WARRANTED AND WARRANTLESS SEARCH AND SEIZURE IN SOUTH AFRICAN INCOME TAX LAW: THE DEVELOPMENT, OPERATION, CONSTITUTIONALITY AND REMEDIES OF A TAXPAYER

by
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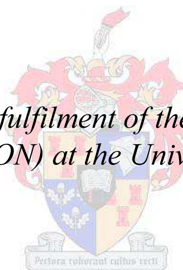

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DECLARATION

I, the undersigned, declare that the content of this assignment is my own original work and has not been submitted, in part of it or its entirety, to any other University to obtain a degree.

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S. Bovijn Date

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WARRANTED AND WARRANTLESS SEARCH AND SEIZURE IN SOUTH AFRICAN INCOME TAX LAW: THE DEVELOPMENT, OPERATION, CONSTITUTIONALITY AND REMEDIES OF A TAXPAYER

Section 74D of the Income Tax Act No 58 of 1962 (the Act) grants the power of search and seizure to the South African Revenue Service, the basic underlying principle being that the Commissioner has to obtain a warrant from a judge prior to a search and seizure operation. The previous section 74(3) of the Act provided that the Commissioner was allowed himself to authorise and conduct a search and seizure operation without the requirement of a warrant. Section 74D of the Act was recently reviewed and the Tax Administration Bill (the TAB) contains the new provisions on search and seizure that will replace section 74D of the Act.

In this assignment, the concept of search and seizure was examined by considering the cases, academic writing and other material on the topic. The objectives were to analyse the development of search and seizure in South African income tax law, to provide a basic understanding of the warranted and warrantless search and seizure provisions of the Act and the TAB, to determine their constitutionality and to determine the remedies available to a taxpayer who has been subject to a search and seizure.

It was found that search and seizure has developed from warrantless under the previous section 74(3) of the Act into the requirement of a warrant under section 74D of the Act into a combination of both under the TAB.

The concept of an *ex parte* application was analysed, which was shown to be permissible in certain circumstances under section 74D of the Act, while it is now compulsory in terms of the TAB. It was shown that the TAB closed the *lacuna* in the Act relating to the validity period of a warrant before it has been executed. It was, however, concluded, regarding whether a warrant expires when exercised or

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whether the same warrant can be used again to conduct a second search and seizure, that the position is not quite certain in terms of the Act and the TAB. It was found that there is no defined meaning of the reasonable grounds criterion, which is often required to be met in terms of the Act and the TAB, but that anyone that has to comply with the criterion must be satisfied that the grounds in fact exist objectively.

The new warrantless search and seizure provisions of the TAB were analysed. It was established that warrantless search and seizure provisions are not uncommon in other statutes, but that the content thereof often differs. The new warrantless provisions were compared to the warrantless search and seizure provisions of, *inter alia*, the Competition Act No 89 of 1998 (the Competition Act), and it was found that the warrantless TAB provisions are not in all respects as circumscribed as those of the Competition Act and recommendations for counterbalances were made.

It was concluded that the warranted search and seizure provisions of the Act and the TAB should be constitutionally valid but that the constitutionality of the new warrantless provisions of the TAB is not beyond doubt.

It was furthermore found that the remedies at the disposal of a taxpayer who has been subject to a search and seizure should indeed be sufficient, but that there are no remedies available to a taxpayer to prevent injustice or harm.

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DEURSOEKING EN BESLAGLEGGING MET EN SONDER LASBRIEF IN DIE SUID-AFRIKAANSE INKOMSTEBELASTINGREG: DIE ONTWIKKELING, WERKING, GRONDWETLIKHEID EN REMEDIES VIR BELASTINGPLIGTIGES

Artikel 74D van die Inkomstebelastingwet No 58 van 1962, (die Wet) verleen aan die Suid-Afrikaanse Inkomstediens die mag van deursoeking en beslaglegging, die grondliggende beginsel synde dat die Kommissaris 'n lasbrief van 'n regter moet verkry voor die deursoeking en beslaglegging kan plaasvind. Die vorige artikel 74(3) van die Wet het bepaal dat die Kommissaris self 'n deursoeking en beslaglegging kon magtig en uitvoer sonder die vereiste van 'n lasbrief. Artikel 74D van die Wet is onlangs hersien en die nuwe Belastingadministrasie-wetsontwerp (BAW) bevat die nuwe bepalings oor deursoeking en beslaglegging wat artikel 74D van die Wet sal vervang.

In hierdie werkstuk is die konsep van deursoeking en beslaglegging ondersoek deur oorweging van die hofsake, akademiese skrywe en ander materiaal oor die onderwerp. Die doelstellings was om die ontwikkeling van deursoeking en beslaglegging in die Suid-Afrikaanse inkomstebelastingreg te ontleed, om 'n basiese begrip van die bepalings in die Wet en die BAW oor deursoeking en beslaglegging met en sonder 'n lasbrief te verskaf, om die grondwetlikheid daarvan te bepaal en om die remedies te bepaal wat beskikbaar is vir 'n belastingpligtige wat onderworpe was aan deursoeking en beslaglegging.

Daar is bevind dat deursoeking en beslaglegging ontwikkel het vanaf sonder 'n lasbrief ingevolge die vorige artikel 74(3) van die Wet tot die vereiste van 'n lasbrief ingevolge artikel 74D van die Wet tot die kombinasie van albei ingevolge die BAW.

Die konsep van 'n *ex parte*-aansoek is ontleed, en dit blyk in sekere omstandighede ingevolge artikel 74D van die Wet toelaatbaar te wees, terwyl dit nou ingevolge die BAW verpligtend is. Daar is aangedui dat die BAW die *lacuna* in die Wet oor die

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geldigheidsperiode van ’n lasbrief voordat dit uitgevoer is, verwyder het. Daar is egter bevind, rakende die vraag of ’n lasbrief verval wanneer dit uitgevoer word en of dieselfde lasbrief weer gebruik kan word om ’n tweede deursoeking en beslaglegging uit te voer, dat daar nie sekerheid ingevolge die Wet of die BAW bestaan nie. Daar is bevind dat daar geen gedefinieerde betekenis vir die kriterium van redelike gronde is nie, waaraan dikwels ingevolge die Wet en die BAW voldoen moet word, maar dat enigiemand wat aan die kriterium moet voldoen tevrede moet wees dat die gronde inderwaarheid objektief bestaan.

Die nuwe bepalings van die BAW oor deursoeking en beslaglegging sonder ’n lasbrief is ondersoek. Daar is vasgestel dat bepalings oor deursoeking en beslaglegging sonder ’n lasbrief nie ongewoon is in ander wette nie, maar dat die inhoud daarvan dikwels verskil. Die nuwe bepalings oor deursoeking en beslaglegging sonder ’n lasbrief is vergelyk met die bepalings oor deursoeking en beslaglegging sonder ’n lasbrief van, *inter alia*, die Mededingingswet No 89 van 1998 (die Mededingingswet), en daar is bevind dat die BAW-bepalings oor deursoeking en beslaglegging sonder ’n lasbrief nie in alle opsigte so afgebaken is soos dié van die Mededingingswet nie en voorstelle vir teenwigte is gemaak.

Die gevolgtrekking is gemaak dat die bepalings oor deursoeking en beslaglegging met ’n lasbrief van die Wet en die BAW grondwetlik geldig behoort te wees, maar dat die grondwetlikheid van die nuwe bepalings van die BAW oor deursoeking en beslaglegging sonder ’n lasbrief nie onweerlegbaar is nie.

Daar is verder bevind dat die remedies tot die beskikking van ’n belastingpligtige wat onderworpe was aan deursoeking en beslaglegging inderdaad genoegsaam behoort te wees, maar dat daar geen remedies aan ’n belastingpligtige beskikbaar is om ongeregtigheid of skade te voorkom nie.

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1 Background

The South African Revenue Service (SARS) was established by legislation to collect revenue and to ensure compliance with tax laws.[1] A country cannot function properly without funds, and it is therefore necessary for the SARS to have certain powers and effective measures for the enforcement of the law and the collection of taxes.[2]

One of those powers is contained in section 74D of the Income Tax Act No 58 of 1962 (the Act), namely the power of search and seizure. Section 74D of the Act regulates the power of the SARS to search a person or premises and to seize certain material.

Section 74D(1) of the Act provides that the Commissioner of the SARS (the Commissioner) can bring an application to a court for a warrant authorising a search and seizure. In terms of section 74D(2) of the Act, the SARS must support its application by information supplied under oath or solemn declaration, establishing the facts on which the application is based. Section 74D(3) of the Act provides that a warrant may then be issued by a judge if he is satisfied that there are reasonable grounds to believe that:

- there has been non-compliance by any person with his obligation in terms of the Act or an offence in terms of the Act has been committed by any person;
- information, documents or things are likely to be found which may afford evidence of such non-compliance or the committing of such offence; and
- the premises specified in the application are likely to contain such information, documents or things.

Section 74D was inserted into the Act by the Revenue Laws Amendment Act No 46 of 1996. This Act also repealed the then operative section 74(3) of the Act, which was

[1] South African Revenue Service Act No 34 of 1997 sections 3 and 4.

[2] Olivier "The new search and seizure provisions of the Income Tax Act" 1997 (issue 350) *De Rebus* 195.

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the section regulating search and seizure prior to section 74D. Section 74(3) of the Act granted the power to the SARS to enter a taxpayer's premises at any time during the day, without a warrant and without prior notice, to search the premises, seize certain material and to retain the seized material until it was no longer required for an assessment or criminal or other proceedings.

Search and seizure has accordingly developed from warrantless under the previous section 74(3) of the Act into the requirement of a warrant, issued by an independent judge to scrutinise the Commissioner's need for a search and seizure, under section 74D of the Act.

The current section 74D of the Act was, however, recently reviewed and the Tax Administration Bill (the TAB) contains the new provisions on search and seizure. The drafting of the TAB was announced in the 2005 Budget Review as a project "to incorporate into one piece of legislation certain generic administrative provisions, which are currently duplicated in the different tax Acts".[3] The first draft of the TAB was released on 30 October 2009. Changes were made to this first draft after consideration of the public comments received and a new draft TAB for second round public comments was released on 29 October 2010. Public comments could be submitted until 15 December 2010. On 23 June 2011, the third draft of the TAB, namely the Tax Administration Bill No 11 of 2011, was introduced in parliament. At time of writing of this assignment, no fourth or final draft was yet available. Reference in this assignment to the provisions of the TAB is on the TAB as it is currently available, i.e. the third draft of the TAB as introduced in parliament on 23 July 2011. Once the TAB is signed into law, it will replace, *inter alia*, the current section 74D of the Act. The TAB provides in clause 272 that the Tax Administration Act (the TAA) shall come into operation on a date to be determined by the President by proclamation in the Gazette. This date is still unknown at time of writing.

[3] Draft Explanatory Memorandum on the Draft TAB (2009) 1.

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The TAB still provides for an application for a warrant and the judge must still be satisfied that there are reasonable grounds to believe that:[4]

- a person failed to comply with an obligation imposed under a tax Act or committed a tax offence; and
- relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or the commission of the offence.

The basic principles of the application for a warrant will thus remain the same under the new TAA once it is signed into law. The other important provisions on search and seizure of the Act that should remain the same under the TAA once it is signed into law are, *inter alia*, the following:

- the duty of an officer conducting the search and seizure to produce the warrant on demand;[5]
- the retaining of the relevant material seized;[6]
- the return of the relevant material seized;[7] and
- the right of a person to examine the material and make copies thereof.[8]

Although the terminology and words used in the search and seizure provisions of the TAB are somewhat different from section 74D of the Act,[9] it is submitted that the same legal concepts should mostly apply equally to the TAA once it is signed into law. This means that the case law laid down on the interpretation of the current section 74D of the Act, and the academic writing on the topic will still apply to the above listed similar provisions. However, when different wording is used, this is analysed throughout this assignment and the effect thereof is addressed.

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4 Clause 60(1) of the TAB.
5 Section 74D(7) of the Act and clause 61(1) of the TAB.
6 Section 74D(8) of the Act and clause 61(9) of the TAB.
7 Section 74D(9) of the Act and clause 66 of the TAB.
8 Section 74D(10) of the Act and clause 65 of the TAB.
9 An example: The Act refers to the search for and seizure of ”information documents and things” whereas the TAB refers to “relevant material”. “Relevant material” is defined in section 1 of the TAB as “any information, document, or thing that is forseeably relevant for tax risk assessment, assessing tax, collecting tax, or showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed”. This shows that the terminology is different, but that the same legal concepts could still apply.

There are, however, also certain new concepts introduced by the search and seizure provisions of the TAB which are not contained in section 74D of the Act, as well as some additions or changes to existing provisions of section 74D of the Act. Some of the most important provisions introduced by the TAB are the following:

- Clause 59(3) of the TAB provides that the SARS, despite sub clause (2) which provides that the SARS must apply *ex parte* to a judge for a warrant, may apply for such a warrant to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under clause 109(1)(a) of the TAB. This amount is still unknown and must be determined by the Minister by notice in the Gazette. What is clear is that the word *may* is used in clause 59(3) of the TAB, which indicates that the SARS has a discretion about whether to bring the application to a High Court (a judge) or a lower court (a magistrate) when the amount in tax does not exceed the amount as determined by the Minister. Section 74D of the Act, however, only provides for an application to a High Court judge. It is furthermore not required in terms of section 74D of the Act that the SARS *must* bring the application *ex parte*.

- Clause 60(3) of the TAB provides that a warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown. The first draft of the TAB provided for 60 days, which has now been changed in the second and third drafts to 45 business days. There is, however, no similar time restraint in section 74D of the Act.

- Clause 61 of the TAB sets out detailed provisions on the carrying out of the search. It regulates what the SARS officials must and may do when conducting a search and seizure. There are currently no such provisions in section 74D of the Act, which may show that the powers of SARS officials will be circumscribed more strictly by the new provisions. Clause 61(4) of the TAB requires that the SARS official must make an inventory of the

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relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person. There is no such duty on an officer conducting a search and seizure under section 74D of the Act. Furthermore, clause 61(5) of the TAB now clearly requires that the SARS official must conduct the search with strict regard for decency and order and in terms of clause 61(6) of the TAB, the SARS official may, at any time, request such assistance from a police officer as the official may consider reasonably necessary and the police officer must render the assistance. No similar provisions are contained in section 74D of the Act.

- Clause 61(8) of the TAB states that, subject to clause 66, the SARS official and the SARS are not liable for damage to property necessitated by reason of the search. There is no such exclusion of liability in section 74D of the Act. Clause 66(1) of the TAB now specifically provides that a person may request the SARS to pay the costs of physical damage caused during the conduct of a search and seizure. If SARS refuses the request, the person may apply to a High Court for the payment of compensation for the physical damage caused.[10] Neither is there such a remedy in terms of section 74D of the Act.

- In terms of section 74D(5) of the Act, where the officer named in the warrant has reasonable grounds to believe that:
    - information, documents or things are at any premises not identified in such warrant and about to be removed and destroyed; and
    - a warrant cannot be obtained timeously to prevent such removal or destruction,

  such officer may search such premises and further exercise all the powers granted by section 74D of the Act, as if such premises had been identified in the warrant. It is accordingly permitted to search premises that are not identified in the warrant. This basic concept of search of premises not

[10] Clause 66(2) of the TAB.

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identified in the warrant is taken over by clause 62 of the TAB, with a few changes. Clause 62(1) of the TAB states that if a senior SARS official has reasonable grounds to believe that:

- the relevant material likely to be found on the premises and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;
- a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and
- the delay in obtaining a warrant would defeat the object of the search and seizure,

SARS may enter and search the premises and exercise the powers granted in terms of part D of the TAB, as if the premises has been identified in the warrant. It is accordingly clear that a third requirement, namely that the delay in obtaining a warrant would defeat the object of the search and seizure, is added. It is thus still permitted under the TAB to search premises that are not identified in the warrant, but all three requirements must now be met, which is accordingly a fundamental change relating to the search of premises not identified in the warrant.

- Clause 63 of the TAB is probably the most controversial new provision relating to search and seizure. It provides that a senior SARS official may without a warrant exercise the powers referred to in clause 61(3)
  - if the person who may consent thereto so consents in writing; or
  - if the senior SARS official on reasonable grounds is satisfied that
    - there may be an imminent removal or destruction of relevant material likely to be found on the premises;
    - if SARS applies for a search warrant under clause 59, a search warrant will be issued; and
    - the delay in obtaining a warrant would defeat the object of the search and seizure.

  Clause 63(3) of the TAB furthermore provides that the SARS official may not enter a dwelling-house or domestic premises, except any part thereof

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> used for purposes of trade, under this clause without the consent of the occupant. This aspect of the TAB has raised wide concern. A warrantless search and seizure will not be scrutinised by an independent judge. Control is currently built into section 74D of the Act by the need for a warrant issued by a judge, the judge being an independent party who can scrutinise the need of the SARS to search and seize. In terms of the warrantless provisions, the SARS can exercise this power subjectively, without a warrant and without the independent examination by a judge. It is furthermore suggested by Klue, chief executive of the South African Institute of Tax Practitioners, that the warrantless search and seizure would give the SARS "absolute power" and that this would mean that the SARS could now "act as judge and jury".[11]

This last point on warrantless search and seizure shows the further development of search and seizure in South African income tax law. Search and seizure has thus developed from warrantless under section 74(3) of the Act into search and seizure by warrant under section 74D of the Act into a combination of both warranted and warrantless search and seizure under the TAB. The above listings also show that certain search and seizure provisions of the Act will remain the same, but that there are many new provisions introduced by the TAB.

2 Problem Statement

Two main problem statements on search and seizure in South African income tax law are identified. The first problem statement is further divided into sub-problems.

2 1 Search and seizure by warrant

How does the law on search and seizure by warrant operate in South African income tax law, is this process and are the provisions relating thereto constitutional and what are the remedies available to a taxpayer?

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[11] Rawoot *SARS may act as "judge and jury"* (2009) http://www.mg.co.za/article/2009-11-06-sars-may-act-as-judge-and-jury (accessed 14 June 2010).

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- Must or can the Commissioner bring the application *ex parte* and what are the consequences thereof?
- What is the meaning of the "reasonable grounds" criterion?
- What is the status of a warrant once it is exercised and how long is a warrant valid?
- Are the warranted search and seizure provisions constitutional?
- What are the remedies available to a taxpayer who has been subject to a search and seizure and are these remedies sufficient?

2 2 Warrantless search and seizure

How does a warrantless search and seizure operate, is this process and are the provisions relating thereto constitutional, what are the remedies available to a taxpayer and how does a warrantless search and seizure as proposed in the TAB compare to warrantless search and seizure in other spheres of the law, e.g. criminal law and competition law?

3 Literature Review

Each of the above problem statements is now briefly addressed in more detail, based on the case law and academic writing available thereon. A literature study was done on the previous section 74(3) of the Act and on section 74D of the Act to identify the problems as listed above. Not much literature is currently available on the TAB but since most principles are taken over by the TAB, it is submitted that the principles laid down by our courts and the opinions and remarks of academic writers will still equally apply to those similar provisions. However, any difference between the Act and the TAB is analysed throughout this assignment.

3 1 Search and seizure by warrant

- A warranted search and seizure requires an application to a judge. The question is, however, whether this application can or must be brought by the Commissioner *ex parte.* An *ex parte* application is an application made to the registrar of the court by one party only with no other party cited as a

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respondent.[12] Section 74D of the Act initially provided that the application must be made *ex parte*. This was changed in 1997 when the words *ex parte* were removed from section 74D of the Act.[13] This might be a suggestion that there were problems with the words *ex parte* and that there might be a movement away from an *ex parte* application. Our courts are however not in agreement on this matter. In terms of the TAB, the SARS must now apply *ex parte* to a judge for a warrant.[14] The problem thus revolves around the *ex parte* application and what the consequences of such an application are on a taxpayer. This problem is addressed in chapter 3.

- Section 74D(3) of the Act and clause 60(1) of the TAB require that the judge issuing the warrant must be satisfied that there are *reasonable grounds* to believe that there was non-compliance with the Act/TAB or that a tax offence has been committed and that the relevant material that may afford evidence is likely to be found at the premises as specified in the application. It is, however, not clear what the phrase *reasonable grounds* entails, and the meaning thereof has not yet been clearly decided in a tax case. The *reasonable grounds* criterion occurs a few times in the search and seizure provisions of the Act and the TAB. It is an important criterion that must be satisfied in terms of clause 63 of the TAB when a warrantless search and seizure is considered. It is, however, not clear how and when the *reasonable grounds* criterion will be satisfied and this is addressed in chapter 3.

- There are some uncertainties regarding the validity of a warrant before and after the exercising thereof. Once the Commissioner is in possession of a warrant to search and seize, the first question relates to the validity of the warrant before it has been exercised: For how long is a warrant valid, or in other words, when does it expire? It could then happen that the Commissioner exercises a valid warrant before its expiry, but that the

[12] Harms *Civil Procedure in the Superior Courts* (2010) LexisNexis Butterworths Intranet Resources B6.13.

[13] Section 74D(1) was amended by section 29 of Act No 28 of 1997.

[14] Clause 59(2) of the TAB.

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documents confiscated by the Commissioner reveal the existence of further documents. This leads to a second question: Can the same warrant be used again to conduct a further search or has the warrant expired when exercised? These questions are addressed in chapter 3.

- Are the warranted search and seizure provisions constitutional? The constitutionality of section 74D of the Act has not yet been considered by our Constitutional Court but it is suggested by various commentators that the provisions should stand up to constitutional scrutiny.[15] According to Silke, the constitutionality of section 74D of the Act is not beyond doubt.[16] It is generally accepted that search and seizure provisions are in conflict with section 14 of the Constitution of the Republic of South Africa Act No 108 of 1996 (the Constitution), which secures the right to privacy. However, the rights in the Bill of Rights may be limited 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.[17] This means that even if the right of the Commissioner to search and seize might at first glance be unconstitutional and in breach of section 14 of the Constitution, it must be remembered that the rights guaranteed by the Constitution may be limited in terms of section 36 of the Constitution. A constitutional analysis of the search and seizure by warrant provisions is done in chapter 5.

- What are the remedies available to a taxpayer who has been subject to a warranted search and seizure and are these remedies sufficient? In terms of both section 74D of the Act and the TAB provisions on search and seizure, a taxpayer may apply to a court for an order for the return of the material seized, and the court may, on good cause shown, make an order as it deems

[15] French "What Revenue can't do: Tax matters" 2007 (vol 193 issue 7) *Finweek* 101.
[16] Silke "Taxpayers and the Constitution: A battle already lost" 2002 *Acta Juridica* (vol 17 issue 1) 282 291.
[17] Section 36 of the Constitution or "the limitation clause".

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fit.[18] In terms of the application for the return, the taxpayer must make out a case for a "good cause". There is thus the burden on a taxpayer to prove this "good cause", which makes it more difficult to rely on this remedy to correct the injustice or inconvenience suffered by a taxpayer. An aspect of uncertainty is whether a taxpayer can claim damages for damage and inconvenience suffered by a search and seizure. There is no provision for or exclusion of such a claim in section 74D of the Act. The TAB now provides in clause 61(8) that, subject to clause 66, the official or the SARS are not liable for damage to property necessitated by reason of the search. The general principle accordingly seems to be that the SARS is not liable. However, clause 66(1) of the TAB explicitly provides for a request to the SARS to pay compensation for the physical damage caused during the search and seizure. This incongruence between clause 66 and clause 68 of the TAB is addressed in chapter 6. The TAB has also introduced a new concept of an independent Office of the Tax Ombud. According to the Draft Memorandum on the Objects of the TAB (2010)[19] the Tax Ombud's Office should "provide accessible and affordable remedies for taxpayers affected by non-adherence to procedures or failure to respect taxpayers' rights". The effect of this Ombud Office on the rights and remedies of a taxpayer are also addressed in chapter 6. Chapter 6 investigates the stage after a search and seizure and the rights and duties of the SARS after a search and seizure are also addressed in this chapter.

3 2 Warrantless search and seizure

- How does the warrantless search and seizure as proposed by the TAB operate? Clause 63(1) of the TAB grants authority to a senior SARS official to, without a warrant, exercise the powers referred to in clause 61(3) if the person who may consent thereto so consents in writing; or if the senior SARS official on reasonable grounds is satisfied that:

[18] Section 74D(9) of the Act and clauses 66(2) and (3) of the TAB.

[19] http:// www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).

  - there may be an imminent removal or destruction of relevant material likely to be found on the premises;
  - if SARS applies for a search warrant under clause 59, a search warrant will be issued; and
  - the delay in obtaining a warrant would defeat the object of the search and seizure.

  The TAB however provides that the SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this clause without the consent of the occupant.[20] It needs to be determined exactly what the powers of the SARS are in terms of the warrantless provisions, and how and when these powers can be exercised. These problems are addressed in chapter 4.

- Are the new warrantless search and seizure provisions constitutional? Since some writers claim that a section 74D of the Act warranted search and seizure is unconstitutional, they would probably come to a conclusion that a warrantless search and seizure would result in a more severe constitutional breach. A search and seizure without a warrant should always be the exception and not the rule.[21] The right to privacy and the limitation thereof by warrantless search and seizure provisions are analysed in chapter 5.

- What are the remedies available to a taxpayer who has been subject to a warrantless search and seizure and are these remedies sufficient? The remedies available to a taxpayer who has been subject to a warranted or a warrantless search and seizure is dealt with together in chapter 6.

- How do the newly proposed warrantless search and seizure provisions of the TAB compare to warrantless search and seizure in other spheres of the law, e.g. in criminal law and competition law? The Criminal Procedure Act No 51 of 1977 (the Criminal Procedure Act) provides for a search and seizure

[20] Clause 63(3) of the TAB.
[21] Currie & De Waal *Bill of Rights Handbook* 5ed (2005) 328.

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without a warrant when consent to the search and seizure is given or where a delay would defeat the object thereof.[22] This is, however, in a criminal law context. A search and seizure conducted by the Commissioner is in the context of a civil liability towards the state.[23] Another Act permitting warrantless searches and seizures is the Competition Act No 89 of 1998 (the Competition Act). However, it sets out very strict boundaries to enter and search without a warrant. The warrantless provisions of the TAB are accordingly compared to the warrantless provisions of other statutes in chapter 4.

4 Research Goals

The following are the key research goals of the study:

- To analyse the development of search and seizure from warrantless under the previous section 74(3) of the Act into the requirement of a warrant under section 74D of the Act into a combination of both under the TAB. This will show how the provisions originated and the history thereof will provide a basic understanding for the further detailed discussions.
- To provide a basic understanding of the warranted search and seizure provisions in South African income tax law and to clarify the problems regarding the operation of a warranted search and seizure. The problems relate to the *ex parte* application, the status of a warrant once exercised, the validity of a warrant and the reasonable grounds criterion. Research is thus done to clarify these problems, and to provide for clarification of these problems.
- To provide a basic understanding of the warrantless search and seizure provisions of the TAB. This a new mechanism available to the Commissioner which must be analysed to determine exactly what the Commissioner may do, how he may do it and when he may do it. These provisions of the TAB are compared to the warrantless search and seizure

[22] Section 22.
[23] Williams "Taxpayers' rights in South Africa" 1997 (vol 7 issue 2) *Revenue Law Journal* 14.

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provisions of other acts to determine whether they are in line with what has been approved by our courts in other spheres of the law.

- To evaluate whether the warranted search and seizure provisions of the Act and the TAB and the warrantless search and seizure provisions of the TAB are constitutional. This must be done to determine whether the legislative provisions on search and seizure are sustainable under the highest law of our country, namely the Constitution.
- To determine what remedies are available to a taxpayer who has been subject to either a warranted or a warrantless search and seizure. These are counterbalances available to a taxpayer and the remedies available must be determined in order for justice to be done to an aggrieved taxpayer.

5 Research Methods

The methodology followed in this research consists of a literature review, an analysis of the relevant provisions of the Act and the TAB and a study of the cases on the topic of search and seizure in South Africa. Historical research is conducted on the previous provisions relating to search and seizure, thereby showing how this field has developed. Furthermore, comparative research is conducted by comparing the warrantless search and seizure of the TAB to warrantless search and seizure in other spheres of the law, e.g. criminal law and competition law.

6 Assumptions and Limitations of Scope

The assumption is made that the third draft of the TAB which was released on 23 June 2011, will become law once it is signed by Parliament.

