

# Cataloging The Commissioner's "Thumbprints" - Items the South African Revenue Service can Seize from a Taxpayer

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**Abstract:** The right to privacy is a fundamental human right protected by law in many countries, including South Africa. However, there are situations in which officials, such as the South African Revenue Service (SARS), may need to legitimately breach these rights to investigate criminal activities. This article discusses the importance of tax officials showing “reasonable grounds” to apply for a warrant and what SARS may search for and seize during an investigation and to determine whether there are limitations on privacy rights that are reasonable and justifiable when determining the items to be seized. The research methodology involves examining South African case law to interpret the legislative scope for a valid search and seizure with a warrant, focusing on the “reasonable grounds” requirement and identifying which materials or articles can be seized. The tax acts provide the Commissioner for SARS with modern-day information-gathering powers to determine a taxpayer's liability for any tax and combat tax evasion. These powers include less intrusive measures such as inspections, verifications, and audits, as well as more intrusive measures such as field audits, criminal investigations, inquiry orders, and search-and-seizure measures. SARS officials should justify their belief to a magistrate or judge in an *ex parte* application for a warrant that a person has failed to comply with their tax obligations and that “relevant material” will be found on the premises to be searched. The study concludes by reviewing the remedies available to taxpayers whose rights have been infringed during such operations.

**Keywords:** Items, Search, Seizure, Reasonable Grounds, Tax Administration Act.

## Introduction

In 1948, three years after World War II, the United Nations drafted the Universal Declaration of Human Rights [1] – the universal consciousness of Human Rights. One of the human rights stated in the Declaration concerned privacy and arbitrary search and seizure measures (Article 12) and held “[t]hat no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”. As the Human Rights and Law Enforcement Guidelines explain [2], a warrant or court order should be sought before officials conduct searches.

The right to privacy is a fundamental human right protected by law in many countries, including South Africa [3]. The right to privacy specifically includes protection against searching a person, their home or property, seizure of property and infringing upon the privacy of their communication [4]. However, there are situations in which officials may need to legitimately breach these rights to investigate criminal activities. This includes the South African Revenue Service (SARS) as a tax authority when there are reasonable grounds to search a taxpayer's home or business during an investigation [5]. In South Africa constitutional rights may be limited by a law of general application provided that it is reasonable and justifiable having regard to several factors listed in the limitation clause contained in section 36 of the Constitution of the Republic of South Africa, 1996, (the Constitution), such as “[t]he nature of the right”, “[t]he importance of the purpose of the limitation” and the question whether there are “less restrictive means to achieve the purpose” [6].

The topics of warrants and the limitation of privacy rights are important because they affect the balance between the interests of the state and the taxpayer. Tax officials must have a valid and legitimate cause to breach a person's right to privacy. They must disclose all material facts to a judge during an *ex parte* application (only one party is heard)

[7] to obtain a search warrant [8]. Existing knowledge on this topic includes the Constitutional Court's ruling in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others* [9], which underlines the need for tax officials to disclose all material facts and state reasonable grounds before a judge during an application [10]. Tax officials' actions must not contravene the Constitution and must comply with the constitutional standard of "just administrative action." There is a knowledge gap regarding the specific items that SARS officials may search for and seize from a taxpayer's business or home. The rationale for this research is to address the knowledge gap regarding the specific items that SARS may search for and seize from these premises during a search and seizure with a warrant. The research question for this study is: What items may SARS search for and seize from a business or taxpayer's home during an investigation? The aim of this research is to identify the specific items that SARS may search and seize from a business or taxpayer's home during an investigation and to determine whether there are limitations on privacy rights that are reasonable and justifiable when determining the items to be seized. There is no hypothesis for this research, as this is a descriptive study that aims to identify the specific items that SARS may search for and seize.

### *Methodology*

The judiciary offers valuable lessons in identifying the failure of SARS officials to meet lawful requirements under tax acts when conducting a search and seizure operation. South African case law is examined to interpret the legislative scope for a valid search and seizure with a warrant. Extensive research exists on searches without a warrant under the tax acts [11]. This study focuses on search and seizure with a warrant, highlighting the "reasonable grounds" requirement and identifying which materials or articles can be seized [12]. The research concludes by reviewing the remedies available to taxpayers whose rights have been infringed during such operations.

### *SARS' information-gathering powers*

The tax acts provide the Commissioner with modern-day information-gathering powers to determine a taxpayer's liability for any tax and combat tax evasion. These powers include less intrusive measures under the Tax Administration Act 28 of 2011 (TAA) [13] such as inspections, verifications, and audits [14]. More intrusive measures include field audits, criminal investigations, inquiry orders and search-and-seizure measures. Searches may be conducted without a warrant and with warrants if they are exercised by SARS officials based on "reasonable grounds" [15]. This means that SARS should justify their belief that a person has failed to comply with their tax obligations and that "relevant material" will be found on the premises to be searched [16]. Relevant material is defined in the TAA as "...[i]nformation, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed." Therefore, under this definition a SARS official should be justified in his or her belief that a judge would be convinced that there are valid reasons to issue a warrant for the search and seizure of relevant material [17].

