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THE CONSTITUTIONALITY OF SARS INFORMATION GATHERING POWERS UNDER THE TAX ADMINISTRATION ACT

A research report submitted to the Faculty of Commerce, Law and Management, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation).

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DECLARATION

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ABSTRACT

This research aims to explore the Constitutionality of the South African Revenue Service's information gathering methods as prescribed by the Tax Administration Act. The study will focus mainly on search and seizure operations by South African Revenue Service and how these operations may affect certain fundamental rights enshrined in the Constitution i.e. the right to privacy, the right not to self-incriminate, and, privilege information. This contribution will find that there must be a balancing act between tax administration and the protection of taxpayer's civil and Constitutional rights by South African Revenue Service. The study will also touch on the question of whether these tools to gather information afforded to the South African Revenue Service extend to the covert collection or collection of intelligence, as the South African Revenue Service has been of late accused in various publications of unlawfully establishing the so called "Rogue unit" to investigate certain taxpayers.

KEY WORDS: covert collection, Constitution of the Republic of South Africa, sovereignty of parliamentary, fundamental right, search and seizure, Anton Piller order, information gathering powers, Tax Administration Act, TAA, enshrined.

LIST OF ACRONYMS AND ABBREVIATIONS

Constitution	Constitution of the Republic of South Africa, of 1996
CPA	Criminal Procedure Act 51 of 1977
CRA	Canada Revenue Agency
Customs Act	Customs and Excise Act 91 of 1964
ITA	Income Tax Act 58 of 1962
NSI Act	National Strategic Intelligence Act 39 of 1994
NZ IR	New Zealand Inland Revenue
SA	Republic of South Africa
SARS	South African Revenue Service
TAA	Tax Administration Act 28 of 2011

TABLE OF CONTENTS

Page Number

CHAPTER 1: INTRODUCTION

1.1 General Orientation

Mandlanga J in his leading judgment where most judges concurred, in the constitutional court said the following quote:[1]

> "Kubomvu!" is the warning that a lookout would sound on the arrival of police at one or the other of the homes that had the misfortune of being subjected to frequent, warrantless police searches. To the apartheid state, the oppressed majority had no privacy to be protected and no dignity to be respected.[2]

The constitutional court had to decide on the constitutionality of the statutory provisions that authorise a warrantless search in the Customs and Excise Act 91 of 1964. The judge touched on the painful history of how these search operations where conducted by the apartheid government mostly at night: a time of relaxation; sleep; intimacy; reckless abandon even; and when some, if not most, would be flimsily dressed.[3] These search operations were carried by members of the dominate race, in violation and degradation of the oppressed.

In the new era of a constitutional democracy where constitutional supremacy reigns, where Sovereignty of Parliamentary and Apartheid is a thing of the past, and, the universal human rights are jealously guarded by the Constitution. It is crucial to scrutinise Acts of Parliament and state agencies like the South African Revenue Service (SARS) in performance of their statutory duties to ensure that rights enshrined in the Constitution are not violated.

The introduction of the interim and final Constitution ushered a new era of the constitutional supremacy and dealt which replaced parliamentary sovereignty. Parliament however retain its position for being the highest law making

[1] *Gaertner and others v Minister of Finance and Others* (CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013). Para 1 at page 2
[2] *Supra*
[3] Supra

institution but subject to the to the provisions of the Constitution as the supreme law of the republic, in terms of section 2 of the Constitution.[4]
SARS as a statutory organ of state cannot administer taxes as it deems fit. SARS in fulfilling its statutory mandate must comply with the provisions of section 195 (1) of the Constitution which inter alia provides for transparency, due diligence, and cost effective way of providing services, by organs of state. Failure to perform these functions per the Constitution renders SARS' actions susceptible to setting aside on judicial review.

The powers conferred to SARS to gather relevant material or information in the excise of its revenue collection mandate was cast under the spotlight with the allegation of formation of various units like the Tiger Group, National Research Group, Special Projects Group and the 'Rogue unit ' within SARS. Some media outlets and high profile personalities alleged that these units operated illegally or employing unconstitutional methods to gather evidence from taxpayers. This research report will not investigate the factual accuracy of such allegations, nor whether such units within SARS exist. This research report will address the legal question, namely whether SARS can employ convert methods as provided for by the National Strategic Intelligence Act 39 of 1994 when carrying out their statutory mandate.

Having said the above, SARS has to deal with the low tax moral of taxpayers, slow economic growth and at times relentless attempts by taxpayers to find sophisticated methods of avoiding tax.

1.2 Research objective

This research report will explore SARS' powers to gather information as contained in chapter 5 of the Tax Administration Act 28 of 2011 (TAA), the paper will focus more on the powers afforded to SARS to conduct search and

[4] Chapter 1 ,section 2 of the Constitution of South Africa of 1996.

seizure operations with or without a warrant and how such powers may adversely affect the fundamental right as protected by the Constitution.

1.3 Importance of the study

The study aims to establishing whether SARS information gathering powers are consistent with the provisions enshrined in the Constitution thus does not infringe on the taxpayers' rights which are enshrined in the Bill of Rights. This paper also aims to compare how SARS is faring in comparison with developed countries like Canada and New Zealand in relation to recognising taxpayers' human rights when discharging their legislative mandate.

1.4 Research Methodology

The research report is based on literature review and analysis of various court decisions and tax legislation in South Africa, New Zealand and Canada.

1.5 The structure of the research report

Chapter 2: Overview of SARS' information gathering powers and constitutional interpretation

This chapter will give an overview of SARS's information gathering powers against the background of how tax legislation must be interpreted when dealing with such powers. This chapter will also give a brief history of how the TAA was promulgated, and, most importantly this chapter will deal with constitutional interpretation. South Africa since the dawn of democracy had moved away from Sovereignty of Parliament to constitutional supremacy, it is in this way important to know how any piece of legislation is interpreted in South Africa.

Chapter 3: search and seizure with a warrant

This chapter will explore search and seizure operations with a warrant and the rights that may be infringed. The chapter will also discuss instances where the taxpayer may apply for the reconsideration of the warrant as it happened in the *Mpisi case.*[5]

Chapter 4: warrantless search and seizure in South Africa

This chapter will give an overview of search and seizure operations without a warrant and the rights the operation may infringe, the discussion will include inter alia what the Constitutional Court held in the *Gaertner and Others v Minister of Finance and Others case.*[6]

Chapter 5: Can SARS engage in covert collection of information?

This chapter will only deal with the legal question of whether SARS may engage in covert collection of information as per the National Strategic Intelligence Act. The chapter will critically discuss the report from the Nugent Commission in relation to this aspect, other relevant reports, and, a recent judgment in the *Wingate-Pearse case*[7] in establishing whether SARS has such powers.

Chapter 6: Search and seizure in New Zealand and Canada

This chapter will examine the possibility of South African courts learning from foreign jurisdiction like Canada and New Zealand when conducting search and seizure operations. The chapter will also compare the Anton Piller order and search and seizer operations with the object of establishing which one of the two would be recommendable in our constitutional democracy

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5 *Huang and others v Commissioner of the South African Revenue Service, In Re: Commissioner of the South African Revenue Service, In Re: Huang and Others* (SARS 1/2013) [2014] ZAGPPHC 563 (13 August 2014).

6 (CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013).

7 *Wingate-Pearse v Commissioner for the South African Revenue Service* (29208/15) [2019] ZAGPJHC 218 (17 July 2019).

Chapter 7: Conclusion

This chapter will summarise the findings of the research and will make recommendations for further research.

CHAPTER 2: OVERVIEW OF THE SARS INFORMATION GATHERING POWERS AND CONSTITUTIONAL INTERPRETATION

2.1 Introduction

South Africa has a dark history and in order for one to understand and appreciate the democratic constitutional dispensation that we are currently enjoying, one has to revisit history and give a background leading to the formation of the Constitution and the constitutional state we are currently subject to.

South Africa used to be subjected to Parliamentary Sovereignty before constitutional democracy or constitutionalism. Parliamentary Sovereignty means supremacy of parliament. Botha C in his book wrote that "not only is Parliament the highest legislative body, capable of enacting any laws it wishes, but no court may test the substance of Parliament Acts against standards such as fairness or equality".[8] Parliament used to pass laws as it deems fit in line with the policies of the government of the day even when those laws infringed an individual's human rights.

The interim and the Final Constitution introduced constitutional supremacy. This effectively meant that Acts of Parliament must be congruent with the provisions of the Constitution. There was in this way a need to review, repeal or amend some of the existing Acts of Parliament. The Katz Commission on Income Tax[9] was one of the commissions established on the 22 June 1994 to assist with tax reform.

The former Minister of Finance in South Africa Trevor Manuel in his speech giving an update in tax reform in 1994 said:

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[8] Botha, C. 2005. *Statutory Interpretation, an Introduction for Students,* 4th edn, Juta & Co, Ltd: Cape Town, at page 8.

[9] Final draft report on the joint standing Committee on Finance on the Third Interim Report on the Katz Commission Inquiring into taxation.1996.

> the central challenge facing the Government that took office in April 1994 was to build a modern, vibrant economy that could assume its rightful place in the global economic community, while addressing the massive backlogs in access to vital social and economic services, which was manifest in the extreme inequality of income and wealth. The mandate given to the Katz Commission was very broad it was to investigate virtually every aspect of the South African tax regime inherited from the previous apartheid government against the backdrop of the political, social and economic goals of the incumbent government.[10]

One of the notable contributions by the Katz Commission was to assist in the establishment of SARS. The first steps in the reform of the tax administration according to the former Minister Manuel, "took place on 18 October 1995 when Cabinet approved the restructuring of the Inland Revenue and Customs and Excise Directorates in the Department of Finance (now the National Treasury) into an autonomous revenue collection agency, known as SARS".[11]

"These changes put SARS in a strong position to obtain its key objectives of collecting all national taxes, duties and levies, by attracting and retaining competent people, utilising modern information technology and adopting efficiency-enhancing organisational structures and incentive schemes".[12]

There was a need in the early 2000 to harmonies tax legislation into one body of legislation for efficient and effective tax administration, which gave birth to the TAA. This chapter will deal in detail with the inception and evolution of the TAA and most importantly chapter five thereof which relates to SARS' information gathering powers. This chapter will also give a brief overview of SARS' information gathering powers and constitutional interpretation.

2.2 Constitutional Interpretation

It is imperative to understand the concept of constitutional supremacy as it plays a pivotal role in the promulgation of new legislation and interpretation of new

[10] *Supra.*
[11] *Supra*
[12] *Supra.*

and existing legislation. Since the dawn of democracy any Act of Parliament must be consistent with the provisions of the Constitution, if not such Act will be invalid. This also applies to the legislation that was passed before the new dispensation, same should be consistent with the Constitution and embrace the spirit envisage by the provision thereto.

The TAA is one of the Acts of Parliament which was promulgated in the new dispensation. This Act aims to harmonise tax legislation especially administrative provisions into one body and also promote natural justice by also accommodating taxpayer's rights. The background of the TAA will be discussed in detail below.

Botha C in his book wrote that the "constitutional interpretation refers to authoritative interpretation of the supreme Constitution by the judiciary during judicial review of the constitutionality of the legislation and government action".[13] This means the courts when excising its duties or reviewing the legality of any legislation must use the Constitution as a yard stick to determine the legality of such legislation; this also refers to the conduct of the government officials and institutions.

South Africa has what is called separation of powers, a doctrine which by nature assist in guarding our democracy. The Mojapelo M P, the Deputy Judge President of the Southern Gauteng High Court wrote that:

> The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, Legislative, Executive and Judiciary. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance.[14]

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[13] Botha, C., 2005. *Statutory Interpretation, an Introduction for Students,* 4th edn, Juta & Co, Ltd. Cape Town, at page 114.

[14] Mojapelo M P, Deputy Judge President of the Southern Gauteng High Court. *'The doctrine of separation of powers (a South African perspective)'. [https://studylib.net/doc/8864095/the-doctrine-of-separation-of-powers]'* (accessed 3 May 2020).

The judge listed the institutions that govern the state which must not encroach on in others duties or the *trias politica* as follows*:*

(a) "Legislative authority – which is the South African Parliament, has the power to make, amend and repeal rules of law,
(b) Executive authority – which is Cabinet or the Government, has the power to execute and enforce rules of law,
(c) Judicial authority – which is the Courts, has the power; if there is a dispute, to determine what the law is and how it should be applied in disputes",[15]

These separate institutions must not encroach on each other's mandate or one institution may not interfere with the duties of the other. In this way the Court is independent from Parliament and Parliament is independent from the Executive but together these institutions work together to build and run the Republic.

What is more important to note is that all these institutions must act in line with the provisions of the Constitution as the supreme law in the Republic and further there is an obligation on each of these institutions to check one another to ensure that there is no deviation from what the Constitution provides hence in this way there is check and balances among these Institution to avoid abuse of power by any of them.

Botha C in his book wrote that "section 35(3) of the interim Constitution[16] blurred the traditional difference between the interpretation of ordinary legislation and constitutional interpretation, and section 39(2) of the final Constitution of 1996 reaffirmed this. South African courts now have to interpret all legislation in the light of the fundamental rights enumerated in the Bill of

[15] *Supra*
[16] Section 35(3) of the interim Constitution: '*In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'.*

Rights. Every Court and forum will have to become involved in the constitutional interpretation to some degree".[17]

The difference between constitutional and ordinary interpretation was explained by Froneman J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*.[18]

> The interpretation of the Constitution will be directed at ascertaining the foundation values inherent in the Constitution whilst the interpretation [of] the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values or principles of the Constitution[19]

Chapter 1 of the Constitution provides for the supremacy of the Constitution, "that any law or conduct inconsistent or in conflict with the Constitution is invalid". Therefore, any legislation must be read in line with what the Constitution provides, should there be a conflict with the provision of any Act of parliament and the Constitution the provisions of the Constitution would prevail over any legislation because of its supremacy.

After the adoption of the interim and final Constitution, in a democratic constitutional state, there was a need to review legislation which conflicted with the policy and the aspiration of the new regime. Old legislation conflicting with the Constitution were repealed or amended and new legislations were also introduced. The Income Tax Act 58 of 1962 was not an exception to these amendments. The Katz Commission had reviewed the Income Tax Act and recommended amendment of some of the sections in the Act.

2.3 The Historical Background of the TAA

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17 Botha, C. 2005. *Statutory Interpretation, an Introduction for Students,* 4th edn, Juta & Co, Ltd. Cape Town, at page 114.

18 1995 (4) SA 631 (CC).

19 Botha, C. *2005. Statutory Interpretation, an Introduction for Students, 4th edn, Juta & Co, Ltd. Cape Town, at page 114.*

There was a need in the early 2000's to harmonies tax legislation into one body of legislation for efficient and effective tax administration. The Tax Administration Bill (TAB) was passed on the 30 October 2009, the aim was to incorporate certain tax administrative provisions which were duplicated from different tax prescript into one legislation.[20]

The objects of the TAB were as follows:

The TAB intended to take account of the taxpayers' constitutional rights as any Act of parliament must be in line with the provisions of the Constitution as the supreme law of the Republic. The TAB also intended to provide a single body of law that outlines common procedures, rights and remedies and to achieve a balance between the rights and obligations of both SARS and taxpayers in a transparent relationship.[21]

According to the Draft Explanatory Memorandum on the Draft Tax Administration Bill due regard was given to the principles of international best practice in tax administration in drafting the TAB, namely:

- "Equity and fairness to ensure that the tax system is fair and also perceived to be fair, which should in turn enhance compliance;
- Certainty and simplicity so that tax administration is not seen as arbitrary but transparent, clear and as simple as the complexity of the system allows;
- Efficiency, where compliance and administration costs are kept to a minimum and payment of tax is as easy as possible; and
- Effectiveness, so that the right amount of tax is collected, active or passive non-compliance is kept to a minimum, and the system remains flexible and dynamic to keep pace with technological and commercial development".[22]

[20] Explanatory memorandum accompanying the Draft Tax Administration Bill 2009.
[21] *Supra para 2 at page 1.*
[22] *Supra.*

The TAB also intended to extend SARS' powers including those that relates to its information gathering, assessment and collection powers. The aim of the TAB was to target non-compliant taxpayers and not necessarily those who were compliant.[23]

The TAB touched on various issues including chapter 5 which deals with Information gathering, which is of relevance to this research report. As alluded above the TAB was announced in 2005 by the then Finance Mister in the budget review, the first draft of the Tax Administration Bill was published in 2009, which was followed by an extensive public consultation process which culminated in the promulgation of the TAA on 4 July 2012.

The TAA

The TAA deals with tax administration and was founded on the principle of natural justice and most importantly it seeks to also balance the taxpayer's constitutional rights and SARS duty to administer the tax administration.

According to SARS short guide to the TAA issued in 2018 the "TAA seeks to deals with tax administration, and 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;
- harmonise the provisions as far as possible".[24]

Seligson, M (SC), in his paper wrote:

> there could be no doubt in consolidating, revising and modernising the provisions governing tax administration, the TAA has considerably widened the

[23] *Supra.*
[24] *SARS Short Guide to The Tax Administration Act 28 of 2011 3rd version 29 March 2018 at page 04*

> powers of SARS officials in carrying out the important functions of tax assessment, collection, information gathering and enforcement, while at the same time seeking to simplify and clarify the powers and duties of SARS and the rights and obligations of taxpayers respectively.[25]

For the purpose of this research report we will be dealing with chapter 5 of the TAA which deals with SARS powers to gather information and confidential information respectively and how these powers may possibly infringe some of the rights entrenched in the Bill of Rights.

2.4 An overview of SARS's information gathering powers

SARS is created by the South African Revenue Service Act 34 of 1997, which vested power in it to collect revenue for the efficient function of the State. SARS as a government institution is also subject to the provisions of section 195 of the Constitution, which inter alia provides that a "high standard of professional ethics must be promoted and maintained by a government institution, services must be provided impartially, fairly, equitably and without bias, and, transparency must be fostered by providing the public with timely, accessible and accurate information."[26]

SARS in this way must exercise its duties in line with the bill of rights or without unjustly infringing taxpayer's constitutional rights; the TAA and other Acts of parliament were promulgated to assist SARS and other government institutions to accomplish this objective. Chapter 5 of the TAA for the purpose of this research report provides for SARS's information gathering powers. It is divided into four parts:

Part A – General Rules for inspection, verification, audit and criminal investigation;

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[25] Seligson, M (SC), 'Previewing the New Tax Administration Act: More Muscle for SARS - Taxpayer Beware!' Business Tax and Company Law Quarterly*, Volume 3, Issue 3, Sep 2012, page 04.*

[26] Section 195(1) of the South African Constitution of 1996

Part B – Inspection, request for relevant material, audit and criminal investigation;
Part C – Inquiries; and
Part D – Search and seizure.

Each part will be discussed individually below.

