F Moosa

Associate Professor, Department of Mercantile & Labour Law, University of the Western Cape. ORCID: http://orcid.org/0000-0002-2161-287X

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WARRANTLESS SEARCH AND SEIZURE BY SARS: A CONSTITUTIONAL INVASION OF TAXPAYERS' PRIVACY? – PART ONE

SUMMARY

Sec. 63 of the *Tax Administration Act* 28 of 2011 (*TAA*) grants unto the South African Revenue Service (SARS) officials access to taxpayers' private and confidential information through, first, searching a taxpayer's person and premises without a warrant and, secondly, permitting the seizure of taxpayers' possessions and communications. Part One of this article argues that the *TAA* is a "law of general application", as envisaged by the so-called "limitation clause" contained in sec. 36(1) of the *Constitution*, 1996 and that – in terms of the threshold stage of analysis prescribed by this provision – the exercise of the powers conferred by secs. 63(1) and (4) limits a taxpayer's constitutional right to privacy as entrenched in sec. 14 of the *Constitution*. Part Two of this article (to be published in *JJS* 2021(2)) hypothesises that, although the search and seizure powers in secs. 63(1) and (4) of the *TAA* are not models of drafting with absolute clarity, they ought – in terms of the second stage of enquiry that is triggered by the findings in Part One – nevertheless to pass muster under sec. 36(1) of the *Constitution.* This is because of the justifiability of the limitation imposed on the right to privacy by these provisions.

1. INTRODUCTION

Taxpayers in South Africa (hereafter, SA) enjoy benefits such as tax exemptions, and can account for certain taxes such as Value-Added Tax (hereafter, VAT) on a voluntary self-assessment basis. These benefits and opportunities "are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage".[1] Indeed, courts have recognised that "general tax morality in [SA] is low and … there is a high rate of tax evasion and fraud".[2] This confirms the need for a strong tax-collection agency as well as laws that are designed to ensure tax

1 *Metcash Trading Ltd v CSARS* 2001 1 SA 1109 (CC):par. 18.

2 *Metcash Trading Ltd v CSARS*:par. 20. See also *ITC 1865* 75 SATC 250, in which a VAT vendor issued fictitious invoices to create a sham revenue stream.

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compliance and promotion of tax morality. In this regard, the South African Revenue Service (hereafter, the SARS) and the *Tax Administration Act* (hereafter, the *TAA*)[3] play key roles.

The SARS is responsible for the efficient and effective collection of taxes and, generally, for the proper administration of SA's tax system.[4] In order to counteract unscrupulous behaviour by recalcitrant taxpayers, sec. 63 of the *TAA* permits warrantless searches and seizures of taxpayers' property. In this way, the SARS can gather information required for the effective policing of compliance and collection of revenue due to the *fiscus*. In so doing, sec. 63 enables SA's tax-administration agency to gain access to taxpayer information in locations such as in a dwelling or business premises, usually considered to be protected spaces. This access to information potentially puts the SARS on a collision course with taxpayers' constitutional right to privacy as entrenched in sec. 14 of the *Bill of Rights* (hereafter, the *BOR*) contained in chapter two of the *Constitution of the Republic of South Africa, 1996* (hereafter, the *Constitution*).

Since the SARS is a creation of the *South African Revenue Service Act*[5] that has no inherent powers in law, a statutory mechanism is required to enable it to gain access to taxpayer information. Sec. 63 of the *TAA* performs this function. As shown in this article, sec. 63 enhances the efficacy of tax administration conducted by the SARS. In the absence of the mechanism created by sec. 63, the SARS would not be empowered to undertake warrantless searches and seizures for *TAA* purposes. Such a state of affairs would not serve the public interest in a climate, as in SA, where tax morality is low.

2. PROBLEM STATEMENT AND FORMULATION OF THE RESEARCH QUESTION

Revenue from taxation keeps the machinery of the state functional.[6] To this end, the *TAA* plays an important role. Sec. 22(1) obliges every person liable to register for tax under a fiscal statute to do so; sec. 25(1) obliges every taxpayer to submit a tax return in the prescribed form and manner; sec. 25(2) requires all taxpayers to make full and proper disclosure in a tax return of all prescribed information; sec. 29 makes it compulsory for taxpayers to retain all records, books of account and documents that would enable the SARS to be satisfied that the taxpayer has observed the requirements of the *TAA* and to retain same for at least five years. Tax collection will suffer, if the SARS lacks proper access to such information. Reduced tax collection would diminish deposits in the National Revenue Fund that, in turn, would undermine the government's

3 *Tax Administration Act* 28/2011.

4 *South African Revenue Service Act* 34/1997:secs. 3 and 4 (hereafter, "the *SARSA*").

5 *South African Revenue Service Act* 34/1997.

6 Fabricius J, in *CSARS v Sunflower Distributors CC* 2015 JDR 2546 (GP):par. 4 states: "[T]he State is obliged to and entitled to collect taxes, as its very existence is dependent on it."

ability to fulfil its constitutional duties. Therefore, public interest demands that the SARS has effective powers of surveillance. To this end, sec. 63 of the *TAA* is pivotal. It permits unannounced, warrantless searches at taxpayers' premises and seizures of taxpayers' property in certain circumstances.[7]

Section 63 reads:

> A senior SARS official may without a warrant exercise the powers referred to in section 61(3) —
>
> if the owner or person in control of the premises so consents in writing;[8] or
>
> b. if the senior SARS official on reasonable grounds is satisfied that —
>
> i. there may be an imminent removal or destruction of relevant material likely to be found on the premises;
>
> ii. if SARS applies for a search warrant under section 59, a search warrant will be issued; and
>
> iii. the delay in obtaining a warrant would defeat the object of the search and seizure.
>
> (2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises —
>
> a. that the search is being conducted under this section; and
>
> b. of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.
>
> (3) Section 61(4) to (8) applies to a search conducted under this section.
>
> (4) A SARS official may not enter a dwelling-house or domestic premises,[9] except any part thereof used for purposes of trade,[10] under this section without the consent of the occupant.
>
> (5) If the owner or person in control of the premises is not present, the SARS official must inform such person of the circumstances referred to

7 In *Janse van Rensburg NO v Minister of Trade and Industry* 2001 1 SA 29 (CC):par. 24, the Court held: "In modern states it has become more and more common to grant far-reaching powers to administrative functionaries." Keulder (2015:820) writes: "The justification for a warrantless search is that it enables SARS to act straight away, thus preventing tax evaders from destroying or hiding evidence of their evasion. If SARS were required first to obtain a warrant, tax evaders would have the opportunity to destroy relevant documentation."

