

C Fritz

Customs searches: Past, present and future

Abstract

The South African Revenue Service is afforded the power to conduct customs searches in order to verify compliance. This article deals with the development of this power, taking into consideration a taxpayer's constitutional rights. It discusses the customs search provisions prior to the *Tax Administration Law Amendment Act*, and thereafter, as well as the customs search provisions in terms of the *Customs Control Act*. The article addresses whether these developments can be considered constitutionally sound. In order to evaluate constitutionality, a constitutional search framework is developed within which searches should be conducted to pass constitutional muster. Comparing this framework with the present customs search provisions leads to the conclusion that the present customs search provisions are a substantial improvement on the previous provisions and that the provisions are constitutional. The same conclusion can, however, not be reached with regard to future customs search provisions in terms of the *Customs Control Act*.

Doeanesoektogte – Die verlede, hede en toekoms

Die Suid-Afrikaanse Inkomstediens het die mag om doeanesoektogte uit te voer ten einde nakoming te kontroleer. Hierdie artikel handel oor die ontwikkeling van hierdie mag deur die belastingbetaler se grondwetlike regte in ag te neem. Die doeanesoektog-bepalings voor die *Wysigingswet Op Belastingadministrasiewette (Tax Administration Law Amendment Act)* en daarna, sowel as die doeanesoektog-bepalings kragtens die *Wet op Doeanebeheer* word bespreek. Hierdie artikel spreek die grondwetlikheid van hierdie ontwikkelinge aan. Ten einde die grondwetlikheid te evalueer, word 'n grondwetlike soektogte-raamwerk ontwikkel waaraan soektogte voldoen moet word ten einde grondwetlik geag te word. Met die vergelyking van hierdie raamwerk met die huidige doeanesoektog-bepalings word die gevolgtrekking gemaak dat daar 'n aansienlike verbetering is in vergelyking met die vorige bepalings. Die huidige bepalings word as grondwetlik beskou. Dieselfde gevolgtrekking kan egter nie bereik word ten opsigte van die toekomstige doeanesoektogte kragtens die *Wet op Doeanebeheer* nie.

C Fritz, Lecturer, Department of Mercantile Law, University of Pretoria. This article emanated from research the author has conducted relating to her LLD thesis. The financial assistance of the National Research Foundation (NRF) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the NRF.

1. Introduction

Life is divided into three terms – that which was, which is, and which will be. Let us learn from the past to profit by the present, and from the present, to live better in the future.¹

Even though this quote relates to life in general, it could equally apply to South African customs searches. Like life, customs searches can be divided into three parts. The past encompasses the customs search provisions prior to the amendment of section 4(4) to 4(6) of the *Customs and Excise Act*.² This amendment was pursuant to the court decisions in *Gaertner v Minister of Finance (HC)*³ and *Gaertner v Minister of Finance (CC)*⁴ where it was held that section 4(4) to 4(6) of the *Customs and Excise Act* as it stood at that stage to be unconstitutional.⁵ The present deals with the current search provisions (after the amendment),⁶ whilst the future relates to the search provisions as provided for in the *Customs Control Act* that is yet to come into operation.⁷

This article analyses the past, present and future in respect of customs searches. The aim of this analysis is twofold. First, the analysis aims to establish whether the current provisions (the present) can be considered to provide better protection of a taxpayer's rights to privacy,⁸ just administrative action,⁹ and access to the courts¹⁰ than the provisions prior to the amendment (the past). Secondly, such analysis seeks to establish whether the provisions of the *Customs Control Act* (the future) can be considered a step towards protecting the said rights.

In order to evaluate whether these rights are adequately protected, a framework within which searches in general function in South Africa, is provided. This framework takes into consideration the rights and values contained in the *Constitution*, which is relevant when dealing with searches. This framework provides a balance between a person's rights when a search is conducted and the purpose for which the search is conducted.

1 Wordsworth [s.a.].

2 *Customs and Excise Act* 91/1964.

3 *Gaertner v Minister of Finance (HC)* 2013 (4) SA 87 (WCC).

4 *Gaertner v Minister of Finance (CC)* 2014 (1) BCLR 38 (CC).

5 *Gaertner v Minister of Finance (HC)*:par. 112; *Gaertner v Minister of Finance (CC)*:par. 88.

6 That is after the amendment of these provisions by the *Tax Administration Law Amendment Act* 39/2013.

7 *Customs Control Act* 31/2014. This Act was assented to on 21 July 2014. The *Customs Control Act*: sec 944(2) indicates that the date of commencement may only be determined when the *Customs Duty Act* 30/2014, which was assented to on 9 July 2014, is amended by an addition of a customs tariff in an annexure to the Act and when the *Excise Duty Act*, which has not yet been drafted, is amended by adding an Excise Tariff in an annexure to the Act.

8 *Constitution of the Republic of South Africa* 1996:sec 14.

9 *Constitution of the Republic of South Africa* 1996:sec 33.

10 *Constitution of the Republic of South Africa* 1996:sec 34.

2. Constitutional search framework

Section 2 of the *Constitution* provides that the *Constitution* is the supreme law of South Africa and no law or conduct may be contrary to the *Constitution*. Furthermore, the duties imposed by the *Constitution* must be fulfilled.

Section 39(2) of the *Constitution* imposes a duty on the courts, tribunals and forums that, when they interpret any legislation, “the spirit, purport and objects of the Bill of Rights” must be promoted. In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*, the court indicated that, in light of section 39(2) of the *Constitution*, the *Constitution* is the point of departure when interpreting any legislation.¹¹ Similarly, the court held in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* that all statutes must “be interpreted through the prism of the Bill of Rights”.¹² The court continued that this requires the courts to give effect to the founding values of the *Constitution*.¹³ The founding values of the *Constitution*, as provided for in section 1 of the *Constitution*, contain, among other values, the rule of law.¹⁴ Consequently, when dealing with legislation such as the *Customs and Excise Act*, it should be interpreted in a manner that gives effect to, among other things, the rule of law.

The rule of law necessitates that government’s conduct is done in accordance with “pre-announced, clear and general rules”.¹⁵ This means that a broad discretionary power without any explicit restrictions would be contrary to the rule of law, as it would be unclear. The person affected by such a power would not know when s/he is entitled to remedies.¹⁶ Furthermore, the rule of law demands that government’s conduct must be

11 *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*:par. 72. See also Mdumbe 2004:472-481.

12 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 21.

13 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC):par. 22. See also *United Democratic Movement v President of the Republic of South Africa* 1 (2002) BCLR 1179 (CC):par. 19.

14 *Constitution of the Republic of South Africa* 1996:sec 1(c).

15 Bekink 2012: 62; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC):par. 108; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (5) BCLR 837 (CC):842.

