

THE CONSTITUTIONAL VALIDITY OF THE SEARCH AND
SEIZURE PROVISIONS IN THE FISCAL LAWS AND HOW
THEY IMPACT ON THE TAXPAYER'S CONSTITUTIONAL
RIGHTS

By

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2. Bernstein and Others v Bester NO and Others 1996 (4) BCLR 570 449 (CC)
3. Cherry v Minister of Safety and Security 1995 (5) BCLR 570 (SE)
4. Cooper NO v FNB of South Africa Ltd 2001 (3) SA 705 (SCA) et 714 E
5. Davis v Tip NO and others 1996 (1) SA 1152 (W)
6. Deutschmann NO and another; Shelton v C: SARS 2000 (2) JTLR 49 (2000 (2) SA 106 (E))
7. Du Plessis and others v De Klerk and Another 1996 (3) SA 850 (CC)
8. Els v Minisre of Safety and Security 1998 (4) BCLR 434 (NC)
9. Ex Parte Minister of Justice : In re R v Pillay 1945 AD 653 et 669
10. Ferela (Pty) Ltd & others v CIR \$ Others 1998 (4) SA 275 (T)
11. Gardener v Whitaker 1996 (4) SA 335 CC
12. Gumede and others v Minister of Law and Order 1987 (3) SA 155 (D) et 157
13. Haynes v CIR (2000) JOL 6320 (T)
14. H Heiman, Maasdorp & Barker v Barker v CIR and another 1968 (4) SA 160 (W) 164
15. Hunter v Southam (1985) 14 CCC (3rd) SCC, 109
16. Hunter et al v Southam Inc. (1985) 11 DLR (4th) 641 (SCC)

17. Hyndai Motors Distributors (Pty) Ltd and others v Smit NO and others 2000 (2) SA 934 (T) : 62 SATC 316
18. Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others 1995 (2) SA 433 (SE) et 443.
19. Katz v United States 389 US 347 (1967)
20. Key v Attorney – General, CPD and Another 1996 (4) SA 187 (CC)
21. Lane and Another NNO v Magistrate, Wynberg 1997 (2) SA 869 (C) et 879 – 886
22. Longhorn Group (Pty) Ltd and Another 1995 (3) SA 836 (W)
23. Mandela v Minister of Prison 1983 (1) 938 (A) et 957 – 964
24. Mark William Shelton v C:SARS Case no 142 of 2000
25. Michael Norwood v Her Mjesty the Queen
26. Minister of Justice v Desai 1948 (3) SA 395 (A)
27. Minister of Law and Order v Hurley 1986 (3) SA 568 (AD)
28. Naidoo v CIR 58 SATC 1996
29. New Zealand Stock Exchange and National Bank of New Zealand v CIR (1991) 13 NZTC, 8, 147
30. Park – Ross v Director : Office for Serious Economic Offences 1995 (2) SA 148 CPD
31. President of the RSA v SARFU And Others 1999 10 BCLR 1059 (CC).
32. R v Edwards (1996) 33CRR (2d) 226 (SCC)
33. R v Kassim 1950 (4) SA 522
34. R v Msweli and Another 1947 (1) SA 216 (N)
35. R v Pugliese (1994) 22 CRR (2d) D – 2.71
36. Rudolph and Another v CIR and Others NNO 1994 (3) SA 771 (W)
37. Rudolph and Another v CIR and Others 1996 (2) SA 886 (A)

38. Rudolph and Another v CIR and Others 1996 (4) SA 552 CC)
39. Regina v Revenue Adjudicators' Office; Ex Parte Drummond 1996 STC 1312
40. Rutenberg v Magistrate, Wynberg, and Another
41. S v Madiba (1998) 1 BCLR 38 D
42. S v Naidoo and Another, 1998 (1) BCLR 46 D
43. S v Sefadi 1995 (1) SA 433 (D)
44. S v Shongwe (1998) 3 All SA 549 (T)
45. S v Soci (1998) 2 All SA 1 (CK)
46. S v Zuma and Others 1995 (2) SA 642 CC et 659 H
47. Shabalala and Others v Attorney – General. TVL and Another 1996 (1) SA 725 (CC)
48. Shelton v C:SARS 2002 (2) SA 9 (SCA)
49. Suliman v Hansa 1971 (2) SA 437 (N) 439

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1. Criminal Procedure Act, No.51, of 1977
2. Estate Duty Act, No.45, of 1955
3. Income Tax Act No.58, of 1962
4. Interception and monitoring Prohibition Act, No. 127 of 1992
5. Marketable Securities Tax Act, No 32 of 1948
6. National Prosecuting Authority Act, No.32 of 1998
7. Promotion of access to Information Act, No.2 of 2000
8. Promotion of administrative justice Act, of 2000
9. South Africa's Interim Constitution Act, No.200 of 1993
10. South African Police Services Act, No.68 of 1995
11. The Republic of South Africa Act, No.108 of 1996
12. Stamp Duties Act, No.77 of 1968
13. Transfer Duty Act, No.40 of 1949
14. Value Added Tax Act , No.89 of 1991

**CONSTITUTIONAL VALIDITY OF THE SEARCH
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CHAPTER – 1

Information gathering powers in the fiscal laws.

1.1 Introduction

The searching of persons and premises is a grave in road upon the privacy of the citizen and must be carried out with responsibility. Its balance must be maintained between the duty to solve the suspected offence or crime and to respect the dignity of the individual. The only goods, which may be seized, are evidential material, things used or suspected to be indented for use instrumentally in an offence and the *corpus delicti*.¹ Normally, a search and seizure violates a person's right to privacy thus Tindall ACJ, in Minister of Justice v Desai, 1948 (3) SA 395 (A), observed that: "The process of search under warrant ... constitutes a serious encroachment on the right of the individual and consequently it is the duty of courts of law to scrutinize most carefully anything done under such section".

Section 74 (3) of the Income Tax Act² ("The Act") has for many years been criticized as arbitrary and unfair,³ The problem was of course that, before the Interim Constitution of the Republic of South Africa⁴ came into force, a taxpayer affected by the unjust or unfair provisions of the Act had only common law remedies against the Commissioner for Inland Revenue ("the Commissioner").⁵ This inevitably created hardship for the taxpayers.

Evidential material is described as an article" which may afford evidence".It is consequently within the direction of the officer executing the search whether the article is

¹ S 20 of Criminal Procedure Act, 51 of 1977

² 58 of 1962 (reference is made to the old s.74(3) of the Income Tax Act)

³ See in general 1994 Taxpayer 181; 1996 Taxpayer 21; Arendse, Kolitz, Stein Dsilke: South African Income Tax (1999) 18.12 A at 18.28.

⁴ Act 200 of 1993 ("The Interim Constitution ")

⁵ See LAWSA Re- issue vol 22(1) par 667.

covered by the search warrant. Not only an article which could be used as evidence is included, but also an article which may assist in solving the offence.⁶ The article must “on reasonable grounds” be believed to be concerned in an offence. The test is objective, depending upon the judgement of a reasonable man.⁷

Before the constitution of Republic of South Africa Act 200 of 1993 (the interim constitution) in particular the charter of human rights came into effect. The commissioner of Inland Revenue (the commissioner) had very wide and uncontrolled powers in terms of the Income tax Act 58 of 1962 (The Act). The taxpayers were at the mercy of the commissioner and his often-bureaucratic representatives.

The entry into premises and inspection of books and documents authorized by this section amounted to a search of “ person, home or property” within the meaning of section 13 of the Interim Constitution.⁸ Although section 13 itself controls access to interference with, and dissemination and use of information on personal matters,⁹ its terms are vague. There was clearly a need for an empowering provision in the Income Tax Act to identify the purpose of the search and seizure and provide clear guidelines within which the responsible officers must carry out their functions.¹⁰ More specifically, there appeared to be no reason why the powers contained in the impugned section could not be subject to the same sort of controls laid down by the Criminal Procedure

⁶ Cheadle, Thompson and Hayson v Min. of Law & Order 1986 (2) SA 279 (W); Andersen v Min. of Justice 1954 (2) SA 473 (W), the decision was questioned to the extent that it held that privileged documents are not exempt from search and seizure. Sasol iii (Edms) Bpk v Min van Wet en Orde 1991 (3) 766 (T)

⁷ Smith, Tabata and Van Heerden v Min. of Law and Order 1989 (3) SA 627 (E)

⁸ s 13 provided for a general right of privacy, together with a direct guarantee of a right to privacy with regard to home or private life, private communications and personal possessions, and the prohibition of unlawful entry, search and seizure of personal belongings.

⁹ Rautenbach & Malherbe Constitutional Law 3 ed (1999) 367

¹⁰ see De Waal, Currie & Erasmus, The Bill of Rights Handbook 3rd ed (2000) 252 - 256

Act.¹¹ As a result, search and seizure authorized by section 74(3) of the Act caused considerable concern among taxpayers. However, the problematic jurisdictional provisions of the Interim constitution, as well as non-retrospective application of the Bill of Rights, made considerably harder on taxpayers to challenge the provisions before a court of law.

It is an undisputed fact that the protection of human rights in the constitution has a major effect on all branches of the law, especially on revenue law. For the first time the commissioner cannot collect taxes without regard to certain basic rights for the individual taxpayer. This basic right can be infringed only if the infringement falls within the scope of the general Limitation Clause contained in S33 of the interim constitution. In terms of this section, the limitation has to be reasonable, justifiable in an open and democratic society and should not negate the essential content of the right.

Some taxpayers may have in the past been subjected to what may be construed as the untrammelled powers of revenue officials. These officials, acting in terms of powers conferred upon them by S 74 (3) of the Income Tax Act of 1962, have entered, searched and seized documentation thought to be useful in investigating the tax affairs of a particular taxpayer.

¹¹ 51 of 1977. Certain other important South African Statutes, to mention but a few, make profound inroads into the rights of privacy. S 41 of the Arms and Ammunition Act, 75 of 1969. It authorises search and seizure. S 4 of the Customs and Excise Act, 91 of 1964. It gives customs officials wide powers of entry, search, and seizure. S 8(6) of the Prevention of Public Violence and Intimidation Act 139 of 1991 also provide wide powers of entry, search and seizure. Ss 11 & 43 of the Drugs and Drug Trafficking Act 140 of 1992 and in particular s 11(1)(g) allows a police official to seize anything which, in his opinion, is connected with, or may provide proof of a contravention of a provision". Ss 143 & 145 of the Liquor Act, 27 of 1989 relate to search and seizure. The constitutionality of these provisions was raised but not decided in *Cherry v Min. of Safety and Security* 1995 5 BCLR 570 (SE).

Complaints echoed by various taxpayers ranged from labeling such actions unreasonable to total disregard for individual privacy. Perhaps the blame should not be apportioned to the revenue officials concerned, but on the wide nature of the relevant section as it then was. The Act on the part of the Commissioner to streamline this provision in accordance with provisions of the constitution is a welcome step although partly motivated by the case of Rudolph and Another V CIR.¹² This case, questioned the Constitutionality and legality of section 74 (3). Although the Constitutionality and Legality of the matter was not decided by the Constitutional Court or Supreme Court, The Commissioner, in anticipation of further litigation, was prompted to act sensibly.

A closer look of the section reveals that the Commissioner or any official acting in terms of the said provision had far wider powers. This is for reasons mentioned hereunder.

A revenue official acting in terms of section 74 (3) could enter, search and seize any documentation or material in any premises without previous notice and without taxpayer's consent.

This was a clear violation of an individual's privacy as powers of the Commissioner were heavily weighed against the taxpayer. The scope of this provision was further widened by the fact that any premises could be searched including non-trade premises, without taxpayer consent.

The taxpayer's consent was not required even if his residential home where no trade was being conducted, was to be entered and searched. No limitation was imposed in respect of which premises could not be searched.

On the absence of constitutional safeguards, the taxpayers were left naked and their only refuge was mercy from revenue officials. With the advent of the new constitution, the Commissioner became exposed and to limit his exposure, section 74 (3) was amended to comply with the provisions of the new constitution.

Section 14 in the present constitution which is the successor to section 13 of the interim constitution provides:

“Everyone has the right privacy which includes the right not to have:

- (a) their person home searched
- (b) their property searched
- (c) the possessions seized or
- (d) their privacy of their communications infringed”

In so far as section 14 of the present constitution is a restatement of the section 13 of the interim constitution, it may be argued that although the court never pronounced on the constitutionality of section 74 (3), there was scope to argue that this section, as it then was, offended the provisions of the interim constitution.

Bearing in mind the wide nature of powers that were voted in the Commissioner’s hands under the old section 74 (3). It is submitted that this maybe further argued that the provision in question was not reasonable and justifiable according to the values of an open and democratic society.

However, as stated earlier, the Commissioner’s conduct of amending the said provision without the constitutional court ruling on the matter, deserves to be commended.

¹² 1996 (2) SA 886 (A)

A recognition of the fact that section 74 (3) was widely phrased amendments to it were introduced, which amendments will be dealt with in the later chapters.

1.2 What are informational gathering powers?: The Income Tax Act as example

The other revenue Act has similar provisions depending on the type of revenue administered on such acts. These types of disclosures may be referred to as required disclosures. The most important required disclosures in terms of the Income Tax Act are:

- (i) Section 65 – all forms of returns and other forms required for the administration of the Income Tax Act shall be in such form as may be prescribed by the Commissioner from time to time;
- (ii) Section 66 (9) – The returns furnished by any persons required to furnish returns under the act shall contain such particulars and be in such form as prescribed by the Commissioner,
- (iii) Section 66 (10) – the Commissioner may, when and as often as he thinks necessary, require any person to make further or more detailed returns respecting any matter of which a return is required or prescribed by the act;
- (iv) Section 68 – Duty of any married taxpayer to include income of his or her spouse and children in his or her returns;
- (v) Section 69 – Duty of any person to furnish any specific information or returns;
- (vi) Section 70 to 72 – Duty of companies to reflect specific information in its return, i.e. in the event of any interest or dividend or assets in winding – up that has become

- (vii) due or is paid or transferred by any company to any person /shareholder any payments in respect of bearer warrants and details of shareholdings.
- (viii) Section 73 – Duty of person submitting accounts in support of returns or preparing accounts for other person to provide certain additional information for example a certificate or statement recording the extent of the examination of the books of accounts and of the documents from which the books of accounts were written up.

Generally, apart from required disclosures, taxpayers are not obliged to disclose information but anything that is disclosed must not be misleading. Xxx may be imposed for deliberately misleading disclosures, and taxpayers open themselves up to the risk that a deliberately misleading disclosure could suggest tax evasion on their part.

Like most other tax authorities, SARS must have adequate additional powers to investigate a taxpayer's affairs in order;

- (a) To verify the information provided by a taxpayer,
- (b) to identify 'non-filers 'or tax evaders;
- (c) generally to enforce the provisions of the revenue act.

It is submitted that effective collection and enforcement measures are needed since no country can function properly without funds. The consequences for the effective function of the country will be dire if tax collections should come to a standstill as a result of the questioning by the taxpayers of the constitutionality of the provisions in terms of which the Commissioner acts. Pending such constitutional questioning the operations of such provisions may be suspended. It is thus of the utmost importance that effective tax collection and enforcement procedures are in place.

1.2.1 What amounts to search and seizure ?

It has been simply stated as a conduct in a situation involving a reasonable expectation of privacy. By privacy it is meant that a person can keep personal information and his affairs secret and out of the public domain. It is submitted that the government agencies come into direct conflict when they are to investigate a person. This therefore means that, if there is an expectation of privacy then a search and seizure must be controlled.

1.3 Information gathering powers – How do they help the

Commissioner? SARS (Protecting the Revenue)

It is undoubtedly of great importance to protect the revenue from tax evasions or neglect, whether deliberate or negligent, to pay taxes that are due. For this reason our taxation statutes contain many extensive (possibly constitutionally to extensive) Provisions that empower the Commissioner and his staff to collect not only tax that is due, but also tax which may not in law be due but is thought to be due by revenue, leaving it to the taxpayer to prove the Commissioner wrong in his view.

Effective collection and enforcement measures are needed since no country can function properly without funds. The consequences for the effective functioning of the country will be dire if tax collection should come to a standstill as a result of the questioning by taxpayers of the constitutionality of the provisions in terms of which the Commissioner acts. Pending such constitutional questioning the operation of such provisions may be suspended. It is thus of the utmost importance that effective tax collection and enforcement procedures are in place and the constitutionality of these provisions is unquestionable.