It is noted that an almost exact replica of section 74D of the Act is found in section 57D of the Value-Added Tax Act No 89 of 1991 (the VAT Act).[24] This assignment does not address the search and seizure provisions of the VAT Act, but it is argued that,

[24] The only minor difference between the two sections is that section 74D(1)(a) refers to "taxpayer" whereas section 57D(1)(a) refers to "person".

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due to its similarity, that the analysis of section 74D of the Act could similarily be applied to section 57D of the VAT Act.

The scope of this assignment does not include clause 64 of the TAB on legal professional privilege. Clause 64 is included in "Part D Search and Seizure" of the TAB but is not dealt with in this assignment.

It should be noted that only a brief constitutional analysis is done in this assignment. It goes without saying that vast amounts of cases and literature exist on the general topic of the constitutionality of search and seizure provisions. Only general principles and some of the most important cases are highlighted in chapter 5. However, this chapter should not be construed as an exhaustive or in depth constitutional analysis of the search and seizure provisions of the Act and the TAB.

7 Chapter Outline

Chapter 2 examines the development of search and seizure in South African income tax law. Search and seizure has developed from warrantless under the previous section 74(3) of the Act into the requirement of a warrant, issued by an independent judge to scrutinise the Commissioner's need for a search and seizure, under section 74D of the Act. The TAB now provides for a combination of a warranted and a warrantless search and seizure. This chapter provides a background and the history of and development to the current provisions. It also investigates those provisions on search and seizure in the Act that will remain the same once the TAB becomes the TAA, and the new provisions introduced by the TAB. This provides a basic understanding for the further detailed discussions.

The operation of a warranted search and seizure, and the problems related thereto, are addressed in chapter 3. This entails the application for a warrant, the status of the warrant once it is exercised, the validity of a warrant and the meaning of the reasonable grounds criterion.

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Chapter 4 discusses warrantless searches and seizures. This chapter firstly looks into the operation of a warrantless search and seizure and secondly compares the warrantless search and seizure provisions of the TAB to the provisions permitting a warrantless search and seizure in other acts. This is done to place the warrantless TAB provisions in perspective and to determine whether the TAB provisions are in line with what has been approved by our courts in other spheres of the law.

Chapter 5 investigates the constitutionality of both the warranted and warrantless search and seizure provisions. The right to privacy is analysed and the limitations clause of the Constitution is also applied in order to determine the constitutionality of the warranted and warrantless search and seizure provisions.

The remedies available to a taxpayer are discussed in chapter 6. This chapter focuses on the stage after a search and seizure has been conducted. The Commissioner has certain rights and duties,[25] but the taxpayer is also protected by law.[26] This chapter addresses the remedies available to a taxpayer who has been subject to either a warranted or warrantless search and seizure. These remedies are analysed and critically evaluated in order to determine whether any injustice that has been suffered by an aggrieved taxpayer can be made undone or could have been prevented.

The last chapter, chapter 7, is the concluding chapter. It contains a summary of the research conducted and the conclusions made on the problems as identified.

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25 For example the right of the Commissioner in terms of section 74D(8) to retain the information, documents or things seized until the conclusion of any investigation or until they are required to be used for the purposes of any legal proceedings under the Act.

26 For example the right of a taxpayer in terms of section 74D(9) to apply to the High Court for the return of any information, documents or things seized.

CHAPTER 2: THE HISTORY, DEVELOPMENT AND CONTENT OF SEARCH AND SEIZURE PROVISIONS IN SOUTH AFRICAN INCOME TAX LAW

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1 Introduction

This chapter firstly examines the history and development of search and seizure in South African income tax law. The enunciation of the development of the relevant search and seizure provisions provides a basic understanding for the further detailed discussions in the next chapters. Secondly, this chapter also provides the content of the search and seizure provisions and investigates those provisions on search and seizure of the Act that will remain the same once the TAB becomes the TAA, as well as the new provisions introduced by the TAB.

2 The previous section 74(3) of the Act

2 1 Introduction

Section 74(3) of the Act, before being substituted in 1996,[27] provided as follows:

> "Any officer engaged in carrying out the provisions of this Act who has in relation to the affairs of a particular person been authorized thereto by the Commissioner in writing or by telegram, may, for the purposes of the administration of this 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 such search, open or cause to be opened or removed and opened, any article in which he suspects any moneys, books, records, accounts or documents to be contained;
>
> *(c)* seize any such books, records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax;
>
> *(d)* retain any such books, records, accounts or documents for as long as they may be required for any assessment or for any criminal or other proceedings under this Act."

This section clearly shows that the Commissioner had an absolute discretion to grant authority for a search and seizure. No warrant was required and a search and seizure could be conducted merely by the authorisation of the Commissioner. Section 74(3)

[27] Section 14 of the Revenue Laws Amendment Act No 46 of 1996 substituted section 74 of the Act, and added sections 74A, 74B, 74C and 74D. The new sections 74 and 74A-74D came into operation on 30 September 1996.

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of the Act has for many years been criticised as *arbitrary and unfair*,[28] and the powers of the Commissioner have been described as *untrammelled*.[29] It gave the Commissioner extremely wide powers to acquire information regarding the taxpayer's affairs and it was therefore argued by academic writers that the section *prima facie* violated a person's right to privacy guaranteed by section 13 of the Constitution of the Republic of South Africa Act No 200 of 1993 (the Interim Constitution).[30]

The Interim Constitution came into operation on 27 April 1994 and the previous section 74(3) of the Act, which required a mere authorisation from the Commissioner to conduct a search and seizure, was thus still in operation when the Interim Constitution came into force. However, on 30 September 1996, the previous section 74(3) of the Act was substituted with a new section 74 and section 74D was inserted into the Act to regulate searches en seizures. The final Constitution then came into operation on 4 February 1997, thus after the substitution of the previous section 74(3) of the Act and the insertion of the new section 74D into the Act. The basic new principle of section 74D of the Act was that a warrant authorising a search and seizure must now be obtained by the Commissioner from a judge. Section 74D of the Act first required that the Commissioner must bring the application for a warrant *ex parte*, but section 74D was amended in 1997 by removing the words *ex parte*.[31]

These dates can be illustrated as follows:

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[28] Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317.

[29] Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38.

[30] This was argued by, *inter alia*: Franzsen "Chapter 3 and tax law: privacy and religious freedom" 1995 (issue 327) *De Rebus* 169; Meyerowitz, Davis & Emslie "The Constitution and the Commissioner for Inland Revenue" 1994 (vol 4 issue 10) *The Taxpayer (Editorial)* 181 and Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38.

[31] Section 74D(1) of the Act was amended by section 29 of the Income Tax Act No 28 of 1997 and this amendment came into operation on 4 July 1997.

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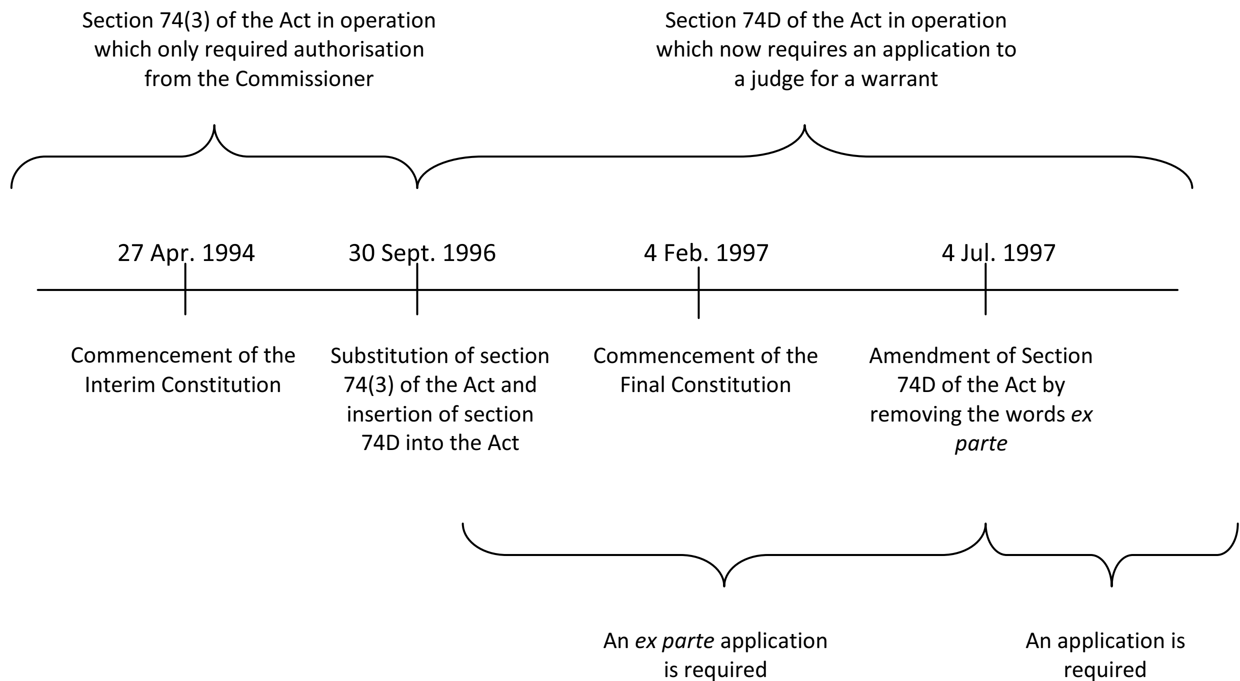
Figure 2.1: Timeline of the search and seizure provisions of the Act and the Interim and Final Constitution



It is thus clear that search and seizure has develop from warrantless or mere authorisation from the Commissioner under section 74(3) of the Act into the requirement of a warrant under section 74D of the Act. The application for a warrant has in its turn developed from an *ex parte* application into just an application.

The constitutionality of section 74(3) of the Act, the detailed content of section 74D of the Act and the further development of section 74D of the Act into the TAB are now analysed.

2 2 The constitutionality of section 74(3) of the Act

Section 13 of the Interim Constitution provided that every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications. Rights are however not absolute and can be limited in certain circumstances. Section 33 of the Interim Constitution was the limitation clause and provided that rights may be limited by law of general

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application, provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right in question. When a right is limited in terms of the limitation clause, it means that there is a justifiable infringement of the right, and it means that the provision is not unconstitutional, even though a fundamental right is infringed.[32] It was however suggested that section 74(3) of the Act could not be saved by the limitation clause of the Interim Constitution, since the powers vested in the Commissioner were too wide.[33]

2 2 1 The Katz Commission

The Commission of Inquiry into certain Aspects of the Tax Structure of South Africa (the Katz Commission), also came to the conclusion that section 74(3) of the Act was a *prima facie* violation of section 13 of the Interim Constitution. The Katz Commission came to their finding with reference to *Hunter et al v Southam*,[34] a Canadian Supreme Court case, where similar provisions were held to be unconstitutional.[35] The Katz Commission furthermore recommended the following:[36]

> "(a) Where feasible, prior authorisation must be obtained in order to execute a valid search and seizure;
>
> (b) authorization must be granted by neutral and impartial persons capable of acting judicially, which implies that the authorization provided in terms of Section 74 from the Commissioner is not constitutionally valid; and
>
> (c) the minimum standard requires that the person issuing the warrant must on reasonable and proper grounds established by information given under oath, believe that an offence has been committed and that evidence will be found at the place of the search."

It is argued that the reason why the Commissioner should not himself give such authorisation is because he is not *a neutral and impartial person capable of acting*

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[32] Currie & De Waal *Bill of Rights Handbook* 5ed (2005) 164.

[33] Meyerowitz, Davis & Emslie "The Constitution and the Commissioner for Inland Revenue" 1994 (vol 4 issue 10) *The Taxpayer (Editorial)* 181 182 and Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38 39.

[34] [1984] 2 S.C.R. 145.

[35] The Katz Commission *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* (1994) 75 (6.3.27).

[36] *Ibid*.

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judicially, as required by recommendation (b), since he is also the person collecting the taxes and enforcing the law.

Coming to the conclusion that section 74(3) of the Act was a violation of the right to privacy, the Katz Commission also recognised in its report that there might be circumstances where the right to privacy may be limited by section 33, the limitation clause, of the Interim Constitution.[37] The Katz Commission thus merely came to the conclusion that section 74(3) of the Act was *prima facie* unconstitutional, which means that section 74(3) was a violation of the right to privacy but that the limitation of this right might be possible in certain circumstances. According to the Katz Commission, when deciding on the limitation of the right to privacy in the context of section 74(3) of the Act, one would then have to take the following factors into account:[38]

- the circumstances, goal and purpose of the intrusion;
- the absence of alternative methods of obtaining the necessary evidence; and
- the likelihood of accomplishing the goal as a result of the intrusion.

The Katz Commission, however, never made a final decision on whether section 74(3) of the Act would be such a justifiable limitation of the right to privacy, it merely listed the above factors which must be taken into account when deciding whether the section could be limited in terms of the limitation clause.

The changes made by the legislature to the Act from the previous section 74(3) to section 74D are in accordance with recommendations (a)-(c) made by the Katz Commission. As discussed in this chapter under 3 2 and 3 3 *infra* in more detail, section 74D of the Act now requires that prior authorisation must be obtained in order to execute a valid search and seizure and this authorisation must be granted by a neutral and impartial person capable of acting judicially.[39] The minimum standard in the Act also requires that the person issuing the warrant must on

[37] The Katz Commission *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* (1994) 75 (6.3.28).

[38] *Ibid*.

[39] Sections 74D(1) and (3) of the Act.

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reasonable and proper grounds established by facts given under oath, believe that an offence has been committed and that evidence will be found at the place of the search, as recommended by the Katz Commission.[40] This shows that the legislature acknowledged the inherent defects of section 74(3) of the Act, and it shows the legislature's attempt to comply with the Constitution as recommended by the Katz Commission.

2 2 2 Constitutionality of section 74(3) of the Act and the Rudolph saga

The first reported case in which a taxpayer constitutionally challenged the Act was on the constitutionality of section 74(3) of the Act.[41] The constitutionality of section 74(3) of the Act was raised in what has been described in the literature as the *Rudolph saga*. The cases part of this saga are all reported as *Rudolph and Another v Commissioner for Inland Revenue and Others*, with only the difference in years and courts. The four *Rudolph* cases will respectively be referred to as the first *Rudolph* case which was decided by the Witwatersrand Local Division,[42] the second *Rudolph* case, decided by the then Appellate Division,[43] the third *Rudolph* case which was decided by the Constitutional Court[44] and the fourth *Rudolph* case, decided by the Supreme Court of Appeal (SCA).[45]

The facts were that Mr Rudolph had, during the years 1988 to 1992, failed to render proper returns for income tax purposes and he had also failed, despite numerous promises to do so, to remedy this situation. On 20 October 1993 the Chief Director of Administration in the service of the Department of Finance, issued fourteen authorisations in terms of section 74(3) of the Act to a number of named officials of the Revenue Department. This authorised the officials to exercise, in relation to the taxpayer and various of his companies and trusts, the powers prescribed in section 74(3) of the Act. Acting under these authorisations, certain of the Commissioner's officials interviewed the taxpayer at his home on 21 October 1993 and seized a

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40 Sections 74D(2) and (3) of the Act.
41 Olivier "The new search and seizure provisions of the Income Tax Act" 1997 (issue 350) *De Rebus* 195.
42 56 SATC 249.
43 58 SATC 183.
44 58 SATC 219.
45 59 SATC 399.

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number of documents. The information then obtained was however not satisfactory and the Commissioner later received further information. Six months after the first search and seizure, on 22 April 1994, members of the investigating team, acting again under the authority of the original written authorisations, searched for and found a mass of relevant documents which they wished to seize.

When Mr Rudolph was informed that the documents would be removed at a specified time, he approached the Witwatersrand Local Division for an interim interdict preventing any further searches or the utilisation of any documents already seized, pending a determination by the Constitutional Court on the constitutionality of section 74(3) of the Act. The applicants contended that, as the Constitutional Court had not yet been brought into being, it was necessary in order to give effect to the intent and principles of the Constitution, for the Witwatersrand Local Division to grant interim relief until the Constitutional Court could rule on the constitutionality of section 74 of the Act. The applicants further contended that the searches and seizures constituted an infringement of or a threat to their rights in terms of section 13 of the Interim Constitution, which guaranteed the right to privacy, including the right against unlawful searches.

It was however held by the court in the first *Rudolph* case that section 74(3) of the Act remained in force unless repealed or amended by parliament or declared unconstitutional by the Constitutional Court.[46] It would otherwise leave a serious gap in the Act pending new legislation or a decision by the Constitutional Court.[47] The court decided not to hear the arguments on the constitutionality of section 74(3) of the Act as those matters fell outside its jurisdiction.[48]

In the second *Rudolph* case, Mr Rudolph appealed to the then Appellate Division, and challenged section 74(3) of the Act on what was said to be the common law grounds of invalidity. The appellants still contended that section 74(3) of the Act was unconstitutional and invalid but recognised that the Appellate Division could not pronounce on that issue. Therefore the common law grounds of invalidity were used

[46] On page 252.
[47] *Ibid*.
[48] On page 253.

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and these grounds related to the giving of the authorisation. It was argued that the authorisation may not be used in perpetuity and had thus expired once executed, that the power to authorise the search and seizure was not properly delegated to the person who gave the authorisation and that the authorisations were invalid on the ground that they were vaguely and imprecisely worded. The appellants requested the court to adjudicate on these common law grounds of invalidity and if they were to fail on these grounds then requesting the court to refer the issue of the constitutionality of section 74(3) of the Act to the Constitutional Court.

The court, however, decided that it was necessary, for the purpose of disposal of the appeal on the common law grounds, that the constitutional issue should be decided first.[49] The court was not convinced that it had a parallel common law jurisdiction in these circumstances but that in any event, in order to decide whether the court would have jurisdiction such as was contended, the court would be obliged to interpret the Constitution, which it was not entitled to do, since the Appellate Division would have no jurisdiction to adjudicate on any matter within the jurisdiction of the Constitutional Court.[50] The matter was therefore, in the interest of justice, referred to the Constitutional Court and the common law grounds were not heard.[51]

This referral gave rise to the third *Rudolph* case, where the Constitutional Court decided that the case had no constitutional merits. The Interim Constitution came into operation on 27 April 1994, a few days after the second search of Mr Rudolph's premises. The searches and seizures had thus taken place prior to the Interim Constitution coming into force which means none of the events of which the applicant complains can be said to constitute a breach of any of his rights under the Interim Constitution. The court held that such rights had not yet come into existence when the events took place, nor could the subsequent advent of the Interim Constitution, by affording rights and freedoms which had not existed before, render

[49] On page 188.
[50] On page 187.
[51] *Ibid*.

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unlawful actions that were lawful at the time at which they were taken.[52] The court therefore decided that it had no jurisdiction to hear the matter since the Interim Constitution did not operate retroactively.[53] It was however held by the Constitutional Court that the Appellate Division was competent to adjudicate upon and determine the common law grounds of invalidity on appeal and the case was referred back to the Appellate Division.

Before addressing the decision of the Appellate Division, an argument of Silke relating to the Constitutional Court decision is relevant here. In a written submission to the Constitutional Court, a concession was made by the Commissioner and it was argued by Silke that this submission could have led to a success of Rudolph's common law attack on section 74(3) of the Act when the appeal was referred back to the Appellate Division.[54] This concession made by the Commissioner was as follows:[55]

> "In the light of the aforegoing it is submitted that common law grounds for invalidity of administrative action fall within the jurisdiction of the Supreme court, including the Appellate Division, and that the Constitutional Court has no jurisdiction in such matters. Should it be held that this Court has such jurisdiction, it is conceded that one or more of the common law challenges should succeed."

According to Silke,[56] it was hoped that the taxpayer would be successful with his common law grounds of attack, and with the concession of the Commissioner, he seemed to have the Commissioner on his side as it is clear that the Commissioner conceded that one or more of the common law challenges should succeed, if the court has jurisdiction.

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[52] On page 224.

[53] On page 227.

[54] Silke "Rudolph and the red-faced officials" 1996 (vol 10 issue 6) *Tax Planning: Corporate and Commercial* 135 and Silke "Rudolph and the courts: the end of the saga" 1998 (vol 12 issue 5) *Tax Planning: Corporate and Commercial* 103-104.

[55] *Rudolph and Another v Commissioner for Inland Revenue and Others* 58 SATC 219 [19].

[56] Silke "Rudolph and the courts: the end of the saga" 1998 (vol 12 issue 5) *Tax Planning: Corporate and Commercial* 103-104.

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Finally, in the fourth *Rudolph* case, the SCA heard the common law grounds of attack. The SCA however decided that Mr Rudolph could not succeed with any of the common law grounds of attack. These were the same grounds as argued in the second case, all relating to the giving of the authorisation. The SCA accepted none of these attacks on section 74(3) of the Act and the appeal was therefore dismissed.

Thus, despite the submission made by the Commissioner that should the court have jurisdiction, one or more of the common law grounds of appeal should succeed, the appeal was still dismissed. It was stated by Silke that it "would therefore seem that a court is likely to pay little or no attention to the Commissioner's view as to what its judgement should be".[57] Although an attempt was made to attack the constitutionality of section 74(3) of the Act, it was in the end never decided by our courts.

It seems clear now why these cases have been described as the *Rudolph saga*. Mr Rudolph fought a long battle from court to court, but according to Silke, taxpayers should not regard this last judgement of the *Rudolph saga* as a total loss since there is still hope in the fact that is shows that a court will not always agree with the Commissioner's views.[58]

2 2 3 Conclusion on the constitutionality of the previous section 74(3) of the Act

The *Rudolph saga* related to the constitutionality of section 74(3) of the Act, but our courts never made a decision on its constitutionality. It was left to the legislature to correct the defects of the section. Academic writers agreed that section 74(3) of the Act was a *prima facie* violation of section 13 of the Interim Constitution, even though it was never decided by our courts.[59] However, they were not in agreement on whether section 74(3) of the Act could be saved by the limitation clause.

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[57] Silke "Rudolph and the courts: the end of the saga" 1998 (vol 12 issue 5) *Tax Planning: Corporate and Commercial* 103-104.

[58] *Ibid*. Silke refers here to the concession which was made by the Commissioner.

[59] Franzsen "Chapter 3 and tax law: privacy and religious freedom" 1995 (issue 327) *De Rebus* 169; Meyerowitz, Davis & Emslie "The Constitution and the Commissioner for Inland Revenue" 1994 (vol 4 issue 10) *The Taxpayer (Editorial)* 181; Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38 and Mosupa "Constitutional

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According to Franszen, section 74(3) of the Act was a *prima facie* violation of section 13 of the Interim Constitution, but he also acknowledges, in agreement with the Katz Commission, that a violation of the right to privacy may be reasonable and justifiable in terms of the limitation clause of the Interim Constitution.[60]

However, Mokgatlo argued that the section could not be saved by the limitation clause since "the provision in question was not reasonable and justifiable according to the values of an open and democratic society".[61]

In the Editorial of *The Taxpayer*, the following was held on the issue of the constitutionality of section 74(3) of the Act:[62]

> "We venture the opinion that to an extent, but only to an extent, section 33 of the Constitution Act would enable the Commissioner or his officials to enter premises, carry out a search, seize books etc, but as section 74(3) stands we are of the view that it is unconstitutional and cannot be upheld in its present form merely because there could be some particular circumstances in some particular cases which would justify within the intent of section 33 of the Constitution Act some entry, some seizure etc."

Mosupa also argued that there is no doubt that section 74(3) of the Act was unconstitutional.[63] The section could thus not be saved by the limitation clause. He came to this conclusion with reference to the case of *Park-Ross v Director: Office for Serious Economic Offence.*[64]

In the case of *Park-Ross,* section 6 of the Investigation of Serious Economic Offences Act No 117 of 1991 (Investigation of Serious Economic Offences Act) was

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validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317 319.

60 Franzsen "Chapter 3 and tax law: privacy and religious freedom" 1995 (issue 327) *De Rebus* 169 171.

61 Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38 39.

62 Meyerowitz, Davis & Emslie "The Constitution and the Commissioner for Inland Revenue" 1994 (vol 4 issue 10) *The Taxpayer (Editorial)* 181.

63 Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317 319.

64 1995 (2) SA 148 (C).

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constitutionally challenged. This section empowered the Director of the Office for Serious Economic Offences (the Director) to enter any premises on which or in which anything connected with an inquiry was or was suspected to be without notice, to seize copies of or extracts from any book or document found there and to request from any person an explanation of any entry therein. The court found that this section was a limitation of the right to privacy, but also held that the rights entrenched by the Interim Constitution are not absolute and can thus be limited. The limitation clause of the Interim Constitution, section 33, was then considered and the court came to the conclusion that it was a prerequisite for a reasonable search and seizure that the power to authorise such a search and seizure should be given to an impartial and independent judicial authority. The Director cannot be an impartial arbiter to grant effective authorisation, and the section was therefore an unreasonable limitation to the right to privacy and therefore unconstitutional.

It is argued that this case could provide precedent for the unconstitutionality of section 74(3) of the Act. The Commissioner is not, similarly to the Director in the *Park-Ross* case, an impartial arbiter to grant effective authorisation. He is the one collecting the taxes and enforcing the Act, and thus not independent and impartial. This would mean that the right to privacy could not be reasonably and justifiably limited by section 74(3) of the Act in an open and democratic society based on freedom and equality and this would in turn mean that section 74(3) is unconstitutional.

The same approach was followed by the Constitutional Court in the case of *Mistry v Interim National Medical and Dental Council of South Africa.*[65] In this case the power of search and seizure was given to inspectors in terms of section 28(1) of the Medicines and Related Substances Control Act No 101 of 1965 (Medicines and Related Substances Control Act) to conduct warrantless searches of business premises. The court held that, to the extent that the Medicines and Related Substances Control Act authorises a warrantless entry into private homes and the rifling through intimate possessions, breaches the right to personal privacy. The

65 1997 (7) BCLR 933.

court then considered whether the right could be limited. There were no safeguards in the Medicines and Related Substances Control Act, such as prior judicial authorisation, to limit the extent of the intrusion on the right to privacy. The Constitutional Court therefore held as follows:[66]

> "To sum up: irrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of the important right to personal privacy authorised by section 28(1) is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach and accordingly fails to pass the proportionality test..."

The court concluded that the desired and permissible ends of regulatory inspection could easily be achieved through means less damaging to the right to privacy, i.e. by the requirement of a warrant.[67] When again applied to section 74(3) of the Act, it could be argued that the same conclusion on constitutionality could be reached. There are no safeguards in section 74(3) of the Act, such as prior judicial authorisation as only the authorisation of the Commissioner was required. Section 74(3) of the Act, similarly to section 28(1) of the Medicines and Related Substances Control Act, gives the officer *carte blanche* to enter any place, including private dwellings, to search the premises and seize material from the premises. The *Mistry* case could accordingly be another precedent for the unconstitutionality of section 74(3) of the Act.

It is thus clear that changes had to be made to section 74(3) of the Act as it would most probably not have passed the constitutional test. Although Mr Rudolph had not been successful in his constitutional challenge, according to Olivier, "his actions

[66] On page 896.
[67] *Ibid*.

prompted the legislature to introduce new search and seizure provisions".[68] This was done by the legislature by enacting the Revenue Laws Amendment Act No 46 of 1996 which substituted section 74 of the Act and inserted sections 74A-D into the Act. According to Mokgatle, the amendment of section 74(3) of the Act without the Constitutional Court ruling on the matter deserves an applause.[69] This statement is however criticised by the writer since it is firstly clear that there were strong arguments for the unconstitutionality of section 74(3) of the Act, which would have only made it a question of time before a court had ruled the section unconstitutional. Secondly, the viewpoint should not be that the legislature must attempt to keep legislation in place which infringes upon a person's rights until the Constitutional Court makes a ruling on the invalidity thereof.

Another argument on the constitutionality of section 74(3) of the Act is that the "shotgun approach" of section 74(3) would have to be narrowed down.[70] This means that the wide powers given to the Commissioner by section 74(3) of the Act would have to be reduced to powers that are in accordance with the Constitution.

Nonetheless, the legislature addressed the problems of the previous section 74(3) of the Act in 1996 by enacting the new section 74 and sections 74A-D of the Act. Section 74D of the Act was the new section on search and seizure.

3 Content of section 74D of the Act and further developments into the TAB

3 1 Introduction

Section 74D was inserted into the Act in 1996 by the Revenue Laws Amendment Act No 46 of 1996. That Amendment Act also substituted the search and seizure provisions of the previous section 74(3) of the Act. The basic new principle of section 74D of the Act is that a warrant authorising a search and seizure must now be

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[68] Olivier "The new search and seizure provisions of the Income Tax Act" 1997 (issue 350) *De Rebus* 195.