Part A - General Rules for inspection, verification, audit and criminal investigation

a) Inspection, Verification or Audit in terms of section 40 of the TAA

According to Seligson, M. (SC) "in terms of section 40 SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or a risk-assessment basis".[27]

The taxpayer may be subjected to inspection, verification or audit on the basis that there was a risk identified in the assessment or randomly for compliance purposes, this is however not applicable to criminal investigation which is usually triggered by indications of the commission of an offence under the tax Act.[28]

SARS short guide provides that "random selection is essentially a spot check, based on random factors, for example every 10th taxpayer on the register from a random starting point. Random audit selection is premised on the reality that it is impossible to verify all returns, and that not all risks are known to SARS or are readily apparent from the face of a return. A spot check or a system of random monitoring is thus essential to the integrity of the tax system".[29]

[27] Seligson, M. (SC) 'Information-gathering by SARS under the TAA: Trumping the Taxpayer's Right to Tax Finality', Business Tax and Company Law Quarterly, *Volume 7 Number 1, Mar 2016* at page 3.
[28] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 23.
[29] *Supra,* at page 24.

According to SARS Short Guide to Tax Administration Act, “risk-based audit selection is, however, more common in modern revenue authorities as it ensures that a revenue authority allocates its audit resources to taxpayers that demonstrate risks. It involves assessing the risk profile of taxpayers (‘risk assessment’) and then allocating resources in accordance with the risk profiles (‘resource to risk allocation’)”. (SARS short guide at page 24).

According to SARS “There are clear benefits to risk based audit selection such as:

- More targeted audits and efficient use of SARS’s and taxpayers’ resources;
- SARS will be able to address emerging tax risks in real-time & provide tax certainty to taxpayers sooner;
- Reduced need for protracted audits (typically some years after targeted transactions occurred);
- Limit disputes; and
- Reduces the incidence of tax underpayments, administrative penalties and interest”.[30]

b) Authorisation to Conduct Audit or Criminal Investigation by a SARS Official in terms of Section 41 of the TAA.

Section 41 of the TAA authorise a Senior SARS official authority to grant a SARS official written authorisation to conduct a field audit or criminal investigation. Subsection (2) and (3) provides that this authorisation must be produced to a member of the public or taxpayer when excising such duty, failure to produce same entitles the concerned taxpayer to assume that requisite authorisation was not obtained.

According to the SARS short guide issued in 2018, “SARS official authorised to conduct audits or criminal investigations does not need a specific authorisation

[30] *Supra.*

for each matter audited or investigation, but the authority letter that affords the SARS official with a general authority to conduct audits or criminal investigations will have a validity period. This authority is in addition to the SARS identity card".[31]

c) The rights of a Taxpayer and/or Suspect under the Criminal Procedure Act[32] (CPA), TAA and the Constitution.

A SARS auditor may suspect commission of a tax offence during a normal tax audit; the latter should then refer any aspect of the audit where criminal activity is suspected to the criminal investigation unit within SARS.

Although the audit may continue, any information gathered from the taxpayer under a Chapter 5 audit after referral must be kept separate from a criminal investigation and is not admissible in criminal proceedings. Material obtained before this referral can be used in a criminal investigation and material obtained in the course of an investigation can be used in civil and in criminal proceedings.[33]

When conducting a criminal investigation, the following rights provided by section 35 of the Constitution must be observed by the concerned official conducts a criminal investigation, this also applies to the police:

a. The right to remain silent;
b. The right to be informed promptly of the right to remain silent and the consequences of not remaining silent;
c. The right not to be compelled to make any confession or admission that could be used in evidence against him or her during a criminal trial; and
d. Aligned to this, the Constitution protects the right of a suspect to choose and be represented by a legal practitioner at his or her own expense, at least until arrest, and to be informed of this right promptly.[34]

[31] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 24.
[32] Act 51 of 1977.
[33] *Supra,* at page 26.
[34] *Supra,* at page 27.

The rights of a person who is a suspect are further protected in the Income Tax Act as follows:

- An admission of an offence by a taxpayer made in the course of information gathering by SARS is not admissible in criminal proceedings, unless a court order's that it is; and
- An inspection and an interview under section 47 cannot be used when conducting a criminal investigation.[35]

d) Keeping Taxpayers informed regarding the Audit process in terms of section 42 of the TAA.

A SARS official conducting an audit is obliged to regularly update the taxpayer through a report or letter about the progress of the audit in terms of section 42 of the TAA.[36]

Seligson, M (SC) in his article trumping the Taxpayer's Right to Tax Finality wrote:

> Under section 42(2), upon conclusion of the audit, where the audit is inconclusive SARS must inform the taxpayer accordingly within 21 business days, and where the audit has identified adjustments of a material nature, SARS must within 21 business days, or a further period required by the complexities of the audit, advise the taxpayer in writing of the outcome of the audit, including the grounds for the proposed assessment or decision referred to in section 104(2) of the TAA. The taxpayer must then, in terms of section 42(3), within a further 21 business days, or such further period as may be allowed by SARS, respond to the facts and conclusions set out in the notification from SARS.[37]

SARS official in terms of section 42(5) of the TAA does not however have to provide such progress report in the latter is of a reasonable believe that doing so would impede or prejudice the purpose, progress or outcome of the audit. Section 42(6) of the TAA provides for the assessment to be made within 21 days or SARS to indicate to the taxpayer whether the period would be extended due to the complexity of the audit or other acceptable reasons.[38]

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[35] *Supra.*
[36] Seligson, M. (SC) 'Information-gathering by SARS under the TAA: Trumping the Taxpayer's Right to Tax Finality', Business Tax and Company Law Quarterly, *Volume 7 Number 1, Mar 2016, at* page 3.
[37] *Supra.*
[38] *Supra.*

Section 42 of the TAA seeks to achieve what section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act, 3 of 2000. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable, procedurally fair, and the right to be given reasons for action that adversely affects any individual. Section 1 of PAJA[39] provides that administrative action includes any decision taken or failure to take a decision, where this adversely affects the rights of any person, inaction is therefore reviewable.

PAJA was enacted to give effect to these constitutional rights, it further elaborated more on what section 33 of the Constitution seeks to achieve. Section 3 of PAJA provides that administrative action which materially and adversely affects the right or legitimate expectation of any person must be procedurally fair. A close study of section 42 of the TAA would reveal that it is a mirror of both section 33 and 3 of the Constitution and PAJA respectively.

e) Procedure to be taken when a taxpayer asserts Legal Professional Privilege in terms of section 42A of the TAA.

It does happen that SARS might perhaps request certain information that one might consider to be privilege. The TAA has fortunately made provisions for procedures to be followed if and when the taxpayer or the taxpayer's representative is faced with this situation.

The Constitutional Court in the Zuma search warrant case[40] remarked as follows in *obiter* or in passing:

> It is generally accepted that communications [between lawyer and client] should be protected in order to facilitate the proper functioning of an adversarial system

[39] Act 3 of 2000.

[40] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008).

of justice, because it encourages full and frank disclosure between advisors and clients.

Section 201 of the CPA provides as follows:

> No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May 1961, by reason of such employment or consultation, have been competent to give evidence without such consent:
>
> Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.[41]

The above provision makes it difficult if not impossible for a legal practitioner to testify or incriminate his or her client, the condition in the section is that the practitioner must have had knowledge before the latter was employed or consulted with the concerned person or the client must consent to the legal practitioner providing privilege information to third parties.

SARS short guide on the TAA sates that the "Tax Administration Laws Amendment Act, 2015, inserted a new section 42A to specifically deal with cases where legal professional privilege is asserted".[42](SARS guide at page 26)

Section 42A provides for a procedure to be followed if an individual alleges the existence of legal professional privilege in respect of relevant material required by SARS. It specifies the details that must be provided by the person asserting the privilege and makes provision for SARS to dispute the assertion of privilege.

[41] Section 201 of Criminal Procedure Act, Privilege of Legal Practitioner.
[42] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 26.

Section 42A (1) provides for information or relevant material that must be submitted by any person who alleges existence of privilege from information requested.

Part B - Inspection, request for relevant material, audit and criminal investigation

a) Inspection in terms of section 45

SARS may without notice to the taxpayer for the purposes of the administration of the tax Act arrive at the premises where a SARS official has reasonable belief that a trade or enterprise is being carried on conduct inspection to determine only:

(a) The identity of the person occupying the premises;
(b) Whether the person occupying the premises is registered for tax; or
(c) Whether the person is complying with sections 29 and 30[43].

Subsection 2 of this section prohibits the concerned SARS official doing the unannounced inspection to do such at a private dwelling of the taxpayer provided the taxpayer or occupant consent to such inspection on private dwelling or house.
A SARS official would be entitled however to inspect part of the private dwelling which is only used for trade or business.

b) Request for relevant material in terms of sections 46 and 47 of the TAA

SARS may issue a notice to a taxpayer requesting relevant information or direct to a third party who is in possession of such information to provide such information information to SARS. According to SARS short guide issued in 2018 “a request for relevant material is not limited to a formal audit or investigation,

[43] Section 45 of the Tax Administration Act 28 of 2011

but may be utilised for any purpose related to the administration of a tax Act, including a simple verification of registration and other details, compliance with any obligation imposed under a tax Act, such as reporting or reportable arrangements, or a so-called 'desk audit".[44](SARS short guide at page 28)

If the material is held by a connected person, it must be submitted within 90 days from the date of the request, which must set out the consequences in terms of section 46(9)[45] of failure to provide the material.

The description of the relevant material must be reasonable and clear, to avoid confusion, and section 46(5) also provides for an extension to if requested to submit the said requested information or material.[46]

A senior SARS official can also ask a person to provide information under oath or a solemn declaration or if required for purposes of a criminal investigation, under oath or solemn declaration in accordance with the requirements of sections 212 or 236 of the CPA.[47]

Whilst section 47(1) of the TAA makes provision to require a person for an interview to clarify any matter to SARS in fulfilling its mandate but this does not extend to criminal investigations :

> a person whether or not chargeable to tax, an employee of the person or a person who holds an office in the person to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person, if the interview:
>
> (a) Is intended to clarify issues of concern to SARS-

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[44] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 28.

[45] Section 46(9) of the TAA provides: *'if the taxpayer fails to provide material referred to in subsection (2)(b), the material may not be produced by the taxpayer in any subsequent proceedings, unless a competent court direct otherwise on the basis of circumstances outside the control of the taxpayer and any connected person referred to in paragraph (d) (i) of the definition of "connected person" in the Income Tax Act, in relation to the taxpayer.*

[46] Seligson, M. (SC) 'Information-gathering by SARS under the TAA: Trumping the Taxpayer's Right to Tax Finality', Business Tax and Company Law Quarterly, Volume 7 Number 1, Mar 2016 at page 5.

[47] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 28.

(i) To render further verification or audit to SARS, or

(ii) To expedite a current verification or audit, and

(b) Is not for purpose of criminal investigation.

Subsection (3) provides that such relevant material must be indicated on the notice and subsection (4) empowers such a person to decline to attend an interview, if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner by public notice.

The two aforementioned provisions provides a senior SARS official with the power not only to request relevant material from the taxpayer or anyone who is in possession of such but with the power to request any person by notice to make himself available for an interview with a SARS official.

Part C - Inquiries

a) Purpose of the inquiry

In terms of SARS Short Guide published in 2018:

> An inquiry under Part C of Chapter 5 of the TAA is a much more formal process with witnesses subpoenaed and evidence being led and cross-examined under oath or solemn declaration, but it remains an information gathering mechanism.[48]

It is submitted that this method although underutilised is also one of the more effective and reliable arsenals at SARS' disposal.

An enquiry is instituted by an ex parte application by SARS who would be the applicant, in chambers for an order to conduct such a process. An ex parte application is usually done in camera by the applicant without the knowledge of the respondent or the taxpayer in this context who will at a later stage have the right to oppose the application should the respondent intend to.

[48] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 30

SARS in its application must convince the judge that reasonable ground exists that the taxpayer has failed to comply with an obligation imposed under a tax Act or that there is reasonable ground that the taxpayer has committed a tax offence. Most importantly SARS must show that relevant material is likely to be revealed during the inquiry which may provide proof of the failure to comply or of the commission of the tax offence or of the disposal, removal or concealment of the assets.

It must be noted that SARS is not obliged to prove factual commission of a tax offence but prove on a balance of probability that a tax offence might be committed.[49]

This was also established in the Mpisi case that SARS does not have to prove that the actual offence was committed reasonable believe that an offence was committed is enough.[50]

The judge essentially will issues an order if persuaded by the applicant which will amongst others provided for a person who will be presiding over the inquiry, the said presiding officer is usually an Advocate or attorney who is on SARS panel of attorney or advocate whichever is applicable. According to the SARS short guide "the purpose of the inquiry is to obtain relevant material and subject to the right against self-incrimination. SARS may use evidence given by a person under oath or solemn declaration at an inquiry in subsequent proceedings involving the person or another person".[51] (SARS short guide 2018 at page 31)

[49] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 31

[50] Faber, P (SAIT Technical Executive: Tax Law & Policy), *'Huang & Others (Incl. Mpisi Trading 74 (Pty) Ltd) v CSARS NGHC 1/2013 (13 August 2013)'* [https://www.thesait.org.za/news/193088/Huang--Others-Incl.-Mpisi-Trading-74-Pty-Ltd-v-CSARS-NGHC-12013-13-August-2013.htm] (Accessed on 6 December 2019).

[51] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 31

The Judge will issue an order if satisfied, according to SARS Short Guide to the Tax Administration Act published in 2018 that must consist inter alia of the following:

- "designate a presiding officer before whom the inquiry is to be held;
- identify the person alleged to have failed to comply with an obligation, committed a tax offence or disposed of, removed or concealed assets;
- refer to the alleged non-compliance, commission of the offence or the disposal, removal or concealment of assets to be inquired into;
- reasonably specific as to the ambit of the inquiry". (para 5.4.2. at page 31)

(b) Obligations and powers of presiding officer during inquiry

Section 54 of the TAA provides that the presiding officer has the same powers regarding witness at the inquiry the powers vested on the presiding officer at the Tax Court, in terms of section 127 and 128 of the TAA.

SARS Short Guide published in 2018 summarise the obligations and powers of the presiding officer as follows:

- "Determine the conduct of the inquiry as the presiding officer thinks fit,
- Ensure that the inquiry proceedings and evidence are recorded at a standard that would meet the standard required for the proceedings and evidence to be used in a court of law;
- Subpoena any person, whether or not chargeable to tax and whether or not he or she is the person whose tax affairs are being investigated, to appear at the inquiry to be examined under oath by the person authorised to conduct the inquiry on behalf of SARS and to produce relevant material;
- Issue a warrant of arrest should that person fail to appear or fail to stay in attendance at the inquiry until excused, and convict the person of a criminal offence for such failure;
- Hold a person in contempt;
- Direct that a person receives witness fees to attend in accordance with the tariffs prescribed in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944); and
- Ensure that the inquiry is private and confidential and, on request, exclude a person from the inquiry if the person's attendance is prejudicial to the inquiry".[52] (SARS Short Guide to TAA 2018 at page 31)

[52] *Supra.*

(c) Rights of person subpoenaed to an inquiry:

SARS must during their information gathering recognise the taxpayer's constitutional rights which are contained in section 35 of the Constitution should it be clear that SARS is pursuing a criminal investigation. It is noteworthy that incriminating evidence obtained during the inquiry will not be admissible during criminal proceeding against the person giving such evidence. The taxpayer on the other hand has the right to advance reasons if subpoenaed of why he or she cannot attend the inquiry and legal representation during the inquiry.[53]

The inquiry is private and confidential, the presiding officer may upon application remove or exclude a person from the proceeding in the person's attendance is prejudicial to the inquiry.[54]

According to section 57 of the TAA a person subpoenaed to give evidence at the inquiry may not refuse to give evidence during the inquiry on the basis that it may incriminate him or her, this is because incriminating evidence obtained under the inquiry is not admissible in criminal proceedings. The condition provided for such evidence to be admissible is where a person is criminally charged with perjury, perjury is a criminal charge for giving false evidence under oath, in this context during the tax inquiry.

Information disclosed during an inquiry constitutes taxpayer information and is subject to the confidentiality provisions of the Act, which regulate the disclosure of taxpayer information and apply with the necessary changes to persons present at an inquiry, including the person being questioned[55].

Part D – Search and seizure

[53] *Supra.*
[54] Section 56 of the TAA.
[55] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 32.

This part dealing with this section will be comprehensively discussed in the following chapters.

2.5 Conclusion

SARS has the power in terms of chapter 5 of the TAA to request for relevant material from the taxpayer or any person who is in possession of such information to fulfil its statutory objective.

It is important for SARS to respect and take into consideration taxpayer's constitutional rights as prescribed by the Bill of rights. The introduction of the TAA which aims to bring congruity between SARS efficacy on the other hand and cognisance of taxpayer's rights on the other hand was a game changer in assisting SARS to achieve its legislative mandate.

It must be emphasised that SARS's conduct in fulfilling its mandate must be consistent with the provisions of the Constitution as the supreme law of the Republic.

CHAPTER 3 - SEARCH AND SEIZURE WITH A WARRANT

3.1 Introduction

Search and seizure warrants were before the introduction of the TAA provided for by the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991, as indicated in chapter 2 there was a need to harmonies tax provisions into one Act for the smooth running of the tax administration by SARS hence the TAA was introduced.

Keulder C, stated:

> that the provisions affording SARS the power to search and seize were, until 1 October 2012, contained in, among others, section 74D of the Income Tax Act 58 of 1962 (ITA) and section 57D of the Value-Added Tax Act 89 of 1991 (VAT Act). These provisions applied before the TAA came into operation on 1 October 2012. The TAA aims to provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible. Consequently, the TAA repealed the search and seizure provisions in the ITA and the VAT Act. The provisions for search and seizure are now contained in sections 59 to 63 of the TAA.[56]

Keulder C noted "that the search and seizure provisions in the Customs and Excise Act 91 of 1964 (the Customs and Excise Act) were not repealed by the TAA. This means that search and seizure by SARS can be conducted either in terms of the TAA or the Customs and Excise Act".[57]

Part D of Chapter 5 of the TAA deals with SARS' power to search premises and seize relevant material in order to gather information. For purposes of information gathering, SARS may, unannounced, enter a premises where relevant material is being kept, conduct a search of a person's premises and

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[56] Keulder, C., '*What's good for the goose is good for the gander - Warrantless searches in terms of fiscal Legislation'*. [https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu]. (Accessed 10 December 2019).

[57] *Supra.*

seize relevant material under a search and seizure warrant issued by a judge or magistrate.

3.2 Background of search and seizure provisions in South Africa

It is noteworthy to indicate the evolution of search and seizure operation pre and post democracy. Search and seizure operations used to be governed by section 74 of the ITA, which was later repealed and replaced by section 74D of the ITA.

Section 74(3) applicable before the Interim Constitution

According to Silke Bovijn and Linda van Schalkwyk "the repealed section 74(3)[58] of the ITA granted the Commissioner wide powers of warrantless search and seizure that was criticised as *arbitrary and unfair*, and the powers of the Commissioner in terms of that provision were described as *untrammelled"*.[59]

Section 74 of the ITA appears to have authorised any official who might not necessarily be a senior SARS official authorised to conduct search and seizure operations. Under this provision there was no need to approach any court of law for an order or judicial authorisation was not required.

[58] Section 74(3) of the Income Tax Act provided:
"Any officer engaged in carrying out the provisions of this Act who has in relation to the affairs of a particular person been authorised thereto by the Commissioner in writing or by telegram, may, for the purpose of the administration of the Act –
(a) without previous notice, at any time during the day enter any premises whatsoever and on such premises search for any moneys, books, records, accounts or documents;
(b) in carrying out any search, open or cause to be opened or removed and opened, any article in which he suspects any moneys, books, records, accounts or documents to be contained;
(c) seize any such books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax.
(d) retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act."