Many taxpayer's reaction upon receiving a request for information from the Revenue is an irritation. But some taxpayers express complete disbelief that the Revenue should be wasting its or their time. While a taxpayer may feel aggrieved at intrusions on his commercial privacy and the time which is absorbed in responding to queries, it is usually counter productive to do anything than give the Receiver what they ask (for because they have provisions that back them which can result in a taxpayer being at the receiving end and not in any position to challenge them) – not less because it is quite clear that Revenue is perfectly entitled to obtain whatever information it thinks is appropriate. A good relationship between the taxpayer and the Revenue will frequently avoid issues of distrust arising, but this trust is built over years of clean tax health and fair dealing from both sides.

So, when faced with what appears to be a potentially time consuming, possibly nit-picking and apparently misguided request for information, resist the temptation to be dilatory, sarcastic or obstructive! SARS will eventually search your premises and seize documents for information. It is submitted that it is usually better to let the Revenue catch what they are asking for and realise that they are barking up the wrong tree, than to raise their suspicions, attenuate the correspondence, and possibly end up in an unpleasant situation in court.

1.4 Importance of information gathering powers

An administrative authority, like the South African Revenue Services (SARS), is usually empowered to deal with some defined subject matter, if it does not deal with that subject matter or deals with matters not within the scope and ambit of its powers derived from legislation, it acts ultra vires¹³ and such action is reviewable. Thus in terms of s7 of the Administrative Justice Act, 2000¹⁴ which Act gives effect to the right to just administrative action in terms of section 33 of the Constitution, 1996 (Act no 108 of 1996), a court has the

¹³ Baxter, Administrative Law, LAWSA par 79

¹⁴ Act no. 3 of 2000

power to review an administrative action if the administrator who took it was not authorised to do so by the empowering provision.

SARS may therefore only employ its information gathering powers, for example, within the scope and submission of such powers. Most of the revenue acts administered by the Commissioner for the South African Revenue Service include such powers.

Taxpayers have a statutory obligation to disclose to the Commissioner in a timely and useful way all information required to be disclosed under the revenue act in terms of the Income Tax Act 1962 ,(The Income Tax Act) and the Value Added Tax Act, 1991 (The VAT Act), for example, taxpayers are required by law to provide certain information in their returns or as otherwise required, for example in the event of changes in address .

It is submitted in respect of information gathering powers generally, the objects of such powers are clearly important in any tax system. Thus it is further submitted that in order to achieve an equitable levying of taxes, a revenue department should, in principle, process or have access to all information which might affect a taxpayer's liability to tax.

Generally, apart from required disclosures, taxpayers are not obliged to disclose information, but anything that is disclosed must not be misleading. Sanctions may be imposed for deliberately misleading disclosures, and taxpayers open themselves up to a risk that a deliberately misleading disclosure could suggest tax evasion on their part.

Like most other tax authorities, SARS must have adequate additional powers to investigate a taxpayer's affairs in order to:

- 1.1 verify the information provided by the taxpayer
- 1.2 to identify 'non-filers' or tax evaders; and

1.3 generally to enforce the provisions of the revenue act

On the same premises the taxpayer's rights and the enforceability thereof need to be respected. The constitutions of the Republic of South Africa contain a Bill of Right in chapter 2. The rights contained in the Chapter are of general application insofar as the state and citizens are concerned. Some of the rights, however, do apply to tax administration and how the South African Revenue Services (SARS) conducts itself in dealing with taxpayers of South Africa.

Section 14 of the constitution Act deals with taxpayer's rights to privacy which includes the rights not to have their homes searched or possessions seized. Previously SARS could, before the 1993 interim constitution;

Arrive unannounced at taxpayers' premises and seize whatever records it deemed necessary. Section 74 was then subsequently repealed and replaced by a series of sections in the Income Tax Act , namely, s74 A to s74 D dealing with the procedures required to be followed before the South African Revenue Services may conduct a search of premises or seize documents.

1.5 What may be seized

1.5.1 Commissioner's powers of search and seizure

Section 74 (3) of the Income Tax Act read-

'any officer engaged in carrying out the provisions of this act who has in relation to the officers of a particular person been authorised thereto by the Commissioner in writing or telegram, may, for the purposes of the administration of this act-

- (a) without previous justice, at anytime 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 resolved and opened, any article in which he suspects any moneys, books, records accounts or documents to be contained;
- (c) any such books, records accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any persons for any tax;
- (d) retain any such books, records accounts or documents for as long as they may be required for any assessment for any criminal proceedings under this act.

It was submitted thus in the Taxpayer 181 (a monthly journal devoted to the law, Practice and incidence of Income Tax and other revenue laws) the view that the section in this form offended against was section 13 of the Interim Constitution.

Section 13 of the interim constitution of the Republic of South Africa Act 200 of 1993 provides thus;

“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 the private communications,”

1.5.2 What is a valid search

There are a series of questions that the decision – maker, usually a judge presiding in the matter, must ask when determining whether a specific search is constitutional and valid, and these include but not exhaustive :

- (1) was the action taken; a search or a seizure? In other words was it a situation where there was a reasonable expectation of privacy.

- (2) If search or seizure did take place what is the level of expectation of privacy that is affected,
- (3) Were the statutory requirements to obtain the warrant complied with when the search was conducted?
- (4) If the search was a warrantless search can it be justified? In fact was it done properly and in exigent circumstances or for the safety of the public or other valid reason.

Thus it is submitted that if a judge finds that there was a violation in obtaining such information through such search, such evidence must be excluded. The reasons for such exclusion are to avoid the risk of unreliability, to preserve the integrity of the judicial process and the courts by ensuring that the courts and judges are not perceived as condoning or encouraging unlawful or improper conduct on the part of the government officials and to protect citizens against violations committed.

It is argued by some scholars and lawyers that the exclusion of relevant and reliable evidence obtained improperly or unlawfully or unconstitutionally is an effective means of disciplining government officials as well as maintaining the integrity and public confidence in the integrity of the judicial system. Thus it is more credible to state that the maintenance of the integrity of the courts is a better reason for the exclusionary rule. In addition, it is probably safe to state that excluding reliable and relevant evidence doesn't serve justice well unless the actions of the government officials are so unacceptable that the entire credibility of the administration of justice would be brought into disrepute in the eyes of the public.

CHAPTER - 2

Constitutionality

2.1 Pre – constitution information gathering powers:

Before the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) and in particular the chapter on Human Rights came into effect, the Commissioner for Inland Revenue had very wide and uncontrolled powers in terms of the Income Act 58 of 1962 (the Act). Taxpayers were at the mercy of the Commissioner and his often bureaucratic representatives.

It is an undisputed fact that the protection of human rights in the Constitution has a major effect on all branches of the law, especially on revenue law. And it is without doubt that some taxpayers may have in the past been subjected to what may be construed as untrammelled powers of revenue officials.

Section 74(3) of the IT Act is a typical example of the information gathering powers of SARS and is similar to those in most of the revenue acts. Prior to the amendments as already stated, section 74 in essence provided that :

2.1.1 The Commissioner may require any person to produce any record, document or information for examination by the Commissioner, or by any person appointed by him for that purpose, at such time and place as may be appointed by the Commissioner (s 74(1))

2.1.2 The Commissioner may by notice in writing require any person entitled to or in receipt of any income (whether on his own behalf or as the representative of any person) or any person whom the Commissioner may deem able to furnish information, to attend at a time and place to be named by the Commissioner for the purpose of being examined on oath respecting the income of any such person or any transactions or matters or matters affecting the same or any of them or any part thereof (s 73(2)).

2.1.3 Any officer may conduct a search (including any entry by force) and seizure at any premises for the purposes of the administration of the Act, after being authorized thereto by the Commissioner in writing or by telegram. (s 74(3)).

The adoption of the Interim Constitution¹⁵ in 1994, however, necessitated the reappraisal of the information gathering powers of the Commissioner as a result of the general belief¹⁶, at that time, that such powers may violate a person's fundamental right to privacy. The proposal by the Katz Commission, ie, that section 74 (and its counterparts in other revenue acts) would need to take account of the following considerations :

- where feasible, prior authorization must be obtained in order to execute a valid search or seizure;
- authorization must be granted by neutral and impartial persons capable of acting judicially, which implies that authorization provided in terms of section 74 from the Commissioner is not constitutionally valid ; and
- the minimum standard requires 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.¹⁷

Normally, search and seizure provisions violated the person's right to privacy,¹⁸ and section 74(3) has since been amended by the inclusion of section 74D. Thus it should be borne in mind that though the constitution was the savior to the taxpayers it did not operate retroactively that it did not enact that " as at a past date the law shall be taken to have been that which was not " and it

¹⁵ Act 200 of 1993

¹⁶ par. 6.3.27 of the First Interim Katz Commission Report where a specific warning in respect of the search and seizure powers, with only the authorization of the Commissioner required, as infringing upon s13 (right to privacy) of the Interim constitution was issued.

¹⁷ Brand J in *Fedics v Matus* 1997 9 BCLR 1199 (CC) par 7

¹⁸ *Du Plessis v De Klerk* 1996 5 BCLR 658

did not invalidate that which was previously valid or vice - versa¹⁹. Thus for example, the constitution has been held not to apply to a search and seizure of the taxpayer's documents which were completed before it came into force.

2.2 The powers of the courts in respect of constitutional issues

The constitution provides that, when deciding a constitutional matter within its powers, a court must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency, and may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of any invalidity for any period and on any conditions to allow the competent authority to correct the defect.

The constitution provides further that the Supreme Court of Appeal, a High Court, or a court of similar status may make an order concerning the constitutional validity of an Act of parliament, but an order of constitutional invalidity has no force unless it is confirmed by the constitutional court. Further a court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the constitutional court on the validity of that Act or conduct. National legislation must provide for the referral of an order of constitutional invalidity to the constitutional court.

2.3 The Bill of Rights

The constitution²⁰ declares that it is the supreme law of the Republic and that the law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

¹⁹ Rudolph and Another v CIR 1995 (3) SA 771 (W)

²⁰ Constitution of the RSA 108 OF 1996t

Any provisions of the Income Tax Act can therefore be challenged in the courts on the grounds that it is inconsistent with the constitution, and is therefore invalid. Of particular significance in this regard is the fundamental rights laid down in Chapter 2 of the constitution, read together with the general limitation provision. Both natural and juristic persons are protected by the Bill of Rights and all organs of the state are bound by it.

The following fundamental rights, enshrined in the constitution, are likely to be of particular significance in Income Tax disputes between the taxpayers and the South African Revenue Services;

- the right to equality before the law (s9)
- the right to privacy (s14)
- the right to property (s25)
- the right of access to information held by the state or by another person (s32)
- the right to lawful, reasonable and procedurally fair administrative action (s33) and
- the right of access to the courts and to have justiciable disputes decided in a fair public hearing by a court or other independent and impartial tribunal or forum.

The general limitation provision in the constitution states that the rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose.

In cases involving a constitutional challenge to the validity of provisions of the Income Tax Act, it has been held that the statutory provisions in issue must be evaluated, not in vacuum, but within the context of overall structures of the Act regarding the assessment of tax and the procedure for collecting due taxes, and that cognisance must be taken of the procedures available under the Act

for a taxpayer to contest the amount of tax for which he has been assessed. *Motsepe v CIR*²¹ It may also be relevant to scrutinize the tax legislation of other democratic countries to see whether there are similar provisions to the ones under challenge.

2.4 The Right to Privacy

The constitution is perhaps the most ambitious legislative instrument of all time. It seeks to re-order both the social and legal reality of our land, its ringing Preamble proclaiming no less than:

“... a need to create a new order in which all South Africans will be entitled to a common South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.”

Thus the search and seizure provisions in the fiscal laws do infringe against the enjoyment and exercising of the fundamental rights and freedoms enshrined in the bill of rights especially the right to privacy. In terms of the constitution, everyone has the right to privacy, which includes the right not to have their persons or home searched, their possessions seized or their privacy of their communications infringed. It should be noted that these rights are not absolute but are subject to the general limitations clause and the principles with regard to the limitation of fundamental rights will accordingly apply. And such limitation shall not negate the essential content of the right in question.

2.5 The right to Just Administrative Action

One of the grounds in which a search and seizure can be challenged is on the ground that such an administrative action was obtained or granted unjustly, and the person who granted it has not

²¹ 1997(2) SA 898 (CC);59 SATC 245 at 251- 253; *Hindry v Nedcor Bank*[1999] 2 All SA 38 (W); 61 SATC 163 at 181- 186

applied his mind to it and is unjust, unreasonable in an open democratic society where parliamentary sovereignty is superseded by Constitutional supremacy.

The constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and to the right to written reasons for administrative action as contemplated in section 33 of the constitution, and to provide for matters incidental thereto.

Thus to promote or adhere to a just administrative action the Promotion of Administrative Justice Act²² has come to place and its objectives are:

- to promote an efficient administration and good governance; and
- to create a culture of accountability, openness and transparency in the Public administration, or the performance of a public function, by giving effect to the right to unjust administrative action.

2.5.1 Procedurally fair administrative action

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. A fair administrative procedure depends on the circumstances of each case. In order to give effect to the right to procedurally fair administrative action, an administrator must give a person ;

- adequate notice nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal, where applicable; and
- adequate notice of the right to request reasons in terms of section 5.

²² Promotion of Administrative Justice Act, 2000

In order to give effect to the right to procedurally fair administration may, in his or her discretion, also give a person an opportunity to-

- obtain assistance and, in serious or complex cases, legal representation;
- present and dispute information and arguments; and
- appear in person.

2.6 The general Limitation Provision

An important question in constitutional challenges to the Provisions of IT is the Scope and content of the Limitation clause of the constitution. It is submitted that the rights in the Bill of Rights are just absolute they may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,, equality and freedom, taking into account all relevant factors, including,

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

In keeping with the principle that no fundamental right is absolute, section 36 provides a mechanism for the court to implement when they are called upon to decide the question of when a limitation on a fundamental right will be legitimate and valid. It is submitted thus, that a limitation shall not be negative (violate) the 'essential content' of the right in question.

In regard in the nature and extent of the limitation of the right to privacy, it is submitted that any infringement is mitigated by the fact that the secrecy provisions of the revenue acts contains important protection mechanisms in respect of the information of taxpayers obtained by SARS.

The information gathering powers of SARS, and its utilization therefore, is clearly of sufficient importance to justify any limitation of constitutional right. The importance of the purpose of the limitation as inextricably bound up with the capacity of the State to impose and collect taxes in order to fulfil its constitutional and other obligations. The very functioning of the State and its ability to implement social and economic policies is dependent upon an efficient system of taxation.

The inequality in the distribution of income in South Africa is extreme and this has to be addressed both on the expenditure and the income sides of the national budget. For this purpose, the necessity of raising sufficient tax revenues efficiently, effectively and with a minimum of delay, is clearly an important pillar in securing the required sustainable macro-economic and fiscal balance.

SARS must ensure that all taxpayers comply with their obligations in terms of the revenue acts, the importance of which is clearly manifested by the small tax base of this country (approximately 6,5 million registered taxpayers) in contrast to its economically active population, as well as the high incidence of tax evasion and low level of tax morality. Evasion and fraud deprives the State of revenue which in turn hampers the State's capacity to attend to the needs of its people. To effect tax compliance and to ensure that all taxpayers comply with their obligations in terms of the revenue acts, SARS must see to it that those who set out to comply with the tax laws must be brought to account in an appropriate way. If people see some sections of society being able to escape their legal tax obligations, the tax system will be seen to be unfair and voluntary compliance will be undermined.

It is submitted that inadequate investigation and prosecution of tax evaders is unfair to taxpayers who complied with the law. If these problems were allowed to persist, they would undermine public confidence in the tax system, and would reduce voluntary compliance by the majority of taxpayers, such compliance being an integral feature of an effective tax system.

Thus in regard to the relation between the limitation and its purpose, it is submitted that any limitation of the right to privacy is only minimal, and its purpose is manifestly one of great social importance.

2.7 Post constitutional amendments to information gathering powers (the new s74)

2.7.1 Power of search and seizure in terms of s74D of the Act

Section 74 was repealed and replaced by a new section 74 and section 74A – D. The new section reflects a generous borrowing from section 231 of the Canadian Income Tax Act²³. Section 74D provides *inter alia* as follows:

“(1) For purpose 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, authorizing the officer named therein to, without prior notice and at anytime –

(a) (1) enter and search any premises; and

(11) 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;

(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.”

In general, the new section provides clear and precise guidelines within which the commissioner or his agents must carry out their functions. Previously, the commissioner could search and seize property of the taxpayer without authorization. Presently, the commissioner has to obtain a warrant from a judge of the High Court authorizing the officer named therein to search premises and seize

property.²⁴ However, the statutory requirement of authorization through a warrant creates ambiguity when read together with section 74D(7) that :

“The officer exercising any power under this section shall on demand produce the relevant warrant if any”.