[69] Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38 39.

[70] Franzsen "Chapter 3 and tax law: privacy and religious freedom" 1995 (issue 327) *De Rebus* 169 171.

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obtained by the Commissioner from a judge. As discussed *supra*, there was a further development regarding the application for a warrant. An *ex parte* application was first required, but this was changed with effect from 4 July 1997 when the words *ex parte* were removed from section 74D(1) of the Act.

Section 74D of the Act was however recently reviewed again and the TAB now contains new provisions on search and seizure. Once the TAB is signed into law, the TAA will replace, *inter alia*, the current section 74D of the Act.

Most of the provisions on search and seizure of the Act and the TAB are similar but the TAB also contains certain new provisions which are not contained in section 74D of the Act, as well as some additions to existing provisions of section 74D of the Act. The following aspects relate to the search and seizure provisions of the Act and/or the TAB and will be discussed in this chapter:

- the application for a warrant;
- the issuance of a warrant;
- the carrying out of the search;
- the search of premises not identified in the warrant;
- the seizure of material not identified in the warrant;
- the preservation and retaining of the material;
- the remedies; and
- an introduction to the warrantless search and seizure provisions.

3 2 Application for a warrant

The application for a warrant is regulated by section 74D(1) and (2) of the Act and clause 59 of the TAB. However, some of the application provisions of section 74D(1) of the Act are also found in certain subsections of clause 61 of the TAB. These relevant provisions read and compare as follows:

Section 74D of the Act:	Clause 59 of the TAB:
(1) For the purposes of the administration of this Act, a judge may, on application by the	(1) The Commissioner personally or a senior SARS official may, if necessary or relevant to administer

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Commissioner or any officer contemplated in section 74 (4), issue a warrant, authorising the officer named therein to, without prior notice and at any time—

(a) (i) enter and search any premises; and

(ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;

(b) seize any such information, documents or things; and

(c) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

(2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the

a tax Act, authorise an application for a warrant authorising SARS to enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.

(2) SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109(1)*(a)*.

Clause 61(3)(a) of the TAB:
The SARS official may open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material. Clause 61(5) of the TAB:
The SARS official must conduct the

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facts on which the application is based.	search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.

Section 74D(1) grants the power to bring an application for a warrant to the Commissioner or any officer contemplated in section 74(4) of the Act. Section 74(4) of the Act provides that, for the purposes of sections 74C and 74D, the Commissioner may delegate the powers vested in him by those sections, to any other officer. An "officer" is furthermore defined in section 74(4) of the Act as an officer contemplated in section 3(1) of the Act. Section 3(1) of the Act in turn provides that the powers conferred and the duties imposed upon the Commissioner by or under the provisions of the Act may be exercised or performed by the Commissioner personally, or by any officer or person engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner. However, in terms of clause 59(1) of the TAB, the Commissioner personally or a senior SARS official may authorise an application for a search and seizure warrant.

Clause 6(3) of the TAB provides that powers required by the TAB to be exercised by a senior SARS official must be exercised by—

(a) the Commissioner;

(b) a SARS official who has specific written authority from the Commissioner to exercise the power; or

(c) a SARS official occupying a post designated by the Commissioner for this purpose.

It is accordingly clear from section 74D(1) of the Act and clause 59(1) of the TAB that the power to bring an application for a warrant is granted to specific persons only. In terms of both the Act and the TAB, the Commissioner may bring the application. Section 74D(1) of the Act provides that this power can also be exercised by any officer or person engaged in carrying out the provisions of the Act under the control, direction or supervision of the Commissioner. However, in terms of clause 59(1) of the TAB, the SARS official must have specific written authority from the

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Commissioner to excercise the power to apply for a warrant. It could accordingly be argued that the Commissioner now has to specifically authorise an official in writing to bring an application for a warrant which is not required in terms of section 74D of the Act. The Commissioner could also appoint a SARS official in a post designated by the Commissioner for a purpose in terms of the TAB.

In terms of section 74D(1) of the Act, the application for a warrant is made to a judge. However, in terms of clause 59(3) of the TAB, the SARS may bring this application to a judge *or magistrate.* Furthermore*,* in terms of clause 59(2) of the TAB, the SARS must bring the application *ex parte.* There are thus some fundamental changes in this regard. The first change relates to the difference in wording between the Act and the TAB with regard to the *ex parte* application. The effect thereof is analysed in chapter 3.

Secondly, a new concept relating to the application for a warrant is introduced by clause 59(3) of the TAB, which provides that the SARS may apply to a *magistrate* for a warrant if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under clause 109(1)(a) of the TAB. Section 74D(1) of the Act, however, only provides for an application to a High Court judge. In this respect, the TAB has changed the position in favour of the Commissioner as he can now also apply to a lower court for a warrant.
The amount mentioned in clause 59(3) of the TAB is still unknown and must be determined by the Minister of Finance by notice in the Gazette. In the first draft of the TAB, there was no reference to this determination by the Minister, but it was stated that the application could be brought to a magistrate if the matter related to an estimated amount of less than R500 000 in tax. It is argued that the second and third drafts of the TAB moved away from a fixed amount to an amount to be determined by the Minister, as it could be argued that it is not ideal to fix amounts in an Act.

Under both the Act and the TAB, an application brought by the Commissioner shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.[71]

This application for a warrant can only be brought *for the purposes of the administration of this Act* in terms of section 74D(1) of the Act, and *if necessary or relevant to administer a tax Act* in terms of clause 59(1) of the TAB. *Administration of this Act* is defined in section 74(1) of the Act and *administration of a tax Act* is defined in clause 3(2) of the TAB and these definitions read and compare as follows:

Section 74(1) of the Act:	Clause 3(2) of the TAB:
"*Administration of this Act*" means the—	*"Administration of a tax Act"* means to—
(a) obtaining of full information in relation to any— (i) amount received by or accrued to any person; (ii) property disposed of for no consideration; and (iii) payment made or liability incurred by any person;	*(a)* obtain full information in relation to— (i) anything that may affect the liability of a person for tax in respect of a previous, current or future tax period; (ii) a taxable event; or (iii) the obligation of a person (whether personally or on behalf of another person) to comply with a tax Act;
(b) ascertaining the correctness of any return, financial statement, document, declaration of facts, valuation or other information in the Commissioner's possession;	*(b)* ascertain whether a person has filed or submitted correct returns, information or documents in compliance with the provisions of a tax Act;
(c) determination of the liability of any person for any tax, duty or levy and any interest or penalty in relation thereto leviable under this Act;	*(c)* establish the identity of a person for purposes of determining liability for tax;
(d) collecting of any such liability;	

[71] Section 74D(2) of the Act and clause 59(2) of the TAB.

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(e) ascertaining whether an offence in terms of this Act has been committed;

(f) ascertaining whether a person has, other than in relation to a matter contemplated in paragraphs (a), (b), (c), (d) and (e) of this definition, complied with the provisions of this Act;

(g) enforcement of any of the Commissioner's remedies under this Act to ensure that any obligation imposed upon any person by or under this Act, is complied with; and

(h) performance of any other administrative function which is necessary for the carrying out of the provisions of this Act.

(d) determine the liability of a person for tax;

(e) collect tax and refund any tax overpaid;

(f) investigate whether an offence has been committed in terms of a tax Act, and, if so—

(i) to lay criminal charges; and

(ii) to provide the assistance that is reasonably required f or the investigation and prosecution of tax offences or related common law offences;

(g) enforce SARS' powers and duties under a tax Act to ensure that an obligation imposed by or under a tax Act is complied with;

(h) perform any other administrative function necessary to carry out the provisions of a tax Act; and

(i) give effect to the obligation of the Republic to provide assistance under an arrangement made with the government of any other country by an agreement entered into in accordance with a tax Act.

These definitions are important since the Commissioner would not be able to apply for a warrant if this purpose of the administration of this Act or a tax Act was

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absent.[72] The definitions are differently worded, but they are both wide definitions and include a catch-all which provides that the administration of this Act or a tax Act means to perform *any* other administrative function necessary to carry out the provisions of this Act or a tax Act.[73] These definitions will not be compared in more detail since it does not seem from the case law on section 74D of the Act that any problems have arisen in this regard and since the new definition in terms of the TAB is still wide in nature.

To sum up, the TAB still contains the general principle of the application for a warrant, but with some differences relating to the person who may bring the application, the express reference to an *ex parte* application and the new provision relating to the bringing of an application to a magistrate.

3 3 Issuance of a warrant

Subsequent to an application made by the Commissioner, a warrant may be issued by a judge in terms of section 74D(3) of the Act, or by a judge or a magistrate in terms of clause 60(1) of the TAB. These relevant provisions read and compare as follows:

Section 74D(3) of the Act	Clause 60(1) of the TAB
Section 74D(3) of the Act: A judge *may* issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that—	Clause 60(1) of the TAB: A judge or magistrate *may* issue a warrant referred to in clause 59(1) if satisfied that there are reasonable grounds to believe that-
(a) (i) there has been non-compliance by any person with his obligations in terms of this Act; or (ii) an offence in terms of this Act has been committed by any person;	(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and
(b) information, documents or	(b) relevant material likely to be found on the premises specified in the

[72] Davis, Olivier & Urquhart *Juta's Income Tax* (1999) 74-3.
[73] Subsections (h) of the definitions in both the Act and the TAB.

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things are likely to be found which may afford evidence of— (i) such non-compliance; or (ii) the committing of such offence; and (c) the premises specified in the application are likely to contain such information, documents or things.	application may provide evidence of the failure to comply or commission of the offence.

The use of the word *may* in both the Act and the TAB clearly indicates that the judge (or magistrate) has a discretion in the issuing of the warrant.[74]

Although the wording is somewhat different between the sections of the Act and the TAB, the basic principle relating to the issuance of a warrant stays the same. The judge (or in terms of the TAB the judge or magistrate) must be satisfied that there are reasonable grounds to believe that:

- there has been non-compliance with obligations in terms of the Act (or a tax Act in terms of the TAB) or an offence in terms of the Act has been committed (the TAB refers to a tax offence);
- information, documents or things (or in terms of the TAB relevant material) are likely to be found which may afford evidence of such non-compliance or the committing of such offence; and
- the premises specified in the application are likely to contain such information, documents or things (or in terms of the TAB relevant material).

The last two bullets, which refer to sections 74D(3)(b) and (c) of the Act, are merely incorporated into one sentence in clause 60(1)(b) of the TAB, which provides that

[74] Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317 323.

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the relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

In terms of the Act, there must be non-compliance with obligations in terms of this Act or an offence in terms of this Act must have been committed. In terms of the TAB, however, a person must have failed to comply with an obligation imposed under a tax Act, or must have committed a tax offence. The difference in wording from *this Act* in the Act to the words *a tax Act* in the TAB is attributable to the fact that the TAB is a consolidation of the administrative provisions of different tax Acts.[75] Section 74D of the Act is only applicable to the Act but clauses 59-66 of the TAB are applicable to, amongst others, the Act, the VAT Act, the Transfer Duty Act No 40 of 1949 and the Estate Duty Act No 45 of 1955.

One of the grounds on which a judge (or magistrate) may issue a warrant is when an offence in terms of the Act has been committed, or under the TAB, when a tax offence has been committed. Offences in terms of the Act are regulated by sections 75 and 104 of the Act. Clause 1 of the TAB defines a tax offence as *an offence in terms of a tax Act or any other offence involving fraud on SARS or on a SARS official relating to the administration of a tax Act* and chapter 17 of the TAB further sets out the criminal offences. The difference between the offences in terms of the Act and the TAB will however not be not be compared in more detail.

The TAB refers to *relevant material* which must be likely to be found to afford evidence, whereas the Act refers to *information, documents or things.* The TAB defines *relevant material* in clause 1 as "any information, document or thing that is forseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed". This new reference to *relevant material* thus still refers to *information, documents and things* as it stands in section 74D of the Act, with the difference now

[75] *Draft Memorandum on the Objects of the* TAB (2010) http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).

being that the relevant material should be foreseeably relevant by meeting one of the following criteria:

- tax risk assessment;
- assessing tax;
- collecting tax;
- showing noncompliance with an obligation under a tax Act; or
- showing that a tax offence was committed.

Despite these criteria, clause 60(1) of the TAB specifically provides that the relevant material may provide evidence of the failure to comply or commission of the offence. This basically refers to the last two bullets of the above mentioned list of criteria. In terms of section 74D(3)(b) of the Act, the information, documents or things likely to be found should also afford evidence of non-compliance or the committing of an offence. It is therefore argued that *relevant material* in terms of the TAB still refers to information, documents and things that provide evidence of non-compliance or the commission of an offence, with the addition that the relevant material could now also be relevant for tax risk assessment, assessing tax and collecting tax. The definition of *relevant material* is accordingly wider in terms of the TAB but it is submitted that the last two bullets of the above mentioned list are the most significant in the context of the search and seizure provisions.

When the warrant is issued by a judge, or magistrate in terms of the TAB, certain information must be included in that warrant in terms of section 74D(4) of the Act and clause 60(2) of the TAB. These relevant provisions read and compare as follows:

Section 74D(4) of the Act: A warrant issued under subsection (1) shall:	Clause 60(2) of the TAB: a warrant issued under subsection (1) must contain the following information:
(a) refer to the alleged non-compliance or offence in relation to which it is issued;	(a) the alleged failure to comply or offence that is the basis for the application;
(b) identify the premises to be searched;	(b) the person alleged to have

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(c)	identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and		failed to comply or to have committed the offence;
		(c)	the premises to be searched; and
(d)	be reasonably specific as to any information, documents or things to be searched for and seized.	(d)	the fact that relevant material as defined in section 1 is likely to be found on the premises.

It is argued that the use of the words *shall* in section 74D(4) of the Act and *must* in clause 60(2) of the TAB indicates that this information *must* be included in the warrant.[76] The only part of the content of a warrant that is not strict under section 74D(4) of the Act is subsection (d) which only requires that the warrant shall be *reasonably specific* as to any information, documents or things to be searched for and seized. Clause 60(2)(d) of the TAB requires that the warrant shall contain the fact that relevant material as defined in clause 1 is likely to be found on the premises. There is thus no requirement to refer to the specific relevant material in a warrant issued under the TAB, as it seems from the wording used in clause 60(2)(d) that a mere statement would be sufficient. The reason for this is dealt with in this chapter under 3 6 *infra*. It is submitted by the writer that clause 60(2)(d) is somewhat contradictory. It refers to the *fact* that relevant material is *likely* to be found. It is doubted whether the likely finding of material could be seen as a fact. It is rather an opinion of the SARS that material is likely to be found.

Once a warrant has been issued, clause 60(3) of the TAB provides that the warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown. The first draft of the TAB provided for 60 days, which was changed to 45 business days in the second and third drafts of the TAB. There is however no similar time restraint in section 74D of the

[76] This is a general principle of interpretation, see e.g. Clegg & Stretch *Income Tax in South Africa* (2009) LexisNexis Butterworths Intranet Resources 2.9.

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Act. Chapter 3 deals with the status of a warrant once it is executed and the validity period of a warrant. The status of a warrant once it is executed relates to the question of whether the same warrant can be used again once it has been executed, or whether it expires on the execution thereof. The validity period of a warrant relates to the time period for which a warrant is valid before it has been executed. Both these questions are addressed in chapter 3.

Furthermore, in terms of section 74D(7) of the Act, the officer exercising any power under this section shall on demand produce the relevant warrant (if any). This is also contained in the TAB in clause 61(1) which provides that a SARS official exercising a power under a warrant referred to in clause 60 of the TAB must produce the warrant. Clause 61(2) of the TAB provides that, subject to clause 63 of the TAB (which contains provisions regarding a warrantless search and seizure), a SARS official's failure to produce a warrant entitles a person to refuse access to the official. It is thus clear that an official conducting a search and seizure must be in possession of the warrant issued by a judge or magistrate. In terms of the Act, the warrant must however only be produced on demand, whereas the wording of the TAB requires is to be produced regardless of whether it is demanded or not and that the failure to produce entitles a person to refuse access to the official.

The use of the words "if any" in section 74D(7) of the Act is interesting. According to Mosupa, these words can have two different interpretations.[77] The one meaning could be that a warrant was issued to the Commissioner, but that the officer executing the warrant is not in possession thereof. The other meaning could be that it authorises a search and seizure without a warrant since the warrant must only be produced if there is one. This second meaning is however doubful since section 74D of the Act was a movement away from the warrantless provisions of the previous section 74(3) of the Act and furthermore since section 74D of the Act does not in any way refer to a warrantless search and seizure.

[77] Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317 321.

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To sum up, the Act and the TAB allow the Commissioner to bring an application to a court for a warrant which will authorise a search and seizure and the judge, or judge or magistrate in terms of the TAB, then has a discretion to issue the warrant. The main differences between the Act and the TAB in this regard relate to the content of the warrant and the validity period of a warrant which is now addressed in the TAB.

3 4 Carrying out the search

Clauses 61(1)-(9) of the TAB set out detailed provisions on the carrying out of the search. It regulates what the SARS officials must and may do when conducting a search and seizure. Clauses 61(1) and 61(2) of the TAB relate to the producing of the warrant and clause 61(3) of the TAB provides as follows:

> "The SARS official may—
>
> *(a)* open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material;
>
> *(b)* 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;
>
> *(c)* make extracts from or copies of relevant material, and require from a person an explanation of relevant material; and
>
> *(d)* 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."

Clause 61(3)(a) of the TAB is similar to section 74D(1)(c) of the Act (as compared *supra* under 3 2) but clauses 61(3)(b)-(d) of the TAB are new provisions.

Clause 61(3)(b) of the TAB now provides for the seizure and retention of a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required. There is no exact similar provision relating to the seizure of computers or storage devices in the Act but it is argued that a computer and a storage device can also be seized under section 74D(1)(b) of the Act since it would fall under a *thing*, which is defined in section 74 of the Act to include any corporeal or incorporeal thing and any document relating thereto.

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Clause 61(3)(c) of the TAB allows the SARS official to make extracts from or copies of relevant material. In this regard the following is stated in the Draft Memorandum on the Objects of the TAB (2010): "If the removal of original documents or computers may prejudice the continuance of a taxpayer's business, SARS has a discretion to make and remove copies if appropriate."[78] According to this Memorandum, it is a provision affording further protection to taxpayers subjected to a search and seizure. It is however argued by the writer that the discretion of the official to make and remove copies is still subjective. The warrant would authorise the official to seize the relevant material. It would then be within the officials' discretion to decide whether to seize the original or whether to make and remove copies. Even though addressed in the Memorandum, there is no requirement in terms of the TAB that copies must be made and removed if the removal of original documents or computers may prejudice the continuance of a taxpayer's business.

Clause 61(3)(d) of the TAB allows a SARS official to stop and board a 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 search of *premises* is thus now broader than in terms of the Act and includes a vessel, aircraft or vehicle. However, this vessel, aircraft or vehicle, which is a premises, must still be included in the warrant issued by a judge or magistrate in terms of clause 60(2)(c) of the TAB. Clause 62 of the TAB has to be complied with if the vessel, aircraft or vehicle was not identified in the warrant.[79]

Clause 61(4) of the TAB relates to the inventory which the SARS official must make and this is further addressed in this chapter under 3 7 *infra*. Furthermore, clause 61(5) of the TAB now clearly states that the SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched. Section 74D(1)(a)(ii) of the Act also requires that a search is conducted by an officer of the same gender as the person being searched, but section 74D of the Act makes no further reference to decency

[78] http:// www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).

[79] See 3 5 *infra* on the search of premises not identified in a warrant.

and order. Reference in the TAB to the conduct of the search with strict regard for decency and order has been held to be affording further protection of taxpayers subjected to a search and seizure in the Draft Memorandum on the Objects of the TAB.[80]

In terms of clause 61(6) of the TAB, the SARS official may, at any time, request such assistance from a police officer as the official may consider reasonably necessary and the police officer must render the assistance. Clause 61(7) of the TAB states that no person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant. Neither of these provisions relating to the assistance from a police officer or the obstruction of a SARS official or the refusal to give assistance is contained in section 74D of the Act.

Clause 61(8) of the TAB provides that, subject to clause 66, the SARS official and SARS are not liable for damage to property necessitated by reason of the search. This is addressed in chapter 6 which focuses on the stage after a search and seizure was conducted. Lastly, clause 61(9) of the TAB is on the preservation and retention of the seized material and this is addressed in this chapter under 3 7 *infra*.

To sum up, clause 61 of the TAB has on the one hand broadened the scope of the carrying out of a search (for example relating to vessels, aircrafts and vehicles) but at the same time also circumscribed certain powers of the SARS officials (for example the requirement of an inventory and the specific reference to decency and order).

3 5 Search of premises not identified in the warrant

The Act and the TAB both allow for a search and seizure of premises not identified in the warrant. Section 74D(5) of the Act and clause 62(1) of the TAB read and compare as follows:

Section 74D(5) of the Act: Where	Clause 62(1) of the TAB: (1) If a

[80] http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010), p 13 of the 2010 Memorandum.

the officer named in the warrant has reasonable grounds to believe that –	senior SARS official has reasonable grounds to believe that—
(a) such information, documents or things are – (i) at any premises not identified in such warrant; and (ii) about to be removed or destroyed; and	(a) the relevant material referred to in clause 60(1)(b) and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;
(b) a warrant cannot be obtained timeously to prevent such removal or destruction,	(b) a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and
	(c) the delay in obtaining a warrant would defeat the object of the search and seizure,
such officer may search such premises and further exercise all the powers granted by section 74D, as if such premises had been identified in a warrant.	SARS may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant.

Section 74D(5) of the Act and clause 62(1) of the TAB grant the same power to the SARS, but in terms of clause 62(1)(c) of the TAB one extra requirement is added, namely that the delay in obtaining the warrant would defeat the object of the search and seizure. It is submitted that this third requirement was added to bring the search of a premises not identified in the warrant in line with the warrantless provisions of clause 63 of the TAB. Clause 63 of the TAB is addressed in this chapter under 3 9 *infra* and in chapter 4

Another difference in wording from section 74D(5) of the Act is that clause 62(1)(a) of the TAB requires that the relevant material *may be* removed or destroyed,

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whereas section 74D(5) of the Act states that it is *about to be* removed or destroyed. The TAB is thus wider in this regard since material that may be removed is not necessarily about to be removed. This is therefore a change in favour of the Commissioner since there might be more situations where material may be removed than where it would be about to be removed.

It is furthermore submitted that different interpretations of clause 62(1)(a) of the TAB could lead to unintended results. In terms of clause 62(1)(a) of the TAB, the official must have reasonable grounds to believe that the *relevant material included in the warrant* is at premises not identified in the warrant and may be removed or destroyed before he may enter and search premises not identified in a warrant. However, clause 60(2) of the TAB does not require that the material to be searched for and seized should be contained in the warrant. There is only a requirement that a warrant must include the fact that relevant material is likely to be found on the premises. There is thus a contradiction when clause 62(1)(a) of the TAB refers to the relevant material as included in the warrant but clause 60(2) of the TAB does not require the details of the material to be included in the warrant. It is argued that, in terms of clause 60(2)(d), it would be sufficient to merely state (as a fact, or rather opinion) that relevant material is likely to be found on the premises. It is therefore argued that there could have been an oversight in the drafting of clause 62(1)(a) of the TAB with the referral to "and included in a warrant". The only other tenable interpretation would be that a statement in a warrant of the fact that relevant material is likely to be found on the premises would satisfy clause 62(1)(a) of the TAB.

Clause 62(2) of the TAB has also introduced a provision which is in favour of the taxpayer. In terms of this clause, a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this clause without the consent of the owner or occupant. This was not contained in section 74D(5) of the Act and it was also not contained in the first draft of the TAB. It is however clear now that a premises which is not identified in the warrant may not

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be entered or searched under clause 62 of the TAB without the consent of the owner or occupant if the premises is a dwelling-house or domestic premises.

To sum up, the basic principle relating to the search of premises not identified in the warrant is retained in the TAB. There is an extra requirement to be met but there might be more situations where material may be removed (as required in terms of the TAB) than where it would be about to be removed (as required in terms of the Act).

3 6 Seizure of material not identified in the warrant

In terms of section 74D(6) of the Act, any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of the Act. There is no similar provision in the TAB but this can be explained with regard to the difference between section 74D(4) of the Act and clause 60(2) of the TAB. These provisions list which information must be contained in a warrant when issued by a judge.

In terms of section 74D(4)(d) of the Act, there is a requirement that a warrant issued shall be reasonably specific as to any information, documents or things to be searched for and seized, but this is not required to be contained in a warrant issued under the TAB. Clause 60(2)(d) of the TAB merely requires that a warrant must contain the fact that relevant material is likely to be found on the premises. The material to be searched for and seized under a warrant issued in terms of the Act is thus limited and provision is therefore made in section 74D(6) of the Act to search for and seize other material. A TAB-warrant, however, does not require to list the material to be searched for and seized, giving the official executing the warrant a wider discretion, and it is thus argued that no further need exists to extend the search and seizure to material not identified in the warrant.

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3 7 Preservation and retention of the seized material

The Act and the TAB contain certain provisions regarding the preservation and retaining of the material seized. Section 74D(8) of the Act and clause 61(9) of the TAB read and compare as follows:

Section 74D(8) of the Act	Clause 61(9) of the TAB
Section 74D(8) of the Act: The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the purposes of any legal proceedings under this Act, whichever event occurs last.	Clause 61(9) of the TAB: If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for— (a) the investigation into the non-compliance or the offence described under clause 60(1)(a); or (b) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used.

The same principle on the preservation and retention of the seized material still applies under the TAB, but the wording is somewhat different. These sections will, however, be further addressed in chapter 6 which focuses on the stage after a search and seizure was conducted.

3 8 Remedies

Sections 74D(9) and 74D(10) of the Act relate to the remedies available to a person who has been subject to a search and seizure. In terms of section 74D(9)(a) of the Act, any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under the section. The court hearing such application may, in terms of section 74D(9)(b) of the Act, on good cause shown, make such order as it deems fit. Furthermore, section 74D(10) of the Act allows that

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the person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine. The principles of a person's right to examine and to make extracts or copies as well as the bringing of an application for return of the seized material is taken over by the TAB, with a few changes, in respectively clauses 65 and 66. These remedies available to a taxpayer are discussed in further detail in chapter 6.

3 9 Warrantless search and seizure

Clause 63 of the TAB is probably the most controversial and radical new provision relating to search and seizure. It provides that a senior SARS official may without a warrant exercise the powers referred to in clause 61(3) of the TAB:

- if the person who may consent thereto so consents in writing; or
- if the senior SARS official on reasonable grounds is satisfied that
  - there may be an imminent removal or destruction of relevant material likely to be found on the premises;
  - if SARS applies for a search warrant under clause 59, a search warrant will be issued; and
  - the delay in obtaining a warrant would defeat the object of the search and seizure.

Control is currently built into section 74D of the Act by the need for a warrant issued by a judge. A judge is an independent party who can scrutinise the need of the SARS to search and seize. In terms of the warrantless provisions, the SARS can, provided that one of the two abovementioned requirements are met, exercise this power subjectively, without a warrant and without the independent examination by a judge. The warrantless search and seizure provisions are examined in chapter 4 and the constitutionality thereof is tested in chapter 5.

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4 Conclusion

It was shown in this chapter that search and seizure has developed from warrantless under section 74(3) of the Act into search and seizure by warrant under section 74D of the Act. The search and seizure by warrant in terms of section 74D of the Act has further changed from the requirement of an *ex parte* application into just an application. Section 74D of the Act is now in further development into a combination of both warranted (by way of an *ex parte* application for a warrant) and warrantless search and seizure under the TAB. The above summary of the content of the relevant search and seizure provisions shows that certain aspects will remain the same, but that there are also certain new provisions introduced by the TAB, as well as some additions to existing provisions of section 74D of the Act. Chapter 3 examines the problems associated with a warranted search and seizure.

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CHAPTER 3: OPERATION OF SEARCH AND SEIZURE BY WARRANT

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1 Introduction

This chapter deals with the problems as identified in chapter 1 on the operation of a warranted search and seizure. These problems relate to the following aspects of a search and seizure by warrant:

- the application for a warrant;
- the status and validity of the warrant before and after it has been exercised; and
- the meaning of the reasonable grounds criterion.