16 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*:842.

done in terms of the law.¹⁷ Moreover, there must be a rational¹⁸ link between the conduct in terms of the law and a legitimate government purpose.¹⁹

Even though the founding values in the *Constitution* do not confer an enforceable right in itself,²⁰ Hoexter indicates that these founding values are linked to rights contained in the Bill of Rights.²¹ She indicates that the rule of law is reflected or implemented, *inter alia*, through the rights to just administrative action, as contemplated in section 33 of the *Constitution*, and access to the courts, as contemplated in section 34 of the *Constitution*.²²

In addition to the *Constitution* prescribing the manner in which legislation must be interpreted, the *Constitution* also imposes duties on the South African Revenue Service (SARS) by virtue of the fact that it is an organ of state.²³ First, section 195(2)(b) of the *Constitution* provides that SARS must adhere to the basic values and principles of public administration, as provided for in section 195(1) of the *Constitution*. Public administration must adhere to the values and principles enshrined in the *Constitution*, must promote and maintain a high standard of professional ethics, and act in an impartial, fair, equitable and unbiased manner. Furthermore, public administration must provide the public with timely, accessible and accurate information.

Similar to the founding values of the *Constitution*, section 195(1) of the *Constitution* does not confer a justiciable enforceable right.²⁴ In *Chirwa v Transnet Ltd*, the court recognised that section 195(1) of the *Constitution* serves an interpretative purpose,²⁵ but in *Joseph v City of Johannesburg*,²⁶ the court went further by indicating that, if public administration does not exercise its powers in line with the values contained in sections 195(1) and 1

17 Dicey 1959:193; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA: in re ex parte president of the Republic of South Africa* 2000 (2) SA 674 (CC); paras. 19-20; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC); par. 49; Bekink 2012:63.

18 See *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa*; par. 90 where it is indicated that rationality should be determined objectively. Rationality sets a minimum threshold requirement when exercising power.

19 *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the Republic of South Africa*: par 85; *New National Party v Government of South Africa* 1999 (3) SA 191 (CC); par. 19; Bekink 2012:63; Rautenbach 2012:9.

20 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); par. 21

21 Hoexter 2012:18.

22 Hoexter 2012:18-19.

23 *South African Revenue Service Act* 34/1997:sec 2.

24 *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C); par. 64; *Chirwa v Transnet Ltd* 2008 (3) BCLR 251 (CC):76.

25 *Chirwa v Transnet Ltd*; par. 75.

26 *Joseph v City of Johannesburg* 2010 (3) BCLR 212 (CC).

of the *Constitution*, the affected person may take the matter on review²⁷ in terms of the *Promotion of Administrative Justice Act*.²⁸

There is also an obligation on SARS to respect the Bill of Rights contained in Chapter 2 of the *Constitution*.²⁹ The Bill of Rights affords rights such as the right to privacy,³⁰ the right to just administrative action,³¹ and the right of access to the courts.³²

The right to privacy includes the right of a person not to have his/her person, home or property searched, as well as the right not to have his/her possessions seized.³³ The following two rights should also be respected when SARS conducts a search. The right of access to the courts that guarantees the right of access to a court or other tribunal and a fair public hearing.³⁴ This right ensures a peaceful and orderly society “without resorting to self-help”³⁵ and where “no one is entitled to take the law into her or his own hands”.³⁶ The right to just administrative action is considered to constitutionalise the rules of natural justice, such as *nemo iudex in propria causa*³⁷ (“no one may be a judge in his or her own case”³⁸) and *audi alteram partem* (“hear the other side”³⁹). The right to just administrative action encapsulates the *nemo iudex in propria causa* rule as it indirectly prohibits a person from becoming a judge in his/her own case.⁴⁰ In addition, the *audi alteram partem* rule is constitutionalised, as the administrator must provide a person with reasonable opportunity to state his/her case.⁴¹

27 *Joseph v City of Johannesburg*:par. 41.

28 *Promotion of Administrative Justice Act 3/2000*. The *Promotion of Administrative Justice Act* gives effect to the right to just administrative action which is contained in the *Constitution of the Republic of South Africa*:sec 33. The matter would be subject to judicial review due to the fact that the “rights” which should be adversely affected before a matter would fall within the ambit of the *Promotion of Administrative Justice Act* includes legitimate expectations. See *Joseph v City of Johannesburg*:par. 41; *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) BCLR 151 (CC)*:par. 41.

29 *Constitution of the Republic of South Africa 1996*:sec 8(1) specifically provides that the Bill of Rights applies to organs of state.

30 *Constitution of the Republic of South Africa 1996*:sec 14.

31 *Constitution of the Republic of South Africa 1996*:sec 33.

32 *Constitution of the Republic of South Africa 1996*:sec 34.

33 *Constitution of the Republic of South Africa 1996*:sec 14.

34 *Constitution of the Republic of South Africa 1996*:sec 34.

35 *Chief Lesapo v North West Agricultural Bank 1999 (12) BCLR 1420 (CC)*:1429.

36 *Chief Lesapo v North West Agricultural Bank*:1436.

37 Burns 2003:197 states that this rule relates to the fact that no one may be a judge in his or her own case.

38 Burns 2003:197.

39 Burns 2013:352.

40 This is due to the fact that the *Promotion of Administrative Justice Act 3/2000*, which has been enacted to give effect to the constitutional right of just administrative action, provides in sec 6(2)(a)(iii) that bias on the side of the administrator would constitute grounds for review.

41 *Promotion of Administrative Justice Act*:sec 3(2)(b)(ii).

It is, however, important to remember that the rights contained in the Bill of Rights are not absolute. Accordingly, the rights to privacy, access to the courts and just administrative action can be limited in terms of section 36 of the *Constitution*. This section provides that a law of general application may limit a right contained in the Bill of Rights if the limitation is reasonable and justifiable. Section 36 indicates factors to consider when determining whether the limitation is reasonable and justifiable, namely the nature of the right; how important the purpose of the limitation is; the nature and extent of the limitation; the relationship between the limitation and its purpose, and whether there are less restrictive means available to accomplish the purpose of the limitation.⁴²

Case law has dealt with what can be considered a reasonable and justifiable limitation of a person's rights to privacy, access to the courts and just administrative action. In *Bernstein v Bester*,⁴³ which dealt with the right to privacy, it was held as follows:

A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.⁴⁴

Cognisance should be taken of the fact that this does not mean that, once a person moves into a public sphere, s/he does not have a right to privacy.⁴⁵ Rather, in such an instance, the person's right to privacy may be subject to reasonable and justifiable limitations.

Some case law suggests that a search conducted without a warrant would not be considered a reasonable and justifiable limitation of a person's right to privacy; in other words, such search would be unconstitutional. In *Park-Ross v Director: Officer for Serious Economic Offences*,⁴⁶ the court dealt with whether section 6 of the *Investigation of Serious Economic Offences Act*⁴⁷ unreasonably violated a person's right to

42 *Constitution of the Republic of South Africa* 1996:sec 36(1)(a)-(e).

43 *Bernstein v Bester* 1996 (2) SA 751 (CC).

44 *Bernstein v Bester*:par. 77.

45 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC):par. 16.

46 *Park-Ross v Director: Officer for Serious Economic Offences* 1995 (2) BCLR 198 (C).