8 Neither the term "owner" nor "person in control" is defined in the *TAA*. They would, however, include both the registered owner and the manager of affected premises.

9 For an analysis of "dwelling-house" and "domestic premises" for *TAA* purposes, see Moosa 2016:369-374.

10 The *TAA*:sec. 1 states that, "unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned". Since "trade" is undefined in the *TAA*, for purposes of sec. 63, it ought to bear its meaning as defined in the *ITA*:sec 1. Similarly, "for purposes of trade" ought to carry its meaning in the *ITA*. In this regard, see, for example, *Burgess v CIR* 1993 4 SA 161 (A):179-182.

> in subsection (2) as soon as reasonably possible after the execution of the search and seizure.

Sec. 63 serves an important public purpose, namely it enhances the SARS' detection capabilities by empowering its officials to enter a taxpayer's premises without a warrant to gather relevant tax information that may otherwise remain unknown to the SARS. Therefore, sec. 63 is a mechanism that fosters improved tax collection and general tax administration. This benefits the *fiscus* by enabling the SARS to ensure that every taxpayer shoulders his or her fair share of the tax burden.[11]

The emphasis placed by the *BOR* on the protection and promotion of fundamental rights is an integral part of SA's democratic hygiene. A core judicial function is the dispensing of justice in a "stewardly manner",[12] by upholding the rights entrenched in the *BOR*. The judiciary fulfils this role by ensuring, *inter alia*, that

> when statutory powers … are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner.[13]

The problem arising is that the exercise of the powers in sec. 63 of the *TAA* is potentially invasive of taxpayers' constitutionally entrenched right to privacy in sec. 14 of the *Constitution*.[14] This raises the following research question: Do the warrantless search and seizure powers permitted by sec. 63(1) constitute a *limitation* of a taxpayer's right to privacy for the purposes of the "limitation clause" in sec. 36(1) of the *Constitution*? If so, can this limitation be regarded as a *reasonable and justifiable* – and hence constitutionally tenable – limitation of a constitutional right in accordance with this clause?

3. SIGNIFICANCE OF THE RESEARCH AND ROADMAP OF THE DISCUSSION

A literature survey revealed that, at the time of writing, the research question formulated above has not yet been the subject of published scholarship or judicial pronouncement. Therefore, this research is significant, as it can potentially guide taxpayers, the SARS officials, lawyers, judicial officers, academics and researchers in terms of the legal-cum-constitutional principles that will be at play when the research question arises for adjudication.

Owing to the breadth of the issues to be canvassed in answering the research question, this article is divided into two parts. Part One is primarily

11 McCabe (1993:11) writes: "The ability to detect shirking and enforce compliance is therefore essential to any equitable system of taxation."

12 *Eke v Parsons* 2016 3 SA 37 (CC):paras. 34, 39.

13 *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2006 2 All SA 175 (E):par. 56.

14 *Huang v CSARS: In re CSARS v Huang* 2015 1 SA 602 (GP):par. 16.

the black letter law phase of the discussion that is intended to lay a firm foundation for the subsequent in-depth application phase of the research to be undertaken in Part Two.

Accordingly, the ensuing discussion commences with an analysis of the right to privacy as entrenched in sec. 14 of the *Constitution*. A discussion of the nature and extent of a taxpayer's privacy expectation is necessary because it flows naturally from the research question and, under sec. 36(1)(*a*) of the *Constitution*, is a relevant consideration when the validity of the potential limitation of this right by sec. 63 of the *TAA* is tested through the lens of the *Constitution*. Building hereon, Part One aims to draw a preliminary conclusion as to the threshold phase of enquiry arising from sec. 36(1) of the *Constitution*, namely whether the exercise of the powers in sec. 63 of the *TAA limits* any facet of a taxpayers' right to privacy. Part One concludes by answering this enquiry in the affirmative. Part Two accordingly proceeds to the second phase of enquiry under sec. 36(1), by examining the nature of the enquiries involved when the criteria listed in sub-secs. (1)(*b*)-(*e*) thereof are considered in constitutional litigation, and by applying them to ultimately hypothesise that the limitation occasioned by sec. 63 of the *TAA* is constitutionally acceptable because of its reasonableness and justifiability "in an open and democratic society based on human dignity, equality and freedom".

4. TAXPAYERS' FUNDAMENTAL RIGHT TO PRIVACY

4.1 Nature of privacy

During apartheid, despite the common law right to privacy, an authoritarian regime de-personalised and de-privatised confidential information and communications through its laws.[15] A succinct overview of the history of systemic violations of privacy during that era is contained in the following *dictum* per Sachs J in *Mistry*:[16]

> South African experience has been notoriously mixed in this regard. On the one hand, there has been an admirable history of strong statutory controls over the powers of the police to search and seize. On the other, when it came to racially discriminatory laws and security legislation, vast and often unrestricted discretionary powers were conferred on officials and police. Generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted, amongst a great many officials, habits and practices inconsistent with the standards of conduct now required by the Bill of Rights.

The entrenchment of a constitutional right to privacy in sec. 14 reflects its importance in a transforming society based on human rights and values.[17] Apart

15 For discussion hereof, see Du Plessis & De Ville 1994:242.

16 *Mistry v Interim Medical and Dental Council of SA* 1998 4 SA 1127 (CC):par. 25.

17 In *Gaertner v Minister of Finance* 2014 1 SA 442 (CC):par. 86, privacy was described as "a fundamental personality right deserving of protection as part of human dignity".

from a person's privacy that is at stake when the State seeks to invade a private sphere, privacy also has a social interest dimension, that is, society's interest in protecting and preserving privacy against unwarranted State intrusion or erosion that would harm democratic values.[18] These considerations, as well as the dark history of SA, in which privacy was routinely violated by the State and its machinery, provide an important lens through which the warrantless search and seizure powers of the SARS in sec. 63 of the *TAA* are to be viewed for purposes of the limitation clause in sec. 36(1).

