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

## SUMMARY

Sec. 63 of the *Tax Administration Act* 28 of 2011 (TAA) grants officials of the South African Revenue Service (SARS) access to taxpayers' private and confidential information by, 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 (see *Journal for Juridical Science* 2021(1)) argued 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 sec. 63(1) and (4) limits a taxpayer's constitutional right to privacy as entrenched in sec. 14 of the *Constitution*. In this Part Two of the article, it will be hypothesised that, although the search and seizure powers in sec. 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*, because of the justifiability of the limitation imposed on the right to privacy by these provisions.

## 8. THE SECOND ("JUSTIFICATION") PHASE OF THE ENQUIRY UNDER THE "LIMITATION CLAUSE" AS CONTAINED IN SEC. 36(1) OF THE CONSTITUTION<sup>1</sup>

### 8.1 Is a warrantless search and seizure antithetical to democratic values?

As shown in Part One of this article, sec. 63 of the *Tax Administration Act*<sup>2</sup> (hereafter, the "TAA") imbues the South African Revenue Service (SARS) with the power to conduct warrantless searches and seizures at taxpayers' premises for purposes of gathering information relevant to tax administration. Since "the substantive enjoyment



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1 *Constitution of the Republic of South Africa*, 1996 (hereafter, "the *Constitution*").  
2 *Tax Administration Act* 28/2011.

of rights has a high premium”,<sup>3</sup> sec. 8(1) of the *Constitution* stipulates that the Bill of Rights<sup>4</sup> “applies to all law” (such as the TAA) and “binds ... all organs of state” (such as the SARS). Therefore, the exercise of the powers in sec. 63 must occur in a manner respectful of a taxpayer and his/her affected fundamental rights such as to dignity (sec. 10), to freedom and security of the person (sec. 12), to privacy (sec. 14), and to property (sec. 25). This duty accords also with sec. 63(3), read with sec. 61(5) of the TAA, that obliges the SARS to effect searches and seizures “with strict regard for decency and order”.

Although the exercise of the powers in sec. 63 “potentially invades the privacy and dignity of the subject of the process, the process itself is permissible and, indeed, essential in a constitutional state such as ours if conducted strictly in accordance with law”.<sup>5</sup> A case law survey reveals that the search and seizure powers granted in sec. 63 of the TAA align with similar powers granted to tax authorities in other democracies such as New Zealand and Australia.<sup>6</sup> Accordingly, for purposes of sec. 36(1) of the *Constitution*, the general notion of a warrantless search and seizure is consistent with the values of an open and democratic society based on human dignity, equality and freedom.<sup>7</sup>

The inherent dangers in the power to conduct warrantless searches and seizures lie in that, first, such acts occur without prior oversight by an “impartial arbiter”<sup>8</sup> and without post-judicial supervision by way of an *ex post facto* validation. Secondly, a SARS officer exercises the administrative power in sec. 63 of the TAA in circumstances where s/he is the proverbial judge, jury and executioner acting in the SARS’ own cause. This is so, because the SARS is the taxpayer’s creditor for any unpaid tax and is a potential creditor for any tax debt that may be imposed based on information uncovered in a warrantless search and/or seizure of property.<sup>9</sup>

Therefore, the powers in sec. 63 are not exercised for the benefit of a disinterested third party, but for a party with a direct financial interest in the

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3 *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC):par. 44.

4 Chapter 2 of the *Constitution*.

5 *Huang v CSARS: In re CSARS v Huang*:par. 16.

6 See, for example, *R v McKinlay Transport Ltd* 47 CRR 151 (SCC); *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649; *New Zealand Stock Exchange and National Bank of New Zealand v CIR* (1991) 13 NZTC 8, 147; *United States v BDO Seidman LLP*, No. 02 C 4822, 2005 WL 742642.

7 *Magajane v Chairperson, North West Gambling Board* 2006 5 SA 250 (CC):par. 75.

8 *Park-Ross v Director: Office for Serious Economic Offences* 1995 2 SA 148 (C):172.

9 The *Tax Administration Act* 28/2011:sec. 169(3) reads: “SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt.”

outcome of a search and seizure.<sup>10</sup> This shows that there is a conflict of interests that creates tension between the SARS and the taxpayer subjected to the warrantless act.<sup>11</sup> The validity of sec. 63 is also unaffected by the possibility that the powers therein may be abused (such as for a fishing expedition), or exercised in a manner that causes a gross violation of rights.<sup>12</sup> All public power, including actions taken under sec. 63, are subject to constitutional control.<sup>13</sup> If the SARS abuses the power to conduct a warrantless search and seizure, then the legal remedy for taxpayers lies in the *Constitution* and not in the invalidation of the empowering provision in sec. 63 of the *TAA*.

If the research question posed in this two-part article is answered in the negative, that is, if the powers of warrantless entry, search and seizure in sec. 63 indeed pass constitutional muster, then an aggrieved taxpayer may use sec. 6 of the *Promotion of Administrative Justice Act*<sup>14</sup> (hereafter, the *PAJA*) to seek a judicial review of the decision to resort to the exercise of the powers in sec. 63, or challenge the legality of the way in which the SARS carried out the particular search and/or seizure. In any such review, the taxpayer would invoke his/her right to lawful, reasonable and/or procedurally fair administrative action.<sup>15</sup> Each case would be decided on its own facts and merits.<sup>16</sup>

In a democracy, warrantless searches and seizures ought only to occur in exceptional cases.<sup>17</sup> Thus, an application for a search warrant under sec. 59 of the *TAA* ought to be the norm in practice. The powers in sec. 63 should be used sparingly – only in those, probably rare, instances that truly demand the use of such drastic measures. For this reason, in the second (“justification”) phase of the test in sec. 36(1) of the *Constitution*, the SARS need not show that a warrantless search and seizure is, in and of itself, permissible under

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10 Bovijn (2011:114) contends that the warrantless search and seizure provisions in the *TAA* lack “sufficient checks and balances” since the SARS, “when contemplating a warrantless search and seizure, makes its own determination of whether the reasonable grounds criterion is satisfied”. Bovijn contends further that “SARS is required to objectively determine the reasonableness of its own view of the matter, which can give rise to difficulties”.

11 The *Tax Administration Act* 28/2011:sec. 7 deals with conflicts of interest arising in tax administration. However, its provisions do not apply to conflicts of interest arising during warrantless searches.

12 For example, a taxpayer’s premises may be raided, and the belongings ransacked. This is impermissible. See *Goqwana v Minister of Safety* NO 2016 1 All SA 629 (SCA):par. 19; *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 2 SA 385 (SCA):par. 71.

13 *Limpopo Province v Speaker, Limpopo Provincial Legislature* 2011 6 SA 396 (CC):paras. 20-22; *First National Bank of SA Ltd t/a Wesbank v CSARS* 2002 4 SA 768 (CC):par. 31.

14 *Promotion of Administrative Justice Act* 3/2000.

15 *Promotion of Administrative Justice Act*:sec. 3, read with the *Constitution*:sec. 33(1).

16 *Huang v CSARS: In re CSARS v Huang*:par. 13.

17 *Magajane v Chairperson, North West Gambling Board*:par. 74.

the *Constitution*.<sup>18</sup> To pass muster, it need merely show that *the limitation* on taxpayers' privacy under sec. 63 is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" having regard to the considerations enumerated in sec. 36(1)(a)-(e). Since the nature of privacy has, for purposes of subsec. (1)(a), already been discussed in Part One of this article, the ensuing discussion will analyse the limitation in sec. 63 of the *TAA* through the prism of sec. 36(1)(b)-(e) of the *Constitution*.