47 *Investigation of Serious Economic Offences Act* 117/1991.

privacy.⁴⁸ This section allowed the Director for Serious Economic Offences to enter and search premises and seize property such as books and documents without authorisation.⁴⁹ The court held this provision to be in conflict with the *Constitution*, as the court did not consider the director to be capable of granting impartial authorisation and acting in a neutral and impartial manner.⁵⁰

Warrantless search and seizure was also declared unconstitutional in *Mistry v Interim National Medical and Dental Council of South Africa*.⁵¹ In this matter, the constitutionality of section 28(1) of the *Medicines and Related Substances Control Act*,⁵² which authorised inspectors to conduct searches and seizures at any premises without obtaining a warrant, came under scrutiny.⁵³ The court pointed out that the provision contained no restriction of this power, as any premises could be searched as long as medicine or scheduled substances were, or were suspected to be, on such premises. This meant that inspectors could enter any residential premises where even aspirin or ointment was kept.⁵⁴ Sachs J commented that safeguards detailing when private premises of people may be entered are essential in a constitutional democracy.⁵⁵ The court also pointed out that this section provided instant power to conduct a warrantless search, as it did not require search and seizure to be authorised by a warrant.⁵⁶ Based on this, section 28(1) was held to be unconstitutional.

In addition to case law, the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa (the Katz Commission) also identified a search conducted without judicial authorisation as being problematic. The Commission recommended that an impartial person capable of acting judicially should, where possible, provide prior authorisation to execute a valid search. Furthermore, it proposed that this impartial person should, at the very least before issuing the warrant, on reasonable and proper grounds believe that an offence had been committed and that evidence would be uncovered at the place of the search.⁵⁷

It is submitted that such judicial authorisation as envisaged by the Commission will ensure that the right of access to the courts and to just administrative action are respected. The right of access to the court is

48 *Park-Ross v Director: Officer for Serious Economic Offences*:202. The right to privacy was at that stage contained in the Interim Constitution of the Republic of South Africa 200/1993:sec 13.

49 *Investigation of Serious Economic Offences Act*:sec 6.

50 *Park-Ross v Director: Officer for Serious Economic Offences*:222.

51 *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

52 *Medicines and Related Substances Control Act* 101/1965.

53 It was questioned whether this provision did not unreasonably and unjustifiably infringe on a person's right to privacy as contained in the *Interim Constitution of the Republic of South Africa*:sec 13.

54 *Mistry v Interim National Medical and Dental Council of South Africa*:par. 21.

55 *Mistry v Interim National Medical and Dental Council of South Africa*:par. 25.

56 *Mistry v Interim National Medical and Dental Council of South Africa*:par. 28.

57 Katz Commission 1994:73.

respected by obtaining judicial authorisation by way of a warrant issued at the discretion of an impartial person. This prevents a person who has the power to conduct a search from taking the law into his/her own hands. For the same reason, the right to just administrative action is respected, because the person who wishes to conduct the search will not be the judge in his/her own matter. Furthermore, judicial authorisation affords the person who will be affected by the search the opportunity to state his/her case.

Apart from ensuring judicial intervention, the warrant itself plays an important role. In *Ferucci v C:SARS*,⁵⁸ it was held that a warrant should indicate what documents are subject to the search.⁵⁹ The court considered this to be a constitutional safeguard and, if this requirement is not met, the warrant can be set aside.⁶⁰ The detail required in the warrant ensures that a judicial officer lays down the parameters of the searches and seizures and that the person executing the warrant does not define these parameters.⁶¹ Thus, in the absence of a warrant, there is no clear indication of the parameters of the search. Furthermore, without a warrant a dispute relating to whether SARS has exceeded its powers during a specific search would be difficult to resolve, as there would be no documentary proof defining the scope of SARS' powers in that specific instance.

*The South African Association of Personal Injury Lawyers v Heath*⁶² case illustrates that not all warrantless search-and-seizure provisions in South Africa will be unconstitutional. In this matter, the court considered section 6 of the *Special Investigating Units and Special Tribunals Act*⁶³ as justifiably limiting a person's right to privacy.⁶⁴ The reason for the departure in this case from the aforementioned judgements is that section 6 of this Act does, in fact, allow for search and seizure authorised by way of a warrant.⁶⁵ Only in exceptional circumstances can a search and seizure be conducted without a warrant. Such circumstances are limited to the situations where a person has consented to a search and seizure,⁶⁶ or when a member of

58 *Ferucci v C:SARS* [2002] JOL 9664 (C):18.

59 *Ferucci v C:SARS*:19. The court indicated that in some instances it may be impractical to individually itemise the documents subject to the search.

60 *Ferucci v C:SARS*:13, 28. See also *Ivanov v North West Gambling Board* [2012] 4 ALL SA 1 (SCA):7 where the courts also concluded that if a warrant is too vague, the warrant should be set aside.

61 *Ferucci v C:SARS*:20.

62 *The South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T).

63 *Special Investigating Units and Special Tribunals Act* 74/1996.

64 *The South African Association of Personal Injury Lawyers v Heath*:1165-1168.

65 *The South African Association of Personal Injury Lawyers v Heath*:1166. See also Bovijn & Van Schalkwyk 2012:522.

66 It is submitted that whenever a search or seizure is conducted with the consent of the relevant person, such a search or seizure will be valid provided that it does not exceed the scope of the consent. This is based on the principle *volenti non fit iniuria* which means that "a willing person is not wronged". Consequently, the first instance of when a warrantless search may be conducted is applicable to all other search and seizure situations.

the Special Investigating Unit on reasonable grounds believed that, (i) if s/he had applied for a warrant, it would have been issued, and that (ii) a delay in obtaining the warrant would defeat the purpose of the search.⁶⁷

*Magajane v Chairperson, North West Gambling Board*⁶⁸ confirmed that a search without a warrant should be allowed only in exceptional circumstances and should not be the norm.⁶⁹ The matter of *Magajane* also brought three other principles to the fore. First, the aim of the search has to be determined. If it is for purposes of criminal prosecution or enforcement, it will be more intrusive than a search aimed at verifying compliance.⁷⁰ Secondly, the broader the inspection or search powers, the greater the limitation of a person's privacy will be.⁷¹ It is submitted, however, that providing clear guidelines relating to the scope, time and place of the search can curb the breadth of the search-and-seizure power. Lastly, the exceptional circumstances when a warrantless search is permitted will only pass constitutional muster if the legislation concerned provides adequate guidelines on conducting the search.⁷²

With this framework in mind, the past, present and future in respect of customs searches will be discussed to ascertain whether they are in line with this framework.

3. Customs searches – the past

3.1 The provisions

Section 4(4) of the *Customs and Excise Act* provided that an officer could, without any prior notice, enter any premises and make enquiries as s/he deemed necessary.⁷³ No warrant was required to conduct a search. As such, section 4(4) of the *Act* granted an instant power to search, a power that required no authorisation.

The officer could also request a person to furnish him/her with relevant documentation which was kept in terms of the *Act* or which related to matters dealt with in the *Act*.⁷⁴ Moreover, the officer could scrutinise and make copies of, or attach such relevant documentation and request explanations regarding entries therein. Attachment would, however, only take place in instances where the officer was of the opinion that such relevant documentation constituted evidence of any matter dealt with in the *Act*.⁷⁵ Lastly, section 4(4) provided that an assistant or a member of the police force could assist an officer.⁷⁶

67 *Special Investigating Units and Special Tribunals Act*:sec 6(6)(a) & (b).

68 *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 CC.

69 *Magajane v Chairperson, North West Gambling Board*:paras. 73–77.

70 *Magajane v Chairperson, North West Gambling Board*:par. 69.

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

72 *Magajane v Chairperson, North West Gambling Board*:paras. 73-77.