2 The application for a warrant

2 1 Introduction and development of the application provisions

A warranted search and seizure self-evidently requires a warrant. This warrant can be obtained by the Commissioner by bringing an application to a court and this application procedure is regulated by section 74D(1) of the Act and will be replaced by clause 59 of the TAB. The basic principles regarding these two sections have been discussed in chapter 2 *supra* under 3 2.

The previous section 74(3) of the Act did, however, not make provision for an application to a judge for a warrant authorising a search and seizure. Section 74(3)(a) of the Act granted wide powers to the SARS to enter a taxpayer's premises at any time during the day, without a warrant and without previous notice. Section 74(3) of the Act was however repealed and the new section 74D came in operation on 30 September 1996.[81] Section 74D(1) of the Act then provided that an application must be brought *ex parte* by the Commissioner.

Less than a year later, with commencement on 4 July 1997, section 74D(1) of the Act was however amended by section 29 of the Income Tax Act No 28 of 1997. The words *ex parte* before the word *application* were removed and there has since been some controversy as to whether an application can or must be brought by the

[81] Section 14 of the Revenue Laws Amendment Act No 46 of 1996 substituted section 74 of the Act, and added section 74D which came into operation on 30 September 1996.

Commissioner *ex parte* in terms of the Act, and what the effects are of the changes made to the section by the amendment in 1997.

The TAB now again provides for an *ex parte* application. Clause 59(2) of the TAB clearly states that the SARS must apply *ex parte* to a judge for the warrant. This shows that the application procedure for a warrant to search and seize has thus developed under the Act from a compulsory *ex parte* application to just an application, after the amendment in 1997, and now again to a compulsory *ex parte* application in terms of the TAB.

2 2 What is an *ex parte* application?

The Oxford English dictionary defines *ex parte* as "on one side only".[82] An *ex parte* application is an application made to the registrar of the court by one party only with no other party cited as a respondent.[83] It means that the court only hears one side of a case and that no notice of the application is given to the other party.[84]

According to Harms, an applicant may only apply for relief by way of an *ex parte* application in the following very limited instances:[85]

- if the relief sought affects the rights of the applicant only and not those of anyone else;
- if the relief sought is preliminary to the main proceedings and is necessary to bring other interested parties before court. Examples are applications for edictal citation, substituted service, arrests to found or confirm jurisdiction, removal of restrictive conditions and the like;
- if the nature of the relief sought is such that notice to the respondent may render the relief nugatory;
- if, due to the urgency of the matter, notice cannot be given to the respondent, for instance, if the harm is imminent; and

82 http://dictionary.oed.com.ez.sun.ac.za/cgi/entry/50080313?single=1&query_type=word&queryword=ex+parte&first=1&max_to_show=10 (accessed 15 October 2010).

83 Harms *Civil Procedure in the Superior Courts* (2010) LexisNexis Butterworths Intranet Resources B6.13.

84 *Ibid* B6.14.

85 *Ibid* B6.12.

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- if the identity of the respondent or respondents is not readily ascertainable (in which event the relief sought will be for a rule *nisi* with directions on how to serve the rule *nisi*).[86]

It is argued that possibly two of the above points could justify an *ex parte* application in the context of a search and seizure application brought by the Commissioner. The first justification would be if the nature of the relief sought is such that notice to the respondent may render the relief nugatory. This refers to a situation where there is a possibility that a taxpayer could for example destroy, remove, hide, edit or create information, documents or things when notice is given to him that the SARS is applying for a warrant to search and seize. That is exactly why notice would render the relief nugatory. The idea is that the search and seizure should come as a surprise to the taxpayer.

Another justification for the Commissioner bringing the application *ex parte* could be if the matter is so urgent that notice cannot be given to the respondent because the harm is imminent. It is however a settled principle in our law that an applicant cannot create his own urgency.[87] This refers to a situation where the SARS is aware that the taxpayer is about to destroy, remove, hide, edit or create information, documents or things, and that there is no time to give notice of the application. However, it is argued that this situation overlaps with and could also fall under the above nugatory provision since the notice would most likely also lead to actions of the taxpayer that would render the relief futile and nugatory.

It seems accordingly that there is justification in the law of civil procedure for the bringing of an *ex parte* application by the Commissioner.

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[86] A rule *nisi* is defined in Volume 3(1) of LAWSA as follows: “Where an application has been granted *ex parte* and it appears to the court that the rights of other persons may be affected by it, the court will not make a final order but will order a rule *nisi* to be issued calling upon such persons to show cause why the order should not be made final.”

[87] Harms Civil Procedure in the Superior Courts (2010) LexisNexis Butterworths Intranet Resources B6.64.

2 3 The case law on the application for a warrant

It might be self-evident to think that the application must be brought *ex parte* by the Commissioner since notice could defeat the purpose of a search and seizure operation. However, it has been a topic of much debate in our case law. As stated above, the application procedure for a warrant to search and seize has developed under the Act from a compulsory *ex parte* application to just an application, and now again to a compulsory *ex parte* application in terms of the TAB. These changes back and forth might be an indication of the uncertainty in this regard.

After removal of the words *ex parte* in section 74D(1) of the Act, the section merely required that the Commissioner had to bring an application. The deletion of the words *ex parte* and the meaning of an application in terms of section 74D(1) of the Act has been dealt with in a number of cases by our courts.

In *Ferela (Pty) Ltd v Commissioner for Inland Revenue,*[88] decided after the removal of the words *ex parte* in section 74D(1) of the Act, Botha J noted that it was clear from the express terms of section 74D(1) that no prior notice need be given of an application for a warrant.[89] He also expressed the view that the deletion of the words *ex parte* had no significant effect.[90] Accordingly, this case is authority to conclude that section 74D still permitted an *ex parte* application, even though the express words to that effect were removed.

In *Deutschmann NO; Shelton v Commissioner for the SARS,*[91] it was submitted on behalf of both applicants that the purpose of the amendment of section 74D(1) of the Act, which deleted the words *ex parte,* was to indicate clearly that applications for a search and seizure warrant should not be brought *ex parte*. They should comply with the Rules of Court, which means that notice of the application must be given. The applicants further argued that the changed wording signified a change of intention by the legislature and that the change was clearly calculated and not

[88] 60 SATC 513.
[89] On page 524.
[90] *Ibid*.
[91] 62 SATC 191.

inadvertent. However, the court rejected these arguments and held that, if regard were had to the wide ambit of search contemplated by the provisions, it was inconceivable that the legislature could have contemplated that prior notice of an application to conduct such a search could be required in every instance.[92]

The court in the *Deutschmann* case furthermore held that a requirement of prior notice would also render the provisions of section 74D(9) of the Act redundant.[93] Section 74D(9) provides that any person may apply to the relevant division of the High Court for the return of any information, documents or things seized. The court thus suggests that if prior notice of an application for a warrant were given, then there would be no need for a provision authorising the return of anything seized. This is however a questionable remark and it is submitted that whether prior notice is given or not, any person should still be able to apply for the return of the seized material.

What is, however, clear is that the *Ferela* and the *Deutschmann* cases are in agreement with regard to the notice of an application. It was decided in both cases that no such notice is required from the Commissioner and that an *ex parte* application is thus permissible in terms of section 74D(1) of the Act, even though the express words were removed.

However, in *Haynes v Commissioner of Inland Revenue,*[94] Lockie J expressed his disagreement with the views of the High Court decisions in *Ferela* and *Deutschmann* that the deletion of the words *ex parte* did not have a significant effect. In Lockie J's view, the deletion of the words *ex parte* appearing before the word *application* is of considerable significance.[95] It was held that the Commissioner was not obliged to bring an application in terms of section 74D of the Act *ex parte* without any notice to the person adversely affected. Nor was the judge considering the application bound

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[92] On page 203.
[93] *Ibid*.
[94] 64 SATC 321.
[95] On page 349.

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to consider or determine such an application on that basis.[96] It is required that the applicant should lay a basis for bringing the application *ex parte* and thus without prior notice and in the instant case no such basis had been laid.[97] There should accordingly be a serious basis for bringing the application *ex parte*. According to the judge, the amendment which removed the words *ex parte* had brought the section into line with the Constitution and the common law, which required that before someone's rights or interests were adversely affected by administrative action, he or she should be given a hearing.[98] The court's conclusion was summarised as follows:[99]

> "The Commissioner's failure to give the applicant notice of the application and failure of the Commissioner to adduce facts and make averments justifying the bringing of the application without notice, in my view invalidates the application for the warrant and the decision to issue the warrant."

It is accordingly clear from the *Haynes* case that an *ex parte* application would not as such be disallowed, but that proper grounds should exist for the bringing of the application *ex parte*.

After the *Haynes* case, the SCA also dealt with the problem of prior notice when an application is made in terms of section 74D(1) of the Act for a warrant to search and seize. This was in the case of *Shelton v Commissioner for SA Revenue Services*[100] where the warrant was applied for and issued on the basis of allegations suggesting that the respondent failed to comply with his obligations in terms of the Income Tax Act of the former Transkei in that he did not submit income tax returns. Furthermore, that he committed an offence in terms of the Act in that there were reasonable grounds for believing that he, with intent to evade the payment of income tax levied, made a false statement in relation to his personal assets and liabilities in a return rendered. The appellant submitted that the Commissioner had to give him notice of the application for a warrant unless a case could be made out that notice should be dispensed with. However, the court held that the giving of

[96] On page 351.
[97] On page 350.
[98] On page 352.
[99] *Ibid*.
[100] 64 SATC 179.

prior notice of the application for a warrant would, in these circumstances, have defeated the object and purpose of the section.[101] The court also held that one of the purposes of the section is to enable the Commissioner to enter premises to search for information intentionally concealed from him and that the section, therefore, by necessary implication, did not require the giving of notice.[102]

Accordingly, the SCA decided in the *Shelton* case that prior notice of the bringing of an application is not a requirement of section 74D(1) of the Act. However, it does not seem from this judgement that the application must be made *ex parte*. It was merely decided that the giving of prior notice of the application for a warrant would, in these circumstances, have defeated the object and purpose of the section. It could however be that certain other circumstances would require the giving of prior notice.

The words *without prior notice* in section 74D(1) of the Act also created some uncertainty. The relevant part of section 74D(1) reads as follows: "For the purposes of the administration of this Act, a judge may, on application by the Commissioner or any officer contemplated in section 74(4), issue a warrant, authorising the officer named therein to, *without prior notice* and at any time…". It was held in the *Deutschmann* case that, when notice of an application for a warrant would be required, it would render the words *without prior notice* in section 74D(1) of the Act nugatory.[103] This case therefore suggests that the words *without prior notice* in section 74D(1) of the Act still mean that the Commissioner must bring the application *ex parte*, even though the express words *ex parte* do not appear in the section anymore.

However, in the *Haynes* case, Locke J did not concur with the above reasoning on the words *without prior notice*. [104] According to Locke J, section 74D(1) of the Act provides that the officer named in the warrant may *without prior notice* enter and

[101] On page 187.
[102] *Ibid*.
[103] On page 203.
[104] On page 349.

search any premises, and search any person present on the premises. The *without prior notice* provision does not apply to the bringing of the application.

It is argued that the *Haynes* decision should be correct in this regard. The words *without prior notice* in section 74D(1) of the Act refer to the search and seizure which can be conducted without prior notice rather than to the application for the warrant without prior notice.

To sum up on the above cases and on the bringing of an *ex parte* application in terms of section 74D(1) of the Act, the *Ferela* and *Deutschmann* cases held that prior notice of the application is not required in terms of section 74D(1). The court held in the *Haynes* case that the Commissioner is not obliged to bring the application *ex parte*, but if it is brought *ex parte*, a proper basis should be laid. The SCA held in the *Shelton* case that the giving of notice of the application was not required. However, none of the cases held expressly that section 74D(1) of the Act required either strictly *ex parte* or that it could never be made *ex parte*. The principles from the cases, and the interpretation of the application in terms of section 74D(1), is accordingly summarised as follows:

- the Commissioner is not obliged to bring the application *ex parte*;
- the Commissioner may bring the application for a warrant *ex parte*; and
- should the Commissioner bring the application *ex parte*, a basis for bringing the application *ex parte* should be laid.

2 4 Conclusion on the application for a warrant

Section 74D(1) of the Act does not specify that the application must be brought *ex parte*. However, in terms of general procedure law and case law, the Commissioner would be entitled to bring the application *ex parte* if, for example, the nature of the relief sought is such that notice to the respondent may render the relief nugatory or if, due to the urgency of the matter, notice cannot be given to the respondent, for instance, if the harm is imminent.[105]

[105] Harms Civil Procedure in the Superior Courts (2010) LexisNexis Butterworths Intranet Resources B6.12.

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However, in terms of the TAB it is now required that the Commissioner *must* bring the application *ex parte*. It could therefore be argued that the Commissioner would have to lay a basis in each *ex parte* application that is made by him. This basis could be, for example, that notice to the respondent may render the relief nugatory or if, due to the urgency of the matter, notice cannot be given to the respondent.

However, according to Klue, the following problem could arise with an *ex parte* application:[106]

> "Another issue with an *ex parte* application by the Commissioner arises where the application for a warrant is tainted with incorrect facts. It is common knowledge that the Commissioner regularly receives tip-offs from estranged spouses, many of which are vexatious, and no doubt some may be factually incorrect. Under these circumstances, the judge may authorise the issue of a warrant which otherwise may not have been issued."

The conclusion could thus be reached that there are two incongruent interests with regard to an *ex parte* application. The Commissioner has a need to bring the application *ex parte* in order to act on a surprise basis, but this could lead to situations where an application is brought by the Commissioner, based on incorrect false facts, which could lead to serious infringements on taxpayers' rights. The TAB now again explicitly requires an *ex parte* application in clause 59(2) of the TAB. In the *Haynes* case, Lockie J expressed his view on the *ex parte* application as follows:[107]

> "On the contrary, as has been seen, on 4 July 1997, the words, '*ex parte*' which previously appeared before the word 'application' were deleted. By so doing, in my view, the sections were brought into line with the Constitution and the common law, which requires that before someone's rights or interests are adversely affected, by administrative action, he or she should be given a hearing."

If Lockie J's view is applied, the TAB could perhaps be constitutionally challenged because of the compulsory requirement of an *ex parte* application. It is however submitted that unconstitutionality of clause 59(2) of the TAB merely because of the

[106] Klue, Arendse & Williams Silke on Tax Administration (2009) § 8.1
[107] On page 351-352.

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fact that it must be brought *ex parte* is unsound. An *ex parte* application is widely recognised in our law in the lower and superior courts and the constitutionality of the principle of an *ex parte* application has never been challenged. It is therefore concluded that the compulsory *ex parte* application as required by the TAB would not justify unconstitutionality *per se* but it is still submitted that this is an aspect of the application procedure which is in favour of the Commissioner.

3 Validity of a warrant before and after the exercising thereof

3 1 Introduction

There are some uncertainties regarding the validity of a warrant before and after the exercising thereof. Once the Commissioner is in possession of a warrant to search and seize, the first question relates to the validity of the warrant before it has been exercised: How long is that warrant valid for, or in other words, when does it expire? It could then happen that the Commissioner exercises a valid warrant before its expiry, but that the documents confiscated by the Commissioner reveal the existence of further documents. This leads to a second question: Can the same warrant be used again to conduct a further search or has the warrant expired when exercised? These two questions on the validity of a warrant are now addressed.

3 2 How long is the warrant valid for?

This question relates to the validity of a warrant before it has been exercised. Section 74D of the Act does not provide for the expiry of a warrant after a certain time period has lapsed. It could be argued that the legislature might have accepted that the Commissioner, when in possession of a valid warrant, would want to exercise it as soon as possible to prevent, for example, a destruction of records. There are also no reported cases on when a warrant issued by a judge in terms of section 74D of the Act expires. However, clause 60(3) of the TAB has now addressed this *lacuna* in the Act.[108]

[108] A *lacuna* is defined in the Oxford English dictionary as "a gap, an empty space, spot, or cavity" and it is often used as a legal word to indicate that there is a gap or omission in an Act.

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Clause 60(3) of the TAB states that the warrant must be exercised within 45 business days, or such further period as a judge or magistrate deems appropriate on good cause shown. It is argued that this section, with the use of the words *must be exercised within 45 business days*, prescribes a validity period of a warrant. It is required that the warrant *must* be exercised in that time period, which leads to the conclusion that the warrant will not be valid after the 45 business days period. Therefore, if the SARS do not exercise the warrant within the prescribed time period, it is submitted that the warrant will expire and accordingly the SARS cannot conduct a valid search and seizure on that warrant anymore.

The first draft of the TAB provided for a 60 days period, which has now been amended to 45 business days in the second and third drafts of the TAB. There was thus a change from *60 days* to *45 business days*. Clause 1 of the TAB defines a *business day* as follows:

> "Any day which is not a Saturday, Sunday or public holiday, and for purposes of determining the days or a period allowed for complying with the provisions of Chapter 9, excludes the days between 16 December of each year and 15 January of the following year, both days inclusive".

The search and seizure provisions are not part of Chapter 9, and the meaning of a business day for purposes of clause 60(3) of the TAB is accordingly "*any day which is not a Saturday, Sunday or public holiday".* Clause 1 of the first draft of the TAB defined a *day* as "a calendar day". It is argued that a *day* in terms of the first draft of the TAB would have included Saturdays, Sundays and public holidays, as those days are also calendar days. Those days are however not *business days* in terms of the second and third drafts of the TAB. It is therefore argued that the change from 60 days to 45 business days is not radical since the exclusion of the Saturdays, Sundays and public holidays would more or less lead to the same amount of business days.

This new provision of the TAB relating to the validity of a warrant also provides for a judicial discretion. Clause 60(3) of the TAB provides that the warrant must be exercised within 45 business days, *or such further period as a judge or magistrate deems appropriate on good cause shown*. The applicant will have to convince the

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judge or magistrate, by showing a good cause, why the warrant needs to be valid for more than 45 business days. There is however no literature or comments yet available on this specific aspect of the TAB and it will be left to the judge or magistrate to decide whether a good cause is shown before he or she will grant a further period for the warrant to be exercised in. In the case of *Cohen Bros v Samuels*[109] the following was held, in general, regarding the definition of a good cause:[110]

> "Mr *Tindall* says the Court has never defined a good cause. In the nature of things it is hardly possible, and certainly undesirable, for the court to attempt to do so. No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature. We can only deal with each application on its merits, and decide in each case whether *good cause* has been shown."

There is no similar provision on the validity of a warrant in the Act. Other legislation is accordingly considered to determine how the position is regulated in other spheres of the law.

Section 21(3)(b) of the Criminal Procedure Act provides that a search warrant shall be of force until it is exercised or is cancelled by the person who issued it or, if such person is not available, by a person with like authority. No guidelines in respect of the time period after which the warrant expires by exercising or cancellation are however given. It merely relates to the expiry of a warrant when exercised. Applied to a search and seizure by the Commissioner, it would mean that the warrant obtained by the Commissioner expires on the exercising thereof or the cancellation thereof by the judge who issued it.

In terms of section 6 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act No 70 of 2002, an entry warrant expires when the period or extended period for which the interception direction concerned has been issued, lapses, or it is cancelled by the designated

[109] 1906 TS 221.
[110] On page 224.

judge who issued it or, if he or she is not available, by any other designated judge, whichever occurs first.

A solution for the *lacuna* in section 74D of the Act could thus be that the warrant issued by a judge under section 74D should provide for a time period in which the warrant must be exercised. The warrant would then expire when the period as prescribed by the judge has lapsed. Furthermore, when the TAB becomes law, all the warrants authorised under section 74D of the Act will still fall under section 74D. Therefore, as argued *supra*, a judge issuing a warrant under section 74D of the Act should prescribe a validity period. It could be argued that the 45 business days validity period, as provided for in the TAB, should in the interim be adopted to achieve uniformity.

3 3 What is the status of a warrant once exercised?

There is a *lacuna* in both the Act and the TAB regarding the validity of a warrant after it has been exercised. It is not clear what the status of an exercised warrant is and the question is thus whether a warrant expires when exercised or whether the same warrant can be used again to conduct a second search and seizure. This is often the case when the first search reveals the existence of other documents which the SARS now wants to seize in terms of a second search for new material. This could also be the case when the SARS has not seized all the relevant material during the first search and now wants to go back for a second search, not necessarily for new material but for the information, documents or things which were not seized the first time. Can the SARS conduct this second search on the same warrant or is a new warrant, and thus a whole new application procedure, required?

Even though the previous section 74(3) of the Act did not require a warrant to conduct a search and seizure, some case law decided on section 74(3) provides guidance on this question. Section 74(3) of the Act required a mere authorisation by the Commissioner to search and seize. In the fourth *Rudolph* case, as discussed in chapter 2 *supra*, such authorisations had been granted on 20 October 1993 and the taxpayer's home and business had been searched on 21 October 1993 and again on

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22 April 1994. The second search was conducted under the authority of the original written authorisation. The taxpayer contended that the authorisations, having once been executed in October 1993, could not validly be executed again in April 1994. The authorisations could thus not be re-activated to validate the search and seizure on the second occasion. The court, however, held that this contention was without substance since there is nothing in the Act which suggested at that time that the mandate conferred by an authorisation under section 74(3) of the Act expires once documents or other articles discovered in the course of an authorised search have been seized and retained.[111] The court further explained as follows:[112]

> "It is obvious that documents discovered as a result of a search may, in many cases, reveal the existence of other documents or articles for which further searches have to be made; and it is not easily conceivable that the Legislature would in such cases require a fresh authorisation for each further search. Be that as it may, the question whether several consecutive searches are authorised by any particular authorisation must be answered by reference to the terms of the authorisation itself. An authorisation under s 74(3), after all, confers a mandate and the duration of the mandate depends, in the absence of any statutory direction, upon the terms of the authorisation itself."

The court found that the authorisations in this case had allowed for consecutive searches and the court thus held that the authorisation did not expire on the execution of the first search and seizure.

What can be concluded from this *Rudolph* judgment, even though section 74(3) of the Act is not applicable anymore, is that the authorisation now given by a warrant will be valid as prescribed in the warrant itself. This means that a warrant which provides for multiple searches and seizures could be used to conduct those further searches and seizures. It is however questionable whether it is permissible to issue such a warrant authorising consecutive searches under the Act or the TAB. Both require that a judge or magistrate must be satisfied that there are reasonable

[111] On page 406.
[112] *Ibid*.

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grounds to believe that the relevant material is likely to be found.[113] This would exclude the possibility of a second search if the material required was only revealed during the first search. If the existence of certain new material is only revealed after the first search and seizure, a judge could not be satisfied to believe that that material was likely to be found when the application was brought. Therefore, this could lead to a conclusion that a warrant permitting multiple searches is not permissible.

It is however submitted that a distinction could be made, in terms of the Act, between a second search for new relevant material based on information gathered during the first search and seizure and a second search for relevant material which was originally contained in the warrant but which was not seized during the first search. Section 74D(4)(d) of the Act requires that a warrant shall be reasonably specific as to any information, documents or things to be searched for and seized. It is therefore argued that a second search might be permissible only in the case where the relevant material to be searched for and seized was contained in the warrant but not seized during the first search and seizure. This has not yet been decided by our courts and the position is thus not clear.

Furthermore, in terms of section 74D(6) of the Act, any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of the Act. It seems as if this section could permit a further search even though the information, documents or things were not listed in the warrant. It is however argued that section 74D(6), which has not yet been interpreted by our courts, would only be applicable during the first (and possible the only permissible) search and seizure operation. During such operation, it would be permissible to seize other material not identified in the warrant, should reasonable grounds for such seizure exist. However, it is submitted

[113] Section 74D(3)(b) of the Act and clause 60(1)(b) of the TAB.

that a second search for material not identified in the warrant would amount to a warrantless search which is not permissible in terms of the Act.

Clause 63 of the TAB now provides for a warrantless search and seizure and this provision of the TAB could thus be used by the SARS to conduct a second search and seizure. It should furthermore be noted that it is not required in terms of the TAB that a warrant must contain the relevant material to be searched for and seized, as contained in section 74D(4)(d) of the Act. The distinction described above relating to a second search for new material which was not identified in the original warrant and a second search for material which was contained in the original warrant would thus not apply to the TAB. It is not required to include the relevant material in the warrant in terms of the TAB, and it seems accordingly that this could lead to a conclusion that a second search would be permissible under the TAB in terms of the warrantless provisions.

It is argued that there is however uncertainty under the TAB relating to a second search because of the 45 business days time period as prescribed in clause 60(3) of the TAB. In terms of this clause, a warrant is valid for 45 business days. It could thus be argued that any number of searches and seizures would be permissible, as long as they are exercised within the prescribed 45 business days time period.

It could be argued that the TAB is too broad regarding the validity of a warrant in general. Firstly, it is not required in terms of the TAB that a warrant must contain details of the relevant material to be searched for and seized. Secondly, there is 45 business days validity period which does not specify whether that would allow multiple searches within such period. Thirdly, the SARS could use clause 63 of the TAB to conduct a warrantless second search and seizure should the requirements of clause 63 be met. In terms of the Act, however, such multiple searches are limited due to the requirement that the warrant must contain the relevant material to be searched for and seized and since warrantless searches and seizures are not permissible under the Act.

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It is therefore submitted that there is a serious *lacuna* in the TAB in this regard and that this aspect should be regulated more comprehensively. Section 21(3)(b) of the Criminal Procedure Act provides that a search warrant shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority. Applied to a search and seizure by the Commissioner, it would mean that the warrant obtained by the Commissioner expires once it is exercised. This should be adopted in the TAB as this would provide more certainty for taxpayers and would not expose them to endless further searches and seizures once the original warrant was exercised.

3 4 Conclusion

The TAB now provides for the 45 business days validity period but there are still some uncertainties regarding the validity of a warrant before and after it has been exercised. It is argued that these aspects need further legislative regulation and could be brought in line with the Criminal Procedure Act, which would mean that the warrant lapses once it is exercised.

4 The reasonable grounds criterion

4 1 Introduction

The phrase *reasonable grounds* occurs quite a few times in the relevant search and seizure provisions of both the Act and the TAB. It is either a judge or magistrate or a SARS official who must be satisfied on reasonable grounds before something can be done. The reasonable grounds criterion in the Act and in the TAB is used as follows:

- a judge or magistrate may issue a warrant if satisfied that there are *reasonable grounds* to believe certain things as set out in section 74D(3)(a)-(c) of the Act and clause 60(1)(a)-(b) of the TAB;
- in terms of both the Act and the TAB, where a SARS official has *reasonable grounds* to believe that relevant material is at premises not identified in the search warrant, it is permitted to search those premises that are not identified in the warrant;[114]

[114] Section 74D(5) of Act and clause 62 of the TAB.

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- section 74D(6) of the Act provides that an officer may seize, in addition to information, documents or things referred to in the warrant, any other information, documents or things that such officer on *reasonable grounds* believes to afford evidence; and
- a search and seizure without a warrant also requires a reasonable grounds satisfaction. In terms of clause 63 of the TAB, a senior SARS official may without a warrant exercise the powers referred to in clause 61(3) of the TAB if the senior SARS official on *reasonable grounds* is satisfied that:
  - there may be an imminent removal or destruction of relevant material likely to be found on the premises;
  - if SARS applies for a search and seizure warrant under clause 59 of the TAB, a search warrant will be issued; and
  - the delay in obtaining a warrant would defeat the object of the search and seizure.

The above listing shows that a reasonable grounds satisfaction is often required in the context of search and seizure. It is in fact a criterion that will always be applied regardless of whether it is a warranted or a warrantless search and seizure. It will always be exercised by a judge or magistrate when an application is made for a warrant and it will always be exercised by a SARS official when a warrantless search and seizure is contemplated. It will also be a criterion required to be satisfied when the officials are in the process of conducting a search and seizure, when there is for example a need to search premises or seize things not identified in the warrant. It is therefore an important criterion and it needs to be determined how and when it will be satisfied.

4 2 Reasonable grounds criterion considered in tax cases

In the case of *Haynes v Commissioner for Inland Revenue*,[115] the High Court decided the following:[116]

[115] 2000 (6) BCLR 596 (Tk).

[116] On page 630.