## 8.2 Section 36(1)(b) applied to sec. 63 of the *TAA*

As stated in Part One of this article, when evaluating the validity of the limitations on taxpayers' privacy under sec. 63 of the *TAA*, sec. 36(1)(b) of the *Constitution* requires that consideration be given to the importance of the limitation's purpose. The "mere existence of a legitimate power or legal competence is not the purpose that must be noted for balancing purposes; the importance of the purposes for which such powers and competences are exercised must be determined".<sup>19</sup> In sec. 36(1)(b), "purpose" includes "the benefit that can be achieved by limiting the right and the importance of achieving that benefit in an 'open and democratic society based on human dignity, equality and freedom'".<sup>20</sup>

Applying sec. 36(1)(b), the limitation of privacy permitted by sec. 63 will not be regarded as reasonable and justifiable, unless a substantial State interest or legitimate public purpose justifies it.<sup>21</sup> Assessing the importance of the limitation's purpose in a tax-administration setting involves a normative evaluation of the abstract weight to be attached to the interests and rights protected or promoted thereby. Revenue yielded from taxation serves to enhance the fulfilment of constitutional aims, in the sense that taxes enable the State, *inter alia*, to comply with its duties arising from sec. 7(2) of the *Constitution*.<sup>22</sup> Accordingly, tax collection is geared to ensuring the availability of adequate resources in the public treasury for public benefit, or for use in

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18 Apart from the *TAA*, warrantless searches and/or seizures are provided in various other statutes. These include the *Criminal Procedure Act* 51/177 (sec. 22); *Anti-Personnel Mines Prohibition Act* 36/2003 (sec. 19); *Civil Aviation Act* 13/2009 (sec. 34(1)); *Competition Act* 89/1998 (sec. 47); *Counterfeit Goods Act* 37/1997 (sec. 5(2)); *Explosives Act* 15/2003 (sec. 6(6)); *Firearms Control Act* 60/2000 (sec. 115(4)); *Health Professions Act* 56/1974 (sec. 41A 6(h)); *Immigration Act* 13/2002 (sec. 33(9)); *Inspection of Financial Institutions Act* 80/1998 (sec. 4); *International Trade Administration Act* 71/2002 (secs. 44, 45); *National Forest Act* 84/1998 (secs. 67, 68); *National Prosecuting Authority Act* 32/1998 (sec. 29(10)); *National Veld and Forest Fire Act* 101/1998 (sec. 27); *Nuclear Energy Act* 46/1999 (sec. 38), and the *South African Police Service Act* 68/1995 (sec. 13(6)).

19 Rautenbach 2014:2255.

20 Rautenbach 2014:2255.

21 *Magajane v Chairperson, North West Gambling Board*:par. 65.

22 Sec. 7(2) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." For a useful outline of the general purpose of tax, see *Gaertner v Minister of Finance* 2014 1 SA 442 (CC):paras. 50-55.

the public interest.<sup>23</sup> In these circumstances, a compelling public need exists to grant the SARS broad information-gathering powers that would enable it to manage tax collection more efficiently and effectively for the benefit of the National Revenue Fund. The administrative powers in sec. 63 are aimed at advancing this public purpose of national importance.

Although the aforementioned pursuit furthers a legitimate governmental purpose, each provision in sec. 63 of the TAA remains subject to scrutiny under sec. 36(1) of the *Constitution* for rationality and, thus, validity.<sup>24</sup> Therefore, a finding that a search under sec. 63(1) or (4) is valid or invalid, as the case may be, in one context (such as at a business premises) cannot without more be superimposed onto another context (such as a residence). Each provision must be tested for validity in its contextual setting.<sup>25</sup>

### 8.3 Section 36(1)(d) applied to sec. 63 of the TAA

The consideration in sec. 36(1)(b) of the *Constitution* (that is, the importance of a limitation's purpose) is closely related to that in sec. 36(1)(d) (that is, the correlation between a limitation and its purpose). Thus, the latter will be discussed before sec. 36(1)(c). The limitations of privacy permitted by sec. 63 of the TAA will not, for the purposes of sec. 36(1)(d), be regarded as reasonable and justifiable, unless a strong causal link exists between, on the one hand, the purpose sought to be achieved by the TAA, as stated in sec. 2 thereof (see quote below), and the limitations permitted by sec. 63, on the other.<sup>26</sup> The greater the extent of a limitation, discussed below with reference to sec. 36(1)(c), the more compelling its purpose must be and the closer the relationship must also be between the means chosen in sec. 63 and the ends to be attained.<sup>27</sup>

The TAA is unmistakably aimed at advancing the public interest. As is evident from its long title<sup>28</sup> and its purpose clause in sec. 2 thereof, the kernel of its aims is ensuring "the effective and efficient collection of tax".

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23 *CSARS v Africa Cash & Carry (Pty) Ltd* 2015 77 SATC 242 (GNP):par. 19.

24 *United Democratic Movement v President of the RSA* 2002 11 BCLR 1179 (CC):par. 55.

25 A case law survey reveals that the following cases involved constitutional challenges of statutory provisions allowing warrantless searches: *Park-Ross v Director: Office for Serious Economic Offences*; *Mistry v Interim Medical and Dental Council of SA* 1998 4 SA 1127 (CC); *Platinum Asset Management (Pty) Ltd v Financial Services Board*; *Anglo Rand Capital House (Pty) Ltd v Financial Services Board* 2006 4 SA 73 (W); *Magajane v Chairperson, North West Gambling Board*; *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* 2014 3 SA 106 (CC), and *Gaertner v Minister of Finance*. See also Mosupa 2001:317; Basdeo 2009:307.

26 *Magajane v Chairperson, North West Gambling Board*:par. 72.

27 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC):par. 35.

28 For the use of a statute's long title as an aid in interpretation, see *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 2 SA 181 (CC):par. 43.

This purpose is reconcilable with the principle in the *Constitution* (sec. 195(1)) requiring efficiency in public administration and it is, furthermore, consistent with the *South African Revenue Service Act*,<sup>29</sup> stating that the SARS aims to ensure the “efficient and effective collection of revenue” (sec. 3).

Section 2 of the *TAA* expresses the statute’s objectives as follows:

The purpose of this Act is to ensure the effective and efficient collection of tax by

- a. aligning the administration of the tax Acts to the extent practically possible;
- b. prescribing the rights and obligations of taxpayers<sup>30</sup> and other persons to whom this Act applies;
- c. prescribing the powers and duties of persons engaged in the administration of a tax Act, and
- d. generally giving effect to the objects and purposes of tax administration.

Section 2(c) is important to the powers prescribed in sec. 63(1) and (4) coupled with the associated procedural duties imposed by sec. 63(2), (3), (4) and (5).<sup>31</sup> Sec. 63 prescribes powers and duties for persons engaged in “administration of a tax Act” within the meaning of this phrase per its definition in sec. 3(2). Accordingly, sec. 63 cannot be read in isolation from sec. 3(2). The latter gives form and substance to tax administration by crystallising its different parts.

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

30 Under the *TAA*, taxpayers’ duties include: (i) to register for tax (sec. 22); (ii) to communicate any change of particulars (sec. 23); (iii) to be honest by submitting “full and true” and “accurate” returns (secs. 25, 27, 96(3)); (iv) to submit a certificate or statement supporting financial statements or accounts (sec. 28); (v) to keep records for certain prescribed periods (secs. 29, 30, 31, 32); (vi) to make a translation of a document when called upon to do so (sec. 33(1)); (vii) to disclose information concerning a reportable arrangement (sec. 38); (viii) to attend an interview with the SARS and be subjected to questioning (sec. 47); (ix) to attend and answer questions at an inquiry even if the answers are incriminating (sec. 57); (x) not to obstruct or refuse reasonable assistance to the SARS officials executing a search and seizure warrant (sec. 61(7)); (xi) to disclose incriminating information in returns (sec. 72); (xii) to prove an entitlement to a deduction or exemption (sec. 102(1)), and (xiii) to give security for tax liability when called upon to do so by the SARS (sec. 161).