73 *Customs and Excise Act*:sec 4(4)(a)(i).

74 *Customs and Excise Act*:sec 4(4)(a)(ii).

75 *Customs and Excise Act*:sec 4(4)(a)(iii).

76 *Customs and Excise Act*:sec 4(4)(b).

Section 4(5) stipulated that any person whose business was conducted on the premises, and employees of the business had to provide the facilities as required by the officer to enter the premises and exercise his/her search powers. If an officer announced his/her capacity, indicated the reason for requiring admission and demanded such admission, but was refused admission, section 4(6)(a) of the *Act* would take effect. This section made provision for the officer to break open windows and doors or break through walls in order to enter the premises.

In the event that the officer has to obtain forced entry during the night, the presence of a member of the police force was required. An officer or person who assisted the officer could also break up any ground or open any room, safe, box or package if the keys thereof were not produced on demand.⁷⁷

3.2 The provisions compared with the constitutional search framework

The enactment of the *Constitution* did not have an effect on these warrantless search provisions. Even though persons were expressly afforded the right to privacy, the right of access to the courts and the right to just administrative action under the *Constitution*, the *Customs and Excise Act* provisions, unlike the provisions in *the Income Tax Act*⁷⁸ and *the Value-Added Tax Act*⁷⁹ dealing with searches⁸⁰ remained unscathed.

If one compares these provisions with the framework provided above,⁸¹ the *Customs and Excise Act* provisions were lacking for a number of reasons.

Section 4(4) of the *Customs and Excise Act* provided a broad discretionary power to SARS without any restrictions. A taxpayer affected by a search in terms of section 4(4) would not know whether s/he is entitled to any redress, as it would be uncertain when this power may be exercised. This is contrary to the rule of law. This means that a taxpayer would have been able to take the matter on review. Furthermore, I submit that when considering sections 36(1)(c) and 36(1)(e) of the *Constitution*, the extent of the limitation is too broad without any restrictions to make the infringement upon a taxpayer's rights less invasive.

In addition, the search could be conducted without any judicial intervention, which was identified as being of importance earlier in this article.

Furthermore, the provisions did not differentiate between a search being conducted at residential premises and that carried out on commercial premises. Accordingly, a person's inner sanctuary was not specifically

77 *Customs and Excise Act*:sec 4(6)(b).

78 *Income Tax Act* 58/1962.

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

80 *Revenue Laws Amendment Act* 46/1996:sec 14 amended the income tax and value-added tax search provisions.

81 See fn. 2 above.

respected as such. This means that section 4(4) of the *Customs and Excise Act* stood in contrast to the *dicta* in *Bernstein v Bester* and *Mistry v Interim National Medical and Dental Council of South Africa*,⁸² which provided that safeguards must be in place when a person's residential premise is searched.⁸³

In addition, the provisions provided for a warrantless search as the norm. No consideration was given to the aim of the search and no guidelines were given on how these warrantless searches should be conducted to ensure that a taxpayer's rights were respected. Hence, section 4(4) of the *Customs and Excise Act* was also not in line with what had transpired from *Magajane v Chairperson, North West Gambling Board* as essential to ensure that a search is considered a reasonable and justifiable limitation of a person's right to privacy.⁸⁴

One could speculate that the reason for warrantless customs and excise searches remaining unscathed is that this is a regulated field where the removal of goods is important, as they may need to be examined to establish whether the information provided, for example as to the value, character and quantity of the goods – which are used to establish the duty payable – is correct.⁸⁵ It could further be argued that requiring SARS to first obtain a warrant before conducting a search would allow the taxpayers concerned to move the goods, making it nearly impossible for SARS to verify the necessary information.

3.3 Constitutional attack of sections 4(4)-4(6) of the Customs and Excise Act⁸⁶

Despite the possible reasons put forward for the provisions pertaining to customs searches remaining intact after the enactment of the *Constitution*, the court in *Gaertner v Minister of Finance (HC)* questioned the constitutionality of a search conducted in terms of section 4(4) of the *Customs and Excise Act*.

The applicants asserted that a warrantless, non-routine search was invalid.⁸⁷ A "routine search", in this instance, is where officers conduct random searches to verify compliance with the *Customs and Excise Act*

82 *Mistry v Interim National Medical and Dental Council of South Africa*:par. 25.

83 *Bernstein v Bester*:par. 77.

84 *Magajane v Chairperson, North West Gambling Board*:paras. 69, 71, 73-77.

85 *Gaertner v Minister of Finance (CC)*:par. 20. In terms of the *Customs and Excise Act*:sec 6(1), goods subject to customs duty are initially placed in a regulated environment such as a transit shed, a container terminal or depot, a state warehouse or a customs warehouse. When the prescribed forms and documentation are completed and the required duty paid, the Commissioner will issue a certificate or invoice. This will constitute due entry and the goods can then be removed from the regulated environment to the domestic domain.

86 The discussion relating to *Gaertner v Minister of Finance (HC)* and *Gaertner v Minister of Finance (CC)* is largely based on Keulder 2015:823-835.

87 *Gaertner v Minister of Finance (HC)*:par. 86.

and where there is no suspicion that the Act has been contravened. A “non-routine search”, on the other hand, is one where SARS searches the specific premises based on a belief or suspicion that material will be found on the premises that would indicate a contravention of the Act.⁸⁸

The High Court concluded that:

- a routine search conducted at designated premises⁸⁹ or at premises of a registered or licensed person without a warrant, would be valid;⁹⁰
 - warrantless, non-routine searches at designated premises were justifiable;⁹¹ and
 - a warrant must be obtained when a search is conducted at the premises of an unregistered and unlicensed person.⁹²
 - The court took cognisance of the principle that, in the absence of a warrant being required, legislation must provide adequate guidelines.⁹³
- The court provided the following guidelines:

- Entry should occur during business hours, except if the officer reasonably believes that entry at another time is necessary for purposes of the Act.
- It should be communicated to the person in charge at the premises whether it is a routine or non-routine search. If a warrant is not required, the person in charge should be furnished with a written statement indicating the purpose of the search. If it is a matter of urgency, this should be communicated orally.
- The person in charge is entitled to be present and witness the search.
- A list of all copies made and things seized should be provided.
- The search proceedings should be conducted in an orderly and decent manner.⁹⁴

The declaration of invalidity of non-routine searches on the premises of an unlicensed or unregistered person, or of searches on the non-designated premises of a registered or licensed person, was held not to apply retrospectively. Accordingly, the court suspended the declaration

88 *Gaertner v Minister of Finance (HC)*:par. 81.

89 *Gaertner v Minister of Finance (HC)*:paras. 77; 100 where designated premises are described as pre-entry facilities such as transit sheds, container terminals, container depots and licensed warehouses and rebate stores.

90 *Gaertner v Minister of Finance (HC)*:par. 87.

91 *Gaertner v Minister of Finance (HC)*:par. 103.

92 *Gaertner v Minister of Finance (HC)*:par. 103. The court par 85 observed that (this type of search would be a non-routine search and would, accordingly, always require a warrant.