> "The provisions of sections 74D [of the Income Tax Act] and 57D [of the Value-Added Tax Act] constitute a draconian remedy available to the respondent. The presiding judge hearing the application brought in terms of section 74D(1) must be satisfied that there are reasonable grounds to believe that there had been non-compliance by the taxpayer with his obligations in terms of the Act and that information, documents or things are likely to be found which will afford evidence of such non-compliance. In my view, the Commissioner would have to show that the measures provided for in section 74A and 74B provided non-compliance by the taxpayer with his obligations in terms of the Act and that the information, documents or things could not be obtained by way of the provisions of section 74B thereby necessitating the application brought in terms of section 74D. In the absence thereof, in the application brought in terms of section 74D(2), the judge hearing the application would in the normal course not be able to be satisfied that there were 'reasonable grounds to believe' as required by section 74D(3)."

This shows that the Commissioner has to use other measures available to him before he can bring an application for a warrant. The Commissioner must first, in terms of section 74A of the Act, require a taxpayer to furnish information, documents or things as the Commissioner may require. He must also use his powers under section 74B of the Act, which provides that the Commissioner may require a taxpayer, with reasonable prior notice, to furnish, produce or make available any information, documents or things. These two sections require reasonable prior notice. If the Commissioner does not succeed with his powers under sections 74A and 74B of the Act, only then can he approach a court for a warrant authorising a search and seizure. Should the Commissioner approach a court for a warrant to search and seize, he would have to show, in terms of the *Haynes* case, that he exhausted his other remedies in terms of sections 74A and 74B of the Act. If the Commissioner does not show this, a judge will not be able to satisfy himself on reasonable grounds to issue the warrant.

The above part of the *Haynes* dictum is on the reasonable grounds criterion which needs to be satisfied by a judge when considering an application. The court also considered the reasonable grounds discretion exercised by a SARS officer when he

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wishes to seize information, documents or things other than those referred to in the warrant in terms of section 74D(6) of the Act. An officer may only seize other information, documents or things as such officer believes on reasonable grounds afford evidence. The court held that, in practical terms, this would mean that such documents, information and things would have to be inspected to enable the authorised officer to satisfy himself on reasonable grounds that such documents, information or things do afford evidence of non-compliance with the relevant obligations or the committing of an offence in terms of the Act by the taxpayer.[117] The court also held that the onus rests on the Commissioner to show that the officers seizing the said documents, information or things had reasonable grounds to believe that such information documents or things were entitled to be seized,[118] and the court held the same regarding the onus when the officers search a premises that was not identified in the warrant in terms of section 74D(5) of the Act. The Commissioner has to show that there were reasonable grounds to believe that information, documents or things not at the premises as identified in the warrant were about to be removed or destroyed and that a warrant could not be obtained timeously to prevent such removal or destruction.

To sum up, it was decided in the *Haynes* case that before a judge can be satisfied on reasonable grounds to issue a warrant, the Commissioner must show that he has exhausted his powers under sections 74A and 74B of the Act. Once the Commissioner is in possession of a warrant, and the officers make a decision in terms of sections 74D(5) or 74D(6) of the Act, based on reasonable grounds, the onus is afterwards on the Commissioner to show that there were in fact reasonable grounds for such a decision.

The *Haynes* case is a High Court decision. The SCA has only once made a statement on the reasonable grounds criterion in terms of search and seizure in tax law. In the *Shelton* case it was emphasized by the SCA that it must be the judge who must be

[117] On pages 642-643.
[118] On page 643.

satisfied on reasonable grounds.[119] It is thus irrelevant whether the person who supplied the information under oath, which must be attended to an application for a warrant to a judge, was satisfied that reasonable grounds existed for the application.[120] It is argued that this could also be applied to the discretion of a SARS officer when he has to be satisfied on reasonable grounds. The emphasize is on his satisfaction, he cannot rely on the satisfaction of another person.

There is however still not a clear guideline in the tax cases as to when and how the reasonable grounds criterion will be met. The *reasonable grounds* criterion is, however, often found in other spheres of the law when some discretion is required. A comparative approach can provide guidance as to the application and the meaning thereof in the context of a search and seizure in tax law.

4 3 Reasonable grounds criterion in other spheres of the law

It is one of the *essentialia* of a contract of sale and a contract of lease that the purchase price or the lease price must be ascertained or ascertainable.[121] In the case of *Engen Petroleum Ltd v Kommandonek (Pty) Ltd,*[122] the question to be decided was whether a lease was valid where it provides that the lessee is entitled to vary the lease on reasonable grounds. It was argued by the respondent, who wanted the lease to be declared void because of vagueness, that such a provision in the lease contract gave the other party an unfettered right to determine the rental. The court however found that there was no such unfettered right since the rental could only be varied on reasonable grounds. This meant that the variation was subject to objective criteria and that the contract was thus valid.[123]

This shows that the reasonable grounds criterion is an objective one. It means that a judge, magistrate or SARS official has to be objectively satisfied that there are reasonable grounds when exercising their various discretions. It is therefore argued

[119] On page 185.
[120] *Ibid*.
[121] Kahn, Havenga, Havenga & Lotz *Principles of the Law of Sale and Lease* 2ed (2010) 17.
[122] 2001 (2) SA 170 (W).
[123] On page 173.

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that a mere subjective suspicion or inkling would not be sufficient to satisfy the reasonable grounds criterion.

In an insolvency case, *Bruwil Konstruksie (Edms) Bpk v Whitson NO,*[124] it was held that *reasonable grounds* contemplates a lesser burden than a *prima facie* case and that a magistrate to whom an application for a warrant is made has a duty to insist on the facts being placed before him on which he could then make his decision for a warrant.[125]

A *prima facie* proof was defined in *Ex parte Minister of Justice: In re R v Jacobson and Levy* as "in the absence of rebuttal, ... clear proof leaving no doubt".[126] Applied to tax law, it would mean that it is not required from the Commissioner to make out a *prima facie* case when applying for a warrant to search and seize, since *reasonable grounds* is a lesser burden. However, he needs to place facts before the judge as to enable the latter to exercise his reasonable grounds discretion. Similarly, an officer exercising his discretion when conducting a search and seizure does not have to be satisfied with certainty but there must be reasonable grounds based on the facts before him.

Similar to the provisions in the Act and the TAB, it is also required in terms of the Criminal Procedure Act that a judge must be satisfied on reasonable grounds before he may issue a warrant authorising a search and seizure.[127] According to Bekker *et al*,[128] the judicial officer must exercise his discretion in a judicial manner, which means that "he must exercise the discretion in a reasonable and regular manner, in accordance with the law and while taking all the relevant facts into account".

The Criminal Procedure Act also provides for a warrantless search and seizure in section 22. Similar to the warrantless provisions of the TAB, one of the circumstances in which articles may be seized in terms of the Criminal Procedure Act without a

[124] 1980 (4) SA 703 (T).
[125] On pages 710 and 711.
[126] 1931 AD 474.
[127] Section 21.
[128] Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe Criminal Procedure Handbook 9ed (2009) 134 135.

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warrant is when the police officer has reasonable grounds to believe that a search warrant will be issued to him if he applies for such warrant and that the delay in obtaining such warrant would defeat the object of the search.[129] In the case of *Mnyungula v Minister of Safety and Security,*[130] a case considering the warrantless provisions of the Criminal Procedure Act, the court held that the onus is on the police to prove, objectively viewed, the existence of ample facts upon which the police base the reasonable belief, which facts must exist at the time when the police acted without a warrant, and not only at a later stage.[131] The court further referred to the case of *Ndabeni v Minister of Law and Order*[132] where that court in turn quoted the following from Milne J:[133]

> "(T)here can only be reasonable cause to believe... where, considered objectively, there are reasonable grounds for the belief... (I)t cannot be said that an officer has reasonable cause to believe... merely because he believes he has reasonable cause to believe."

This means that the reasonable grounds must exist objectively at the time when a warrantless search and seizure is conducted, and not afterwards. This would practically mean that a SARS officer cannot satisfy himself on reasonable grounds only after he has already seized the documents that bring the facts to light on which he "based" his reasonable belief. There needs to be this reasonable belief beforehand and it needs to be based on objective and true facts. An officer cannot form his reasonable belief based on what he subjectively believes.

The court in *Mnyungula* also had to consider the following question:[134]

> "Is it the law of this land that once a policeman on incorrect 'facts' formed a '*bona fide'* reasonable belief that there are sufficient grounds to seize a vehicle, that that seizure is 'forever' or can the 'reasonable belief' later be rebutted by the true facts being shown, causing the seizure to lapse?"

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[129] Section 22(b).
[130] [2003] JOL 11934 (Tk).
[131] On pages 5-6.
[132] 1984 (3) SA 500 (D).
[133] On page 511.
[134] On page 12.

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The court held that it can, in terms of its inherent powers, set aside the seizure in the interest of justice and order the seized article to be returned when it is shown that the "facts" or "grounds" relied upon by the policeman when forming the "reasonable belief", did not in reality exist or were false.[135] This could mean that a SARS officers' belief, which later turns out to be based on unreasonable grounds, can lead to the setting aside of the seizure.

4 4 Conclusion on the reasonable grounds criterion

It is thus clear that anyone exercising the reasonable grounds criterion in terms of a warranted or a warrantless search and seizure must be satisfied that the grounds in fact exist objectively. It is not sufficient that the SARS officer subjectively and *bona fide* believed that they existed. A mere hope is also not enough to satisfy the reasonable grounds criterion. This can similarly be applied to a judge's or magistrate's discretion. He must have reasonable grounds at the time of the granting of the application for a warrant, based on the objective facts existing at that time.

It is however necessary, in the context of the discretion of a judge or magistrate, that the information put before the judge or magistrate must contain sufficient detail to enable him to satisfy himself on reasonable grounds. It is therefore a burden on the Commissioner to place the correct facts before the judge or magistrate to allow him or her to be satisfied on reasonable grounds.

5 Conclusion

As shown in chapter 2 *supra*, the basic principles of a search and seizure by warrant remain the same under the TAB. In terms of clause 59(2) of the TAB, however, the SARS *must* now bring this application *ex parte* and this could be seen as a fundamental difference between the Act and the TAB. It was shown in this chapter, with reference to case law, that an *ex parte* application is permissible in terms of section 74D of the Act, while it is compulsory in terms of the TAB. The effect thereof has been analysed in this chapter and the conclusion is reached that the compulsory *ex parte* application as required by the TAB would not justify its unconstitutionality

[135] On page 12.

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per se but it is still submitted that this is an aspect of the application procedure which is now in favour of the Commissioner. It is however also acknowledged that an *ex parte* application makes sense in this regard as notice of the search and seizure could render the object of the search and seizure nugatory. It is difficult to reach a balance between the needs of the Commissioner and the protection of a taxpayer in this regard.

It was furthermore concluded in this chapter that the TAB has now closed the *lacuna* in the Act relating to the validity period of a warrant before it has been executed. There is now provision for a 45 business day period wherein the warrant must be exercised. However, regarding whether a warrant expires when exercised or whether the same warrant can be used again to conduct a second search and seizure, it was concluded that the position is not quite certain in terms of the Act or the TAB. In terms of the TAB, however, the warrantless provisions of clause 63 could be invoked to conduct further searches.

This chapter also discussed the meaning of the reasonable grounds criterion and it was concluded, with reference to case law, when and how this criterion could be satisfied. It is an objective criterion and the facts need to exist at the time of the exercising of this discretion by the judge, magistrate or SARS officer.

Chapter 4 addresses the new warrantless search and seizure provisions.

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CHAPTER 4: WARRANTLESS SEARCH AND SEIZURE

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1 Introduction

This chapter firstly addresses the content of the warrantless search and seizure provisions of the TAB. Clause 63 of the TAB now authorises a search and seizure without a warrant, which is not allowed in terms of section 74D of the Act. Secondly, this chapter analyses commentaries on the warrantless provisions. Lastly, this chapter compares the warrantless search and seizure provisions of the TAB to the provisions permitting a warrantless search and seizure in other acts. This places the warrantless search and seizure provisions of the TAB in perspective and it can then be determined whether the TAB provisions are in line with the warrantless provisions in other spheres of the law. The constitutionality of the warrantless search and seizure provisions is addressed in chapter 5.

2 Content of clause 63 of the TAB

2 1 Introduction

Clause 63 of the TAB provides as follows:

> (1) A senior SARS official may without a warrant exercise the powers referred to in clause 61(3) –
>
> (a) if the person who may consent thereto so consents in writing; or
>
> (b) if the senior SARS official on reasonable grounds is satisfied 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 clause 59, a search warrant will be issued; and
>
> (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.
>
> (2) Clause 61(3) to (9) applies to a search conducted under this section.
>
> (3) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

Since the substitution of the previous section 74(3) of the Act and the insertion of section 74D into the Act in 1996, warrantless searches and seizures were no longer

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permitted in South African Income Tax law.[136] It could be argued that section 74D(5) of the Act, which allows for a search and seizure of premises not identified in the warrant, is similar to a warrantless search and seizure. However, this section can only be implemented when there is already a warrant, but the premises that the SARS wants to search are not indentified in that warrant. It means that some form of judicial control was thus involved when that original warrant was authorised and it is therefore argued that it is not warrantless in the very strict sense.

A similar clause authorising a warrantless search and seizure was also contained in the first and second drafts of the TAB. Clause 55 of the first draft of the TAB read as follows:

> (1) A senior SARS official may without a warrant exercise the powers referred to in clause 53(3)—
>
> (a) if the person who may consent thereto so consents in writing; or
>
> (b) if the official on reasonable grounds is satisfied—
>
> (i) that there may be an imminent removal or destruction of relevant material likely to be found on the premises;
>
> (ii) that if SARS applies for a search warrant under clause 51, a search warrant will be issued; and
>
> (iii) that the delay in obtaining a warrant would defeat the object of the search and seizure.
>
> (2) Clause 53(4) to (8) applies to a search conducted under this section.

Clause 63 of the second draft of the TAB read as follows:

> (1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3)—
>
> (a) if the person who may consent thereto so consents in writing; or
>
> (b) if the senior SARS official on reasonable grounds is satisfied 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

[136] Section 14 of the Revenue Laws Amendment Act No 46 of 1996 substituted section 74 of the Act, and added section 74D, which came into operation on 30 September 1996.

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(iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

(2) Section 61(3) to (8) and section 64(2)(b) applies to a search conducted under this section.

It is submitted that there were no substantial changes to the warrantless provisions from the first draft to the second draft of the TAB. The only minor differences related to the fact that all the clause numbers had changed in the second draft, and references were changed accordingly. However, the third draft of the TAB has now introduced an additional sub clause in clause 63 which provides that a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this clause without the consent of the occupant. There was no such limitation in the warrantless search and seizure provisions of the first or second draft of the TAB.

In terms of clause 63 of the TAB, the power to conduct a warrantless search and seizure is granted to a senior SARS official. Clause 6(3) of the TAB provides that the powers required by the TAB to be exercised by a senior SARS official must be exercised by—

(a) the Commissioner;

(b) a SARS official who has specific written authority from the Commissioner to exercise the power; or

(c) a SARS official occupying a post designated by the Commissioner for this purpose.

It is thus clear from clause 6(3) of the TAB that only a very limited number of persons will be authorised to conduct a warrantless search and seizure. It is furthermore clear that there are only two circumstances under which a warrantless search and seizure may be conducted, namely if the person who may consent thereto so consents in writing or if the senior SARS official on reasonable grounds is satisfied of the three requirements as listed in clause 63(1)(b)(i)-(iii) of the TAB.

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2 2 Consent

None of the reasonable grounds requirements need to be satisfied when consent is obtained by the SARS. Accordingly, if the person who may consent thereto so consents in writing to the warrantless search and seizure, it would not lead to the same kind of complexity than it could when the reasonable grounds criterion needs to be satisfied. It would in turn make any burden of proof easier since no discretion is involved in the obtaining of consent. It is thus argued that consent should always be the first option when a warrantless search and seizure is conducted. However, the reality is that consent will not always be easily obtainable by the SARS. Furthermore it is not clear from clause 63(1)(a) of the TAB who the person is "*who* may consent thereto". Is it the owner of the premises to be searched or of the thing to be seized? Is it the occupant? Or is it a person in control of the property? The following provisions of the Act and the TAB also relate to the giving of consent and provide as follows:

- In terms of section 74B(3) of the Act, relating to the power of the Commissioner to require a taxpayer or any other person to furnish, produce or make available any information, documents or things required for inspection, audit, examination or obtaining, the Commissioner or any officer contemplated in the section, shall not enter any dwelling-house or domestic premises (except any part thereof as may be occupied or used for the purposes of trade) without the consent of the *occupant*.
- Clauses 45(2) of the TAB, on the inspection powers of the SARS, and clause 48(5) of the TAB, on the audit or criminal investigation powers of the SARS, provide that a SARS official may not enter a dwelling-house or domestic premises (except any part thereof used for the purposes of trade) under these clauses without the consent of the *occupant*.
- Clause 62(2) of the TAB, on the search of premises not identified in the warrant, provides that a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this clause without the consent of the *occupant*.

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- Clause 63(3) of the TAB provides that a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under clause 63 without the consent of the *occupant*.

It is accordingly clear that certain provions of the Act and the TAB refer specifically to the consent of the occupant. However, clause 63(1)(a) of the TAB is not specific in this regard, and it is accordingly not clear how our courts will interpret this clause. Therefore, other areas of the law could provide some guidance.

In terms of section 22(a) of the Criminal Procedure Act, a police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 of the Criminal Procedure Act if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question.

This part of section 22 of the Criminal Procedure Act was considered in the case of *Ngamlana v MEC for Safety & Security and Another.*[137] The court held the following regarding the "person who may consent" thereto:[138]

> "To require the person who may consent to the search of the premises to have authority to consent to the seizure of a section 20 article found on the premises is to read into section 22(a) words which it does not contain. It would also be impractical to require a police official to be satisfied that the person consenting to the seizure has authority to do so, more particularly when it is borne in mind that in relation to many articles falling within the purview of section 20 of the Act it would be difficult to know at the time of seizure who the person or persons may be who might have a lawful right to possess the article. In my view therefore the mere fact that the person who may consent to the search of the premises gives consent to the search and seizure suffices to validate a search and seizure that was not done pursuant to a warrant. If the person who may consent to the search of the premises withholds consent to either, or both, the search and the seizure,

137 [1998] JOL 3821 (Tk).

138 Pages 4-5.

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> then what was not consented to can only be done by obtaining a warrant, unless the circumstances are such that the provisions of section 22(b)(i) and (ii) of the Act can be invoked."

In this case, counsel for the applicant submitted that it was required that the person who gave the consent was in charge of the premises or that he or she had authority to consent to the seizing of the item. It was however decided that it is not required that the person who may consent thereto must have the authority to consent. It was also held by the court that it is not required for the person giving the consent to have a lawful right to possess the article. It seems accordingly that the giving of consent is not limited to the true owner of a thing or the lawful possessor. The person giving the consent is also not required to have authority from the true owner or lawful possessor to give consent for the search and seizure of that owners' or possessors' thing.

No further clear guidelines were however given as to whom exactly the person is who may consent thereto in terms of the Criminal Procedure Act. It was only stated whom the person does not have to be. The Competition Act also makes provision for permission to conduct a search and seizure. Section 47(2)(a) of the Competition Act provides that the inspector conducting the search in terms of the Competition Act must get permission from *the owner or person in control of the premises* to enter and search the premises. There is thus a clear indication here of whom the person is that must consent to the search and seizure.

To sum up on the interpretation of the person "*who may consent thereto*" in terms of clause 63(1)(a) of the TAB, it is not clear whether it would be the owner, occupant or person in control as no specific reference is made. The Memorandum on the Objects of the TAB, 2011 merely indicates that the warrantless power "may only be invoked if the person affected consents thereto or if a senior SARS official on reasonable grounds is satisfied that...". It is however still not clear who the "affected person" would be and it could perhaps be argued that all these categories of

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persons, i.e. owner, occupant or person in control, would fall under the broad term of "the person who may consent" which is used in clause 63(1)(a) of the TAB.

Regarding the giving of consent in general in terms of Criminal Procedure law, the following principles apply:[139]

- the consent must be valid;
- the consent must be given voluntarily; and
- consent cannot validate an irregular search warrant. This refers to the position where a warrant is obtained but that warrant is later found to be an invalid warrant. Consent can then not validate such an irregular search warrant.

It is argued that the above general principles should be equally applicable to the giving of consent in terms of clause 63(1)(a) of the TAB. Thus, consent has to be valid, must be given voluntarily and consent cannot validate an irregular search warrant.

2 3 Satisfied on reasonable grounds

The only other justification for the SARS to conduct a warrantless search and seizure is when the senior SARS official is satisfied on reasonable grounds that:[140]

> (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 clause 59, a search warrant will be issued; and
>
> (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

The reasonable grounds criterion and the meaning thereof is discussed *supra* in chapter 3. It is clear from the word *and* between sub clauses (b)(ii) and (b)(iii) of clause 63 of the TAB that all three of the above requirements need to be complied

[139] Basdeo *A Constitutional Perspective of Police Powers of Search and Seizure in the Criminal Justice System*. Masters of Law thesis University of South Africa (2009) 102-105.

[140] Clause 63(1)(b) of the TAB.

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with. This part of the warrantless search and seizure provisions of the TAB is again very similar to the warrantless provisions of the Criminal Procedure Act which shows that an attempt was perhaps made to bring the warrantless provisions of the TAB in line with the warrantless provisions of other acts. Section 22(b) of the Criminal Procedure Act reads as follows:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—
>
> (a) …
>
> (b) if he on reasonable grounds believes—
>
> (i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and
>
> (ii) that the delay in obtaining such warrant would defeat the object of the search."

Sections 22(b)(i) and (ii) of the Criminal Procedure Act are similar to clauses 63(1)(b)(ii) and (iii) of the TAB. However, clause 63 of the TAB has a third requirement, namely that the senior SARS official must on reasonable grounds be satisfied that there may be an imminent removal or destruction of relevant material likely to be found on the premises.[141] The Oxford English Dictionary defines the word *imminent* as follows: "Of an event, etc. (almost always of evil or danger): Impending threateningly, hanging over one's head; ready to befall or overtake one; close at hand in its incidence; coming on shortly". It shows that the removal or destruction of the relevant material must be impending or threatening.

It is furthermore also necessary to establish that if the SARS applies for a search warrant under clause 59 of the TAB, a search warrant will be issued and the delay in obtaining a warrant would defeat the object of the search and seizure.[142] To satisfy the requirement that if the SARS applies for a warrant, a warrant will be issued, it could be argued that the SARS must exercise the discretion of clause 60(1) of the TAB, which is the discretion that a judge or magistrate would exercise when deciding

[141] Clause 63(1)(b)(i) of the TAB.
[142] Clause 63(1)(b)(ii) and (iii) of the TAB.

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on the issuance of a warrant. In terms of clause 60(1) of the TAB, the judge or magistrate must be satisfied that there are reasonable grounds to believe that:

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

The SARS should thus place itself in the position of the judge or magistrate in order to decide that if the SARS applies for a search warrant, a search warrant will be issued.

The last requirement is that the delay in obtaining a warrant would defeat the object of the search and seizure.[143] It is argued that the object of a search and seizure in terms of the Act or the TAB would be the gaining of relevant material if a person failed to comply with an obligation imposed under a tax Act or committed a tax offence. If the time needed to apply for a warrant would defeat that object, this requirement could be satisfied.

It should, however, be noted that it is a general principle in our law that one cannot create its own urgency.[144] It is thus argued that the SARS should not be able to use the warrantless search and seizure provisions in a situation where there is urgency, but where that urgency was created by the SARS when they did not apply for a warrant when there was still time available to do so.

As shown in chapter 3 *supra*, when it is required to be satisfied on reasonable grounds, those grounds must in fact exist objectively. It is not sufficient that the senior SARS official subjectively and *bona fide* believed that the grounds existed. A mere hope is also not enough to satisfy the reasonable grounds criterion. It is thus clear that this is not an easy burden on the SARS. When a warrantless search and seizure is conducted in terms of clause 63 of the TAB, the SARS will have to prove

[143] Clause 63(1)(b)(iii) of the TAB.

[144] Harms Civil Procedure in the Superior Courts (2010) LexisNexis Butterworths Intranet Resources B6.64.

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that reasonable grounds for all three requirements of clause 63(1)(b) of the TAB existed at that time.

2 4 Dwelling-house or domestic premises

Clause 63(3) of the TAB now specifically provides that a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under clause 63 without the consent of the occupant.

The words *dwelling-house* and *domestic premises* are not defined in the TAB. *Dwelling-house* is defined in the Oxford English Dictionary as ”a house occupied as a place of residence, as distinguished from a house of business, warehouse, office, etc”. The ordinary meaning of a *dwelling-house* or *domestic premises* would be a domestic residence, as opposed to a place of business. The SARS may not use its clause 63 warrantless power to enter such a domestic residence without the consent of the occupant. However, should any part of that residence be used for purposes of trade, that part of the residence may be entered under clause 63 of the TAB.

This sub clause was not contained in any of the previous versions of the TAB. It was only introduced in the third draft of the TAB, which might be an indication that the legislature found the previous warrantless powers of the TAB, which did not exclude such domestic residences, to be too wide and that greater protection of the right to privacy is perhaps intended.

2 5 Conclusion on the content of clause 63 of the TAB

The above new provisions of the TAB show the further development of search and seizure in South African income tax law. Search and seizure has thus developed from warrantless under section 74(3) of the Act into search and seizure by warrant under section 74D of the Act into a combination of both warranted and warrantless search and seizure under the TAB. However, these new warrantless search and seizure provisions did not come into being without commentaries from all quarters.

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3 Commentary on the warrantless provisions of the TAB

3 1 Commentary from the SARS

In the Draft Explanatory Memorandum on the Draft TAB (2009), the SARS comments as follows on the warrantless search and seizure provisions:[145]

> "The extension of search and seizure powers to enable SARS to conduct a search and seizure without a warrant if such warrant cannot be obtained in time to prevent the imminent removal or destruction of records, i.e. in effect to stop a crime in progress. This power should assist in addressing the problem of tax evaders who, upon approach by SARS, waste no time to destroy all records and evidence of their fraudulent activities and details of income derived."

The SARS is accordingly of belief that it needs these provisions to deal with the limited number of people who SARS believes will destroy or remove documents to prevent SARS from determining their non-compliance with tax laws or tax evasion.[146]

One of the objects of the TAB is explained as follows in the Draft Explanatory Memorandum on the Draft TAB (2009):[147]

> "The TAB also extends SARS' powers, for example its information gathering, assessment and collection powers. The purpose of the TAB in this regard is the extension of powers to more effectively target tax evaders who demonstrate certain behaviour, not ordinarily compliant taxpayers. Thus the power to search a premise without a warrant is narrowly circumscribed, for example a senior SARS official must be satisfied that there may be an imminent removal or destruction of records."

With reference to clause 63 of the second draft of the TAB, the following is explained in the Draft Memorandum on the Objects of the TAB (2010):[148]

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[145] *Draft Explanatory Memorandum on the Draft TAB* (2009) 7 http://www.sars.gov.za/home.asp?pid=52833 (accessed 13 March 2010).

[146] http://webcache.googleusercontent.com/search?q=cache:yrzE94VFZBAJ:www.persfin.co.za/index php%3FfSectionId%3D591%26fArticleId%3D5746450+tax+administration+bill+warrantless+search +and+seizure&hl=en&gl=za&strip=1 (accessed 14 December 2010).

[147] *Draft Explanatory Memorandum on the Draft TAB* (2009) 1-2 http:// www.sars.gov.za/home.asp?pid=52833 (accessed 13 March 2010).

[148] *Draft Memorandum on the Objects of the TAB* (2010) 12 http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).

> "This power is consistent with that found in other legislation in South Africa and has been reviewed and approved by the courts in that context. It should *inter alia* assist in tax base broadening and addressing the reality that tax evaders who, upon approach by SARS, waste no time in destroying all records and evidence of their fraudulent activities and details of income derived."

Franz Tomasek, SARS's group executive for legislative drafting and research says the following:[149]

> "The Constitutional Court has held that there are times when a search without a warrant and the seizure of documents are justified and constitutional. This power can be used only in very narrow circumstances, and there are more than 15 other pieces of legislation in South Africa that also allow warrantless search and seizure."

The constitutionality of the warrantless search and seizure provisions will be further addressed in chapter 5. What is however clear from the above is that the SARS is certain that the warrantless search and seizure provisions of the TAB are acceptable and constitutional. It seems that the SARS only intends to use the warrantless provisions in very limited circumstances. It has been said a few times that the target would be tax evaders and that it would only be applied to a very limited number of taxpayers.