31 Duties imposed by sec. 63 include: (i) to carry out a search with strict regard for decency and order (sec. 63(3), read with 61(5)); (ii) prior to a search, to inform the owner or person in control of the premises that the search takes place under sec. 63 and also the factual basis that led to the search (sec. 63(2)); (iii) to impart the information prescribed in sec. 63(2) as soon as is reasonably possible after the search is executed if the owner or person in control of the premises was absent before the search (sec. 63(5)), and (iv) not to enter a dwelling-house or domestic premises without the occupant’s consent, except in relation to any part used for a trade purpose (sec. 63(4)).

As regards sec. 63 of the TAA, the following are the relevant components of tax administration as distilled from sec. 3(2):

- to obtain full information; to ascertain whether a person has filed or submitted correct returns, information or documents required by a tax Act (as defined in sec. 1);
- to establish a person's identity for purposes of determining a tax liability; to investigate whether a tax-related offence has been committed under a tax Act and, if so, to lay criminal charges and provide assistance for the investigation and prosecution of tax offences or related common law offences, and
- to enforce the SARS' powers and duties under a tax Act to ensure tax compliance.

Accordingly, the powers of warrantless search and seizure conferred by sec. 63 must be understood in context of the wider process of information gathering and sharing aimed at ensuring efficient and effective tax administration in a much broader sense than merely tax assessment and collection. It is against this backdrop that the limitation on taxpayers' privacy by sec. 63 must be viewed.

A limitation on the entrenched right to privacy would be invalid if its purpose is incongruous with the *Constitution*.<sup>32</sup> This is part of the principle of legality that is engrained in the rule of law. It requires a limitation to be rationally related to achieving or furthering a legitimate governmental purpose or State interest that serves a broader public interest for public benefit.<sup>33</sup> A taxpayer may successfully challenge the validity of a limitation on privacy authorised by sec. 63 of the TAA, by showing either that an impugned limitation lacks a legitimate purpose or State interest, or that there is no rational connection between the scheme adopted by the legislature in sec. 63 and the advancement of the governmental purpose or State interest relied on by the SARS (or other State party) in relation to that legislative provision.<sup>34</sup>

A rationality review is an objective enquiry.<sup>35</sup> In any such enquiry, it need not be shown that the provision under consideration is reasonable or appropriate.<sup>36</sup> A finding of rationality must be reasonably supported by concrete evidence.<sup>37</sup> In relation to sec. 63, the SARS or other State party bears the onus to show that a sufficient causal nexus exists between a warrantless search and seizure, on the one hand, and the advancement of a legitimate

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32 *Du Plessis v De Klerk* 1996 3 SA 850 (CC);par. 123.

33 *Minister of Home Affairs v Scalabrini* 2013 6 SA 421 (SCA);par. 69. Hefer JA, in *Cactus Investments (Pty) Ltd v CIR* 1999 1 SA 315 (SCA);322J-323A, commented that "it is often said ... that there is no equity in tax legislation (nor, I would add, complete rationality)".

34 *Sarrahwitz v Martiz* NO 2015 4 SA 491 (CC);par. 51.

35 *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC);paras. 85-86.

36 *New National Party of SA v Government of the RSA* 1999 3 SA 191 (CC);par. 24.

37 Erasmus 2013:55 (and the authorities cited there at fn. 143 and fn. 144).

purpose or State interest in the “administration of a tax Act”, as defined in sec. 3(2) of the TAA, on the other. Without such nexus, the limitations in sec. 63 would not pass muster.<sup>38</sup>

It is submitted that the powers conferred by sec. 63 are rationally linked to the attainment of the aims underpinning the TAA, as explained earlier. The powers granted by sec. 63 are key weapons required to be included in the SARS arsenal to combat tax minimisation that impedes the government’s ability to fulfil its mandate, on the one hand, and to ensure tax compliance to thereby raise a constant stream of revenue, on the other. These aims are congruent with the values of a constitutional democracy and are also of such importance and incontestable necessity that they diminish the invasiveness of a search or seizure occurring under sec. 63.<sup>39</sup>

#### 8.4 Section 36(1)(c) applied to sec. 63 of the TAA

For purposes of sec. 36(1)(c) of the *Constitution*, consideration must be given to the nature and extent of the limitation on privacy when the powers in sec. 63, read with sec. 61(3), are exercised. The requirement in sec. 36(1)(c) refers, first, to information on the limitation’s intensity (that is, how intrusive it is in respect of the conduct and interests protected by privacy).<sup>40</sup> Secondly, it “relates to the methods and instruments used to limit the right”.<sup>41</sup> The extent of a limitation must be weighed against its purpose, importance and effect: if, to an extent that meets the standard set by sec. 36(1), the benefit flowing from allowing an intrusion on taxpayers’ privacy outweighs the loss that the intrusion will entail, then the validity of the intrusion will be recognised.<sup>42</sup>

With regard to sec. 36(1)(c), consideration must be given to the timing, place, procedure and scope of a warrantless search and seizure operation, and to whether the powers in sec. 61(3) are “sufficiently circumscribed”<sup>43</sup> within constitutional bounds. It is to this aspect that attention will now be turned.

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38 Currie & De Waal (2014:304) contend: “In general, searches and seizures that invade privacy must be conducted in terms of legislation clearly defining the power to search and seize. They are only permissible to achieve compelling public objectives.” Bovijn (2011:114) submits that “the purpose of section 63 ... to curb tax evasion could outweigh the right to privacy in certain circumstances”.

39 See *Gaertner v Minister of Finance*:par. 56.

40 Rautenbach 2014:2255.

41 Rautenbach 2014:2256.

42 *Midi Television (Pty) Ltd v DPP (Western Cape)* 2007 3 All SA 318 (SCA):par. 11.

43 *Magajane v Chairperson, North West Gambling Board*:par. 71.



### 8.4.1 The timing of a warrantless search and seizure

The TAA does not regulate the timing of a warrantless search (such as, during business hours, or at reasonable times).<sup>44</sup> Thus, such operations may occur at any time, irrespective of the reasonableness of the hour and of the necessity to conduct a search at night. This places taxpayers at the mercy of SARS officials who have an unfettered discretion to decide to act, for example, in the dead of night, or at such other inopportune time without any justifiable reason for doing so, save that it is within the sole preserve of their power to do so. The absence of guidelines on the timing of a search has the undesirable effect that the process permitted by sec. 63 of the TAA entails a measure of arbitrariness.<sup>45</sup> This suggests that privacy is limited by sec. 63 in a manner inconsistent with the rule of law. However, this, on its own, ought not to justify its provisions being declared invalid. This would, however, be a basis for the setting aside of a particular warrantless search or seizure carried out at an unreasonable time.<sup>46</sup>

### 8.4.2 The location of a warrantless search and seizure

A warrantless search and seizure may occur at any “premises”.<sup>47</sup> Sec. 63(1)(b)(i) restricts this to places where a senior SARS official is, on reasonable grounds, satisfied that “relevant material [is] likely to be found”. In this context, “premises” is not confined to a place occupied, controlled, or owned by the taxpayer, or in which the taxpayer has an interest. It includes any place owned, occupied, or controlled by a third party at which relevant material may be found.<sup>48</sup>

A search with written consent envisaged by sec. 63(1)(a) is not subject to a just or good cause requirement of the nature encountered in sec. 63(1)(b)(i) referred to earlier. Therefore, a consensual search may occur at any premises in South Africa, irrespective of whether a senior SARS official believes that relevant material may be found there. The absence of a provision akin to that in sec. 63(1)(b)(i) does not result in sec. 63(1)(a) imposing a greater limitation of the right to privacy than that under sec. 63(1)(b). The invasiveness of sec. 63(1)(a) is tempered by the consent granted in terms thereof. Derogation

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44 The *Tax Administration Act 28/2011*:sec. 31 provides that “records, books of account and documents ... must at all reasonable times ... be open for inspection by a SARS official”. For provisions in other statutes that regulate the timing of a search, see *Gaertner v Minister of Finance*:par. 41.