93 As envisaged in *Magajane v Chairperson, North West Gambling Board*:paras. 73-77.

94 *Gaertner v Minister of Finance (CC)*:par. 105.

for a year and a half to allow the legislature to bring the relevant provisions in line with the *Constitution*.⁹⁵

To confirm the order declaring these sections invalid, the matter of *Gaertner* was referred to the Constitutional Court.⁹⁶

The Constitutional Court concurred with the High Court that a search conducted in terms of the *Customs and Excise Act* restricts the taxpayer's rights and as such it must be determined whether the restriction is reasonable and justifiable.⁹⁷

First, in considering the factor provided for in section 36(1)(a) of the *Constitution*, to wit the importance of the right, the court held that the right to privacy includes the right to be "free from intrusions and interferences by the state".⁹⁸ The court remarked that, as a person moves into the public sphere, his/her expectation of privacy is diminished, but not abolished.⁹⁹

Furthermore, the purpose of the limitation contained in section 36(1)(b) was considered. The court held that the main purpose of customs duty is to raise revenue, which is a legitimate government purpose.¹⁰⁰ The court considered the search provisions contained in the *Customs and Excise Act* to be rationally linked to this purpose, as SARS can monitor and prevent tax evasion.¹⁰¹

When the court dealt with the factor contained in section 36(1)(c) of the *Constitution*, i.e. the nature and extent of the limitation, the court pointed out three principles. The state regulates commercial activities to ensure that it is exercised in accordance with public interest. The extent of the state's regulation is determined by the nature of the specific industry. The court held that the customs and excise industry may necessitate regular inspections. The court pointed out that the right to privacy at business premises is attenuated, but not when dealing with this right in a private home. The court highlighted that the current search provisions contained in the *Customs and Excise Act* do not distinguish between searches at private homes and business premises.¹⁰² This is contrary to what case law suggests would be considered a reasonable and justifiable limitation of a person's right to privacy.¹⁰³

The second principle the court dealt with is that a search, which relates to criminal prosecution or enforcement, may be more intrusive than a

95 *Gaertner v Minister of Finance* (CC):par. 119.

96 *Constitution of the Republic of South Africa* 1996:sec 167(5).

97 *Gaertner v Minister of Finance* (CC):par. 21.

98 *Gaertner v Minister of Finance* (CC):par. 48.

99 *Gaertner v Minister of Finance* (CC):par. 48.

100 See *Gaertner v Minister of Finance* (CC):par. 53 where secondary purposes of customs duty are listed. These are (i) to regulate imports of goods; (ii) conserve foreign exchange; (iii) protecting local suppliers against unequal foreign competition.

101 *Gaertner v Minister of Finance* (CC):paras. 53-55. In this respect section 4(4) to 4(6) complied with one of the components of the rule of law.

102 *Gaertner v Minister of Finance* (CC):paras. 60-64.

103 *Mistry v Interim National Medical and Dental Council of South Africa*:par. 25.

search aimed at compliance. The court observed that it is thus important to determine whether a search is aimed at enforcement or compliance.¹⁰⁴ In this instance, the court found that the searches related to enforcement, which meant that the invasion of a person's right to privacy will be greater.¹⁰⁵ As such, guidelines to curb this invasion should have been present.

The last principle considered by the court relating to the nature and extent of the limitation was the breadth of the relevant provisions. It was of significance that neither the time when a search may be conducted nor the type of premises that may be subject to a search was limited. This led the court to conclude that SARS officials have far-reaching powers to conduct searches at any time and any place without a reasonable suspicion.¹⁰⁶

In relation to subsection 36(1)(d) of the *Constitution*, the court held that there is indeed a link between the limitation of a person's right to privacy and ensuring that the purpose of the limiting provision, namely regulating compliance of the *Customs and Excise Act*, is achieved.¹⁰⁷

The last justification factor that the court considered was whether there are less restrictive means to achieve the purpose of the provision. The court did not find private home searches necessary in order to regulate compliance.¹⁰⁸ In addition, the court supported the *dictum* of *Magajane v Chairperson, North West Gambling Board* that a search without a warrant should not become the norm.¹⁰⁹ The court indicated that the importance of obtaining a warrant lies in the fact that it restricts the infringement on a taxpayer's right to privacy, as it stipulates the manner in which the search should be conducted.¹¹⁰ Consequently, only in exceptional circumstances should a search be conducted without a warrant, and legislation should prescribe how these searches should be conducted.¹¹¹ The court held that there were less restrictive ways in which to achieve the stated purpose. These means include conducting private home searches with a warrant and conducting searches at a certain time, place and with a restricted scope.¹¹²

After considering all the factors contained in section 36(1) of the *Constitution*, the court found the relevant sections of the *Customs and Excise Act* to be unconstitutional, as it unreasonably limited a person's right to privacy.¹¹³

104 This principle transpired in *Magajane v Chairperson, North West Gambling Board*:par. 69

105 *Gaertner v Minister of Finance (CC)*:par. 65.

106 *Gaertner v Minister of Finance (CC)*:par. 66.

107 *Gaertner v Minister of Finance (CC)*:par. 67.

108 *Gaertner v Minister of Finance (CC)*:par. 68.

109 *Magajane v Chairperson, North West Gambling Board*:par. 74. Referred to in *Gaertner v Minister of Finance (CC)*:par. 69.

110 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd in re: Hyundai Motor Distributors (Pty) Ltd v Smit*:par. 40. Referred to in *Gaertner v Minister of Finance (CC)*:par. 69.

111 *Gaertner v Minister of Finance (CC)*:paras. 70-71.

112 *Gaertner v Minister of Finance (CC)*:paras. 73-74.

113 *Gaertner v Minister of Finance (CC)*:par. 74.

The Constitutional Court provided an interim reading-in provision that, when a search is conducted at a private residence, a warrant must be obtained. The said warrant could be issued by a judge or a magistrate, if s/he is satisfied that (i) there are reasonable grounds to suspect a contravention of the *Customs and Excise Act*; (ii) a search of the premises will uncover information relating to the contravention, and (iii) the search is reasonably necessary for purposes of the *Act*. A warrantless search of a private residence will be allowed if the officer reasonably believes that (i) a warrant would have been issued if the officer had applied for it, and (ii) a delay in order to obtain the warrant is likely to defeat the purpose of the search.¹¹⁴

These reading-in provisions acknowledge the principle that a person's expectation of privacy will be greater at his/her private residence, and, accordingly, the court indicated that a warrant would be required for these types of searches. The reading-in provisions did, however, not contain details relating to what the content of the warrant should be. The reading-in provisions did not curb the extent to which a taxpayer's rights are limited by indicating the time during which a search may be conducted and that the objects subject to the search have to be specified. It is, however, submitted that, even though the reading-in provisions did not require such detail, a taxpayer would be able to have a warrant set aside if it is too vague.

4. Customs searches – the present

4.1 The provisions

The legislature amended the relevant provisions by way of the *Tax Administration Law Amendment Act*,¹¹⁵ which came into operation on 16 January 2014.¹¹⁶ This amendment provides, as a point of departure, that an officer may only enter premises under authority of a warrant.¹¹⁷ The warrant to conduct a search of premises will be issued if the judge or magistrate is satisfied that (i) there are reasonable grounds to suspect that an offence in terms of the *Customs and Excise Act* has been committed; (ii) a search is likely to produce documents that can be used as evidence, and (iii) the search is reasonably necessary for the purposes of the *Act*.¹¹⁸

Exceptions to the point of departure will be made, when the search is conducted at licensed premises, the business premises of a registered person, premises operated by the state, or with the consent of the person

114 *Gaertner v Minister of Finance (CC)*:par. 88.