In accordance with international human rights norms,[19] the *Constitution* entrenches privacy in the *BOR*.[20] The right in sec. 14 is couched wider than the right to privacy in the common law of SA.[21] Section 14 reads: "Everyone has the right to privacy, which includes the right not to have – (*a*) their person or home searched; (*b*) their property searched; (*c*) their possessions seized; or (*d*) the privacy of their communications[22] infringed." Sec. 14 forbids encroachments on "private facts"[23] or "personal matters".[24] This prohibition ensures a repudiation of, and a clean break from past practices repugnant to the protection of privacy, dignity, freedom, social justice and other democratic values of a liberal society.[25] This is part of the *Constitution*'s transformative spirit and ethos.

4.2 Extent of privacy

The parameters of sec. 14 must be determined objectively with reference to its structure and internal content.[26] Section 14 is structured in two distinctive

18 *Minister of Justice and Constitutional Development v Prince; NDPP v Rubin; NDPP v Acton* 2018 6 SA 393 (CC):paras. 50-57.

19 The right to privacy is recognised in several international legal instruments, including the Universal Declaration of Human Rights (art. 12), the International Covenant on Civil and Political Rights (art. 17), the European Convention on Human Rights (art. 8), and the American Convention on Human Rights (art. 11).

20 O'Regan J, in *NM v Smith* 2007 5 SA 250 (CC):par. 131, held: "The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing."

21 See Rautenbach 2001:115; Dendy 2009:46-47.

22 Mokgoro J, in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC):par. 30, pointed out that "communication" embraces both the transmission and the reception of information.

23 Madala J, in *NM v Smith*:par. 34, defines "private facts" as "those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private". This *dictum* pertains to information privacy. However, other privacy interests include personal privacy to bodily integrity and territorial privacy to property.

24 Rautenbach (2012:360) defines "personal matters" as "matters concerning the free and unimpeded exercising of rights".

25 *Gaertner v Minister of Finance*:par. 48.

26 *National Media Ltd v Jooste* 1996 3 SA 262 (SCA):271D.

parts.[27] Whilst the first part recognises a positive, general right to privacy ("[e]veryone has the right to privacy"), the second part recognises a negative right to privacy ("the right not to have …"). The latter protects 'everyone' against specific forms of infringements listed in sec. 14.

The word "[e]veryone"[28] indicates that sec. 14 protects persons, not places or property.[29] "Everyone" casts the net of its subject very widely.[30] Textually and contextually in sec. 14, "everyone" is all-encompassing in its extent: it includes all and excludes none. This widens considerably the reach of sec. 14. Consequently, it is now settled law that sec. 14 applies to juristic persons, although their privacy "can never be as intense as those of human beings".[31] The blanket application of sec. 14 to a wide range of persons, including juristic ones, is an integral part of a truly "democratic, universalistic, caring and aspirationally egalitarian ethos"[32] that is "vital to a conscience-honouring social order"[33] in a democracy.

The justification for the extension of sec. 14 to juristic persons such as taxpayer companies and close corporations emerges from the following *dictum*:[34]

> Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The state might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. *Juristic persons therefore do enjoy the right to privacy*, although not to the same extent as natural persons.

Based on the foregoing, sec. 14 contains internal limitations that regulate the extent of its application in a practical sense.[35] The rights therein are themselves formulated in general terms.[36] The substantive right to privacy is not defined

27 Currie & De Waal 2014:294.

28 McCreath J, in *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T):1118H, held that "the terms 'every person' and 'everyone', as used in the *Constitution* are synonymous".

29 Currie & De Waal 2014:304.

30 *Christian Lawyers Association of SA v Minister of Health:*1118-1119. For the effect of the word "every", see *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 1 SA 254 (A):261; *Southern Life Association Ltd v CIR* 47 SATC 15:18-19.

31 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 18.

32 Per Mahomed J, in *S v Makwanyane* 1995 3 SA 391 (CC):par. 262.

33 *De Lange v Presiding Bishop, Methodist Church of Southern Africa* 2015 1 SA 106 (SCA):par. 31.

34 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 18 (emphasis supplied). See also *First National Bank of SA Ltd t/a Wesbank v CSARS: First National Bank of SA Ltd v Minister of Finance* 2002 4 SA 768 (CC):par. 42.

35 *First National Bank of SA Ltd t/a Wesbank v CSARS: First National Bank of SA Ltd v Minister of Finance*:par. 110; Carpenter 1995:260.

36 The rights delineated in sec. 14 are underpinned by human dignity, equality and

with precision. Therefore, some uncertainty exists as to its exact scope and ambit.[37] This prompted Ackermann J to describe the concept of privacy as "an amorphous and elusive one",[38] whose scope is closely related to a person's own identity. Sec. 14 is couched open-endedly, thereby permitting the inclusion of other facets of privacy that are not expressly mentioned in its make-up. As such, as employed in the provision, the word "includes" indicates that sub-paragraphs (*a*)-(*d*) thereof are not a *numerus clausus*. Thus, other privacy interests may, through interpretation, be regarded as protected under the umbrella of sec. 14.[39] This would be so if, as required by sec. 39(1) of the *Constitution*,[40] their protection is consonant with the values of an open and democratic society based on human dignity, equality and freedom.

In *Bernstein*, Ackermann J stated further that "it seems to be a sensible approach to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured".[41] A legitimate expectation entails a subjective expectation of privacy that society recognises as objectively reasonable.[42] Therefore,

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freedom. See *Minister of Safety and Security v Mohamed* 2010 4 All SA 521 (WCC):par. 25.

37 Harms JA, in *National Media Ltd v Jooste*:271, and Ackermann J, in *Bernstein v Bester*:par. 68, accepted the following definition of privacy proposed by Neethling: "Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private." (translated from Afrikaans). Madala J held, in *NM v Smith*:paras. 32-33, "the nature and the scope of the right [to privacy] envisage a concept of the right to be left alone. Privacy encompasses the right of a person to live his or her life as he or she pleases". In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 16, Langa DP held: "Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."

38 *Bernstein v Bester* 1996 2 SA 751 (CC):par. 65.

39 Privacy includes the "right to be let alone, to be free from unwanted and unwarranted intrusions upon one's time, peace of mind and sleep" (*Makhanya v Vodacom Service Provider Co (Pty) Ltd* 2010 3 SA 79 (GNP):par. 12) and an adult's right "to use or cultivate or possess cannabis in private for his or her personal consumption" (*Minister of Justice and Constitutional Development v Prince; NDPP v Rubin; NDPP v Acton*:par. 58).