45 ‘Arbitrary’ denotes “the absence of reason, or at the very least, the absence of a justifiable reason” (*Woolworths (Pty) Ltd v Whitehead* 2000 3 SA 529 (LAC):par. 128), or “caprice, or the exercise of the will instead of reason or principle; without a consideration of the merits” (*Johannesburg Liquor License Board v Kuhn* 1963 4 SA 666 (A):671).

46 *R v Inland Revenue Commissioners – ex parte Rossminster Ltd* 1980 AC 952:1001.

47 The *Tax Administration Act 28/2011*:sec. 1 defines “premises” as including “a building, aircraft, vehicle, vessel or place”.

48 Moosa 2016:367-369.

from a right to privacy that is duly and properly authorised would, generally speaking, be constitutionally defensible.

### 8.4.3 The scope of the powers exercisable at a warrantless search and seizure

The nature and extent of the powers exercisable at a warrantless search are outlined in Part One of this article at 6.2. The powers enumerated in sec. 61(3) (a)-(e), read with sec. 61(5), are broad-ranging and couched in wide terms. They license the search and seizure of an extensive array of persons and property. To this end, the following objective considerations are noteworthy:

- Sec. 61(3)(a) confers the power to open, remove and seize “anything which the official suspects to contain relevant material”. Grammatically, “anything” casts its subject widely so that, contextually, relevant material covers everything, including private papers and personal possessions. Similarly, sec. 61(3)(b) refers to the seizure of “any relevant material”. Contextually, “any” has an effect similar to “anything” used in sec. 61(3) (a). Furthermore, the suspicion referred to in sec. 61(3)(a) is not qualified by reference, for example, to a reasonable suspicion standard.<sup>49</sup> Thus, any suspicion, regardless of its reasonableness, would arguably suffice.
- The power conferred by sec. 61(3)(d) for a designated SARS official to seek “an explanation of relevant material” from “a person” at the premises is cast sufficiently broad to sustain an interpretation that anyone present may be questioned and is duty-bound to provide an explanation. This power is not expressly qualified by, for example, a requirement that the person questioned be someone reasonably suspected or believed to possess, or likely to possess, information about relevant material related to, or connected with an “alleged failure to comply with an obligation imposed under a tax Act or tax offence”.<sup>50</sup>
- In terms of sec. 61(5), a body search may be conducted in respect of “a person”. Linguistically, this means *any* person. Thus, sec. 61(5) is cast sufficiently broadly to sustain a construction that anyone at the premises may be searched. Affected persons would include the taxpayer, an employee, a family member, and anyone directly or indirectly associated with the taxpayer (such as a tax practitioner, accountant, lawyer, client, business partner, friend, visitor, guest, and service provider).

49 *Magajane v Chairperson, North West Gambling Board*:par. 87. Reasonableness is a norm adopted in sec. 8 of the Canadian Charter of Rights and Freedoms. It reads: “Everyone has the right to be secure against unreasonable search or seizure.”

50 For an example of a restrictive provision of the kind referred to, see *Park-Ross v Director: Office for Serious Economic Offences*:159H. The *Tax Administration Act 28/2011*:sec. 1 defines “tax offence” to mean “an offence in terms of a tax Act or any other offence involving – (a) fraud on SARS or on a SARS official relating to the administration of a tax Act; or (b) theft of monies due or paid to SARS for the benefit of the National Revenue Fund”.

The foregoing considerations suggest that, for purposes of sec. 36(1)(c) of the *Constitution*, the nature and extent of the powers exercisable at a warrantless search and seizure involve a high degree of invasiveness of privacy. In some respects, the powers concerned appear to be overly broad and appear not to be adequately circumscribed to limit a searcher's discretion as to the scope of a search with the potential to cause problems of the nature identified in *Magajane*,<sup>51</sup> namely: (i) persons adversely affected by a warrantless search and seizure would not be aware of the upper limits of the powers available at a search and seizure operation, and (ii) officials undertaking a search and seizure would not have sufficient guidelines with which to conduct any such operation within acceptable legal limits.

Generally, overbreadth in search and seizure powers would impermissibly result in a greater intrusion on privacy that would extend beyond those circumstances in which the reasonable expectation of privacy is low (such as at property used for commercial purposes) and would include situations where a privacy expectation is at its apex (such as in a dwelling). The ensuing discussion shows that, when other legally relevant factors are considered, the powers conferred by sec. 61(3) and (5) of the *TAA* are sufficiently circumscribed within constitutional limits so that an appropriate balance appears to be struck between the protection of taxpayers' rights during tax administration, on the one hand, and the legitimate public interest in the efficient and effective administration of tax, on the other.

The first consideration is sec. 63(3) of the *TAA*, which stipulates that the procedural guidelines in sec. 61(4)-(8) apply to warrantless search and seizure operations. For present purposes, there are several relevant ones. First, the SARS must prepare an inventory of all relevant material seized and provide a copy thereof to the owner or person in control of the premises from where the relevant material was seized.<sup>52</sup> Secondly, the SARS must conduct a search with strict regard for decency and order,<sup>53</sup> and no one may be searched by

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51 *Magajane v Chairperson, North West Gambling Board*:par. 71.

52 Sec. 61(4) provides that an inventory must be made "at the time that is reasonable under the circumstances". The practical effect of sec. 61(4) is that there is no obligation on the SARS to make an inventory at the same time as when it seizes property. The SARS may seize property without immediately issuing a receipt or other documentary proof of the property taken into its possession. This places affected taxpayers at a disadvantage because their property may be removed without the designated SARS officials disclosing the nature and extent of the things taken or providing written proof thereof. This creates room for disputes as to the property seized. This is a real concern, particularly because taxpayers and other affected persons would not be present when the SARS makes a belated inventory. If any such inventory is not received within a reasonable period after the seizure, then anyone with *locus standi* may apply to a competent court for an order compelling compliance within such period as may be determined by the court.

53 Generally, "with due regard" means "with proper consideration" (*Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 6 SA 638 (SCA):par. 15). Hence, in the context of sec. 61(5) of the *TAA*, the phrase "with strict regard for decency and order" ought to be construed to mean "with strict consideration for decency and order".

someone of the opposite gender. Thirdly, the SARS may, at any time, request such assistance from a police officer as may be reasonably necessary in the circumstances of a particular search. Fourthly, the SARS must preserve relevant material seized and may retain it until it is no longer required for its investigation, or for legal proceedings.