Other than the TAA, the "reasonable grounds" requirement forms an integral part of the Criminal Procedure Act, 51 of 1977 (CPA) [18], Customs and Excise Act, 91 of 1964 [19], the Investigation of Serious Economic Offences Act, 117 of 1991 [20], the Competition Act, 89 of 1998 [21] and the International Trade and Administration Act, 71 of 2002 [22], and the National Prosecuting Authority Act, 32 of 1998 (NPAA) [23] to mention but a few [24]. Legislation regulating search and seizure measures include, among others, the CPA, the South African Police Service Act, 68 of 1995 [25]; the Special Investigating Units and Special Tribunals Act, 74 of 1996 [26]; the Interception and Monitoring Prohibition Act, 127 of 1992 [27]; the Control of Access to Public Premises and Vehicles Act, 53 of 1985 [28]; the National Prosecuting Authority Act, 32 of 1998 [29]; and the Prevention of Organised Crime Act, 121 of 1998 [30]. These legislative instruments may also form the basis for obtaining a warrant in conjunction with the TAA. SARS may seek assistance from other government agencies that can exercise it on their behalf [31]. As required by the CPA, the TAA requires a judicial officer such as a judge or magistrate to issue a warrant after a successful application by the Commissioner on an *ex parte* basis [32].

### *Search and seizure and constitutional rights*

The Constitution is the supreme law of South Africa, its obligations must be adhered to and law or conduct inconsistent with its provisions are invalid [33]. Because a search and seizure warrant implicitly limits fundamental human rights, it should comply with constitutional requirements [34]. The question must be asked; however, what is a search? According to Basdeo [35], a search can be described as visually or physically inspecting a person,

container, or premises to determine whether something is inside, on, or upon them. The central issue, as posed by the taxpayer in *Attieh and Others v Commissioner for South African Revenue Service*, is whether the Commissioner's power of search and seizure, considering the Constitution and the rights it protects, should be exercised sparingly and cautiously [36]. Additionally, it is necessary to consider whether this power should only be used in circumstances where no less invasive or alternative remedy is adequate, or when exceptional measures are necessary. In *Christoffel Hendrik Wiese and Others v CSARS*, the Supreme Court of Appeal held that evidence obtained during an inquiry in the form of the taxpayer's testimony is admissible in further litigation [37]. The Supreme Court ruled that because of SARS's statutory duty to recover tax debts on behalf of the fiscus, there was a legitimate purpose for providing the tax authority with access to information or evidence obtained during the inquiry. The decision warrants further scrutiny, as taxpayers might feel it is difficult to answer questions without the guarantee of full transparency and freedom of expression, given that their testimony could be used against them.

The term "seizure" in tax law refers to the confiscation of relevant materials that demonstrate a person's or taxpayers' non-compliance with a tax act, based on information obtained during a search with a warrant. This inevitably involves the infringement of the rights of a person subject to such a search. Therefore, the courts generally adopt a restrictive interpretation of warrants. Seven different constitutional rights were highlighted by the applicant in *Bechan and Another v SARS Customs Investigations Unit and Others* [38]. These were (i) the right to human dignity [39], (ii) freedom of security of persons [40], (iii) privacy [41], (iv) freedom of movement [42], (v) the right not to be arbitrarily deprived of property [43], (vi) the right of access to court [44], (vii) the right of a detained person to remain silent and the right against self-incrimination [45]. Constitutional rights are however not absolute. A person who uses his/her privacy to commit crimes cannot prevent his/her premises from being searched [46]. In *Arena Holdings (Pty) Ltd t/a financial Mail and others v South African Revenue Services and others* [47] (*Arena*) the Constitutional Court recently confirmed that:

"The Constitution and the protection it affords in the pursuit of individual liberty and freedom were never intended to be used as an impermeable shield to protect an individual from scrutiny in respect of conduct that represents a threat to society" [48].

The Constitutional Court in *Arena* also confirmed the principle expressed in *Berstein v Bester* [49] that the right to privacy only applies to the most private part of a person's life (related to home, family and sexuality) and that the scope of the right decreases proportionally as a person engages in business, social and more public activities [50].

#### *The validity of the contents of a warrant*

The content of the warrant should specify the articles or documents to be searched [51] rather than allowing a blanket approach [52]. Judicial officers should not fill in vital gaps in the warrants for search and seizure [53]. Although the application for a warrant constitutes administrative action, section 3 of the Promotion of Administrative Justice Act (PAJA) [54] does not require SARS to notify taxpayers prior to the application. The validity of the warrant can be challenged by the taxpayer under current tax legislation and in terms of PAJA. In addition, as the warrant infringes on the taxpayer's right to privacy, it breaches the taxpayer's right to dignity. Following the due process for issuing a warrant requires a decisive determination by a judge or magistrate [55].