115 *Tax Administration Law Amendment Act 39/2013*.

116 *Government Gazette* 16 January 2014:37236.

117 *Customs and Excise Act*:sec 4(aA). See also <http://bit.ly/15Ew2HQ> (accessed on 2 September 2013).

118 *Customs and Excise Act*:sec 4(e) (i)–(iii).

in charge of the premises.¹¹⁹ Entry to premises without a warrant will also be allowed when a SARS officer reasonably believes that a warrant would have been obtained.¹²⁰ This means that a SARS officer must reasonably believe that (i) there are reasonable grounds to suspect that an offence in terms of the *Customs and Excise Act* has been committed; (ii) a search is likely to produce documents that can be used as evidence, and (iii) the search is reasonably necessary for the purposes of the Act.¹²¹ In addition, the delay in order to obtain a warrant must defeat the purpose of the search.¹²²

The *Customs and Excise Act* does not require that there be an imminent threat that relevant material likely to be found at the premises will be removed. Accordingly, the Act does not require that time be of the essence. When, apart from a possible removal, would a delay in obtaining a warrant defeat the purpose of the search? It is submitted that the purpose will not be defeated, as a warrant can be obtained by way of an *ex parte* application,¹²³ that is, the taxpayer concerned would not receive notice of the application for a warrant. This is based on the ground that *ex parte* applications may be used, among others, when the nature of the relief – in this case, authorisation to search specific premises – is such that notice would render the relief nugatory, or when the relief sought is a matter of urgency.¹²⁴

Furthermore, in reiterating the guidelines provided in *Gaertner v Minister of Finance & C:SARS (HC)*, the amended provisions state that, when dealing with the situation where a search is conducted without a warrant, the following requirements should be met:

- Officers should enter the premises during ordinary business hours, unless the officer is of the reasonable opinion that entry after business hours is necessary for purposes of the Act.¹²⁵
- The officer must inform the person in charge of the premises of the purpose of the search when entering the premises.¹²⁶

119 See Bovijn & Van Schalkwyk 2012:511 for a discussion of what consent in this context should entail.

120 *Customs and Excise Act*:sec 4(aB)(i). See also <http://bit.ly/15Ew2HQ>.

121 *Customs and Excise Act*:sec 4(e) (i)-(iii).

122 *Customs and Excise Act*:sec 4(4)(aB)(ii).

123 In *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* (2010) 1 SA 446 (W);par. 83, the court stated that an *ex parte* application is one where the person against whom relief is sought does not receive notice of the application, and that the relief is also sought in this person's absence.

124 According to Joubert 2012:par. 125, other instances which would necessitate an *ex parte* application are those where the relief sought will only affect the applicant; where the relief is preliminary in order to bring interested parties before court; or where the identity of the respondent is not readily ascertainable.

125 *Customs and Excise Act*:sec 4(4)(AC)(c)(i).

126 *Customs and Excise Act*:sec 4(4)(AC)(c)(ii)

- If the search is conducted on the grounds of suspected offences being committed in terms of the *Customs and Excise Act*,¹²⁷ or if, after gaining entry to the premises, the officer decides to search for documents in respect of which an offence in terms of the *Customs and Excise Act* is suspected to have been committed:
 - the officer must furnish a written statement indicating that a search will be conducted, unless the officer is of the opinion that this might frustrate the search if the search is delayed in order to provide the said written statement;¹²⁸
 - the officer's search parameters are restricted to what is reasonably necessary for the purpose of the search;¹²⁹
 - the person in charge, or an appointed representative, has the right to be present and observe the search;¹³⁰
 - an inventory must be made of all documents removed from the premises¹³¹ and a schedule drawn up of copies made during the course of the search;¹³² and
 - a copy of the inventory and schedule must be signed by the officer before leaving the premises and must be handed to the person in charge.¹³³
- The officer should also conduct the search in an orderly and decent manner.¹³⁴
- An assistant or member of the police force may assist an officer. The presence of an assistant or police officer is, however, restricted to instances when the SARS official deems such presence necessary for purposes of the search.¹³⁵

4.2 The provisions compared with the constitutional search framework

In evaluating the amended provisions, it is apparent that warrantless searches are allowed only in limited instances.¹³⁶ This means that a warrantless search is not the norm and will only be permitted in exceptional circumstances. This allows for judicial intervention as a point of departure. This, it is submitted, is in line with the constitutional search framework.

127 This means instances where the subjective criterion is present.

128 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(aa).

129 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(bb).

130 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(dd).

131 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(ee).

132 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(ff).

133 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii)(ee); sec (4)(AC)(c)(iii)(ff).

134 *Customs and Excise Act*:sec 4(4)(AC)(c)(iii). See also <http://bit.ly/15Ew2HQ>.

135 *Customs and Excise Act*:sec 4(4)(AC)(b).

136 <http://bit.ly/1heWPu1> (accessed on 2 September 2013).

On the other hand, the principle relating to residential premises is not completely acknowledged. Even though the *Customs and Excise Act's* objective criterion relating to warrantless search and seizures does not include residential premises, it is still possible for a customs official to conduct a warrantless search at such premises if s/he has a reasonable belief that a warrant would have been obtained.

The guidelines that are provided for the situation where a warrantless search is conducted ensure further compliance with the constitutional search framework. These guidelines restrict the warrantless search powers of SARS; hence, they are not as broad as they were previously. As a result, infringement of a person's right to privacy will not be as invasive as prior to the amendments.

The amended provisions also recognise the fact that a search for enforcement purposes will be more invasive than a search aimed at verifying compliance. This is borne out by the fact that further requirements must be met when a SARS official suspects that an offence has been committed.

The amended provisions, therefore, seem to conform to most of the principles identified in the constitutional search framework relating to what would constitute a reasonable and justifiable limitation of a person's rights. Thus, it is submitted that the current provisions will muster constitutional scrutiny.

5. Customs searches – the future

5.1 The provisions

Regardless of the fact that the current search provisions seem to be in line with search principles considered to constitute a reasonable and justifiable limitation on a person's rights, another change relating to customs searches is looming. This change will occur when the *Customs Control Act* comes into operation.¹³⁷ Once the *Customs Control Act* comes into operation, section 4 of the *Customs and Excise Act*, which deals with search and seizure, will be repealed in its totality.¹³⁸ The new search provisions relating to customs will then be contained in sections 709 and 714 of the *Customs Control Act*.

Section 709(2) of the *Customs Control Act* stipulates that a warrant must be authorised before an officer can gain access to premises and conduct a search.¹³⁹ A judge or a magistrate may issue the said warrant once the customs authority has made application for a warrant. The customs authority referred to means "(a) the Commissioner; or (b) a customs officer; but only if and to the extent that a power or duty assigned to the customs authority in terms of this Act has been delegated to that officer in terms

137 See fn. 7.

138 *Customs and Excise Amendment Act 32/2014*:sec 4.