These procedural guidelines serve to ensure that the powers conferred by sec. 61(3) are not abused, and that every warrantless search and seizure operation occurs in an orderly, dignified, respectful, responsible, and rights-sensitive way that conforms with constitutional values. Their application would have the desirable effect of mitigating, to a considerable degree, the adverse impact that a search and seizure has on the privacy and other fundamental rights of taxpayers. Sec. 63(3), as read with sec. 61(4)-(8), serves to inform all affected persons of the rights enjoyed during a warrantless search and seizure exercise. This exemplifies compliance with a basic tenet of the rule of law, namely that the *TAA* ought to be drafted with such clarity as to enable taxpayers to be forewarned and aware of their rights during and after a search and seizure operation, and to permit SARS officials to determine the upper limits of their duties prior to, and during any such operation.<sup>54</sup>

The second consideration is the definition of “relevant material”,<sup>55</sup> as read with the duty in sec. 63(2)(b) to impart certain prescribed information. This is another indicator that the powers conferred by sec. 61(3)(a), (b), (c) and (d) are appreciably circumscribed. Sec. 61(3) empowers SARS officials to “seize any relevant material” and to open, remove, retain, and copy anything containing relevant material. The scope and ambit of such material (that is, information, documents, and things) is expressly confined by the definition of “relevant material” to that which “in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3”. Therefore, sec. 63(1), read with sec. 61(3) of the *TAA*, does not authorise the warrantless search and seizure of all “information”, nor of every “document” and “thing”. In other words, the SARS officials exercising the powers conferred by these provisions do not have *carte blanche* to search and seize anything that they deem fit. They may search and seize material “foreseeably relevant” to the administration of a tax Act as particularised in sec. 3(2)(a)-(i) (see in 8.3).<sup>56</sup>

Sec. 63(2)(b) imposes a procedural obligation, namely, before conducting a search, a SARS official must disclose to the owner or person in control of the premises the factual matrix forming the rationale (or “basis”) for the warrantless search, that is, the “alleged failure to comply with an obligation imposed under a tax Act or tax offence”. Therefore, when the definition of “relevant material” is understood and applied purposively in light of sec. 63(2)(b), it becomes clear that sec. 63(1), read with sec. 61(3) of the *TAA*, only

54 *President of the RSA v Hugo* 1997 4 SA 1 (CC):par. 102; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC):par. 58.

55 For a discussion of the term “relevant material”, see Moosa 2020:21. See also the references in fn. 106 in Part One of this article.

56 “Reasonable specificity” of material is a limiting standard used in the *Tax Administration Act* 28/2011:sec. 47(3).

permits the search and seizure of material connected or related to the actual reason or cause that precipitated the search in the first place. This softens the impact of sec. 63.

The powers in sec. 61(3) may not be used for fishing expeditions “in the hope of finding something ... that might in the sole judgment of those searching have evidentiary value”.<sup>57</sup> As a result, a search is impermissible if it is premised on a mere hope of possibly uncovering facts indicative of non-compliance with a tax Act in circumstances where, at the time of the search, SARS officials have no facts, or insufficient credible facts, to give rise to a reasonable suspicion of non-compliance.

The third consideration is sec. 61(5), which empowers SARS officials to “search a person”. However, sec. 61(5) does not expressly limit the categories of persons who may be searched. The starting point to interpreting this provision is to consider the plain, ordinary, grammatical meaning of “a person”.<sup>58</sup> A linguistic interpretation thereof would result in sec. 61(5) encompassing anyone found at the premises where a warrantless search occurs. Such a broad interpretation would expose any person at the premises to the risk of a search, not because of any connection to a tax offence or an alleged non-compliance with a tax Act, but simply because s/he has the misfortune of being present at the time and place of a search. A broad construction ought to be averted in favour of a narrower one, so that the reach of sec. 61(5) is circumscribed within reasonable limits, provided the latter interpretation advances the objectives of tax administration and does not have to be winkled out of contextual crevices through a strained reading of the text.<sup>59</sup>

When interpreting “a person” in sec. 61(5), consideration must also be given to the prescripts of sec. 39(2) of the *Constitution*, which stipulates that, when interpreting any legislation, every court “must promote the spirit, purport and objects” of the Bill of Rights. As a result, the meaning ascribed to “a person” must advance at least one identifiable value enshrined in the Bill of Rights.<sup>60</sup> The narrower interpretation of “a person” contended for in this instance promotes the protection of the dignity of innocent bystanders who are physically present at the place where a search is carried out under sec. 63 of the *TAA*. The stricter interpretation averts an invasion of their privacy through being subjected to a warrantless search and possible seizure of things.

Sec. 61(5) must also be interpreted purposively.<sup>61</sup> This requires the meaning of “a person” to promote the aims of sec. 63, read with sec. 3(2) of the *TAA*. In the context of sec. 61(5), “a person” ought to simply encompass someone who is reasonably suspected or believed to possess, or likely to possess, relevant material related to an alleged failure to comply with an

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57 *Ferucci v CSARS* 2002 6 SA 219 (C):231A 233C-D 235B-H.

58 *Chisuse v Director General, Department of Home Affairs* 2020 6 SA 14 (CC):par. 47.

59 *Chisuse v Director General, Department of Home Affairs*:par. 53.

60 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC):par. 72.

61 *Chisuse v Director General, Department of Home Affairs*:par. 51.

obligation under a tax Act or the commission of a tax offence, and who, on reasonable grounds, is suspected or believed to be involved in its “imminent removal or destruction” (sec. 63(1)(b)(i)).<sup>62</sup> This interpretation is reasonably capable of being sustained by the language used.<sup>63</sup>

The fourth consideration is sec. 66(1)(b) and (2), which renders the SARS liable for the costs of damage caused to property during a search and seizure operation. This underscores an implied duty on SARS officials to execute their functions under sec. 63 with reasonable care and the utmost regard for taxpayers’ property and proprietary interests. The imposition of these duties circumscribes, within acceptable limits, the exercise of the powers contained in sec. 61(4)-8).

## 8.5 Section 36(1)(e) of the *Constitution* applied to sec. 63 of the TAA

### 8.5.1 Legal principles applicable to determining the proportionality of means used

Sec. 36(1)(e) requires consideration of whether other suitable – but less intrusive and equally effective – constitutional means are available that would achieve the same or substantially similar outcomes to that sought by sec. 63. An affirmative answer would be a strong indicator of incompatibility between sec. 63 and the *Constitution*. Sec. 36(1)(e) “requires an empirical prognosis of the effectiveness of potential alternative measures”.<sup>64</sup> This involves a proportionality review.<sup>65</sup> In a constitutional democracy, the ends do not justify the means used to attain them.

In its widest sense, proportionality is a device serving to ensure reasonableness, fairness, and good administration, by obliging State action that infringes fundamental rights to be based on rational or fair grounds.<sup>66</sup> This is so because a fundamental right may not be impaired more than is reasonably necessary for purposes of advancing a public benefit. On the other hand, proportionality in its narrow sense entails an impairment of a right in circumstances where the harm caused is proportional to the State’s gain from furthering its intended goal.<sup>67</sup> In this context, reasonable and justifiable would entail that a limitation be sensible and judicious in the sense of being appropriate to achieve a specific or defined aim. Moreover, it would require

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62 For a similar view as espoused in this instance, see *Ferucci v CSARS*:232D-E.

63 *Public Protector v CSARS* 2021 5 BCLR 522 (CC):par. 24.

64 Petersen 2014:405.

65 *Christian Education SA v Minister of Education* 2000 4 SA 757 (CC):par. 30. For a detailed discussion of proportionality, see Steiner 2013:23-58; Slade 2013:210-214.