In *Ex parte Hull* [56], a Chief Detective forcibly removed keys from an attorney's person after the latter refused to hand them over. The search party wanted to access the attorney's safe to obtain private information about one of his clients. The warrant, submitted before the court is as follows:

"You are hereby ordered in the name of the Government of the South African Republic to go into the said house during the day, and there carefully search through the house of the said Attorney Hull, and if the said articles are found there, to bring them before the Assistant Landdrost, there to be dealt with according to law" [57].

In a later application brought before the court, Attorney Hull submitted that the warrant was too vague and could not be a legitimate means to secure private information about one of his clients. A reading of the warrant reveals that it contained no information about the applicable law, the person authorised to search, the person or premises being searched, the items to be seized, the reason for the search, or the offence committed. The Supreme Court of Transvaal not only expressed its contempt for the violent conduct of the officials but also indicated that a warrant should only be granted in exceptional circumstances [58]. The Supreme Court of Transvaal agreed with the applicant's submission that the warrant contents were "too vague and general" [59]. The court held that the appropriate action would have been to serve the attorney with a *subpoena duces tecum* [60] summons, which would have called upon the attorney to present himself with the desired documentary evidence, thereby, adhering to an

inquiry approach. The vagueness and overbreadth of the warrant invalidated its content and rendered the search illegal.

As early as 1907, the judiciary was called upon to determine whether warrant content was muddled or “unintelligible.” Even so, no offence mentioned in the warrant came under scrutiny in *Hertzfelder v Attorney-General* [61] (*Hertzfelder*). The court was unconvinced about the warrant’s validity and found its contents were “most irregular in form.” Innes CJ concluded that the warrant should have indicated the offence committed and the warrant made no sense as it was “quite unintelligible” (*Hertzfelder* at page 405).

In the *Minister of Safety and Security v Van der Merwe and Others* case [62], various warrants issued by several courts to officials of the SARS Criminal Investigations Unit and the Commercial Branch of the South African Police Service (SAPS) were contested by the taxpayer based on vagueness and the common law principle of intelligibility [63]. SARS investigated several irregular financial transactions and possible violations of the Income Tax Act 58 of 1962 (ITA) [64] by the taxpayer. During the investigation, the officials deposed a few affidavits supporting warrants to conduct search and seizure operations under section 21 of the CPA. The Constitutional Court stated that “contents” is valid if it specifies: (i) the name of the applicable Statutory Act, (ii) the identity of the searcher, (iii) the statutory authority under which the searcher is acting, (iv) the identity of the individual/premises to be searched, (v) the article to be searched for and seized with proper care and; (vi) the offence and names of the accused [65]. Thus, since several warrants failed to meet the intelligibility requirement (to specify the offence), it swayed the Constitutional Court to find in favour of the taxpayer [66]. The above precedents precede the promulgation of the TAA which applies with effect from 1 October 2012 [67]. The TAA requires the warrant to contain details of i) the alleged failure to comply with a tax act or the offence, ii) the person who is alleged to have failed to comply or who is suspected of committing a tax offence, iii) the premises to be search and iv) an averment that relevant material is likely to be found at the specific premises mentioned in the warrant [68].

*The reasons for the warrant, good cause and disclosure of material facts*

A senior SARS official should show good (valid) cause or sufficient reason(s) in the application for a warrant [69]. Legislation outlines an objective standard for granting consent to breach or limit a person’s right to privacy [70]. This requires the decision maker to strike a balance between the person’s interest and that of the state when a breach of a person’s right to privacy is contemplated. It is only then that the limitations of privacy rights are reasonable and justifiable [71]. Therefore, it is necessary for officials to disclose all material facts to a judge during an *ex parte* application. This enables the presiding officer to properly apply his or her mind to the matter at hand [72]. Croome and Olivier [73] state that SARS cannot act as both judge and jury in choosing whether a warrant should be issued to seize records and search a taxpayer’s premises [74]. They aver that an independent party should consider this question [75].

Special investigation units such as Investigating Directorates require warrants to effectively investigate serious criminal activities by conducting preparatory investigations [76]. According to the Constitutional Court, the granting of a warrant for a preparatory investigation allows the Investigating Director to acquire “reasonable grounds” for conducting an inquiry [77]. It can only happen when doubt exists that an offence is committed and when doubt exists whether an offence is a specified or listed offence. When interpreting section 29(5) of the NPAA, the Constitutional Court stated that before granting a warrant for a preparatory investigation, a “reasonable suspicion” must exist that an offence – conceivably a specified offence – was attempted, is being committed or has been committed [78]. The Constitutional Court added the proviso that “...[I]t should not be understood as stating that all searches, in whatever circumstances, are subject to the requirement of a reasonable suspicion that an offence has been committed” [79]. Considering the legal provisions discussed earlier, there must be compelling reasons to believe that articles relevant to the inquiry may be located at the specified premises.

The warrant application would be void if there were no reasonable suspicions that an offence had been committed. Under sections 20 and 21 of the CPA, searches can only be conducted in connection with criminal investigations if there is “reasonable suspicion” that an offence has been committed. In this context, a warrant is used to search for and secure evidence that a crime has been suspected to have been committed.