[59] Silke Bovijn and Linda van Schalkwyk. Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act. https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu. Accessed 23/04/2019.

The constitutionality of section 74(3) of the Act was raised in the so-called 'Rudolph saga'[60] where the applicant, Rudolph, fought a long battle through the courts. However, the Constitutional Court found that the Interim Constitution did not apply to the matter since the acts of issuing the authorisations and of searching for and seizing the documents in question were all completed before the interim Constitution came into operation. This, it was held, meant that none of the events of which the applicant complained could be said to have constituted a breach of any of his rights under the Interim Constitution.[61]

It is submitted that this confirms how individual's rights were infringed and trembled upon before our democracy. There is no doubt that had the court found that the provision of the interim Constitution are applicable, the court would have held that there was an infringement of the taxpayer's constitutional rights.

Bovijn S and van Schalkwyk L wrote that "even though the constitutionality of section 74(3) of the Income Tax Act was never decided by our courts, this provision was repealed by the Revenue Laws Amendment Act 46 of 1996 and was replaced by section 74D of the Income Tax Act".[62]

Enactment of Section 74D of the Income Tax Act

Section 74D of the Income Tax Act replaced the old section 74 of the ITA, the provisions thereof had been said to be almost identical to those of section 231 of the Canadian Income Tax Act RSC 1985, c1 (5th Supp) (CITA).

The only difference to have been identified was that section 74D (3) of the ITA gave the presiding officer the discretion to either grant or decline an application

[60] 1994 (3) SA 771 (W), 56 SATC 249

[61] Bovijn S and van Schalkwyk L. Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act. https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu. Accessed 23/04/2019

[62] *Supra.*

for a warrant, the position in Canada was however different in that the reading of section 231 of the CITA suggested that there was no discretion given to the presiding officer to issue a warrant or not.

Frank Mosupa wrote in his paper called Constitutional validity of search and seizure provisions: A perspective on section 74 of the Income Tax Act 58 of 1962:

> that the position in Canada was also changed to make way for judicial discretion in determining whether a warrant should be granted. In Baron's case[63] the Canadian Supreme Court found the use of the word "shall" in section 231.3(3) of the Canadian Income Tax Act to be unconstitutional. Sopinka J held that the exercise of discretion is a Constitutional requirement; section 231.3(3) removes or impermissibly restricts this discretion. The court concluded that the subsection makes it possible for a judge to be statutorily bound to authorise an unreasonable search or seizure once satisfied that the three statutory conditions set out therein have been satisfied. This was reason enough for the court to hold that the subsection violates section 8 of the Canadian Charter of Rights and Freedoms 1960, c 44.[64]

Section 74D of the ITA as opposed to its predecessor did not make provision for warrantless search as it obliged the Commissioner to apply for a warrant, it also made provision for reasonable grounds to exist before a warrant may be issued and it also made provision for judicial discretion to either issue or decline a warrant upon review of the application or existence of reasonable ground.

Section 74D(1)(a) of the ITA made provision for a search of any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched. Section 74D of the ITA was a major victory to taxpayers when it came to recognition of individual rights to privacy and dignity.

Although section 74D of the ITA was later repealed the, the Constitutionality thereof has not been challenged successfully, to date, mainly for two reasons:

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63 *Baron v Canada* 13 CRRR (2 ed) 65 (S.C.C.).

64 Mosupa, M: Constitutional validity of search and seizure provisions: A perspective on section 74 of the Income Tax Act 58 of 1962. https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu. Accessed 23/04/2019. at page 323.

Firstly, section 74D was enacted in response to a court application challenging the constitutionality of the previous search warrant provisions of the ITA, but moreover it is a product of a jurisprudential era of constitutionalism[65].

Unlike its predecessors, it does not give a representative of the Commissioner acting on written authority the right to search for information at premises and seize any documents if necessary. Neither does it grant powers for a search without a warrant[66].

This in itself is a significant distinction insofar as it implicitly acknowledges that arbitrary entry to premises of the taxpayer will be a thing of the past. Secondly, it introduces an important safeguard which, arguably, is a pre-requisite for a valid search and seizure, and that is authorisation of a judge before an enquiry or search can take place. This, it is submitted, grants legitimacy to the whole process.[67]

Search and seizure under the final Constitution of 1996

The Constitution in the supreme law of the Republic and any law or conduct inconsistent with it is invalid. Search and seizure order prima facie violate the right to privacy, but does that mean that all search and seizure orders or operations are unconstitutional? Negative! Section 36[68] of the Constitution provides for limitation of right in the Bill of Rights to the extent that such limitation is reasonable justifiable in an open and democratic society.

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[65] *Supra* at page 324
[66] *Supra*
[67] *Supra*
[68] *Section 36 of the Constitution reads as follows:*
"Limitation of rights
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose.

According to DLA Cliff Dekker Hofmeyr "Section 59[69] of the TAA provides that in obtaining the search and seizure warrant, SARS must make an *ex parte* application to a judge, which application must be supported by information supplied under oath or solemn declaration, establishing the facts upon which the application is based".[70]

One of the distinguishable amendments to the search and seizure provisions is that the power to grant a warrant has been extended to the magistrate provided the amount does not exceed that which is determined by the Minister from time to time. For a warrant to be granted by either a judge or a magistrate there are conditions that must be satisfied.

According Louw H "section 60 of the TAA provides that a judge or magistrate may issue the warrant if:

- there are reasonable grounds to believe that a person has failed to comply with its obligations under a tax Act
- or committed a tax offence, and,
- further that relevant material is likely to be found on the premises specified in the application and that such material may provide evidence of the failure by the person to comply with its tax obligations or the actual commission of the offence".[71]

Section 60 (1) and (2) therefore makes provision for both the conditions that the applicant must satisfy and the details that must be contained in the warrant.

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[69] *Section 59 of the Tax Administration Act reads as follows:*

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 premises and any person on the present on the premises and seize relevant.*
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 a manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax dispute does not exceed the amount determined in the notice issued under section 109(1)(a).*

[70] DLA Cliff Dekker Hofmeyr, *'Search and Seizure: The Extend of SARS's Powers Search and seizure: the extent of SARS's powers'.*
[https://www.cliffedekkerhofmeyr.com/en/news/publications/2014/tax/tax-alert-5-september-search-and-seizure-the-extent-of-sars-powers.html.]
(accessed 23 April 2019)

[71] Louw, H, *'Search and seizure: the extent of SARS's powers*.'
[https://www.cliffedekkerhofmeyr.com/en/news/publications/2014/tax/tax-alert-5-september-search-and-seizure-the-extent-of-sars-powers.html]
(accessed 10 December 2019)

This is to prevent abuse and to protect the taxpayer's rights in instances where SARS conducts unlawful search operations.

3.3 Conducting a search and seizure operations.

The warrant must be excised within 45 days or as determined by the Judge or Magistrate. In terms of section 61 of the TAA, SARS officials arriving at the premises to conduct the search and seizure must produce the warrant to the person in charge of the premises; this is with exception to the warrantless search and seizure conducted under section 63 of the TAA. A failure to produce a warrant entitles a person to refuse access to the officials.

Section 61(3) of the TAA empowers SARS officials to do the following under the warrant:

(a) "open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material;
(b) seize any relevant material;
(c) seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required;
(d) make extracts from or copies of relevant material, and require from a person an explanation of relevant material; and if the premises listed in the warrant is a vessel, aircraft or vehicle, stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act".

The officials conducting the operation must conduct the search with strict regard to decency and order, and, may only search a person if the official is of the same gender as the person being searched. This is to protect the individual's right to inherent dignity and the right to have their dignity respected and protected in terms of section 10 of the Constitution and further to avoid a situation of any claim of harassment.

In the Huang and Others v Commissioner of the South African Revenue Service, In Re: Commissioner of the South African Revenue Service, In Re: Huang and Others (SARS 1/2013) [2014] ZAGPPHC 563 (13 August 2014)

(Mpisi case) the court assisted in clarifying the requirements of a valid warrant and gave light to what does not amount to an abuse of the TAA by SARS.

Summary of the Mpisi case:

SARS had successfully made an ex parte application on the 13 April 2013 for a warrant to search and seizure material information as per the warrant against Mr Jen-Chih Huang (1st applicant), his wife Shou-Fang Huang (2nd applicant) and a company owned by the 1st applicant, Mpisi Trading 74 (Pty) Ltd (3rd applicant). The parties will herein be referred to as Applicants.

SARS obtained a court order on 9 October 2013 in terms of section 50 of the TAA to conduct inquiry proceedings into the tax affairs of the three applicants.

However, on 18 November 2013, the applicants approached the High Court for a remedy to stop the inquiry proceedings questioning the validity of the search warrants. The applicants argued that should the inquiry proceedings continue they might be prejudiced by the information obtained during the search and seizure operation, should the court of review set aside the search warrant which was being reviewed by the court at a later date. The court granted their request and temporarily excluded information obtain under the search warrant until the review is finalised.[72]

The Application for reconsideration of the warrant was based *inter alia* on the following:

a) the search warrant application did not satisfy the requirements of an ex parte application on the basis of material non-disclosures and misrepresentations by SARS;
b) the application for the warrants did not satisfy the requirements of the Tax Administration Act; and

[72] Faber, P (SAIT Technical Executive: Tax Law & Policy), *'Huang & Others (Incl. Mpisi Trading 74 (Pty) Ltd) v CSARS NGHC 1/2013 (13 August 2013)'* [https://www.thesait.org.za/news/193088/Huang--Others-Incl.-Mpisi-Trading-74-Pty-Ltd-v-CSARS-NGHC-12013-13-August-2013.htm] (Accessed on 6 December 2019).

c) the *ex parte* application by SARS for the warrant was an abuse of the court process[73].

The Court Held:

Material non-disclosure and misrepresentation

With regards to this aspect the applicants submitted that not all relevant material facts were disclosed by SARS to the Judge, in that irrelevant, vexatious and spurious facts were provide to the judge to influence him to issue a warrant. Those irrelevant facts were for instance the previous conviction of the first applicant, alleged criminal pending charges which SARS did not know were withdrawn against the first applicant and further the omission by SARS that the applicants was tax compliant at the time of the application was meant to influence unduly influence the judge[74].

SARS however on the other hand justified its action by submitting that some of the information such as the previous conviction and media reports was only used as introduction and background information and not to support the application. SARS also submitted that they did not know that the criminal charges at the time of application of the warrant were withdrawn in this way this was a mere oversight.[75]

The court provided for instances when an ex parte application is made and the nature of the application by referring to *Powell NO and Others v Van der Merwe and Others* (503/2002) [2004] ZASCA 25; [2005] 1 All SA 149 (SCA) (1 April 2004) and held : with regards to this aspect that an *ex parte* application is a serious departure from the ordinary principles applicable to civil proceedings to

[73] *Supra*
Judgment Kubushi J case no: SARS 1/2013 *Jen –Chih Huang and others vs. SARS 13 August 2014.*

[75] Faber, P (SAIT Technical Executive: Tax Law & Policy), *'Huang & Others (Incl. Mpisi Trading 74 (Pty) Ltd) v CSARS NGHC 1/2013 (13 August 2013)'* [https://www.thesait.org.za/news/193088/Huang--Others-Incl.-Mpisi-Trading-74-Pty-Ltd-v-CSARS-NGHC-12013-13-August-2013.htm](accessed on 6 December 2019.

seek an order in the absence of notice to the respondent party and in this way the applicant must act in good faith by disclosing all material facts.[76]

The court held that in its "view, the applicants' submissions have no merit. It is said that in vast and complex cases, such as the present, there can be no crystal-clear distinction between facts which are material and those which are not".[77]

The court held further that an applicant have to make a judgment call as to which facts are relevant to can influence the judicial officer in reaching its decision and which, "although connected to the application, are not sufficiently relevant to justify inclusion".

The court also made reference to the *Thint (Pty) Ltd and Zuma v National Director of Public Prosecutions:*

> *"* where is held that the test of materiality should also 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"*.*[78]

Sufficient Jurisdictional Facts

The court rejected the submission by the Applicant that SARS failed to establish jurisdictional requirements as provided by section 59 and 60 of the TAA which if absent would be fatal to the ex parte application as correctly pointed out by the Applicant, the court held that there are inter alia two essential jurisdictional requirements that the applicant must make to obtain a warrant as follows:

- "The judge issuing the warrant must have been satisfied that, firstly, there were reasonable grounds to believe that a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and,
- secondly, that there were reasonable grounds to believe that relevant material to be found on the premises specified may provide evidence of the failure to comply or the commission of the offence".

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[76] Judgment Kubushi J case no: SARS 1/2013 *Jen-Chih Huang and others vrs SARS* 13 August 2014 para 16.
[77] *Supra* para *18.*
[78] *Supra.*

The court also rejected the Applicants' submission "that reasonable grounds require *prima facie* proof of the non-compliance or offences as the innocence or guilt of the applicants is not an issue in such a case".

The court held:

> "That the TAA merely requires a suspicion that the offences have been committed and that reasonable grounds exist for the granting of the warrant. The requirement is therefore merely that there is an objective set of facts which caused the judicial officer to have the required belief which belief was established from the total picture presented by SARS in the warrant application".[79]

The court further held

> "that SARS is not obligated to make the judicial officer aware of less intrusive measures to retrieve the information as it is the duty of the judicial officer hearing the matter to decide whether the warrant sought by SARS would be reasonable in the circumstances. SARS merely needs to place the objective facts before the court to make the determination. The court concluded that the jurisdictional facts were therefore determined and that no material non-disclosure occurred by SARS".[80]

Abuse of Court Process

The applicants' submission on this point is that SARS has opportunistically manipulated and abused the legal process by relying on tax offenses that are provided for by the Customs and Excise Act and not section 60 of the TAA. SARS in this way ignored the provisions of section 4 of the TAA which specifically excludes customs related offences from its operation. This means that SARS were prohibited to use offences provided by the Customs Act in obtaining a warrant under the TAA, and this is provided for by section 4 of the TAA.[81]

SARS maintained that the warrant was not an abuse of the court process but the latter however conceded that custom transgressions do not count in the

[79] *Supra* para 46-47 at page 20.
[80] *Supra* para 48 at page 21.
[81] Judgment Kubushi J case no: SARS 1/*2013 Jen –Chih Huang and others vrs SARS 13 August 2014* at para 58.

circumstances of this case, but adamant that the offence the 3rd Applicant (the company) is suspected of fall under the ambit of the TAA.

The court partially agreed with the Applicant in as far as section 4 of the TAA is concerned but rejected the submission that SARS had abused the court process. The court found that although section 4 of the TAA which deals with issues covered by the TAA excludes the Customs Act, the irregularities attributed to the 3rd Applicant overlaps with the provisions of the TAA and/or there is overlapping inter-relationship between the TAA and the Customs and Excise Act and thus the contention that the third Applicant's activities fall beyond the reach of the tax Acts is mistaken.

The court found that:

> "though the business of forwarding and clearing agent falls within the ambit of the Customs Act, those same actions result in income tax and VAT obligations for the applicants. The court further noted that the applicants as agent could even under section 180 TAA incur liability on the VAT of the importer or exporter where they were held to have been negligent. The court further noted that though the alleged offences fall in periods preceding the TAA, section 270 TAA specifically allowed the retrospective application of its provisions to offences occurring prior to the commencement of the TAA".[82]

The court rejected the submission by the applicants that SARS abused the court process by applying for the warrant as they were entitled to so to administer the tax Acts. It also rejected the submission that SARS should have in the current instance distinguished between the TAA and Customs and Excise Act as it correctly solely relied on the TAA.[83]

The court judgment illustrates that when an application for a search and seizure order is sought, the applicant must not misrepresent himself or herself, there must be sufficient jurisdictional facts, the applicant need not have all the proof for non-compliance but reasonable belief of non-compliance. "The Court also

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[82] Faber, P (SAIT Technical Executive: Tax Law & Policy), *'Huang & Others (Incl. Mpisi Trading 74 (Pty) Ltd) v CSARS NGHC 1/2013 (13 August 2013)'* [https://www.thesait.org.za/news/193088/Huang--Others-Incl.-Mpisi-Trading-74-Pty-Ltd-v-CSARS-NGHC-12013-13-August-2013.htm] (accessed on 6 December 2019).

[83] *Supra.*

found that the applicant is not obligated to make the judicial officer aware of less intrusive measures to retrieve the information as it is the duty of the judicial officer hearing the matter to decide whether the warrant sought by SARS would be reasonable in the circumstances".

Some of the guidelines to be observed by a court considering the validity of the warrants that might assist were listed by Mogoeng CJ in paragraph 56 in the *Minister for Safety and Security v Van der Merwe* 2011 (5) SA61 (CC).

Chuks Okpaluba summarised the guideline (referred above) in his paper "Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure" as follows:

a) "the person issuing the warrant must have authority and jurisdiction;
b) the person authorising the warrant must satisfy his or herself that the affidavit contained sufficient information on the existence of the jurisdictional facts;
c) the terms of the warrant must be neither vague nor overbroad;
d) a warrant must be reasonably intelligible to both the searcher and the
e) searched person;
f) the court must always consider the validity of the warrants with a Jealous regard for the searched person's constitutional rights; and
g) the terms of the warrant must be construed with reasonable strictness" (Chuks Okpaluba at page 427).[84]

[84] Chuks Okpaluba. Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure. Acta Juridica Volume 2015, November 1, December 2015, p.407-429. at page 427.

3.4 How seizure of information/articles affects the right to property

Section 25 of the Constitution provides for the protection of the right to property, subsection (1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Section 25 clearly discourages arbitrary deprivation of property by the state; subsection (2) of section 25 makes provision for just and equitable compensation if a property is so deprived.

Section 61(2) (b) and (c) empowers SARS to seize relevant material for as long as it is necessary. The power to seize taxpayer's property clearly affects their right to property however this is limited by provision of the law including the TAA. It is also submitted that SARS has a duty of care towards taxpayer's property when seized; section 61(4) provides that SARS must make an inventory of the relevant material and make a copy to the taxpayer.

During the search and seizure operation the taxpayer or his or her legal representation are allowed to be present, relevant material are also treated as evidence and stored as such. In the *Africa Cash and Carry case*[85] finalised in November 2019 where SARS won a huge victory of collecting at least one billion rand, it was provided in the judgment how the evidence was preserved.

According to the judgment computer equipment was seized, sealed in evidence bags and removed, available computer hard drives were also imaged at the taxpayer's premises. Documents were placed in boxes, each having a template indicating the location from which documents were removed and a brief description of the documents contained therein, and removed.

What was seized was acknowledged in writing by the taxpayer's legal representative. About 74,000 documents in pallets were seized comprising sales invoices, supplier invoices, supplier trade agreements, and financial

[85] Africa Cash & Carry (Pty) Ltd v The Commissioner for the South African Revenue Service (783/18) [2019] ZASCA 148 (21 November 2019).

records.[86] This illustrates the importance of record keeping that would play important part during the presentation of evidence in court.

It is also important to keep record of the material seized in case where the taxpayer may allege that some of the material or property was damaged in the custody of SARS.