139 *Customs Control Act*:sec 709(2)(a).

of section 19¹⁴⁰. This, in turn, means that it is not an ordinary customs officer who can apply for a warrant, but only the Commissioner or a duly delegated customs officer. The Commissioner or the said officer must indicate under oath or by way of affirmation the grounds on which access is required.¹⁴¹

The *Act* also makes provision for a warrantless search of premises in certain circumstances.¹⁴² These circumstances can be broadly divided into objective and subjective criteria. The first objective circumstance relates to customs control areas. Customs control areas would include, among other areas, container terminals,¹⁴³ container depots,¹⁴⁴ storage warehouses, and excise warehouses.¹⁴⁵ Whenever a search relates to such an area, the customs officer has unrestricted access to this area.¹⁴⁶ A reason for allowing the customs officer to exercise these powers without a warrant may be that participants in the regulated field of customs should tolerate routine searches to verify compliance.¹⁴⁷

Section 709(3) of the *Customs Control Act* makes provision for other objective instances when a warrant is not required in order to conduct a search. The exceptions under section 709(3) of the *Customs Control Act* relate to premises that are not in a customs control area. First, a warrantless search will be permitted if the owner of the premises, or the person in physical control, consents thereto.¹⁴⁸ If consent is obtained, the search cannot be considered to be unreasonable, as the principle of *volenti non fit iniuria* applies.¹⁴⁹

Another exception when a warrant is not required relates to premises that are occupied by a person who is registered in terms of the *Customs Control Act* and who uses the premises for the business for which s/he

140 *Customs Control Act*:sec 1. Sec 19 indicates, among other things, that the delegation must be done in writing and that it is subject to the limitations as determined by the Commissioner.

141 *Customs Control Act*:sec 715.

142 *Customs Control Act*:sec 709(1)(a) & 709(2)(a) read together with sec 709(3) & (4).

143 *Customs Control Act*:sec 1 read together with sec 43(1)(iv).

144 *Customs Control Act*:sec 43(1)(xiii).

145 *Customs Control Act*:sec 1 read together with sec 43(1)(xv). See the *Customs Control Act*:sec 43(1) for a complete list of what areas would be regarded as customs control areas. Sec 43(2) also provides a list of areas which the Commissioner may designate as customs controlled areas.

146 *Customs Control Act*:sec 709(1)(a).

147 *Gaertner v Minister of Finance (HC)*:par. 38.

148 *Customs Control Act*:sec 709(3)(a).

149 See fn. 69.

is registered.¹⁵⁰ A customs officer may also access premises without a warrant if the public has access to the premises.¹⁵¹

In addition, premises may also be accessed without a warrant if the subjective criterion is met, that is, where a customs officer has reasonable grounds for his/her suspicion.¹⁵² The first ground of suspicion is that there are goods subject to customs control that were, or are being used as part of activities that breached, or will breach provisions of the *Customs Control Act* or another tax-levying Act.¹⁵³ A search can then be conducted if the customs officer reasonably believes that these goods,¹⁵⁴ information relating to these goods,¹⁵⁵ or documents concerning these goods¹⁵⁶ will be found at the premises.

The second ground relates to the situation where it is suspected that there are prohibited, restricted or counterfeit goods on the premises.¹⁵⁷ Irrespective of which ground of suspicion is present, the customs officer must also on reasonable grounds believe that a warrant would have been authorised in terms of section 715 of the *Customs Control Act* and that a delay in obtaining such a warrant would defeat the object of the access.¹⁵⁸

5.2 The provisions compared with the constitutional search framework

Whilst it is commendable that judicial intervention is preserved, section 709 of the *Customs Control Act* fails to provide the full protection that is envisaged by obtaining a warrant. Section 709 lacks the specific requirements contained in the *Customs and Excise Act*. Unlike the *Customs and Excise Act*, section 709 does not stipulate that (i) the customs officer must on reasonable grounds believe that an offence has been committed; (ii) a search must likely produce documents that can be used as evidence, and (iii) the search must be reasonably necessary for the purposes of the Act

150 *Customs Control Act*:sec 709(3)(b). According to the *Customs Control Act*: sec 1, a “registered” person refers to someone who is registered in terms of chapter 28 of the Act. Chapter 28 deals, *inter alia*, with the registration of importers and exporters of goods; persons obtaining ownership of goods whilst the goods are still subject to a customs procedure; and persons who submit declarations to the customs authority electronically.

151 *Customs Control Act*:sec 709(3)(c).

152 *Customs Control Act*:sec 709(3)(d)-(f).

153 *Customs Control Act*:sec 709(3)(d)(i)-(iii). In terms of sec 1, a “tax levying Act” is “any legislation, other than this Act, imposing or imposing and regulating the administration of a specific tax on goods”. Furthermore a “tax levying Act” will include rules, regulations or other subordinate legislation of the *Customs Duty Act*, the *Value-Added Tax Act 89/1991*, the *Excise Duty Act*, the *Diamond Export Levy Act 15/2007* and the *Diamond Export Levy Administration Act 14/2007*.

154 *Customs Control Act*:sec 709(3)(d).

155 *Customs Control Act*:sec 709(3)(f).

156 *Customs Control Act*:sec 709(3)(e).

157 *Customs Control Act*:sec 709(3)(d)(iv).

158 *Customs Control Act*:sec 709(4).

before a warrant may be issued.¹⁵⁹ The *Customs Control Act* simply refers to “grounds” without clarifying what would constitute grounds necessitating a search. The effect of this is that, in the absence of any requirements that must be met being laid down in the *Act*, authorisation of a warrant is completely at the discretion of the judicial officer. This will consequently make it difficult for a person affected by the search to establish whether there are any reasons to apply for the setting aside of the warrant. Equally, it will be difficult for a judge or a magistrate hearing an application for the setting aside of a warrant to determine whether the judicial officer in the application for the warrant exercised his/her discretion judicially.

The vagueness of the grounds, on which a warrant will be authorised, leads to broader powers on the part of SARS. Conversely, taxpayers’ rights are more limited owing to this vagueness. It is submitted that this is also contrary to one of the founding principles of the *Constitution*, namely the rule of law. A taxpayer would, therefore, be able to take the matter on review for infringing on this principle.

In addition, the principle relating to residential premises is not adhered to. Even though the objective criterion only allows access to such premises when consent is given, it is still possible for a customs officer to conduct a warrantless search of residential premises in terms of the subjective criterion. Consequently, no additional protection is provided for when a search relates to residential premises. The legislature has failed to consider the nature of the right to privacy, which necessitates more protection when dealing with residential premises.

When considering the first ground of suspicion, namely a suspected breach coupled with the fact that the officer must reasonably believe that taking time to obtain the warrant would defeat the purpose of the search, such ground appears similar to the *Customs and Excise Act*’s requirements for conducting a warrantless search in terms of the subjective criterion.¹⁶⁰ However, a more in-depth analysis proves the contrary. To begin with, the *Customs and Excise Act* provisions only deal with a suspicion of an offence¹⁶¹ being committed and not a breach. The *Customs Control Act*, on the other hand, refers to a “breach” of the *Customs Control Act* or a tax-levying *Act* “whether or not that act or omission is an offence”.¹⁶² This,

159 See 4.1 above.

160 *Customs and Excise Act*:sec 4(aA)-(aB) read together with sec 4(e).

161 Interestingly, the *Customs and Excise Act*:sec 78(1) provides that a contravention of or failure to comply with any provision of the *Customs and Excise Act* will be regarded as an offence, even though the Act does not classify that specific contravention or failure as an offence. “Offence” thus has a wide definition.