66 Blaauw-Wolf & Wolf 1996:289-291.

67 Rautenbach 2014:2234.

that any such “object must not be discordant with the principles integral to a free and democratic society”.<sup>68</sup>

A limitation ought to be commensurate with its intended benefit. In essence, proportionality, under sec. 36(1)(e), entails testing the validity of a limitation of a fundamental right through the lens of competing rights, values, and interests. A delicate balancing must occur on a principled basis between competing values and interests that underlie an open, democratic society, on the one hand, and the fundamental rights of an affected person, on the other. The aim of the exercise is to “determine who should win”<sup>69</sup> (that is, public purpose or private right). This weighing is the centrepiece of the limitation analysis.<sup>70</sup> In any such exercise, extreme positions cannot be taken “which end up setting the irresistible force of democracy and general law enforcement against the immovable object of constitutionalism and [the] protection of fundamental rights”.<sup>71</sup>

The balancing of contrasting legally relevant considerations aims to ensure maximum harmonisation between competing rights, values, and interests so as to determine whether a limitation is “reasonable and justifiable” within the meaning of these words in the context of sec. 36(1). O’Regan J, in *S v Bhulwana*; *S v Gwadiso*,<sup>72</sup> usefully summed up the process involved in the balancing exercise as follows:

- a. In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

### 8.5.2 Proportionality applied to the exception in sec. 63(4) of the TAA

Sec. 63(4) contains a general prohibition against a SARS official entering a dwelling-house or domestic premises without consent of an occupant, except such part thereof used for purposes of a trade. Although entry into, and search of a residence is a substantial inroad into the privacy of the taxpayer and other occupants thereof,<sup>73</sup> the operation of the exception permitted by sec. 63(4)

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68 Blaauw-Wolf & Wolf 1996:292.

69 Rautenbach 2014:2231-2232.

70 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC):par. 54.

71 Per Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC):par. 155.

72 *S v Gwadiso* 1996 (1) SA 388 (CC):par. 18. See also Petersen 2014:408.

73 Sopinka J, in *Baron v Canada* 1993 13 CRR (2<sup>nd</sup>) 65 (SCC):84-85, usefully captures the invasiveness of a search as follows: “Physical search of private premises ... is the greatest intrusion of privacy short of a violation of bodily integrity.”

is confined to only certain parts of a residence. Therefore, the intrusion on privacy is appreciably minimised within determinable limits outlined in the *TAA*.

The context and purpose of searches are important considerations to be factored into the equation when evaluating if the exception in sec. 63(4) is impermissibly overbroad in its effect. The SARS requires access to all premises where a trade is conducted. This is necessary to advance legitimate fiscal interests beneficial to the *fiscus* and the public. To be effective, such access must be accompanied by powers that would enable SARS officials to gather valuable information that would assist in the execution of the service's administrative duties and the achievement of the broader aims of efficient and effective tax administration.<sup>74</sup>

A consideration pointing to the exception in sec. 63(4) not being impermissibly overbroad in its effect is the absence of a power in the hands of SARS officials to use force to gain entry to premises (such as by breaking a door or cracking open a window). The SARS is a creation of statute. As such, it is imbued with only such powers as are conferred on it by law.<sup>75</sup> The same principle applies to senior SARS officials, a creation of the *TAA*. By virtue of sec. 63(3), read with sec. 61(6) of the *TAA*, a SARS official may request assistance from a police officer to gain entry to a residence. However, the *TAA* does not authorise a police officer to use force when providing any form of assistance.

Adopting a purposive interpretation to the exception catered for in sec. 63(4) has the effect that a SARS official may enter a residence without the occupant's consent in circumstances where this is intended to enable the relevant official to use an exclusively domestic area as a point of entry or thoroughfare to access that part of a residence used for trading purposes. Although this interpretation permits the exception to have a broad application, it is not, for the ensuing practical, common sense reasons, impermissibly overly broad in its effect.

An owner or other person in control of property determines the physical layout of a dwelling-house or domestic premises, including demarcating that part used for trading. Thus, if a home is designed in such a way that access to a trading area is dependent on entry first being gained to a non-trading area, then, in such event, a purposive interpretation of sec. 63(4) favours granting SARS officials rights of access to such non-trading area without the occupant's consent. This construction advances the attainment of the *TAA*'s objectives in sec. 63 discussed earlier. A contrary interpretation ought not to be embraced, because doing so would allow the creation of an unpalatable loophole that would undermine achieving the aims of sec. 63.

The loophole referred to, in this instance, is the following. Taxpayers would, readily and legally, be able to circumvent the exception in sec. 63(4)

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74 To foster the attainment of this aim, the *TAA* provides, *inter alia*, for the protection of the confidentiality of taxpayer information. See *CSARS v Public Protector* 2020 4 SA 133 (GP).

75 *AM Moolla Group Ltd v CSARS* 2005 JOL 15456 (T):3.



by (re-)configuring or (re-)structuring the layout of their business premises in such a way that access thereto is dependent on access first being gained to a non-trading area at home. In so doing, the exception catered for in sec. 63(4) would be rendered ineffectual.

Mindful of the imperative to interpret statutes, where reasonably possible, in conformity with the *Constitution*, unless doing so would unduly strain their provisions,<sup>76</sup> it is submitted that the exception in sec. 63(4) is not impermissibly overbroad. Its provisions as a whole are consistent with the protection of privacy in a home, as exemplified by sec. 14(a) of the *Constitution*, namely, every person's right not to have his/her home searched. Section 63(4) also promotes the constitutional value of human dignity and respect for privacy at home.

The privacy of an occupant sharing a home with a taxpayer ought not to be unduly limited in pursuit of a fiscal goal or public interest in relation to the affairs of a taxpayer who trades from part of the place that the innocent occupant calls "home". In keeping with democratic values and principles, the person, property, possessions, and communications of an innocent occupant ought to be protected during a search and seizure occurring in, or at his home. If such an occupant's rights are not adequately protected during warrantless searches under sec. 63, then all that would be achieved is that the "secrets of private friendship, relationship, trade and politics, communicated under the seal of privacy and confidence would become public, and the greatest trouble, unpleasantness and injury caused to private persons".<sup>77</sup> Such a situation ought to be avoided as far as is reasonably possible.

Interpreting sec. 63(4) in a manner that prohibits, in all circumstances, a search of the person or property of a third party at a taxpayer's home would undermine the efficiency and effectiveness of tax administration. This is so because a taxpayer could subvert the aims of a warrantless search and seizure operation by simply storing tax-related information with a third party who would be exempted from being searched. Such a state of affairs is undesirable. Consequently, a construction of sec. 63(4) that permits such a result would be incongruent with a purposive mode of interpretation. It ought, thus, to be rejected in favour of a construction that strikes a fair balance between protecting and preserving a substantial or significant degree of privacy in a person's home, on the one hand, and interpreting sec. 63(4) in a manner that secures the public's interest in obtaining financial information stored at business premises located at a dwelling-house or domestic premises, on the other.

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76 *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC);par. 28.

77 *Ex parte Hull* 1891-1892 4 SAR TS 134:141 (quoted with approval in *Goqwana v Minister of Safety NO*;par. 19).

In view of all the foregoing, it is submitted that sec. 63(4) ought to be construed restrictively by reading down its provisions.<sup>78</sup> Such a construction would entail that SARS officials are able to access a trading area from a non-trading area in a residence where this is unavoidable (that is, absolutely necessary). In such circumstances, the SARS would be empowered, without the occupant's consent, to access a non-trading area in a home so as to access such part thereof used for a trade purpose, but only in cases, where doing so is a measure of last resort.<sup>79</sup> Sec. 63(4) ought to be construed in a manner that permits a third party, present at the residence, being searched. However, this may only occur in circumstances where such person is reasonably suspected or believed to possess, or likely to possess, relevant material related to an alleged failure to comply with an obligation under a tax Act or the commission of a tax offence, and who is also, on reasonable grounds, suspected or believed to be involved in its "imminent removal or destruction" (sec. 63(1)(b)(i)). The interpretation of sec. 63(4) contended for, in this instance, would not unduly strain its provisions. It is advantageous, because it would ensure that an infringement of privacy in a home satisfies the test for proportionality, as required by sec. 36(1)(e) of the *Constitution*.<sup>80</sup>

### 8.5.3 Proportionality applied to searches under sec. 63(1)(a) and (b) of the TAA

Section 63(1)(a) provides that a senior SARS official may, without a warrant, exercise the powers provided for in sec. 61(3) "if the owner or person in control of the premises so consents in writing". Generally, consent would significantly ease, if not relieve altogether the State's onus to justify a limitation under sec. 36 of the *Constitution*. This is because any derogation from a fundamental right authorised by its holder would be constitutionally defensible. Thus, if a taxpayer gives a legally binding consent for a warrantless search conducted under sec. 63(1) of the TAA, then any operation ought to pass muster under sec. 36(1)(e) of the *Constitution*.