Once issued, a warrant cannot be applied to perpetuity and must be executed within 45 business days [80]. Previously, under section 74(3) of the ITA, if documents seized by the Commissioner indicated a need for additional searches, they could be carried out under a previous warrant. There was no statutory rule indicating the amount of time the warrant was valid. However, under “the common law grounds of invalidity” a warrant should have an expiry date, namely a date by which the warrant must be executed. A judicial officer has the discretion to extend the

standard 45-business day period within which a warrant should be carried out if “good cause” is shown by SARS [81]. It is submitted that an impugned delay due to SARS departmental processes would negate the granting of such an extension. The merits of success depend on SARS acting without undue delay.

*SARS’ authority to conduct a search and seizure*

SARS, as tax authority, must have the power to carry out searches and seizures. In *Gaertner v Minister of Finance and Others* [82], the Constitutional Court considered SARS's authority to search for and seize taxpayer assets, both with and without a warrant. In *Gaertner*, approximately forty (40) SARS officials performed a routine warrantless search of the taxpayer’s business premises under the Customs and Excise Act and fourteen (14) at the taxpayer’s home in Constantia, Cape Town [83]. The house was searched, including freezers, ceiling spaces, safes, cellars, garages, and storage rooms [84]. They searched home computers, including those of Mr Gaertner's children and personal belongings [85]. Officials took photographs during the search and conducted thorough body and vehicle searches on people leaving the premises. SARS returned all seized articles and documents when the taxpayer approached the High Court [86]. It is submitted that if a tax official decides to search the taxpayer’s home instead of the taxpayer’s business premises, as determined by the warrant, and enters the children’s rooms and seizes the children’s computers to obtain relevant material, the official’s conduct would violate the terms of the warrant. Such conduct would also not pass constitutional muster as the inner most personal space such as person’s home must be respected as was reiterated in

*Bernstein v Bester.*

The court a quo in *Gaertner* held that a warrant would be justified if an unregistered or unlicensed individual's premises were searched for. However, a non-routine search would be justified in the company's warehouse or rebate store but not in a private residence. The Constitutional Court [87] declared that inspections are aimed at guaranteeing compliance and are generally considered less intrusive than criminal searches, which are carried out to enforce criminal charges in addition to enforcement [88]. A definitive and clear line is drawn between the search of business premises and a person’s home, as the latter has the highest expectation of privacy [89].

As a result of SARS officials' actions and conduct in *Gaertner*, the Constitutional Court agreed with the High Court’s determination that the legislation regarding Customs and Excise Act [90] be amended to require: searches to take place during regular business hours; SARS officials to inform the premises owner in writing of the purpose of the search, and a copy of the inventory of all items seized to be provided to that individual [91]. A determination should be made whether the inspected items have the potential to yield information about tax legislation contraventions. This justifies the limitation of the number of items searched. However, the legislation does not limit the number of places searched, including rooms, safes, chests, boxes, and packages; even the floor may be broken up.

*Specificity of relevant material to be searched*

As part of the application for a warrant, the delegated senior SARS official must present a fact-supported request under oath or solemn declaration to the judge to search for “relevant material”. The phrase “relevant material” is defined in section 1 of the TAA to include:

“any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act...”.

In turn, the term “information” is further defined to include “information generated recorded, sent, received, stored or displayed by any means” [92]. In the TAA the term “document” is defined in section 1 as follows:

“...anything that contains a written, sound or pictorial record, or other record of information, whether in physical or electronic form”.

Electronic “documents” sought in terms of the warrant also includes a computer, videos, CD’s, DVD’s, photos, flash disks and external hard drives. To be reasonably specific, "relevant material" or relevant documents must provide evidence that the Commissioner’s official sought to prove failure to comply or the committing of an offense [93].

Section 29 of the NPAA [94] allows “classes of items” to be seized. On the one hand, it aligns with section 61(2)(b) of the TAA, which permits the seizure of “any relevant material” by a SARS official when searching premises identified in a warrant. On the other hand, under section 61 of the TAA, SARS officials can copy relevant material or make mirror images from electronic sources. Accordingly, relevant material does not always need to be removed from the premises identified in the warrant. The Constitutional Court in *Van Der Merwe and Another v Taylor NO*

and Others [95] stated that section 20 of the CPA permits the State to seize any item during a search and seizure operation [96]. Seized items may serve as evidence for criminal trial [97]. However, if no criminal proceedings were instituted against an accused, the accused would be notified in writing to collect the items within 30 days [98].

#### *The search for articles in vehicles in the vicinity of the premises*

In *Bechan and Another v SARS Customs Investigations Unit and Others* [99] (*Bechan*), SARS Customs officers observed staff carrying materials to cars parked in a parking lot where the taxpayer's business was when they arrived at the identified premises to execute a warrant. SARS officials entered the vehicle of Mr Bechan with the help of a locksmith and confiscated articles, including laptops, computers and cell phones. The specific vehicle was not listed on the warrant. However, SARS officials are authorised to enter listed premises on "reasonable grounds" if relevant materials are accessible under section 62(1) of the TAA [100].