40 Sec. 39(1) reads: "When interpreting the Bill of Rights, a court, tribunal or forum – (*a*) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (*b*) must consider international law; and (*c*) may consider foreign law."

41 *Bernstein v Bester*:par. 75. Expectations of privacy are normative rather than descriptive standards. See *R v Tessling* 2004 3 SCR 432 (SCC):par. 42.

42 *Bernstein v Bester*:par. 75. Currie & De Waal (2014:298) contend that, for purposes of applying the legitimate expectation test, "[w]hat is reasonable … depends on the set of values to which one ties the (empty) standard of reasonableness". Rautenbach (2012:358) writes: "To determine the reasonableness of a subjective expectation the Constitutional Court uses the German idea to arrange forms of privacy in concentric circles ranging from inner sanctum privacy, which is protected

an expectation of privacy must be weighed against "the conflicting rights of the community".[43] Ackermann J further held that it would be reasonable for a person to expect privacy in the "truly personal realm" or "inner sanctum of a person" such as in his home. However, "as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks".[44] This probably accounts for the exception in sec. 63(4) of the *TAA* quoted above.

4.3 Privacy in a tax-administration setting

In *Hyundai Motor Distributors,* the following was held: "As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."[45] Accordingly, privacy has an inviolable, narrowly construed "intimate core"[46] that is "lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated".[47] Therefore, when a taxpayer is out of his home and, for instance, in his office, motor vehicle, hotel, holiday house or other like premises, he enjoys a less intense right to privacy.[48]

It is against this backdrop that the arrangement of a taxpayer's privacy expectations on a sliding scale from high to low must be understood.[49] In a taxpayer's home, the right to privacy enjoys premium protection; in a business or social setting, privacy enjoys less protection. This difference is evident when secs. 63(1)(*b*) and (4) of the *TAA* are compared. Whereas the former permits a senior SARS official[50] to enter a taxpayer's premises without a warrant and

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without any qualification, to periphery privacy, which is so attenuated by societal interests that a subjective privacy expectation is unreasonable."

43 McQuoid-Mason 2000:247.

44 *Bernstein v Bester*:par. 67. Sachs J held, in *Mistry v Interim Medical and Dental Council of SA*:par. 27, that "Ackermann J [in *Bernstein*] posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated". Madlanga J, in *Gaertner v Minister of Finance*:par. 49, held: "This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home."

45 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 18. For further discussion of privacy, see Okpaluba 2015:407.

46 *Bernstein v Bester*:par. 77.

47 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 15.

48 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 16.

49 Rautenbach 2012:358.

50 The *TAA*:sec. 1 read with sec. 6(3) defines "senior SARS official" to mean "(*a*) the Commissioner; (*b*) a SARS official who has specific written authority from the Commissioner to do so; or (*c*) a SARS official occupying a post designated by the

conduct a search and seizure, the latter prohibits this power from being used without a taxpayer's consent at a taxpayer's residence, except such part thereof used for purposes of trade.

Conducting a trade at a residential dwelling ought not to attenuate the reasonable privacy expectations of a homeowner or occupier to such a degree that a very low privacy expectation exists for certain parts of a home. A home is a personal space reserved for the most private of activities and is deserving of a high level of protection against intrusion by the State and its agents.[51] The mere carrying on of a trade or some part of trading activity from a residence does not alter the basic principle that "every man's house is his castle".[52] The essential character of a place as a home does not change merely because a trade operates there. The site or structure remains a residence. Everyone living there, including a trader, ought to be entitled to a high level of protection of privacy. For this reason, the high protection afforded to privacy in a home environment by way of a prior warrant was emphasised as follows by the Constitutional Court:

> Once the investigation extends to private homes, however, there would seem to be no reason why the time-honoured requirement of prior independent authorisation should not be respected.[53]

This notwithstanding, a taxpayer's home is not an impregnable fortress. Its walls may be breached in appropriate circumstances when justifiable under sec. 36(1) of the *Constitution*.[54] In light hereof, when a search and/or seizure occurs under sec. 63 of the *TAA* at a business operating from a residential dwelling, a delicate balance must be struck between, on the one hand, the high expectation of privacy at a person's home and, on the other, the lower privacy expectation of a business. No hard and fast rules can be laid down in advance as to when the privacy expectation at a residence may be validly pierced to advance a legitimate public interest. Each limitation catered for in sec. 63 must be decided on its merits.

Based on the foregoing, it is evident that privacy is not "construed absolutely or individualistically in ways which [deny] that all individuals are members of a broader community and are defined in significant ways by that membership".[55] Accordingly, although the cluster of privacy rights entrenched

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Commissioner in writing for this purpose".

51 *Mistry v Interim Medical and Dental Council of SA*:par. 28.

52 *Platinum Asset Management (Pty) Ltd v Financial Services Board; Anglo Rand Capital House (Pty) Ltd v Financial Services Board* 2006 4 SA 73 (W):par. 1.

53 *Mistry v Interim Medical and Dental Council of SA*:par. 29. See also *Gaertner v Minister of Finance*:par. 73.

54 *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*:paras. 65, 99, 106.

55 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC):par. 31. Ackermann J (par. 32) held: "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community." The Canadian Supreme Court, in *R v Dyment* 1988 2 SCR 417:436, refers to the spheres or zones of privacy as being "spatial, physical and informational".

in sec. 14 of the *Constitution* strengthen a taxpayer's claim for the protection of all dimensions of privacy against arbitrary or "unreasonable invasion and search",[56] the nature of privacy is such that it is not impenetrable. Privacy may be subjected to restrictions, provided they satisfy the standards set forth in sec. 36(1) of the *Constitution*.

Therefore, searches and seizures under sec. 63 of the *TAA* are not, *per se*, an unconstitutional violation of sec. 14 of the *Constitution*. Privacy expectations relating to taxpayers' premises, plant, equipment, machinery, materials, records and other assets is attenuated by the duty to comply with reasonable schemes involving searches and seizures linked to "an effective regime of regulation".[57] Accordingly, to be valid vis-à-vis taxpayers' privacy, the warrantless search and seizure provisions in sec. 63 of the *TAA* must pass muster under sec. 36(1) of the *Constitution*. It is to this litmus test that attention is now turned.