Section 63(1)(b) provides that the powers in sec. 61(3) may be exercised if a senior SARS official is satisfied "on reasonable grounds" that the

78 De Vos *et al* (2014:788) define reading down as the "principle of legal interpretation which requires that ordinary legislation is interpreted in line with the spirit, purport and object of the Bill of Rights if the words are reasonably capable of such an interpretation or are not unduly strained".

79 *Thint (Pty) Ltd v NDPP; Zuma v NDPP* 2009 1 SA 1 (CC):par. 377; *Ferucci v CSARS:235B-C*. See also Croome 2010:307.

80 The discussion and submissions made, in this instance, apply equally, *mutatis mutandis*, in relation to searches conducted under sec. 63(1) of the TAA at non-residential premises.

jurisdictional facts in sec. 63(1)(b)(i)-(iii) are present.<sup>81</sup> For purposes of sec. 36(1)(e) of the *Constitution*, it is necessary to consider whether the powers exercisable under sec. 61(3) are proportional to the factual basis indicated by sec. 63(1)(b)(i) as the sole justification for the SARS undertaking the relevant search, namely “an imminent removal or destruction of relevant material”. It is, however, noteworthy that the *TAA* does not expressly limit the exercise of the powers in sec. 61(3) to searches that are designed to protect and preserve the material in question, thereby ensuring their availability for tax-administration purposes.

The nature and extent of the powers exercisable at a search conducted under sec. 63(1)(b) ought to be such that a direct correlation exists between these and the narrow circumstances mentioned in sec. 63(1)(b)(i) that give rise to the need for, or cause of the warrantless, non-consensual search in the first instance. Unless the wide powers conferred by sec. 61(3) are sufficiently circumscribed for purposes of sec. 63(1) of the *TAA*, the exercise of all the available powers may aptly be described as “breath-taking in their scope”.<sup>82</sup> Put differently, for purposes of sec. 36(1)(e) of the *Constitution*, they would be significantly overbroad and disproportionate in the sense that a greater invasion of privacy would be permitted than is reasonably necessary to overcome the narrowly stated mischief which sec. 63(1)(b) is directed to address.

The *TAA* is susceptible to an interpretation that would, if applied, uphold the validity of the searches and seizures authorised by sec. 63(1)(b). In this context, the powers conferred by sec. 61(3) ought to be construed strictly, so that the only powers that ought to be exercisable for the specific purpose of sec. 63(1)(b) are those that would enable the relevant material contemplated by sec. 63(1)(b)(i) to be found, seized and/or copied, so that they may be protected and preserved. This interpretation ought to be favoured, as it promotes the proportionality envisaged by sec. 36(1)(e) of the *Constitution*. This is so because, first, it ensures that effect is given to the ends sought by sec. 63(1)(b) and, secondly, it guards the taxpayer’s privacy by protecting the rights against excessive, unwarranted intrusion.

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81 The test for “on reasonable grounds is satisfied” is objective. In determining whether this requirement is met, consideration must be given to whether a reasonable person, in the position of the senior SARS official who made the decision to conduct a warrantless search and possessed the same information at such official’s disposal at the relevant time, would have been satisfied that good and sufficient (“reasonable”) grounds existed to justify a belief that the jurisdictional facts are met. See *Bert’s Bricks (Pty) Ltd v Inspector of Mines, North West Region* 2012 ZAGPPHC 11 (9 February 2012):paras. 10-11. Whether a search is conducted for good reasons will depend on the surrounding circumstances and the subject matter of the search. Relevant factors ought to include the nature and seriousness of the alleged non-compliance, the taxpayer’s history of non-compliance, the nature of the “relevant material” in question and ease with which it may be removed or destroyed, and the existence of additional, accessible copies of the material in question.

82 *Powell NO v Van der Merwe* 2005 5 SA 62 (SCA):par. 45.

#### 8.5.4 Availability of other less invasive means than warrantless searches

The *TAA* caters for the following mechanisms whereby relevant material may be accessed: an inspection (sec. 45), a request for information (sec. 46), an interview (sec. 47), a field audit or criminal investigation (sec. 48), an inquiry proceeding (sec. 52), and warranted as well as warrantless searches and seizures (secs. 61, 62, 63). These information-gathering mechanisms complement each other. Each mechanism applies in a fact-specific context to achieve a particular objective. The different mechanisms have varying criteria for their respective operation, and the extent of the powers related to each also differs. Therefore, each mechanism is invasive of a taxpayer's privacy to varying degrees.

The provision in the *TAA* of less intrusive information-gathering means than that catered for in sec. 63(1) does not, in and of itself, mean that the mechanism chosen fails the proportionality test.<sup>83</sup> The existence of alternatives is not the end of the enquiry. The test for proportionality also demands consideration of whether the other available means would have been equally effective to combat the mischief at which sec. 63 is directed. This issue will now be discussed in relation to warrantless, non-consensual searches under sec. 63(1)(b).

As discussed earlier, this provision caters for searches in circumstances involving a high degree of urgency that necessitate prompt, immediate action by the SARS to prevent probable harm to the administration of a tax Act arising from an identified, reasonably foreseeable, imminent threat. To avert the materialising of harm of the nature contemplated by sec. 63(1)(b)(i) requires that the SARS be equipped with powers that would enable its officials to act swiftly and, without prior notice, to seize the relevant material reasonably believed to be at risk of removal or destruction. In these circumstances, inspections, requests for information, interviews, field audits and criminal investigations, as well as inquiries are ill-suited to effectively deal with the challenges which sec. 63(1)(b) is designed to address. None of the alternative mechanisms mentioned, in this instance, authorise SARS officials to seize relevant material, or to deal with it in any other manner that would ensure its retention or preservation for tax-administration purposes. Moreover, except

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83 The information-gathering mechanisms in secs. 45, 46, 47, 48 and 52 of the *TAA* are all, for present purposes, presumed to be constitutional.

for inspections under sec. 45, all other alternative mechanisms require that advance notice be given to a taxpayer of the intended action.<sup>84</sup>

To combat the mischief which sec. 63(1)(b) seeks to address demands that speedy action is capable of being taken on an unannounced basis. The elements of surprise and urgency are critical ingredients to successfully thwart any effort to remove or destroy relevant material. Prior notice would alert a would-be wrongdoer of the intended action or plan, thereby significantly increasing the risk of the relevant material being successfully removed or destroyed. In so doing, prior notice would severely hamper the attainment of the aims sought to be achieved by sec. 63(1)(b).

In light of the foregoing, the other less restrictive means catered for in the TAA under secs. 45, 46, 47, 48 and 52 are not equally, or better suited towards achieving the overall purpose than a warrantless, non-consensual search conducted under sec. 63(1)(b). Accordingly, the provision of warrantless, non-consensual searches thereunder is a proportional response for purposes of sec. 36(1) of the *Constitution*.