The excises of labelling or classifying relevant material might be long and tiring processes as indicated by Johann van Loggerenberg in his tell it all book "Rogue". The latter is one of SARS senior officials who have been accused of being involved in what Sunday Times Newspaper called the Rogue unit that is alleged to have been unlawfully established and that conducted unlawful operation of spying on prominent South Africans.

The seizure of relevant material does not necessarily mean that the materials belongs to SARS and are therefore not returnable, the taxpayer may apply for a reconsideration order to declare the search and seizure unlawful like in the *Mpisi case* or the material might be returned after investigations or after finalisation of the case.

Collaboration between SARS and Asset Forfeiture Unit

We often see on the news the Asset forfeiture Unit (AFU) and SARS working together on a big case especially seizing properties belonging to a prominent member of our society, suspected to be involved in some crime. We recently witnessed the property of the former Mayor of Durban's property being attached and some of the Gupta's family property being seized.

According to Willman D, the "Prevention of Organised Crime Act 121 of 1998 (POCA) provides that property obtained by means of criminal activities may be forfeited to the State; this Act gave birth to the AFU which was established in

[86] *Supra* at para 4.

May 1999 in the Office of the National Prosecuting Authority (NPA). The unit was established to focus on the implementation of Chapters 5 and 6 of the POCA, to ensure that the powers in the Act to seize criminal assets would be used to the maximum effect in the fight against crime, and, in particular organised crime".[87]

The question may arise as to how does SARS work with the NPA whilst the latter deals with criminal matters or the link between the two? The answer to that is that the TAA makes provision for certain non-compliance to be classified as tax evasion, which is a criminal offence, and, criminal offences are prosecuted by the NPA. In this way SARS would for all practical purpose file a complaint with the SAPS leading to prosecution on condition there is prima facia evidence to prosecute.

Asset forfeiture procedure under the POCA

The burden of proof in criminal cases is that the State must proof its case beyond reasonable doubt but this does not apply to when an application for seizure is sought for under POCA. Asset forfeiture proceedings are civil proceedings where the standard of proof is on a balance of probabilities and not beyond reasonable doubt thus it is easier to obtain the order.[88]

"The following orders according to the NPA website may be applied by the AFU:

a) Restraint order;
b) Confiscation order;
c) Preservation order; and
d) Forfeiture order".

Restraint and confiscation orders

[87] Willman, D. 'Taking the Profit out of crime: The Asset Forfeiture Unit [https://www.npa.gov.za/sites/default/files/files/FAQs%20on%20AFU.pdf] (accessed 23 March 2020)
[88] *Supra.*

The first two orders above, namely restraint and confiscation orders according to Willman, D "depend on whether there has been a prosecution of a criminal and his/her conviction. In order to obtain these orders, it has to be shown that the accused benefited from his/her offence, and what the amount of that benefit was.[89] The NPA will seek a confiscation order for the amount for which the accused benefited from his/her crime(s) this will usually be done after conviction, as the state would have proved beyond reasonable doubt the commission of a crime".

According to Willman, D "restraint order is usually obtained prior to a confiscation order being made after the accused's conviction. The accused's property is seized or restrained before his/her conviction to ensure that property is available to be sold later to pay the confiscation order that may be made should the accused be convicted".[90]

A confiscation order is in this way obtained after the accused person is found guilty or convicted of a criminal offence. The NPA will apply for this order to confiscate the amount which the accused benefited for his or her crime.

Preservation and Forfeiture Orders

These orders unlike the two aforementioned orders don't depend on conviction of an accused person or a successful prosecution although some evidence of criminal activity is required. The NPA when applying must show that the concerned property e.g. a house, motor vehicle, boat, laptop, investment or any property is the proceeds of crime and/or an instrumentality of an offence. The property has to be tainted in some way by a commission of a crime.

Instance where the AFU and SARS collaborated

89 *Supra.*
90 *Supra.*

One of the biggest cases where SARS was the complainant, SARS had assisted the AFU is the criminal case against Mr. Delport and 12 other individuals and associated business entities[91] according to SARS media statement face more than 7 000 charges relating to cigarette smuggling, fraud and racketeering, the investigations started on around 2007 but the case was finalised in December 2019.

During the year 2000 SARS conducted an audit on the various business entities associated with Mr. Delport and his co-accused to verify the exportation documents for cigarettes to various countries.[92]

According to the media statement "the investigation also required co-operation from law enforcement agencies from Angola, Zimbabwe and Malawi. SARS' contention in the subsequent criminal trial against Mr. Delport and his co-accused is that documents submitted by the entities were false in order to claim VAT and excise duties from SARS. SARS further contends that fraudulent claims for VAT and excise duties amounts to a potential loss to the fiscus of approximately R264 million".[93]

The High Court was approached by the AFU to obtain a preservation order in terms of the POCA seeking to preserve property belonging to persons who have allegedly benefited from crime. The order was granted and the curator was also appointed. It is important to note that the order was obtained before conviction that is pending finalisation of the criminal matter.

This is because for this order to be granted the state need to proof on a balance of probability not beyond reasonable doubt that the property is tainted by proceeds of crime.

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[91] *S v Delport and Others* (80/2017) [2019] ZAFSHC 243 (10 December 2019).
[92] Media Releases 2007 Largest seizure of assets by the AFU 28 February 2007.
[93] *Supra.*

It worth noting that SARS may apply through relevant process for an order in terms of section 179 of the TAA to compel any third party (usually financial institutions) to pay over funds or assets in its possession which belongs to a tax defaulter or judgment debtor.

Section 179(1) of the TAA provides that:

> A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

In this way SARS may ask the NPA or the police if they are in possession of the funds or assets of the taxpayer whom a judgment has already been obtain to settle the tax liability.

In the judgment in the matter between *Williams's v Minister of Police and Others* (2560/2016) [2017] ZAWCHC 40 (1 February 2017):

Funds were seized by the SAPS from the taxpayer's premises and later transferred to the SARS to satisfy the taxpayer's tax liability in terms of section 179 of the TAA. The court found that for as long as the provisions of section 179 are complied with, the person holding the funds must comply with the notice. The taxpayer in this matter argued *inter alia* that the SAPS did not make them aware of the 179 notice however this argument was overruled.

The judge ruled in paragraph 68 that there was no duty on the SAPS to provide the 179 notice to the taxpayer as the notice was legally obtained.[94] The implications of this judgment is that SARS does not necessarily have to wait for the finalisation of a criminal matter against the tax debtor to collect outstanding taxes, especially if the assets of the said debtor are seized, regardless of whether the criminal matter relates to outstanding taxes or different issue.

[94] *Williams v Minister of Police and Others* (2560/2016) [2017] ZAWCHC 40 (1 February 2017): para 68 at page 17.

The third party appointed in terms of the section 179 notice will be held personally liable should he or she deviate from what the notice orders *thus* compliance is mandatory and not an option.
The person who is unable to comply with the notice must provide reasons of the alleged inability within the time period specified by the notice, a senior SARS official upon review of such reasons, may (has discretion) withdraw, amend the notice or deal with the matter as he or she deems appropriate.

3.5 Conclusion

For SARS to obtain a warrant it must apply for an ex parte application to a judge usually in chambers, section 63 of the TAA supported in the *Mpisi case* provides for facts that must be presented to a judge before a search and seizure warrant is issued. We have learned that the applicant or SARS must show that there are sufficient jurisdictional facts and also that the applicant is not on a fishing expedition in this way the application is not an abuse of the court or judicial system.

The search must be conducted in a decent manner taking into consideration the dignity of the respondent/s or the party to whom the order is obtained against. There must be a register which consist of a list of items , documents, electronics etc. seized and the respondent is also entitled to have his or her legal representative present during the search and seizure operation.

There is no question that the search and seizure operation adversely affect in most cases the property rights of the respondents or taxpayers, the latter may in this way apply for the reconsideration of the order if there exist reasonable ground that the order was unduly obtained. The court may amend the order should the application succeed or set it aside.

CHAPTER 4 - WARRANTLESS SEARCH AND SEIZURE IN SA

4.1 Introduction

SARS short guide to TAA indicates that "the power to conduct a warrantless search and seizure is a narrow exception to the requirement that searches and seizures occur pursuant to a warrant. However, such narrow exceptions occur frequently in South African law, and our courts, including the Constitutional Court, have emphasised that such narrow exceptions to the warrant requirement are appropriate".[95] (SARS short guide issued 2018 at page 34)

It was held in the *Magajane v Chairperson, North West Gambling Board and Others [2006]* ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC). (*Magajane case)* that warrantless searches should be conducted under exceptional circumstances.

Although SARS can search and seize relevant material without a warrant, it must do so or carry out the search as if the warrant was obtained. The provisions of section 61 of the TAA are still applicable; the difference *inter alia* is that a warrant is not at hand when the search and seizure operation is conducted. Search and seizure under the TAA as indicated above is an exception thus it can only be conducted under strict conditions.

4.2 The conditions under which a warrantless search and seizure may be conducted.

(a) Consent by the owner or the person in lawful possession :

The SARS senior official intending to conduct a search and seizure operation must first obtain written consent from the person who is in lawful possession or occupation of the concerned property. Section 63 (a) stipulates that the consent

[95] South African Revenue Service, (2018) 'Short Guide to the Tax Administration Act 28 of 2011', 3rd version, Pretoria at page 34.

must be in writing, verbal consent, it is submitted is not sufficient as that might be difficult discharge should the legality of the operation be subject to a judicial review.

(b) Urgent basis:

Search and seizure may be conducted on an urgent basis, section 63(b) of the TAA makes provision that the following factors must exist when a senior SARS official is intending to conduct an operation without a warrant.

Section 63(b) of the TAA provides:

> "If the senior SARS official believes that reasonable ground exist to satisfy that:
>
> i. There may be an imminent removal or destruction of relevant material likely to be found on the premises,
> ii. If SARS applies for a search warrant under section 59, a search warrant will be issued, and,
> iii. The delay in obtaining a warrant would defeat the object of the search and seizure"[96].

The reading of this provision suggest that a warrantless search must be unplanned but most importantly urgent, there must be reasonable grounds to conduct such an operation, more so that one of the factors used as a test is that, a warrant would be issued if it was applied for. This it is submitted that should the warrantless search and seizure be tested in court, the presiding officer will consider the above aforementioned fact, and, should they be absent the warrant less search would be set aside.

4.3 How search and Seizure may infringe on the Right to Privacy

Langa J as he then was in his judgment in *Investigating Directorate Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) (*Hyundai Motor case)* in the Constitutional court, found that an individual has a right to decide what information about him or her is consumed or known by the public, further that individuals when in the privacy of their homes, cars,

[96] Section 63 (b) of the Tax Administration Act 28 of 2011

using the cell phone have a right to privacy provided the state justify limitation thereof:

> Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.[97]

The above profound quote was said by the late and former Chief Justice Langa (Langa CJ) as he then was in his judgment in the *Hyundai Motor case*[98] in the Constitutional Court, the latter's contribution to search and seizures and the right to privacy is well received and continues to assist our courts in determining whether the right to privacy is justifiably infringed. Privacy like most of the rights in the Bill of Rights is not absolute meaning it can be limited, but such limitation must comply with the provision of section 36 of the Constitution which is known as the limitation clause.

The right to privacy according to section 14 of the Constitution:

> Everyone has the right to privacy, which includes the right not to have-
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) The privacy of their communications infringed.[99]

There is no doubt when one glance even in *obite*r the provisions of section 14 of the Constitution that search and seizure operations in both business and private dwelling limit the owner's rights, but the limitation of a business or a juristic person would be limited more than that of a human being as a juristic person bears no human dignity.[100]

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97 *Investigating Directorate Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd* 2000 10 BCLR 1079 (CC) at para 16.

98 *Supra.*

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

100 Chuks Okpaluba. Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure. Acta Juridica Volume 2015, November 1, December 2015, at page 419.

It can however be argued and it is respectfully submitted that although a juristic person bears no human dignity it has goodwill which is an important asset a company has relating to the value and worth of the business.

Section 74 of the ITA and section 4 of the Customs and Excise Act both repealed and amended respectfully conferred powers to search and seizure relevant to SARS which extended to any premises including domestic dwellings. *The Gaertner and Others v Minister of Finance and* Others [2014] ZACC 3, 2014 (3) SA 106 (CC), 2014 (4) BCLR 373 (CC) (*Gaertner case)* dealt with warrantless searches conducted at both the taxpayer's business and private home.

The Facts of the case

SARS establish that Orion Cold Storage (Pty) Ltd (OCS) a South African company which was involved in a legal battle with its trade partner Sloan Valley Dairies Ltd (SVD) a Canadian company, had fraudulently manipulated the invoices so as to pay less duty.

Mr Gaertner and Mr Klemp, the first and second applicants, are directors of the third applicant OCS which conducts business as an importer and distributor of bulk frozen foods. OCS imports and distributes bulk frozen foodstuffs and holds licences for storage warehouses (also known as customs bonded warehouses or bond stores) in Muizenberg.[101]

On the 21 May 2012, SVD instituted motion proceedings against OCS claiming the return of consignments of skim milk powder sold to OCS, alternatively payment of the purchase price, a copy of the application was also served on SARS. SARS compared the invoices attached to the application with those that OCS had submitted to SARS for purposes of customs duty. The prices on the SVD invoices were substantially higher than what was reflected on the

[101] *Gaertner and Others v Minister of Finance and Others* [2014] ZACC 3, 2014 (3) SA 106 (CC), 2014 (4) BCLR 373 (CC) para 4 at page 3.

submission to SARS. This discrepancy led SARS to suspect that OCS had fraudulently manipulated the invoices so as to pay less duty. Consequently, SARS decided to search the premises of OCS.[102]

On the 30 May 2012 SARS visited the OCS premises under the disguise that they would be conducting a bond inspection, which is a routine inspection usually conducted annually to monitor compliance. SARS later revealed to Mr Gaertner after the building was sealed that the purpose of the visit was to conduct a search and seizure operation, and this was conducted without a warrant.

Over the two-day period it included a search of the warehouse; bond store; a safe in the strong room; computers; and the offices of Mr Gaertner and Mr Klemp. Mirror images of data on various computers were made and a variety of documents and other objects were seized.[103]

This warrantless search was extended to Mr Gartner's private dwelling where the private computers, including freezers, the ceiling space, the safe, the cellar, garages and storerooms. Throughout this process the officials failed or refused to advise Mr Gaertner what they were looking for or what the search is about.

Legal issue

This matter eventually went to the Constitutional Court where the issue was whether sub-paras (i) and (ii) of section 4(4)(a) of the Customs and Excise Act and section 4(4)(b), 4(5) and 4(6) are unconstitutional. Section 4 of the Customs and Excise Act extended SARS' powers to search and seize to even private homes or dwellings of taxpayers and the court had to make a finding as to whether this section infringes the right to privacy.

[102] *Supra* para 7 at page 4.
[103] *Supra* para 8 at page 5

Court findings

The court confirmed that section 4 of the Customs and Excise Act was unconstitutional an issue which became moot in the High Court. The court held that the provision was too broad in that it allowed SARS officials to search any premises anywhere, and, this power also extended to not only the private dwelling of taxpayers but business associates, clients, service providers, employees and their relatives, thus infringed the right to privacy.

The provision does not provide for jurisdictional facts or basis upon a search may be conducted or reasonable suspicion to exist before such searches. The provisions are broad as to the manner of conducting the searches. The court held that:

> "searches may be conducted in private dwellings at any time, and officials may not only break in at the dwellings but, once inside, they may even break up floors. And they do not need a warrant to do all this".[104]

As far as limitation of the right of privacy is concerned, the court held

> "that privacy, like other rights is not absolute, as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy, in this way the right to privacy is attenuated but not obliterated".[105]

The *Magajane case*[106] assisted largely in the judgment in this matter as the court referred to it more often. The principle in that case, is inter alia the reasonable expectation of privacy. A business for instance would have less reasonable expectation of privacy as it is regulated and its personal space shrinks because of its communal interactions with the general public. This limitation is also attenuated by the fact that most regulated licensed business are subject to regulated inspections by the authorities to which they fall under.

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[104] *Gaertner and Others v Minister of Finance and Others* [2014] ZACC 3, 2014 (3) SA 106 (CC), 2014 (4) BCLR 373 (CC) at para 40.
[105] *Supra at para 49.*
[106] *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC).

Madlanga J made reference to the Magajane matter wherein the court quoted what was said in the Mistry case:

> Mistry listed a number of respects in which the proprietor of a business generally has a reduced expectation of privacy. Reasonable regulations and inspections are an 'inseparable part of an effective regime of regulation.' The more a business creates potential hazards to the public, the more important and less invasive the inspection. People involved in certain businesses must be taken to know that their activities will be monitored.[107]

4.4 Reasonable expectation to privacy

The reasonable expectation of privacy is an element of private law that determines in which place and in which activities a person has a legal right to privacy, sometimes referred to as the "right to be left alone."[108] A person's reasonable expectation of privacy means that someone who unreasonably and seriously compromises another's interest in keeping her affairs from being known can be held liable for that exposure or intrusion.[109] The reasonable expectation doctrine originates from the *Katz v United State* 389 U.S. 347 (1967), (*Katz case)* according to the Cornell Law School on a website Legal Information Institute.

According to the case the test determines whether an action by the government has violated an individual's reasonable expectation of privacy. This test was developed according to Justice Harlan in the *Katz case* in his concurring opinion. Although it was not formulated by the majority, this test has been the main takeaway of the case. Justice Harlan created a two-part test:

> a. "an individual has exhibited an actual (subjective) expectation of privacy,
> b. the expectation is one that society is prepared to recognize as reasonable if both of these requirements have been met, and the government has taken an action which violates this "expectation", then

[107] *Gaertner and others v Minister of Finance and Others [*2014] ZACC 3, 2014 (3) SA 106 (CC), 2014 (4) BCLR 373 (CC) para 61.
[108] FindLaw's team .What is the Reasonable Expectation of Privacy : [https://www.law.cornell.edu/wex/expectation_of_privacy] (accessed on 17 March 2020)
[109] *Supra.*

> the government's action has violated the individual's Fourth Amendment rights".[110]

South African courts also employs the doctrine of reasonable expectation of privacy as mentioned in the *Magajane case, Gaertner case, Mistry case.*[111] The Constitution provides that South African courts must consider international law and may consider foreign law when interpreting the bill of rights,[112] thus there is an obligation to consider international law and the discretion to consider foreign law, because of the usage of the words "must" when it comes to international law and "may" when considering foreign law.

The *Magajane case*, it is submitted played a major role in the development and recognition of the doctrine of reasonable expectation of privacy in South Africa, the court held inter alia a person's expectation of privacy will be diminished when he or she moves into public activities as opposed to activities in the inner sanctum of the home and all inspections conducted in terms of legislation would limit a person's right to privacy, as a result when dealing with inspections or searches, an evaluation in terms of section 36 of the Constitution was required in order to determine whether the limitation was reasonable and justifiable.[113]

This means that section 36 of the Constitution is also used to determine whether the limitation of privacy was justifiably limited. The *Gaertner case* illustrated this, also borrowing from the *Magajane case* with regard to the principle of reasonable expectation of privacy.

In an article written by Chuks Okpaluba where he wrote about the contribution made by the late former chief Justice Langa, about the *Constitutional protection*

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[110] *Supra*
the *Mistry v Interim National Medical and Dental Council and Others (*CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998)

[112] Section 39 of the Constitution reads:
(1) When interpreting the Bill of Rights, a court, tribunal or forum—
(a) …….
(b) must consider international law; and
(c) may consider foreign law.