5. ANALYSIS OF THE SO-CALLED "LIMITATION CLAUSE" IN SEC. 36(1) OF THE CONSTITUTION

Sec. 36(1) is a freestanding, general limitation clause in the *BOR*. It reads:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
>
> a. the nature of the right;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the relation between the limitation and its purpose; and
>
> e. less restrictive means to achieve the purpose.

Sec. 36(1) imposes a uniform set of "primary criteria",[58] which provide a constitutional framework for assessing whether a rational justification exists for a limitation of an entrenched right. A clause of this nature means that "there will be a more orderly and 'open and candid consideration of competing governmental, public, private and constitutional interests'".[59] The phrase in sec. 36(1), namely "[t]he rights in the Bill of Rights", is couched sufficiently broadly, so as to encompass *all* the rights in the *BOR*,[60] thus clearly including the right

56 *Park-Ross v Director: Office for Serious Economic Offences* 1995 2 SA 148 (C):166.

57 *Mistry v Interim Medical and Dental Council of SA*:par. 27. See also McQuoid-Mason 2000:249.

58 *Phillips v Director of Public Prosecutions, WLD* 2003 3 SA 345 (CC):par. 20.

59 Cheadle 2020:30-33.

60 *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*:par. 37.

to privacy.[61] Consequently, it is submitted that taxpayers, both natural and juristic persons, have *locus standi* under sec. 38(*a*) of the *Constitution*, when a right guaranteed by sec. 14 is infringed (or threatened with infringement) by the SARS exercising the formidable powers conferred on it by sec. 63 of the *TAA*, read holistically.[62]

When confronted with an alleged limitation of privacy by these provisions, our courts will apply a two-stage enquiry.[63] The first is the threshold phase.[64] In relation to the research question considered in this article, this entails an enquiry into whether the exercise by the SARS of its powers in sec. 63 of the *TAA limits* any aspect of a taxpayer's privacy as guaranteed in sec. 14 of the *Constitution*. If not, then the whole enquiry ends in relation to the specific provision at issue. In the threshold phase, the burden is on the taxpayer to prove that the exercise of power under sec. 63 infringes a right forming part of the cluster of privacy interests protected in sec. 14.[65] If a court is satisfied that sec. 63 indeed limits privacy, as is argued below, this renders the relevant provision therein *prima facie* unlawful.[66] A shifting of onus then occurs.[67]

The SARS (or other State party) relying on the statutory limitation would bear the burden to prove justification for it.[68] In this context, onus does not carry its usual connotation of a burden of proof in a civil or criminal matter involving the resolution of factual disputes respectively on a balance of probability or beyond reasonable doubt. A special onus is at play. It is simply a burden to justify a limitation.[69]

The second phase of the enquiry under sec. 36(1) entails an analysis of whether the degree of infringement permitted by sec. 63 "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" after the balancing considerations listed in secs. 36(1)(*a*)-(*e*) are put into the scales and weighed in a proportionality evaluation. A detailed discussion of these considerations will appear in Part Two of this article. However, for present purposes, it bears stating that, when dealing with an infringement of privacy under sec. 63 of the *TAA*, relevant factors to be

61 Woolman 1997:102.

62 Sec. 38 entitles persons with *locus standi* to judicial relief if "a right in the Bill of Rights has been infringed or threatened". Thus, the *BOR* protects persons against actual and threatened infringements. See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 232 (CC):par. 11.

63 *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC):par. 18.

64 *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC):par. 28.

65 *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC):paras. 55-56.

66 McQuoid-Mason 2000:246.

67 *Phillips v Director of Public Prosecutions, WLD* 2003 3 SA 345 (CC):par. 19.

68 *Phillips v Director of Public Prosecutions, WLD*:par. 19.

69 *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC):paras. 18-19; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 3 SA 280 (CC):paras. 34-36.

considered in the justification phase are the broader context, purpose and practical effect of the provisions concerned.[70]

In *South African National Defence Union*,[71] the court pointed out a trio of questions to be answered during the justification phase. By a parity of legal reasoning, in relation to sec. 63 of the *TAA*, they would be: first, what is the purpose of the relevant impugned provision? Under the rule of law, the measure in sec. 63 must serve a legitimate governmental (or public) purpose or interest. Secondly, what is the actual effect of the impugned provision on the taxpayer's privacy? In this regard, the nature of the right to privacy discussed above, as well as the nature and extent of the limitation in sec. 63 are important. Thirdly, is the impugned provision well-tailored for its intended purpose? A rational connection must exist between the measure imposed in sec. 63 and the purpose it seeks to achieve. This question embodies the principle of proportionality. It requires consideration as to the availability of other suitable, less intrusive (or invasive) constitutional means to achieve the limitation's aim. The warrantless search and seizure provisions catered for in sec. 63 would be bereft of rationality and, thus, validity if it does not use the least onerous means of achieving its aims.[72]

Sections 36(1)(*b*), (*d*) and (*e*) refer to the "purpose" of a limitation. This recurring theme is an indication of the importance of a limitation's aim in the justification analysis (or phase). A limitation would be justifiable if it serves a good reason or purpose that is "compellingly important"[73] or "exceptionally strong".[74] If not, then the limitation would not pass muster. Each case is decided on its own facts. As a general rule, the more serious a measure's impact is on a fundamental right, the more persuasive or compelling its justification must be.[75] It is, however, insufficient for a limitation to serve a justifiable purpose. The nature and the extent thereof must also be such that there is good cause to believe that the limitation would achieve its intended aim. Ultimately, the test is one of degree, that is to be evaluated within the context of the "concrete legislative and social setting of the measure".[76]

To this end, due regard must be given to the surrounding circumstances. This includes but is not limited to a consideration of the values or interests sought to be protected or advanced by sec. 63 of the *TAA*, and whether there are any other "realistically available"[77] means whereby the measure's intended purpose may be attained other than through a limitation of the taxpayer's

70 *Harksen v Lane NO* 1998 1 SA 300 (CC):par. 35. In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 4 SA 623 (CC):par. 68, the Court held: "It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other."

71 *South African National Defence Union v Minister of Defence*:par. 18.

72 *Prinsloo v Van der Linde*:par. 35.