However, there has also been wide concern about the newly proposed warrantless search and seizure provisions.

3 2 Public commentary

The warrantless provisions of the TAB have been widely dispraised and criticised and some of the commentary reads as follows:

- Klue, chief executive of the South African Institute of Tax Practitioners, argues that the warrantless search and seizure provisions would give the

[149] http://webcache.googleusercontent.com/search?q=cache:yrzE94VFZBAJ:www.persfin.co.za/index php%3FfSectionId%3D591%26fArticleId%3D5746450+tax+administration+bill+warrantless+search +and+seizure&hl=en&gl=za&strip=1 (accessed 14 December 2010).

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SARS "absolute power" and that this would mean that the SARS could now "act as judge and jury".[150] Klue also raised concern about the fact that a senior SARS official is not necessarily legally trained and that the senior SARS official could authorise such a warrantless search and seizure based on information from a junior SARS official or an informant, which information may be tainted with incorrect facts.[151] According to him, the search and seizure would in those circumstances not have been authorised by a judge.

- According to the Submissions of the Draft TAB of the Law Society of South Africa ("the LSSA"), the "search without a warrant would be the same as a blanket warrant. This would be too broad and unjustifiable violate a taxpayers right to privacy."[152] In the same report, the LSSA also said that "it is not appropriate that SARS should be seen to be promoting a Bill in which absolute powers inimical to constitutional values are sought."[153] This was not said specifically with regard to the warrantless provisions of the TAB but since they expressd their strong expostulation on the search and seizure provisions, it is argued that this could refer to the warrantless provisions of the TAB. The view of the LSSA is that "some of the provisions of the TAB are profoundly disturbing, whether or not they are constitutionally justified."[154]
- In a memorandum prepared by Milton Seligson SC, Trevor Emslie SC and Joe van Dorsten commenting on the provisions of the first draft of the TAB, the following was said regarding clause 55 of the first draft of the TAB (which is now clause 63 of the TAB): "Taxpayers must be able to assert the right to prevent any unlawful search and seizure by officials acting without a warrant."[155] However, according to them, taxpayers will be able to do so since the official's decision will be justiciable by a court.

[150] Rawoot *SARS may act as "judge and jury"* (2009) http://www.mg.co.za/article/2009-11-06-sars-may-act-as-judge-and-jury (accessed 14 June 2010).

[151] Du Preez *SARS wants power to search and seize without a warrant* (2009) http://www.persfin.co.za/index.php?fArticleId=5275002 (accessed 22 March 2010).

[152] Law Society of South Africa *Submissions on the Draft TAB* (2010) 24.

[153] *Ibid* 1.

[154] *Ibid* 1.

[155] Meyerowitz, Davis & Emslie "Comment on the Draft Tax Administration Bill" 2010 (vol 59 issue 2) *The Taxpayer (Editorial)* 24 28.

- Journalists have also described the new warrantless search and seizure provisions as “controversial” and “draconian”.[156]

3 3 Conclusion on the commentary on the warrantless provisions of the TAB

It is thus clear from the above list that there is strong discontentment and concern about the new warrantless search and seizure provisions of the TAB. The constitutional aspects of the warrantless provisions are discussed in chapter 5 *infra* and will enlighten the acceptability or not of the provisions. It must however be kept in mind that the comments of especially journalists are often used to catch the public’s eye and to create sensation with words such as “controversial” and “draconian”.

On the other hand, it seems that the SARS really has a need for provisions authorising them to conduct a warrantless search and seizure. The fact that these provisions are proposed might be an indication that the current provisions on search and seizure are not adequate enough to meet the needs of the SARS.

It could thus be that the criticism on clause 63 of the TAB is too wide when the context in which the SARS wants to execute the provisions is as limited as said by them. However, the TAB still grants the wide powers and the comments of the SARS that they will only target serious tax evaders and that it would only be applied to a very limited number of taxpayers is not binding.

4 Warrantless provisions in other acts

4 1 Introduction

The warrantless search and seizure provisions of the TAB have been compared to the warrantless search and seizure provisions of the Criminal Procedure Act under 2 2 and 2 3 of this chapter. The provisions of the TAB are now also compared to the Competition Act, i.e. not in a criminal law context. The legislation analysed in this chapter should however not be seen as an exhaustive list of legislation containing

[156] Du Preez *SARS wants power to search and seize without a warrant* (2009) http://www.persfin.co.za/index.php?fArticleId=5275002 (accessed 22 March 2010).

warrantless provisions. It is merely by way of example that the Criminal Procedure Act and the Competition Act were chosen to compare the warrantless TAB provisions. As indicated above, according to Franz Tomasek, it seems that warrantless provisions are contained in more than 15 other pieces of legislation in South Africa.

4 2 The Competition Act

Section 47 of the Competition Act authorises a warrantless search and seizure and provides as follows:

> (1) An inspector who is not authorised by a warrant in terms of section 46 (2) may enter and search premises other than a private dwelling.
>
> (2) Immediately before entering and searching in terms of this section, the inspector conducting the search must provide identification to the owner or person in control of the premises and explain to that person the authority by which the search is being conducted, and must—
>
> > (a) get permission from that person to enter and search the premises; or
> >
> > (b) believe on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search.
>
> (3) An entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.

It is clear from the above that the Competition Act sets out strict boundaries for a warrantless search and seizure. These safeguards are as follows:

- private dwellings may not be entered and searched;[157]
- immediately before entering and searching, the inspector conducting the search must provide identification to the owner or person in control of the premises and explain to that person the authority by which the search is being conducted;[158] and

[157] Section 47(1) of the Competition Act.
[158] Section 47(2) of the Competition Act.

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- an entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances.[159]

One of the grounds in terms of which an inspector may conduct a warrantless search in terms of section 47(2)(a) of the Competition Act is when the owner or person in control of the premises gives permission. There is accordingly clear reference to the person who may give permission as being the owner or person in control of the premises. Furthermore, the word *permission* is used, as opposed to the word *consent* in clause 63(1)(a) of the TAB and section 22(a) of the Criminal Procedure Act. *Permission* is defined in the Oxford English Dictionary as "the action of permitting, allowing, or giving consent; consent, leave, or liberty to do something" whereas *consent* is defined as "voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission". It is accordingly submitted that permission and consent are merely synonyms and this difference in wording between the Competition Act and the TAB should be of no relevance. Another difference between the Competition Act and the TAB in this regard is that consent must be given in writing in terms of the TAB. This writing-requirement could then provide proof for the SARS that consent was in fact given to conduct the search and seizure without a warrant. This is not required in terms of the Competition Act, which might make it more difficult for an officer to prove, when in dispute, that actual permission was given when not given in writing.

One of the other grounds in terms of which a warrantless search may be conducted in terms of section 47(2)(b) of the Competition Act is when the inspector believes on reasonable grounds:

- that a warrant would be issued under section 46 if applied for; and
- that the delay that would ensue by first obtaining a warrant would defeat the object or purpose of the entry and search.

[159] Section 47(3) of the Competition Act.

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These two reasonable grounds requirements are also contained in clause 63(1)(b) of the TAB, however, with one additional requirement in terms of the TAB. Clause 63(1)(b)(i) of the TAB requires that the senior SARS official must also be satisfied on reasonable grounds that there may be an imminent removal or destruction of relevant material likely to be found on the premises. This is not required in terms of the Competition Act and it is accordingly submitted that the burden of proof of an officer conducting a warrantless search in terms of the Competition Act would be lighter as there is no need to establish, on reasonable grounds, that there may be an imminent removal or destruction of material.

Similar to clause 63(3) of the TAB, the Competition Act also excludes entries into private dwellings. Some other safeguards in the Competition Act which are, however, not included in the TAB are as follows:

- the inspector must provide identification before entering and searching;
- the inspector must explain the authority on which the search is conducted; and
- the entry and search may only be carried out during the day, unless doing it at night is justifiable and necessary in the circumstances.

It is argued that the provisions of the Competition Act on the identification of the inspector to the owner or person in control of the premises and the explanation of the authority by which the search is being conducted would be desirable in a tax context. The same goes for the provision in the Competition Act on the entry and search without a warrant which may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances. These provisions would confine and restrict the powers of the SARS.

5 Conclusion

This chapter has analysed the warrantless search and seizure provisions as contained in clause 63 of the TAB. Comments and criticism from all quarters were analysed and converged to find a balance. It was also found that warrantless search and seziure provisions are not uncommon in other statutes, but the content thereof often

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differs. The provisions were compared to section 22 of the Criminal Procedure Act, which is very similar to clause 63 of the TAB. It should however be kept in mind that the Criminal Procedure Act falls under criminal law and that the context and objectives of the Criminal Procedure Act are very different from the TAB. Therefore, the warrantless provisions of the TAB were also compared to a statute outside the sphere of criminal law, i.e. the Competition Act, and the conclusion is made that the TAB provisions are not in all respects as circumscribed as the warrantless provisions of the Competition Act. It is therefore recommended that the warrantless provisions of the TAB should contain some counterbalances as found in the Competition Act to equal the rights of taxpayers to the needs of the SARS. Those counterbalances should include the following:

- a requirement that the official identifies him or herself to the owner or person in control of the premises before entering and searching;
- an explanation from that official to that person on the authority by which the search is being conducted; and
- a requirement that an entry and search without a warrant may only be carried out during the day, unless doing it at night is justifiable and necessary in the circumstances.

The constitutionality of the warranted and warrantless search and seizure provisions of the Act and the TAB is addressed in chapter 5.

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CHAPTER 5: CONSTITUTIONALITY OF THE SEARCH AND SEIZURE PROVISIONS

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1 Introduction

A constitutional analysis of the search and seizure provisions of the Act and the TAB should be done in order to determine whether they are sustainable under the highest law of our country, namely the Constitution. The constitutionality of the previous section 74 of the Act was analysed in chapter 2 with reference to, *inter alia*, the Katz Commission and the *Rudolph* cases. It was concluded that the constitutionality of the previous section 74(3) of the Act was never decided by our courts. The *Rudolph saga* was a long battle in which the Constitutional Court held that the case had no constitutional merit. The searches and seizures had taken place prior to the Interim Constitution coming into force which meant that none of the events of which the applicant complained could be said to constitute a breach of any of his rights under the Interim Constitution. However, with reference to the findings of the Katz Commission and court decisions in which similar provisions in other acts were found to be unconstitutional, it was argued in chapter 2 that section 74(3) of the Act was unconstitutional.

The constitutionality of the current section 74D of the Act has not yet been tested by our Constitutional Court. There have, however, been several submissions that the section should stand to constitutional scrutiny. According to Silke, the constitutionality of section 74D of the Act is not beyond doubt.[160] However, according to Juta's Income Tax, section 74D of the Act "has been drafted to ensure compatibility with the Constitution in that the previous section 74 possessed far too few safeguards for this purpose."[161] It is thus clear that there is no unanimity between academic writers on the constitutionality of section 74D of the Act. It could be argued that, since some writers claim that a section 74D of the Act warranted search and seizure is unconstitutional, they would probably come to a conclusion that a warrantless search and seizure in terms of the TAB would result in an even more severe constitutional breach.

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[160] Silke "Taxpayers and the Constitution: A battle already lost" 2002 *Acta Juridica* (vol 17 issue 1) 282 291.

[161] Davis, Olivier & Urquhart *Juta's Income Tax* (1999) 74D-2.

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The search and seizure provisions of the Act and the TAB are tested in this chapter against section 25 of the Constitution, the right to property, and section 14 of the Constitution, which secures the right to privacy. However, section 36 of the Constitution provides that the rights in the Bill of Rights may be limited 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. This means that even if the right of the Commissioner to search and seize might at first glance be in breach of constitutional rights, it must be remembered that the rights guaranteed by the Constitution may be limited in terms of section 36 of the Constitution.

2 The right to property

Section 25(1) of the Constitution 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.

In the case of *Deutschmann NO and Others; Shelton v Commissioner for the SARS,*[162] the applicants contended, *inter alia*, that the processes of search and seizure under the warrants in terms of section 74D of the Act had constituted a serious encroachment on their right against arbitrary deprivation of property contained in section 25 of the Constitution.

A full bench of the High Court held that reliance on the Constitution was misplaced in this case.[163] According to the court, the provisions in terms of which the warrant was sought and obtained, i.e. section 74D of the Act, do anything but permit arbitrary deprivation of property. Section 74D of the Act requires an application supported by information supplied under oath and the exercise of a discretion by a judge. The judge who authorises the warrant does not thereby affect the property or the rights to such property vesting in an individual. According to the court, any party remains free, in terms of the statute, to establish his entitlement and claim delivery.

[162] 62 SATC 191.

[163] On page 205.

It is accordingly submitted that the aim of the search and seizure provisions under consideration in the Act and the TAB is not to keep the property in question as payment of tax but as an information gathering tool. Therefore, section 25 of the Constitution is not further analysed in this chapter since the search and seizure provisions of the Act and the TAB should not infringe the right to property.

3 The right to privacy

3 1 Introduction

Section 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed.

As discussed *supra* under the right to property, section 74D of the Act has come under constitutional scrutiny in the *Deutschmann* case. The applicants contended that the search and seizure in terms of section 74D of the Act violated their right to, *inter alia*, privacy but the High Court held that reliance on the Constitution was misplaced.[164] In coming to this conclusion, the court referred to the case of *Bernstein and Others v Bester NO and Others.*[165]

The Constitutional Court held in the *Bernstein* case that privacy is an individual condition of life characterised by seclusion from the public and publicity which implies an absence of acquaintance with the individual or his personal affairs in this state.[166] The court further defined the right to privacy in the *Bernstein* case as follows:[167]

> "In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism

[164] *Ibid*.
[165] 1996 (4) BCLR 449 (CC).
[166] On page 484.
[167] *Ibid*.

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> towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."

This personal concept of the right to privacy is now known as the *Bernstein* "continuum" of privacy interests.[168] With reference to the *Bernstein* case, the court held in *Deutschmann,* in the context of section 74D of the Act, that reliance on the Constitution was misplaced since the right to privacy does not extend to include the carrying on of business activities. On the facts of the *Deutschmann* case, the documents had been seized from the applicants' business premises, and they could accordingly not rely on the right to privacy.

However, in the case of *Haynes v Commissioner for Inland Revenue*,[169] the court justifiably disagreed with these findings in the *Deutschmann* case that reliance on the Constitution was misplaced and that the concept of privacy does not extend to include the carrying on of business activities. Locke J in the *Haynes* case was of the view that reliance in the *Deutschmann* case on the *Bernstein dicta* was incorrect since the judge in *Bernstein* was dealing with wrongful intrusions of the right to privacy in terms of the common law when reference was made to the carrying on of business activities.[170] The *Bernstein* case never held that the right to privacy in terms of the Constitution does not include the carrying on of business activities. Locke J quoted from numerous foreign cases where it was in fact held that the right to privacy is applicable to a home and business premises. Accordingly, even though it was held in the *Deutschmann* case that reliance on the constitution was misplaced, it is argued that the *Deutschmann* case should not be seen as section 74D's constitutional assent to the right to privacy. The *Haynes* case pointed the deficiencies of the *Deutschmann* case out and a further constitutional analysis is still required.

[168] Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2009) 9.2.1.
[169] 64 SATC 321.
[170] On page 339.

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3 2 Application of the right to privacy

It has been held by the Constitutional Court in the case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*[171] that the right to privacy is applicable to any person, therefore including juristic persons. In terms of section 8(4) of the Constitution, a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. In the *Hyundai* case, the Constitutional Court referred to the *Bernstein* case, where it was decided that privacy concerns only the inner sanctum of a person. The court held in *Hyundai* that juristic persons are nevertheless bearers of the right to privacy, even though they are not the bearers of human dignity. Their privacy rights can never be as intense as those of human beings, but this does not mean that juristic persons are not protected by the right to privacy.[172]

There is accordingly a fine line between a juristic person being a bearer of the right to privacy and the right to privacy being related to the very personal inner sanctum of a person. It seems clear, however, that a non-natural person taxpayer would still be a bearer of constitutional rights.

3 3 The limitation of the right to privacy and search and seizure by warrant

It is clear that the Commissioner *prima facie* violates the right to privacy of a person when a search and seizure operation is conducted since there is an infringement of the section 14 guaranteed right not to have one's person or home searched, property searched or possessions seized. The question is however whether there can be a reasonable and justifiable limitation of the right to privacy in terms of section 36(1) of the Constitution, which provides as follows:

> "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

[171] 2000 (10) BCLR 1079 (CC) at par 17.
[172] On page 1087-1088.

> 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."

Olivier submits that "although the amended section [section 74D of the Act] clearly still infringes the right to privacy … it will in all likelihood fall within the scope of the general limitations clause".[173] She submits accordingly that section 74D of the Act should be constitutional since it constitutes a valid limitation of the right to privacy.

Locke J furthermore held as follows in the *Haynes* case:[174]

> "Whilst in my view the provisions of s 74D constitute a reasonable limitation upon the rights provided for in ss 14 and 25 of the final Constitution, this would not constitute a reasonable limitation in respect of such entities where the Commissioner has at his disposal the remedies provided for by the Income Tax Act and the VAT Act in terms of s 74A and B and 57A and B respectively."

Accordingly, it was held in the *Haynes* case that section 74D of the Act is a reasonable limitation of the right to privacy, but only when the Commissioner has used the remedies available to him in terms of sections 74A and 74B of the Act. The interaction between section 74D of the Act and sections 74A and 74B is also discussed under 4 2 *supra* in chapter 3.

According to Currie & De Waal the general rule for searches and seizures that violate the right to privacy, is that they must be authorised by a warrant and that the invasion of the right to privacy is only permissible to achieve compelling public objectives.[175] It is helpful to consider cases where the constitutionality of warranted

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[173] Olivier "The new search and seizure provisions of the Income Tax Act" 1997 (issue 350) *De Rebus* 195 196.
[174] On page 365.
[175] Currie & De Waal *Bill of Rights Handbook* 5ed (2005) 325.

search and seizure provisions in terms of other legislation was constitutionally challenged. Numerous other acts contain search and seizure provisions similar to those contained in the Act and the TAB.

In the *Hyundai* case the, Constitutional Court declined to confirm the order of the High Court which declared certain provisions of the National Prosecuting Authority Act No 32 of 1998 (NPA Act) inconsistent with the Constitution and thus invalid. The provisions of the NPA Act under consideration were the granting of the power to an Investigating Director in the office of the National Director of Public Prosecutions to search and seize on authority of a warrant issued by a judge. The Constitutional court held that it was clear that the search and seizure provisions of the NPA Act constituted a limitation of the right to privacy, but what had to be determined was whether the limitation was constitutionally justifiable in terms of the limitation clause.[176] For the purposes of this inquiry, the court had to ascertain the proper meaning of the relevant provisions of the NPA Act. The court concluded that there are considerable safeguards in the NPA Act to protect the right of privacy of individuals, which makes the scope of the limitation of the right to privacy narrow.[177] These safeguards were the following:[178]

> "The warrant could only be issued where the judicial officer had concluded that there was a reasonable suspicion that such an offence had been committed, that there were reasonable grounds to believe that objects connected with an investigation into that suspected offence might be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considered it appropriate to issue a search warrant."

The court also considered the purpose of the NPA Act to combat crime. The search and seizure provisions served an important purpose in the fight against crime, especially in South Africa, where it is a notorious fact that the rate of crime is very high.[179] The court found that a balance must be struck between the interests of the individual and those of the State, and that this balance was achieved by the

[176] Par 20 of the *Hyundai* case.
[177] Par 52 of the *Hyundai* case.
[178] *Ibid*.
[179] Par 53 of the *Hyundai* case.

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safeguards as discussed above. The privacy right was not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process.[180]

The conclusion from this case is that a statute authorising a search and seizure on the authority of a warrant can be a justifiable limitation of the right to privacy, as long as there is a balance between the interests of the individual and those of the State. This balance can be struck by setting up objective standards that have to be met prior to the violation of the right, such as the safeguards in the NPA Act.

Currie & Waal lay down the following rules in order for a law authorising a search and seizure to be constitutional in terms of the limitation clause:[181]

> "To comply with section 36, the authorising law must properly define the scope of the power to search and seize. Secondly, prior authorisation by an independent authority is usually required. Thirdly, the Act must require the independent authority to be persuaded by evidence on oath that there are reasonable grounds for conducting the search."

Davis & Steenkamp submit the following on the limitation of the right to privacy in the context of search and seizure: [182]

> "The safeguards against an unjustified interference in the right to privacy include prior judicial authorisation and an objective standard – that is, whether there are reasonable grounds to believe that an offence has been or is likely to be committed; that the articles sought or seized may provide evidence of the commission of the offence; and that the articles are likely to be on the premises to be searched."

It seems that the warranted search and seizure provisions of the Act and the TAB are in compliance with the *Hyundai* case and the above quoted literature and accordingly constitutional. There are proper safeguards in place since a judge may only issue the warrant in terms of both the Act and the TAB when satisfied of certain aspects as specified in the search and seizure provisions in the Act and the TAB on

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[180] Par 54 of the *Hyundai* case.
[181] Currie & De Waal *Bill of Rights Handbook* 5ed (2005) 325.
[182] Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2009) 9.6.

reasonable grounds. This must be supported by information supplied under oath in terms of both the Act and the TAB. An objective judicial discretion and prior authorisation is accordingly required. Furthermore, the scope of a search and seizure is clearly defined in section 74D(1) of the Act and clause 61 of the TAB. However, this is only applicable to warranted searches and seizures. It is for the very reason that an independent judge authorises the search and seizure that it is considered to be constitutional. Accordingly, the constitutionality of the warrantless provisions, where that judicial discretion is absent, should still be considered.

3 4 The limitation of the right to privacy and warrantless search and seizure

The above conclusion on the constitutionality of the warranted search and seizure provisions could lead in a different direction when considered in the context of a warrantless search and seizure as proposed in clause 63 of the TAB. Section 74D(5) of the Act and clause 62(1) of the TAB on the search of premises not identified in a warrant and section 74D(6) of the Act on the seizure of material not identified in a warrant could also fall under the analysis of the constitutionality of the warrantless search and seizure provisions.[183] The cases of *Park-Ross* and *Mistry* are discussed under 2 3 3 *supra* in chapter 2 as part of the discussion on the constitutionality of the previous section 74(3) of the Act, which also permitted a warrantless search and seizure.

It was held in the *Park-Ross* case that section 6 of the Serious Economic Offences Act No 117 of 1991, which empowered the Director of the Office for Serious Economic Offences to conduct a warrantless search and seizure, was unconstitutional. A similar conclusion was reached in the *Mistry* case where it was found that section 28(1) of the Medicines and Related Substances Control Act No 101 of 1965, which authorised inspectors to conduct warrantless searches of business premises, was unconstitutional. These cases accordingly indicate that a warrantless search and seizure may be unconstitutional under certain circumstances.

[183] The content of these sections of the Act and the TAB are discussed in chapter 2 *supra* under 3 5 and 3 6.

Another case dealing with the constitutionality of warrantless search and seizure powers is the case of *South African Association of Personal Injury Lawyers v Heath and Others*.[184] In this case, the applicant contended that certain subsections of section 6 of the Special Investigating Units and Special Tribunals Act No 74 of 1996 infringed and limited the constitutional right to privacy guaranteed by section 14 of the Constitution. In terms of section 6 of the Special Investigating Units and Special Tribunals Act, the general principle is that a search warrant is required. However, in terms of section 6(6) of that Act, the powers of entry, search, attaching and removal can be exercised without a warrant if the person conducting the search, on reasonable grounds, believes that a warrant will be issued to him or her if he or she were to apply for such a warrant and that the delay in obtaining such a warrant would defeat the object of the entry and search.

The High Court found in the *Heath* case that this section was constitutionally valid because the circumstances under which such a warrantless search and seizure could be conducted were narrowly defined. The *Heath* case went on appeal to the Constitutional Court where the Constitutional Court held there was no threat to the appellant or its members that the search and seizure powers will be used against them. There was accordingly no need for the Constitutional Court to deal with the challenge to the constitutionality of section 6 of the Special Investigating Units and Special Tribunals Act.[185]

In the *Heath* case, the High Court distinguished the legislative provisions under consideration from those considered in the *Mistry* case. In the *Mistry* case, the legislation did not qualify the powers of entry, examination, search and seizure by inspectors of medicines. Inspectors could enter and search business premises without a warrant and without any satisfaction on reasonable grounds. The only requirement imposed by the Medicines and Related Substances Control Act No 101 of 1965 is that the powers of search and seizure must be exercised at reasonable

[184] 2000 (10) BCLR 1131 (T).

[185] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) par [66].

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times and this was found to be insufficient to pass the constitutional test in the *Mistry* case.

Of particular importance is the following part of the Constitutional Court's *dicta* in the *Mistry* case:[186]

> "At the end of the day, the reasonableness and justifiability of the powers given to the inspectors will depend on the overall scheme of checks and balances put in place to regulate their authority. Such scheme would have to take account of the statutory and social context in which the inspectors would have to function and would include, where appropriate, independent prior authorisation. Thus, the failure to distinguish between the circumstances where such authorisation would be required and those where a warrantless regulatory inspection would be quite in order, is, in my view, a sufficiently material defect to undermine the scheme of section 28(1) as a whole."

It is clear from this quote that there must be a distinction between circumstances where prior judicial authorisation is required and those circumstances where a warrantless search and seizure would be permitted. The absence of this distinction, or the granting of "instant" warrantless powers, lead to the failure of the constitutional test in the *Mistry* case. On the other hand, in the *Heath* case, the circumstances were distinguished and a warrantless search and seizure could only be conducted if the person conducting the search, on reasonable grounds, believes that a warrant will be issued to him or her if he or she were to apply for such a warrant and that the delay in obtaining such a warrant would defeat the object of the entry and search. The general principle was that a warrant should be obtained, with provision for a warrantless search and seizure in certain exceptional circumstances.

The *Park-Ross* case can also be distinguished from the *Heath* case in this regard. Section 6(1) of the Investigation of Serious Economic Offences Act No 117 of 1991 only provided for a warrantless search and seizure, and was accordingly also an "instant" power where no provision was made to apply for a warrant.

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[186] Par 28.

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The respective constitutional findings in these cases can be summarised as follows:

Table 5.1: Findings on the constitutionality of the legislative provisions under consideration in the *Park-Ross*, *Mistry* and *Heath* cases

Case	Infringement of the right to privacy?	Reasonable limitation of the right to privacy?	Finding and reasons
Park-Ross	√	×	The section under consideration was an unreasonable limitation to the right to privacy and therefore unconstitutional. It was a prerequisite for a reasonable search and seizure that the power to authorise such a search and seizure should be given to an impartial and independent judicial authority. The Director empowered in terms of the act under consideration cannot be an impartial arbiter to grant effective authorisation.
Mistry	√	×	The extent of the invasion of privacy sanctioned by the act under consideration was disproportionate to its purpose, overbroad in its reach and thus invalid and unconstitutional. There were no safeguards in the Medicines and Related Substances Control Act, such as prior judicial authorisation, to limit the extent of the intrusion on the right to privacy.
Heath	√	√	It was found that the section was constitutionally valid because the circumstances under which such a warrantless search and seizure could be conducted were narrowly defined, being consent or the reasonable grounds criterion as set out in section 6(6) of the act under consideration.

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This table shows how our courts have dealt with search and seizure provisions in other cases and this serves as support for the findings made *infra* on the conclusion on the constitutionality of the warrantless search and seizure provisions of the TAB.

3 5 Conclusion on the right to privacy and the warrantless provisions

What is clear from the above is that the provisions under consideration in the *Park-Ross* and *Mistry* cases granted "instant" warrantless powers without any form of judicial authorisation. There was no general requirement of or provision for a judicial warrant with exceptional circumstances in terms of which a warrantless search and seizure could take place, which is also how the previous section 74(3) of the Act operated. In the *Park-Ross* and Mistry cases, these "instant" powers were found to be an unreasonable limitation of the right to privacy. Accordingly, the conclusion was made in chapter 2 that the previous section 74(3) of the Act was unconstitutional.

It is however submitted that the *Heath* case and the warrantless provisions of the TAB can be distinguished from the *Park-Ross* and *Mistry* cases and the previous section 74(3) of the Act. In terms of the TAB, the general rule is still that a warrant must be obtained. Only in exceptional circumstances can a search and seizure be conducted without a warrant.