[113] Keulder, C., 'What's good for the goose is good for the gander - Warrantless searches in terms of fiscal Legislation'.[https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu]. (Accessed 10 December 2019).

of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure Chuks Okpaluba wrote that the Constitutional Court held in the earlier cases –*Ferreira*, *Bernstein*, and *Mistry* – that the scope of the person's privacy extends only to those matters to which a legitimate or reasonable expectation of privacy can be harboured.[114] This is proof that South African courts have recognised this principle in line with the provisions of the Constitution.

In the *Mistry v Interim National Medical and Dental Council and Others (*CCT13/97) [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998) the central problem was whether the powers of entry, examination, search and seizure given to inspectors by section 28(1) of the Medicines and Related Substances Control Act 101 of 1965 were consistent with section 13 of the interim Constitution, section 13 of the interim Constitution dealt with the right to privacy.

Sachs J held in the *Mistry case* (above) that "it was not necessary for the court in the present case to determine precisely when an inspection became a 'search', however a statutory regulation, in this case found in the Medicines and Related Substances Control Act 101 of 1965 would infringe an individual's right to privacy to the extent that it authorise warrantless search which extends to the individuals private homes and intimate possession of the concerned person.[115]

Sachs J also held that:

> "a critical consideration was that the more the industry or activity in question is public and the more closely it is regulated, the more the right to privacy is attenuated and any possible invasion becomes less intense. In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation".[116]

[114] Chuks Okpaluba. Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure. Acta Juridica Volume 2015, November 1, December 2015, at page 413.
[115] *Supra* at page 413.
[116] *Supra* at page 415

One of the lessons from this case is that regulated industries' reasonable expectation of privacy is limited but not obliterated by public interest; this also applies to unlicensed businesses.

This is confirmed by what Rogers J held in the Gaertner matter when the case was still in the High Court:[117]

> [a] Warrantless routine searches are justifiable under the Act in respect of the business premises of persons registered in terms of s 59A, of persons licensed under Chapter VIII, of person registered under s 75(10) and of persons who operate pre-entry facilities, to the extent that the search relates to the business for which such person is registered or to the business for which such premises are licensed or registered or to the business of operating the pre-entry facility.
>
> [b] Warrantless non-routine searches are justifiable under the Act in respect of pre-entry facilities, licensed warehouses and rebate stores, to the extent that the search relates to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store.
>
> [c] Searches without judicial warrant are not justifiable in other cases. In particular, there is no justification for dispensing with the requirement of a warrant in the case of [i] searches of the premises of unregistered and unlicensed persons; [ii] non-routine searches of the premises of registered persons (except to the extent, if applicable, permitted by para (b) above). [118]

Rogers J finding was confirmed by Madlanga J in the constitutional court in the same matter when the case was referred to the constitutional court, where he found that "in other case" as referred to by Rogers J also included private dwelling of individuals.[119]

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117 Supra at page 428

118 *Gaertner and Others v Minister of Finance and Others (12632/12) [2013] ZAWCHC 54; 2013 (6)BCLR 672 (WCC); 2013 (4) SA 87 (WCC); [2013] 3 All SA 159 (WCC) (8 April 2013)* para 103.

119 Chuks Okpaluba. Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure. Acta Juridica Volume 2015, November 1, December 2015, at page 428.

4.5 Conclusion

Section 63 of the TAA provides that for warrantless searches under two circumstances, i.e. by written consent by the owner or on an urgent basis. This follows that warrantless searches cannot be planned; the official who embark on a warrantless search must inter alia be under the reasonable suspicion that there may be an imminent removal or destruction of relevant material likely to be found on the premises.

Warrantless search and seizure prima facie infringes ones right to privacy but the right to privacy is not absolute, section 36 does provide for limitation of rights. In the *Magajane case* the court held that warrantless reach should be conducted under exceptional circumstances. The case also contributed by applying the principle of reasonable expectation of privacy in concert with the provisions of section 36 of the Constitution (limiting clause) in establishing whether warrantless search justly limited the right to privacy in that matter.

The court held in the *Magajane case* that reasonably expectation of privacy differs from case to case, for instance companies, because of public interest and that there are regularly regulated in any given industry, have less reasonable expectation of privacy as compared to individuals.

Van der Westhuizen J in the Magajane case made the following quote:

> In the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of an effective regime of regulation.[120]

[120] *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC). para 46 at page 25

CHAPTER 5 - CAN SARS ENGAGE IN COVERT COLLECTION OF INFORMATION

5.1 Introduction

'Love affair rocks SARS' this was a Sunday Times article published on the 10 August 2014 that shook the country and brought the spotlight to the business dealings of SARS more particularly its information gathering powers.

Johannes Hendrikus van Loggerenberg (Van Loggerenberg) avers and gives the genesis of the so called "Rogue unit" phenomenon in his book Rogue. He wrote in his book that at the time of his resignation in early 2015 SARS had the following investigative units to which he was a Group Executive (Tax and Customs Enforcement Investigations). As an executive he led the following Units as stated in his book Rogue:

> a. "Centralised Projects: a small centrally based unit which focused on significant projects and cases,
> b. National Projects: this unit had regional offices country wide and its members used various skills, combining tax, and customs and excise expertise with civil and criminal investigations to combat revenue related offences,
> c. The Tactical Intervention Unit: which also had bases in most of the provinces, focused on customs and excise enforcement activities,
> d. Evidence Management and Technical Support: was centrally housed experts who liaised with other law-enforcement and state agencies, as well as with tax, customs, excise, legal and other experts,
> e. High-Risk Investigation Unit (HRIU):
> This unit was established in 2007 and had consisted initially of 26 members, reduced to 6 at the time of Van Loggerenberg's resignation. This group worked on matters that presented a risk to other investigators. It had started as the Special Projects Unit (SPU), but was later renamed the National Research Group (NRG) before it became the HRIU. This is the unit that was termed as the "Rogue unit" by the Sunday Times".[121] (Van Loggerenberg, Rogue at page 4)

The question of whether SARS can collect information covertly was triggered by a series of Sunday Times Newspaper articles which opened a can of worms for

[121] Van Loggerenberg, J with Lackay, A. 2016. *Rogue the Inside Story of SARS's Elite Crime-busting Unit*. Jonathan Ball Publishers. Johannesburg & Cape Town at page 04

SARS, and the Sunday Times itself. The articles of the Sunday Times Newspaper *inter alia* stated that The National Research Group (NRG), as the unit was called, became a law unto itself and supplied members with aliases and fake IDs. The unit according to the newspaper article probed non-tax-related matters such as taxi violence and was used to fight business battles on behalf of friends and relatives of senior SARS officials. No explanation was offered about why members were given these tasks.[122]

According to one of the articles some of the NRG members were working as VIP bodyguards for some politicians while working for SARS. At least one individual didn't have experience or even a firearm to work as a bodyguard. One member who worked as a VIP bodyguard indicated that the cover allowed them to eavesdrop on some of the politician's conversations.[123]

The articles *inter alia* alleged that the members of this group set up its own brothel, held meetings in a Pretoria NG Church and posed as bodyguards for top ANC politicians, the members would work as bodyguards for prominent ANC members to infiltrate the organisation and eavesdrop on politicians. The articles were alleged to be based on various memorandums and reports obtained from reliable sources. The articles did a lot of damage to the reputation and credibility of SARS and some of the officials who were alleged to be involved in the illegal operations of this Rogue unit.

This research report will not make findings as to whether these allegations are truthful but rather whether could SARS legally collect information in fulling its statutory mandate covertly.

[122] Mzilikazi wa Afrika, Piet Rampedi and Stephan Hofstatter. *Taxman's rogue unit ran brothel*: 09 November 2014 - 02:05 (accessed on 23 December 2019)
[123] *Supra.*

5.2 Examples of covert operations

A covert operation is an investigation technique designed to obtain evidence by use of agents whose true role is undisclosed to the target, the target in this context is the person being investigated. There are two major forms of covert operations namely:

- Undercover operations, and
- Surveillance operations.[124]

Several distinctions define these two types of covert operations. Undercover operations seek to develop evidence directly from people involved in the offence using disguised and deceit. Rather than waiting for the information to come by other routes, there is a conscious decision to seek it out. In contrast, surveillance operations use the skills of observation to determine activity of individuals. Surveillance operations are designed to gather information.[125]

The courts in various jurisdictions including South Africa recognise these investigative methods which employs disguise and deceit tactics, on condition that:

- they are not fishing expedition but based on probable cause,
- the basis of the operation must be legally sound and defensible in court, and,
- most importantly they must not violate the individual's reasonable expectation of privacy.[126]

It is important for one to seek legal counsel before engaging in a covert operation to ensure or minimise the risk of the evidence or information collected being declared illegal or unconstitutionally obtained. For instance, in some countries it is illegal to audiotape a conversation provided one has consent from both parties. In South Africa however, consent is not required as long as the other party recording the conversation is party to such conversation.

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[124] Rita Risk and Investigation Training Academy Part 3 at page 3.301.
[125] *Supra.*
[126] *Supra.*

Entrapment is also another challenge or an issue for consideration when one is to embark on a covert operation, especially undercover. Entrapment occurs when law enforcement officers or government agents induce a person or target to commit a crime that he or she is not previously disposed to commit.[127]

5.3 Can SARS Collect Information Covertly

Van Loggerenberg in his book wrote that as SARS gradually grew to be one of the best revenue collectors, the institution was guided by a number of principles and one of its philosophy was that taxpayers and traders want to do the right thing, meaning they want to pay tax thus contribute to building the nation and also fulfil their social contract.

> Van Loggerenberg in his book Rogue wrote that "it was equally important for taxpayers and traders to be sufficiently educated, not only about how to comply and when to do so, but also to be reassured that their financial contributions to the state went towards government programmes aimed at developing society as a whole. For those who deliberately choose not to comply, there needed to be a credible enforcement capability that demonstrated the negative consequence of disregarding the law" (Rogue at page 17).[128]

Van Loggerenberg in his book also gave an inside into SARS's enforcement strategy, which according to him had three legs:

- The first aimed to demonstrate that SARS's enforcement units had the ability to reach all tax types and taxpayers types in all the corners of the country, this was commonly referred to as the "width" part of the strategy,
- The second leg, is called the "depth" part, projected the ability and capacity to deal with the most complex and sophisticated tax crimes regardless of the time and effort invested until completion,
- The last leg was called "leverage", this technique combined both the width and depth legs, SARS would join hands with other law-enforcement agencies and state departments to seek capacity that could effectively be leveraged to "punch above our [SARS] weight".[129]

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[127] *Supra.*

[128] Van Loggerenberg, J with Lackay, A. 2016. *Rogue the Inside Story of SARS's Elite Crime-busting Unit*. Jonathan Ball Publishers: Johannesburg & Cape Town *at page 17.*

[129] *Supra*

According to Van Loggerendberg SARS cooperated with other law enforcement agencies and the latter denied that they did collect intelligence covertly in terms of the National Intelligence Strategic Act (NIS Act) as alleged.

'Covert collection' means the acquisition of information which cannot be obtained by overt means and for which complete and continuous secrecy is a requirement.[130]

Section 209 of the Constitution recognises intelligence service only from SAPS and SANDF and further that any intelligence other than the two must be established by the President. [131]

Chapter 5 of the TAA provides for the powers and arsenal at SARS disposal to collect information in order to fulfil its mandate of collecting revenue, and, there is no specific provision that expressly empowers SARS to collect relevant information in that manner.

SARS is further not a member of the National Intelligence Structure (intelligence structure) which according to the National Strategic Intelligence Act 39 of 1994 (NSI Act) can conduct covert operations as per the Intelligence Act. Section 1 of the Intelligence Act defines the members of the National Intelligence Structures as:

Means-

> *(a)* the intelligence division of the National Defence Force;
> *(b)* the intelligence division of the South African Police Service;
> *(c)* the Agency (National Intelligence Agency as referred to in section 3 (1) of the Intelligence Services Act, 2002 (Act 65 of 2002)); and
> *(d)* the Service (South African Secret Service as referred to in section 3 (1) of the Intelligence Services Act, 2002 (Act 65 of 2002);

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130 Section 1 National Strategic Intelligence Act 39 of 1994

131 Establish and control of intelligence services: Any intelligence service, other than any intelligence division of the defence force or police service, may be established only by the President, as head of the national executive and only in terms of national legislation. The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility.

SARS is not included on the list as a member; this is the view of the Public Protector, and Advocate Sikhakhane. The Public Protector in her report also found that the Inspector General of Intelligence share the same view in a classified report which was sanction by the Inspector General of Intelligence which the Public Protector is currently requesting the Inspector General of Intelligence to declassify.

Although there has been denial of the illegal establishment of the so-called Rogue unit there has been overwhelming support by the Nugent Commission, Sikhakhane report, the National Intelligence Committee, and ordinary citizens for SARS to have its own intelligence unit to fight illicit economy.

It appears that the issue of the Rogue unit will find its way to the Constitutional Court, as Minister Pravin Gordhan is currently taking the Public Protector's report on review and on the other hand both the Nugent Commission and the High Court has made findings that there was nothing untoward the establishment of the Rogue unit .

However Judge Nugent conceded that the conduct of the members of the unit was not investigated by his commission, he also recommended that SARS can have such an intelligent unit but it must operate within limits, the implications of that is that and it is respectfully submitted that if it could be found or investigated that the said Rogue unit conducted itself as alleged, for instance communication interception, and, bugging of the NPA offices were carried out such conduct would be illegal if the necessary procedures were not followed to conduct such operations.

5.4 The Public Protector's report

The Public Protector in her report investigated inter alia whether SARS in the tenure of Mr Pravin Gordhan as the Commissioner established an investigative unit in violation of South African intelligence prescripts.

The genesis of SARS having Intelligence Unit dates back to the year 2007 or even before that as found by the Public Protector when the then SARS Commissioner Mr Pravin Gordhan penned a memorandum titled *"To fund intelligence capability within NIA in support of SARS*" requesting funding for the formation of an Intelligence Unit from the former Finance Mister Mr Trevor Manual. The memorandum requested approval to fund a special capability Unit with the National Intelligence Agency (NIA) to supply SARS and law enforcement with the necessary information to address the illicit economy.

The Public Protector in her report[132] regarding this issue copied paragraph 2.1 and 2.2 and 2.3 of the said memorandum which suggested that SARS knew at the time of the request that it did not have the legislative authority and capacity to conduct the investigation sought hence the need for collaboration with NIA:

> 2.1. Collecting tactical intelligence invariably means penetrating and intercepting organised crime syndicates. This is an activity for which SARS does not presently have capability (including the legislative mandate to manage clandestine activity)
> 2.2. Discussions are taking place with the National Intelligence to supplement SARS intelligence capacity. NIA is willing to create a ring fenced capability, provided funds are made available to cover personnel costs. All other costs will be covered by NIA. NIA is willing to formalise the above mentioned arrangement into a MOU.
> 2.3. We therefore request that NIA's budget be increased to fund the creation of this special capability[133].

The recommendation was supported by the General Manager: Enforcement and Risk and was approved by both the Deputy Finance Minister and the Minister of Finance on the 22 February 2007. It is worthwhile to note the

[132] Public Protector South Africa: report into investigation of violation of the Executive Ethic's Code by Mr Pravin Gordhan, as well as allegations of maladministration, corruption and improper conduct by South African Revenue Service, at page 42.
[133] *Supra at page 43.*

comments of the Deputy finance Minister, who commented as follows: "supported however this is a strange way of executing what I consider to be the mandate of the NIA…it seems as if it's an add-on rather than part of NIA's mandate.[134]"

The contents in the above memorandum according to the Public Protector was not disputed and safe to say that SARS acknowledged that at the time it needed both the funding and collaboration with the NIA to penetrate and infiltrate the concerned crime syndicates.

The use of the words on the memorandum '*clandestine activity'* which means "kept secret or done secretively", it is submitted, suggest that covert operation was one of the tools or arsenals that SARS wanted to use to penetrate these well-funded and sophisticated syndicates in this context.

The KPMG report issued on the 4 December 2015 found that SARS had entered into an agreement with NIA in the year 2002 to enhance the fulfilment of their responsibility in terms of their legal mandate. It was acknowledged that NIA is primarily responsible for the gathering, correlation, and analysis of domestic intelligence and also fulfilment of the national counter-intelligence responsibility and the gathering of departmental intelligence, when requested.[135]

This meant that the two parties recognised that intelligence gathering was not within the powers and legal mandate of SARS. It also meant that there would be instances where SARS would require access to specialised surveillance. For various reasons the intended mechanism and relationship between SARS and NIA did not materialise as intended resulting in SARS continuing to develop its own capabilities, this according to the Public Protector was caused by lack of trust and cooperation between the two Institutions.

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[134] *Supra.*

[135] Public Protector South Africa : report into investigation of violation of the Executive Ethic's Code by Mr Pravin Gordhan ,as well as allegations of maladministration, corruption and improper conduct by South African Revenue Service.

The former Minister of Intelligence was one of the Ministers who were requested on or around the 09 March 2007 in a memorandum to approve that SARS and NIA jointly work in covert collection and surveillance of strategic priorities relating to border intelligence. The unit would be staffed by SARS's personnel under the command and employment of the NIA but the former Minister did not approve.[136]

SARS is not mentioned in terms of relevant legislation as one of the national intelligence structures established in terms of NSI Act and can only work with other law enforcement agencies within the principle of co-operative government in achieving its objectives.[137]

The Public Protector in her report quoted inter alia section 209 of the Constitution which provides that any intelligence service other than any intelligence division of the defence force or the police service may be established only by the President, as head of the national executive, and only in terms of national legislation.

The Public Protector found that the Constitution, the TAA and the NSI Act do not include SARS as one of the Institutions listed by the NSI Act or confer powers on SARS to gather intelligence covertly.

5.5 Findings by the Nugent Report

Judge Nugent has a different view contrary to the Public Protector, the latter found in his report that the NSI Act prohibits the covert gathering of certain intelligence, which applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax[138].

[136] *Supra* at paragraph 5.2.12-13.
[137] *Supra* at paragraph 5.2.56.
[138] Final Report: Commission of Enquiry into Tax Administration and Governance by SARS page 76, paragraph 9.

As to the conduct of the concerned members of the Unit, the judge acknowledged that the members might have acted unlawfully or might have acquired intelligence gathering equipment unlawfully but maintains that he saw no reason why SARS was and could not establish and operate a unit to gather intelligence on the illicit trade, even covertly within limits.[139]

5.6. Findings of the Sikhakhane Report

This report was sanctioned to investigate Van Loggerendberg's conduct in line with a series of Sunday time's newspaper articles about "a love affair that rocked SARS". According to the testimony by one Belinda Walter a self-confessed triple agent, she had a love affair with Van Loggerendberg who had confided in her that he was intercepting communication of her clients, this was refuted by Van Loggerendberg who however admitted to the affair which he testified had in all material time disclosed to his SARS seniors.