It is submitted that compliance with the constitutional standard of a limitation that is "reasonable and justifiable in an open and democratic society" is further evident from the following considerations. First, the absence of a warrant requirement is rationally related to the achievement of tax-administration aims identified in the TAA. Secondly, in terms of sec. 63(1)(b)(ii), a senior SARS official must, on reasonable grounds, be satisfied that the legal requirements for the issuance of a warrant under sec. 59 are met, so that a warrant would have been issued by a competent court of law if an application for a warrant had been launched.

## 9. CONCLUSION

This two-part article has shown that sec. 63 of the TAA achieves an appropriate balance between the powers exercisable by the SARS at a warrantless search and the limitation of the constitutional right to privacy in light of the formula in sec. 36(1) of the *Constitution*. In reaching this conclusion, the public interest

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84 For example, the *Tax Administration Act 28/2011*:sec. 46(1) reads: "SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, within a reasonable period, submit relevant material (whether orally or in writing) that SARS requires." Compliance with a request under sec. 46 is mandatory. See *CSARS v Brown* 2016 ZACPEHC 17 (5 May 2016):par. 39. The relevant portion of sec. 47(1) reads: "A senior SARS official may, by notice, require a person, whether or not chargeable to tax, ... to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person." The relevant portion of sec. 48(1) reads: "A SARS official ... may require a person, with prior notice of at least 10 business days, to make available at the person's premises specified in the notice relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to the person or another person."

in tax administration was delicately weighed against the competing privacy rights of taxpayers. It was demonstrated that a causal link exists between the privacy limitations under sec. 63(1) and (4), and the attainment of the governmental aim to promote efficient and effective tax administration. A rational connection was shown to exist between the limitation of privacy and the State's efforts to ensure efficacy in general tax administration.

It was further demonstrated that a causal and rational link exists between the privacy limitations potentially occasioned by sec. 63(1) and (4), and the attainment of the governmental aim to promote efficient and effective tax administration, thus establishing that any such limitation of taxpayers' privacy rights may be justified in terms of the *Constitution's* "limitation clause". This conclusion is bolstered by the principle that an impugned statute ought, as far as is reasonably possible, to be construed in a manner that is constitutionally compliant; as such, it is submitted that the scales ought to tilt in favour of a finding that warrantless searches and seizures under sec. 63(1) and (4) are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".

It should nevertheless be borne in mind that it has been pointed out that the drafting of sec. 63 has a number of shortcomings: It fails to regulate the timing of a warrantless search, and does not define "owner", "person in control of the premises" and "the occupant" for purposes of sec. 63. It also does not clarify the requirements for a valid consent to searches under sec. 63(1)(a). However, these shortcomings do not render sec. 63 too vague. Under the rule of law, what is required is reasonable certainty and not perfect lucidity. Sec. 63 of the *TAA*, read with sec. 61 thereof, indicates with reasonable certainty what is required of persons who are bound by their provisions, so that they may regulate their conduct accordingly.

## 10. POSTSCRIPT: THE JUDGMENT IN *ARENA HOLDINGS (PTY) LTD T/A FINANCIAL MAIL v SARS*

Shortly before this volume went to press, the North Gauteng High Court, per Davis J, handed down judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*.<sup>85</sup> Although this case did not deal with the central focus of this article, namely, the intersection between the search and seizure powers of the SARS under the *TAA* vis-à-vis taxpayers' privacy, it nevertheless dealt pertinently with a crucial issue canvassed here, namely, what legally relevant considerations are at play when a court adjudicates whether a taxpayer's privacy rights may, under the *TAA*, be validly attenuated by legislation? The applicants, relying on their entrenched constitutional rights of access to information held by the State and to freedom of expression, sought an order that obliges the SARS to make disclosure of information held by it in relation to the tax affairs of South Africa's former President, Jacob Zuma. The applicants contended that the disclosure of the information sought was in the public interest on the basis

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85 [2021] ZAGPPHC 779 (16 November 2021).

that it would reveal “a substantial contravention of the law”<sup>86</sup> by a senior public official which, so they argued, trumped the taxpayer’s right to privacy.

The SARS refused disclosure and opposed the judicial relief on two main grounds: first, it argued that the strict secrecy regime in secs. 67 and 69 of the *TAA* prohibits the disclosure of taxpayer information to third parties, except in certain narrowly prescribed instances which did not find application *in casu*;<sup>87</sup> secondly, it contended that secs. 35 and 46 of the *Promotion of Access to Information Act* (hereafter, the *PAIA*)<sup>88</sup> do not oblige the SARS to make disclosure of taxpayer information to anyone other than the taxpayer whose information is sought. Consequently, the applicants challenged the constitutionality of secs. 35 and 46 of the *PAIA* on the basis that their failure to provide a public interest override to taxpayer information held by the SARS is an unreasonable and unjustifiable limitation of their fundamental rights as contained in secs. 16 (freedom of expression) and 32 (access to information) of the *Constitution*.<sup>89</sup> They also challenged the constitutionality of secs. 67 and 69 of the *TAA* to the extent that these provisions precluded access to taxpayer information where the threshold for a right of access under the *PAIA* have been met.

On the other hand, the SARS argued that the limitations imposed by the *PAIA* and the *TAA* pass muster under sec. 36(1) of the *Constitution*. It also contended that the strict protection afforded to the secrecy of taxpayer information ought to be preserved because it strengthened taxpayer confidence in the SARS and its administration of the tax system which, in turn, fostered openness and honesty by taxpayers in their dealings with the SARS. The court disagreed with both arguments. First, on the basis of expert evidence, Davis J held that it is “not a universal truth”<sup>90</sup> that “voluntary disclosure and taxpayer compliance is inextricably linked to or dependent on the taxpayer secrecy regime”.<sup>91</sup> Moreover, Davis J held that the secrecy compact written into the *TAA* is not given by the legislature as a quid pro quo for truthful and accurate disclosure by taxpayers. Davis J held that “the failure to make truthful and accurate submissions are indeed linked to the penalty and criminal sanction provisions”<sup>92</sup> in sec. 234(d) of the *TAA*. Consequently, Davis J held that there is an absence of direct evidence to support a core premise relied on by the SARS against disclosure, namely, that the secrecy compact “is sacrosanct enough to justify the limitation”<sup>93</sup> imposed thereon by the *PAIA* and the *TAA*.

Secondly, with reference to *Mail and Guardian Media Ltd v Chipu NO*,<sup>94</sup> Davis J reiterated that the notion of absolute confidentiality is inconsistent

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86 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par.1.

87 For a discussion of the *TAA*'s secrecy regime, see *Public Protector v CSARS*: paras. 23-26. Also, see Moosa 2020: 190.

88 *Promotion of Access to Information Act 2/2000*.

89 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 6.2.

90 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 8.1.

91 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 8.2.

92 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 8.5.

93 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 8.4.

94 2013 6 SA 367 (CC) paras. 92-93.

with the *Constitution*. Therefore, the secrecy regime created by the TAA does not create an impenetrable wall that prevents encroachment on taxpayer privacy in every instance. This reinforces the contention made in this series of articles, namely, that a taxpayer's right to privacy in sec. 14 is not absolute – no blanket protection exists in all circumstances for tax administration purposes. On this basis, and applying the balancing test enumerated in sec. 36(1) of the *Constitution* discussed above, Davis J concluded that the shield (or immunity) granted by the PAIA against disclosure of taxpayer confidential information to all third party requesters is an unreasonable and unjustifiable violation of the applicants' constitutional right to access information held by the SARS. Consequently, Davis J upheld the applicants' constitutional challenges and declared the impugned statutory provisions invalid to the extent of their incongruence with the *Constitution*.<sup>95</sup> He also ordered that the confidential taxpayer information sought be disclosed for publication in the public interest.

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