In the High Court the taxpayer contended that the articles seized by SARS were in his undisturbed possession, and that he was unlawfully dispossessed of them during the execution of the warrant [101]. Invoking the *mandament van spolie* [102], he sought the return of the seized articles [103]. On cross-appeal, the Supreme Court of Appeal upheld the High Court's decision, finding that SARS officials had reasonable cause to suspect that the vehicles contained relevant material [104].

The High Court found that SARS was entitled to search and seize the articles in the execution of a warrant issued under sections 59 and 60 of the Tax Administration Act, 2011. The High Court also found that the taxpayer's remedy was not *mandament van spolie*, as he claimed. Instead, he made a written application to SARS under section 66(1)(a) of the TAA to return the articles, including two laptops and two cell phones. Thus, the High Court's decision indicates that vehicles on the extended premises or near the premises identified in the warrant can be searched. This is based on the "reasonable grounds" principle that the relevant material or information is available in the vehicle. On cross-appeal, the Supreme Court of Appeal [105] confirmed that section 61(3)(a) of the TAA does not afford SARS officials *carte blanche* in searching the property of third parties who may be on the premises identified in a warrant, but they may do so if they suspect that the property of the third parties contains material relevant to the taxpayer [106], including computers, electronic storage devices, cell phones, and purchase files containing banking details.

#### *Electronic material*

Electronic information is a significant source of relevant material available for search, as it is included in the definition of 'documents' in section 1 of the TAA. SARS's power to search and seize computer hardware and electronic information includes emails, short text messages (SMS), electronic documents and banking records. This type of digital evidence may be available on a computer, tablet, cell phone, or electronic media storage, such as a USB flash drive, an external hard drive, or the cloud. SARS officials could access thousands of email conversations. In this case, a forensic specialist will need to ascertain whether there are any messages relating to the alleged tax crimes involved, including intentional tax fraud. Otherwise, taxpayer communications are private and a taxpayer's claim of legal professional privilege should be respected. According to Leacock [107], courts have granted warrants to prosecuting authorities for collecting digital evidence. It includes emails, digital photographs, word documents, instant messaging, spreadsheets, Internet browsers, digital key lock activities (hotels), automatic teller machine slips, and global positioning schedules [108].

Evidence was provided by *Gordhan v Public Protector and Others* [109] on the use of electronic surveillance by SARS. However, according to the testimony in this matter, these operations by SARS (in conjunction with the NPA) were lawful, as it involved a tax fraud fugitive and the seizure of a container containing contraband [110]. Other forms of electronic material include share certificates indicating shareholding, trust statements, computer-generated cryptocurrency transaction ledgers, Bitcoin smart contracts, and ordinary business contracts or agreements.

Cell phone messages can be described as electronic communications. The Electronic Communications and Transactions Act (ECT Act) [111] states that a data message is admissible as evidence in any legal proceedings [112]. A "document" or information [113] in electronic format can be classified as lawful evidence when a person produces a data message which is certified to be correct, confirming its complete and unaltered form of the original version (section 14 of the ECT Act). As an additional example, an authorised SARS official can access taxpayers' cell phone messages if they seize the phone during a search or seizure.

SARS must adopt an ethos to explore and pace artificial intelligence advances and their impact on tax collection in the digital world. In the future, the use of biometric or biological data to access information in the cloud may include

facial recognition, fingerprints, voice recognition, or iris/retina scans. Additional forensic investigations are required to obtain relevant information in the cloud, where data are protected from access without the individual's biological data. As a result, forensic investigators have difficulty searching and seizing digitally relevant material without a warrant.

This difficulty was experienced in *Bechan* where the relevant laptop computers that had been seized from Mr Bechan could not be accessed by SARS due to the unavailability of the passwords to access the laptops [114]. The question whether the reasonable grounds requirement is met in such a situation where the SARS official has no knowledge or relevant suspicion concerning the nature of the information contained on a laptop was not addressed by the court. In our view, it is not advisable to permit SARS to confiscate articles that potentially possess relevant information, the exact nature of which remains undetermined at this time. A warrant should not be used as an instrument to seize all information or articles that could possibly be relevant if SARS does not have any idea what the information is that they are searching for.

#### *The belief of reasonable grounds (requirement)*

A presiding officer may issue a warrant in various ways. First, SARS must show that there are “reasonable grounds” to believe a person or a taxpayer either failed to comply with a tax obligation imposed under a tax Act or committed a tax offence [115]. It is submitted that SARS must show that there is no other method of obtaining the required evidence available, as it may turn into a fishing expedition without this constraint. As the warrant constitutes an enforcement action limiting constitutional rights, the facts upon which the belief of reasonable grounds is based must be clearly explained to the court.

An official of SARS must provide the judge with all relevant details during an *ex parte* hearing for a warrant application [116]. In *Haynes v Commissioner* [117], the judge reasoned that the onus rested on the Commissioner to substantiate that he used less draconian measures to obtain the information sought before applying for a warrant [118]. It is necessary that the judge fully understands the justification behind SARS's request to impair a taxpayer's rights and must be convinced that SARS requested information from the taxpayer [119].