162 *Customs Control Act*:sec 1. The list of acts or omissions that will constitute a breach of the *Customs Control Act* or a tax-levying Act comprises of (i) contravening or not complying with a provision of the *Customs Control Act* or a tax-levying Act; (ii) contravening, failing to comply or evading or attempting to evade “a term or condition of any registration, licence, accreditation, release, authorisation, permission, approval, exemption, instruction, direction

it is submitted, indicates that the concept “breach” is broader than that of an offence.¹⁶³ This leads to an extension of what the customs officer can reasonably suspect before conducting the search. It would be easier to reasonably suspect a breach than an offence. Consequently, this results in the extension of the customs officer’s powers relating to the situation when a warrantless search can be conducted. In addition, it is unclear how a customs officer can reasonably believe that a warrant would have been granted in view of the fact that the *Act* does not set out the grounds on which a judge or magistrate will authorise a warrant. It is, therefore, clear that the ground of suspicion concerned is not simply a replica of what is currently provided for in terms of the *Customs and Excise Act*.

6. Conclusion

Conducting a search to verify whether a taxpayer has complied with customs legislation is essential. By the same token, it is also essential that these searches be conducted in accordance with the *Constitution*.

This article first set out to evaluate whether the current customs provisions are constitutionally sounder than the past provisions, by providing a constitutional framework within which searches should be conducted, and then comparing this framework with previous and current customs search provisions. From this comparison, it became apparent that some of the constitutional framework principles have trickled down to the current search provisions.

First, the *Customs and Excise Act* provides that only in exceptional circumstances may a warrantless search be conducted. As a point of departure, a search must be authorised by way of a warrant. However, the protection afforded to taxpayers by requiring a warrant as a point of departure seems to have been diluted. The *Customs and Excise Act* indicates that there should be relevant material, which is likely to be found at the specific premises. It does not require that the warrant indicates exactly what the relevant material is. Therefore, a taxpayer will be uncertain as to what the parameters of the search are, thereby creating a possible area for abuse by SARS. This vagueness is contrary to the rule of law. In accordance with *Joseph v City of Johannesburg*, a taxpayer would be able to have the search reviewed based on the fact that the extent of what SARS could search was vague and SARS also failed to act in a transparent manner, as required in terms of section 195(1) of the *Constitution*.

Secondly, the customs and excise provisions are mindful of the fact that, when a warrantless search is conducted, there should be adequate guidelines in place to ensure that the warrantless provisions are considered

or recognition issued or given in terms of” the *Customs Control Act* or a tax-levying Act and (iii) not complying with an instruction of the customs authority in terms of the *Customs Control Act* or a tax levying Act.

163 Further support for this view is the fact that the *Customs Control Act*:sec 1 provides for a non-prosecutable breach which is “a breach of this Act which is not an offence in terms of this Act”.

constitutional. In addition to these guidelines pertaining to warrantless searches, the *Customs and Excise Act* provides further guidelines when conducting a search in terms of the subjective criterion. This ensures that the aim of the search is taken into account. The guidelines ensure that SARS' powers are curbed. This is a factor, in terms of section 36(1)(c) of the *Constitution*, that must be considered when ascertaining whether the limitation is reasonable and justifiable.

On the other hand, it is lamentable that the *Customs and Excise Act* does not protect a taxpayer's residential premises against a warrantless search conducted on the basis of the subjective criterion. This means that the nature of a person's privacy right, i.e. that a person has a greater expectation at residential premises, is ¹⁶⁴

From this investigation, it is clear that the current customs search provisions have been drafted to protect a taxpayer's constitutional rights, which it mostly achieves.

The article's second aim was to establish what the impact of the imminent *Customs Control Act* provisions will be on a taxpayer's rights.

Even though it is encouraging to note that the *Customs Control Act* will, as a point of departure, require a warrant before a search may be conducted, it is nevertheless a matter of concern that no specific grounds must be averred before a warrant may be issued. This vagueness may create uncertainty, and it will be difficult for a taxpayer to challenge the grounds on which the warrant is authorised. Inadvertently, this provides SARS with broader search powers. Apart from making it difficult for a taxpayer to ascertain the grounds, it also falls short of a founding value of the *Constitution*, namely the rule of law. The taxpayer should be able to take the matter on review based on vagueness.

The fact that a SARS official may conduct a warrantless search if s/he suspects a breach of the *Customs Control Act* or of a tax-levying *Act* instead of suspecting an offence also extends the scope of the powers assigned to SARS. Furthermore, no specific guidelines are provided regarding the situation where a warrantless search is conducted. Such guidelines could curb the extent of infringement of a taxpayer's rights to privacy, to just administrative action and of access to the courts. It is submitted that the absence of guidelines when considering whether there are less restrictive means available to achieve government's purpose, as provided for in section 36(1)(e) of the *Constitution*, results in a situation where a taxpayer's rights are not reasonably and justifiably limited.

The *Customs Control Act* fails to specifically protect a person's residential premises and does not take the aim of the search into consideration.

164 This is a factor in terms of *Constitution of the Republic of South Africa 1996:sec 36(1)(a)* that must be considered when ascertaining if a limitation of a right is constitutional.

In conclusion, therefore, this article established that, where customs searches are concerned, we have learnt from the past and a taxpayer can benefit from constitutionally sounder provisions. However, the future in respect of customs searches seems bleaker, as these searches do not conform to the constitutional search framework.

Bibliography

BEKINK B

2012. *Principles of South African constitutional law*. 1st ed. Durban: Lexis Nexis.

BOVIJN S AND VAN SCHALKWYK L

2012. Concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act. *Stellenbosch Law Review* 23(3):507-526.

BURNS Y

2003. *Administrative law under the 1996 Constitution*. 2nd ed. Durban: Lexis Nexis.

2013. *Administrative law*. 4th ed. Durban: Lexis Nexis.

DE BRUIN P

2013. SAID se mense het nog te veel mag. *Beeld*, 3 May 2013:3.

DICEY A

1959: *Introduction to the study of the Law of the Constitution*. 10th ed. London: Macmillan Press.

HOEXTER C

2012. *Administrative law in South Africa*. 2nd ed. Cape Town: Juta.

JOUBERT W

2012. *The law of South Africa*. Durban: Butterworths.

KATZ COMMISSION

1994. *Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa*. Pretoria: Government Printer.

KEULDER C

2015. What's good for the goose is good for the gander – warrantless searches in terms of fiscal legislation. *South African Law Journal* 132(4):819-848.

MDUMBE F

2004. Has the literal/intentional/textual approach to statutory interpretation been dealt the *coup de grace* at last? *SA Publiekreg/ Public Law* 19(2):472-481.

PRICEWATERHOUSECOOPERS

2013. SARS's powers of search and seizure in terms of the Customs and Excise Act. Synopsis. <http://bit.ly/1gIA6A8> (accessed on 4 May 2013).

RAUTENBACH I

2012. *Rautenbach-Malherbe constitutional law*. 6th ed. Durban: Lexis Nexis.

WORDSWORTH W

s.a. William Wordsworth Quotes. <http://bit.ly/1Fgf0jf> (accessed on 23 April 2015).