73 Currie & De Waal 2014:151.

74 Van der Bank 2014:267.

75 *S v Manamela* (*Director-General of Justice intervening*) 2000 3 SA 1 (CC):par. 32.

76 *S v Manamela* (*Director-General of Justice intervening*):par. 32.

77 *S v Manamela* (*Director-General of Justice intervening*):par. 32.

privacy. This is so because sec. 36 neither "permit[s] a sledgehammer to be used to crack a nut",[78] nor does it "allow for means that are legitimate for one purpose to be used for another purpose where their employment would not be legitimate".[79]

A finding that other suitable, less invasive or intrusive, but equally effective, constitutional means are available whereby the aims of sec. 63 could be achieved would be fatal to the limitation in question. In such circumstances, it would be regarded as excessive in the sense that it is "substantially disproportionate to its public purpose … [and] is clearly overbroad in its reach".[80] As a result, the measure(s) would be declared invalid. This is because, in a democracy, the results achieved do not justify the means employed to attain them.

These principles will now be applied towards an analysis of the threshold phase of a sec. 36 enquiry, with a view to reaching a preliminary conclusion that will be taken further in Part Two of the article.

6. THE THRESHOLD PHASE EMBODIED IN SEC. 36 OF THE CONSTITUTION, AS APPLIED TO SEC. 63 OF THE TAA

6.1 Interpreting the phrase "in terms of law of general application"

For a search and seizure under sec. 63 of the *TAA* to fall within the ambit of sec. 36(1) of the *Constitution*, the *TAA* must qualify as a "law of general application". This necessitates an interpretation of this phrase within the context that it is employed in sec. 36(1).

The first point to be noted is that sec. 36 requires a limitation, in the sense explained above, to be grounded "*only* in terms of law of general application". The word "only" emphasises that a limitation authorised in a manner other than by a "law" is unconstitutional. Our courts have not yet crystallised the full spectrum of "law" for the purposes of sec. 36(1), nor have they articulated the interrelationship (or interdependence) that must exist between a "law" and a "limitation". They are also yet to interpret the words "in terms of" and "general application".[81]

Our courts have dealt episodically with the phrase "in terms of law of general application". The essence of this requirement is that a limitation must be "contained in"[82] (that is, it must be sourced in or must stem from) a law

78 *S v Manamela* (*Director-General of Justice intervening*):par. 34.
79 *S v Manamela* (*Director-General of Justice intervening*):par. 34.
80 *Mistry v Interim Medical and Dental Council of SA*:par. 30.
81 De Vos & Freedman (eds) *et al* 2014: 361-362. For a general discussion, see van der Vyver 1994: 47.
82 The Court, in *Hoffmann v South African Airways* 2001 1 SA 1 (CC):par. 24, refers to a "measure complained of … *contained in* a law of general application". (my emphasis)

that applies generally and impersonally to all persons (and thus not only to a specific individual or group of persons).[83] Compliance herewith is determined objectively. The question that begs asking is: Does the *TAA* qualify as a "law of general application" for purposes of sec. 36(1) of the *Constitution*? This issue will now be explored.

Constitutional supremacy renders every "law" contemplated by sec. 36(1) to be subject to direct control by constitutional imperatives.[84] The *Constitution* does not define the term "law" for its purposes. This raises the question as to whether the definition of this word in sec. 2 of the *Interpretation Act*[85] applies to sec. 36(1)? Section 2 of this *Act* defines "law" to mean "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". When a word is statutorily defined, that meaning prevails over its ordinary, dictionary meaning, unless there are compelling reasons to deviate from the legislated meaning.[86] Since the definition of "law" expressly indicates that it applies to an "enactment having the force of law", applying the trite principles applicable to the interpretation of statutory words,[87] it is submitted that, in the context of the *Interpretation Act*, this term excludes so-called judge-made legal rules.[88] Whilst such rules would, technically, have "the force of law", they are clearly not in the nature of "enactments" passed by a legislative body or Cabinet Minister or other authority exercising power to make legally binding rules.

The opening words of sec. 2 of the *Interpretation Act* expressly state that the definitions therein apply, unless the context of a word or term indicates otherwise. This exception applies to sec. 36(1) of the *Constitution*, because the definition of "law" in the *Interpretation Act* does not encompass the full ambit of "law" as utilised in sec. 36(1). In the latter setting, "law" is not confined to an "enactment having the force of law". Rather, "law" has a broader meaning, encompassing both enactments such as primary legislation and subordinate legislation, and non-enactments such as the common law and customary law rules.[89]

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83 De Vos & Freedman (eds) *et al.* 2014:360-361. Sec. 36(1) "includes law in the general sense of the legal system applicable to all" (such as, the corpus of law known as the law of contract). See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA):par. 17. Public policy and practices of an organ of state, such as SARS, are not "law of general application". See *Hoffmann v South African Airways*:par. 41.

84 The Court, in *Barkhuizen v Napier* 2007 5 SA 323 (CC):par. 15, held: "All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the Constitution and the values that underlie our Constitution."

85 *Interpretation Act* 33/1957.

86 *Liesching v S* 2017 4 BCLR 454 (CC):par. 33.

87 See *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society* 2020 2 SA 325 (CC):par. 18.

88 For example, in *South African Airways SOC v BDFM Publishers (Pty) Ltd* 2016 2 SA 561 (GJ):par. 45, Sutherland J refers to the common law right of a lawyer's client to assert legal professional privilege over confidential communication as "judge-made law".

89 *Midi Television (Pty) Ltd v Director of Public Prosecutions, WC* 2007 3 All SA 318 (SCA):par. 8.

Whilst the definition of "law" in the *Interpretation Act* does not determine the outer perimeters of the term "law", as used in sec. 36(1) of the *Constitution*, that definition is nevertheless useful to give some substance (or content) to "law" in the realm of sec. 36, as read holistically. For its purposes, to be valid, a "law" must pass the benchmarks of the rule of law.[90] Whether a "law" satisfies the benchmarks is determined objectively with reference to all pertinent facts applicable to the relevant "law". If it fails to comply, then it is not a valid "law" for the purposes of sec. 36(1) of the *Constitution*.[91]

The warrantless search and seizure powers of the SARS are "contained in" the *TAA*, a statute passed by Parliament. Viewed objectively, the *TAA* is original legislation that falls squarely within the concept of "law", as envisaged by sec. 36(1) of the *Constitution*. The *TAA*'s provisions have "general application" in that they do not target or single out a specific taxpayer, or class or group of taxpayers. In terms of sec. 4 of the *TAA*, its provisions apply universally to all taxpayers affected by tax administration occurring thereunder. Moreover, the *TAA* applies nationally throughout SA to every natural and juristic person qualifying as a taxpayer under a fiscal statute falling within the scope and ambit of a "tax Act" in relation to a "tax", each term being defined in the *TAA* (sec. 1).