For a judge, there is a distinct difference between the types of documents mentioned in the application for a warrant when the property is to be seized from an “individual” taxpayer's home versus the “business” taxpayer. In the case of an individual taxpayer, records of income and invoices for expenditure would differ substantially from the official records of the business taxpayer. This is true for an automated and official transaction-accounting ledger compiled for business purposes.

Similarly, SARS officials may search the business part of the taxpayer's premises without a warrant if satisfied on reasonable grounds [120]. The taxpayer's right to privacy based on the reasonable grounds principle must be restrictively exercised in terms of section 63(1)(b) of the TAA [121]. If a search without a warrant is exercised to secure relevant material but constitutes a breach of the taxpayer's right to privacy or because of an illegal act by an official, the evidence will be tainted [122].

#### *Seizure of relevant information*

The warrant must “fingerprint” or identify the information, documents, or property to be searched at the premises identified in the warrant [123]. A warrant must also identify documents related to the search, in addition to the residence or house to be searched [124]. If the warrant describes the documents to be seized appropriately, the other property will not be wrongly seized. Only “relevant information” can be seized [125]. Every private document scrutinised by a delegated tax official that is not specified in a warrant is, in principle, an invasion of privacy rights.

However, section 64 of the TAA stipulates that if SARS foresees that the information found in the search may be subject to legal professional privilege, a legal practitioner from a panel appointed by the Minister of Finance in terms of section 111 of the TAA must be involved. Examining legally privileged information is best left to a legal practitioner trained to discern which information is privileged and should be excluded from a search. This exclusion is, however, not an absolute right but one that prevents legal advice obtained in confidence from being admitted into evidence [126].

If a judge or presiding officer, after questioning the applicant, thinks there are reasonable grounds to believe that the articles sought in terms of the warrant include legally privileged information, the officer must carefully examine the list of articles to be searched and seized with precision [127]. Privileged items or data need not be individually described in the warrant because privilege extends to search and seizure procedures, but a claim of privilege must be

treated with the necessary care [128]. It is still possible to claim common law privilege at a later stage if the document is seized or as part of a court procedure.

#### *Conduct of taxpayers and SARS officials*

Taxpayers must provide SARS officials with reasonable assistance during search and seizure procedures [129]. Failure to do so can constitute a criminal offence. Similarly, SARS officials must carry out the search in a decent and orderly manner and searches of the body of a person may only be conducted if the official is of the same gender as the person being searched [130]. Section 61(7) of the TAA states that no person may obstruct the SARS official or police in their execution of a warrant nor may they refuse to grant reasonable assistance.

A taxpayer who prevents officials from exercising a search at their residence should only be removed with a reasonable force when necessary. It should only be done with a police officer's assistance when the resistant behaviour hampers the search. Conduct that undermines the object of a warrant, such as a bad temper on the part of the taxpayer or a tax official, is unacceptable. The timing of a search is critical and may limit unreasonable behaviour – a daytime search is a more reasonable approach. Intimidation of any kind, especially to any family member at the taxpayer's residence or an employee in the workplace, is prohibited.

According to SARS, searches without a warrant may only be conducted like searches with a warrant [131]. Furthermore, the same statutory limitations apply. As a result, SARS officials cannot conduct themselves differently, regardless of whether they have a warrant. There is also the possibility that a taxpayer may challenge the procedure if the official's conduct is coercive, incriminating, or unlawful.

#### *Available remedies when taxpayer rights are breached*

The TAA allows taxpayers to request the return of cash or seized material seized from SARS [132]. The High Court may directly be approached if SARS refuses the request [133]. Constitutional questions may arise from taxpayers who believe that SARS wrongfully seized their property or conducted a search that violated their constitutional rights. In such cases, a High Court can hear a challenge to the legality of SARS' search and seizure practice. The High Court has jurisdiction to hear cases related to constitutional issues, including violations of fundamental rights, such as privacy and property. When fundamental human rights are violated, the High Court may make an order of unconstitutionality which should then be confirmed by the Constitutional Court [134]. The High Court can also hear matters related to the administrative law. This can include challenges to the actions of government officials when they act beyond their legal powers. Common law remedies are necessary when statutory remedies are unavailable. The High Court may make any order that is just and equitable and may develop the common law if it is just and equitable [135].

Physical damage claims may be filed directly with SARS. A taxpayer may approach the High Court if SARS refuses to return seized items or fails to pay for the physical damage. Litigation costs usually exceed claims for physical damage and should be a last resort for aggrieved taxpayers. Based on SARS officials' first-hand testimony (being personally present) regarding relevant material availability, an affidavit can confirm the availability of evidence on the premises.

#### *Conclusion*

This contribution commenced with an assessment of the powers of the Commissioner to impose search and seizure measures in taxation matters. It dealt with arbitrary search and seizure measures under the old Income Tax dispensation before 1994 and with changes brought about by the Constitution of South Africa, 1996.