This is how warrantless provisions in other statutes are also worded. The provisions of the Criminal Procedure Act and the Competition Act (as discussed in chapter 4 *supra*) also provide for the general rule of a judicially authorised warrant, with exceptional circumstances under which a warrantless search and seizure may be conducted. What has however not yet been decided by our courts in terms of the constitutionality of such warrantless provisions is exactly what the circumstances are under which such a warrantless search and seizure may be conducted in order to be a justifiable limitation of the right to privacy. The safeguards in the Competition Act which are not contained in clause 63 of the TAB include that an entry and search without a warrant may be carried out only during the day, unless doing it at night is justifiable and necessary in the circumstances, that the inspector must provide

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identification before entering and searching and that the inspector must explain the authority on which the search is conducted.

However, the warrantless provision accepted by the court in the *Heath* case only required a reasonable grounds satisfaction that a warrant will be issued if an application for such a warrant were made and that the delay in obtaining such a warrant would defeat the object of the entry and search. These two requirements must also be met in terms of section 63 of the TAB, but there is another reasonable ground satisfaction that must be met in terms of section 63 of the TAB, namely that there may be an imminent removal or destruction of relevant material likely to be found on the premises. Accordingly, section 63 of the TAB has an additional requirement in this regard when compared to what has been accepted by our courts in the *Heath* case.

Furthermore, clause 63(3) of the TAB now explicitly provides that a SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, without the consent of the occupant. This is a safeguard included in the TAB, which is similarly found in the Competition Act, but which was not found in the statutes under consideration in the *Park-Ross*, *Mistry* or *Heath* cases.

It is thus clear that the provisions in different acts authorising warrantless searches and seizures are not consistent. The warrantless provisions of the TAB are stricter than the one's in the Special Investigating Units and Special Tribunals Act as accepted by our courts in the *Heath* case but less circumscribed in certain respects when compared to the warrantless provisions of the Competition Act. The warrantless search and seizure provisions of the Competition Act have not yet been constitutionally challenged. It seems however that the general principle of a warrantless search and seizure is not *per se* unconstitutional, but our courts will have to decided exactly what the circumstances are which allow for a warrantless search and seizure.

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It has been argued that the new warrantless search and seizure provisions of the TAB, as any other warrantless provisions, do not have sufficient checks and balances in place.[187] This is argued since the SARS, when contemplating a warrantless search and seizure, makes its own determination of whether the reasonable grounds criterion is satisfied. Accordingly, the SARS is required to objectively determine the reasonableness of its own view of the matter, which can give rise to difficulties.

According to the legislature, the warrantless search and seizure provisions of the TAB are fully in accordance with the Constitution. The following is stated in the 2010 Draft Memorandum on the Objects of the TAB:[188]

> "This power [referring to the warrantless search and seizure] is consistent with that found in other legislation in South Africa and has been reviewed and approved by the courts in that context. It should *inter alia* assist in tax base broadening and addressing the reality that tax evaders who, upon approach by SARS, waste no time in destroying all records and evidence of their fraudulent activities and details of income derived."

With reference to the *Park-Ross* case, it is furthermore argued by Williams that "there are differences in the respective objectives of the Serious Economic Offences Act and the Income Tax Act."[189] This relates to the above statement made in the 2010 Draft Memorandum on the Objects of the TAB which explains what the purpose or objective of the warrantless provisions of the TAB is. The purpose of the NPA Act to combat crime was an important consideration in the *Hyundai* case and it is accordingly submitted that the purpose of section 63 of the TAB to curb tax evasion could outweigh the right to privacy in certain circumstances. It will however be for our courts to decide exactly which circumstances would justify a limitation of this fundamental right.

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[187] Gad & Bovijn *New Tax Administration Bill introduces new search and seizure provisions (2011)* http://www.ens.co.za/newsletter/briefs/taxMay11newTax.html (accessed 29 May 2011).

[188] Draft Memorandum on the Objects of the TAB (2010) page 12 http:// www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).

[189] Williams "Taxpayers' rights in South Africa" 1997 (vol 7 issue 2) *Revenue Law Journal* 1 14.

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4 Conclusion

It is concluded, based on case law and academic writing, that the warranted search and seizure provisions of the Act and the TAB should be constitutionally valid. The independent authorisation from a judge when a warrant is issued is a sufficient safeguard and accordingly justifies a limitation of the right to privacy.

The constitutionality of the new warrantless provisions of the TAB is however not beyond doubt. The fact that no "instant" warrantless powers are granted tends to lead to a conclusion that the provisions could be constitutionally valid. However, the courts will have to consider the purpose of the TAB and a determination will have to be made whether the circumstances under which such a warrantless operation may be conducted are defined narrowly enough. There is no standard test from the case law to be applied in order to determine the constitutionality of warrantless search and seizure provisions.

Even though it may be found that the search and seizure provisions of the Act and the TAB are constitutionally valid, the conduct of the SARS officials when conducting such a search and seizure, whether in terms of a warrant or warrantless, must still be in compliance with the Constitution. It is therefore important to distinguish the statute which authorises a search and seizure from the actual conduct that took place. It is argued by Goldswain that "the revenue authorities must be very circumspect in their conduct, which is still subject to an individual's rights in terms of the Constitution".[190]

Accordingly, should the provisions of the Act and the TAB be found to be constitutional, it might not be the end of the constitutional battle which can be fought by a taxpayer as it is still required from the SARS to conduct its search and seizure operations in compliance with the Constitution.

[190] Goldswain "Special or unusual defences or 'extenuating circumstances' that may be pleaded for the purposes of remission of penalties in income tax matters" 2003 (vol 11) 45 56.

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Apart from a breach of constitutional rights, SARS' search and seizure powers could lead to other types of harm or injustice to taxpayers. The next chapter analyses, *inter alia*, the rights available to a taxpayer who has been subject to either a warranted or warrantless search and seizure in terms of the Act or the TAB.

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CHAPTER 6: THE STAGE AFTER A SEARCH AND SEIZURE

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1 Introduction

This chapter focuses on the stage after a search and seizure has been conducted. It analyses the rights and duties of the SARS after a search and seizure and the remedies available to a taxpayer who has been subject to either a warranted or a warrantless search and seizure. These remedies are critically evaluated in order to determine whether any injustice that has been suffered by an aggrieved taxpayer can be made undone or could have been prevented. The problem relating to the remedies available to a taxpayer who has been subject to a search and seizure is twofold: what are the remedies and are those remedies sufficient?

2 The rights and duties of the SARS after a search and seizure

2 1 Introduction

In terms of the Act and the TAB, the SARS and its officials have certain rights and duties after they have exercised their search and seizure powers. They have the right to retain the material seized, but they also have the duty to take reasonable care when retaining the material and to preserve the material.

2 2 Preservation and retention of the seized material

The Act and the TAB have certain provisions regarding the preservation and retention of the material seized. The relevant provisions read and compare as follows:

Section 74D(8) of the Act	Clause 61(9) of the TAB
Section 74D(8) of the Act: The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the	Clause 61(9) of the TAB: If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for— (a) the investigation into the non-compliance or the offence described under clause 60(1)(a); or (b) the conclusion of any legal

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purposes of any legal proceedings under this Act, whichever event occurs last.	proceedings under a tax Act or criminal proceedings in which it is required to be used.

The same principle on the preservation and retention of the seized material still applies under the TAB, but the wording is somewhat different. There is no mention in clause 61(9) of the TAB of *whichever event occurs last* as used in section 74D(8) of the Act but the words *until it is no longer required for* in clause 61(9) of the TAB combined with the word *or* between the two options could have the same effect. When, for example, the investigation is completed but the legal proceedings are still running, section 74D(8) of the Act allows the SARS to retain the material until no longer required to be used for the legal proceedings under the Act as this would be the last event to occur. Similarly, in terms of clause 61(9) of the TAB, they could also be retained until no longer required for the conclusion of any legal proceedings under a tax Act.

Another difference in this regard is that the TAB now allows that the relevant material seized may be retained until it is no longer required for criminal proceedings in which it is required to be used. This is a new ground on which the material may be retained by the SARS. It is however odd to grant this retention to the SARS since they are not the ones who would prosecute and thus use the material for the criminal proceedings. Clause 61(9) of the TAB could however also be read to mean that the SARS must hand the material over to the State for the criminal proceedings and that it can thus, in general, be kept until it is no longer required for those criminal proceedings. There is no literature or comments available on this specific aspect of the TAB but it is submitted that the right of the SARS to retain the relevant material for criminal proceedings is somewhat strange.

2 3 Reasonable care

Section 74D(8) of the Act requires that the Commissioner shall take reasonable care to ensure that the information, documents or things are preserved. In the case of

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Haynes v Commissioner for Inland Revenue,[191] it was held by Locke J that this part of section 74D(8) of the Act entails the following:[192]

> "In spite of these very wide definitions, it is in my view required of the Commissioner to ensure that detailed inventories are taken of each and every 'document' or 'thing', or 'information' seized. The Commissioner is required to sufficiently identify each and every page of every document seized, to identify with precise description what data has been seized, and to identify with sufficient description each corporeal or incorporeal thing seized. … Obviously if documents are contained by way of a bound book it would not be necessary to identify each and every page but each document held as part of a loose-leaf system would have to be so identified. In the absence thereof, the Commissioner would simply not be able to take reasonable care to ensure that such information, documents or things are preserved as required by s 74D(8). Such a detailed inventory prepared in the presence of the taxpayer and countersigned by the taxpayer would obviate any disputes thereinafter as to the preservation of the documents, information or things seized. It follows as a consequence that copies of the inventory made should be handed to the taxpayer."

The preservation part of section 74D(8) of the Act has thus been interpreted widely, even though the Act only required that the Commissioner shall take *reasonable care* to ensure that the information, documents and things are preserved. The TAB now contains a new provision regarding the making of an inventory. Clause 61(4) of the TAB now provides as follows:

> "The SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person."

This has been described in the Draft Memorandum on the Objects of the TAB as "affording further protection of taxpayers subjected to a search and seizure".[193] Exactly what is meant by "in the form, manner and at the time that is reasonable under the circumstances" is not yet known and will have to be decided by a court

[191] 64 SATC 321.
[192] On pages 365-366.
[193] http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010), p 14 of the 2010 Memorandum.

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when dealing with this duty of the SARS to make an inventory. The *Haynes* judgement was very specific in its requirements of the making of an inventory whereas clause 61(4) of the TAB can be construed less strict. However, it is submitted that clause 61(4) of the TAB is a movement in the direction of the *Haynes* judgement which requires more diligence and painstaking conduct from the SARS when searching and seizing.

3 The remedies of a taxpayer

3 1 Introduction

Apart from the above duties of the SARS (to, *inter alia*, keep an inventory and to preserve the seized material with reasonable care), a taxpayer should have certain other remedies at its disposal after a search and seizure has been conducted. Some questions that spring to mind when a taxpayer has been subject to a search and seizure could be the following:

- When can the taxpayer get the seized material back and how?
- What if the taxpayer needs the material urgently to e.g. ensure continuance of his or her business?
- What if the taxpayer has suffered damage due to the search and seizure?
- What if the taxpayer needs access to the seized material when a case is pending against him?

It is thus clear that legislation needs to protect a taxpayer who has been subject to a search and seizure. This protection is included in both the Act and/or the TAB and relates to the following:

- the return of the seized material;
- the right to examine and make copies;
- the costs of damages; and
- the office of the Tax Ombud.

These remedies, as well as other remedies not explicitly contained in the Act and/or the TAB will now be discussed in more detail.

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3 2 The return of the seized material

In terms of the Act and the TAB, there are remedies available to a taxpayer for the return of the seized material. These remedies are contained in section 74D(9) of the Act and clause 66 of the TAB and these provisions read and compare as follows:

Section 74D(9) of the Act:	Clause 66 of the TAB:
(a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.	(1) A person may request SARS to— (a) return some or all of the seized material; or (b) pay the costs of physical damage caused during the conduct of a search and seizure.
(b) The court hearing such application may, on good cause shown, make such order as it deems fit.	(2) If SARS refuses the request, the person may apply to a High Court for the return of the seized material or payment of compensation for physical damage caused during the conduct of the search and seizure.
	(3) The court may, on good cause shown, make the order as it deems fit.
	(4) If the court sets aside the warrant issued in terms of clause 60(1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice.

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Paragraph (*a*) of section 74D(9) of the Act was amended by section 38 of the Revenue Laws Amendment Act No 53 of 1999. The effect thereof is however insignificant as the amendment made was only the substitution of the words *Supreme Court* with the words *High Court* in accordance with the renaming of the Supreme Courts in South Africa to High Courts.

It is clear from the length of the above quoted provisions that this aspect is now regulated more fully and in more detail in the TAB. The TAB now provides that a person must first request the SARS for the return of the relevant material before an application for such a return can be made to the High Court. There was no similar provision in the Act but it is argued that a person who wants the seized material back would in any case have requested the SARS first for such return before going to court. It is however clear in terms of the TAB that it is now a prerequisite in terms of clause 66(2) of the TAB that the SARS must have refused the request for the return before an application may be made to the High Court.

An application for the return of material seized was made in the case of *Deutschmann NO and Others; Shelton v Commissioner for the SARS.*[194] Two separate applications were dealt with in one judgment as the issues required to be decided were substantially the same. Two warrants for search and seizure had been authorised by judges against the applicants in terms of section 74D of the Act. The aforementioned warrants resulted in the seizure of a considerable amount of documents and information from the applicants' business premises. The applicants thereafter made application to the Eastern Cape Division of the High Court for, *inter alia*, return of all material seized and certain ancillary relief. They also applied to have these warrants declared null and void *ab initio*, or alternatively for an order directing that they (specifically in the case of *Deutschmann*) be set aside. The seizures, they alleged, had negatively impacted on the proper running of their business causing them to suffer prejudice thereby.

[194] 62 SATC 191.

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However, both applications were dismissed since the applicants had failed to show good cause for the return of the information, documents and things seized in terms of the warrants. The court did not deal with the content of section 74D(9) of the Act in any detail but came to the conclusion that the applicants failed to show good cause since they failed to establish that the warrants were improperly sought and obtained.

Shelton appealed and the SCA dealt with section 74D(9) of the Act in more detail in the case of *Shelton v Commissioner for SARS.*[195] Counsel for the appellant submitted that a good cause was established in that:[196]

- the application for a warrant did not comply with section 74D(2) of Act;
- material facts were not disclosed to the judge who issued the warrant;
- the application for the warrant was fatally defective;
- the warrant itself was fatally defective; and
- the execution of the warrant was irregular.

The SCA decided that the legislature clearly intended to confer a wide discretion on a court dealing with an application for an order under section 74D(9) of the Act since the Act does not in any way specify what would constitute a *good cause.*[197] The court then considered each of the above listed arguments of the appellant and rejected all of them. The taxpayer was thus once again not successful with his application for the return of the material seized.

It seems, however, from this *dictum* that should one of the above listed arguments have succeeded, it could have established a good cause and it could thus justify the return of the material seized. It is also argued that it is clear from this judgement that a person who applies for the return of the seized material in terms of section 74D(9)(a) of the Act has to show a good cause since the court hearing such application (referring to the application for the return) may, on good cause shown, make such order as it deems fit. It is also clear from the court *a quo* judgement and

195 64 SATC 179.
196 On page 184.
197 *Ibid*.

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from the judgement of the SCA that the courts will not easily grant an order for the return of the documents. It seems that there need to be serious shortcomings in the application for the warrant, the issuance thereof or the execution of the warrant.

Even though it seems that our courts interpreted section 74D(9) of the Act more narrow in the *Shelton* cases and also rejected the application for the return of the seized material, this approach is not necessarily decisive. In the case of *Ferela (Pty) Ltd and others v CIR,*[198] it was held that the legislature provided the mechanism in section 74D(9) of the Act by means of which any injustice or hardship caused by the draconian procedure of section 74D(1) of the Act may be corrected.[199] The court further held that section 74D(9) of the Act gives the High Court power to reverse the effect of a warrant issued, *in toto.*[200] The court held the following regarding the phrase *make such order as it deems fit*:[201]

> "It therefore empowers the court to grant such further relief as may be appropriate, which would obviously include an order for costs. It could of course order other relief as well, such as the retention of copies by the Commissioner. It is not necessary for me to speculate on all the types of grounds on which s 74D(9) could be invoked. Grounds that spring to mind are: if a party concerned needs any documents that have been seized; if the documents seized do not have any bearing on the affairs of a taxpayer; if the documents seized are not covered by the warrant and also if the warrant is deficient or if it should not have been obtained."

Another case in which the court addressed section 74D(9) of the Act and the setting aside of a warrant is the case of *Ferucci and Others v Commissioner for SARS and Another*.[202] In this case, the court agreed with the above quoted passage from the *Ferela* case and added the following:[203]

> "It is perhaps necessary to elaborate on the one aspect raised by him [referring to the dictum of Botha J in the *Ferela* case], namely that a warrant can, in

[198] 60 SATC 513.
[199] On page 524.
[200] *Ibid*.
[201] On page 525.
[202] 2002 (6) SA 219 (C).
[203] On page 11.

> appropriate circumstances, be set aside on the grounds that it should not have been obtained. It must be borne in mind that a warrant is issued as part of an investigation against the taxpayer which will frequently result in criminal or civil proceedings. The taxpayer may, in seeking to have the effect of a warrant reversed in terms of section 74D(9), or the equivalent provision in the VAT Act, raise all manner of exculpatory and other explanations in regard to the material which has been put up by the Commissioner, when applying for the warrant. A number of factual disputes may be created in relation to the averments raised by the Commissioner. It cannot be the function of the Court, when determining an application for the setting aside of a warrant under section 74D(9) or an application for the return of documentation, to decide on the correctness or otherwise of such factual issues. That is a task reserved for the court dealing in due course with the criminal or civil proceedings which may be instituted against the taxpayer."

The court then held that when dealing with an application under section 74D(9) of the Act, all the court needs to do is to satisfy itself, as does the judge issuing the warrant, that there are reasonable grounds for believing that there has been a non-compliance by any person of his obligations or an offence committed under the Act, and that information, documents or things affording evidence of such non-compliance or offence are likely to be found at the premises specified in the warrant. Accordingly, if the court is not so satisfied, that may constitute a ground for setting aside the warrant.[204]

It was thus decided in the *Ferucci* case that the court, when dealing with an application under section 74D(9) of the Act, has to place itself in the shoes of the judge who initially authorised the warrant. If all the requirements that the judge had to be satisfied with were met at that time, there would be no need to set the warrant aside in terms of section 74D(9) of the Act.

It is argued that the above *dicta* on section 74D(9) of the Act will equally apply to clauses 66(2) and (3) of the TAB. The TAB provides, exactly the same as in the Act,

[204] *Ibid*.

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that an application to a High Court for the return of the seized material can be made and that the court may, on good cause shown, make the order as it deems fit.[205] The only prerequisite in terms of the TAB is that a request must first be made to the SARS for the return before the application can be brought to the High Court.[206]

One aspect which might not be fair towards the taxpayer in this regard is that the TAB still provides that the order for the return of the seized material must be brought to the High Court. However, the SARS can now bring the application for a warrant to search and seize to a magistrate in terms of clause 59(3) of the TAB. When the SARS obtained the warrant from a Magistrates Court and the taxpayer now wants to exercise his rights in terms of clause 66(2) of the TAB based on that warrant, he has to bring such application to a High Court. There is thus no equality in this regard between the SARS and the taxpayer and this will be at the taxpayer's disadvantage as the procedure, time and costs of bringing an application to the High Court is more comprehensive than bringing it to a Magistrates Court.

Clause 66(4) of the TAB is a new provision and provides that if the court sets aside the warrant or orders the return of the seized material, the court may nevertheless authorise the SARS to retain the original or a copy of any relevant material in the interests of justice. There seems to be a discrepancy in this clause. How could the court order the return of the seized material on the one hand, and then also authorise the SARS to retain the original? It is submitted that clause 66(4) of the TAB should read that *the court may nevertheless authorise SARS to retain a copy of any relevant material*. The court can thus order that the original material should be returned but that the SARS could retain a copy should that be in the interests of justice. Exactly what would constitute *in the interests of justice* in this regard would still have to be decided by our courts.

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[205] Clause 66(2) and (3) of the TAB.
[206] Clause 66(1)(a) of the TAB.

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3 3 The right to examine and make copies

Section 74D(10) of the Act and clause 65 of the TAB relate to the right to examine the seized material and make copies thereof. These provisions read and compare as follows:

Section 74D(10) of the Act:	Clause 65 of the TAB:
The person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine.	(1) The person to whose affairs relevant material seized relates may examine and copy it. (2) Examination and copying must be made— (a) at the person’s cost in accordance with the fees prescribed in accordance with section 92(1)(b) of the Promotion of Access to Information Act; (b) during normal business hours; and (c) under the supervision determined by a senior SARS official.

The Act and the TAB remain the same in the sense that a person to whose affairs any material seized relates may examine and copy such material. This may be done during normal business hours and under supervision as determined by the Commissioner or a senior SARS official. The only difference in this regard is that the Act provides that the copies are made at the expense of the State whereas the TAB now provides that the copies will be made at the person’s cost. This change will bring the TAB in line with the Promotion of Access to Information Act No 2 of 2000

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which also requires that the fees must be paid by the requestor of the information.[207]

3 4 Damages

This remedy relates to the following question: If the taxpayer has suffered damage due to the search and seizure, does he have a claim for damages against the SARS? A few types of damage that could result from a search and seizure conducted by the SARS are the following:

- physical damage to property from forced entry or while conducting the search;
- loss of income due to e.g. the seizure of a computer; and
- damage to the good name or reputation of a business.

The Act does not contain any provisions on damages but this position is different under the TAB. Furthermore, the position under the first, second and third drafts of the TAB is also different and requires being distinguished.

3 4 1 Damages under the first draft of the TAB

Clause 53(7) of the first draft of the TAB provided that the official and SARS are not liable for damage to property necessitated by reason of the search. There was thus a clear exclusion of liability when the SARS officials caused damage to property when conducting the search.

The question is, however, whether legislation can exclude liability for damage caused. It is a general principle in the Law of Damages that legislation may define damage in such way that some forms of harm are excluded.[208] It means that a claim for damages from certain people or bodies can be excluded by legislation.[209] Such exclusion is often found in legislation and this is exactly what the legislature has done in the first draft of the TAB: damage to property, which is a form of harm, is

[207] Section 22(1) of the Promotion of Access to Information Act.
[208] Erasmus & Gauntlett *Damages* (2010) par 10.
[209] Visser & Potgieter *Skadevergoedingsreg* (2003) 257.

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excluded and this seems to be an acceptable exclusion in terms of the Law of Damages. It means that a taxpayer would thus not be able to claim for damage to property necessitated by reason of the search by the SARS under the first draft of the TAB.

3 4 2 Damages under the second draft of the TAB

The second draft of the TAB also provided in clause 61(8) that the SARS official and SARS are not liable for damage to property necessitated by reason of the search. This is thus exactly the same as under the first draft of the TAB. However, clause 66(1)(b) of the second draft of the TAB explicitly provided that a person may request SARS to pay the costs of physical damage caused during the conduct of a search and seizure. Furthermore, clause 66(2) of the second draft provided that if SARS refuses the request, the person may apply to a High Court for the compensation for physical damage caused during the conduct of the search and seizure. There were no such remedies in the first draft of the TAB.

Accordingly, clause 61(8) excludes liability for damage to property necessitated by reason of the search, whereas clause 66(1)(b) provides that a person may request SARS to pay the costs of physical damage caused during the conduct of a search and seizure. This might seem like some kind of inconsistency in the second draft of the TAB between the exclusion of liability for damage to property on the one hand and the granting of a claim for physical damage on the other hand.

It is argued that there are a few possible explanations for this inconsistency. Firstly it could mean that reference to *damage to property* in clause 61(8) is not the same as *physical damage* as used in clause 66(1)(b) of the second draft of the TAB. It would then mean that a taxpayer would have a claim for physical damage but not for damage to property. This is however unlikely since it is argued that damage to property would be included in physical damage, which is a broader term. The term *physical damage to property* is used in the Law of Damages which also shows that

physical damage and damage to property would be the same.[210] It is therefore argued that it is not likely that the legislature intended to exclude liability for damage to property and to also grant a claim for physical damage.

The second explanation for this inconsistency is that there was an oversight in the drafting of the second draft of the TAB by not removing the exclusion of liability. This would mean that clause 61(8) of the second draft of the TAB can be ignored and should have been removed when the legislature inserted the claim for physical damage in clause 66(1)(b). However, as shown below under 3 4 3, it is not likely that this was an oversight in the second draft of the TAB as similar clauses remained in the third draft of the TAB.

The writer was informed by Dr Beric Croome,[211] who attended workshops on the TAB, that the SARS is not prepared to pay costs where a taxpayer, say, refuses to open a safe and the SARS forces it open, causing damage. Hence the exclusion of liability in clause 61(8) of the TAB. It seems like the word *necessitated* is of particular importance in this regard. The SARS is not liable for damage to property *necessitated* by reason of the search. *Necessitated* is defined in the Oxford English dictionary as "made necessary or unavoidable; necessarily fixed, determined, or appointed". Accordingly, damage caused which was necessary or unavoidably cannot be claimed from the SARS in terms of clause 61(8) of the TAB.

However, according to Dr Beric Croome, where the SARS, for example, interferes with the taxpayer's computer system and causes loss of data, the SARS should be liable for this consequential damage suffered. This would not constitute damage necessitated by reason of the search and damages could be claimed in terms of clause 66(1)(b) of the TAB. In terms of this clause, the person may then request SARS to pay the costs of physical damage caused during the conduct of a search and seizure and if the SARS refuses the request, the person may apply to a High Court for

[210] Erasmus & Gauntlett *Damages* (2010) par 13.
[211] Dr Beric Croome is an executive at Edward Nathan Sonnenbergs.

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the compensation for physical damage caused during the conduct of the search and seizure.

It seems accordingly that clauses 61(8) and 66(1)(b) of the second draft of the TAB could be read together. What would actually be included in a claim for physical damage is analysed below under 3 4 4.

3 4 3 Damages under the third draft of the TAB

Clause 66(1)(b) of the second draft remained exactly the same under the third draft, i.e. a person may request SARS to pay the costs of physical damage caused during the conduct of a search and seizure. However, clause 61(8) of the second and third drafts, respectively, provided as follows:

Clause 61(8) of the second draft if the TAB:	Clause 61(8) of the third draft of the TAB:
The SARS official and SARS are not liable for damage to property necessitated by reason of the search.	Subject to clause 66, the SARS official and SARS are not liable for damage to property necessitated by reason of the search.

It is clear from the above that the words *subject to section 66* were inserted in clause 61(8). This means that, in terms of clause 61(8), the SARS official and SARS are not liable for damage to property *necessitated* by reason of the search but that a person may still request SARS to pay the costs of physical damage caused during the conduct of a search and seizure in terms of clause 66(1)(b). It is argued that this now brings the two clauses regarding damages more into harmony. However, what would actually be included in a claim for physical damage in terms of clause 66(1)(b) of the TAB?

3 4 4 Physical damage

In terms of the Law of Damages there is a clear difference between physical damage (which is *saakskade* in Afrikaans) and pure economic loss.[212] Physical damage relates

[212] Visser & Potgieter *Skadevergoedingsreg* (2003) 60.

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to the physical harm of a thing. On the contrary, pure economic loss does not relate to the damage of a thing, it is a damage which takes the form of e.g. loss of income.[213]

The TAB provides for a claim for physical damage in clause 66(1)(b), which would thus include damage to a thing or damage to property. It is argued that this would include damage which results from e.g. forced entry or from force used while conducting the search which was not *necessitated* by reason of the search.

A few other types of damage that could result from a search and seizure conducted by the SARS, as listed above, are the loss of income due to e.g. the seizure of a computer, or damage to the good name or reputation of a business. This would, however, fall under pure economic loss. This would not be claimable under clause 66(1)(b) of the TAB as that clause only allows for a claim for physical damage. In terms of clause 61(8) of the TAB, the SARS official and SARS are not liable for damage to property necessitated by reason of the search. There is accordingly no exclusion for a claim of pure economic loss (only damage to property necessitated by reason of the search is excluded) and there could be a claim for pure economic loss in terms of the Law of Damages.

The general principle for such a claim is that the culprit must have committed a delict.[214] A delict is an unlawful act which requires conduct, wrongfulness, fault, causation and damage.[215] These elements and the Law of Delict will however not be further discussed as this detail is beyond the scope of this thesis. Reference was made to a delict to illustrate that should the requirements of a delict be met by unlawful conduct of the SARS, there could be a claim for pure economic loss even though this was not explicitly provided for in the TAB.