The phrase “if any” when viewed against its surrounding text may be open to various interpretations. The one being that, the Commissioner may have already at the time of demand secured the relevant warrant but is nevertheless not in possession thereof. In that case, the commissioner would still be exercising his powers within the ambit of the law as prior authorization would have been obtained. However, if the phrase in question suggests that the commissioner may search premises and seize property without judicial sanction, then the provision may well be in danger of being challenged constitutionally.²⁵ This is especially so since the new section was introduced to avoid anything in the nature of arbitrary search and seizure. Therefore, to circumscribe unwarranted interference with the rights of the taxpayer, it is important for the courts to assume an active and resolute role in dealing effectively with any form of practice *ultra vires* the legislative framework. By the same token it is imperative that the powers granted by the section should also be exercised subject to the law in general and the constitution in particular. This proposition is particularly important in the context of discretionary powers. It is submitted that search and seizure without warrant should be the exception and not the rule.²⁶

²³ It should be emphasized that s74D of the Income Tax Act is not identical to s231(3) of the Canadian Income Tax.

²⁴ In terms of s74 D(2) an application for the warrant must be supported by information supplied under oath or solemn declaration, establishing the facts upon which the application is based. Similarly, the United States Supreme Court in *Go-Bart Important Co v United States* 282 US 344 held that the application for a warrant must contain a description of the place to be searched, persons to be searched and property to be searched.

²⁵ More so keeping in mind that in terms of s74D(3), the judge before issuing the warrant must be satisfied that reasonable grounds exists of non-compliance with the obligations in terms of the act, any warrantless entry to the premises, may therefore raise serious concern about irregular invasions of taxpayer’s liberties by authorities.

²⁶ Itzikowitz 1995 *SAJHR* 281 at 289

2.7.2 The “reasonable ground” discretion

It is of paramount importance to note that the powers vested in the commissioner in terms of the Act are not peremptory. The commissioner may as a matter of course exercise a discretion to seize property not referred to in the warrant based on the requirement of reasonable grounds embedded in subsection 74D(5) and (6). Section 74D(5) reads as follows:

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

(a) such information, documents or things are-

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

(11) 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”.

Section 74D(6) reads as follows:

“(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.”

However the question arising is what criteria should be employed to establish the basis of such grounds. When one looks at foreign systems, the Canadian courts have stated that the standard of proof to be met in order to establish reasonable grounds for search is “reasonable probability”.²⁷ Although not quite unequivocal, one may infer that for a seizure of property on reasonable grounds to be justiciable there ought to exist an objective set of facts which cause the officer to have the

required belief.²⁸ In the absence of such set of facts, the reliance on reasonable grounds will be vague and baseless. Obviously, however, it remains important for the courts to determine the existence of grounds reasonable enough to warrant a belief.

The Constitutional Court in *Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd*²⁹ had the opportunity to consider and pronounce upon the constitutionality of the provisions contained in the National Prosecuting Authority Act³⁰ that authorize the issuing of warrants of search and seizure for purposes of a “preparatory investigation.” Langa DP held that section 29(5) explicitly provides that prior to issuing of a search warrant, a judicial officer must be satisfied that there are reasonable grounds to believe that some object which is connected to the preparatory investigation is on the premises sought to be searched. He therefore concluded that the impugned provisions are reasonably capable of a meaning that requires a reasonable suspicion of the commission of an offence as a pre condition for the issue of a search warrant for purposes of a preparatory investigation.

An illustration of the strictness within which the “reasonable grounds” requirement is enforced, was the finding in *Minister of Law and Order v Hurley*, the court held that if the section commissioned an officer to exercise a discretion on reasonable grounds, such commissioning does not preclude the court from considering whether the officer indeed had reasonable grounds for his belief. This decision is to be commended as it implies that a commissioner imbued with such responsibility may not necessarily be the ultimate judge as to whether there are reasonable grounds for his belief. There may be a need for the intervention of the judicial authority to ensure that existing rights are not impinged upon.

²⁷ *Regina v Debot* (1986) 26 C.R.R 275,285; *R v Debot*(1989) 45 C.R.R 49, 70. The court found that “reasonable probability” is comparable to the “probable cause” requirement in the American Fourth Amendment.

²⁸ *Sigaba v Minister of Defence and Police & Another* 1980 (3) SA 535 (TK)

²⁹ 2000 10 BCLR 1079 (CC)

CHAPTER - 3

Constitutional Aspects of search and seizure

3.1 Discretion to allow search and seizure

This intervention is not confined to the validity or non-validity of the discretion exercised by the commissioner. It extends to a crucial function of determining whether the facts before him are sufficient to warrant a search and seizure of property. Section 74D(3) provide that:

“ A judge *may* issue the warrant ... if he is satisfied that there are reasonable grounds ...”

Use of the word *may* make clear that there is a judicial discretion to refuse to issue a warrant where the circumstances do not justify the invasion of privacy. The exercise of discretion to grant or withhold the warrant was explained by Sopinka J in *Baron v Canada*³¹ to require the balancing of two interests: that of the individual to be free of intrusions by the state and that of the state to intrude on the privacy of the individual for the purpose of law enforcement.”

In *Baron's* case the Canadian Supreme Court found the use of the word “shall” in section 231.3(3) of the Canadian Income Tax Act to be unconstitutional. It was held that the exercise of discretion is a constitutional requirement and in his view section 231.3(3) removes or impermissibly restricts this discretion. The court concluded that the subsection makes it possible for a judge to be statutorily

³⁰ 32 of 1998

³¹ 13 CRRR (2 ed) 65 (SCC)

bound to authorize an unreasonable search or seizure once satisfied. Thus the court holds that the subsection violates section 8 of the Canadian Charter of Rights and Freedoms.

3.2 Constitutional Challenges to information gathering powers.

The amendments were effected after a thorough comparative studies of various other democratic nations, with similar taxation laws and constitutions to that of the Republic of South Africa. The amendments to a large extent reflected the powers of the Canadian and the United States of America Revenue authorities, with certain provisions of other jurisdictions also incorporated.

Since the introduction of the amendments mentioned supra, the constitutionality of the search and seizure provisions of the Income Tax Act has been considered in the case of *Deutchman NO and Others v Commissioner for the South African Revenue Services*³², although some other challenges in this regard have been raised but were abandoned by the applicant or disposed of in another manner by the High Court. The challenges were mainly based on possible infringements by the search and seizure provisions on the fundamental rights to privacy or just administrative action.

In the case of *Rudolf and Another v Commissioner for Inland Revenue and Others*³³, the provisions of section 74(3) of Income Tax Act before the amendments were attacked on the basis that it violated the right not to be subjected to a search of a person's property and to seizure of private possessions, the constitutionality of section 74(3) was not decided as the Appellate Division referred the matter to the Constitutional Court in terms of section 102(6) of the Constitution of the Republic of South Africa Act³⁴, which court eventually ruled that the Constitution did not apply to the matter because the acts of issuing authorizations and of searching for and seizing documents in question were all completed before the Interim Constitution came into operation.

³² 2000(2) SA 106 (E)

³³ 1996 (2) SA 886 (A)

The Bill of Rights contains a comprehensive listing rights protected under the constitution and certain of these deals with equality (s 9) and provides that all persons are equal before the law and prohibits discrimination on various grounds. Section 14 deals with taxpayers' rights to privacy which includes the right not to have their homes searched or possessions seized. Previously the Commissioner for South African Revenue Services could, Section 74 was subsequently repealed and replaced by a series of sections already mentioned earlier, dealing with the procedures required to be followed before SARS may conduct a search of premises or seize documents.

If SARS now wishes to conduct an investigation at a taxpayer's premises, it is necessary for SARS to approach a judge of the High Court in order to secure a warrant granting authority to search premises and seize records. The only other time that a SARS official may visit a business to examine records is where due and proper notice has been given in accordance with the fiscal statutes. SARS officials may therefore not arrive unannounced at the taxpayer's premises to conduct routine VAT, PAYE or other inspections unless prior and proper arrangements have been made with the taxpayer.

At present the Constitution Act is the supreme law of South Africa and no statute can conflict therewith. In the past it was immaterial that the legislative measure was unreasonable, impolitic, or retrospective or that it impinged upon existing rights. If that which was passed into law was within the scope of the power conferred and violated no restriction on that power, it was upheld whatever the court may think of it. In this regard (see *Middelburg Municipality v Gertzen*³⁵; *Joyce and Mc Gregor Ltd v Cape Provincial Administrator*³⁶).

Now the position has changed, Parliamentary sovereignty has been replaced by Constitutional sovereignty. Section 2 of the Constitution provides that the Constitution is the supreme law of the country and any law inconsistent with it will be declared unconstitutional. Now the taxpayers

³⁴ 200 of 1993

³⁵ 1914 AD 544 at 554

are also entitled to a just administrative action and this is in accordance with the provisions of section 33 of the Constitution Act. This provision required that national legislation be enacted to give effect to the right to just administrative action, hence the introduction of the Administrative Justice Act and the Act gives effect to the rights of taxpayers and citizens to just administrative action. In view of the fact that SARS is making administrative decisions it is bound to follow the provisions of the Administrative Justice Act. It is this Act that gives some protection to taxpayers in their dealings with SARS. The Administrative Justice Act affords some measure of relief to taxpayers and it allows taxpayers to approach the Magistrates Court for relief, which is far cheaper than proceeding to the High Court.

Section 33(1) of the constitution provides that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. It is against that background that the search and seizure provisions in the fiscal laws met so much constitutional challenge. Thus it has been contended that those provisions adversely affected the rights of taxpayers especially the right to privacy. It is apparent that these provisions offended against the Constitutional guarantees embodied in the Bill of Rights in that they substituted the Commissioner for the court, which renders him a judge in his own cause.

As much as these provisions amongst other things are designed to fight the low tax morale, it is still no justification for deploying mechanisms which have no respect for the taxpayer's constitutional rights. In democratic societies the State has the duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons who have committed crimes. In a constitutional state that obligation is of fundamental importance and it is clearly recognized as such in our constitution.

³⁶ 1946 AD 658 at 669

3.3 Information Gathering powers - Risk of Constitutional infringement

The South African Revenue Services accepts that the new constitutional order, based as it is on constitutionalism, requires that governmental power is only exercised through a system of defined procedures and limits, and that all rights are sustained and exercised in accordance with the letter and spirit of the constitution.

It is submitted that the employment of the South African Revenue Services' information gathering powers can arguably, be attacked on the basis that the information gathering powers violates a cluster of interrelated and overlapping constitutional rights, for example:

1. the general right to privacy (s14)
2. the particular aspect of the right to personal privacy not to be subjected to seizure of property or possessions or the violation of private communications (s14(b),(c) or (d);
3. the general right to just administrative justice action (s32) as read with the Promotion of Administrative Justice Act,³⁷ for example the application or employment of the NITS:
 - 3.1 in a manner not authorized by the empowering provisions; or
 - 3.2 where a mandatory procedure or mandatory condition prescribed by law was not complied with.

It is submitted that the effect of NITS system on the taxpayer is that the taxpayer will be required to disclose a significant amount of additional information which might have been confidential. The rights of taxpayers are also supposed to be protected and respected as per the SARS Client Charter which set out the rights of taxpayers and obligations. In terms of the Charter, SARS is expected to protect the taxpayer's constitutional rights by keeping his private affairs strictly confidential, by furnishing reasons for any decisions that it makes, and by applying the law both consistently and impartially.

It is further submitted, however, obviously, any evidence obtained with their information gathering powers of the South African Revenue Services in a manner that violates any right in the Bill of Rights must be excluded in any subsequent court proceedings if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice (s35(5)) of the Constitution, Act 108 of 1996.

3.4 The Right to Privacy in general

The manner in which the information gathering powers of SARS is employed, may arguably entail a violation of the constitutionally protected right to privacy, depending on the type of information that is accessed and obtained.

Section 14 of the constitution , provides that everyone has the right to privacy, which includes the right not to have –

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

3.5 The Right to Privacy and Search and seizure

The following revenue acts administered by the Commissioner for the South African Revenue Service contains search and seizure provisions that requires a warrant issued by a judge:

3.5.1 Income Tax Act, 58 of 1962 (the IT Act) – s74D

3.5.2 Value Added Tax Act, 89 of 1991 s- 57D

3.5.3 Estate Duty Act, 45 of 1955 – s8E

3.5.4 Transfer Duty Act, 40 of 1949 – s11E

³⁷ Act no2 of 2000

3.5.5 Marketable Securities Tax Act, 32 of 1948 – s9D

3.5.6 Stamp Duties Act, 77 of 1968 – s 31D

The Customs and Excise Act, 29 of 1948, provides for search and seizure without a warrant issued by a judge (see for example s4 and s88). See also par 13(14) of the fourth Schedule of the IT Act in respect of search and seizure without a warrant for unused employees' tax certificates. The constitutionality of search and seizure provisions in other legislation has been considered in a few cases.

In the case of S v Naidoo and Another³⁸, the court dealt with section 2(2) of the Interception and Monitoring Prohibition Act. In relation to the right not to have privacy of communications infringed the court held that, the procedures prescribed for securing such a judicial authority are to be strictly adhered to – where the monitoring occurs pursuant to an invalid direction, the monitoring is not only a contravention of the provisions of the Act but constitutes a breach of the fundamental right to personal privacy.

The court relied on the American decision of Katz v United States where it was held that evidence of intercepted telephone conversations is on the same footing as a “search and seizure” within the meaning of the fourth amendment. Where the evidence was obtained without judicial authority it was inadmissible. The basis of this approach was that the purpose of the prohibition on unreasonable search was to protect a reasonable expectation of privacy.

The court concluded that the provisions of the Interception and Monitoring Prohibition Act³⁹, complied with the requirements of the limitation clause, section 33(1) of the Interim Constitution, and the provision for monitoring in the circumstances referred to in the Act clearly constituted a permissible limitation on the right to privacy.

³⁸ 1998 (1) BCLR 46 (D)

³⁹ Act no. 127 of 1992

In Park-Ross and Another v Director: Office for Serious Economic Offences⁴⁰ the court held in relation to the right not to be subject to searches of his or her person, home or property, that, the law authorizing search and seizure limits the right to privacy, but that such limitation meets the requirements of section 33(1) of the Interim Constitution, assuming that the law pursues an objective sufficiently important to justify limiting individual constitutional rights and is rationally connected to such objective.

The assessment whether such law impairs the right to privacy no more than is necessary to accomplish the objective and whether such law does not have a disproportionately severe effect on the persons to whom it applies, must focus on its 'reasonable' or 'unreasonable' impact on the subject of search and seizure, and not simply on its rationality in furthering some valid government objective.

It is submitted that the prerequisites for reasonable searches and seizures in connection with investigation of offences were set out by the Supreme Court of Canada as follows;

- (1) prior authorization by an impartial and independent person who is bound to act judicially;
- (2) evidence on oath satisfying such person that there are reasonable grounds to suspect an offence has been committed;
- (3) evidence on oath to satisfy such person that there are reasonable grounds to believe that the search will produce evidence of the commission of an offence.

In the case of *Deutschmann NO and Others v C: SARS; Shelton*, the Commissioner's officials pursuant to the authorization of warrants for search and seizure against the applicants in terms of the Income Tax Act and the VAT Act, searched the premises of the applicants and seized a considerable amount of material. The applicants subsequently launched an application for the return of the seized material. One of the grounds upon which the return of the material was

⁴⁰ 1995 (2) SA 148 (C)

premised, was that searches and seizures are a violation to the rights of privacy and property as contained in the constitution.

The court in considering the issue of whether the applications should be viewed against the background of the constitutional rights to privacy and property, examined the definitions and scope of these rights. The court held that it was clear that the definition of privacy does not extend to include the carrying on of business activities.

With regard to the alleged deprivation of property, the court emphasized that the constitutional right prevents the arbitrary deprivation of property. The fact that the granting of an application for a warrant requires a formal application supported by information supplied under oath and the exercise of a discretion by a judge negated the view that there was arbitrary deprivation of property involved.

A related case to the above is the case of Haynes v Commissioner for Inland Revenue and the issue was whether an order restraining SARS from acting in accordance with the warrant of search and seizure, should be extended or set aside. The application was dismissed by both judges with cost. However, the Haynes case had an interesting twist. Locke J in a separate obiter and unsupported judgment expressed an opinion on certain aspects of the Income Tax – and VAT Act – about the requirements of a valid application for a warrant for search and seizure. He expressed an opinion that a taxpayer should have notice of an application for a warrant and that the absence of any notice of an application for a warrant and that the absence of any notice constitutes an infringement of the taxpayer's right to privacy.

In an article “ NO, TAXMAN, NO” in the Financial Mail (page 105 – June 23 issue) this obiter judgement by Locke J was quoted in support of stating that the ‘ application (by Haynes) was granted’, that a “new precedent is set” and that “ the case is a winner for the taxpayer”.

It is submitted that this clearly is not the correct legal position in the South African law at this point in time. Thus Botha J in the case of *Ferela AO v CIR*⁴¹ held that no service was required. This view was confirmed by a full bench of the Eastern Cape Division in the *Deutschmann* case referred to above. In the latter case the court held that the giving of notice would make the words “without prior notice” in the relevant sections redundant, and that “it is inconceivable that the legislature could have contemplated that prior notice of an application to conduct such search could be required in every instance”.

As a single judge, and in terms of the *stare decisis* rule (lower courts must adhere to decided cases of a higher court), Locke J is bound by the majority judgment of the *Deutschmann* case.

3.6 The Right to Privacy and Compulsory Disclosure of certain information

The compulsory disclosure of certain information by taxpayers or third parties via for example section 74A of the Income Tax Act, may be attacked on the basis that such compulsory disclosure invades a taxpayer’s right to privacy. The constitutionality of ‘compulsory disclosure’ in enquiry proceedings in terms of other legislation has been considered in some cases.

Thus in the case of *Bernstein and Others v Bester and Others*⁴², the applicants as part of their attack on the constitutionality of section 417 and 418 of the Companies Act (enquiry proceedings) submitted that “a witness’s privacy is clearly invaded when he is forced to disclose his books and documents that he wants to keep confidential and to reveal information that he wants to keep to himself”. In addition, the applicants contend that the

⁴¹ 1998 (4) sa 275 (TPD)

⁴² 1996 (4) BCLR 449 (CC)

“compulsory production of documents under section 417(3) constitutes a ‘seizure’ within the meaning of the right not to be subject to the ‘seizure of private possessions’ in terms of section 13 of the constitution”.

The Constitutional court held that, in view of the fact that it was not possible to pronounce on the issue of privacy unless the content of the document or information in respect of which privacy was claimed was disclosed, it would be inadvisable under the circumstance to give a detailed exposition on the constitutional right to privacy at section 417 proceedings. In any event, in the Court’s view, this was an exercise which the Supreme Court ought to perform on a case-by-case basis. This conclusion rendered it unnecessary to consider the limits of the constitutional right to privacy, but the Constitutional Court felt it appropriate to venture some observations on the scope of this right.

The scope of the privacy right was closely related to the concept of identity and was not based on a notion of the unencumbered self but on the notion of what was based on a notion of what was necessary to have one’s own autonomous identity. No right was absolute. This implied from the outset of interpretation that each right was already limited by every other right accruing to another citizen. In the context of privacy this meant that it was only the inner sanctum of a person, such as his/her family life, sexual preference and home environment which was shielded from erosion by conflicting right of the community. Privacy was acknowledged in the truly personal realm, but as a person moved into communal relations and activities such as business and social interaction, the scope of personal space shrank accordingly.

There was no authority for the right to privacy extended beyond the private sphere of an individual's existence. Beyond that the scope of a person's right to privacy extended only to those aspects in regard to which a legitimate expectation of privacy could be harboured. In each particular situation an assessment had to be made as to whether the public's interest to be left alone by government had to give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

The facts operative in the present case concerned neither the invasion of private living space nor any specific protected relationship. The establishment of a company as a vehicle for conducting business on the basis of limited liability was not a private matter. It drew on a legal framework endorsed by the community and operated through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute would have concomitant responsibility. These included the statutory obligation of proper disclosure and accountability to shareholders. It could not therefore be said that in relation to such information a reasonable expectation would not be recognized by society as objectively reasonable to privacy existed. Such an expectation would be recognized by society as objectively reasonable. The same applied to auditors and the debtors of the company. The conclusion was therefore unavoidable that no threat to Applicants' right to privacy as protected by section 13 of the Constitution had been established.

As regards the challenge based on the right to privacy as it pertained to the seizure of private documents and possessions, the argument could be disposed of in exactly the

same way as the previous argument. Their compelled production would be justified for the very same reason that the compelled answers to relevant questions would be justified.

The right to privacy therefore does not extend beyond this private sphere of an individual's existence the right to privacy is acknowledge in this 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 and extends only to those aspects to which a legitimate expectation of privacy can be harbored.

President of the Republic of South Africa and Others v South African Rugby Football Union and Other⁴³, in following decision of Ackermann J in Bernstein's case, the Constitutional Court held that similar considerations apply to the provisions of the Commissions Act. It may be that a witness before the commission may be asked questions or produce documents which will limit his or her right to privacy. However, in any particular case, the questions put and the documents sought must be relevant to the scope of the commission's investigation and that investigation must be a matter of public concern.

If the questions asked or documents sought are relevant to such an investigation, then in all probability an invasion of privacy will be permissible. The requirement that the commission be investigating a matter of public concern coupled with the requirement that any questions be relevant to its terms of reference will ensure that witnesses' privacy right will not be improperly infringed.

Chapter – 4

Courts approach of Search and Seizure

4.1 How the courts approach the information gathering provisions.

The case of Rudolph and Another v CIR* laid the formation or is the cornerstone or pillar in challenging the constitutionality of the then 74(3) Rudolph against whom the Revenue had acted in terms of section 74(3) took the point that the Revenue's actions were unconstitutional and therefore sought an interdict. The court refused to do so on the ground that until the Constitutional Court ruled on the validity of section 74(3) other courts had to accept the validity of the section and it was therefore not competent for the court to grant an interdict, Rudolph's only remedy being to seek an interdict from Constitutional Court.

An appeal to the A.D. for relief on the basis that the terms of the Commissioner's authorization were invalid on certain common law grounds. The court in the appeal directed that the matter should be referred to the Constitutional Court to determine *inter alia*, whether section 74(3) of the Act was contrary to the provisions of Chapter 3 of the Constitution and accordingly invalid.

The Constitutional Court gave no answer to these questions because

- a) the seizure had to take place before the Constitution was in place and therefore
- b) as the court had held in a number of judgments prior to the referral to it by the Appellate Division that the Constitution did not have the retrospective effect, the validity of section 74(3) was not in issue.

⁴³ 1999 (10) BCLR 1059 (CC)

It is indeed a pity that all efforts put into obtaining a decision as to the validity of section 74(3) had been in vain because of the timing of the facts before the Constitutional Court. That however, is the way courts work. They require a concrete and not a hypothetical set of facts to which the law must be applied.

It is interesting to note, although Rudolph lost, the taxpayers as a body, it is submitted, have not lost Revenue has recognized that section 74 (3) is too widely framed. Section 74 has now been replaced with a number of provisions which do safeguard taxpayers against what could be arbitrary actions on the part of the Commissioner and his officials and therefore may well avoid being unconstitutional. These changes have been introduced by the Revenue Laws Amendment Act passed during the second session of Parliament.

Amendments similar to those made to the Income Tax Act have been made to the Marketable Securities Act (in place of section 9), to the Transfer Duty, to the Estate Duty Act (in place of section 8 bis), to the stamp Duties Act (in place of s 31) and to the Vat Act (in place of section 56 and 57)

There is no doubt that section 74 was unconstitutional. One merely has to consider the approach followed in *Park-Ross v Director: office for Serious Economic offence* to realise the implications of the considerations canvassed there on section 74. The court per Tebbutt J. adopted a pragmatic approach in dealing with unqualified search and seizure provisions.*[Thus section 6 of the Investigation of Serious Economic offences Act 117 of 1991(The Act') authorized the Director of the office for Serious Economic Offences or any person authorized thereto by him in writing to enter (at any time) any premises or in which anything connected with the inquiry is or is suspected to be..... "The Director or person so authorized may then "make copies or take extracts from any books or documents found on or in the premises"It was therefore the applicant's assentation that it offends s. 13 of the Interim Constitution.

Section 6 like section 74, did not provide for necessary safeguards or guidelines to minimise the extent of the intrusion on privacy. In fact, neither regulations expressly required a warrant prior to a search and seizure.

In *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (CPD), 170 Tebbutt J. referred to *Hunter v Southern* (1985) 14 CCC (3d) 97 CC, 109 where Dickson J. emphasized the important of prior authorization as follows: "A requirement of prior authorization, usually in the form of valid warrant, has been a consistent pre-requisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the right Charter to prefer, where feasible, the rights of the individual to be free from state interference to the interests of the state in advancing its purpose through such interference.

More specifically, rather than an independent person authorizing a search and seizure as was required by the court's decision in *Park-Ross*, section 6 granted wide powers of entry, search and seizure to the Director. Thus power, Tebbutt J. observed "ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the individual must constitutionally give way to those of the state" In his view, the Director could not "be impartial arbiter necessary to grant effective authorization."

In *Hunter v Southern* *supra* 110, Dickson J. remarked that "foran authorisation procedure to be meaningful, it is necessary for a person authorising the search to be able to assess the evidence as to whether [an appropriate] standard has been met, in an entirely neutral and impartial manner." Similarly, the court in *Greensburg No v Minister van Handel en Nywerheid* No 1999 2 BCLR 204 (T), held that a search and seizure should be endorsed as necessary by an independent authority before it can be conducted. Thus s 7 of the Harmful Business Practices Act 71 of 1998 was struck down as it did not incorporate mechanisms for control and supervision as deemed necessary by the court.

As a result, Tebbutt J. applies to section 74. Like section 6, provisions of section 74 authorised warrant less entry into the premises of the person connected with the inquiry without any measure to curtail infringement of constitutional rights. Furthermore, considering that it was the official in each case rather than an independent person capable of acting judicially, who decided whether search and seizure should take place, it is unlikely that section 74 would have survived the constitutional scrutiny.

Thus it becomes clear why there were developments in the form of amendments to section 74 of the Act seeking to safeguard the fundamental rights of the taxpayer.

Another important decision on taxpayer rights in respect o Search and Seizure warrant issued under the Income Tax Act and the Vat Act is to be found in the case of Deutchman No v C: SARS, Shelton v C: SARS [2000], All SA 198 E, 62 SATC 19,

The back ground was the following;

In two separate Ex Parte Applications brought by the Commissioner for South African, Erasmus J. and Kroon J. respectively issued warrants for the search and seizure of the taxpayers property in terms of s.74 D(1) of the IT Act. And s. 57D of the VAT Act. The respondents in the two applications were the late NR Deutchman and Mark William Shelton, respectively. Pursuant to the warrant, officers in the employ of SARS searched the premises identified in the warrants and seized a considerable amount of material. The executrix in Deutchmann's estate brought an urgent application in the High Court for an order directing the C: SARS to return all seizure material, and for certain ancillary relief. An interim order was issued, directing the C: SARS to deliver all materials seized to the Registrar of the High Court, and permitting the applicant and her attorneys to make copies thereof. In the same month Shelton made a similar application, and a similar interim order was made.

In neither matter did the applicant's taxpayer attack the constitutionality of the Search and Seizure provisions of the Income Tax Act of the VAT Act. Instead, the t/ps sought a review of Kroon J's

and Erasmus J's respectation decisions to issue the warrant in question. The court said (at SATC 194 G.H) that the issues raised in the two applications were substantially similar and would therefore be addressed in an Judgment.

To take the C: SARS on review in relation to the exercise of his discretionary powers is not uncommon, but to take a judge's review certainly is. However, where judges perform administrative function, their decisions can be taken on review: (see *Ferela (Pty) Ltd v Cir* 1998 (4) SA 275 (T) 60 SATC 513 at 524). In the instant case the court (at SATC 198 I.J) hold, following the decision in *Ferela*, that the giving of a warrant of search and seizure in terms of the Income Tax Act or the value Added Tax Act is an Administrative authorisation. Thus, s 74 D (3) of the Income Tax Act providence that a judge 'may issue" a warrant for the Search of persons and premises and the seizure of information, documents or things 'if he is satisfied that there are reasonable grounds to believe' that there has been use-compliance with the Act or the Commission of a criminal offence. It is therefore a judge and not the court who issue the warrant, and the word 'may' and 'if he is satisfied' has the consequence that the only method of impugning the judge's decision to issue the warrant is by way of review, rather than an appeal on the merits.

In review proceedings the decision in question is impugned on either or both grounds. The first is that the decision was arrived at arbitrarily, capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose. The second basis is that the decision maker misconceives the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or that his decision was so grossly unreasonable as to warrant an inference that he had failed to apply his mind to the matter in accordance with the behest of the statute and the tenets of natural justice, (see *Shidiack v Union Govt.* 1912 AD 642; *CIR v City Deep Ltd* 1924 AD 298, 1 SATC18, *Rand Ropes Pty Ltd v CIR* 1944 AD 142, 13 SATC1, *Moosa v Union Govt. (Man of Justice & Registrar of Asiatics)* 1915 AD 582 at 586, *Hira v Booyen* 1992 (4) SA 69 (A), *JHB Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 151-4). It is regrettable that the applicants in the instant case did just make

clear-or, if they did, that the judgment in the instant case was not founded on any impugning of the impartiality or bone fides of the judges in question.

It is submitted that the result was that the court briefly considered whether the issuing of a warrant of search and seizure constituted an infringement of the constitutional protection from the arbitrary deprivation of property, to which it gave an answer in the negative, and did not apply its mind to whether the denial of the right of appeal on the merits against the issuing of the warrant was unconstitutional as an infringement of the right to reasonable and fair administrative action.

In the case of Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others 2000 (2) SA 934 (T); 62 SATC 316

The Facts were as follows, SARS commenced investigation into the affairs of a taxpayer and companies owned or controlled by him SARS requested the National Director of Public Prosecutor to take over the investigation in terms of the National Prosecuting Act 32 of 1998. Information and documentation obtained by the office of the Commissioner in the course of its investigation was made available to the National Director's office, including draft affidavits and annexures prepared in anticipation of proposed applications in terms of s 74D of the Income Tax Act 58 of 1962. The Commissioner's office furnished the National Director's office with information relating to non-tax matters and tax offences. The secrecy provisions contained in ss 4(1) and 4(2A) of Act 58 of 1962 excluded the communication of matter to a person other than the taxpayer or his lawful representative by an official in the performance of his duties in terms of the Act and the publication of information by the Commissioner or any officer in the exercise of his power or duties from the ambit of those sections.

The Issues

The issue was whether such information and documentation supplied was in contravention of the secrecy provisions contained in s 4 of Income Tax Act, of 1962. It was held that as a matter of principle that the Commissioner for SARS and his officials could not be permitted to disclose

information to the law enforcement and prosecution authority in breach of their duty to preserve the secrecy of the information even for the purpose of investigating crime. There would always be a period between when the prosecutor received the information for the purpose of prosecuting and when the prosecution commenced in court when the duty to preserve secrecy in terms of the Acts would operate, prohibiting disclosure of information relating to a taxpayer's affairs. The permission of the Investigating Director could not override the provisions of the Tax Act. The Commissioner and his officials had contravened the provisions of the s 4 of Act 58 of 1962. It was held further that even if it was accepted that, in making the information available to the National Director, the Commissioner's officials were acting in performance of their duties in terms of the Income Tax Act, the National Director himself was precluded by section 4(2A) from publishing or making that information known to any other person.

Other cases cited in the judgement included R v Kassim – 1950 (4) SA 522- court held that the disclosure of information to the prosecuting authority for the purpose of prosecuting an offence in terms of the Income Tax Act and the giving of evidence in court by the SARS official is in the performance of his duties. Ministry v Interim National Medical and Dental Council of SA & Others 1998 (4) SA 1127 (cc) Hunter et al v Southam inc (1985) 11 DLR (4th) 641 (SCC) – sets out the requirements for search and seizure procedure:-

- ❖ The power to authorize a search and seizure is given to an impartial person who is bound to act judicially to discharge that function;
- ❖ That evidence must satisfy the justice that the person seeking the authority has reasonable grounds to suspect that an offence has been committed;
- ❖ The evidence must suggest that the applicant has reason grounds to believe thatsomething that will afford evidence of an offence may be recovered ; and
- ❖ There must be evidence on oath before him.
- ❖ The onus rests on the State to demonstrate the superiority of its interests to that of the individual.

4.1.1 The issues pertaining to the search warrant

The search warrant was requested in terms of S29(5) of the National Prosecuting Authority Act 32 of 1998.

On 11/99 The staff of the National Director of Public Prosecutions and SARS attended the taxpayer's premises and search and seizure the documents and computer records. The applicant sought to review and set aside the decision to authorize the search warrant.

Court stated in terms of S29(6) of the NPA Act a warrant remains in force until it has been executed.

The attack on the validity of the search warrant was on 2 grounds:

1. The information obtained was in contravention of the secrecy provisions and that it therefore violated the applicant's right to lawful and procedurally fair administrative action.
2. That there were no reasonable grounds to suspect that a specified offence was committed.

Court was of the view that any investigation based on info obtained in a manner contrary to the Act is in conflict with the constitution and invalid. However the facts of the case must prove this.

The court held that there was insufficient evidence to determine reasonable grounds to suspect that any specified offence was committed and therefore these warrants not have been authorized.

In Selton v Commissioner, South African Revenue Services 2002(2)SA 9(SCA),

Issue in the appeal was validity of the issue and execution of a warrant authorizing officers in the employ of the South African A Revenue Service to enter premises, search for certain documents and other items and seiz such documents. The warrant had been issued on 16 April 1999 and executed on 15 July 1999. The appellant applied in a Provincial Division in terms of s 74D(9) of the Income Tax Act 58 of 1962 (the IT Act) and s 57D(9) of the Value Added Tax Act 89 of 1991(the Vat Act) for an order directing the respondent B to deliver everything seized in terms of warrant. Such application was dismissed by a Full Bench of the Provincial Division. The appellant

accordingly appealed to the Supreme Court of Appeal. On appeal the court found that the appellant had good cause for the return of the documents seized. As required by the relevant sections, because the application for the warrant had not complied with s74D(2) of the IT Act and s 57D(2) of the Vat Act as it had not been supported by information supplied under oath or solemn declaration establishing the facts that's upon which the application was based as required by the sections; material facts had not been disclosed to the Judge issuing the warrant; the application for the warrant, as well as the warrant itself, had been fatally defective; and the executive of the warrant had been regular. The material facts which had not been disclosed were according to the applicant, that there was a discrepancy between the dates of signature of the affidavits supporting deposed to in the instant matter, deleted from such affidavit any reference to bribes paid by the appellant to staff of the South African Revenue Service; E and that at the time of bringing the application for warrant, the respondent had known that there would be a substantial delay in its execution. The appellant further alleged that a persons not authorised in terms of the warrant had conducted the search and seized the documents concerned. Held, that, by providing in s74D(9) of the IT Act and s57D(9) of the Vat Act that the Court may' on good cause shown, make such order as deems fit' without in any way specifying what would constitute 'good cause', the J 2002 (2) SA p11

Held, further, with regards to the alleged discrepancy in the affidavits, that the Judge issuing the warrant had had before him an application made by a person authorised to do so supported by information supplied under oath establishing the facts on which the application was based and all that was required in the circumstances B was that the Judge be satisfied that reasonable grounds existed for the application. The discrepancy referred to by the appellant was irrelevant in the context of the matter and the failure by the respondent in not directing the judge's attention thereto did not constitute material non-disclosure.

Held, further, that the warrant had been sought and issued on the basis of allegations suggesting that the appellant had failed to comply with his tax obligations. In the circumstances, giving prior notice of the application for a warrant would have defeated the object and purpose of the relevant

section, which sought to enable the respondent to enter premises to search for information intentionally concealed from him. Held, accordingly, that the appellant had not shown good cause for the return of the documents seized in terms of the warrant. The decision in the Eastern Cape Division in *Shelton v Commissioner for the South African Revenue Service* 2002 (2) SA 106 confirmed.

4.2 Comparative approaches in other Jurisdictions

A discussion of Search and Seizure requires an understanding of the powers that have been given to law enforcement authorities to their job. This includes an appreciation of the kind of interference or intrusions exercised by the government officials in carrying out their duties in a person's privacy, home, family and papers. The universal starting point is recognition of the standard set out in Article 17 of the International Covenant of Civil and Political Rights which states that,

"No one shall be subject to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation.."

In addition, everyone has the right to the protection of the law against such interference or attacks. Further, Article 2 of the Covenant requires each state party to ensure that any person whose rights are violated shall have an effective remedy to be determined by competent judicial, administrative or legislative authorities and the remedy will be enforceable when granted.

It is submitted that the introduction of the concept arbitrariness is intended to guarantee that even inference provided for by law should in accordance with the provisions, aims and

objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. Even with regard to interference that conforms to the Covenant, relevant legislation must specify in details the precise circumstances in which such interferences may be permitted.

It is further submitted that a decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case – by – case basis. It is further articulated that compliance with Article 17 requires that the integrity and confidentiality of correspondence should be guaranteed, meaning that correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched.

It is fundamental principle of the rule of law and a necessary part of a democracy that the citizens of a nation must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary actions by state officials could seriously affect the personal freedom of the individual as a fundamental aspect of a free and democratic society.

In New Zealand it is submitted that in order to achieve an equitable levying of taxes, a revenue department should, in principle, possess or have access to all information which might affect a taxpayer's liability to tax. Such department's resources should be focussed on ensuring that all taxpayers pay the correct amount of tax on time. Its resources or energy should not be dissipated in disputes over whether or not it is entitled to have access to a particular item or information.

Information is the lifeblood of such department's taxpayer audit activity. The Privy Council in New Zealand Stock Exchange and National Bank of New Zealand v CIR(1991)13 NZTC 8, 147, confirmed the wide ambit of the Commissioner's information gathering powers and related those powers to the Commissioner's public duty of correctly assessing the taxable income of all taxpayers.

“ By accident or design a taxpayer may default in his obligation to furnish a return or to disclose all his assessable income. In order to discharge his duty of assessing and recovering tax on all taxable income, the Commissioner must discover the names of the taxpayers and the respective sources and amounts of their assessable income” (New Zealand Stock Exchange supra at 8.148 under section 17 of the New Zealand Tax Administration Act 1994, the Commissioner, for example, is entitled to requisition information about taxpayer from third parties, such a banks). This interpretation was confirmed by the Privy Council in New Zealand Stock Exchanged supra.

4.3 The American Approach

In the United States Constitution the fourth Amendment sets out the protection against unreasonable searches and seizures by stating that,

“The right of the people to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”.

Nevertheless, there were still lawful warrantless searches that could be undertaken. The result has been that only those pursuant to a warrant needed to be “reasonable“. However, over the years the Supreme Court of the United States has held that the government officials must, whenever practicable, obtain advanced judicial approval of search and seizure through a warrant procedure.

Of course, exceptions to searches under warrants were to be closely contained by the necessity for the exception. These exceptions today are in the administrative searches category justified by special needs. Thus warrantless searches are permitted by administrative authorities in government offices justified on the basis of public safety. It is argued that this is justified because the government's interest outweighs the privacy interest of the individual.

4.3.1 Effect of the Fourth Amendment

For the fourth Amendment to be applicable there must be a search and seizure occurring. The primary aim is to protect privacy and whether there is an expectation of privacy that exists. Thus protection of the home is at the top of the list because of the right associated with the ownership to exclude others. The balancing test set forth by the United States Supreme Court examines the level of privacy interest involved and then the extent of intrusion involved. What constitutes a search depends on whether or not a person had a reasonable expectation of privacy in the place searched.

The Supreme Court has held that an expectation of privacy arises in places outside the home including commercial premises. A search or seizure is not "unreasonable" if it is authorized by a warrant and that "probable cause" exists to believe that contraband or evidence of the commission of the crime can be found by the officials. What is meant by probable cause has been held by the courts to be whether or not there was reasonable grounds to believe that a law was being violated and that there was evidence to be found in the place identified to be searched.

4.3.2 The American Exclusionary Rule

This rule was established by the Supreme Court in 1961. In both the United States and Canada, it can be said that an illegal search and seizure as opposed to an unreasonable one may be the subject of a criminal action against the official conducted it, prosecuting the official for unlawful trespass or some type of offence. However, experience in both countries show that it is more likely that that the official would be subject to disciplinary measures. Further, persons who have been illegally or subject to an illegal search or seizure could launch a court action for damages pursuant to common laws or statutory laws.

The Supreme Court of the United States has held that the most effective method to deal with government officials' misconduct is to have evidence obtained from an unconstitutional search excluded at subsequent trials. However, there are many exceptions. The most important exception is from a search that was undertaken in "Good faith" on the basis of a warrant issued by a competent authority even if it turns out that the approval of the warrant was made without probable cause.

It is now clear that interception of telephone communications are treated as searches and thus are subject to Fourth Amendment requirements. Wiretaps must be approved in advanced by a judge or magistrate. The same requirement exist in Canadian law. In fact, The Supreme Court of Canada has followed the American decisions in holding that electronic surveillance is a search or seizure within Section 8 of the Charter of Rights and Freedoms. The court has held that the purpose of the prohibitions on unreasonable search and seize is to protect the reasonable expectation of privacy. However, in contrast to the United States Supreme Court which has held that surveillance agreed to by a participant is

not a search or seizure within the Fourth Amendment, the Supreme Court of Canada has refused to draw this distinction.

4.4 The European Approach

The European Convention on Human Rights has been adopted by the Western European countries as the governing body of law that is a reflection of the International Covenant on Civil and Political Rights. In respect to search and seizure the key article in the European Convention is Article 8 which imposes on states the obligation to respect a wide range of personal interests. It provides in sub section 1 as follows :

“ Everyone has the right to respect for his private and family life, his home and his and his correspondence”.

Subsection 2 states:

“ There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 8 by requiring that there be respect for private life, home and correspondence appears to restrict the power of the authorities when they are investigating crimes. The European Court of Human Rights in its decisions has attempted to reconcile the genuine needs of public officials with individual privacy by insisting that searches be controlled by some process of independence prior approval and supervision.

4.4.1 The interests protected by Article 8

The court has stated that “private life” as the first interest enumerated includes personal identity (including sexual identity), some aspects of moral and physical integrity, private space (hotel rooms), collection and use of information (medical records), sexual activities and some aspects of social life. The second interest is family life that includes a variety of relationships arising from marriages and children. The third interest is the home. Although Article 8 specifies only the home the court has held that it includes a person’s professional or business office. This is similar to the American and Canadian interpretations. The fourth interest is correspondence that has been held to include telephone tapping cases. The European Court has made it clear that interception of telephone communications may create an interference with private life and correspondence and thus a violation of Article 8.

4.4.2 Justification for Interference by the Authorities

Article 8 provides for the interests to be protected and the power of the state to interfere with those rights. It is the applicant who must establish that there has been an interference. The real question that arises is whether the interference was “in accordance with the law”. This not only requires compliance with domestic law but also relates to the quality of that law, requiring it to be compatible with the rule of law. The general test is whether the state has established a scheme or process that is reasonable in the circumstances. The requirement is for the national law to protect against arbitrary exercise of any discretion that it confers on the authorities to carry their duties. This is especially important in such areas as secret surveillance and prisoner’s correspondence. The state must identify the

objective for which it is interfering with a person's right. Those aims are listed in the latter part of section 8(2) as noted above. Moreover, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to such interferences.

A recent case in the United Kingdom, *Khan v UK* (2000) demonstrates how the European Court interprets 'in accordance with the law'. This case dealt with the use of covert listening devices at time when no statutory system existed to regulate the use by government officers. The Home Office Guidelines were not legally binding nor directly publicly accessible. Therefore the court held that this interference could not be justified in accordance with the law and that the collection of evidence against the accused through the use of a covert listening device amounted to a violation of his right to respect for his private life. It is interesting to note that notwithstanding the fact that the evidence was secured in a manner contrary to the Convention, the Court found that it was admissible as it did not conflict with the requirements of fairness. The conviction would stand.

A great deal of debate has revolved around what is 'necessary in a democratic society' as set out in the section. It is the state to indicate the objective of its interference and to demonstrate the 'pressing social need' for limiting the enjoyment of the individual's rights. In this respect the protection of the lawyer – client relationship and the privileged interest has been regarded by the court of high importance. The need to obtain prior authorization is very important in order to undertake a search and seizure of a lawyer's office.

In a series of cases, the European Court has reviewed the use of search warrants in various European countries. It should be noted that the court has been unwilling to

elaborate general statements of rights in these cases but rather reviews them on a case – by – case basis. This provides some limited direction on how these rights are to be implemented domestically.

In *Funke v France* (1993), custom officials had searched the suspect's house for information related to a customs offence. Under the law at that time, these officials had exclusive competence to assess the scale of inspections. The court was concerned about the very wide powers given to the custom authorities to institute searches of property: which appeared "to be too lax and full of loopholes for the interference with the applicant's rights to have been strictly proportionate to the legitimate aim pursued" The court held that the search and seizure was not justified under Article 8(2), emphasizing particularly the absence of prior judicial authorization.

In *Niemietz v Germany* (1992) illustrates that the fact that a judicial warrant was obtained will not always be sufficient. In that case, the Court found that the warrant was drawn in too broad terms and the search, being of a lawyer's office, impinged on the professional secrecy where there was no special procedural safeguards in place.

In summary the European court continues to attempt to strike the balance in reconciling the right of the individual to his privacy guaranteed in section 8(1) and the state's need to enforce the laws through its officials and justify interfering with the individual's rights pursuant to section 8(2).

The efforts of the Canadian, American and European jurisdictions that have been described above demonstrate that the requirements of the International Covenant on Civil

and political Rights in the area of search and seizure have not only been met but have gone beyond the minimum guarantees set out therein. However, the recent terrorist events make it obvious that the need for new laws and regulations enacted by governments will continue to increase the level of intrusions in our lives. Therefore, the challenge that we will continue to face in our democratic societies is to speak out when those laws are being formulated to ensure that they are reasonable and necessary for good governance, national security and the protection of our lives. While doing so, these interests will need to be balanced by an independent judiciary when they are applied to hold the state and its agents accountable under the rule of law for their actions. For these countries that have already signed the Covenants the obligations of ratifying the International Covenants and their implementation are clear in this respect. This is the meaning of living in a free, safe and democratic society in accordance with the rule of law and the protection of human rights.

4.5 Search and Seizure of Computer Data

A person authorized to search a computer system in a building or place for data may use or cause to be used any computer system at the building or place to search data contained in or available to the computer system.

The emphasized clause has significant implications because the phrase “or available to” ignores certain realities of computer communication. Information retrieval and data processing is a distributed and decentralized activity. The volume of data available to computers is growing dramatically, as is the number of sources of that data. As a result, the scope of a search warrant for a computer system is extremely broad.

Since any data contained in any computer anywhere in the world is available to any other computer located anywhere else, when each has a modem and a phone line, virtually all data would be covered by a warrant which on its face identifies only a particular computer system. All information on the Internet, online services and information database would be covered.

Especially vulnerable is the information security of parties involved in electronic data interchange (EDI) and outsourcing of data processing. Such arrangements typically involve the creation of digital communication lines between two or more parties. Inherent to the functioning of the system is making the data of one party available to the computers of another. If a search were to be conducted of one party's computer system, the data of other parties could also be searched, even if they were not named in the warrant.

The constitutional validity of the new provision is doubtful because they authorize search and seizure of things without a warrant precisely identifying those things. The potential exists for a court – authorized search conducted in a manner consistent with the new provision to violate “the right to be secured against unreasonable search and seizure” (Canadian Charter of Rights and Freedoms s8)

It is unlikely that the amendments will be modified, because identical language is already in force in several statutes. However, the Computer records Task Force of the Canadian Bar Association's National Competition Law Section is preparing a critique of the provisions that appear in the Competition Act. The critique will be equally applicable to every statute in which they appear.

CHAPTER 5

5.1 NATURE OF APPLICATION FOR SEARCH AND SEIZURE (ISSUE OF WARRANT)

It is the opinion of the Commissioner that the issue of a warrant in terms of the relevant provisions is an administrative application and not a court of application , and this must be argued, if necessary, in any warrant application. No reference to the “High Court” or “respondent” or “Honourable Court” or ‘ex parte’ must therefore be made in the application.

The term ‘ex parte’ has been omitted from section 74 by virtue of section 28 and 29 of the Income Tax Act, 28 of 1997. The Explanatory Memorandum to the Income Tax Bill, 1997, states that the amendments by virtue of section 28 and 29 are of a textual nature.

The relevant provisions of section 74 of the Income Tax Act (the other Acts contains similar provisions) are:

Section 74D (1)-‘For the purpose of the administration of this Act, a judge

- (1) may, on application by the Commissioner or any officer contemplated in section 74 (4), issue a warrant;
- (2) Section 74(4) –‘For the purposes of section 74C and 74D, the Commissioner may delegate the powers vested in him by those sections, to any other officer;
- (3) Section 74(1)- ‘a Judge’ means a judge of High Court and includes a judge in chambers.
- (4) Section 74(1) ‘officer means an officer contemplated in section 3(1)
- (5) Section 74D(9) ‘(a) Any person may apply to the relevant division of the Supreme 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 deemed fit'.

On the reported judgement of the Transvaal Provincial Division in *Ferela (Pty)Ltd & Others vs CIR & Others*, 1998 (4) SA (T), it was contended on behalf of C:SARS that an application for a warrant in terms of section 74D is not a court application, but an administrative application which incidentally had to be made to a judge (at 285D). Botha R in this regard held that (at 285 F):

“The reference in section 74 D to judge as opposed to court in section 74(D) 9 does, however, point to an intention that the application for a warrant to a judge should not be considered to be a court application. I do not think that one can say that a warrant is an order. See *R vs Msweli and Another* 1947 (1) SA 216(N). It is an administrative authorization issued to a court official. That appears also from the definition of ‘warrant’ cited above.

A judge or magistrate acting in his judicial capacity, will be in his capacity as judicial officer presiding over a court of law, and not in an administrative, quasi-administrative or quasi-judicial capacity, thus see the case of *Rutenberg vs Magistrate, Wynberg and Another*, at 749. A court of law will sit , as a rule, in public. An enquiry, not open to the public, by a judge or Magistrate or any other person not acting in any judicial capacity, therefore cannot constitute a competent court of law, for example of an enquiry in terms of Section 28 of the National Authority Act, No. 3 of 1998.

An application for a directive, by a judge in terms of the Income Tax Act, it is submitted, similar to;

- (a) An application for a directive, by a judge in terms of the Interception & Monitoring prohibition Act 127 of 1992, to intercept and monitor postal articles or telecommunications the application for such a directive must be in writing (Section 3(1)(b) and must be made (Section 3(2)) by an officer referred to in section 33 of the South African Police services Act, 68 of 1995.
- (b) An application for a search warrant in terms of the Criminal Procedure Act , 51 of 1997, to a magistrate or a judge presiding in a criminal case (Section 21). The application is normally supported by an affidavit by the investigating officer, and is thought either by himself or as a state prosecutor.
- (c) The entering upon premises by an Investigating Director in terms of Section 29 of the National Prosecuting authority Act 32 of 1998, may only be performed, by virtue of a warrant issued in chambers by a Magistrate, Regional Magistrate or judge. The application must be supported by information on oath or affirmation, and although the Act does not prescribe who may bring the application, in practice it is normally brought by the Investigating Director or his assistance, who can be attorneys, state advocate (prosecutor), policeman or any other person seconded to assist him.

In respect of all these applications referred to above, the relevant magistrate or judge is acting in an administrative capacity in terms of the relevant act.

It is submitted that, it must be established in what capacity the Regional legal practitioners may bring an application 'for a warrant in terms of Section 74D of the Income Tax Act, 58 of 1962 (the Income Tax Act) or similar provisions in other revenue acts administered by the Commissioner: SARS. The RLP's are officers as meant in, for example, Section 3 of income tax Act, engaged in

carrying out the provisions of the relevant acts under control, direction or supervision of the commissioner.

The rules of the Law Society are to the effect that, an attorney who is no longer 'a practising attorney' (either for own account or as a professional at an attorneys firm), but who is in the permanent employ of an employer or not in practise in any other manner, will not be issued with a fidelity fund certificate by his relevant Law Society, without which certificate he has no right of appearance or may not act in any manner as an attorney (for example use an attorneys letterhead), not even *pro amico*; his name will appear on the 'non-practizing' roll of attorneys of relevant Law Society, and he is attorneys of the relevant Law Society , and he is otherwise still a member and subject to its rules.

The Commissioner is of the opinion that it is not necessary that the RLP's must be delegated in terms of Section 74(4) to bring the applications. Of their right to bring the application is challenged by any judge, the RLP's must argue that an application for a warrant in terms of the relevant provisions is not a court application, but 'an administrative application which incidentally had to be made to a judge', and that the legal representative of the Commissioner or as Section 74(4) delegate therefore do not need to have the right of appearance to bring the application, but may bring the application in their capacity as officer as meant in, for example, Section 3 of the 2nd Act, engaged in carrying carrying out the provisions of relevant acts under the control, directive or supervision of the Commissioner.

It is further submitted that, if need be, where the right of a RLP to represent the Commissioner in proceedings before any court, board, tribunal or similar institution is questioned, a power of attorney by the Commissioner can be drafted for such an official.

5.1.1 Pro – Forma Warrant in terms of s74D of IT Act and s57D of VAT Act.

In the *ex parte* application of:

CASE NO.

COMMISSIONER FOR THE SOUTH
REVENUE SERVICES

APPLICANT

**WARRANT IN TERMS OF SECTION 74D OF THE INCOME TAX
ACT NO. 58 OF 1962 AND SECTION 57D OF THE VALUE –
ADDED TAX ACT NO. 89 OF 1991**

Having read the notice of application and supporting affidavits, this Warrant is issued authorizing:

- (a) -----
- (b) -----
- (c) -----
- (d) -----
- (e) -----
- (f) -----
- (g) -----
- (h) -----
- (i) -----
- (j) -----

(All being officers in the service of the applicant)

To:

Enter and search, at any time without prior arrangement and consent, the premises situated at -----, Durban and -----, Durban, KwaZulu – Natal; and to 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 specified hereunder by:

(a) ----- (ID 62 ----- O88)

("the taxpayer") with their obligations in terms of the Income Tax Act No. 58 of 1962 and the Value Added Tax Act No. 89 of 1991 and to seize any such information, documentation, or things that may include but are not restricted to:

- (a) bank statements
- (b) bank deposit books
- (c) cheque books
- (d) property sale agreements
- (e) bond account statements
- (f) title deeds purchase and sale invoices
- (g) insurance policy documents
- (h) documents relating to private expenditure, assets and liabilities
- (i) trust documentation
- (j) any documents summarizing or pertaining to the aforesaid

(k) any information contained on computer disc or hard drive, including any computer device containing such information in relation to the personal and business activities of the taxpayer.

This warrant is issued in relation to the following:

(a) -----

In carrying out the search in terms of this Warrant, the Officers referred to above are authorized to open or cause to be opened or removed and opened, anything in which any such officer suspects any information, documents or things as referred to above to be contained.

THUS SIGNED AT DURBAN this ----- day of OCTOBER 2002

REGISTRAR OF THE HIGH COURT,
DURBAN AND COAST LOCAL DIVISION

5.1.2 POWER OF AN ATTORNEY (AN EXAMPLE)

To Whom It May Concern:

“That I, the undersigned Pravin Jamnadas Gordhah in my capacity as Commissioner for the South African Revenue Services do hereby nominate, constitute and appointed in their capacities as Regional Legal Practitioners (or SARS officers) of the Region, respectively, jointly and separately to be my attorneys and/or agents and/or delegates with full power and authority to act for me in the matter? In which in my aforesaid capacity I represent the South African Revenue Services and in my name institute any action and/or to sign the necessary documents and affidavits in the above-mentioned matter.

This done and Executed at ? , On ? At ?

*Signed + two witnesses.

Such powers of attorney can be arranged via SARS legal Services.

5.2 FORMAT OF APPLICATION

It goes without saying that the application must comply with the high court rules and must be of the highest professional standard.

The format is as evidenced by the pro forma application hereunder;

- (a) Font -Times New Roman, Arial or Courier New at least 11 pt.
- (b) Double line spacing with 12pt. Spacing between paragraphs (Format-paragraph-spacing before & after set at 12 Pt.)
- (c) Text must be indented (at least 1cm) & justified (Ctrl+J).
- (d) Legal numbering must be used, i.e

1. Aa aaaaaaa aaaaaaaaaa aaaaaaaaaa
Aa aaaaaaa aaaaaaaaaa aaaaaaaaaa

1.2 Bbb bbbb bbbbbb bb bbbbbb

1.2.1 Ccc ccc ccccc cccccc

- (e) The annexures must be referred to in affidavits as “ Annexure A at page ?” and annexures must be paginated starting with the number following

the number on the last page of the affidavit (this prevents judges having to search fore “annexure B” following on “Annexure A” consisting of 20 pages).
- (f) Other typing rules must be followed. The register of the relevant division of the High Court can be approved to establish whether any rules in this regard have been issued.
- (g) The deponent and Commissioner of oaths must initiate any affidavit, including all Annexures thereto. The Commissioner of Oaths, it is submitted must be completely unconnected to SARS and preferably an attorney.

5.3 PRO FORM A NOTICE OF APPLICATION

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

Before the Honorable

case no.

In the ex parte application of:

COMMISSIONER FOR SOUTH
AFRICAN REVENUE SERVICES

APPLICANT

Notice of application for the issue of a warrant to Search for and Seize in terms of
Section 74D of Income Tax Act No. 58 of 1962 and Section 57D of the Value Added
Tax Act No. 89 of 1991.

To: The Registrar of High Court
Durban and Coast Local Division
Masonic Grove
Durban

Sir,

KINDLY TAKE NOTICE application on behalf of the applicant to a judge in
Chambers on theday of November 2002 at ... or so soon thereafter as the
applicant's representative may be heard for the issue, in terms of Section 74D of
the Income Tax Act No.58 of 1962 and Section 57Dof the value Added Tax
No.89 of 1991, of a warrant in the form set out in the annexure hereto, marked
"A".

KINDLY TAKE NOTICE FURTHER that the affidavits of ...? and ...?
will be used in support of this application.

Kindly submit the application for hearing accordingly.

Dated at Durban this day of November 2002.

APPLICANT

5.4 DISCLOSURE OF FOUNDING AFFIDAVITS

It is submitted that SARS is entitled and obliged to oppose access to the founding affidavits in a warrant application in the following circumstances:

1. For the protection of informants – see Ferela (supra) at 283E; Els v Minister of Safety and Security 1998 (4) BCLR 434 (NC); Gumede and Others v Minister of Law and Order 1987 (3) SA 155 (D) AT 157. See also the English decision of, Regina v Revenue Adjudicator's Office, ex parte Drummond (1996) STC 1312;
2. Where the affidavits contain “any evidential material, information or witness statement created and brought into being with the dominant purpose of being used in contemplated litigation between the Receiver and the taxpayer s”- per Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others 1995 (2) SA 433 et 443;
3. Where a reasonable risk exists that disclosure of the information “might constitute a breach of State secrets, methods of police (SARS) investigation, identity of informers, communication between legal advisers and clients or lead to intimidation o witnesses or otherwise impede ends of justice”- per Shabalala and Others v Attorney General, Transvaal and Another 1996 (1) SA 725 (CC), i,e the ‘docket privilege’. It is arguably also applicable in respect of SARS investigation thou it has not yet been tested in court.

In respect of the privileges referred to in par 2 and 3 above, substantial grounds must exist for exercising these privileges. It is submitted that taxpayers, in the normal course, are entitled to the record of assessments – thus every taxpayer is entitled to certified

copies of such recorded particulars as relate to him. Such records are not open to public inspection- (s 80 of the IT Act);

The Promotion of Access to Information Act, 2 of 2000, was enacted to govern access to information in terms of section 32 read with item 23 of schedule 6 of the Constitution, Act no. 108 of 1996.

In terms of section 35 of this Act, SARS (defined in the, s 2, as a 'public body' for purposes of the act) must refuse to a request for access to a record of SARS if it contains information which was contained or held by SARS for the purposes of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Services Act, 1997. (defined as 'income in terms of legislation, including penalties and interest in connection with such moneys')

SARS, in terms of section 35(2) of the above Act may not refuse a record consisting of information about the requestor or the person on whose behalf the request is made. This confirms the authority in this regard that a taxpayer is, subject to any privilege that SARS may invoke, entitled to his or her records at SARS.

Privileges that SARS may invoke where a taxpayer requires access to his or her file are for example :

- 1) Informant information :- Such information is also protected by virtue of section 36- 37 of the Promotion of Access to Information Act, where it is referred to as 'information provided in confidence' by a third party; (see also Hoffman & Zeffert, The South African Law of Evidence 4th Edition; Suliman v Hansa 1971(2) SA

437 (N) at 439 A; Ex parte Minister of Justice: In re R v Pillay 1945 AD 653- 669; S v Sefadi 1995 (1) SA 433 (D); A v R Kinder- en Kindersorgvereniging 1996 (1) SA 649(T); Els v Minister of Safety and Security 1998 4 BCLR 434 (NC)

- 2) Legal Professional Privilege :- a taxpayer is not entitled to any confidential information or communication which passed between the Commissioner and his legal adviser (including counsel, attorney and his in-house professionally qualified legal adviser) to enable him to obtain and his legal adviser to give legal advise; or which relates to litigation contemplated by the Commissioner, and the latter. Similar protection is also afforded by section 40 of the Promotion of Access to Information Act

- 3) Documentation and information obtained in contemplation of litigation :- in the case of Jeeva supra at 443 such privileged information was described as ‘ any evidential material, information or witness statement created and brought into being with the dominant purpose of being used in contemplated litigation’ between the Commissioner and taxpayers.

Other grounds for refusal of access to SARS information by a taxpayer in terms of the Promotion of Access to Information Act, may include:

- 1) A ‘docket privilege’
- 2) Where a disclosure could reasonably be expected to cause prejudice to defence, security and international relations of the Republic.
- 3) Where disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interest of the Republic;

- 4) Where disclosure may cause serious disadvantage to information about research being or to be carried out by or on behalf of SARS;
- 5) Where access to a record of SARS, consisting of information that was obtained for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law, may frustrate the deliberative process or frustrate the success of that policy by premature disclosure of a policy or contemplated policy; and
- 6) Where the request is manifestly frivolous or vexatious, or the work involved in processing the request would substantially and unreasonably divert the resources of SARS.

The present arrangement with the Judge President of the divisions of the High Court are that :

A copy of the application and warrant signed by the judge will be retained by the Registrar of the relevant High Court;

Such copy, still subject to the secrecy provisions of the relevant act, will be kept in a locked filing cabinet or safe;

Any request by the taxpayer or a representative for access to the file will be referred to SARS official who brought the application and the registrar will not, unless permission is given by SARS, grant access to the file .

The responsibility lies with the relevant SARS Regional Legal Practitioner to ensure that the registrar are aware of and adheres to these arrangements. In the absence of any privilege that may on reasonable grounds be exercised by SARS, the relevant documentation must be disclosed on receipt on any request in this regard by the taxpayer or its representatives.

5.4.1 Pro – Forma Founding Affidavit

IN THE HIGH COURT OF SOUTH AFRICA
(DURBAN AND COAST LOCAL DIVISION)

CASE NO.

In the *ex Parte* application of:

THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICES

APPLICANT

AFFIDAVIT

I, the undersigned, -----, do hereby solemnly declare and say:

1.

I am an adult male Revenue Inspector, employed by the Durban office of the Special Investigations Unit of the South African Revenue Services at 221 West Street, Durban, KwaZulu – Natal.

2.

The facts deposed to herein are within my personal knowledge, unless the contrary is stated or appears from the context hereof, are to the best of my knowledge and belief, true and correct.

3.

In my capacity as aforementioned, I have access to all the files and records of :-

X (Pty) Ltd – reg. no. 12345

Y (Pty) Ltd – reg. no. 56789

AB. Mjt – ID no. 69 ----- 088

The ABC Family Trust

(Hereinafter referred to as “the taxpayer”.)

4.

The nature of my work includes, *inter alia*, to perform inspections to ensure that the provisions of the Income Tax Act and the VAT Act administered by the applicant are adhered to. This entails, *inter alia*:

- 4.1 Investigating any non – compliance with any provisions of the Acts
- 4.2 Investigating any contravention and/ or commission of offences in respect of the Acts;
- 4.3 Determining the liability of any person to pay income tax and value added tax in terms of the Acts;
- 4.4 Inspecting all relevant records and documentation of a taxpayer and his business;
- 4.5 Investigating the ability of a taxpayer to pay taxes.

5.

In the course of my above mentioned duties, I have performed a preliminary audit of the tax affairs of:-

- 5.1 xxx (Pty) Ltd - registration number: xxxx whose physical address is xxx, Durban, KwaZulu Natal. From declarations made in the vat registration return (VAT 101) and income tax returns (IT14), this company is a manufacturer of clothing. The trading is xxx, Durban KwaZulu – Natal.
- 5.2 individual xxx- ID number xxxwhose residential address is xxx, Durban, KwaZulu Natl. he is married out of community of property to xxx(ID number xxx) and is a director of the companies mentioned in 5.1 and 5.3 above. He is also a trustee and

beneficiary of the xxx trust mentioned in above, and a trustee of the xxx Trust (below).

5.3 Xxx Trust, a 31% shareholder of the companies mentioned in 5.1 and 5.2 above.

6.

6.1 information from two informants has been received alleging that the directors of the company are involved with a scheme of non-disclosure of sales from particular debtors, using the avenue of maintaining a second set of financial records and opening bank accounts in the names of employees in order to hide deposits and transfers of payment. In addition, both have indicated that goods and raw materials imported into the country have been undervalued for the purpose of Customs duty.

6.2 informant 1 has supplied full details of the debtors and amounts in records which total R25 927 291-00 for a period of thirty- one months from 01/06/1996 to 31/12/1998. He has indicated that records could be held at one or more of the other premises listed in xx.

6.3 Informant 2 has supplied the location of the computer and written records within the business premises as well as the names of the persons in whose names the bank accounts are held and the institutions where they are held. He has also indicated that further records could be held at one or more of the other premises listed in xx.

6.4 a reconciliation between turnover declared for vat purposes and turnover declared for income tax purposes in respect of the period 01/03/1996 to 28/02/1999 has revealed the following discrepancies which cannot be explained by normal accounting practice,

6.4.1xxx (Pty) Ltd- R1309 657-00

6.4.2 xxx (Pty) Ltd- R393 685-00

6.5 The following statutory offences have been committed by xxx (Pty) Ltd, to wit;

6.5.1 income tax returns in respect of the 1986, 1991, 1990, and 1991 were

submitted late resulting in a warning being issued for the 1986 tax year and additional taxes being levied for the 1989, 1990 and 1991 years.

6.5.2 Provisional tax was underpaid in respect of the 1986, 1987, 1989, 1990, 1991, 1992 and 1993.

6.5.3 Non-deductible expenditure was claimed in respect of the 1993 to year; despite notification of the fact that such expenditure was not deductible, the taxpayer attempted to claim the same expenditure in the following tax year (1994).

6.5.4 The taxpayer failed to reply timeously to enquiries for information required in terms of section 74A of the Income Tax Act separately in respect of the 1996 and 1997 tax years, resulting in final demands for the information being issued in both instances.

I respectfully submit that: the taxpayers have not complied with their obligation in terms of Income Tax Act, Value Added Tax and possibly the Customs and Excise Act; the taxpayers conducted in allegedly failing to declare all income, persisting in claiming expenditure to which they are not entitled, submitting income tax returns late, not supplying information when required in terms of section of the Income Tax Act and underpaying provisional tax due, is consistent with an intention of non-compliance; I furthermore respectfully submit that information, documents or things pertaining to the activities of the taxpayers mentioned in above are likely to be found at the following addresses.

xxx, Durban*(residential address)*

the offices of the accountants/ auditors of the taxpayers, to wit, xxx, of xxx, Durban.

The information, documents or things to be searched for in the aforementioned instances will include inter alia

Bank statement;

Bank deposit books;

Cheque books;

Property sale/ purchase agreements;

Title deeds;

Purchase and other invoices;

Documentation relating to farming or other business activities;

Insurance policy documents;

Documentation to determine private and domestic expenditure as well as assets and liabilities;

Any documents summarising or pertaining to any of the aforementioned documentation;

Any information contained on a computer disk or drive including any computer device which contains such information.

8.

I respectfully submit that the aforesaid relevant information, documents or things should be found and are likely to be situated at the premises referred to.

9.

The following persons shall be involved with the search of the premises mentioned in xx above:-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)
- (j)

10

In order to enable me to fully investigate whether the provisions of the Income Tax Act of Value Added Tax Act have been complied with and whether any contravention of these Acts have taken place, I respectfully request this Honourable Court to issue a warrant as contemplated in section 74D(1) of the Income Tax Act and section 57D(1) of the Value Added Tax Act, in terms of which the officers listed in paragraph 9 above are authorised to, without prior notice and at any time:

- 10.1 enter and search the premises mentioned in paragraph 10 above, and,
- 10.2 search any person present on the premises for any information, documents or things that may afford evidence as to the non-compliance by the taxpayers, with their obligation in terms of the aforesaid Acts;
- 10.3 seize any such information, documents or things; and
- 10.4 in carrying out such search, open or cause to be opened or removed and opened, anything in which the officer suspects any such information, documents or things may be contained.

11.

I respectfully pray that it may please this Honourable Court to grant an Order in terms of the Notice of Motion prefixed hereto.

Signed and SOLEMN DECLARATION made before me at DURBAN on this day by
the Department has acknowledged that he knows and understands the content of this

affidavit, and has declare that he has no objection to making solemn declaration and regards such declaration as binding on his conscience, and has uttered the following words: I hereby solemnly declare that the contents of this affidavit are true”.

5.5 Procedure During Execution of Warrant

The proper planning of a raid will involve, inter alia, the following;

5.5.1 Obtaining as much information as possible, for example via informants, of the layout of the premises- where what is situated, where is whose office, where crucial documents are kept, what kind of computer system and network are used, what is needed to gain access to computer network;

5.5.2 Ensuring that the premises for which a warrant is obtained is actually occupied or is occupied during the raid;

5.5.3 Ensuring that only key SARS personnel are aware of which taxpayer/ premises will be raided until shortly before the raid in order to avoid any 'leaks';

It is submitted that a taxpayer or any other person, when questioned in terms of section 74A, does not have the right to remain silent on the basis that any answer might incriminate him/her, as:

- i. Section 35 (1)(a) of the Constitution provides that Everyone who is arrested for allegedly committing an offence has the rightto remain silent’;
- ii. S35(3)(h) provides that ‘Every person has a right to a fair trial, which includes the rightto remain silent and not to testify during the proceeding ‘
- iii. A person, however, also ha a common law right to remain silent in the face of criminal charge. This principle was clearly illustrated in the case of S v Zuma and Others 1995 (2) SA 642 (CC) at 659H.

A taxpayer may thus exercise this right when he is questioned as a suspect for any criminal offence (including tax evasions – ss 75 and 104 IT Act & 58 and 59 of VAT Act respectively) or about any facts that might lead to criminal charges.

In the case of Davis v Tip NO and Others 1996 (1) SA 1152 (W) the applicant requested that misconduct proceedings against him be postponed until criminal prosecution against him was finalized.

It was argued that the applicant’s right to remain silent during his criminal trial guaranteed by the Constitution would be violated if the inquiry proceeded, since he might of necessity be called on to answer evidence given against him if he wished to avoid a finding of misconduct.

The court held, that, while civil proceedings invariably created the potential for information damaging to the accused being disclosed by the accused, not least so because it wold often serve his or her interests in the civil proceedings to do so, the exposure of an accused person may be in conflict with the right to remain silent during the criminal proceedings.

Where Courts had intervened to protect the right to remain silent, there always been a further element, namely the potential for compulsion by the State to divulged information.

The right to remain silent derived from an abhorrence of coercion as a means to secure convictions by self-incrimination and existed to ensure that there was no potential for such coercion to occur: it achieved this by protecting an accused person from being placed under compulsion to incriminate himself or herself and not by shielding him or her from making a legitimate choice to testify.

What distinguished compulsion to testify from the choice to testify was whether the alternative that presented itself constituted a penalty which served to punish a person for choosing a particular route as an inducement to him or her not to do so.

The court held, that, even if in the present case the applicant might be required to choose between incriminating himself or losing his employment, his loss of employment would be a consequence of the choice he had made and not a penalty for having done so: it would be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak.

Hard as the choice might be, it would be a legitimate one which the applicant could be called upon to make and would not amount to compulsion: the right to silence did not shield him from making that choice.

An attorney of the taxpayer, whether employed by the taxpayer or in private practice, may refuse to give any documentation or information on the basis of legal privilege between himself and the person in relation to whom the information/ documents are sought. This privilege, however, is qualified by the decision in H Heeiman Maasdorp & Barker v Sir & Another 1968 (4) SA 160 (W) at 164, where it was held that:

An attorney-client privilege can be invoked against warrant for search and seizure, but whether there is an attorney-client privilege depends on the facts of each case,

An attorney cannot refuse to hand over a document which, if in the hands of his client, the latter would be obliged to hand over to the (Commissioner) for examination;

A memorandum prepared by the attorney for the client's use in the conduct of his affairs cannot be withheld;

A taxpayer cannot, by employing an attorney to do certain things for him which someone else could equally well have done for him, defeat the purpose of sec. 74 by claiming an attorney-client privilege in respect of it.

See also Mandele v Minister of Prisons 1983 (1) SA 938 (A) at 957 – 964; Bogoshi v Van Vuuren no and Other; Bogoshi and Other v Director ; Office for Serious Economic Offences, and Others 1993 (3) SA 953 – 962; Lane and Another NO v Magistrate, Wynberg 1997 (2) SA 869 (C) at 879-886

In the event of any dispute as to which documents are subject to legal professional privilege that cannot be resolved, it is advisable to request the attorney to make copies of the file in the presence of a SARS officer (to ensure the whole file is photocopied), and to place the copies in a suitcase, filling cabinet, or safety security box that can be locked and /or sealed. The attorney can be given an undertaking that the relevant container will not be opened until it is resolved which documents are subject to privilege, by a court or otherwise, and the container removed from the premises. If the attorney is still unhappy, the container can be taken in his or a representative's presence to, for example, a senior counsel of the local bar to be stored in his chambers until the matter is resolved, or any other independent person or institution (bank) suitable to both parties.

CHAPTER – 6

Setting aside of Warrant

6.1 Application to have warrant set aside

Section 74D of the Income Tax Act permits, *inter alia*, SARS on a warrant issued by a judge to search/ or seize documents. Subsection (9) provides that any person may apply to the relevant division of the High Court for the return of the documents or things seized and that the court may on good cause shown make such order as it deems fit. In 1999 a judge issued a warrant which was executed. An urgent application to the Full Bench was brought by the taxpayer for an order directing the Commissioner to return the documents but it was dismissed. (*Shelton v C:SARS 2002 (2) SA 9 (SCA)*)

With leave the taxpayer appealed to the Supreme Court of Appeal. It was held that the appeal be dismissed. A number of grounds were advanced by the taxpayer. Most of them

related to alleged defects in the warrant. One of general interest related to the lack of notice to the taxpayer of the application by the Commissioner for the warrant.

Streicher JA (Viviera ADCJ, Howie JA, Conradie ans Cloete AJJA CONCURRING):

[6] By providing in section 74D(9) of the Income Tax Act and 57D(9) OF THE vat Act that a court may 'on good cause shown, make such order as it deems fit' without any way specifying what would constitute 'good cause', the Legislature clearly intended to confer a wide discretion on a court dealing with an application for an order directing the return of documents seized under section 74D or section 57D.

..... [17] The Appellant submitted that the respondent had to give notice to him of the application for a warrant unless a case could be made out that notice should be dispensed with; that the respondent failed to make out such a case; and that the respondent's application for a warrant should, therefore, have been refused. As authority for this proposition the appellant relied on Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 (SCA). In that case the issue to be decided was whether notice should have been given of an application in terms of section 69(3) of the Insolvency Act 24 of 1936 for a warrant to search for and take possession of property. Smalberger JA said at 713F: '(A)s a general principle, a warrant should not be issued without affording the person or persons affected, or likely to be affected (to the extent that their identities are ascertainable or reasonably ascertainable), an opportunity to be heard, unless it can be said that section 69(3) (the authorizing provision) excludes that right either expressly or by necessary implication. An opportunity to be heard would require the giving of appropriate notice to the person or persons concerned'.

And at 71E:

‘ When seeking to recover concealed items suspected of belonging to an insolvent estate, the giving of prior notice and affording a right to be heard would, or at least defeat the very object and purpose of the section. From this it must be inferred, by way of necessary inference, that the legislature intended to exclude the giving of notice (and the concomitant right to be heard) in cases involving concealed items.’

In the present case the warrant was applied for and issued on the basis of allegations, among others, suggesting that the respondent failed to comply with his obligations in terms of section 66 of the Income Tax Act of the former Transkei in that he did not submit income tax returns to the office of the Receiver of Revenue in Umtata in respect of the 1994 and 1995 tax years. Furthermore, that he committed an offence in terms of section 104(a) of the Income Tax Act in that there were reasonable grounds for believing that he, with intent to evade the payment of income tax levied under the Income Tax Act, made a false statement in relation to his personal assets and liabilities in a return rendered in terms of the Income Tax Act. In these circumstances, the giving of prior notice of the application for a warrant would have defeated the object and purpose of the section which ie, among other things, to enable the respondent to enter premises to search for information intentionally concealed from him. In the circumstances the section, by necessary implication, did not require the giving of notice.

6.2 Rights to privacy and property can't always stop a Revenue raid

In terms of the Constitution of the Republic of South Africa Act 108 of 1996, every individual is entitled to certain rights in regard to privacy and property. An individual is

entitled to a life secluded from the public and publicity. In addition no person may be deprived of property (except in terms of the law of general application), and no law may permit arbitrary deprivation of property.

However, Revenue has certain powers under the provisions of the Income Tax Act and the Value Added Tax Act to enter and search premises at any time to seize evidence as to the noncompliance by a taxpayer in regard to obligations in terms of the Acts.

In terms of section 74D of the Income Tax Act and section 57D of the Value Added Tax Act, the Commissioner may apply for a search and seizure warrant without giving the

taxpayer notice. To give notice would render the provisions of section 74D(9) of the Act redundant. Thus, this was clearly illustrated in the cases of Deutschmann NO and Another; Shelton v C:SARS (supra), the constitutionality of the two sections was questioned.

Two warrants for search and seizure were authorized against the applicants in terms of section 74D and section 57D, respectively. The respondent's officials searched the premises of the applicants and seized a considerable amount of material. Subsequently, the applicants sought the return of the seized material. One of the grounds was that the searches and seizures were a violation of the rights of privacy and property as contained in the Constitution of the Republic of South Africa Act 108 of 1996.

Mrs Deutschmann, who was the executrix of the estate of the late Deutschmann, as well as further numerous applicants, launched the application as one of urgency. An interim order was granted by the court and the respondent was ordered to deliver all material seized to the Registrar of the court. The applicant, her legal representatives and her accountant were permitted to make copies of the material seized. About two years later,

Shelton launched an application. Though both applications were similar in nature, there were differences in the relief sought by the parties.

In Deutschmann's case, an order was sought declaring the warrant to be null and void; alternatively, that it be set aside. In Shelton's case, the court was requested to consider the application against the background of the general rule that searches and seizures involved a violation of the rights to privacy and property in the Constitution as well as the Common law rights to privacy and property. Section 74D of the Income Tax Act and its equivalent in the Value Added Tax Act allow any person to apply to the relevant High

Court for the return of any information, documents or things seized under the sections in question. One of the preliminary grounds of attack by the respondent was the fact that the applications were brought on an urgent basis. The court, however, held that as the business enterprises of the applicants were vast and substantial, the seizure of the documents affected significantly the running of the businesses. Accordingly, the need for the matters to be dealt with urgently was acknowledged by the court.

The applicants attacked the granting of the warrants for search and seizure on the basis that material inaccuracies and hearsay allegations were admitted into evidence. The court however, emphasised the fact that in bringing the application for the warrants, the onus on the respondent was far less than that required of a litigant in a civil case. In bringing the applications, the respondent had proof that the applicants had not been subject to proper taxation or tax assessments for a significant period. Accordingly, there was nothing to suggest that the warrants had been improperly obtained.

The court, considered the issue of whether the applications should be viewed against the background of the constitutional rights to privacy and property. The court examined the definitions and scope of these rights and concluded that the definition of privacy did not include the carrying on of business activities. With regard to the allegation of the deprivation of property, it was emphasized by the court that the Constitution prevents the arbitrary deprivation of property.

The very fact that an application for the granting of a warrant requires certain formalities supported by information supplied under oath and the exercise of a discretion by a judge clearly negated the view that there was arbitrary deprivation of property under the two

sections in question. The court held that the applicants had failed to show the good cause for the return of the seized items. Reliance on the Constitution was in the opinion of the court misplaced: the concept of privacy did not extend to the carrying on of business activities and the provisions of the Income Tax Act and the Value Added Tax Act did not amount to arbitrary deprivation of property. The provisions extending to privacy and property in the Constitution are not safeguards should Revenue have proof that the taxpayer has not complied with his obligations. The onus on compiled with his obligation. The onus on Revenue need not be that of the standard required in a civil matter. A knock on the door could be unfortunate for some (non) taxpayers.

It is submitted that the taxpayer in the case of Deutchmann NO supra a review of Kroon's J's and Erasmus J's respective decisions to issue the warrant which was in question. Thus the court stated (at SATC 194 G-H) that to take the commissioner on review in relation to the exercise of his discretionary powers is not uncommon, but to take a judge on review certain is. However, where judges perform administrative functions, their decisions can be

taken on review. Thus in the instant case the court held, following the decision in *Ferela*, that the granting of a warrant of search and seizure in terms of the Income Tax Act and or the Value Added Tax Act is an administrative authorization. Thus, s 74D (3) of the Income Tax Act provides that a judge "may" issue a warrant for the search of persons and premises and the seizure of information, documents or things 'if he is satisfied that there are reasonable grounds to believe' that there has been non-compliance with the Act or the commission of a criminal offence. It is therefore a judge and not 'the court' who issues the warrant, and the discretionary and subjective criterion implicit in the words 'may' and 'if he is satisfied' has the consequence that the only method

of impugning the judge's decision to issue the warrant is by way of review, rather than an appeal on the merits.

In review proceedings the decision in question is impugned on either or both of two grounds. The first is that the decision was arrived at arbitrarily, capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose. The second basis is that the decision-maker misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or that his decision was so grossly unreasonable as to warrant an inference that he had failed to apply his mind to the matter in accordance with the behest of the statute and the tenets of natural justice. (see *Shidiack v Union Government* 1912 AD 642 ; *CIR V City Deep Ltd* 1924 AD 298, 1 SATC 18 ; *Rand Ropes (Pty) v CIR* 1944 AD 142, 13 SATC 1; *Hira v Booyesen* 1992 (4) SA 69 (A); *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 151-4).

It is regrettable that the applicants in the instant case did not make clear – or if they did that the judgment in the instant case does not record – that the application for review was not founded on any impugning of the impartiality or bona fides of the judges in question.

In the event the High Court found that the application for review to be fatally defective, holding that the applicant taxpayers were non- suited on the grounds that neither of the judges who had issued the warrants for search and seizure had been joined as parties to the proceedings. However, the court allowed the taxpayers to put forward arguments in terms of their statutory right under s74D(9) to apply for the return of the seized documents. Section 74D(9) of the Income Tax Act provides that –

- (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'.

The nature of the application contemplated in these provisions is puzzling. Paragraph (a) does not seem to establish a statutory right of appeal, on the merits, against the granting of the search and seizure warrant, for the only relief that the taxpayer can ask for is an order for the 'return of any documents or things seized' (for example, the taxpayer might argue that SARS had had sufficient time to consider the seized documents and that they should now be returned) and not for the settings aside of the warrant, although paragraph (b) expressly empowers the court to 'make such an order as it deems fit'. Whether the latter order can go further than requiring the return of specified documents and matter ancillary to such return is uncertain. Could the taxpayer, for example, apply in terms of s

74D(9) for a return of the document seized on the grounds (supported by affidavit) that, on the merits, the warrant should never have been issued, and could the court, in making 'such order as it deems fit', order that the warrant be set aside. The judgment in the instant case reveals no argument or decision on these fundamental question, but in Ferela's case(supra) at SATC 524 it was held that s 74D(9) 'empowers the court to reverse the effect of a warrant in toto [and] empowers the court on hearing such an application to make such an order as it deems fit'. In the latter case the court ordered SARS to return the seized documents and to pay the taxpayer's High Court costs.

It is important to appreciate the parlous situation of a taxpayer in respect of whom a search has been made in terms of s 74D. The South African Revenue Service is entitled to apply

for the order *ex parte*, as it did in this case.(Indeed, it may be expected that SARS will almost invariably apply for such a warrant *ex parte*, for the fear that if the taxpayer is given notice of the application, he may conceal or destroy the documents or things which SARS wishes to seize.) Although the words '*ex parte*' were deleted from s 74D in 1997 (see s 29 of Act 28 of 1997), s 74D still expressly provides (as the court in *Deutschmann*; *Shelton* pointed out at SATC 203) that the application can be made 'without prior notice'. The result is that the taxpayer in questions has no opportunity, when the judge hears the application for the warrant, to oppose it on the merits by disputing the facts, deposed to in SARS' s supporting affidavits. If the judge issues the warrant in terms of s 74D(3) and if, as seems to be the case, the taxpayer has no right of appeal but only the right to take the judge's decision on review, this means that the taxpayer is never afforded an opportunity to contest the issuing of the warrant on the merits.

Assume, for argument's sake, that the affidavits filed in court by SARS in support of the application for a warrant contain a factual error or the perjury appears ex facie the documents placed before the judge who heard the application for the warrant, the taxpayer will have no opportunity in review proceedings to prove the error or the perjury, for, in a review, the question is whether the decision maker properly applied his mind to the issues, and the admissible evidence is confined to the facts originally laid before him, and thus to the knowledge he possessed at the time he made the decision in question. (Cf ITC 1601(1996) 58 SATC 172 at 178.)

The trend in recent years for good reason has been to repeal the Commissioner's once numerous discretionary, non - appealable powers under the Income Tax Act, and virtually all of his decisions are now subject to objections and appeal. It was, I suggested, a

seriously retrograde step for the legislature to have enacted s 74D in 1996 (see s 14 of Act 46 of 1996) in a form which vested non-appealable powers in the judiciary particularly when the power in question is to authorize the invasion of fundamental rights of privacy and property . Moreover, where the documents seized are business documents, their seizure (as the court in the instant case recognized at SATC 195H-1) 'must inevitably impact on the proper running of the business and the prejudice suffered thereby cannot be overstated'. Compounding the vulnerability of the taxpayer is the principle (see at SATC 200A-B) that, in bringing an application for a warrant of search and seizure, the onus SARS is 'less than that upon a litigant required to prove a prima facie case'. It is certainly arguable that denying taxpayers the right of appeal on the merits against the issuing of a warrant of search and seizure is an infringement of the constitutional right to 'administration action that is lawful, reasonable and procedurally fair'(s 331(1) of the 1996 Constitution), and it is regrettable that the taxpayer in the instant case did not make this

argument, but contended only (see at SATC 205) that their application 'should be viewed against the background of the right to privacy and property' entrenched in ss 14 and 25(1) of the 1996 Constitution a remarkably meek and fuzzy submission. It is submitted that the result was that the court briefly considered whether the issuing of a warrant of search and seizure constituted an infringement of the constitutional protection from the arbitrary deprivation of property, to which it gave an answer in the negative, and did not apply its mind to whether the denial of the right of appeal on the merits against the issuing of the warrant was unconstitutional as an infringement of the right to reasonable and fair administrative action.

CHAPTER- 7

7.1 Conclusion

Although Rudolph has thus not been a very successful litigant, his actions prompted the legislature to introduce new search and seizure procedures. Not only the income Tax Act, but also the Marketable Securities Tax Act 32 of 1948, the Transfer Duty Act, the Estate Duty Act, the Stamp Duty Act and the Value Added Tax Act were amended. These amendments were introduced by the Revenue Laws Amendment Act.

Section 74A and 74B partly replace s74(1) and authorizes the Commissioner or officer to require any person to furnish information, documents or things. The power to obtain information must be directed at the supply information against a specific taxpayer. The right to call on any person at any premises during normal business hours to obtain the necessary information, documents or things

is also reserved. However, the right may be exercised only if reasonable prior notice had been given. No such notice was previously required.

Section 74C replaces s74(2) which empowered the Commissioner to require, by written notice, any person entitled to or in receipt of any income to be examined under oath regarding the income of any person or any transaction or matters affecting such income. The new section still makes provision for an inquiry to be held, but the Commissioner has to apply *ex parte* to a judge for an order designating a presiding officer before whom the inquiry is to be held (s74(2)) The application to be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based. The judge grants the order if he is satisfied that there are reasonable grounds to believe that there has been non-compliance with the provisions of the Act or an offence has been committed and that information is likely to be revealed by the inquiry which may afford proof of such non-compliance or offence (s74D(5)).

The draconian search and seizure powers previously contained in s74(3) have been replaced by s74D. The Commissioner is no longer at liberty to interrogate persons, search premises and seize documents as he sees fit. The subjective opinion of the Commissioner is replaced by the objective opinion of a judge after weighing the factors supplied to him under oath or solemn declaration.

It is submitted that to be able to track down the guilty, SARS must of necessity be armed with fierce recovery provisions, including searching and seizure of documents, material etc. which could harm the innocent. SARS is bound to make mistakes if inexperienced or over enthusiastic officials get carried away by their desire to eliminate evasion, avoidance or fraud. However, before the court is approached for judicial review of a SARS decision, or for declaration order or application for a return of seized articles or documents, it should be borne in mind that the very same records had

been found untruthful by the Revenue Officials to what has been declared or it is proved that they were used or about to be used in the Commission of an offence to defraud the fiscus, and in such circumstances it would be necessary before a court would intervene in any way apply its mind to those circumstances.

The powers and procedures contained in the search seizure provisions might be regarded as draconian but only where the targeted taxpayer is innocent. Thus where the person whose articles have been seized proves to owe or proved to have intended to invade or to defraud or such articles proved to be intended for the commission of the offence, it is submitted that few taxpayers will have sympathy, as defrauding the fiscus comes to defrauding taxpayers. It is thus submitted that the best way to escape the grip of SARS recovery measures, is not to fall target thereof in the first place.

Effective collection and enforcement measures are needed since no country can function properly without funds. It is without doubt that the consequences for the effective functioning of the country will be dire if tax collection should come to a stand still as a result of questioning by taxpayers of the constitutionality of the provisions in terms of which the Commissioner acts. Thus a balance should be struck between the intended interests of the legislature and the protection of the taxpayers' rights

as such rights may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ;

- (a) the nature of the right ;
- (b) the importance of the purpose of the limitations ;
- (c) the nature and extent of the limitation ;

(d) the relation between the limitation and its purpose

It is submitted that although the Commissioner continues to have powers of entry, search and seizure, the taxpayer has been accorded a new set of rights in line with the constitution. These may be summed as follows ;

- the right to be given reasonable notice where the taxpayer is required to make available information, documents or things for inspections, audit, examination or obtaining,
- a taxpayer whose affairs are investigated or against whom an enquiry is held, is entitled together with his representative to be present, unless the presiding officer directs otherwise,
- a taxpayer's dwelling or domestic premises not used for purposes of trade can not be entered without the occupant's consent. However , where the Commissioner has made an *ex- parte* application and the judge is satisfied about merits of the application, premises may be entered without any notice.

The built-in safety measure in this process is that, unlike the past where a particular revenue official would rely on his/her own opinion or suspicions to enter and search premises, the new amendment allows for the judge to apply his mind to the said *ex-parte* application before entry, search and seizure of documentation can take place.

Thus there amendment of section 74(3) should therefore be seen as a substantial triumph for taxpayers and where there is violation of the said rights by revenue officials, taxpayers should have the courage to challenge such violations using available legal remedies. Taxpayers are now largely protected against what can be construed as excesses on the part of the Commissioner and his officials. It is apparent that the taxpayer is afforded reasonable protection and the Commissioner's

powers are accordingly circumscribed. Reasonable notice has to be given to a taxpayer whose documents or things need to be inspected or obtained.

Thus in the light of the aforementioned amendments to the search and seizure provisions, taxpayers should remain vigilant and not hesitate to approach the courts for relief where their privacy rights are infringed.

7.2 Can section 74D survive the Constitutionality test?

To avoid some legal consequences, the drafters of section 74D simulated section 231(3) with minor differences, especially by inserting the word “may” in section 74D(3), which usually has the effect that discretion is implied.

Keeping in mind that the new section does not function in a void, but within an existing constitutional framework, the salient question arising is: in the light of the Canadian experience, notwithstanding the text of section 74D, can the latter survive the constitutional scrutiny? To date, the constitutionality of the new section has not been challenged successfully, mainly for two

reasons: Firstly, section 74D was enacted in response to a court application challenging the constitutionality of the previous search warrant provisions of the Income Tax Act, but moreover it is a product of a jurisprudential era of constitutionalism. Unlike its predecessors, it does not give a representative of the commissioner acting on written authority the right to search for information at premises and seize any documents if necessary. Neither does it grant powers for a search without a warrant. This in itself is a significant distinction insofar as it implicitly acknowledges that arbitrary entry to premises of the taxpayer will be a thing of the past. Secondly, it introduces an important safeguard which, arguably, is a pre-requisite for a valid search and seizure, and that is authorization

of a judge before an enquiry or search and seizure can take place. Thus, it is submitted, grants legitimacy to the whole process.

The draconian search and seizure powers previously contained in section 74(3) have been replaced by section 74D. The commissioner is no longer at liberty to interrogate persons, search premises and seize documents as he sees fit. The subjective opinion of the commissioner is replaced by the objective opinion of a judge after weighing the factors supplied to him under oath or solemn declaration. Although the amended section clearly still infringes on the right to privacy contained in section 14 of the constitution, it is in all likelihood fall within the scope of the general limitation clause.

The amendments are a huge improvement on the previous sections and appear successfully to balance the rights of the Commissioner as well as the rights of taxpayers and other parties concerned. If the amendments are an indication of the standard of future amendments which will follow to bring the Act in line with the Constitution, then they will help a great deal to remove the present resentment which several taxpayers feel towards the Commissioner and his enforcement officers.

The amendments should therefore be seen as a substantial triumph for taxpayers and where there is violation of the said rights by revenue officials, taxpayers should have the courage to challenge such violations using available legal remedies. Thus it is without doubt that amendments to section 74 are a major development from the previous position. It is more coherent, clarified and precise. In its endeavour to curb soaring tax liabilities and to advance tax collection measures, the legislature has sought to make these provisions more lucid and comprehensive in order to yield the desired results. Generally, the provisions of section 74 safeguard, rather than encroach upon, individual taxpayer's rights in much the same way as the fundamental rights in our constitution protect individual

citizens. Therefore, the investigative and enforcement measures embedded therein provide not only a positive starting point to ensuring that the spirit and tenor of the constitution is embraced, but also grant legitimacy and clarity to the enquiry that was envisaged by the impugned section 74.

BIBLIOGRAPHY

1. Baxter Lawrence.- Administration Law, Legal Regulation of Administrative Action in South Africa, Juta & Co, Ltd 1991
2. Basson Dion - South Africa's Interim Constitution (Text and Notes –Revised Edition) Juta & Co. 1995
3. The Constitution of the Republic of South Africa, 1996 Act 108 of 1996
4. Income Tax Act No. 58 of 1962 – Butterworths Tax Publishing
5. De Waal, Currie & Erasmus – The Bill of Rights Handbook 3rd ed. (2000) 252 – 256, The Constitutionality of laws authorising searches and seizures.
6. Zeffert & Hoffman, The Law of Evidence, 4th Edition

JOURNALS & ARTICLES

1. Haupt Phillip & Huxham Keith.- Hedron Tax Journal Vol. 10 No. 2 April 1999
2. Haupt P & Huxham Keith. Customs & Excise – Seizure of goods, Hedron Tax Journal Vol. 10 No. 1, p.19, (1999)
3. Haupt P & Huxham K. Search and Seizure of Accounts and Records, Hedron Tax Journal Vol. 8 No. 1 p. 6, (1997)
4. Protecting the Revenue – The Taxpayer ,Volume 49 No. 1 p. 1 January 2000
5. Williams, R.C. An important decision on taxpayer's in respect of Search and Seizure warrants issued under the Income Tax Act and the Value Added Tax Act , South African Law Journal; Vol. 118 , Iss 3, p 418-421, 2001

6. Mosupa, F. Constitution validity of search and seizure provisions :a perspective on section 74 of the Income Tax Act, 58 of 1962. Stellenbosch Law review, Vol 12, Iss 2, p.317 – 325, 2001.
7. Mokgatle, O. Entry search and Seizure :Any Taxpayer Rights? Management Today; Vol. 13, Iss 9 p.38-42, October, 1977
8. Foreign cases :right to Privacy: search & seizure, South African journal on human rights, Vol. 12, Iss 3 p.. 521-522, September 1996
9. The Commissioner's power of search and seizure: section 74 (3) of Act 58 of 1962. The taxpayer, Vol 45, Iss 9 pg 161-162, September, 1996
10. Search and Seizure and the Constitution: Income Tax Reporter Vol 37 Parts 1-8, 1998
11. Temkin S. - Search and Seizure may be legal sometimes; Rights to Privacy and property can't always stop a Revenue Raid, Financial Mail, p.108, May 19, 2000
12. Search and Seizure: Income tax Manual Service issue No.8, Nov, 2000

13. Phala Tsepo - Some observation on the impact of the constitution on Tax law, Juta's Business Law, Vol 8 Part 1, 2000
14. Income Tax, search and seizure of documents – warrants, The Taxpayer Vol 51, No. 3, March,2002
15. The Hon VG Heimstra , Search and seizure, South African Law journal ; Vol 5, first reissue ,p130 – 136, 1994
16. Oliver,L – The new Search and seizure provisions of the Income Tax Act, De Rebus, Iss.350, p,195 – 196, March,1997

UNPUBLISHED READING

1. C. Smit – Guidelines in respect of warrant applications - SARS Law Administration.