Tax authorities can conduct searches and seizures to investigate tax evasion, intentional tax fraud and other financial crimes. It includes searches with a warrant or without a warrant. In addition to protecting individual rights, warrants ensure that searches are lawful and justified. Tax authorities must gather relevant material and tax-related evidence to support their cases. A strong case depends on obtaining more specific information or relevant material. Searches and seizures must be proportionate to the suspected crimes. Tax authorities cannot search for or seize property irrelevant to their purposes. Authorities must respect due process and privacy during criminal investigation. This means conducting the search professionally and respectfully and informing individuals of their rights.

South African history indicates that the Commissioner had unfettered powers to exercise search and seizure without proper checks and balances. After adopting the Constitution of South Africa in 1996, several ground-breaking rulings by the Constitutional Court clarified the Commissioner's discretion regarding search and seizure under the tax acts. The TAA provides SARS with modern information-gathering powers, that are less intrusive, such as



verifications, inspections and audits. More intrusive measures include field audits, inquiry orders and searches and seizures.

The reasonable grounds principle in section 60(1) of the TAA provides the doorway for SARS to act on suspicious activities under the tax acts. Warrants and constitutional rights are intertwined, and warrants must be executed appropriately with the necessary sensitivity to the rights of others. Flaws and defects in a warrant can void the search and seizure processes. Unlawful conduct, such as intimidation by tax officials, is not permitted. SARS officials should only seize relevant material for purposes of the administration of the tax acts, and unlicensed individuals' premises can be searched without a warrant. SARS can use seized monies to settle outstanding tax debts where appropriate by considering third-party claims.

Items that can be seized by SARS from both the home and business of taxpayers include hard-copy books of account, financial documents and invoices, electronic format documents kept on electronic storage devices and the cloud, computers and cell phones. Additionally, share certificates indicating shareholding, trust statements, computer-generated cryptocurrency transaction ledgers, Bitcoin smart contracts, contracts and written agreements entered by taxpayers may be seized. Taxpayers can ask SARS to return seized items and may claim damages for the physical damage suffered to their property by SARS officials. The taxpayer may approach the High Court if SARS refuses to approve a claim of physical damage. The types of relevant material sought during a search and seizure depend on the evidence that SARS seeks to prove tax evasion or that taxpayers fail to comply with their tax obligations. Information containing legal professional privilege, in particular legal advice, must be sealed by an attorney while searching the taxpayer's premises. A court must make a final determination regarding the claim of legal professional privilege.

It is critical to remember that warrants can only be issued by judicial officers if there are reasonable grounds to believe that a person has failed to comply with a tax obligation or has committed a tax offence. The warrant is the key to the taxpayer's premises to search for and access relevant material. Delegated SARS officials must conduct searches within 45 business days or longer if good cause is shown. Officials must act with decency, and by adhering to the abovementioned principles, SARS can uphold the rule of law and protect individual taxpayer rights. Using its arsenal of information-gathering powers, SARS can apply less restrictive measures than costly search and seizure operations with greater effectiveness through inquiries. Through inquiries, taxpayers are forced to reveal relevant material instead of SARS going on fishing expeditions. Considering the findings in *Bechan*, SARS can provide insight into the current tax system by creating a comprehensive list of items and properties that can be searched and seized, as well as the costs involved with search and seizure operations and inquiries, and the possibility of using less invasive methods when conducting searches and seizures.

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- [98] Section 31(2) of the CPA. <https://www.justice.gov.za/legislation/acts/1977-051.pdf>
- [99] Bechan and Another v SARS Customs Investigations Unit and Others [2022] ZAGPPHC 525. <https://www.saflii.org/za/cases/ZAGPPHC/2022/525.html>
- [100] Section 62(1) of the TAA specifies that a SARS official may enter premises not identified in a warrant if they believe relevant material referred to in the warrant may be found there. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [101] Bechan v BK and Another v Minister of Police and Others [2022] ZAGPPHC 525 at par 5. <https://www.saflii.org/za/cases/ZAGPPHC/2022/525.html>
- [102] According to the Constitutional Court in Ngqukumba v Minister of Safety and Security and Others [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC), at par 10, “...[T]he essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before or else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and inducing them to follow due process.” <https://www.saflii.org/za/cases/ZACC/2014/14.html>

- [103] *Bechan and Another v SARS Customs Investigations Unit and Others* [2022] ZAGPPHC 525 at par 5. <https://www.saflii.org/za/cases/ZAGPPHC/2022/525.html>
- [104] *Bechan and Another v SARS Customs Investigations Unit and Others* (1196/2022) [2024] ZASCA 20 at paras 18 and 23. <https://www.saflii.org/za/cases/ZASCA/2024/20.html>
- [105] *Bechan and Another v SARS Customs Investigations Unit and Others* [2024] ZASCA 20 at par 17. <https://www.saflii.org/za/cases/ZASCA/2024/20.html>
- [106] *Bechan and Another v SARS Customs Investigations Unit and Others* [2024] ZASCA 20 at paras 6 and 17. <https://www.saflii.org/za/cases/ZASCA/2024/20.html>
- [107] Leacock, C. (2008). Search and seizure of digital evidence in criminal proceedings. *Digital evidence and electronic signature Law Review*, 5, 221-225. <https://journals.sas.ac.uk/deeslr/article/view/1873/1810>
- [108] Leacock, C. (2008). Search and seizure of digital evidence in criminal proceedings. *Digital evidence and electronic signature Law Review*, 5, 221-225. <https://journals.sas.ac.uk/deeslr/article/view/1873/1810>
- [109] *Gordhan v Public Protector and Others* [2020] JOL 49105 (GP) at par 169. [https://legalbrief.co.za/media/filestore/2020/12/Gordhan\\_v\\_Public\\_Protector\\_and\\_others\\_2020\\_JOL\\_49105\\_GP.pdf](https://legalbrief.co.za/media/filestore/2020/12/Gordhan_v_Public_Protector_and_others_2020_JOL_49105_GP.pdf)
- [110] *Gordhan v Public Protector and Others* [2020] JOL 49105 (GP) at par 169. [https://legalbrief.co.za/media/filestore/2020/12/Gordhan\\_v\\_Public\\_Protector\\_and\\_others\\_2020\\_JOL\\_49105\\_GP.pdf](https://legalbrief.co.za/media/filestore/2020/12/Gordhan_v_Public_Protector_and_others_2020_JOL_49105_GP.pdf)
- [111] The Electronic Communications and Transactions Act, 25 of 2002 (ECT Act). <https://www.gov.za/documents/electronic-communications-and-transactions-act>
- [112] Section 15 of the ECT Act. <https://www.gov.za/documents/electronic-communications-and-transactions-act>
- [113] Section 17 of the ECT Act. <https://www.gov.za/documents/electronic-communications-and-transactions-act>
- [114] *Bechan and Another v SARS Customs Investigations Unit and Others* at par 8.
- [115] Section 60 of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [116] *Haynes v Commissioner 64 SATC 321* at page 323. Available at LexisNexis.
- [117] *Haynes v Commissioner 64 SATC 321*.
- [118] *Haynes v Commissioner 64 SATC 321* at page 324.
- [119] According to section 46(1) of the TAA, SARS can request relevant material (tax-related information) from a taxpayer. SARS can also apply for an inquiry to be held per section 50(1) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [120] Section 63(4) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [121] Section 63(1)(b) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [122] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079; 2011 (1) SA 545 (CC) at par 54. <https://www.saflii.org/za/cases/ZACC/2000/12.html>
- [123] *Haynes v Commissioner 64 SATC 321* at pages 328, 341, 344, 354, 355 and 365. Available at LexisNexis.
- [124] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC38; 2014 (1) SA 442 (CC) BCLR 38 (CC). <https://www.saflii.org/za/cases/ZACC/2013/38.html>
- [125] Section 61(3)(b) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [126] *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) at par 1. <https://www.saflii.org/za/cases/ZAGPJHC/2015/293.html>
- [127] *R v Chesterfield Justices and another, ex parte Bramley* [2000] 1 All ER 411 at 412. <https://justis.vlex.com/vid/793034089>
- [128] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at par 193 (<https://www.saflii.org/za/cases/ZACC/2008/13.html>); See also section 29(11) of the National Prosecuting Act, 32 of 1998. <https://www.justice.gov.za/legislation/acts/1998-032.pdf>
- [129] Section 64 of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [130] Section 61(5) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [131] SARS. 2011. Tax Administration Bill, B11-2011. Standing Committee on Finance Briefing Note: search without warrant: clause 63. [Online]. Available at: <https://www.sars.gov.za/wp-content/uploads/Legal/RespDocs/LAPD-LPrep-Resp-2011-04-Response-Documents-Briefing-to-SCoF-Search-without-warrant-Clause-63.pdf> SARS performed a comparative overview of 17 legislations concerning searches without a warrant prior to the TAA.

- [132] Section 66(1)(a) of the TAA. [https://www.gov.za/sites/default/files/gcis\\_document/201409/a282011.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a282011.pdf)
- [133] In *Cassimjee v Minister of Finance* [2012] ZASCA 101; 2014 (3) SA 198 (SCA), the taxpayer challenged the Commissioner's decision after 30 years. It concerned that Customs and Excise officials seized several vehicles in 1977. Inordinate delays could border on frivolous or vexatious litigation. <https://www.saflii.org/za/cases/ZASCA/2012/101.pdf>
- [134] Section 172 of the Constitution (<https://www.gov.za/documents/constitution-republic-south-africa-1996>); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079; 2011 (1) SA 545 (CC). <https://www.saflii.org/za/cases/ZACC/2000/12.html>
- [135] Section 172 of the Constitution (<https://www.gov.za/documents/constitution-republic-south-africa-1996>); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079; 2011 (1) SA 545 (CC). <https://www.saflii.org/za/cases/ZACC/2000/12.html>