Consequently, the *TAA* is, like the *Income Tax Act*[92] and the *Value-Added Tax Act*[93] that are applicable in SA,[94] a "law of general application" within the contemplation of sec. 36(1) of the *Constitution*. Therefore, to the extent that sec. 63 of the *TAA* infringes taxpayers' privacy, it satisfies the "in terms of law of general application" requirement under sec. 36(1).[95]

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90 Botha (2001:524) argues that "the rule of law requires government action to be based on … legal rules of general application". This is so because, as Botha contends, "the generality of law shields the individual from arbitrary exercises of power, renders government action calculable, and ensures the formal equality of all citizens". In this way, the impartiality of the exercises of state authority is secured.

91 Per O'Regan J (minority judgment) in *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC):par. 100 (and the authorities cited there at fn. 17).

92 *Income Tax Act* 58/1962.

93 *Value-Added Tax Act* 89/1991.

94 *Deutschmann NO v CSARS; Shelton v CSARS* 2000 2 SA 106 (E):124A recognises that these statutes are "law[s] of general application" under sec. 36(1) of the *Constitution*.

95 See *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 82; *Premier: Mpumalanga and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC):par. 42. See also Currie & De Waal 2014:161. Some academics (for example, De Ville 1995:275 and Cheadle 2020:30-38) contend that the phrase "law of general application" encompasses only laws and not conduct undertaken in terms thereof. However, other academics contend otherwise. See, for example, Woolman & Botha Original service 07-06:34-53 at fn. 3 who opine that rules, directives and guidelines issued by administrators in accordance with enabling legislation, qualify as "law of general application" if they satisfy the four rule of law criteria listed by the authors at 34-48.

6.2 Interpreting the term "limitation" in sec. 36(1) of the Constitution

Sec. 63 of the *TAA* read as a whole grants the SARS officials access to private and confidential information by way of searching a taxpayer's person, home and property, and by seizing a taxpayer's possessions and communications found at any place searched.[96] These powers raise the question as to whether a search and seizure under sec. 63 qualifies as a "limitation" on taxpayers' privacy within the meaning of "limitation" in sec. 36(1) of the *Constitution*. This calls for an interpretation of this term for purposes of sec. 36(1).

Currie and De Waal, correctly so, explain "limitation" with reference to its dictionary meaning. They point out that, grammatically, it is synonymous with "infringement". Therefore, so they contend, in sec. 36(1), "limitation" means a "justifiable infringement".[97] Other academics support this construction.[98] Using this accepted meaning, it is submitted that, for purposes of sec. 36(1), "limitation" contemplates a law that has the effect of curtailing (that is, restricting, impairing or encroaching on) the protected content, space or sphere of a fundamental right. It does not envisage a law that eviscerates or negates the right by leaving nothing of its substance (or essence) intact. If this occurs, then the measure would not be a limitation but rather a revocation, abolition or suppression of the right. Such a measure cannot pass constitutional muster. It would be incongruent with the values of a "*Rechtsstaat"* (constitutional state), as in SA.

As explained earlier, taxpayers' privacy includes the rights not to have "their property[99] searched" (sec. 14(*b*)), nor "their possessions[100] seized" (sec.

96 The *TAA* is a fiscal statute that must, like any other legislation, be interpreted grammatically, contextually and purposively. See *CSARS v Langholm Farms (Pty) Ltd* [2019] ZASCA 163 (29 November 2019):par. 11.

97 Currie & De Waal 2014:151.

98 See, for example, De Vos & Freedman (eds) *et al*. (2014:785) who write: "When law or conduct infringes on one or more of the rights protected in the Bill of Rights, this is called a limitation of the right. A limitation can be justified in terms of section 36 (and is then constitutionally valid) or is unjustified (and is then unconstitutional)."

99 For the meaning of 'property' in a constitutional sense, see *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 6 SA 638 (SCA):par. 17; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC):par. 16; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC):paras. 37-55.

100 Possession is a "subset of the right to property" (*Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC):par. 9). Thus, if the SARS seizes property in violation of the principle of legality, then it commits a form of self-help prohibited under the rule of law. See *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC):paras. 74-75. This would entitle the despoiled person to the remedy, for example, under sec. 66 of the *TAA*, alternatively the so-called *mandament van spolie*. The latter is a common law remedy expressed in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The Court, in *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC):par. 10, held: "The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own

14(c)). The *Constitution* does not define the terms "searched" and "seized" as used in secs. 14(*b*) and (*c*). Case law has also not defined these terms for purposes of this constitutional setting. The question of what is a "search" and "seizure" is a factual issue to be answered in each case by way of a common-sense approach, taking into account the ordinary, natural, dictionary meanings of these words.[101]

A "search" is characterised as "any act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on or upon such person, container or premises".[102] This description is consonant with sec. 14 of the *Constitution* that refers to the search of a physical being ("person"), territory ("home") and "property". When determining if an act is a search for constitutional purposes, relevant considerations ought to include its underlying aim or purpose;[103] the degree of intrusion permitted by the relevant law;[104] whether entry, observation and removal are authorised, and the affected person's degree of privacy expectation.[105]

"Seizure" is not a word or term of art.[106] Rather, it implies "a forcible deprivation of possession".[107] Put differently, a seizure entails the act of taking possession of an article discovered and its detention.[108] Accordingly, an essential distinguishing feature of a seizure is the "effective deprivation of the owner's control".[109] Whether such deprivation occurs is a factual issue to be decided on a case-by-case basis. A seizure must, under sec. 61(8) of the *TAA*, be for investigative purposes regarding non-compliance with a "tax Act" (as defined) or the commission of an offence or be justified by an intention on the part of the SARS to use the seized property in subsequent civil or criminal proceedings.[110]

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hands and by inducing them to follow due process."