[213] *Ibid* 396.
[214] *Ibid* 316.
[215] *Ibid* 4.

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3 4 5 Conclusion on damages

Even though the Act does not provide for a claim for damage caused during a search and seizure, or provides for the specific exclusion thereof, it is submitted that such a claim is available under the Act in terms of the Law of Damages, when a delict is committed. Specific provision is however now made in the TAB for a claim for physical damage, with the exclusion of damage to property necessitated by reason of the search. It was concluded that a claim for pure economic loss would furthermore be available to a taxpayer suffering such loss from a search and seizure operation.

3 5 The Office of the Tax Ombud

The TAB has now also introduced a new concept of an independent office of the Tax Ombud. Clauses 15 to 21 of the TAB regulate the office of the Tax Ombud and according to the Draft Memorandum on the Objects of the TAB (2010) the office of the Tax Ombud should "provide accessible and affordable remedies for taxpayers affected by non-adherence to procedures or failure to respect taxpayers' rights".[216] This means that the Tax Ombud will be a haven for taxpayers who have been exposed to conduct of the SARS which is not in compliance with the law.

The Minister must appoint the Tax Ombud in terms of clause 14 of the TAB and this will thus ensure that the Tax Ombud is independent from the SARS.[217]

One of the objectives of the Tax Ombud is to "achieve a balance between SARS' powers and duties and taxpayer obligations, remedies and rights",[218] and that is exactly what needs to be achieved by a search and seizure. The SARS needs the right to search and seize to carry out its tasks and duties, but on the other hand, a taxpayer needs protection of his or her rights. A taxpayer furthermore needs remedies to make any injustice that has been suffered undone or could have been prevented. It is thus the object of the Tax Ombud to achieve a balance between the interests of the different parties involved.

[216] http:// www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010) page 8.
[217] *Ibid* page 8.
[218] *Ibid* page 8.

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Clause 16(1) of the TAB describes the mandate of the Tax Ombud as follows:

> "The mandate of the Tax Ombud is to, subject to section 18(4), review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS."

It seems that this new Tax Ombud could thus be a counter balance regarding the search and seizure powers of the TAB. It is clear from the above mandate that the Tax Ombud would review and address a complaint made by a taxpayer regarding a search and seizure conducted by the SARS. The complaint would relate to a procedural matter, namely the procedure of search and seizure, arising from the application of the provisions of a tax Act, namely the search and seizure provisions of the TAB.

The above mandate of clause 16(1) of the TAB was however qualified in the Draft Memorandum on the Objects of the TAB (2010):[219]

> "The mandate of the Tax Ombud will be to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS, *generally only after the taxpayer has exhausted the available complaints resolution mechanisms within SARS*." (Own italics).

This means that a taxpayer would first have to consult with the SARS before the Tax Ombud can be approached for help. The Tax Ombud will thus serve as a middle man in a dispute with the SARS and the position of the Tax Ombud in the tax system was described as follows in the Draft Memorandum on the Objects of the TAB (2010):[220] "An independent Tax Ombud will fill a gap in the mechanism that currently exists between SARS' internal processes and access to the normal court system."

However, there is currently no such independent Tax Ombud and thus no independent authority, apart from the courts, where a taxpayer could go when any

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219 *Ibid* Page 9.
220 *Ibid* Page 8.

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harm or injustice was suffered. The development in this regard is thus welcome and positive in the light of the rights of a taxpayer.

3 6 Access to the court file

In the *Ferela* case, the applicants became aware of the issuance of a warrant against them and they then attempted to obtain a copy of the application for the warrant. They were however informed, on the instructions of the Commissioner, that they were not to be allowed access to the court file. They then applied for an order to grant them access to the court file. The court held that section 4 of the Act, which is on the preservation of secrecy, was not applicable as section 4 of the Act clearly "protects taxpayers against other parties gathering information about their information from the taxman".[221] That section is thus not applicable when the taxpayer himself wants to gather information. The court however also held that there could be reasons in a particular case why the contents of a file in an application for a warrant have to be withheld from the parties affected by it, but in this case there were no such reasons.[222] The court further held that the applicants were entitled in terms of section 32(1) of the Constitution, which is the right to access to information, to have access to the file in order to exercise their rights in relation to the warrant. The applicants were entitled to consider the authenticity, validity and ambit of the warrant and they were entitled to consider what steps they could take to have its effect undone.

Accordingly, another remedy is available to a taxpayer, originating from section 32(1) of the Constitution, which is not specifically provided for in the Act or the TAB. It allows a taxpayer access to the court file, which the file applicable to the application for the warrant, when an application for a search and seizure was made by the SARS. The taxpayer can then gather information from the court file which he might need when deciding what steps he should take.

[221] On page 522.
[222] *Ibid*.

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4 Conclusion

This chapter addressed the rights and duties of the SARS after a search and seizure on the one hand and the remedies available to a taxpayer on the other hand. It is concluded that the remedies should indeed be sufficient. This is especially true with the advent of the new independent Tax Ombud. Some remedies are contained expressly in the Act and the TAB, e.g the right to examine and make copies in terms of section 74D(10) of the Act and clause 65 of the TAB, whereas other remedies originate from the Constitution, e.g. access to the court file. There are thus different sources of remedies.

It is however acknowledged that there are seemingly no remedies available to a taxpayer to prevent injustice or harm. All the available remedies relate to the position after the harm has been done and they are available to undo or to balance the injustice or harm that has been suffered. There is thus still a *lacuna* in this regard but perhaps slender hope can be found in clause 61(5) of the TAB which requires that the SARS official must conduct the search with strict regard for decency and order. This could thus prevent harm or injustice during the course of the carrying out of the search, but does not cover the period before and after the search.

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CHAPTER 7: CONCLUSION

The concept of search and seizure was examined in this assignment by considering the cases, academic writing and other material on the topic. The objectives of this assignment were to analyse the development of search and seizure in South African income tax law, to provide a basic understanding of the warranted and warrantless search and seizure provisions of the Act and the TAB, to determine the constitutionality of the search and seizure provisions of the Act and the TAB and to determine the remedies available to a taxpayer who has been subject to a search and seizure.

It was found that search and seizure has developed in South African income tax law from warrantless in terms of the previous section 74(3) of the Act into the requirement of a warrant in terms of section 74D of the Act into a combination of both in terms of the TAB. It was found that the previous section 74(3) of the Act would not have passed the constitutional test and would accordingly be unsustainable in our constitutional democracy, even though its constitutionality was never decided by our courts. A summary of the content of the search and seizure provisions of the Act and the TAB showed that certain aspects will remain the same under the TAB, but that there are also certain new provisions introduced by the TAB, as well as some additions to existing provisions in section 74D of the Act.

The basic principles of a search and seizure by warrant remain the same under the TAB. In terms of the TAB, however, the SARS *must* now bring the application for a warrant *ex parte* and this could be seen as a fundamental difference between the Act and the TAB. It was shown that an *ex parte* application is permissible in terms of section 74D of the Act (if, for example, the nature of the relief sought is such that notice to the respondent may render the relief nugatory or if, due to the urgency of the matter, notice cannot be given to the respondent, for instance, if the harm is imminent) while it is now compulsory in terms of the TAB. It was found that the compulsory *ex parte* application as required by the TAB would not justify its unconstitutionality *per se* but that this is an aspect of the application procedure

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which is now in favour of the Commissioner. It was however also acknowledged that an *ex parte* application makes sense in this regard as notice of the search and seizure could render the object of the search and seizure nugatory. It was found that the Commissioner has a need to bring the application *ex parte* in order to act on a surprise basis, but that this could lead to situations where an application is brought by the Commissioner, based on incorrect false facts, which could lead to serious infringements on taxpayers' rights.

Another area of uncertainty which was examined in this assignment is the validity of a search and seizure warrant before and after is has been exercised. The TAB now provides for the 45 business days validity period and accordingly closed the *lacuna* in the Act relating to the validity period of a warrant before it has been executed. However, regarding whether a warrant expires when exercised or whether the same warrant can be used again to conduct a second search and seizure, it was concluded that the position is not quite certain in terms of the Act or the TAB. It was argued that the aspects of uncertainty regarding the validity of a warrant after it has been exercised needs further legislative regulation and could be brought in line with the Criminal Procedure Act, which would mean that the warrant lapses once it is exercised. In terms of the TAB, however, the warrantless provisions of clause 63 could be invoked to conduct further searches.

It was furthermore found that there is no defined meaning in the Act or the TAB of the reasonable grounds criterion, which is often required to be met by the Commissioner, a SARS official, a judge or a magistrate in terms of both the Act and the TAB. It was found that anyone exercising the reasonable grounds criterion in terms of a warranted or a warrantless search and seizure must be satisfied that the grounds in fact exist objectively. It is not sufficient that the police officer or the SARS officer subjectively and *bona fide* believed that they existed. A mere hope is also not enough to satisfy the reasonable grounds criterion. This can similarly be applied to a judge's or magistrate's discretion. He must have reasonable grounds at the time of the granting of the application for a warrant, based on the objective facts existing at that time. It is however necessary, in the context of the discretion of a judge or

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magistrate, that the information which is put before the judge or magistrate must contain sufficient detail to enable him to satisfy himself on reasonable grounds. It is therefore a burden on the Commissioner to place the correct facts before the judge or magistrate to allow him or her to be satisfied on reasonable grounds.

The new warrantless search and seizure provisions were analysed in this assignment and it was found that these new provisions did not come into being without commentaries from all quarters. It was shown that there is strong discontentment and concern about the new warrantless search and seizure provisions of the TAB. On the other hand, it seems that the SARS really has a need for provisions authorising them to conduct a warrantless search and seizure. The fact that these provisions are proposed might be an indication that the current provisions on search and seizure are not adequate enough to meet the needs of the SARS. It was however also shown that the criticism on the new warrantless provisions is perhaps a bit harsh and too wide when the context in which the SARS wants to execute the provisions is as limited as said by them, being only to target serious tax evaders. However, the TAB still grants the wide powers and the comments of the SARS that they will only target serious tax evaders and that it would only be applied to a very limited number of taxpayers is not binding.

It was also established that warrantless search and seziure provisions are not uncommon in other statutes, but the content thereof often differs. The new warrantless provisions of the TAB were accordingly compared to the warrantless search and seizure provisions of the Criminal Procedure Act, which are very similar to the warrantless provisions of the TAB. It should however be kept in mind that the Criminal Procedure Act falls under criminal law and that the context and objectives of the Criminal Procedure Act are very different from the TAB. Therefore, the warrantless provisions of the TAB were also compared to a statute outside the sphere of criminal law, i.e. the Competition Act, and the conclusion was reached that the warrantless TAB provisions are not in all respects as circumscribed as the warrantless provisions of the Competition Act. It was therefore recommended that the warrantless provisions of the TAB should contain the counterbalances as found

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in the Competition Act to equal the rights of taxpayers to the needs of the SARS. Those counterbalances should include a requirement that the official identifies him or herself to the owner or person in control of the premises before entering and searching, an explanation from that official to that person on the authority by which the search is being conducted and a requirement that an entry and search without a warrant may only be carried out during the day, unless doing it at night is justifiable and necessary in the circumstances.

It was concluded that the warranted search and seizure provisions of the Act and the TAB should be constitutionally valid. The independent authorisation from a judge when a warrant is issued is a sufficient safeguard and accordingly justifies a limitation of the right to privacy. It was however found that the constitutionality of the new warrantless provisions of the TAB is not beyond doubt. The fact that no "instant" warrantless powers are granted tends to lead to a conclusion that the provisions could be constitutionally valid. However, the courts will have to consider the purpose of the TAB and a determination will have to be made on whether the circumstances under which such a warrantless operation may be conducted are defined narrowly enough. There is no standard test from the case law to be applied in order to determine the constitutionality of warrantless search and seizure provisions. It was also concluded that even though it may be found that the search and seizure provisions of the Act and the TAB are constitutionally valid, the conduct of the SARS officials when conducting such a search and seizure, whether in terms of a warrant or warrantless, must still be in compliance with the Constitution. Accordingly, should the provisions of the Act and the TAB be found to be constitutional, it was found that this might not be the end of the constitutional battle which can be fought by a taxpayer as it is still required from the SARS to conduct its search and seizure operations in compliance with the Constitution.

The stage after a search and seizure was also analysed in this assignment and entails the rights and duties of the SARS and the remedies available to a taxpayer who has been subject to a search and seizure. The rights and duties of the SARS after a search and seizure, for example the duty to retain and preserve the material seized with

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reasonable care, were analysed and weighed up against the remedies of taxpayers subsequent to a search and seizure operation. It was found that some remedies are contained expressly in the Act and the TAB, e.g. the right to examine and make copies, whereas other remedies originate from the Constitution, e.g. access to the court file. It was accordingly found that there are different sources of remedies and the conclusion was reached that these remedies should indeed be sufficient, which includes the right to claim damages in certain circumstances. This is especially true with the advent of the new independent Tax Ombud. It is however acknowledged that there are seemingly no remedies available to a taxpayer to prevent injustice or harm. All the available remedies relate to the position after the harm has been done and they are available to undo or to balance the injustice or harm that has been suffered. There is thus still a *lacuna* in this regard but perhaps slender hope can be found in clause 61(5) of the TAB which requires that the SARS official must conduct the search with strict regard for decency and order. This could thus prevent harm or injustice during the course of the carrying out of the search, but does not cover the period before and after the search.

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BIBLIOGRAPHY

1 Acts and Bills

- Competition Act No 89 of 1998.
- Constitution of the Republic of South Africa Act No 108 of 1996.
- Criminal Procedure Act No 51 of 1977.
- Income Tax Act No 58 of 1962.
- Inspection of Financial Institutions Act No 80 of 1998.
- Interim Constitution of the Republic of South Africa Act No 200 of 1993.
- Medicines and Related Substances Control Act No 101 of 1965.
- National Prosecuting Authority Act No 32 of 1998.
- Promotion of Access to Information Act No 2 of 2000.
- Revenue Laws Amendment Act No 46 of 1996.
- Revenue Laws Amendment Act No 53 of 1999.
- Securities Services Act No 36 of 2004.
- Serious Economic Offences Act No 117 of 1991.
- Special Investigating Units and Special Tribunals Act No 74 of 1996.
- Tax Administration Bill No 11 of 2011.
- Tax Administration Bill – Draft for Public Comment, 29 October 2010 http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).
- Tax Administration Bill – Draft for Public Comment, 30 October 2009 http://www.sars.gov.za/home.asp?pid=52833 (accessed 6 March 2010).
- Value-Added Tax Act No 89 of 1991.

2 Books

- Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 9ed (2009) Juta & Co, Cape Town, South Africa.
- Currie & De Waal *Bill of Rights Handbook* 5ed (2005) Juta & Co, Cape Town, South Africa.
- Davis, Olivier & Urquhart *Juta's Income Tax* (1999) Juta & Co, Cape Town, South Africa.

Stellenbosch University http://scholar.sun.ac.za

- Klue, Arendse & Williams *Silke on Tax Administration* (2009) LexisNexis, Durban, South Africa.
- Kahn, Havenga, Havenga & Lotz *Principles of the Law of Sale and Lease* 2ed (2010) Juta & Co, Cape Town, South Africa.
- Visser & Potgieter *Skadevergoedingsreg* (2003) Juta & Co, Cape Town, South Africa.

3 Electronic Databases

- Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2009) LexisNexis Butterworths Intranet Resources.
- Clegg & Stretch *Income Tax in South Africa* (2009) LexisNexis Butterworths Intranet Resources.
- Erasmus & Gauntlett *Damages* (2010) LexisNexis Butterworths Intranet Resources.
- Harms *Civil Procedure in the Superior Courts* (2010) LexisNexis Butterworths Intranet Resources.

4 Journal Articles

- Franzsen "Chapter 3 and tax law: privacy and religious freedom" 1995 (issue 327) *De Rebus* 169-171.
- French "What Revenue can't do: Tax matters" 2007 (vol 193 issue 7) *Finweek* 101.
- Goldswain "Special or unusual defences or 'extenuating circumstances' that may be pleaded for the purposes of remission of penalties in income tax matters" 2003 (vol 11) *Meditari Accountancy Research* 45-66.
- Meyerowitz, Davis & Emslie "The Constitution and the Commissioner for Inland Revenue" 1994 (vol 4 issue 10) *The Taxpayer (Editorial)* 181-184.
- Meyerowitz, Davis & Emslie "Comment on the Draft Tax Administration Bill" 2010 (vol 59 issue 2) *The Taxpayer (Editorial)* 24-38.
- Mokgatle "Entry, search and seizure: Any taxpayer rights?" 1997 (vol 13 issue 9) *Management Today (South Africa)* 38-42.

- Mosupa "Constitutional validity of search and seizure provisions: a perspective on section 74 of the Income Tax Act" 2001 (vol 12 issue 2) *Stellenbosch Law Review* 317-325.
- Olivier "The new search and seizure provisions of the Income Tax Act" 1997 (issue 350) *De Rebus* 195-196.
- Silke "Rudolph and the red-faced officials" 1996 (vol 10 issue 6) *Tax Planning: Corporate and Commercial* 135.
- Silke "Rudolph and the courts: the end of the saga" 1998 (vol 12 issue 5) *Tax Planning: Corporate and Commercial* 103-104.
- Silke "Taxpayers and the Constitution: a battle already lost" 2002 (vol 17 issue 1) *Acta Juridica* 282-334.
- Williams "Taxpayers' rights in South Africa" 1997 (vol 7 issue 2) *Revenue Law Journal* 1-17.

5 Table of Cases

South African Cases: Case Name	South African Tax Cases: Reference
Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC)	
Bruwil Konstruksie (Edms) Bpk v Whitson NO 1980 (4) SA 703 (T)	
Cohen Bros v Samuels 1906 TS 221	
Deutschmann NO and Others; Shelton v Commissioner for the South African Revenue Services 2000 (2) SA 106 (E)	62 SATC 191
Engen Petroleum Ltd v Kommandonek (Pty) Ltd 2001 (2) SA 170 (W)	
Ex parte Minister of Justice: In re R v Jacobson and Levy 1931 AD 474.	
Ferela (Pty) Ltd and Others v Commissioner for Inland Revenue and Others 1998 (4) SA 275 (T)	60 SATC 513
Ferucci and Others v Commissioner for South African Revenue Services and Another 2002 (6) SA 219 (C)	
Haynes v Commissioner for Inland Revenue 2000 (6) BCLR 596 (Tk)	64 SATC 321
Investigating Directorate: Serious Economic Offences and Others v	

Stellenbosch University http://scholar.sun.ac.za

Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC)	
Mistry v Interim National Medical and Dental Council of South Africa 1997 (7) BCLR 933.	
Mnyungula v Minister of Safety and Security [2003] JOL 11934 (Tk)	
Ndabeni v Minister of Law and Order 1984 (3) SA 500 (D)	
Ngamlana v MEC for Safety & Security and Another [1998] JOL 3821 (Tk)	
Park-Ross and Another v Director: Office for Serious Economic Offences 1995 (2) SA 148 (C)	
Rudolph and Another v Commissioner for Inland Revenue and Others 1994 (3) SA 771 (W)	56 SATC 249
Rudolph and Another v Commissioner for Inland Revenue and Others 1996 (2) SA 886 (A)	58 SATC 183
Rudolph and Another v Commissioner for Inland Revenue and Others 1996(4) SA 552 (CC)	58 SATC 219
Rudolph and Another v Commissioner for Inland Revenue and Others 1997 (4) SA 391 (SCA)	59 SATC 399
Shelton v Commissioner for South African Revenue Services 2002 (2) SA 9 (SCA)	64 SATC 179
South African Association of Personal Injury Lawyers v Heath and Others 2000 (10) BCLR 1131 (T)	
South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)	

Foreign Cases

Canada: Hunter *et al* v Southam [1984] 2 S.C.R. 145

6 Other Sources

- Basdeo *A Constitutional Perspective of Police Powers of Search and Seizure in the Criminal Justice System*. Masters of Law thesis University of South Africa (2009).
- Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Services comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts*. Ph.D. thesis University of Cape Town (2008).
- *Draft Explanatory Memorandum on the Draft Tax Administration Bill* (2009) http:// www.sars.gov.za/home.asp?pid=52833 (accessed 13 March 2010).
- *Draft Memorandum on the Objects of the Tax Administration Bill* (2010) http:// www.sars.gov.za/home.asp?pid=52833 (accessed 6 November 2010).
- Du Preez *SARS wants power to search and seize without a warrant* (2009) http://www.persfin.co.za/index.php?fArticleId=5275002 (accessed 22 March 2010).
- Gad & Bovijn *New Tax Administration Bill introduces new search and seizure provisions (2011)* http://www.ens.co.za/newsletter/briefs/taxMay11newTax.html (accessed 29 May 2011).
- Law Society of South Africa *Submissions on the Draft Tax Administration Bill* (2010) (hard copy available on request).
- Memorandum on the Objects of the Tax Administration Bill, 2011.
- Rawoot *SARS may act as "judge and jury"* (2009) http://www.mg.co.za/article/2009-11-06-sars-may-act-as-judge-and-jury (accessed 14 June 2010).
- The Katz Commission *Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa* (1994).

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Annexure A: Extracts from the Income Tax Act No 58 of 1962

74D Search and seizure

(1) For the purposes of the administration of this Act, a judge may, on application by the Commissioner or any officer contemplated in section 74 (4), issue a warrant, authorising the officer named therein to, without prior notice and at any time—

(*a*) (i) enter and search any premises; and

(ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched, for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;

(*b*) seize any such information, documents or things; and

(*c*) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

(2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) A judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that—

(*a*) (i) there has been non-compliance by any person with his obligations in terms of this Act; or

(ii) an offence in terms of this Act has been committed by any person;

(*b*) information, documents or things are likely to be found which may afford evidence of—

(i) such non-compliance; or

(ii) the committing of such offence; and

(*c*) the premises specified in the application are likely to contain such information, documents or things.

(4) A warrant issued under subsection (1) shall—

(*a*) refer to the alleged non-compliance or offence in relation to which it is issued;

(*b*) identify the premises to be searched;

(*c*) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and

(*d*) be reasonably specific as to any information, documents or things to be searched for and seized.

(5) Where the officer named in the warrant has reasonable grounds to believe that—

(*a*) such information, documents or things are—

(i) at any premises not identified in such warrant; and

(ii) about to be removed or destroyed; and

(*b*) a warrant cannot be obtained timeously to prevent such removal or destruction, such officer may search such premises and further exercise all the powers granted by this section, as if such premises had been identified in a warrant.

(6) Any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of this Act.

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(7) The officer exercising any power under this section shall on demand produce the relevant warrant (if any).

(8) The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the purposes of any legal proceedings under this Act, whichever event occurs last.

(9) (*a*) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.
(*b*) The court hearing such application may, on good cause shown, make such order as it deems fit.

(10) The person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine.

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Annexure B: Extracts from the Tax Administration Bill No 11 of 2011, as released on the 23 June 2011

Application for warrant

59. (1) The Commissioner personally or a senior SARS official may, if necessary or relevant to administer a tax Act, authorise an application for a warrant authorising SARS to enter a premises where relevant material is kept to search the premises and any person present on the premises and seize relevant material.

(2) SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.

(3) Despite subsection (2), SARS may apply for the warrant referred to in subsection (1) and in the manner referred to in subsection (2), to a magistrate, if the matter relates to an audit or investigation where the estimated tax in dispute does not exceed the amount determined in the notice issued under section 109(1)*(a)*.

Issuance of warrant

60. (1) A judge or magistrate may issue the warrant referred to in section 59(1) if satisfied that there are reasonable grounds to believe that—

(a) a person failed to comply with an obligation imposed under a tax Act, or committed a tax offence; and

(b) relevant material likely to be found on the premises specified in the application may provide evidence of the failure to comply or commission of the offence.

(2) A warrant issued under subsection (1) must contain the following information:

(a) the alleged failure to comply or offence that is the basis for the application;

(b) the person alleged to have failed to comply or to have committed the offence;

(c) the premises to be searched; and

(d) the fact that relevant material as defined in section 1 is likely to be found on the premises.

(3) The warrant must be exercised within 45 business days or such further period as a judge or magistrate deems appropriate on good cause shown.

Carrying out search

61. (1) A SARS official exercising a power under a warrant referred to in section 60 must produce the warrant.

(2) Subject to section 63, a SARS official's failure to produce a warrant entitles a person to refuse access to the official.

(3) The SARS official may—

(a) open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material;

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(b) 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;

(c) make extracts from or copies of relevant material, and require from a person an explanation of relevant material; and

(d) 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.

(4) The SARS official must make an inventory of the relevant material seized in the form, manner and at the time that is reasonable under the circumstances and provide a copy thereof to the person.

(5) The SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.

(6) The SARS official may, at any time, request such assistance from a police officer as the official may consider reasonably necessary and the police officer must render the assistance.

(7) No person may obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant.

(8) Subject to section 66, the SARS official and SARS are not liable for damage to property necessitated by reason of the search.

(9) If the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required for—

(a) the investigation into the non-compliance or the offence described under section 60(1)*(a)*; or

(b) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used.

Search of premises not identified in warrant

62. (1) If a senior SARS official has reasonable grounds to believe that—

(a) the relevant material referred to in section 60(1)*(b)* and included in a warrant is at premises not identified in the warrant and may be removed or destroyed;

(b) a warrant cannot be obtained in time to prevent the removal or destruction of the relevant material; and

(c) the delay in obtaining a warrant would defeat the object of the search and seizure,

SARS may enter and search the premises and exercise the powers granted in terms of this Part, as if the premises had been identified in the warrant.

(2) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

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Search without warrant

63. (1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3)—

(a) if the person who may consent thereto so consents in writing; or

(b) if the senior SARS official on reasonable grounds is satisfied 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.

(2) Section 61(3) to (9) applies to a search conducted under this section.

(3) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

Legal professional privilege

64. (1) If SARS foresees the need to search and seize relevant material that may be alleged to be subject to legal professional privilege, SARS must arrange for an attorney from the panel appointed under section 111 to be present during the execution of the warrant.

(2) An attorney with whom SARS has made an arrangement in terms of subsection (1) may appoint a substitute attorney to be present on the appointing attorney's behalf during the execution of a warrant.

(3) If, during the carrying out of a search and seizure by SARS, a person alleges the existence of legal professional privilege in respect of relevant material and an attorney is not present under subsection (1) or (2), SARS must seal the material, make arrangements with an attorney from the panel appointed under section 111 to take receipt of the material and, as soon as is reasonably possible, hand over the material to the attorney.

(4) An attorney referred to in subsections (1), (2) and (3)—

(a) is not regarded as acting on behalf of either party; and

(b) must personally take responsibility—

(i) in the case of a warrant issued under section 60, for the removal from the premises of relevant material in respect of which legal privilege is alleged;

(ii) in the case of a search and seizure carried out under section 63, for the receipt of the sealed information; and

(iii) if a substitute attorney in terms of subsection (2), for the delivery of the information to the appointing attorney for purposes of making the determination referred to in subsection (5).

(5) The attorney referred to in subsection (1) or (3) must within 21 business days make a determination of whether the privilege applies and may do so in the manner the attorney deems fit, including considering representations made by the parties.

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(6) If a determination of whether the privilege applies is not made under subsection (5) or a party is not satisfied with the determination, the attorney must retain the relevant material pending final resolution of the dispute by the parties or an order of court.

(7) The attorney from the panel appointed under section 111 and any attorney acting on behalf of that attorney referred to in subsection (1) must be compensated in the same manner as if acting as chairperson of the tax board.

Person's right to examine and make copies

65. (1) The person to whose affairs relevant material seized relates, may examine and copy it.

(2) Examination and copying must be made—

(a) at the person's cost in accordance with the fees prescribed in accordance with section 92(1)*(b)* of the Promotion of Access to Information Act;

(b) during normal business hours; and

(c) under the supervision determined by a senior SARS official.

Application for return of seized relevant material or costs of damages

66. (1) A person may request SARS to—

(a) return some or all of the seized material; and

(b) pay the costs of physical damage caused during the conduct of a search and seizure.

(2) If SARS refuses the request, the person may apply to a High Court for the return of the seized material or payment of compensation for physical damage caused during the conduct of the search and seizure.

(3) The court may, on good cause shown, make the order as it deems fit.

(4) If the court sets aside the warrant issued in terms of section 60(1) or orders the return of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice.