subsection (4) (*b*) or (5), if the taxpayer or other person has been absent for a period of 21 business days from his or her usual place of residence or business within the Republic, the court may direct that it will be sufficient service of that notice or rule if a copy thereof is affixed to or near the outer door of the building where the court sits and published in the Gazette, unless the court directs some other mode of service. (7) The court, in granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with, including— (a)authorising the seizure of all movable assets; (b)if not appointed under subsection (4) (*d*), appointing a curator bonis in whom the assets vest; (c)realising the assets in satisfaction of the tax debt; (d)making provision as the court may think fit for the reasonable living expenses of a person against whom the preservation order is being made and his or her legal dependants, if the court is satisfied that the person has disclosed under oath all direct or indirect interests in assets subject to the order and that the person cannot meet the expenses concerned out of his or her unrestrained assets; or (e)any other order that the court considers appropriate for the proper, fair and effective execution of the order. (8) The court making a preservation order may*

also make such further order in respect of the discovery of any facts including facts relating to any asset over which the taxpayer or other person may have effective control and the location of the assets as the court may consider necessary or expedient with a view to achieving the objects of the preservation order. (9) The court which made a preservation order may on application by a person affected by that order vary or rescind the order or an order authorising the seizure of the assets concerned or other ancillary order if it is satisfied that— (a)the operation of the order concerned will cause the applicant undue hardship; and (b)the hardship that the applicant will suffer as a result of the order outweighs the risk that the assets concerned may be destroyed, lost, damaged, concealed or transferred. (10) A preservation order remains in force— (a)pending the setting aside thereof on appeal, if any, against the preservation order; or (b)until the assets subject to the preservation order are no longer required for purposes of the satisfaction of the tax debt. (11) In order to prevent any realisable assets that were not seized under subsection (2) from being disposed of or removed contrary to a preservation order under this section, a senior SARS official may seize the assets if the official has reasonable grounds to believe that the assets will be so disposed of or removed. (12) Assets seized under this section must be dealt with in accordance with the directions of the High Court which made the relevant preservation order."

247. The object of section 163 is the preservation of "realisable assets"[100] in order "*to prevent any realisable assets from being disposed of or removed which may frustrate the collection of the full amount of tax due" and "to secure the collection of tax*".[101]

248. The TAA contains no definition of *"realisable assets"*.

249. A preservation order may, however, be obtained in respect of "any assets of a taxpayer or other person".[102]

250. It appears that the assets of *"the taxpayer"* and "other person" would constitute "realisable assets" which may be the subject matter of a preservation order.

251. Section 163 of the TAA should be interpreted in accordance with the common law requirements for anti-dissipation interdicts. According to the common law the SARS official must show an intention on the part of the respondent to remove or dispose of the

[100] Section 163(3) of the Act

[101] Sub-sections (1), (2) and (3) of section 163. In Cambridge Advanced Learner's Dictionary and Thesaurus, the meaning of the word "preserve" is:- "to keep something as it is, especially in order to prevent it from decaying or being damaged or destroyed".[101] The meaning of "safeguard" is:- "to protect something from harm".[101]

[102] See sub-sections (1), (4), (5), (6) and (8) of TAA, section 163

assets in order to evade payment of the debt. This is in line with the wording of section 163(1) of the Act.[103]

252. In other words it is necessary for the SARS official to show either an intention of the part of the taxpayer to dissipate assets to frustrate the collection of tax, alternatively a reasonable likelihood of such a dissipation.[104]

253. It is essential for the SARS official to establish an intention on the part of the taxpayer of secreting assets for purposes of defeating the claims of creditors.[105]

254. SARS is regarded as creditor of the taxpayer owing the tax debt. Until attachment of specific assets in execution, SARS as a judgment creditor has no preferential rights over any of the taxpayer's assets.[106]

255. A preservation order is not a recovery mechanism.[107]

256. The SARS official is not permitted to make use of a preservation order to preserve assets in circumstances where it has yet to determine whether a tax debt will arise or not; until the levying of execution on a judgment obtained from a competent court SARS, as a judgment creditor, has no preferential rights over any of the taxpayer's assets.[108]

257. Even assuming that the taxpayer could be held liable in law for the tax liabilities as alleged SARS, the SARS official must still set out in the ex parte application the basis

---

[103] Our Courts have held that an application for a restraint order is analogous (although not identical) to an application for interim interdicts and attachments pendente lite. NDPP vs Starplex 47 CC & Others, 2008 [4] All SA 275 (C); National Director of Public Prosecutions vs van Heerden & Others 2004 (2) SACR 26 (C) at 33 – 34

[104] The main remedy afforded by section 163 is an asset preservation interdict. This statutory remedy resembles the anti-dissipation interdict known in our common law. The latter is similar to the Mareva injunction known in English law and the freezing order known in other foreign jurisdictions. – See Knox D'Arcy Ltd v Jamieson 1994 (3) SA 700 (W); 1996 (4) SA 348 (A); Bester v Van Niekerk 1960 (2) SA 363 (E) at 365H-366A.

[105] Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund 2010 (1) SA 446 (W) at 480J-482G

[106] Sections 169(1) and (3) 172 and 174 of the Act; *Knox D'Arcy Ltd v Jamieson supra*. Guidance may also be derived from provisions analogous to section 163 of the TAA - see e.g. the Prevention of Organised Crime Act, No. 121 of 1998 ("POCA"): Chapter 5 sections 12-36 and Chapter 6: sections 37-62; Section 163(3) of the Act.

[107] Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2013

[108] Sections 169(1). 169(3), 172 and 174 of the Tax Administration Act

for a reasonable suspicion on the part of any tax official to justify the launching of the application.

258. In this regard, an objective test is applied and, in the absence of a factual substratum underpinning the suspicion, the requirement of reasonableness will not have been met.

259. In **Mabona and Another v Minister Of Law And Order And Others 1988 (2) SA 654 (SE)** at 658E-H the Court stated: -

> *"The test of whether a suspicion is reasonably entertained within the meaning of s40 (1) (b) [of the Criminal Procedure Act, 51 of 1977], is objective (S v Nel and Another 1980 (4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary and not a reasonable suspicion."*

260. In advancing its case, it is a trite rule that the SARS official must be honest with the Court. This includes not only disclosure of the facts and evidence underpinning SARS' case against the taxpayer, but also those facts that are not in favour of its case (i.e. the fact that are in the taxpayer's favour).

261. The principles of transparency and ethical requirements are of paramount important to ex parte applications especially when considering a preservation order.

262. Since the application is brought *ex parte*, it is required of the SARS official to show the utmost good faith,[109] as the SARS official is "*under a duty to be ultra-scrupulous in disclosing any material facts that might influence the court in coming to its decision*."[110]

[109] Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 349A-B

[110] Powell NO and others v Van der Merwe NO and Others 2005 (5) SA 62 (SCA) at para 42. See also Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd and Others 2006 (5) SA 306 (W) at para 30; Naidoo and another v Matlala NO and Others 2012 (1) SA 143 (GNP) at para 6. See also National Director of Public Prosecutions v Basson 2002 (1) SA 419 (SCA) at para 21; National Director of Public Prosecutions v Kyriacou 2004 (1) SA 379 (SCA) at para 18; Mohunram and Another v NDPP and Another, Mohunram and Another v NDPP and Another, National Director of Public Prosecutions v Braun and Another 2007 2 SACR 145 CC

CHAPTER 8: TAXPAYER'S PREJUDICE & HARM

263. Chapter 6 of the Tax Administration Act deals with the confidentiality of taxpayer information.

264. Section 67(2) requires all SARS officials, including those persons referred to in section 70, to undertake an oath or solemn declaration in the prescribed form before a magistrate, justice of the peace or commissioner of oaths before the commencement of their duties or exercising of their powers under a tax Act and/or before the disclosure of the Taxpayers' confidential information to a person referred in section 70.

265. Section 67(3) of the Tax Administration Act specifically provides that any person to whom the confidential information of a taxpayer was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.

266. It may be that SARS' causes of action against the taxpayer are premised on baseless inferences only. The taxpayer has a right to know what case he has to meet and to properly and meaningfully prepare for trial and is therefore entitled to know the facts supporting SARS' causes of action.

267. SARS' cause of action against the taxpayer must be substantially clear, lucid, and contain the necessary allegations that constitute fact: -

> *"It is trite that pleadings must be lucid and logical, and in an intelligible form, and that the cause of action must appear clearly from the allegations made."*[111]

268. In **Improfed (Pty) Ltd v National Transport Commission [1993] ZASCA 36; 1993 (3) SA 94 (AD) at 107D** [112], Kumleben JA and Nienaber JA referred with approval to Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice*[113] and stated the fundamental principle of pleadings as follows: -

---

[111] Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T) at 210H-I
[112] [1993] ZASCA 36; 1993 (3) SA 94 (AD) at 107D
[113] 22nd Ed, at 113

"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be obtained when each party states his case with precision".

269. In **Wootton v Sievier (1913) 3 K.B. 499 (C.A.)** the rule was stated at p. 503 as: -

"In every case in which the defence raises an imputation of misconduct against him, a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation."

270. The institution of a groundless claim is an abuse of the process of court.[114]

271. The applicable test can be distilled from an examination of the case law on the subject in other jurisdictions.

272. Abuse connotes improper use, that is, use for ulterior motives. And the term "*abuse of process*" connotes that "*the process is employed for some purpose other than the attainment of the claim in the action*".[115]

273. At times "*vexatious*" conduct or litigation is used synonymously with or as an instance of abuse of the process of court.

274. In its legal sense, "*vexatious*" means "*frivolous, improper; instituted without sufficient ground, to serve solely as an annoyance to the defendant*".[116]

275. What amounts to abuse of process is insusceptible to precise definition or formulation comprising closed categories.

276. Courts have understandably refrained from attempting to restrict abuse of process to defined and closed categories.

---

[114] Western Assurance Co v Caldwell's Trustees 1918 AD 262 at 272; African Farms Township v Cape Town Municipality 1963(2) SA 555 (A) at 565D-F; Corderoy v Union Government 1918 AD 512 at 517; Beinash v Wixley1997 (3) SA 721 (SCA).

[115] Varawa v Howard Smith Co Ltd [1911] HCA 46; (1911) 13 CLR 35 at 91.

[116] Short Oxford English Dictionary; Fisheries Development Corporation of SA Ltd v Jorgensen and Another: Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) at 1339E-G.

277. While there can be no all-encompassing definition of the concept of "*abuse of process*", that is not to say that the concept of abuse is without meaning. It has been said that '*an attempt made to use for ulterior purposes machinery devised for the better administration of justice'* would constitute an abuse of the process.[117]

278. In **Beinash v Wixley***,* the Supreme Court of Appeal in South Africa held that "an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective"[118].

279. In **Price Waterhouse Coopers and Others v National Potato Co-operative Ltd**, it was held the "*general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end*."[119]

280. In **Walton v Gardiner**, the High Court of Australia held that the power to strike out an action on the grounds of abuse of process "*extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness*".[120]

281. As a general matter, an abuse of the process of the court occurs when the court process is used for improper purpose.

282. Thus, a plaintiff such as the SARS official who has no *bona fide* claim but intends to use litigation to cause the taxpayer financial (or other) prejudice will be abusing the process.[121]

283. Improper result or motive can be established by way of inference.

---

[117] Hudson v Hudson and another supra at 268
[118] Beinash v Wixley, supra, at 734C-G.
[119] [2004] ZASCA 64; 3 All SA 20 (SCA) (1June 2004) SAFLII at para 50
[120] [1993] HCA 77; (1993) 177 CLR 378; (1993) 112 ACR 289.
[121] Id

284. Whether the court process has been used for improper purpose and therefore constitutes an abuse of the process of the court is a question of fact that must be determined by the circumstances of each case.[122]

285. The circumstances in which abuse of process can arise are varied. It is therefore neither possible nor desirable to attempt to list exhaustively the circumstances under which the inherent power will be exercised.

286. Inordinate delay in the prosecution or finalisation of litigation and the institution of a groundless action are among the grounds frequently relied upon as evidence of the abuse of the process of the court.[123]

287. In the English case of **Lawrence v Norreys, Bowen 39 Ch.D.,** L.J. said that: -

> *"It is an abuse of the process of the Court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief in it . . . I quite agree that this power ought to be exercised with the very greatest care, that it is not for the Court on a motion of this kind to discuss the probabilities of the case which is going to be made, except so far as to see whether the case stands outside the region of probability altogether, and becomes vexatious because it is impossible."* [124]

288. In the South African case of **Ravden v Beeten 1935 CPD 269**, it was held that this power should be exercised only in plain and obvious cases, i.e. cases that are obviously frivolous or vexatious or obviously unsustainable.[125]

289. In **Rogers v Rogers and Another**, the Zimbabwe Supreme Court held that an action is frivolous or vexatious in a legal sense "*when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation*".[126]

290. A useful collection of the various phrases that courts have used to describe the test to be applied appears from the Australian case of **General Steel Industries Inc. v.**

---

[122] Beinash v Wixley, supra, at 734F-G.
[123] African Farms Township v Cape Town Municipality 1963(2) SA 555 (A) at 565D-F; L F Boshoff Investment v Cape Town Municipality 1969 (2) SA 256 at 275B-C.
[124] at p. 234.
[125] at p. 276; Texas Company (S.A.) Ltd v Wilson Bros. Garage, 1936 NPD 510 at p. 515.
[126] [2008] ZEST 7 (27 May 2008) SAFII.

Commissioner for Railways (N.S.W), where Barwick CJ, after examining decisions in which the inherent power of the court to prevent abuse was invoked and those in which the statutory rules were relied upon, said: -

> *"The test to be applied has been variously expressed; "obviously unsustainable", "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense."* [127]

291. It is clear from these authorities that the fundamental right of free access to the courts should not be interfered with by the summary dismissal of an action without hearing evidence, on the ground that it is vexatious, unless it is manifest that the action is so unfounded that it could not possibly be sustained.

292. It must be quite clear that failure of the action is a foregone conclusion.[128]

293. What these authorities emphasise is that SARS ought not to be denied access to court unless the lack of merit in the claim is clearly demonstrated or, to borrow the phrase from Lord Herschellin ***Lawrence v Norreys,*** *supra,* the story told in the pleadings is a myth that has no solid foundation.[129]

[127] General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125 at 129.
[128] Argus Printing & Publishing Co Ltd v Anastassiades 1954 (1) SA 72 (W) at 74.
[129] Per Lord Herschell at 220

CHAPTER 9: TAXPAYER'S RIGHTS & REMEDIES

Chapter 9.1: Introduction

294. The TAA attempts to restrict the taxpayer rights to approach the High Court by forcing the taxpayer to stay within the four corners of the TAA. This is obviously because the TAA favours SARS over the taxpayer whereas the Uniform Rules of Court provide an equal playing field to both sides in the litigation process.

295. Section 105 of the TAA provides that: -

> *"**105. Forum for dispute of assessment or decision**: - A taxpayer may not dispute an assessment or decision as described in section 104 in any court or other proceedings, except under this B Chapter or by application to the High Court for review."*

296. Section 104 of the TAA provides as follows: -

> *"**104. Objection against assessment or decision**.— (1) A taxpayer who is aggrieved by an assessment made in respect of the taxpayer may object to the assessment. (2) The following decisions may be objected to and appealed against in the same manner as an assessment— (a) a decision under subsection (4) not to extend the period for lodging an objection; (b) a decision under section 107 (2) not to extend the period for lodging an appeal; and (c) any other decision that may be objected to or appealed against under a tax Act. (3) A taxpayer entitled to object to an assessment or 'decision' must lodge an objection in the manner, under the terms, and within the period prescribed in the 'rules'. (4) A senior SARS official may extend the period prescribed in the 'rules' within which objections must be made if satisfied that reasonable grounds exist for the delay in lodging the objection. (5) The period for objection must not be so extended— (a) for a period exceeding 30 business days, unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection; (b) if more than three years have lapsed from the date of assessment or the 'decision'; or (c) if the grounds for objection are based wholly or mainly on a change in a practice generally prevailing which applied on the date of assessment or the 'decision'."*

297. Section 105 of the TAA provides as follows: -

> *"**107. Appeal against assessment or decision. —** (1) After delivery of the notice of the decision referred to in section 106 (4), a taxpayer objecting to an*

assessment or 'decision' may appeal against the assessment or 'decision' to the tax board or tax court in the manner, under the terms and within the period prescribed in this Act and the 'rules'. (2) A senior SARS official may extend the period within which an appeal must be lodged for— (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days. (3) A notice of appeal that does not satisfy the requirements of subsection (1) is not valid. (4) If an assessment or 'decision' has been altered under section 106 (3), the assessment or 'decision' as altered is the assessment or 'decision' against which the appeal is noted. (5) By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'. (6) Proceedings on the appeal are suspended while the alternative dispute resolution procedure is ongoing. (7) SARS may concede an appeal in whole or in part before— (a) the matter is heard by the tax board or the tax court; or (b) an appeal against a judgment of the tax court or higher court is heard."

298. In **Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 (1) SA 1109 (CC),** after referring to the remedies of a vendor under D the VAT Act, Kriegler J stated the following: -

> *"[33] But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief. [46] It is therefore clear that any decision of the Commissioner to make a VAT assessment under s 31 and/or to levy additional tax under s 60 is subject to judicial intervention in certain circumstances."*

299. Section 169 of the Constitution empowers the High Court to decide on any constitutional matter. This includes matters relating to the protection or enforcement of fundamental rights, unless that matter is assigned to a court of equal status to the High Court.[130]

300. In **Ackermans Ltd v Commissioner, South African Revenue Service 2015 (6) SA 364 (GP)** the Court found that the section 105 of Tax Administration Act does usurp the jurisdiction of the Court to review a decision of the Commissioner: -

> *"[20] It seems to me that on the strength of the authorities cited above, this court has the jurisdiction to hear this review application. The objection by Sars that this court does not have jurisdiction to hear H this application has no merit and must*

[130] Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others 2002 (2) SA 693

therefore fail."

Chapter 9.2: Rights and Remedies found in the Constitutional

301. A taxpayer's fundamental rights, whether in his personal capacity or as a taxpayer, are enshrined in the Bill of Rights and must be respected by the SARS official in all his dealings the taxpayer.

302. The taxpayer's rights including *inter alia* the following: -

302.1. The right to equality before the law and to the equal protection and benefit of the law, which includes the right not to be discriminated against, amongst others on grounds of race, gender, sex, marital status, or ethnic or social origin (*section 9 of the Constitution*);

302.2. The right to human dignity and to have such dignity respected and protected (*section 10 of the Constitution*);

302.3. The right to freedom and security of the person (*section 12 of the Constitution*);

302.4. The right to privacy, which includes the right not to have person or home searched, property searched, possessions seized or the privacy of communications infringed (*section 14 of the Constitution*);

302.5. The right to freedom of movement, the right to leave the Republic, and the right to reside anywhere in the Republic (*section 21 of the Constitution*);

302.6. The right not to be deprived of property except in terms of law of general application; no law may permit the arbitrary deprivation of property and 'property' is not limited to land (*section 25 of the Constitution*);

302.7. The right to use the language of choice (*section 30 of the Constitution*);

302.8. The right of access to any information held by the SARS official or any information held by another person that is required for the exercise or protection of any rights (*section 32 of the Constitution*);

302.9. The right to administrative action that is lawful, reasonable and procedurally fair, and the right to be given written reasons where rights have been adversely affected by administrative action (*section 33 of the Constitution*);

302.10. The right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum (*section 34 of the Constitution*);

303. In addition, the taxpayer also has the following rights: -

303.1. The right to information, as envisaged in section 32 of the Constitution, read with the Promotion of Access to Information Act, 2000 ("**PAIA**");

303.2. The right to just administrative action as envisaged in section 33 of the Constitution, read with the Promotion of Administrative Justice Act, 2000 ("**PAJA**");

304. The Constitution expressly requires the SARS official, when it interprets the Bill of Rights and/or the TAA to promote the values that underlie an open and democratic society based on human dignity, equality and freedom (*section 39 of the Constitution*).

305. Section 195 of the Constitution stipulates that the SARS official must, *inter alia*, at all times:-

305.1. act with a high standard of professional ethics;

305.2. use resources effectively, efficiently and economically;

305.3. act impartially, fairly, equitably and without bias;

305.4. be accountable; and

305.5. be transparent and provide taxpayers with timely and accurate information.

306. In addition, section 7 of the Constitution requires the SARS official to respect, protect, promote and fulfil the rights in the Bill of Rights of the Constitution.

307. Dispute resolution in respect of tax matters are governed by Chapter 9 of the TAA which are to be read together with the Rules promulgated under section 103 of the TAA ("**the Rules**"). However, these provisions, being Chapter 9 and the Rules, must be read together with the Constitutional rights afforded to a Taxpayer.

308. These Constitutional rights are entrenched primarily in the Bill of Rights.

309. PAJA was enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution. The writer deals with the legal framework of PAJA below in more detail.

310. The Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. In this regard reference is made to what is set out in **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC)** at paragraph 1: -

> *"[1] One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood: "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy." And the role of these foundational values in helping*

to strengthen and sustain our constitutional democracy sits at the heart of this application."

311. When determining the taxpayer's challenge to a decision or findings of the SARS official, the Constitution expressly requires the SARS official to interpret the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom (at section 39 of the Constitution).

312. The Tax Administration Act provides, *inter alia*,: -

312.1. The purpose of the TAA is to ensure the effective and efficient collection of tax (at section 2 of the TAA as read with the pre-amble);

312.2. The TAA seeks to promote a better balance between the power and duties of SARS and the rights and obligations of taxpayers and to make this relationship more transparent;

312.3. Chapter 5 of the TAA sets out the information gathering processes available to SARS.

312.4. Chapter 6 of the TAA sets out the confidentiality of a taxpayer information;

312.5. Chapter 8 of the TAA provides for the assessment process to be adopted by SARS;

312.6. Chapter 9 of the TAA provides for the dispute resolution process between a taxpayer and SARS;

312.7. Relevant material may be required from the taxpayer by the SARS official to administer a tax act such as verifying whether a return is correct, auditing a person's tax affairs, establishing a person's correct tax liability and investigating and collecting evidence whether a person has committed a tax offence

313. SARS' explanatory memorandum to the Tax Administration Bill, 2011 provides, inter alia, that the current [tax] framework, such as *inter alia* the Income Tax Act and the VAT

Act, is outdated and needs to be aligned with modern approaches, business practices, accounting practices and constitutional rights.

314. The Tax Administration Bill, 2011 takes account of the constitutional rights of taxpayers, but does not seek to re-codify them, because all legislation, including the TAA, must be read together with the provisions of the Constitution.

315. The Guide provides, *inter alia*, that,: -[131]

315.1. That the TAA intended to incorporate into one piece of legislation the administrative provisions that are generic to all tax acts and to simplify the administrative provisions. The TAA seeks to promote a better balance between the power and duties of SARS and the rights and obligations of taxpayers and to make this relationship more transparent;

315.2. That the TAA seeks in numerous ways to enhance tax compliance to ensure that every person pays his or her fair share;

315.3. That the majority of taxpayers are compliant and want a more modern and responsive revenue administration but there is a minority who seeks to evade tax or defraud the government;

315.4. That the information gathering powers of SARS may only be used to obtain relevant material. This relevant material includes information, documents or things that are foreseeably relevant for tax risk assessment, assessing and collecting tax or for determining compliance with a tax obligation.

315.5. That SARS may conduct a field audit and request relevant material and ask questions and examine systems and download relevant material as part of conducting their audit.

315.6. The Guide also sets out the rights of SARS under search and seizure and the controls in respect thereof.

[131] version 2 dated 5 June 2013

316. Given the wide-ranging powers in the TAA, the SARS official ought to be held to account for failing to make use of the less invasive powers available through the TAA in conducting its investigations and tax audit into the tax affairs of the taxpayer.

317. For the reasons set out herein, the writer is of the respectful view that the SARS official is required to comply with *inter alia* the following,: -

317.1. The provisions of the TAA;

317.2. The provisions of the Rules promulgated in terms of the TAA;

317.3. The various memorandum and guides issued by SARS in terms of the TAA.

318. The writer refers to the TAA at, *inter alia*,: -

318.1. The preamble of the TAA that requires SARS to provide for the confidentiality of information of taxpayers;

318.2. Chapter 6 of the TAA that requires inter alia all SARS officials, including a person contracted by SARS to take an oath of secrecy. Failure to take the oath before commencing duties is a statutory offence.

319. The writer refers to the Guide published by SARS where the following is provided: -

319.1. Taxpayers have a right to expect that any information provided by them or about them under the tax Acts is treated in confidence, will not be disclosed to third parties and is used for tax purposes only. The public policy in South Africa behind the secrecy provisions is to encourage taxpayers to register and make full and proper disclosure of their income.

319.2. There is a general duty on current and former SARS employees, and on every person contracted by SARS, to preserve the secrecy of taxpayer information and to not disclose taxpayer information to a person who is not a SARS official. All SARS officials, including persons contracted by SARS, are obliged to take

an oath of secrecy. Failure to take the oath before commencing duties is a statutory offence.

320. Various provisions in the Constitution of the Republic of South Africa, 1996 enjoin the courts, whenever it is in the interest of justice to do so, to develop the rules of common law and, in so doing, remedies unheard of before, may evolve which, either substantively, or under the heading 'special matters' may justify a stay of proceedings, either temporarily or permanently.[132]

321. SARS enjoys its *locus standi* as a creditor in all disputes with a taxpayer. Enforcement of its rights as a creditor can bankrupt the taxpayer. It has enforced its rights on draconian principles based on pride of place. Insolvency, necessarily and appropriately, is shifting from being a creditor-driven regime to focusing on the interests of other stakeholders involved in and affected by the insolvency proceedings.[133]

322. Moreover, it is necessary that insolvency law and its implementation, like all South African law, be constitutionally compliant.[134]

323. It is submitted that such compliance extends to the taxpayer's constitutional rights. Business rescue: -

> *"constitutes a major theme of the new Companies Act, 2008, and is amplified in section 7(k) thereof, which states that one of the purposes of the Act 'is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'."* [135]

324. With the implementation of the 2008 Companies Act and the business rescue provisions: -

---

[132] The Minister of Public Works v MXN Development Construction CC 2007 JDR 0673 (C)

[133] for example, an amendment to the Insolvency Act 24 of 1936 ("the Insolvency Act") now requires that a copy of a sequestration application must be furnished to employees of the insolvent debtor. See Stratford and others v Investec Bank Limited and others [2014] ZACC 38 (19 December 2014) [reported at 2015 (3) BCLR 358 (CC)] with reference to s 9(4A). Similarly, the Companies Act 71 of 2008 has introduced business rescue proceedings.

[134] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) at [31] [also reported at 2002 (7) BCLR 702 (CC)]. Also De Lange v Smuts NO and others 1998 (3) SA 785 (CC) [also reported at 1998 (7) BCLR 779 (CC)] where the Insolvency Act was subjected to constitutional scrutiny.

[135] Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC) at [1] [also reported at [2012] JOL 28893 (WCC)]

"the rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees,[136] *and with the public interest too."*[137]

325. In this regard: -

325.1. The Court has a discretion to grant or dismiss an application for liquidation or make any other order it may deem just;

325.2. If a company is in fact solvent, in the sense of its assets exceeding its liabilities, this may, depending on the circumstances, lead to a refusal of a winding-up;

325.3. The legislature has, by virtue of the 2008 Companies Act, recognised that the liquidation of companies more frequently than not, occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods;

325.4. It is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible;

325.5. The remedy of liquidation has therefore been relegated to a last resort which ought not to be granted if an alternative remedy is available to SARS.

326. These principles are equally applicable to the steps taken by the SARS official when enforcing the provisions of the TAA.

327. SARS is after all only a creditor.

328. Our courts have repeatedly emphasized the special duty of fair play expected of the state as a litigant: -

328.1. The Constitutional Court remarked in **Mohamed** that:[138]

[136] Investec Bank Limited v Stratford and another [2013] ZAWCHC 207 at [15]. In terms of s 9(4A) of the Insolvency Act 24 of 1936, employees of a debtor facing sequestration or winding-up must be notified of the proceedings

[137] Absa Bank Limited v Newcity Group (Pty) Ltd and another related matter [2013] 3 All SA 146 (GSJ) at [31]. See also Dippenaar NO and others v Business Venture Investments No 134 (Pty) Ltd and another [2014] 2 All SA 162 (WCC) at [45].

"South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example."

328.2. The Constitutional Court has, on more than one occasion, emphasized the duty of the state to conduct itself fairly in litigation. [139]

328.3. In **Matatiele**, Sachs J said the following about the failure of the state to make full disclosure of the relevant facts: [140]

"In this respect, the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as s 165(4) of the Constitution requires."

328.4. In **Ngxuza**, Cameron JA said the following: - [141]

"All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticise government's decisions in the area of social policy. But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard."

329. The SARS official, no matter how powerful, remains a creature of statute. Any decision or findings by a SARS official is a discretion which must be exercised judicially and must, by operation of law, flow naturally from a correct appreciation of the facts.

330. In reaching its decision, the SARS official must adhere to the rule of law, including the prescribed processes in the TAA as all its decisions are administrative action subject to

---

[138] Mohamed and another v President of the Republic of South Africa and others 2001 (SA) 893 (CC) at para 68

[139] See, generally, Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC); Baphalane Ba Ramokoka Community v Mphela Family and others 2011 (9) BCLR 891 (CC) at para 38

[140] Matatiele Municipality and others v President of the RSA and others 2006 (5) SA 47 (CC) at para 107

[141] Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others 2001 (4) SA 1184 (SCA) at para 15

Constitutional scrutiny and the provisions of *inter alia* the PAJA. The SARS official must interpret (and use) its powers in the tax Acts within the spirit

331. Fortunately, the taxpayer is not unarmed and defenseless in its battle against the SARS official. Quite the contrary.

332. The TAA recognizes South Africa's new Constitutional dispensation, including the taxpayer rights.

> *"One of the crucial elements of our Constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck." (see In Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC) at para 1).*"

Chapter 9.3: Rights and Remedies found in the TAA

333. The TAA provides for the following,: -

333.1. The preamble requires SARS to provide for the request for information and to provide for the carrying out of an audit or investigation by SARS;

333.2. Chapter 5 of the TAA deals with information gathering and section 40 notes that SARS may select a person for inspection, verification and/or audit;

333.3. Chapter 5 of the TAA also stipulates out the information gathering processes available to SARS. The TAA increases SARS information gathering powers as SARS may:-

333.3.1. conduct unannounced but limited inspections at business premises to verify that a person has complied with the formal obligations such as registering and maintaining proper records;

333.3.2. request information that concerns previous, current and future tax periods or taxable events known as real time audits;

333.3.3. request information in respect of an objectively identified taxpayer;

333.3.4. conduct audits on a random or risk assessment basis;

333.3.5. obtain information for purposes of revenue estimation;

333.3.6. ask a taxpayer to attend an interview at a SARS office to clarify issues of concern;

333.3.7. seek authority to conduct a search and seizure.

333.4. SARS is required to keep the taxpayer informed of its audit and to notify the taxpayer on regular intervals of the scope of the audit, the stage of completion thereof and to be informed on any relevant material still outstanding from the taxpayer.

334. SARS' Guide published by SARS version 2 dated 5 June 2013, states that in certain impactful provisions of the Act, administrative fairness provisions have been codified: -

334.1. SARS may only conduct a field audit or investigation with prior notice;

334.2. At the conclusion of the audit process, SARS is obliged to give prior notice and prior opportunity to the Taxpayer to respond to the audit findings before the assessment is issued;

334.3. regarding assessments, SARS must give grounds for the need for an assessment based on an estimation and an assessment that is not fully based on a return i.e. that is adverse to the tax position taken by the taxpayer;

334.4. The information gathering powers of SARS may only be used to obtain relevant material. This relevant material includes information, documents or things that are foreseeably relevant for tax risk assessment, assessing and collecting tax or for determining compliance with a tax obligation.

335. SARS' External Guide on Access To Audit Files (undated) provides as follows,:-

335.1. The aim of a statutory audit is to express an opinion on the financial statements as a whole. The opinion only provides reasonable assurance and is issued for the use of all interested parties, including SARS.

335.2. The aim of a tax audit is to determine if the taxpayer has complied with the relevant legislation administered by SARS. The tax auditor does not express an opinion, but rather makes a determination as to the correctness of a declaration. These tax audits are normally based on risk(s) identified in a specific declaration made by a taxpayer. The financial statements are an important source of supporting evidence for declarations made by taxpayers.

335.3. Despite the different objectives of statutory auditors and tax auditors, both audits should be of a high standard and be conducted effectively and efficiently. In both audits sufficient and appropriate audit evidence must be gathered to support the opinion/determination of the auditor;

335.4. In terms of section 46 of the TAA SARS can only request relevant material for purposes of the administration of a tax Act which includes information, documents or things that in the opinion of SARS are foreseeably relevant for the administration of a tax Act.

335.5. SARS will generally exhaust all options to request relevant material from the taxpayer directly;

335.6. In the process of administration of a tax Act, SARS may consider it necessary to gain an understanding of the taxpayer's operating environment in order to focus its audit efforts. This can be obtained from the audit file of the statutory auditor.

335.7. Furthermore, in circumstances where the taxpayer's declaration is incomplete or insufficient, or the taxpayer or independent third parties are unable to provide SARS with the information required, access to the statutory auditor's audit file could be considered necessary in order to ensure sufficient and appropriate audit evidence is gathered to support the assessment by the tax auditor.

335.8. Lastly, in instances where the taxpayer withholds information, SARS might deem it necessary to obtain the information it needs from the statutory auditor's audit file.

336. Every taxpayer has the right, in terms of Rule 3, to request reasons for the assessment or additional assessment from SARS. If this is done, many of the issues concerning the nature of the case may be resolved. In the event that no such request has been made, a taxpayer disputing an assessment will file an objection to the assessment based on an interpretation of the reason for which the assessment has been raised.

337. The Commissioner is obliged to notify the taxpayer of the decision on the objection in writing, but is not required to provide reasons for the decision. Thereafter, the taxpayer may appeal against the decision of the Commissioner, and specify which of the grounds of objection are relied upon.

338. In terms of Rule 10(1), on receipt of a notice of appeal, the Commissioner must prepare and deliver a statement of grounds of assessment to the taxpayer.

339. In the statement of grounds of assessment, the Commissioner must state the grounds upon which the taxpayer's objection was disallowed and the material facts and legal grounds on which reliance is placed for the disallowance.

340. The right to administrative justice under the Constitution is given effect to in PAJA. PAJA essentially mandates in the context of tax administration that tax administrative actions that materially and adversely affect taxpayer rights must, in the absence of exceptions provided for in PAJA, adhere to fairness requirements such as:-[142]

[142] SARS's Short Guide to the TAA (5 June 2013)

340.1. Prior notice of the intended decision;

340.2. A prior hearing before the decision is taken;

340.3. Clear grounds for the decision.

Chapter 9.4: Rights and Remedies found in PAJA

341. A Taxpayer's rights to review the senior SARS' official's decision arises from both the final Constitution[143] ("**the Constitution**") and Promotion of Administrative Justice Act, no 2 of 2000 ("**PAJA**").

342. Section 33 of the Constitution states that:-

> *"(1) Everyone has the right to administrative action that it lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. National legislation must be enacted to give effect to these rights".*

343. PAJA was passed pursuant to the provisions of section 33(3) of the Constitution and was enacted to give effect to specific and express legislative measures required by the Constitution,[144] being those rights constitutionally enshrined in the Bill of Rights of the Constitution, to just administrative action.

344. PAJA is both 'constitutional' and 'universal' legislation conferring rights upon all South Africans and their dealings with organs of State are concern.[145] This applies with equal force to the rights of a taxpayer in its dealings with SARS.

345. PAJA sets out the requirements for procedurally fair administrative action, and provides for the grounds on which administrative action may be judicially reviewed and set aside. The most significant definition in PAJA is the definition of "*administrative action*". This is defined as:

---

[143] Act 108 of 1996

[144] section 32, 33(1) and 9 read with item 23(1) of Schedule 6 of the Constitution

[145] Sasol Oil (Pty) Ltd v Metcalf NO 2004 (5) S.A 161 (w) at para 7 at 165H-I and 166C

"Any decision taken, or any failure to take a decision, by –
an organ of state, when – exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power of performing a public function in terms of any legislation; or a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".

346. "*Decision*" is defined as: [146]

"[A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to … making … or refusing to make an … award or determination; … refusing to give a[n] approval, consent or permission; … or … doing or refusing to do any other act or thing of an administrative nature."

347. The definition of "*administrative action*" therefore requires that five elements be satisfied:-[147]

347.1. a decision of an administrative nature;

347.2. made in terms of an empowering provision;

347.3. made by an organ of state or by a private person exercising a public power or performing a public function;

347.4. that adversely affects rights; and

347.5. that has a direct, external legal effect.

348. To succeed on review, a taxpayer must show in terms of *inter alia* section 6(2)(h) of PAJA, the SARS' official's decision: -

"is so unreasonable that no reasonable person could have so exercised the power or performed the function" of determining the question of causation. It means

[146] in section 1(v) of PAJA
[147] Currie and Klaaren; The Promotion of Administrative Justice Benchbook (2001) at 41

that the senior SARS' official's finding is reviewable only if "it is one that a reasonable decision-maker could not reach." [148]

349. Reasonableness is a variable standard. Its requirements depend on its context. What constitutes a reasonable decision depends on the circumstances of every case.[149]

350. The Constitutional Court held in **Bato Star** that the factors relevant to the determination of reasonableness include "the nature of the decision, the identity and expertise of the decision-maker (and) the range of factors relevant to the decision".[150]

351. A decision or finding of a senior SARS' official is clearly made in terms of an empowering provision.

352. An "Empowering provision" is defined in section 1 of PAJA as "*a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken*".

353. Insofar as a taxpayer's rights are concerned, it should be interpreted broadly. [151]

354. The senior SARS' official's disputed decision has a "*direct, external legal effect*". This element of the definition of "*administrative action*" was introduced to ensure that only *final* decisions are covered by PAJA. A decision will have a direct effect if it has an immediate impact on a person's rights.[152]

355. The TAA and the rules thereto would qualify as such in this regard.

---

[148] Bato Star Fishing v Minister of Environmental Affairs 2004 (4) SA 490 (CC) para 44; Foodcorp v Deputy DG, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 191 (SCA) at para 12

[149] Bato Star para 45; Minister of Health v New Clicks SA 2006 (2) SA 311 (CC) at para 145

[150] Bato Star para 45

[151] Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 835 (SCA)

[152] Currie and de Waal *Bill of Rights Handbook* (2005) at 552

356. The SARS official's decision would ordinarily involve the exercise of public power is determined not by reference to the identity of the person who exercises the power, but by the nature of the power being exercised.[153]

357. The power is exercised in terms of any one of the many provisions in the TAA and as set out above. This is clearly a public power, there can be no dispute.

358. The Constitutional Court in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA (1) (CC)** set out a number of considerations that must be taken into account in determining whether a public power or function is involved on any particular set of facts. The Court stated at para 143:-[154]

> *"A series of considerations may be relevant in deciding on which side of the line a particular action falls. The source of the power, although not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation".*

359. Therefore, that these requirements for the definition of "*administrative action*" appear to be satisfied.

360. The SARS official's decisions would thus satisfy the definition of "*administrative action*" in PAJA in that all five of the requirements contemplated by this definition appear to be met on the facts.

361. For the sake of completeness that even in the event that the SARS official's decision is not regarded as "*administrative action*", the decision may arguably be reviewed by courts on the following grounds: -

361.1. Under the constitutional principle of rationality that was established by the Constitutional Court in ***Pharmaceutical Manufacturers Association of SA***

[153] Greys Marine Hout Bay (Pty) Ltd and Others v The Minister of Public Works and Others 2005 (6) SA 313 (SCA) at para 24

[154] Cape Metropolitan Council v Metro Inspection Services (Western Cape) and Others 2001 (3) SA 1013 (SCA) at para 17.

***and others; In re: Ex parte application of President of the RSA and others* 2000 (3) BCLR 241 (CC)**.

361.2. In this case, the Court struck down a decision of the President to bring an Act of Parliament into force as being irrational, despite the fact that such decision did not amount to administrative action.

362. Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may within 90 (ninety) days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the administrative action, request that the SARS official furnish written reasons for the action, whether it is a decision or finding.

363. The reasons for a SARS official's decision will determine how a taxpayer will respond, that is, whether he or she will accept the decision or challenge it. Thus, it is important to establish what constitutes "*adequate reasons*" as neither section 5 nor Rule 3(1)(a) of the existing tax Acts[155] explains what the term means.[156]

364. In considering the right to reasons under section 24 of the Interim Constitution in **Moletsane v Premier of the Free State and Another 1996 (2) SA 95 OPD**, the court said: -

> *"This, in my view, connotes a correlation between the action taken and the reasons furnished: the more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished."* [157]

365. In the matter of **Minister of Environmental Affairs and Tourism v Phambili (2003) 2 ALL SA 616 (SCA)** the court said the following: -

---

[155] Income Tax Act Act 58 of 1962; Value Added Tax Act 89 of 1991

[156] Lange & Wessels The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts (2004) 116

[157] Ibid 98

"what constitutes adequate reasons", has been apply described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others [1983] FCA 179; (1983) 48 ALR 500 at 507 (lines 23-41), as follows:[158] *"The passages from judgments which are conveniently brought together in Re Parma and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, served to confirm my view that section 13(1) of the Judicial Review Act requires the decision maker to explain his decision in a way which will enable a person aggrieved to say, in effect: " even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging." "This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute) and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only."*

366. In Hoexter: The New Constitutional and Administrative Law the learned author says the following:[159]

> *"(I)t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.": See Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others **1986 (2) SA 756** (A) at 772 I-773 A."*

367. In **R an International Supply Company (Pty) Ltd and Others v Mpumulanga Gaming Board 1999 (8) BCLR 918 T** the following was said: -

> *"On the one hand it is not necessary for an administrative body to spoon-feed an aggrieved party seeking reasons; on the other hand the administrative body cannot expect an aggrieved party to seek justification for the reasons from a myriad of documents where such reasons cannot reasonably be determined."*

368. The writer contends that the principles applicable to adequate reasons for assessments conducted in terms of the VAT and Income Tax Acts apply equally to the TAA.

---

[158] Fisheries 2003 (6) SA 407 (SCA) at para [40]

[159] Vol 2 at 244

369. Without the basic particularity, it is near impossible for anyone to know what case the taxpayer must meet or to make an informed decision whether to accept or to oppose the SARS official's decision.

370. A taxpayer has a right to be informed of the underlying thinking that resulted in the SARS official's decision. The SARS official's must therefore expand on the statutory provisions relied on and justify why he reached that particular conclusion.

371. It is not good enough to take an obstinate position that the reasons appear from a myriad of correspondences sent by the SARS official to the taxpayer over the duration of i.e. an audit or an assessment.

372. In **Swissborough Diamond (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 TPD**, the following was said by the Court in terms of allegations contained in affidavits:-

> *"The facts set out in the founding affidavit (and equally in the answering affidavit and replying affidavit) must be set out simply, clearly and in chronological sequence and without argumentative matter … Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the strength thereof."* [160]

373. Accordingly, a taxpayer should not have to sift through a significant number of documents to glean the reasons for the SARS official's decisions. The taxpayer is entitled to clear and precise reasons.

374. In **X v Commissioner for the South African Revenue Service**,[161] the following was expounded: -

> *"An offer to accept a proposal to reduce an assessment does not constitute reasons. Here, I do not believe that the taxpayer is in a position to determine with any degree of certainty that "even though I may not agree with it, I now understand why the decision went against me." The Applicant is not ideally placed in a position to decide on the basis of the information supplied by the*

[160] **Ibid 324**

[161] **(4/05) [2005] ZAGPHC 121 (28 November 2005)**

Respondent whether the decision is worth challenging. For the above reasons the Applicant was, and still is, entitled to answers to its questions. They are essential to enable the Applicant to formulate its objection to the assessment. If the Court sanctions the Respondent's attitude, the Applicant will have to perform the impossible task of distilling the Respondent reasons from twenty letters which do not speak for themselves and none of which contain clearly formulated reasons before formulating its objection."

375. In terms of section 6(2)(f)(ii) of PAJA, there must be a rational connection between the SARS official's decision and the purpose for which it was taken, the purpose of the decision, the information before the SARS official's, and the reasons given by the SARS official's for his decision.

376. As was stated by the **Constitutional Court in Pharmaceutical Manufacturers of SA and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)** at para 86: -

"[T]he question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry … The setting of this standard does not mean the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is in the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it."

377. Section 6(2)(h) of PAJA requires that the SARS official's decision be subjected to reasonableness review. This review demands more of a decision-maker than does judicial review on the basis of rationality;

378. The leading case concerning reasonableness review under PAJA is the decision of the Constitutional Court in **Bato Star Fishing**, where the Court examined whether a decision taken by an organ of state in regard to the allocation of fishing quotas was reasonable. The Court held: -

"[A]n administrative decision will be reviewable if … it is one that a reasonable decision-maker could not make. … . What will constitute a reasonable decision will depend on the circumstances of each case …. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to

> *the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected … The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness."* [162]

379. This test was slightly re-phrased in **Foodcorp (Pty) Ltd v Deputy Director General Department of Environmental Affairs & Tourism 2006 (2) SA 191 (SCA**). The Supreme Court of Appeal stated at para 12:

> *"[Section] 6(2)(h) of PAJA, requires a simple test namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached."*

380. In common with rationality review, a fundamental principle that guides courts in assessing reasonableness review is that appropriate deference must be shown to the administrative decision-maker.

381. As the Constitutional Court stated in **Bato Star Fishing** (at para 48): -

> *"A Court should … give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. … Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts, or are not reasonable in the light of the reasons given for it, a court may not review that decision."*

382. It will be evident from the factors articulated in the **Bato Star Fishing** decision that reasonableness review is a context-specific inquiry, undertaken against the background of the principles of judicial deference to administrative decision-making, and the importance of not blurring the distinction between appeals and reviews;

383. Against this legal background, and with due regard to the principles of deference to which is referred to above, it is possible that a court could conclude that the SARS

[162] at paras 44-45

official's decision is unreasonable in that no reasonable SARS official would have come to the same decision/conclusion.

384. Specifically, when making his decision, the SARS official must also have regard to all the relevant facts regarding the taxpayer which includes inter alia: -

384.1. the taxpayer's historical tax debt;

384.2. the taxpayer's historical conduct;

384.3. whether the taxpayer has acted *bona fide*;

384.4. whether the taxpayer taken SARS into his confidence;

385. Our courts have repeatedly emphasised the special duty of fair play expected of the state as a litigant.

Chapter 9.5: Rights and Remedies found in PAIA

386. Section 32 of the Constitution provides for a right of access to information held by both public and private bodies. It states that:

> *"(1) Everyone has the right to have access to any information held by the State; and any information that is held by another person that is required for the exercise or protection of any right. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State."*

387. PAIA is the national legislation envisaged in section 32(2) of the Constitution.

388. It was enacted in order to give effect to access to information and promote the values of openness, transparency, accountability and good governance – principles foundational to the Constitution.

389. The preamble of PAIA provides that the system of government in South Africa before 27 April 1994 "*resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations*".

390. The preamble continues and provides that PAIA is enacted to "*foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information*".

391. Section 9 of PAIA describes its objects as, *inter alia*, the promotion of: -

> *"... transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies; to understand the functions and operation of public bodies. to effectively scrutinise… decision-making by public bodies that affects their rights"*

392. In terms of PAIA, both private and public bodies are now under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of the grounds listed in PAIA.

393. Every request for access to information in terms of PAIA is an invocation of the section 32 right in the Constitution and entitles the requestor to access to the requested record, or part of it, if that requestor complies with all the procedural requirements and save where a refusal of a request is permitted or required by one or more of the grounds for refusal contemplated in PAIA.

394. It is against the above background that the TAA, which was enacted to give effect to section 32 of the Constitution, must be interpreted.[163]

395. As a point of departure, therefore, and as is suggested by its very name, the TAA must be interpreted generously in favour of access to information held by the State.[164]

[163] Minister of Health v New Clicks 2006 (2) SA 311 (CC) at paras 100, 446
[164] S v Zuma 1995 (2) SA 642 (CC) at 650H-651I.

396. The TAA was enacted in order to give effect to access to information and promote the values of openness, transparency, accountability and good governance – principles which are foundational to the Constitution.[165]

397. In **Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110** the Court held: -

> *"… the genesis of the legislation was the Constitution and Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. … It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution."*[166]

398. The preamble read together with section 9 of PAIA provides that one of the objects of PAIA is to "foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information".[167]

399. Other related objects of PAIA include establishing voluntary and mandatory mechanisms to enable persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible.[168]

400. Any interpretation given to the provisions of PAIA must be consistent with the purposes sought to be achieved by it, read together with the *raison d'être* for section 32 of the Constitution, within the broader context of the Constitution.[169]

401. Section 2(1) of PAIA provides that when a provision is interpreted, every court must prefer any reasonable interpretation thereof that is consistent with the objects of PAIA over any alternative interpretation that is inconsistent with those objects.

---

[165] Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA) at para 1.
[166] at para 16.
[167] Record vol 1 p 15 para 24.
[168] Section 9(d); CCII Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre as *amicus curiae*) 2003 (2) SA 325 (T) at para 12.
[169] De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at para 85; S v Dzukuda and Others, S v Dshilo 2000 (4) SA 1078 (CC) at para 37; 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 2001(1) SA 545 (CC) at para 23.

402. In terms of PAIA, both private and public bodies are now under a duty to provide access to a requested record, or part of it, unless refusal of the request is sanctioned by one or more grounds listed in PAIA.

403. The grounds of refusal constitute limitations on the right of access to information contained in section 32 of the Constitution. In accordance with ordinary principles of constitutional interpretation, these limitations must in themselves comply with section 36 of the Constitution, the general limitations clause.[170] And they must be interpreted restrictively, so as to limit access to information as little as possible.[171]

404. The key provisions of PAIA are contained in Parts 2 and 3.

404.1. Part 2 deals with access to information held by public bodies.

404.2. Part 3 deals with access to information held by private bodies.

405. Save where a refusal of a request is permitted or required by one or more of the grounds contemplated in Chapter 4 of Part 2 of PAIA, a public body has an obligation to provide access to a requested record,[172] or part of it, if (as is common cause in this appeal) the requester (i.e. the taxpayer) complies with the procedural requirements set out in PAIA.[173]

406. Unlike in the case of requests for information held by private bodies, requesters who make requests of public bodies are in principle entitled to the information sought.[174]

---

[170] Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province 2005 (2) SA 110 (SCA) at para 16.

[171] Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province 2005 (2) SA 110 (SCA) at para 12. Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at 552; Publications Control Board v William Heinemann Ltd 1965 (4) SA 137 (A) at 160E-G (Rumpff JA).

[172] A "record" is defined in relation to both a public and private body as meaning
"any recorded information
(a) regardless of form or medium;
(b) in the possession or under the control of that public or private body, respectively; and
(c) whether or not it was created by that public or private body, respectively".

[173] Section 11 of the Act.

[174] Transnet Ltd v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at para 16; Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa 2008 (5) SA 31 (CC) at para 54.

Thus the taxpayer does not have to substantiate his request for access to certain documents; the onus is on SARS to justify its refusal to grant access thereto.[175]

Chapter 9.6: Rights and Remedies found in the Uniform Rules of Court

407. Any application brought by motion proceeding, and which is sought and granted on an ex parte basis (i.e. without notice to the taxpayer) may be set aside.

408. A reconsideration application can be brought in terms of Rule 6(11) and/or Rule 6(8) and/or Rule 6(12)(c) of the Uniform Rules of Court, being: -

408.1. Rule 6(8) of the Uniform Rules of Court which permits any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice, and/or

408.2. Rule 6(11) of the Uniform Rules of Court which states that an application may be enrolled if it is incidental to pending proceedings if it is subordinate or accessory to while at the same time being distinct from the main proceedings;

408.3. Rule 6(12)(c) of the Uniform Rules of Court which allows a person against whom an order was granted in his or her absence in an urgent application to set the matter down on notice for reconsideration.

409. A reconsideration application is based on the submissions that the order granted ex parte was improperly obtained on one or more of the following bases, being for example:-

409.1. the application did not satisfy the requirements of an *ex parte* application in *inter alia* the following ways:

409.1.1. The SARS official did not act in good faith;

[175] Section 81(3)(a) of the Act.

409.1.2. The SARS official misled, *alternatively* improperly influenced this Honourable Court's discretion in granting the search and seizure order;

409.1.3. The SARS official was remiss in its duty fully to disclose all the material facts;

409.1.4. The SARS official acted unreasonably; or

409.1.5. The SARS official relied on selective evidence and misleading speculative conclusions based thereon.

409.2. the application did not satisfy the requirements of the Tax Administration Act.

410. In essence, it would be to set aside the *ex parte* application as an abuse of court process.

CHAPTER 10: PROPOSED REMEDIES TO ADDRESS SHORTFALLS

Chapter 10.1: Introduction

411. The following serves as a list of recommendations to address the shortcomings in the TAA, in particular insofar as it relates to the SARS official's powers.

Chapter 10.2: Definition of Audit

412. The writer contends that the TAA ought to provide:-

412.1. a definition for an audit;

412.2. standards and criteria for conducting an audit;

412.3. skills and qualifications of persons conducting an audit;

412.4. explanatory memorandum setting out best practice guidelines for conducting an audit.

413. The SARS official is currently a liberty to make use of any process as an "audit" and may make any decision based on what SARS contends to be an audit. These processes may not comply with the minimum requirements prescribed by local and international standards. By implementing objective norms and standards, both the Courts and the taxpayer will have certainty, and assurance, the processes adopted by SARS.

Chapter 10.3: Introduction of Process to seek Further Particulars

414. The writer is of the view that the tax dispute process ought to include a process that entitles both parties equal access to the facts and information supporting the opposing side's case.

415. In civil proceedings, the entitlement of a party to receive particulars for trial derives from and is regulated by Rule 21.

416. Rule 21 of the Uniform Rules of Court provides as follows: -

> *"21. Further particulars. - (1) Subject to the provisions of subrules (2) to (4) further particulars shall not be requested. (2) After the close of pleadings any party may, not less than twenty days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial. Such request shall be complied with within ten days after receipt thereof. (3) The request for further particulars for trial and the reply thereto shall, save where the party is litigating in person, be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney. (4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet. (5) The court shall at the conclusion of the trial mero motu consider whether the further particulars were strictly necessary, and shall disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either party to pay the costs thereby wasted, on an attorney and client basis or otherwise."*

417. The purposes of providing further particulars for trial was said by Galgut J in **Thompson v Barclays Bank DCO 1965 (1) SA 365 (W),** [176] to be three-fold, namely: -

> *"(a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his opponent to prepare his case to combat counter allegations…; (c) having regard to the above nevertheless not to tie the other party down and limit his case unfairly at the trial."*

418. And at 369F-G the Court stated: -

> *"even if a question relates to a matter for evidence, this would not preclude a party from being ordered to provide the particularity sought, if the particulars are required for the proper preparation of a party's case."*

[176] At 369D-E. See too Lotzoff v Connel and another 1968 (2) SA 127(W) at 129C-D.

419. In **South African Railways and Harbours v Deal Enterprises (Pty) Ltd [1975] 4 All SA 94 (W)** Botha J summarised the principles of further particulars as follows: -

> *"The function of particulars to a plaintiff's particulars of claim or declaration, at the pleading stage, is to fill in the picture of the plaintiff's cause of action, to limit the generality of the allegations therein, and to define with greater precision the issues which are to be tried; the purpose of such particulars is to enable the defendant to plead or to tender an amount in settlement. (CurtisSetchell, Lloyd and Matthews v. Koeppen, 1948 (3) S.A. 1024 (W) at p. 1027; Samuels and Another v. William Dunn & Co. S.A. (Pty.) Ltd., 1949 (1) S.A. 1149 (T) at pp. 1158, 1159; Tahan v. Griffiths, 1950 (3) S.A. 899 (O) at pp. 9023; White v. Moffett Building & Contracting (Pty.) Ltd., 1952 (3) S.A. 307 (O) at pp. 3112; Rule 18 (4); Rule 21 (1), and cf. Rule 21 (4); Van Tonder v. Western Credit Ltd., 1966 (1) S.A. 189 (C) at p.195ABD; Gibbs and Others v. Allen and Others, NN.O., 1973 (1) S.A. 351 (E) at pp. 3545).No hard and fast rules can be laid down as to the degree of particularity that is required; the Court exercises its discretion upon the facts of each case; and the decision in one case is no safe guide to the solution of another unless the relevant facts are identical.(White, supra at p. 315GH; Erasmus v. Venter, 1953 (3) S.A. 828 (O) at p. 830DE; Bantry Head Investments (Pty.) Ltd. and Another v. Murray & Stewart (Cape Town) (Pty.) Ltd., 1974 (2) S.A. 386 (C) at pp. 398 in fin.399A). A defendant is not entitled to know the plaintiff's evidence, as opposed to the outline of the case which is being brought against him. He is not entitled to information simply because it would be useful to him. In particular, he is not entitled to be supplied with information which forms no part of the plaintiff's cause of action as formulated, or which relates to matters extraneous to the facta probanda put forward by the plaintiff himself, for the purpose of enabling him to ascertain whether he has a defence to the claim, or to formulate such a defence. (CurtisSetchell,supra at p. 1028; Samuels, supra at pp. 11561160; Van Tonder, supra at p. 195DG; Gibbs, supra at pp. 355C356G; Elvinco Plastic Products (Pty.) Ltd. v. Grotto Steel Construction (Pty.) Ltd., 1974 (3) S.A. 676 (C) at pp. 8FG, 679AB, F, 680CE). If a defendant is entitled to particulars in accordance with the abovementioned principles, the plaintiff cannot avoid the obligation of furnishing them and thus incorporating them in the pleadings, by stating that the relevant information is in the possession of the defendant, or available to the defendant from other sources.(Samuels, supra at p. 1157; Tahan, supra at pp. 905A906A; Mavundla, supra at p. 30GH; Bantry Head Investments, supra at p. 7 394GH)."*

420. In the case of **Annandale v Bates 1956(3) SA 549** it was held that: -

> *"….the object of particulars at this stage is to enable a party properly to prepare for trial and to prevent him being taken by surprise by evidence of a nature he could not reasonably anticipate".* [177]

[177] Erasmus, Superior Court Practice at B1 – B138

421. The objectives of the Uniform Rules of Court were held in **Die Bestuursraad van Sebokeng v Tlelima 1968(1) SA 680 (A)** to be to secure the inexpensive and expeditious completion of litigation before the courts and are not an end in themselves.[178]

422. In **Ncoweni v Bezuidenhout 1927 CPD 130** it was held that the Uniform Rules of Court should therefore be interpreted and applied in a spirit which will facilitate the work of the courts, and enable litigants to resolve their dispute in as speedy and inexpensive a manner as possible.

423. In **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as *amicus curiae*); *In re* Masetlha v President of the RSA & Another [2008] JOL 21781 (CC)** Moseneke DCJ held as follows at paragraph 25:-

> *"Ordinarily courts would look favourably on a claim of a litigant to gain access documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because the courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time –honoured part of a litigating party's right to a fair trial."*

424. The Court's power to prevent the abuse of the process of the court is an important tool in order to promote the proper functioning of the court, and to prevent the judicial process from being abused by litigants who institute proceedings to harass their adversaries with vexatious litigation.

---

[178] Hudson v Hudson and Another 1927 AD 259 at 267; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2) 1971 (4) SA 532 (C) at 535 (last paragraph); Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 754D-E; Vitorakis v Wolf 1973 (3) SA 928 (W) at 932F-G.

425. It prevents the court process from being turned into an instrument to perpetuate unfairness and injustice, and the administration of justice from being brought into disrepute.[179]

426. The exercise of this discretion protects the public interest in the proper administration of justice.

427. It has been said, albeit in a different context:-

> *"Public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."* [180]

428. In **Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee, Sternberg & another v Hammond & Another [1968] 1 All ER 543 (CA)** Salmon LJ stated at 561E-H: -

> *"[A] defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the Court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply."*

429. In **Weinberger v Inglis [1918] 1 Ch., p. 133** the court stated: -

> *"As a general rule, the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the*

[179] Hunter v Chief Constable of the West Midlands Police [1981] UKHL 13 (1982) AC 529 at 536.
[180] Moevao v. Department of Labour (29) (1980) 1 NZLR 464, at p 481.

plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him."

430. In **Carter v. Carter 1913 T.P.D. 103** the Court adopted the English practice with regard to special particularity where charges of misconduct are made. In that case, an averment that between the 16th July and 12th December, 1912, the second defendant frequently committed adultery with the first defendant at a house occupied by them both in Potgietersrust, "*the exact dates not being known to the plaintiff*", was struck out for want of particularity as to the times when the alleged adultery occurred.

431. This approach was followed and applied in a number of cases such as **van Biljoen v. Botha 1952 (3) S.A. 494 (O)** where, furthermore, it was pointed out[181] that:-

"inability to furnish particulars does not convert a pleading which is vague and embarrassing on account of absence of the particulars into a good one."

432. In **Erasmus v. Erasmus 1923 T.P.D. 260** Tindall J ordered particulars to be given specifying which homestead, of which there were five on one farm and six on the other, where the allegation was that on particular dates adultery had taken place on the two farms.

433. In **Seele v. Seele 1939 T.P.D. 379** where the plaintiff gave the dates on which the adultery was alleged to have taken place, and the names of the towns, he was ordered to give particulars of the exact places in those towns where the alleged adultery had taken place notwithstanding the plaintiff's statement that the places were not more precisely known to him.[182]

434. In **Woodiwoos v Woodiwoos [1958] 3 All SA 468 (D)** Milne J stated that where a plaintiff is unable to provide adequate particularity, there remains an obligation to provide at least a minimum of information regarding the evidence to be led at trial: -

"From the formulation of those particulars one would tend to think that the case made by the plaintiff was that he was going to produce evidence from witnesses who saw the defendants thus living together. If that is so the plaintiff would be obliged to say exactly where they were thus living together for he must be able to

[181] at p. 498

[182] See, too, Pillai v. Pillay, 1945 C.P.D. 229.

obtain that information from the witnesses. In this respect I think that I (as the Court did in van Biljoen *v.* Botha*, supra) should follow cases like that of Seele and Erasmus, supra, rather than* van *der Merwe v. Eksteen, 1933 O.P.D. 164, on which Mr. Cadman relied though, obviously, a party cannot be ordered to give information which it is not at all within his power to furnish however diligently and closely his witnesses may be questioned by him or on his behalf. Mr. Cadman claimed, however, that the statement by the plaintiff in his further particulars that he could give no additional information is consistent with his having no witnesses who would come and say that they had seen the defendants living together and with his proposing to prove these averments by proof of admissions made by the defendants, to the plaintiff or others, and that, in such a case, if he had to give particulars he would, in effect, have to plead the evidence on which he proposed to rely. If, however, the plaintiff's case, with respect to the allegations regarding Hillcrest and Johannesburg, is based upon admissions, it is clear, in the light of the authorities to which I have referred and Mathi v. Mia, 1935 T.P.D. 337 at p. 339 (applied in Eybers v. South British Insurance Co., 1949 (3) S.A. 1202 at p. 1206 (T), that the plaintiff ought to say that he is relying on such admissions and I think that he ought also to indicate when, where and to whom they were made and whether they were made orally or in writing. He could, I think, do this without embarrassment to himself even though it would be indicating the names of his witnesses (Cf. the passage from Bullen & Leake cited with approval in* van Biljoen *v.* Botha*, supra, at p. 499) and in my view, the defendants would be unduly embarrassed if he did not give this information. In Jooste v. Jooste, 1937 N.P.D. 305, it appears to have been held that a plaintiff should say so in his declaration if he proposes to prove adultery by showing that the defendant was suffering from a venereal disease accompanied by a confession. The rule against pleading evidence is, I think, mainly conceived in the interests of the pleader's opponent (Cf. van Biljoen v. Botha, supra at p. 499) but, in any case, for the reasons I have indicated, I think that the particulars given with respect to Hillcrest and Johannesburg were inadequate to the point of embarrassment. (I may say that it was held in the last-mentioned case that where a party, even in an ordinary case not involving charges of misconduct, alleges that he is not able to give particulars, he should, at the same time, state why he is not thus able.)"*

435. The writer is of the contention that SARS and the SARS official ought to be made to comply with a disclosure obligations similar to those obligations found in Rule 21 of the Uniform Rules of Court in civil proceedings.

436. A rule of this nature will ensure that the SARS official does not advance the barest of particularity when taking enforcement steps against the taxpayer.

437. A disclosure obligation will minimize the SARS official from taking an opportunistic approach premised on the hope that SARS' cause of action against the taxpayer will be assembled in time to come.

Chapter 10.4: Awarding of Punitive Costs

438. The writer is of the view that the TAA ought to embrace a stronger position insofar as vexatious litigation is concerned.

439. SARS is an organ of state and is, in most cases, legally represented.

440. In instances where it is obvious that their position against the taxpayer was untenable in law, and such litigation against the taxpayer is found to be vexatious, dilatory, or mendacious, such conduct may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs.[183]

441. The SARS official may improperly vilified the taxpayer court proceedings including in affidavit deposed under oath. Such allegations are serious, far-reaching and can also amount to defamation of the taxpayer's good name and reputation.

442. There may also be instances where allegations of fraud, breach of fiduciary duties and other corporate misfeasance are levelled against the taxpayer.

443. It is inconceivable that unsubstantiated aspersions of this nature, including claims of underhanded dealings by the taxpayer in circumstances where there are no facts to prove the allegations, and where the SARS official is acting on the barest of suspicion or inferences, are serendipitously brought into court proceedings to hang above the taxpayer's head and muddy the merits of the taxpayer's case, when in fact all that the taxpayer is seeking is to discharge the heavy evidentiary burden imposed on him by the TAA and to protect its *prima facie* interests in a lawful and *bona fide* manner.

[183] Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597 at 607

444. Notwithstanding all of this, the SARS official will continue to advance the position that SARS' interest in advancing the interests of the *fiscus*, and its bringing of court proceedings against the taxpayer, was *bona fide*.

445. In these circumstances, the SARS official's conduct was clearly being advanced solely with the motive of fishing for information and facts from the taxpayer and to conceal the fact that SARS does not have concrete evidence of wrong-doing against the taxpayer.

446. This conduct clearly constitutes frivolous and vexatious conduct in the sense envisaged in the case **In re Alluvial Creek Ltd 1929 CPD 532** [184] and the many decisions including those of the Appellate division and the SCA.

> *"Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."*

447. The **Alluvial Creek decision** was cited with approval by the Appellant Division (as it was then known) in the case of **Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and another 1997 (1) SA 157 (A)** [185]. The Court stated:

> *"It was not disputed that in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear'. (In re Alluvial Creek Ltd 1929 CPD 532 at 535.) See also Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd E 1973 (3) SA 914 (W) at 918H-919B, and Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W) at 101G-102D."*

184 at 535
185 at 177D

448. At the level of legal principle, the SARS official's conduct can be vexatious in effect, and is nothing short of a reprehensible attempt to discredit and sully, and unreasonably so, the *bona fide* intentions of the taxpayer while seeking to protect the taxpayer's *prima facie* rights and to discharge the onus imposed on him by virtue of the allegations advanced by the SARS official.

449. If the taxpayer can demonstrate that, at the level of fact, the institution of proceedings by the SARS official was completely devoid of any factual basis then the conduct of SARS amounts to vexatious litigation.

450. The SARS official's conduct, accordingly, is typical of that kind of conduct which **In Re Alluvial Creek** is regarded as vexatious because it puts the other side (the taxpayer) to the unnecessary trouble and expense in the litigation which the other side ought not to bear.

451. These troubles and expenses include having to deal with contrived issues raised in the SARS official's affidavits, not to mention instructing of legal representative to prepare affidavits and prepare heads of argument for court litigation.

452. Even if the SARS official entered the litigation with the most upright purpose and firm believe in SARS' cause, this would not shield the SARS official from a punitive cost order as, at the very least, his conduct was vexatious in effect even if not in intent. In these circumstances courts quite readily grant punitive costs orders even if there are no allegations of malice, dishonesty or misleading of the court.

453. The writer contends that in these circumstances the interest of fairness dictate that the taxpayer should not be out of pocket and that SARS ought to be bears such costs on punitive scale.

CHAPTER 11: CONCLUSION

454. Given the nature and extent of the powers granted to the SARS officials in the TAA, there exists an enormous fissure between the information available to the SARS official and information disclosed to the taxpayer.

455. The TAA provides inadequate mechanisms to the taxpayer to force the SARS official to disclose its information to the taxpayer so that the taxpayer may not only know what case to meet but also to place the taxpayer in a position to be able to measure and assess the conduct of the SARS official in particular insofar as the reasonableness of such conduct is concerned.

456. The writer is of the view that the rights and powers afforded to the SARS official in the TAA are draconian and one-sided, and there exists a dire need to even out the information gathering albeit information sharing process between SARS and the taxpayer.

457. In the absence of an even playing field, SARS and the SARS official will continue to infringe upon the Constitutional rights of the taxpayer in the process of administrating the collection of tax.

REFERENCES AND BIBLIOGRAPHY

Books

- The South African Law of Evidence, Zeffertt, 1st Ed
- Pleadings, Amlers, 7th Ed
- Principles of Pleading and Practice in Civil Actions in the High Court of Justice, Odgers, 22nd Ed
- Bill of Rights Handbook, Currie and de Waal, 2005

Journals

- Erasmus, Superior Courts Practice, 2nd Ed
- Erasmus, Commentary on the Uniform Rules of Court, Superior Courts Practice, 2nd Ed

Statutes

- Tax Administration Act, 28 of 2011
- South African Revenue Service Act, 34 of 1997
- Criminal Procedure Act, 51 of 1977
- Electronic Communications and Transactions Act, 25 of 2002
- Auditing Profession Act, 26 of 2005
- Promotion of Administrative Justice Act, 3 of 2000
- Companies Act, 71 of 2008
- Companies Act, 61 of 1973
- Income Tax Act Act 58 of 1962
- Value Added Tax Act, 89 of 1991
- Constitution Act, 108 of 1996
- Prevention of Organised Crime Act, 121 of 1998
- Promotion of Access to Information Act, 2 of 2000

Case Authority

- ABC (Pty) Ltd v C:SARS, ITC case 0038/2015
- Absa Bank Limited v Newcity Group (Pty) Ltd and another related matter [2013] 3 All SA 146 (GSJ)
- Ackermans Ltd v Commissioner, South African Revenue Service 2015 (6) SA 364 (GP)
- African Farms Township v Cape Town Municipality 1963(2) SA 555 (A)
- Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee, Sternberg & another v Hammond & Another [1968] 1 All ER 543 (CA)
- Annandale v Bates 1956(3) SA 549
- Baphalane Ba Ramokoka Community v Mphela Family and others 2011 (9) BCLR 891 (CC)
- Bato Star Fishing v Minister of Environmental Affairs 2004 (4) SA 490 (CC)
- Becker v Noel and Another [1971] W.L.R. 803
- Beinash v Wixley1997 (3) SA 721 (SCA)
- Bernstein v Bester NO 1996 (4) BCLR 449 (CC)
- Bester v Van Niekerk 1960 (2) SA 363 (E)
- Bitcon v Rosenberg (1936) AD
- Bodasingh v Kissondath (1927) 48 NPD 29
- C:SARS v J Brown (Case No: 561/2016)

- Cape Metropolitan Council v Metro Inspection Services (Western Cape) and Others 2001 (3) SA 1013 (SCA)
- Carter v. Carter 1913 T.P.D. 103
- Casswell v Powell Duffryn Associated Collieries Ltd 1939 (3) All ER 722
- CIR v Louw 45 SATC 113
- Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA)
- Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd [1981] 3 All SA 506 (W)
- Commissioner for Inland Revenue v Goodrick 12 SATC
- Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd, 33 SATC
- Commissioner, South African Revenue Services v Pretoria East Motors (Pty) Ltd [2014] 3 All SA 266 (SCA)
- Constitutional Court in Pharmaceutical Manufacturers of SA and Another: In re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)
- Cooper v Another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA)
- Corderoy v Union Government 1918 AD 512
- Courtney-Clarke v Bassingthwaighte 1991 (1) SA 684 (Nm) 689
- Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530
- De Lange v Smuts NO and Others 1998 (3) SA 785 (CC)
- Die Bestuursraad van Sebokeng v Tlelima 1968(1) SA 680 (A)
- Dippenaar NO and others v Business Venture Investments No 134 (Pty) Ltd and another [2014] 2 All SA 162 (WCC)
- Duncan v Minister of Law and Order 1986 (2) SA 805 (A) 819I
- Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC)
- Erasmus v. Erasmus 1923 T.P.D. 260
- Ex Parte Arntzen (Nedbank Ltd as intervening creditor) 2013 (1) SA 49 (KZP);
- First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)
- Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W)
- Foodcorp v Deputy DG, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 191 (SCA)
- Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others 2002 (2) SA 693
- Gascoyne v Paul and Hunter 1917 TPD 170;
- Gates v Gates 1939 AD 150; Motswai v Road Accident Fund 2014 (6) 360 (SCA)
- General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125
- Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W)
- Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC)
- Gilbey Distillers & Vintners (Pty) Ltd v Morris NO 1990 (2) SA 217 (SE)
- Greys Marine Hout Bay (Pty) Ltd and Others v The Minister of Public Works and Others 2005 (6) SA 313 (SCA)
- Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A)
- Hudson v Hudson and Another 1927 AD 259
- Hülse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA)
- Hunter v Chief Constable of the West Midlands Police [1981] UKHL 13 (1982) AC 529

- Imprefed (Pty) Ltd v National Transport Commission [1993] ZASCA 36; 1993 (3) SA 94 (AD)
- In re Alluvial Creek Ltd 1929 CPD 532
- Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa 2008 (5) SA 31 (CC)
- Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd and others 2006 (5) SA 306 (W)
- Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund 2010 (1) SA 446 (W)
- 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 2001(1) SA 545 (CC)
- ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 1996 (4) SA 484 (W)
- Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and another 1997 (1) SA 157 (A)
- Kate's Hope Game Farm (Pty) Limited v Terblanchehoek Game Farm (Pty) Ltd 1998 (1) SA 235 (SCA)
- Khumalo v Holomisa 2002 5 SA 401 (CC)
- Klaassen v Benjamin 1941 TPD 80
- Knox D'Arcy Ltd v Jamieson 1994 (3) SA 700 (W); 1996 (4) SA 348 (A)
- L F Boshoff Investment v Cape Town Municipality 1969 (2) SA 256
- Lawrence v Norreys, Bowen 39 Ch.D
- Lotzoff v Connel and another 1968 (2) SA 127(W)
- Lourenco and Others v Ferela (Pty) Ltd 1998 (3) SA 281 (T)
- Mabaso v Felix 1981 3 SA 865 (A)
- Mabona and Another v Minister Of Law And Order And Others 1988 (2) SA 654 (SE)
- Macleod v Rens 1997 (3) SA 1039 (E)
- Matatiele Municipality and others v President of the RSA and others 2006 (5) SA 47 (CC)
- McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD
- Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another 2001 (1) SA 1109 (CC)
- Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110
- Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province 2005 (2) SA 110 (SCA)
- Minister of Environmental Affairs and Tourism v Phambili (2003) 2 ALL SA 616 (SCA)
- Minister of Health v New Clicks SA 2006 (2) SA 311 (CC)
- Minister of Public Works v MXN Development Construction CC 2007 JDR 0673 (C)
- Minister of Safety and Security v Van der Merwe 2011 5 SA 61 (CC)
- Mohamed and another v President of the Republic of South Africa and others 2001 (SA) 893 (CC)
- Moletsane v Premier of the Free State and Another 1996 (2) SA 95 OPD
- Mpande Foodliner CC v Commissioner for the South African Revenue Service and Others 2000 (4) SA 1048 (T)
- Mpange and others v Sithole 2007 (6) SA 578 (W)
- MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd 2008 (3) SA 585 (SCA)
- National Director of Public Prosecutions v Braun and another [2007] 1 All SA 211 (C)
- National Director of Public Prosecutions vs van Heerden & Others 2004 (2) SACR 26 (C)
- National Media Ltd v Bogoshi 1998 4 SA 1196 (SCA)
- Ncoweni v Bezuidenhout 1927 CPD 130

- NDPP vs Starplex 47 CC & Others, 2008 [4] All SA 275 (C)
- Neethling v Du Preez 1994 1 SA 708 (A);
- Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597
- Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (CC)
- Oberholzer v C: SARS (unreported; Cape of Good Hope Provincial Division, case 8714/1998)
- Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A)
- Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others 2001 (4) SA 1184 (SCA)
- Pharmaceutical Manufacturers Association of SA and others; In re: Ex parte application of President of the RSA and others 2000 (3) BCLR 241 (CC)
- Pillay v Krishna 1946 AD 946
- Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
- Powell NO v Van der Merwe NO 2005 (5) SA 62 (SCA)
- President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA (1) (CC)
- Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA)
- Price Waterhouse Coopers and Others v National Potato Co-operative Ltd [2004] ZASCA 64; 3 All SA 20 (SCA) (1June 2004) SAFLII
- Publications Control Board v William Heinemann Ltd 1965 (4) SA 137 (A)
- R an International Supply Company (Pty) Ltd and Others v Mpumulanga Gaming Board 1999 (8) BCLR 918 T
- R v Blom 1939 AD 288
- R v McColl (1999) 17 CRNZ 136 (CA)
- Ravden v Beeten 1935 CPD 269
- Reclamation Group (Pty) Ltd v Smit and Others 2004 (1) SA 215 (SE)
- Rhino Hotel & Resort (Pty) v Forbes 2000 (1) SA 1180
- Rogers v Rogers and Another [2008] ZEST 7 (27 May 2008) SAFII
- S v Dzukuda and Others, S v Dshilo 2000 (4) SA 1078 (CC)
- S v Zuma 1995 (2) SA 642 (CC)
- Sasol Oil (Pty) Ltd v Metcalf NO 2004 (5) S.A 161 (W)
- Schlesinger v Schlesinger 1979 (4) SA 342 (W)
- Seele v. Seele 1939 T.P.D. 379
- Shaaban Bin Hussien and Others v Chong Fook Kam and Another [1970] AC 942 (PC) ([1969] 3 All ER 1626)
- Shelton v C: SARS 2002 (2) SA 9 (SCA)
- SIR v Geustyn, Forsyth and Joubert 33 SATC 113
- SIR V Trow 43 SATC 189
- Smit v Arthur 1976 (3) SA 378 (A)
- South African Railways and Harbours v Deal Enterprises (Pty) Ltd [1975] 4 All SA 94 (W)
- South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA708 (A)
- Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd 2012 (2) SA 423 (WCC)
- Standard Bank of SA Ltd v Ocean Commodities Inc 1983 (1) SA 276 (A) 292
- Stratford and others v Investec Bank Limited and others [2014] ZACC 38 (19 December 2014) [reported at 2015 (3) BCLR 358 (CC)]

- Strijdom Park Extension 6 (Pty) Ltd v Abcon (Pty) Ltd 1998 (4) SA 844 (SCA)
- Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA)
- Swissborough Diamond (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 TPD
- Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre as amicus curiae) 2003 (2) SA 325 (T)
- Texas Company (S.A.) Ltd v Wilson Bros. Garage, 1936 NPD 510
- Thint (Pty) Ltd and Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC)
- Thompson v Barclays Bank DCO 1965 (1) SA 365 (W)
- Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 835 (SCA)
- Transnet Ltd v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA)
- Tranz Rail Ltd v Wellington District Court [2002] 3 NZLR 780 (CA)
- Tregea v Godard 1939 AD 16
- Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T)
- van Biljoen v. Botha 1952 (3) S.A. 494 (O)
- Varawa v Howard Smith Co Ltd [1911] HCA 46; (1911) 13 CLR 35
- Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O)
- Vitorakis v Wolf 1973 (3) SA 928 (W)
- Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378
- Weinberger v Inglis [1918] 1 Ch., p. 133
- Western Assurance Co v Caldwell's Trustees 1918 AD 262
- Woodiwoos v Woodiwoos [1958] 3 All SA 468 (D)
- Wootton v Sievier (1913) 3 K.B. 499 (C.A.)
- X v C:SARS, ITC case 13380
- Zanberg v Van Zyl 1910 AD 302

Periodical

- SARS Short Guide to the Tax Administration Act dated 5 June 2013
- SARS External Guide on Access to Audit Files

Online Resources

- http://www.sars.gov.za/ClientSegments/Individuals/What-If-Not-Agree/Pages/Being-Audited.aspx
- http://www.sars.gov.za/AllDocs/OpsDocs/Guides/GEN-AU-14-G01%20-%20Guide%20on%20access%20to%20audit%20files%20-%20External%20guide.pdf
- http://www.ifac.org/system/files/downloads/a008-2010-iaasb-handbook-isa-200.pdf
- http://www.ifac.org/system/files/downloads/b003-2010-iaasb-handbook-framework.pdf
- http://www.ifac.org/system/files/downloads/a022-2010-iaasb-handbook-isa-500.pdf
- http://www.ifac.org/system/files/downloads/a011-2010-iaasb-handbook-isa-230.pdf