101 Since the *BOR* applies both vertically and horizontally, searches and seizures are, for constitutional purposes, not limited in their scope to governmental invasions of fundamental rights, as in, for example, the USA. See McQuoid-Mason 2000:251.

102 Basdeo 2009:309. See also *R v Jefferies* 1994 1 NZLR 290 (CA):300.

103 In accordance with sec. 60(2)(*a*) and sec. 63(2)(*b*) of the *TAA*, a warrantless search conducted by SARS is aimed at ascertaining facts that would prove the SARS' allegation that a taxpayer failed to comply with a duty or committed an offence.

104 Sopinka J, in *Baron v Canada* 1993 13 CRR (2nd) 65 (SCC):84-85, captures the invasiveness of a search concisely as follows: "Physical search of private premises (I mean private in the sense of private property, regardless of whether the public is permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity."

105 Gupta 2013:226-235.

106 *Rudolph v CIR* 1996 4 SA 552 (CC):par. 11.

107 *Green v Commissioner of Customs and Excise* 1941 WLD 128:133; *Naidoo v CIR* 58 SATC 251:260. The Canadian Supreme Court, in *R v Dyment*:431, defines the essence of a "seizure" to be the "taking of a thing from a person by a public authority without that person's consent".

108 Basdeo 2009:312 (and the authorities cited there).

109 *Rudolph v CIR*:par. 11.

110 Sec. 61(8) reads: "If the SARS official seizes relevant material, the official must

Searches and seizures are, by their nature, drastic invasions of privacy.[111] In accordance with sec. 63(1) read with secs. 61(3) and (5) of the *TAA*, the following powers may be exercised when carrying out a warrantless search:[112]

> to "open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material"[113] (sec. 61(3)(*a*));
>
> to "seize any relevant material" (sec. 61(3)(*b*));
>
> to "seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required" (sec. 61(3)(*c*));
>
> to "make extracts from or copies of relevant material, and require from a person an explanation of relevant material" (sec. 61(3)(*d*));
>
> if the premises is a vessel, aircraft or vehicle, to "stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act" (sec. 61(3)(*e*)); and
>
> to "search a person [found at the premises] if the official is of the same gender as the person being searched" (sec. 61(5)).

Accordingly, SARS officials are, during a search, empowered to open "anything" and scour through personal possessions and private communications of whatsoever nature found at the premises where the search is conducted. They

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ensure that the relevant material seized is preserved and retained until it is no longer required for – (a) the investigation into the non-compliance or the offence described under section 60 (1) (a); or (b) the conclusion of any legal proceedings under a tax Act or criminal proceedings in which it is required to be used."

111 *Mistry v Interim Medical and Dental Council of SA*:par. 25; *Platinum Asset Management (Pty) Ltd v Financial Services Board; Anglo Rand Capital House (Pty) Ltd v Financial Services Board*:par. 127 (and the authorities cited there).

112 Powers to search ought to be sufficiently circumscribed as regards the timing, place and scope thereof. This is so, because overbreadth must be avoided since it creates problems. First, overbreadth causes a failure to inform an occupier of the limits of a search. Secondly, overbreadth may leave an inspector without sufficient guidelines in accordance with which to conduct the search within legal limits. Thirdly, overbreadth permits greater privacy intrusions that extend beyond circumstances where the reasonable expectation of privacy is low, to situations where the reasonable expectation of privacy is high. See *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC):par. 71.

113 The term "relevant material" is defined in the *TAA*:sec. 1 to mean "any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3". The *TAA*:sec. 1 defines "information" as including "information generated, recorded, sent, received, stored or displayed by any means"; defines "thing" as including "a corporeal or incorporeal thing", and defines "document" to mean "anything that contains a written, sound or pictorial record, or other record of information, whether in physical or electronic form". The latter definition includes "electronic communication" as per the *Electronic Communications and Transactions Act* 25/2002 discussed in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash* 2015 2 SA 118 (SCA). For a discussion of the term "relevant material", see Moosa 2020:21.

are also empowered to conduct a body search to find material in, for example, a jacket or pants pocket, and they may also copy material as well as remove and retain possession of computers and storage devices such as iPhones, smart phones and cell phones. The exercise of search and seizure powers under the *TAA* can cause severe hardship, since they "frequently result in criminal or civil proceedings"[114] and infringe the affected persons' rights to dignity, privacy, freedom, bodily security and/or property.[115] Parliament's recognition that searches and seizures encroach on privacy is clear from the prohibition in sec. 63(4) of the *TAA* against a SARS officer, generally, entering a dwelling-house or domestic premises without the occupant's consent.

7. PRELIMINARY CONCLUSION

Part One of this article has shown the search and seizure powers conferred by sec. 63 of the *TAA* to qualify as searches and seizures envisaged by secs. 14(*b*) and (*c*) of the *Constitution*. This view is reinforced by sec. 63 (read with sec. 61(3) of the *TAA*), using the same terminology as in sec. 14, namely "search" and "seize". Therefore, the powers of search and seizure conferred by sec. 63 of the *TAA* have been shown to encroach on interests embedded in sec. 14. As such, the powers in question are, individually and collectively, a "limitation" for purposes of the threshold phase of enquiry into the (im) permissible limitation of a right contained in the *BOR* in terms of sec. 36(1) of the *Constitution*. This conclusion triggers the second ("justification") enquiry in terms of that provision.

The application of this second stage in the limitation analysis will be considered in Part Two of this article. For present purposes, it will suffice to state that the limitation occasioned by exercising the powers conferred by sec. 63 of the *TAA* will offend the prescripts of sec. 36(1) if they infringe a taxpayer's right to privacy by narrowing or abridging the reach of this right to a degree (or in a manner) that is disproportionate to the intended governmental objective or public purpose (or interest) that sec. 63 is designed to advance. If so, the relevant provision(s) in sec. 63 would be susceptible to a declaration of invalidity under sec. 172(1)(*a*) of the *Constitution* "to the extent of its inconsistency" with the *BOR*. This is so, because the erosion of taxpayers' privacy would warrant a conclusion that it is unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom.

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114 *Ferucci v CSARS* 2002 6 SA 219 (C):227D-E. See also Mosupa 2001:317.
115 An encroachment on privacy by the State harms social values integral to a democratic society. See Cockfield 2007:43-49.

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