According to the judgment in the *Wingate-Pearse v Commissioner for the South African Revenue Service case,* Belinda Walter, an attorney, represented Carnilinx one of the companies in the tobacco industry. Her law practice has been focusing on the tobacco industry since 2009: advising clients on customs and excise issues and matters pertaining to bonded warehouses for excisable items such as cigarettes; assisting the State Security Agency (SSA) in initiatives relating to crimes and syndicates, particularly in the tobacco industry; and, in conjunction with the SSA, she initiated the establishment of the Fair-Trade Independent Tobacco Association (FITA) in June 2012.[140]

The provisions of NSI Act were interpreted or found by the Sikhakhane Commission:

> "to regulate the functioning of intelligence structure in South Africa and prohibits the conducting of covert intelligence gathering by structures other than the National Defence Force, the SAPS, or the State Security Agency. Any

[139] *Supra*
[140] *Wingate-Pearse v Commissioner for the South African Revenue Service* (29208/15) [2019] ZAGPJHC 218 (17 July 2019) para 12.

> assessment of the NRG must therefore be made while bearing in mind that SARS's mandate is to ensure the efficient and effective administration of the revenue collecting system of the Republic and the control over the export and import of certain goods, in doing so SARS is required to enforce and implement the relevant tax legislation".[141]

The Sikhakhane Commission found further that:

> "SARS is not responsible for crime intelligence or covert intelligence gathering, therefore the structure of our legal system envisages that entities such as SARS, the SAPS, and the SSA will work together to address the areas of concern. Any investigative activities by SARS officials must therefore be conducted in this context".[142]

The Commission in this way inter alia found regarding the establishment of the Special Project Unit, HRG, and High-Risk Investigation Unit, The establishment of the unit without the requisite statutory authority was indeed unlawful, and, further that there is prima facie evidence that the unit have abused its powers and resources by engaging in activities that resides in other agencies of government.[143]

5.7 *Wingate-Pearse* and others v CSARS case[144]

The cause of action started during April 2006 when SARS investigated Mr Wingate-Pearse's alleged under declaration of taxable income. Mr Wingate-Pearse is a businessman a shareholder in Carnilinx (Pty) Ltd (Carnilinx), a mid-tier cigarette manufacturer, and a member and director of various other entities with interests in the clothing industry.

SARS re-opened assessments from 1998-2005 which were older than 3 years and raised additional assessment in terms of the relevant governing legislation. Pursuant to the additional assessment SARS was tipped by a unit within SAPS that the taxpayer might be under declaring his taxable income, this led to SARS

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[141] Adv Muzi Sikhakhane*. 05 November 2014 Investigation Report on the conduct of Mr Johan Hendrikus Van Loggerenberg page 87-88.*

[142] *Supra* at paragraph 89.

[143] *Supra* at paragraph 188.2.

[144] *Wingate-Pearse v Commissioner for the South African Revenue Service* (29208/15) [2019] ZAGPJHC 218 (17 July 2019).

approaching the High Court for a search and seizure warrant which was duly obtained. Approximately 2000 documents were seized, an inventory and index of the documentation seized was compiled and made available to Mr Wingate's mother who acted on his behalf.

SARS estimated that Mr Wingate-Pearse had grossly under-declared his taxable income for the relevant periods of assessment. SARS' estimate was based on a capital reconciliation (a 'lifestyle audit') a process by which it considered whether his declared income, including his non-taxable accruals and receipts, were sufficient to have financed the growth of his net asset position, taking his living expenses into account. According to SARS, it established a substantial shortfall, indicating that Mr Wingate-Pearse had income from sources that he failed to declare in his tax returns for the relevant period of assessment.[145]

Belinda Walter had at some point represented Mr Wingate-Pearse this is the same lady mentioned above who was alleged to have been involved in a romantic relation with Van Loggerendberg as per the Sunday Times report and her evidence in the Sikhakhane report.[146] Mr Wingate-Pearse relies on the evidence by Belinda Walter that SARS employed illegal intelligence gathering measures against him.

It is Mr Wingate-Pearse's case that he was a victim of what he described as SARS' 'covert intelligence unit' that was known as 'Tiger Group', 'Special Projects Unit' or 'SPU', 'National Research Group' or 'NRG' or 'HRIU' (HRIU). Van Loggerendberg (second respondent) and Pillay (third respondent) were, according to him, linked to the HRIU. He alleges that the HRIU was established to conduct illegal covert intelligence operations and that Van Loggerendberg, on behalf of SARS, conducted covert surveillance operations of and concerning him and he intercepted and monitored his communications. He contends that

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145 *Supra.*

146 *Supra* at paragraph 12.

the operations of the HRIU infringed several of his Constitution ally protected rights.[147]

The relief that he sought from the court according to the judgment in the *Wingate-Pearse and others v CSARS case*, which is more relevant for this contribution, are *inter alia*:

> a. He sought a declaratory order that the establishment by SARS of the investigating unit, HRIU, was without statutory authority, unlawful, inconsistent with the Constitution and invalid,
> b. A declaratory order that the conduct of SARS and of Van Loggerendberg in respect of him 'was biased and/or prejudicial and/or discriminatory, and accordingly inconsistent with the Constitution and invalid,
> c. The search and seizure was unlawful and unconstitutional and that all documents obtained pursuant thereto were illegally obtained and all actions taken throughout the process, illegal and invalid.

Courts' decision

The court held in relation to the Rogue unit saga, inter alia as follows that Mr Wingate-Pearse's case was based on issues that relates to the establishment of the Rogue unit that required factual determination, and, the motion court cannot be burden with such a responsibility. The court held that in motion proceedings, SARS' version should be adopted as the yardstick in determining whether Mr Wingate-Pearse can succeed with the relief he seeks. Motion proceedings in which final relief is sought cannot be used to resolve factual issues because they are not designed to determine probabilities.[148]

The court held that it had to accept the facts alleged by SARS, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers[149].

147 *Supra* at paragraph 17.
148 Supra para 26 at page 13
149 *Supra*

The court went further to say that the Sikhakhane report that Mr. Wingate-Pearse relies on was not considered by the Nugent commission in its final report that support SARS' stance that Mr. Wingate-Pearse's allegations about the existence of a Rogue unit within the ranks of SARS are without a sound factual basis.

The court held that when SARS investigated Mr. Wingate-Pearse's tax affairs the HRIU was not even in existence as it was established in the year 2007. HRIU or Mr. Van Loggerenberg was not in any way involved in the investigation into Mr. Wingate-Pearse's tax affairs, nor did Mr. Van Loggerenberg provide any oversight. The deponent to SARS' first answering affidavit, Mr. Pieter Engelbrecht, was involved and he did not report to Van Loggerendberg.[150]

The court in this way relied inter alia on the findings by the Nugent Commission in not accepting the findings of the Sikhakhane report, in that Judge Nugent found that advocate Sikhakhane failed to convince him that the HRIU was unlawfully established. A Sunday time apology about their story was also mentioned in the Nugent report which was a huge blow to the narrative that there HRIU was unlawfully established.

The court also found that SARS Advisory Board chaired by Judge Kroon, was also mentioned in the Nugent findings, where they had issued a media statement, saying the unit was unlawful, but in evidence Judge Kroon told the Commission that was not a conclusion reached independently by the Board, but had been adopted from the Sikhakhane panel, and he had come to realise it was wrong.[151]

The court in this way rejected the evidence that the HRIU known as the Rogue unit was unlawfully established and held that the evidence gathered by SARS leading to and during the audit was not unlawfully obtained, not mainly that the

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150 *Supra para 29*

151 Judge R Nugent.*11 December 2018.Commission of inquiry into Tax Administration and Governance by SARS, page 77, paragraph 11.*

Unit was lawfully established but that the Unit did not exist when Mr Wingate-Pearse's tax affairs was investigated.

5.8 Critical analysis of the judgment in *Wingate-Pearse and others v CSARS case.*

It appears from the judgment that the court did not want to be drawn in the debate of whether the Rogue unit was lawfully established even though it had to make some sort of ruling on this aspect because it was brought up by Mr. Wingate-Pearse as a ground to set aside the evidence gathered against him. The court did not make a finding determining whether SARS has a legal mandate to collect covert information but rather whether there existed of evidence that there was indeed a Unit/s within SARS that bugged the NPA offices or conducted itself improperly as alleged by the Sunday Times.

This was confirmed by what the court held regarding motion proceedings, that motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities. The court accepted SARS's version in denying allegation of the unlawful establishment of the Rogue unit because it did not "constitute bald or uncreditworthy denials or are palpably implausible, far- fetched or so clearly untenable that they could safely be rejected on the papers".

This it is submitted, means that action proceedings were more suited to deal with this aspect and not motion proceedings as found by the court, it is further submitted that there has not been a clear court ruling at the time of this contribution, answering the question of whether SARS has the power to conduct covert operations. Judge Nugent had in his report said that he "sees no reason why SARS was not and is not entitled to establish its own unit to gather intelligence on the elicit trades, even covertly, within limits".[152]

[152] *Supra at page 76 para 09.*

Judge Nugent appears, it is submitted, to be expressing an opinion and/or making a recommendation just like most commentators including Adv Sikhakhane made that SARS can establish its own intelligence unit that can operate covertly but within limits.

The challenge with the phrase “within limits” is: does it mean SARS must work with other agencies as held by both the Public Protector and Adv Sikhakhane? Or that SARS may keep people under surveillance in the public domain but not in private, may watch a person or property such as business premises, residences, containers, etcetera but only in the public domain, may not listen to or record private conversations unless a SARS official is a party to the conversation[153], or conduct covert operation to a limit that does not infringe taxpayer’s rights.

The Public Protector’s report which found differently to judge Nugent has been sent for a review and hopefully the court will provide guidance and clarity on this matter. What judge Nugent had however found confidently is that there is no factual evidence to show that the Unit was unlawfully established; he found that he had requested Adv Sikhakhane to convince him on this issue but the latter had failed. The question still remains for the purpose of this research report is whether SARS can collect information covertly? The question is not whether the Rogue unit was lawfully established but the capability to covertly collect information by any investigative Unit legally established within SARS.

The challenge again is that the judge only stated in the report (Nugent report) that Adv Sikhakhane re-submitted to him what he had previously found in his report and he was not convinced that the unit was unlawfully established. The judge Nugent, it is submitted missed the opportunity to give more clarity on SARS powers by stating in detail what part or parts of the report he did not agree with and the reasons thereof.

[153] Supra at page 77 para 10.

The other challenge is that the finding that the Rogue unit was not unlawfully established is based on a technical point that there is no proof to either suggest that such a unit ever existed or it was established unlawfully, Judge Nugent should have perhaps in his finding stated for instance that indeed SARS can operate covertly and the legislative basis for that, instead judge Nugent gave what it appears to be a recommendation.

5.9 Critical analysis of the findings by the Nugent Commission and the Public Protector findings.

It appears that the findings of the Public Protector and that of the Nugent Commission differs materially with regards to the question of whether the so-called Rogue unit was lawfully established, the Nugent Commission finding that the Rogue unit was lawfully established whilst the Public Protector found that it was unlawfully established.

The Public Protector:

It is worth noting that the findings of the Public Protector are binding until reviewed by the High Court. It is also noteworthy that the judgment in the Wingate-Pearse matter handed down on the 17 July 2019 did not make mention of the Public Protector's findings which were released on the 05 July 2019 but elected to mention what was remarked by the Nugent Commission regarding the Rogue unit saga, be that as it may both the Public Protector and Wingate-Pearse case findings are binding.

The Public Protector has found that SARS does not have powers in terms of chapter 5 of the TAA to covertly gather intelligence, the latter has also in her report found that the NSI Act does not recognise SARS as one of the institutions that falls under the security cluster for purposes of the NSI Act, thus not capable of covertly collecting intelligence. The Public Protector has also quoted section 209 of the Constitution which provides that only the President

through legislation can establish an entity other than SAPS and SANDF to gather intelligence.

The Public Protector found that SARS can only gather such intelligence covertly through collaboration and assistance by the NIA thus SARS cannot independently gather intelligence covertly as it is prohibited by both NSI Act and the Constitution to do so, the question might be would SARS be found wanting should it gathers information covertly within limits as implied by Judge Nugent above, for example, by conducting surveillance and other operations in such a way that it does not infringe the right to privacy of the taxpayer?

It is submitted that it would be difficult to fault SARS if they would conduct such operation within “limits”; this is also the view of the Sikhakhane Commission according to Judge Nugent in his report. Van Loggerendberg in his book also wrote that this is how they conducted themselves; they conducted surveillance only in public places.

Nugent Commission

Judge Nugent on the other had has a different view, he found that the NSI Act does not apply to SARS, the Act deals with gathering intelligence information that is a threat to national security, whilst SARS is in the business of collecting information or intelligence to fulfil its legislative mandate of collecting revenue.
Judge Nugent found that the Rogue unit was not unlawfully established and opine that he does not see any problem with SARS establishing its own intelligence unit to collect intelligence to fulfil its mandate.

The challenge about judge Nugent’s finding is that he did not elaborate more on his finding that the provisions of the NSI Act does not apply to SARS. The latter did not refer to the provisions that were relied upon by the Sikhakhane Commission to find that SARS does not fall under the security cluster and give his detail interpretation.

The judge it is submitted made a swiping finding that the NSI Act does not apply to SARS and that Adv Sikhakhane failed to convince him why the unit was unlawfully established, no mention of what the Constitution provides, case law if any or national legislation that he relied on. Most institutions and commentators even the Sikhakhane Commission recommends that SARS should have its own intelligence unit to infiltrate criminal syndicates, the question is: does South Africa have any legislation empowering SARS to covertly gather information?

If the argument is that the NSI Act does not apply to SARS, does that mean SARS can independently conduct covert operations to collect tax, and if that is the case how then does one interpret the provisions of section 3 of the NSI Act which empowers organs of state or department to gather intelligence but not covertly provided they get assistance from SAPS or SANDF. If the contention remains that the emphasis is on information threatening the security of the State, is tax evasion which many consider treason not a threat to State security.

5.10 The finding after assessment of the Nugent, Sikhakhane, Public Protector report and *Wingate-Pearse and others v CSARS case*

This research has found no legislation that directly confers SARS with powers to <u>independently</u> gather information covertly to achieve its legislative objective i.e. revenue collection however it does not mean that SARS cannot follow legal process to obtain warrants or court orders should it wish to gather information to fulfil its legislative mandate.

The research has found no provision in the TAA or the Constitution empowering SARS to covertly gather information; however, the TAA empowers SARS to conduct criminal investigations and to take cognisance of the taxpayer's constitutional rights during such investigation. This means that if SARS intends to bug private or business premises of taxpayers it must follow the correct procedure and obtain a warrant or a court order to do so.

Judge Nugent had found that “NSI Act prohibits the covert gathering of certain intelligence, which applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax”[154], the Public Protector however found differently. There is in this way a debate whether intelligence relevant to tax collection, is or is not intelligence in terms of the NSI Act, this debate will hopefully be clarified by the court in a pending review case *Gordhan v Public Protector and Others* (48521/19) [2019] ZAGPPHC 311; [2019] 3 All SA 743 (GP) (29 July 2019) against the Public Protector’s finding by Mr Pravin Gordhan.

It is therefore submitted that SARS can covertly gather information for its purpose provided it does not infringe taxpayer’s constitutional rights. SARS officials authorised may keep surveillance on taxpayers in public but not in private thus within limits, audio record taxpayer as long as a SARS official participate in the conversation and this was also found by the Sikhakhane Commission according to the Nugent report. According to the report SARS May act as follows:

- “May keep people under surveillance in the public domain but not in private,
- May follow a person or vehicle in the public domain but not in private,
- Probably may place an electronic tracking device on property to trace its movements. It may however not place an electronic tracking device on a vehicle to follow the movements of its driver because it impinges on his or her privacy,
- May watch a person or property such as business premises, residences, containers, and etcetera but only in the public domain,
- May take photographs or videos of people or property in the public domain but not in private,
- May not listen to or record private conversations unless a SARS official is a party to the conversation,
- May not electronically record third party conversations by using listening devices,
- May record conversations between SARS officials and third parties.
- May accept information from informers on the basis that their identities will not be revealed,

[154] Judge R Nugent.*11 December 2018.Commission of inquiry into Tax Administration and Governance by SARS. page 76 para 9.*

- May accept information from a person even if it knows that the information was unlawfully obtained. It may however not accept stolen property".[155]

5.11 Conclusion

SARS is a government institution which must comply with the provision of section 195 of the Constitution when fulfilling its legislative mandate, in this way it must conduct its affairs professionally, cost effectively and most importantly must conduct its affairs to some level of transparency in its dealing with the public to boast public confidence in it.

Whilst there is no provision in the TAA to suggest that SARS can gather information covertly, the fact that tax evaders are always evolving and discovering new and sophisticated way of evading tax cannot be ignored and is also alarming. This has started a call to use more efficient and effective way including covert methods to counter these tax evaders, this view is supported by most commentators including the Nugent Commission.

Judge Nugent has found that the provisions of the NSI Act do not apply to SARS whilst the Public Protector and Adv Sikhakhane have a different view. The Public Protector's finding will be reviewed by the High Court and hopefully the Court will squash this debate once and for all, it must also be mentioned that the Public Protector's findings are valid until set aside by the Court of law. This matter, it is submitted will end up in the Constitutional Court no matter the outcome of the review court and in this way, it is difficult to find whether SARS has powers to covertly gather information with certainty or not.[156]

It is in this way submitted that SARS can covertly gather information but within the ambit of the law, without unjustly infringing taxpayer's right.

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155 *Supra.*

156 Judge R Nugent.*11 December 2018*. Commission of inquiry into Tax Administration and Governance by SARS, page *76-77, at para 9* -10.

CHAPTER 6: SEARCH AND SEIZURE IN NEW ZEALAND AND CANADA AND WHETHER ANTON PILLER IS AN ALTERNATIVE TO SEARCH WARRANTS

6.1 Introduction

Canada and New Zealand are developed countries that both recognises Human Rights which are provided for in their respective domestic legislations, and, most importantly for the purpose of this research report both countries recognise and protects the right to privacy which is a primary right to be considered when law enforcement agencies apply for and obtain a search warrant.

It was for this reason that it is important to do a comparative study as to how search and seizure operations are conducted in both Canada and New Zealand. When South Africa was developing its search and seizure provisions for tax purposes, it borrowed from section 231 of the Canadian Income Tax and this is one of the reasons that were considered when deciding to compare Canadian provisions with that of South Africa, a developing country.[157]

This chapter will also examine whether the Anton Piller order can be used as an alternative to search warrant for tax purposes as contained in the South African TAA. An Anton Piller order is used in civil cases where the Applicant or Plaintiff seeks to preserve evidence that would later be used as evidence in a trail, the Applicant must show that there is reasonable believe that the Respondent or Defendant might destroy or temper with the said evidence before discovery stage or before trail.

[157] Mosupa. Constitutional validity of Search and Seizure provisions: a perspective of section 74 of the Income Tax Act 58 of 1962. https://jutastat.juta.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu. Accessed 23/04/2019 paragraph 34 at page 324.

6.2 Search and seizure in Canada for Tax Purposes

According to Carika Fritz, C. "the framework that informs fiscal searches and seizures in Canada is similar to that of South Africa. The South African Bill of Rights contained in Chapter 2 of the Constitution follows the same structure as the Canadian Charter of Rights and Freedoms (Charter) as contained in Part I of the Canadian Constitution. In Canada, a taxpayer's privacy in relation to searches and seizures is protected in terms of section 8, which provides that everyone has the right to be secure against unreasonable search or seizure".[158]'(Carika Fritz, C. at page 254)

Privacy which is protected by section 8 of the Charter is "rather elusive and malleable concept."[159] Privacy was found in the Canadian Supreme Court in *R v Plant*[160] that the purpose of privacy is to promote the dignity, integrity and autonomy of the individual.

Section 24 of the Charter protects taxpayers from unreasonable search and seizures by empowering the courts to remedy the infringement in a manner that is appropriate and just in a given case. Canada has through case law developed methods of excluding what they refer to as tainted evidence in civil cases.[161]

The Canadian legal system is one of those that afford special protection to the right to privacy as it is provided for in the charter. The *Hunter v Southam case*[162] according to various legal commentators contributed a lot in protecting this right. Dickson J. as he then was, first held:

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158 Carika Fritz, C. *(2017), 'Income Tax -related search and seizure in South Africa: lessons from Canada and New Zealand', SA Merc LJ 240, Department of Mercantile Law, University of Pretoria. At page 254*

159 Michaelson, Croft. *"The Limits of Privacy: Some Reflections on Section 8 of the Charter." The Supreme Court Law Review: Osgoode's annual Constitutional Cases Conference 40. (2008). http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/4 (accessed 23/04/2019At page 90.*

160 S.C.J. No. 97, 84 C.C.C. (3d) 203, at 212 (S.C.C.).

161 Louise Summerhill. *Search & Seizure in Tax Cases https://www.mondaq.com/canada/14992/search-seizure-in-tax-cases (accessed 13/05/2020)*

162 *Hunter v Southam* [1984] S.C.J. No. 36, 41 C.R. (3d) 97 (S.C.C.).

> "that section 8 is aimed at protecting the individual's reasonable expectation of privacy, rather than places or structures. He then went on to hold that, although the state interest in law enforcement can override the individual's right to privacy, state intrusion can only occur if there is prior judicial authorization, given that the Charter gives preference to the individual's right to privacy".[163]

Dickson J found further:

> "In other words, before any intrusion can occur, the competing interests of the state and individual have to be balanced by a judicial officer, an individual who must be able to decide the issue in a neutral and impartial manner. Moreover, the standard for judicial authorization, at least where the state's interest is law enforcement, is a credibly based probability that evidence will be found as a consequence of the intrusion".[164]

According to Dickson J searches which were conducted without prior judicial authorisation were prima facia unreasonable and the burden this way shifted to the state to prove otherwise.

(a) Warrantless searches in Canada

The CITA recognises the distinction between regulatory searches and those aimed at investigation. In relation to regulatory searches, the search may be conducted without a warrant, whilst investigation purposed searches require a warrant.[165] Section 231.1 of the CITA provides as follows:

Sections 231.1(1)[166] of the Income Tax Act permit Canada Revenue Agency (CRA) to conduct an audit. The CITA permits auditors to carry out a warrantless

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163 Michaelson, Croft. *"The Limits of Privacy: Some Reflections on Section 8 of the Charter." The Supreme Court Law Review: Osgoode's annual Constitutional Cases Conference 40. (2008). http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/4 (accessed 23/04/2019) at page 89*

164 Supra

165 Carika Fritz, C., (2017), 'Income Tax -related search and seizure in South Africa: lessons from Canada and New Zealand', SA Merc LJ 240, Department of Mercantile Law, University of Pretoria at page256

166 231.1 (1)" An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,
inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and,

examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the

search and seizure, demand information or the production of documents, and compel the taxpayer to assist the CRA in their own audit. Taxpayers are required to provide reasonable assistance, allow the auditors to inspect books, records, and answer proper questions. This power is available to CRA for a *non-investigatory* purpose, to determine tax liability.[167]

Section 231.1(2) of the Act however demands for consent from the owner of the house or warrant to be obtained if the search will extend to the private dwelling of a taxpayer.[168]

The CITA does not expressly provide for a warrantless search, it however provides for inspection which can be done without judicial authorization. Inspection is however akin to a search hence it has been concluded that although the CITA does not expressly provide for warrantless search, the provisions as contained in section 231.1 are sufficient to allow the CRA to conduct a warrantless search. The search however should not be predominately based on criminal investigation.

The circumstances therefore under which a warrantless search may be conducted are that the purpose of the search must be predominately regulatory or for compliance purpose and not for investigative purpose. As soon as the audit becomes an investigation, all of the taxpayer's fundamental rights

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authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act, and for those purposes the authorized person may

subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person".

167 Heller, Rubel Barristers. Drawing the Line Between Audits and Investigations: The "Predominant Purpose" Test in R. v. Jarvis and R. v. Ling http://hellerrubel.com/legal-developments-income-tax-act (30/12/2019)

168 CITA 231.1 (2) Where any premises or place referred to in paragraph 231.1(1) (c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

protected by the Charter are engaged, including the right against self-incrimination pursuant to section 7 of the Charter, and the right to be secure against unreasonable search and seizure pursuant to section 8 of the *Charter.*[169]

Section 231.1(2) does not permit warrantless searches to be conducted at private homes or dwelling of taxpayers provided consent from the owners is obtained or a warrant was issued. The searches are also expected to be conducted during a reasonable time, which is believed to be during business hours.

As indicated above it is imperative that the warrantless searches should be regulatory and non-investigatory in nature, the test for those that are investigatory in nature were laid in the following cases heard in the Supreme Court of Canada *R. v. Jarvis*[170] and *R. v. Ling*[171] (*Jarvis* and *Ling).* The court came up with what is currently known in Canada as the "Predominant Purpose".

According to the test developed by *Jarvis* and *Ling,* the court may consider inter alia the following factors as compiled by Brian *Heller,* Rubel Barristers, in determining whether the search is regulatory or investigative in nature:

a. "Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
b. Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
c. Had the auditor transferred his or her files and materials to the investigators?
d. Was the conduct of the auditor such that he or she was effectively acting as an agent in the collection of evidence?

169 Heller, Rubel Barristers. Drawing the Line Between Audits and Investigations: The "Predominant Purpose" Test in *R. v. Jarvis and R. v. Ling* http://hellerrubel.com/legal-developments-income-tax-act (30/12/2019)
170 [2002] 3 S.C.R. 757.
171 [2002] 3 S.C.R. 814.

e. Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
f. Is the evidence sought relevant to taxpayer liability generally, or is the evidence relevant only to the taxpayer's criminal liability?
g. Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?"[172]

This according Heller Rubel Barristers is what is known as the "predominant purpose test". "Once the predominant purpose of the audit transforms into an investigation, statements can no longer be compelled via section 231.1 of the CITA, documents cannot be seized and examined without a search warrant, and no documents can be required of the taxpayer or third party for the purpose of establishing criminal liability. Any statements or documents obtained under the guise of an audit when the "predominant purpose" is to investigate criminal liability may be excluded from evidence by the Courts".[173]

6.3 Right to privacy and its limitation

Croft Michaelson states despite the protection of the right to privacy that no one lives in an island:

> While we all can agree that individuals should be entitled to maintain some private sphere from which they can exclude others, we must also readily acknowledge that no one lives a hermetically sealed existence, free from interaction with others and a public sphere of activity.[174]

The right to privacy in Canada is protected by section 8 of the Charter, which limits search and seizure powers of the government including police and other government investigators. Section 8 provides that: everyone has the right to be secure against unreasonable search and seizure.

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172 *Supra*

173 *supra*

174 Michaelson, Croft. "The Limits of Privacy: Some Reflections on Section 8 of the Charter." The Supreme Court Law Review: Osgoode's annual Constitutional Cases Conference 40. (2008). http://digitalcommons.osgoode.yorku.ca/sclr/vol40/iss1/4 (accessed 23/04/2019*)*

The courts have defined "search" for section 8 purposes as any state activity that interferes with a reasonable expectation of privacy, this can inter alia include looking for things that are tangible or intangible, such as spoken words and electronic data (*R. v. Morelli*)[175], or scents (*Evans* at paragraphs 12-21; *R. v. Kokesch).*[176, 177]

The greatest expectation of privacy when it comes to territory is generally in a person's home, followed by the perimeter around the home. The lowest expectation of privacy is generally for public places like parks or public buildings, or places where people otherwise have a diminished expectation of privacy, such as prisons.[178]

The Courts in Canada uses the "Totality of the circumstances" test to establish whether the person concerned has the expectation of privacy. This test was established in *R. v. Edwards case.*[179]

The Department of Justice in Canada listed on its website as a guide to establish whether or not a person has a reasonable expectation of privacy the following, determined by looking at all of the circumstances of each case, including whether that person:

- "Was present at the time of the search;
- Had possession or control of the property or place that was searched;
- Owned the property or place searched;
- Had historically used the property or item;
- Had the ability to control or regulate access to that property or place, including the right to admit or exclude others from it;
- Had a subjective expectation of privacy; and

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175 [2010] 1 S.C.R. 253.
176 [1990] 3 S.C.R. 3.
177 Department of Justice Canada. Section 8 – Search and seizure: http://ojen.ca/wp-content/uploads/In-Brief_Section-8-of-the-Charter.pdf. (Accessed 02/01/2020)
178 *Supra.*
179 [1996] 1 S.C.R. 128 at paragraph 45.

- Had an expectation of privacy that was objectively reasonable".[180]

According to the Ontario Justice Education Network "the totality of the circumstances test determines both the existence and extent of the reasonable expectation of privacy. If there is no reasonable expectation of privacy, the protections of section 8 are not engaged and the analysis ends there. If there is a reasonable expectation of privacy of any degree, section 8 will be engaged to prevent state interference except under the authority of a warrant or other reasonable law".[181]

Once it has been determined that a person had a reasonable expectation of privacy, the search will only be permitted under section 8 of the Charter if it was reasonable, and the basic requirement for a search to be reasonable is a warrant. There is a presumption in Canada established in the *Hunter v Southam* case that if the search was conducted without a warrant, it is unreasonable until the State proves otherwise.

The factors to prove legal authorization were set out in *R v Collins* (1987), as follows:

- "the search is authorized by law (either statute or case law);
- the law that authorizes the search is itself reasonable; and
- the search is carried out in a reasonable manner",

even if police have obtained a warrant or legal authorization, a search can still be found to be a violation of section 8 if it is established, on the basis of the above factors, that the search is carried out unreasonably.

[180] Department of Justice Canada. Section 8 – Search and seizure :http://ojen.ca/wp-content/uploads/In-Brief_Section-8-of-the-Charter.pdf (Accessed 02/01/2020)

[181] Ontario Justice Education Network. Section 8 of the Charter: the right to be secured against secure unreasonable search and seizure. http://ojen.ca/wp-content/uploads/In-Brief_Section-8-of-the-Charter.pdf .(accessed 13/05/2020)

6.4 Illegally obtained evidence

In the Hunter v Southam case it was also held that searches conducted without prior judicial authorization, warrantless searches, were held *prima facie* unreasonable, with the state bearing the onus of demonstrating why the search was reasonable in the circumstances.

Unlawfully obtained evidence is admissible at common law. However, under the Canadian Charter of Rights and Freedoms, evidence obtained in contravention of the Charter is inadmissible if its admission would bring the administration of justice into disrepute.[182]

(b) Search and Seizure under a warrant in Canadian Tax Law

Inspection

Section 231.1 of the CITA grants the CRA the power to inspect, audit or examine the books and records of a taxpayer and any documents of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under the CITA.

The CRA does not require a warrant to inspect business premises for tax purposes, however, it requires a warrant to inspect private dwelling if the is a reasonable believe that information they need to complete the audit is located in a private dwelling.

The provisions of section 231.1 (3) of the CITA makes provision for a warrant to be obtained for purposes of inspection and reads as follows:

Where, on ex parte application by the Minister, a judge is satisfied by information on oath that:

[182] ED Kroft CQ, Blake, Cassels, Graydon LLP. Dealing with Tax Officials: Selected issues in Administration, Enforcement and Appeals at page 91. http://www.cba.org/cba/cle/PDF/TAX11_Kroft_Paper_TaxOfficials.pdf. (accessed 13/05/2020)

(a) there are reasonable grounds to believe that a dwelling-house is a premises or place referred to in paragraph 231.1(1)(c),
(b) entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
(c) entry into the dwelling-house has been, or there are reasonable grounds to believe that entry will be, refused, the judge may issue a warrant authorizing an authorized person to enter the dwelling-house subject to such conditions as are specified in the warrant but, where the judge is not satisfied that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, the judge may
(d) order the occupant of the dwelling-house to provide to an authorized person reasonable access to any document or property that is or should be kept in the dwelling-house, and
(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act, to the extent that access was or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

The CRA does not however require a warrant in terms of section 231.1 (2) if the owner or occupant consents to the warrantless inspection.

Search warrants.

CRA does not need a search warrant as long as the audit is for regulatory purpose, however, as soon as it becomes clear that the audit is taking an investigation turn a warrant is needed. The test that can be used to determine this is the Predominant Purpose as already discussed above.

Section 231.3 (3) of the CITA provides:

that a judge may issue the warrant referred to in subsection 231.3(1) where the judge is satisfied that there are reasonable grounds to believe that:

(a) an offence under this Act was committed;
(b) a document or thing that may afford evidence of the commission of the offence is likely to be found; and
(c) the building, receptacle or place specified in the application is likely to contain such a document or thing.

When comparing the reading of section 231.1 dealing with regulatory inspections and 231.3 dealing with jurisdictional fact for a warrant, one can observe that section 231.3 requires ground to believe that an offence under the tax Act has been committed, whilst the reading of section 231.1 merely provides for gathering of information for purposes of audit.

It is in this may respectively submitted that section 231.1 is regulatory orientated while section 231.3 is more investigative or enforcement orientated and the provisions therein comes into effect immediately when the audit shift to criminal investigation.

Section 231.3 (4) provides for a description as to what should be contained in the warrant, it provides that the warrant must have:

- "the offence for which it is issued,
- identify the building, receptacle or place to be searched,
- the person alleged to have committed the offence, and,
- the warrant must reasonably specify as to any document or thing to be searched for and seized".

The CITA makes provision for a warrant to be obtained under two circumstances, first one is if the authorised officer intends to search the private dwelling of the taxpayer where consent is not given and secondly where the audit of the taxpayer takes form of an investigation and not compliance based. CRA does not need a search warrant for a business premises as long as the information required is strictly for tax compliance or regulatory purposes.

6.5 Comparison between Canada and SA

The framework that informs fiscal searches and seizures in Canada is similar to that of South Africa, the South African Bill of Rights contained in Chapter 2 of the Constitution follows the same structure as the Canadian Charter of Rights and Freedoms (Charter) as contained in Part I of the Canadian Constitution.[183] In Canada, a taxpayer's privacy in relation to searches and seizures is protected in terms of section 8, which provides that everyone has the right to be secure against unreasonable search or seizure.[184]

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183 Fritz, C., (2017), 'Income Tax -related search and seizure in South Africa: lessons from Canada and New Zealand', *SA Merc LJ 240*, Department of Mercantile Law, University of Pretoria at *page 254-255.*

184 *Supra* at page 255.

Similarly in South Africa section 14 of the Constitution provides for the right to privacy, that the a person has a right not to have their person, home search and their property seized, this is of course subject to the limitation clause which determines the person's reasonable expectation of privacy.

According to Fritz C, "in South Africa, no distinction is made between regulatory and investigatory searches and seizures, whilst such a distinction is indeed made in Canada, section 45 of the TAA in South Africa does make provision for unannounced inspection for compliance but documents or articles may not be seized. In Canada a warrant is not required for regulatory searches except in cases where the authorised officer intends to extend the search to the taxpayer's private dwelling".

In South Africa section 63 of TAA specifically provides for warrantless search in cases of urgency where a senior SARS officer is of a reasonable believe that delay in obtaining a warrant might result in the information in possession of the taxpayer being tempered with or destroyed. In Canada a warrantless search is only conducted upon consent from the taxpayer if the authorised officer intends to search the private dwelling of the taxpayer, other searches do not require a warrant provided they are regulatory in nature.

In South Africa, it is not necessary to provide particulars relating to what specific items are subject to the search, in Canada; however, the warrant should specify what items will be subject to the search and seizure.[185] This is an important aspect, because, in Canada, the warrant provides the parameters for the search and seizure, which ensures certainty and transparency. If the warrant contains details of the specific items that are subject to scrutiny, both the investigating officer and the taxpayer are able to identify the ambit of the search and seizure[186].

[185] Supra at page 26.
[186] Supra

6.6 Search and seizure in New Zealand for Tax Purposes

New Zealand like South Africa has both the Income Tax Act and the Tax Administration Act; however, it does not have a single Constitution like South Africa and Canada which embodies all the human rights in one document. That is not to say that New Zealand does not ascribe or recognise Human Rights which are universal to all civilised countries.

Section 16 of the New Zealand Tax Administration Act (NZTAA) makes provision for search and seizure operations, section 16 also refers to Part 4 of the Search and Surveillance Act of 2012 meaning they must be read together when it comes to search and seizure orders.

Section 16(1) of the NZTAA[187] provides that

> the New Zealand Commissioner of Inland Revenue (NZ Commissioner) is entitled at all times, to full and free access to all places and documents for the purpose of inspecting them where this is considered 'necessary or relevant' for the purpose of collecting any tax. The New Zealand Inland Revenue (NZ IR) interprets the phrase 'necessary or relevant' to mean what is 'pertinent' in the NZ Commissioner 's opinion, and includes documents likely to provide any information required for the purposes of any of the Inland Revenue Acts or the NZ Commissioner 's functions.[188]

Woellner RH and Maples AJ refers to the defines a document as : "document refers and includes all forms of storage and extends to 'electronic storage devices e.g. computer hard drives, memory cards, memory sticks, mobile

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187 Section 16(1) Commissioner may access premises to obtain information.
Notwithstanding anything in any other Act, the Commissioner or any officer of the department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such documents.

188 Woellner RH and Maples AJ. In search of Information : Comparison of New Zealand and Australian Access Powers . Journal of Australasian Law Teachers Association Volume 10. At page 151

phones, MP3 players, or any other devices that have the function of storing data electronically".[189]

6.7 Warrantless searches in New Zealand

Warrantless searches are understood to be those searches dictated to by urgency and where there was no judicial authorisation by the official seeking to conduct the search. The searches are conducted urgently where the official would be under a reasonable belief that a delay in obtaining a warrant might result in the destruction of crucial information.

Unlike in South Africa where the TAA expressly provides for warrantless search, search with a warrant for both business and private dwelling, the NZ TAA does not do so. The NZ TAA grants the NZ Commissioner with powers to search all land, building and documents without a warrant except private dwelling, thus warrantless searches conducted on commercial building or land are automatically without a warrant for income tax purposes.

Section 16 provides the NZ Commissioner or anyone authorised wide range of powers to access at all times to any building, land, and all document under the custody of any other person whatever for purposes of inspection. Both subsections (3)[190] and (4) however restrict searches on private dwelling provides that searches or inspection of private dwelling may only be conducted

[189] *Supra at page 156*

[190] Subsection (3) NZ TAA Notwithstanding subsection (1), the Commissioner, an authorised officer, or a person accompanying the Commissioner or the authorised officer, shall not enter any private dwelling except with the consent of an occupier or pursuant to a warrant issued under subsection (4).

(4) An issuing officer who, on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of the Search and Surveillance Act 2012, is satisfied that the exercise by the Commissioner or an authorised officer of his or her functions under this section requires physical access to a private dwelling may issue to the Commissioner or an authorised officer a warrant to enter that private dwelling.

when consent is provided by the occupier of the building or a warrant is obtained.

The NZ Commissioner must comply with the provisions of subpart 3 of Part 4 of the Search and Surveillance Act (SSA) to obtain a valid warrant. The reading of section 16 suggest that inspections or searches conducted in commercial premises requires no warrant to be obtained, however when it comes to private dwellings a warrant or consent must be obtained.

6.8 Searches with a Warrant in New Zealand

Section 16 of the NZTAA refers to the parts of SSA which entails a process to be followed for a valid warrant to be obtained in this way section 16 of the NZTAA refers one to another piece of legislature for a process one has to follow in obtaining a warrant in cases where the NZ Commissioner intends to search private dwellings where consent is not given or likely to be denied.

Section 100 of the SSA provides for a warrant application to be in writing and should have the following:

a) “the name of the applicant,
b) the provisions in terms of which the application is made,
c) the ground upon which the application is made,
d) the description of the place or building to be accessed,
e) the description of item/s to be inspected”.

6.9 Seizures in New Zealand

The NZ TAA differentiates between the seizure of documents in order to conduct an inspection and the removal of documents in order to copy them, section 16C of the NZ TAA, which deals with the removal of documents with a view to conducting a full and complete inspection, requires either the consent of the occupier or a warrant. Section 16B of the NZ TAA, in contrast to section 16C of the NZ TAA, provides that the Commissioner or officer does not need to

obtain consent or a warrant before removing documents from the accessed premises to make copies.[191]

The provisions of section 16B of the NZ TAA is to make copies, whilst, in section 16C, deals with removal of documents for inspection purposes. Section 16B permits the NZ Commissioner or an officer an authorised officer to remove documents accessed under section 16 in order to copy them without a warrant or consent of the owner or person who is in possession of such documents. However it has been a practise by the NZ IR to make copies at the premises without removal , if it is practical to do so.[192]

Section 16B NZ TAA as oppose to how SARS does grant the NZ IR permission to retain the documents indefinitely or upon completion of the audit that at times last for a long period. The documents must be return within a reasonable time.[193]

According to Fritz C "a possible reason why one section requires consent or a warrant for removal and the other does not may be that the taxpayer's rights may be infringed to a greater extent than when the removal is for inspection purposes, and thus safeguards are built in".[194]

6.10 Rights under the Bill of Rights Act 1990 act 109

Just like with South Africa and Canada New Zealand recognise human rights and has promulgated in its domestic law section 21 which aims to safeguard against unreasonable search and seizure. Section 21 provides that everyone

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191 Supra.

192 Woellner RH and Maples AJ. In search of Information : Comparison of New Zealand and Australian Access Powers . Journal of Australasian Law Teachers Association Volume 10. At page 162.

193 Supra.

194 Fritz, C., (2017), 'Income Tax -related search and seizure in South Africa: lessons from Canada and New Zealand', SA Merc LJ 240, Department of Mercantile Law, University of Pretoria page 263.

has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Section 21 is commonly associated with law enforcement, both in terms of investigating offences and carrying out powers of inspection. The privacy values underlying the section 21 guarantee are those held by the community at large[195].

According to Fritz C, privacy values "are not merely the subjective expectations of privacy a particular owner or occupier may have and may demonstrate by signs or barricades. Reasonable expectations of privacy are lower in public places than on private property. The expectation of privacy is greatest in relation to a person's body, the nature of the activities carried on, particularly if involving public wellbeing or governmental control, may affect reasonable expectations of privacy".[196]

6.11 Reasonable expectation of privacy

In New Zealand and other foreign jurisdictions like Canada, and South Africa, the key concept that is used to accommodate Human rights values and law enforcement values, in the context of this paper, the right to privacy, is reasonable expectations of privacy. The concept has been accepted by the Court of Appeal (in New Zealand) as underlying section 21 of the Bill of Rights Act which has the same effect as section 14 of the Constitution of South Africa.[197]

In the jurisdictions where the concept is used, the reasonable expectations of privacy enquiry has two purposes, first and primarily, it is used as a filter, it determines whether particular law enforcement conduct for instance search and

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195 *Supra*

196 *Supra*.

197 Search and Surveillance Powers June 2007, Wellington, New Zealand page 43.

seizure requires infringes on individuals human rights which in this context is the right to privacy, dignity and property.[198]

Secondly, if it is decided that the conduct in issue does need to meet human rights standards, the reasonable expectations enquiry structures the analysis that is required. This analysis focuses on the nature and importance of the interests at stake and the reasonableness of the particular intrusion on the "expectations of privacy" that are involved when set against applicable law enforcement values.[199]

6.12 Comparison between SA and New Zealand

The effects of the search and seizure provisions in these countries are largely similar although differently worded. The New Zealand provisions are aggressively worded as compared to the South African provisions. The NZ Commissioner does not need a warrant to conduct searches in any business premises the latter only need a warrant if a need arises to search taxpayer's private dwelling for tax purposes and to remove documents from the taxpayer's premises to make copies.

In South Africa however a warrant is required for senior SARS officials to conduct search and seizure for in business and private dwelling for tax purposes, warrantless searches are conducted under exceptional circumstances. In this way South Africa as opposed to New Zealand must generally obtain a warrant to effect a search and seizure operation.

Unlike SARS, the NZ I R conducts searches without a warrant from the onset. Although the power to conduct warrantless searches in all instances would assist SARS to verify compliance and detect the commission of offences in an efficient and effective manner, such an approach would not be workable in the

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198 *Supra.*

199 Supra.

light of case law relating to warrantless searches under the South African Constitutional dispensation.[200]

Although the NZ Inland Revenue may enter and search premises without a warrant, removal or seizure is a separate component all together. Before documents may be removed, the purpose of their removal must be determined, if the purpose is to make copies or to determine whether they may be seized, the NZ I R may remove the documents without a warrant or consent.[201]

Both countries recognise human rights in that provision is made for privacy law and remedies if such privacy is violated. It is also note-worth that both countries have borrowed from the Canadian in their search and seizure provisions.

6.13 Anton Pillar Order

Bredenkamp states "that without proper evidence one cannot hope to be a successful litigant. In many cases however, the evidence required is in the hands of one's opponent, one potentially valuable tool that most litigants may be unfamiliar with, that will aid in obtaining evidence from one's opponent, is the Anton Piller order".[202]

An Anton Piller order is a court order obtained to allow a party to obtain and preserve evidence from their opponent. The order gives the right to enter and search the opponent's premises without prior warning, for the purpose of seizing evidence that may be destroyed or tempered with before discovery or trail stage of any judicial proceedings.[203]

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200 Fritz, C., (2017), 'Income Tax -related search and seizure in South Africa: lessons from Canada and New Zealand', SA Merc LJ 240, Department of Mercantile Law, University of Pretoria 266.

201 Supra.

202 Bredenkamp K. Anton Piller Proceedings. https://www.ip-lawyer.co.za/en/newsroom/articles/anton-piller-proceedings . (Accessed 02/01/2020)

203 *supra*

History of the Anton Piller

The Anton Piller has an English origin below is a quote from an English case which played an important role in the development of this order.

> Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say, 'Get out'. … But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permissions. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission – with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.[204]

The above *quote* was pronounced by Lord Denning MR, with the concurrence of Ormrod LJ and Shaw LJ, in *Anton Piller KG v Manufacturing Processes Ltd and Others*[205] a case that has gone down in the annals of English legal history for introducing "a search warrant in disguise[206]".

According to this case the Anton Piller has some resemblance to search warrants, although the order unlike the search warrant does not accord the applicant or plaintiff the right to forcefully access the defendant's property it somehow compels the defendant to give the plaintiff access to his or her property, in that failure to provide such access may constitute contempt of court by the defendant in refusing access to the property.

The Summary of the Anton Piller case:

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204 Yee KP and Pinath SR. The Anton Piller Order: A Search Warrant in Disguise? https://www.skrine.com/insights/newsletter/september-2013/the-anton-piller-order-a-search-warrant-in-disguis (accessed 13/05/2020)

205 [1976] 1 All ER 779, 782-783.

206 *Supra .*

This case involves the Plaintiff a reputable German manufacturer of electric motors and generators who had designed and was on the verge of launching a new frequency converter called “the silent block”. The defendant was the Plaintiff’s agent and dealer in the United Kingdom, and by virtue of that relationship, came into possession of confidential information relating to “the silent block”.[207]

The Plaintiff received a tip that the defendant had been liaising covertly with certain other German companies to produce a copycat of “the silent block” using the Plaintiff’s confidential information. If a copycat of “the silent block” was allowed to hit the market before or their own, the Plaintiff feared that their business would suffer financially loss, in this way the latter wanted to repossess the confidential information and prevent further dissemination.[208]

The plaintiff also wanted any documents showing the Defendants’ wrongdoing to be secured and preserved for purposes of the trial. As such, it sought an injunction from the court to compel the Defendants to deliver up the confidential information and other documents.[209]

Lord Denning found in the Court of Appeal that an Anton Piller Order should be granted under the following circumstances:

1. “It is essential that the Plaintiff should have inspection so that justice can be done between the parties;
2. If the Defendants are forewarned, there is a grave danger that vital evidence will be destroyed, lost, hidden or taken beyond the jurisdiction so that the ends of justice are defeated; and
3. The inspection would do no real harm to the Defendants or their case”.[210]

Consistent with this, Ormrod LJ opined that such an Order should only be made when there is no alternative way of ensuring that justice is done and laid down three essential pre-conditions for making such an Order:

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207 Supra.
208 Supra.
209 Supra.
210 Supra.

1. "There must be an extremely strong *prima facie* case;
2. The damage, potential or actual, must be very serious to the Plaintiff; and
3. There must be clear evidence that the Defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any *inter partes* application can be made".[211]

The court also found that when serving and executing the Order, the supervising solicitor or legal representative should explain the Order to the Defendants and give them the opportunity to consult their own legal representative.

Court found further that "if the Defendants wish to apply to discharge the Order as having been improperly obtained, they must be allowed to do so. If the Defendants refuse permission to enter or to inspect, the Plaintiff must not force its way in. It must accept the refusal and bring it to the Court's attention, if need be, on an application to commit".

Anton Piller in South Africa

South Africa is not isolated from the rest of the world and the Constitution has through section 39 (c) which provides that when interpreting the bill of rights the court may consider foreign law thus gave the South African court a discretion to borrow from foreign jurisprudence. South Africa is also one of the jurisdictions that recognises and apply the Anton Piller order.

According to Khan F, "Anton Piller orders are applications made in secret and without notice to the other party cases where a person (the applicant) who wants to institute legal proceedings against someone else (the respondent), has reason to believe that the respondent is in possession of vital evidence which he or she could easily destroy or hide if they became aware of the legal proceedings to be embarked by the applicant".[212]

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211 Supra.

212 Khan F. What is an Anton Piller Order?. https://www.findanattorney.co.za/content_anton-piller-order (accessed 01/02/2020)

Khan F recognises Supreme Court of Appeal decision of *Universal City Studios Inc. and Others v Network Video (Pty) Ltd*[213] case as one that contributed largely to Anton Piller in South Africa. In passing judgment in that case, the judges said that Anton Piller orders "have become a necessary evil in certain circumstances and will remain so until a successful Constitutional challenge is brought. What is furthermore clear is that by its very nature it violates the rights of persons who are affected by its terms."[214]

Khan F. is the view that "the Courts generally adopt a cautious and circumspect approach to such an application and if the relief is granted, stringent safeguards should be built into the order. Hence the courts will not readily grant such an application unless it is properly satisfied that the applicant has a cause of action against the respondent, which he intends to pursue".[215]

Jurisdictional requirements of the Anton Piller Order

The requirements in South Africa are more or less similar to the ones above in England, because the Anton Piller prima facie invade the right to privacy the courts treat the application with extreme caution. In the *Viziya Corporation v Collaborit Holdings case*[216] the requirements for an Anton Piller order were stated by Corbett CJ:

a) "The applicant must establish a prima facie were he has a cause of action against the respondent which he intends to pursue;
b) that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right);
c) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way".[217]
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213 *Supra.*
214 *Supra.*
215 *Supra.*
216 *Viziya Corporation v Collaborit Holdings (Pty) Ltd & Others* (1189/17) [2018] ZASCA 189 (19 December 2018).
217 Supra at paragraph 22.

The notable similarities and difference of the Anton Piller and search and seizure order:

Search and seizure	Anton Piller
1. Need to apply for an ex parte application were sufficient jurisdictional facts must exist. 2. Gather information in an investigation. 3. Right of forced entry if access is denied by the owner or occupier, the owner will be guilty of an offence if he refuses entry. 4. Prima facie invade the right of privacy and dignity.	1. need to apply for an ex parte application where a cause of action exist 2. Preserve evidence in a cause of action. 3. No right of forced entry if access is denied, the owner might be in contempt of court if he/she refuses entry. 4. Prima facie invade the right of privacy and dignity.

6.14 Can the Anton Piller be an alternative to the TAA Search and seizure

Both the Anton Piller and search and seizer orders are ex parte application obtained in secret and prima facie invade the right to privacy and dignity of the person to which the orders are obtained against. The Anton Piller has even been described as a search and seizure in disguised by the Anton Piller case that played a major role in the development of this remedy.

The TAA search and seizure order is more of an investigative tool or relief that assist SARS to gather information to fulfil its legislative objective, whilst the Anton Piller is more of a preservation of evidence available to the plaintiff or applicant, because of fear of tempering or destruction of such evidence in the later stage of the legal battle.

The TAA search and seizure provision also consists of this quality of preserving information, in that one of the jurisdictional requirements is that the applicant reasonably believe that continuous possession of the information by the defendant or respondent may result in the information being tempered with or destroyed.

The TAA was meticulously drafted bearing in mind the supremacy of the Constitution, this resulted in chapter 5 of the TAA being one of the chapters that would be hard to challenge in court. The legislature in drafting the TAA search and seizure provisions made it difficult for one to challenge the provisions by considering the history of the provisions and the rights that may be possibly infringed when the search and seizure orders are obtained and executed.

The Anton Piller on the other hand is a common law relief which predates the Constitution and had to adopt and synchronize with the provisions of the Constitution, to avoid being inconsistent with the provisions of the Constitution as the supreme law of the Republic . It is in this way submitted that SARS TAA search and seizure provisions which have already been constitutionally tested in the Constitutional Court are more effective than the Anton Piller order. The Anton Piller Order would limit the investigative muscle of SARS in that it is only applicable when one not only intends to take legal action but when it can be sustained that such legal action has high probability of ensuing.

Preferring the Anton Piller order would also defeat one of the purpose of the TAA i.e. to avoid influx of tax dispute into our courts in that for one to employ this remedy the applicant must be in the process of taking the dispute to court and fear that before discovery or trial the evidence which is important for his or her case would have been tempered or destroyed.

It is further submitted that it is not necessary for SARS to be limited to one relief as both these orders are available to SARS, in that SARS may elect to

use the search and seizure during information gathering and may also employ the Anton Piller if necessary in future when taking a matter to court.

It is therefore humbly submitted that the TAA search and seizure order is deadlier, fit for purpose and most effective arsenal at SARS's disposal in fulfilling its legislative mandate.

6.15 Conclusion

Both search and seizure in both Canada and New Zealand are warrantless for search operations on business premises, a warrant is required when there is intention to extend the search to a private dwelling when consent is not or likely to be declined by the owner of the property. Both these countries including South Africa recognises the right to privacy and the principle of reasonable expectation of privacy as a tool to determine the extent to which this right might be limited.

This chapter also considered whether the Anton Piller would be a suitable alternative relief and less intrusive method that can be used as SARS in gathering information; it was found that the TAA search and seizure is more effective, more powerful and less limiting than the Anton Piller. Further that the courts and national legislation have developed the search and seizure provisions in such a way that it is not necessary to seek an alternative.

CHAPTER 7: CONCLUSION

SARS has been given one of the most important and noble tasks, which is to collect tax revenue for the efficient running of this country and it is one of those Institution that support our democracy. To achieve this legislative objective SARS need to be equipped with resources and arsenal in cases where there is non-compliance. One of the resources conferred to SARS is contained in chapter 5 of the TAA in a form of information gathering powers.

For SARS to collect tax it must be placed in a position to be able to determine by audits how much each tax resident is liable for tax, most tax residents are compliant but unfortunately there are those that are making it difficult for SARS to fulfil its mandate. SARS has been bestowed with certain powers to deal aggressively but within the law with such taxpayer, and, the information gathering powers contained in chapter 5 of the TAA is one such example.

SARS has the power to request relevant material in terms of section 46 of the TAA from the taxpayer; it also has the power to interview taxpayers in terms of section 47 about their tax affairs in order to fulfil its legislative objective. With power comes responsibility, SARS must however excise its powers in line with the provision of the Constitution as the supreme law of the Republic , that is without unjustly infringing taxpayer's rights enshrined in the Bill of Rights. SARS must in this way strike a balance in tax collection and taxpayer's right, if not the courts will intervene.

Enquiry:

One of the arsenals at SARS disposal, arguably underutilised is the power to establish a tax enquiry which is presided over by a competent presiding officer for purpose of information. The advantage of this process is that the presiding officer has the inter alia powers to subpoena person being investigated, and, find those who do not cooperate in contempt.

Search and seizure warrants:

SARS also has the powers to obtain search and seizure warrant in terms of section 59 of the TAA to assist in the information gathering process, section 63 of the TAA also makes provision for warrantless search if a senior SARS is under a reasonable impression that a delay in obtaining a warrant can result in the information been tempered or destroyed. Search and seizure prima facie violates the right to privacy and dignity, in this way the common law has established the reasonable expectation of privacy rule to determine the degree to which these search warrants may limit the right to privacy of an individual in each case.

According to this test a person's reasonable expectation of privacy will be diminished when he or she moves into public activities as opposed to activities in the inner sanctum of the home and all inspections conducted in terms of legislation would limit a person's right to privacy, as a result when dealing with inspections or searches, an evaluation in terms of section 36 of the Constitution was required in order to determine whether the limitation was reasonable and justifiable.

Foreign jurisprudence:

The report also did a comparative study to establish whether there are perhaps lesson that might be learned from Canada and New Zealand, the study shows that there are striking similarities in the search and seizure provisions of these countries as compared with South Africa. Tax authorities of Canada and New Zealand do not need search warrants to search or inspect business premises for compliance but require one when intending to search private dwelling of taxpayers, while South Africa requires a warrant as a standard requirement for search and seizure, where warrantless search is an exception to the general rule. The search has shown in this way that South Africa when compared with

developed countries comply with best international practises and that is commendable.

SARS and covert collection of information

The Nugent Commission has found that there is nothing stopping SARS from having its own intelligence Unit that may even covertly operate within limits to infiltrate organised syndicate which threatens the tax base. The Public Protector does not however agree that SARS can operate in that fashion, she held that SARS must work with other competent institution like SAPS for instance to gather intelligence covertly.

Her findings have been taken for review by Mr Pravin Gordhan, and, the court is yet to make a judgment on this matter and provide clarity and guidance. Continuous study in this regard is recommended.

The study has however found that SARS may covertly gather information for tax purposes to the extent that it does not infringe taxpayer's constitutional right.

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