



**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

DEPARTMENT OF MERCANTILE LAW

THE 1996 CONSTITUTION AND THE TAX ADMINISTRATION ACT 28 OF 2011:
BALANCING EFFICIENT AND EFFECTIVE TAX ADMINISTRATION WITH
TAXPAYERS' RIGHTS

A thesis submitted in fulfilment of the requirements for the degree Doctor Legum (LLD).

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DECLARATION

I, the undersigned, make the following declarations:

1. This dissertation is my own, original work. I researched the material personally and wrote the content thereof. I have not submitted this dissertation at any time to any other University for degree, examination or other purpose.
2. The bibliography at the end of this dissertation and the footnotes in the body of this dissertation contain appropriate references to all sources utilised or quoted.
3. This dissertation does not include reference to footnotes within any quotes.
4. The referencing used in this dissertation conforms to the 2012 referencing style guide issued by the Faculty of Law, University of the Western Cape.
5. In accordance with Academic Rule A6.1.1, the University of the Western Cape is vested with copyright in this work.
6. In this dissertation, unless otherwise stated or the context indicates differently, words importing the masculine gender include females and neuter, and vice versa. In addition, words in the singular number include the plural and vice versa.
7. This dissertation reflects the law in South Africa and in foreign jurisdictions referred to, as well as reported judgments, as at 31 October 2016.
8. For academic purposes, the word count of this dissertation, computed as per Microsoft word, is 139 639.

Submission date: 28 November 2016

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ABSTRACT

Taxation is fundamental for development in South Africa (SA), a developing country with an emerging economy in which taxation is essential to capacitate the government so that it can fulfil its mandate under the Constitution of the Republic of South Africa, 1996 (Constitution). This mandate includes bringing about socio-economic transformation, part of transformative constitutionalism, through progressively realising socio-economic rights. This dissertation examines the way in which tax administration may take place efficiently and effectively with due respect for taxpayers' rights. A clear link is shown between taxation, human rights and the South African government's responsibilities to attain its transformation targets. To facilitate this process, the Constitution creates a legal framework for the imposition of tax and for the equitable distribution of tax revenue among the three spheres of government. For historical, political and other reasons, South Africans generally, as happens elsewhere in the world, lack a strong culture of voluntary tax compliance. Wilful non-payment of tax is antithetical to the values of democracy, *ubuntu* and the rule of law. Tax non-compliance minimises revenue collected from taxation. This, in turn, hinders the attainment of transformation in all its facets. A pressing need exists for laws that, on the one hand, promote tax morality and, on the other, strengthen the South African Revenue Service (SARS) so that it can effectively administer SA's national tax system (or grid). To this end, the Tax Administration Act 28 of 2011 (TAA) is pivotal. It regulates tax administration, a part of public administration. Under the Constitution, SARS is obliged to execute its functions in a manner respectful of taxpayers' rights and that upholds the Constitution's values and democratic principles. Consequently, the TAA must strike a fair balance between, on the one hand, protecting taxpayers' rights and, on the other, arming SARS with adequate powers with which it can effectively combat the mischief of tax non-compliance. This dissertation shows that, when viewed through the prism of s 36 of the Bill of Rights (BOR), the powers conferred on SARS by ss 45(1), (2), 63(1) and (4) of the TAA to conduct warrantless inspections and searches, as the case may be, limit taxpayers' rights to, inter alia, privacy. It concludes that, whilst ss 63(1) and (4) ought to pass muster, ss 45(1) and (2) are susceptible to a declaration of invalidity under s 172(1) of the Constitution.

GLOSSARY OF KEY WORDS, EXPRESSIONS AND TERMS

The following key words, expressions and terms are used in this dissertation:

Bill of Taxpayers' Rights

Democratic principles in tax administration

'Dwelling-house or domestic premises'

Extraterritorial application of tax laws

Fundamental human rights

Juristic person

Limitation of fundamental rights



Meaning of 'tax'

Money Bill

Tax Administration Act

Tax Ombud

Taxpayer Protection Bill

Taxpayer rights

Warrantless inspections and searches

ABBREVIATIONS AND ACRONYMS

The abbreviations and acronyms mentioned below bear the meanings indicated.

(i) Journals

DR	De Rebus
ITJ	Insurance and Tax Journal
JBLJ	Juta's Business Law Journal
LDD	Law, Democracy & Development Law Journal
MAR	Meditari Accountancy Research
PELJ	Potchefstroom Electronic Law Journal
RLJ	Revenue Law Journal
SABR	Southern African Business Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAPL	Southern African Public Law
SJ	Speculum Juris
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TP	Tax Planning
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

(ii) Publishers

Ashgate	Ashgate Publishing Ltd
Butterworths	Butterworths Publishers (Pty) Ltd
IBFD	International Bureau of Fiscal Documentation
IMF	International Monetary Fund
Juta	Juta & Co Ltd
Kluwer	Kluwer Law International
LexisNexis	LexisNexis (formerly LexisNexis Butterworths) (Pty) Ltd
CUP	Cambridge University Press
OUP	Oxford University Press
PULP	Pretoria University Law Press
UCTP	UCT Press



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(iii) Statutes

C&EA	Customs and Excise Act 91 of 1964
Companies Act	Companies Act 71 of 2008
CPA	Criminal Procedure Act 51 of 1977
EDA	Estate Duty Act 45 of 1955
ITA	Income Tax Act 58 of 1962
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
RoLRA	Restitution of Land Rights Act 22 of 1994
SARSA	South African Revenue Service Act 34 of 1997
TAA	Tax Administration Act 28 of 2011

TAB 11B, 2011 Tax Administration Bill 11B, 2011

TDA Transfer Duty Act 40 of 1949

VATA Value-Added Tax Act 89 of 1991

(iv) **Conventions and Treaties**

African Charter African Charter on Human and Peoples' Rights 1981

ECHR European Convention on Human Rights 1950

UDHR Universal Declaration of Human Rights 1948

(v) **General**

Art Article

ARMSA Association of Regional Magistrates of Southern Africa

BEPS Base Erosion and Profit Shifting

BOR Bill of Rights

BOTR Bill of Taxpayers' Rights

CC Constitutional Court

CIR Commissioner for Inland Revenue

Code King Code of Governance Principles for South Africa 2009

COT Commissioner of Taxes

CSARS Commissioner for the South African Revenue Service

DPP Director of Public Prosecutions

EPRI Economic Policy Research Institute

GG Government Gazette

IBAHRI International Bar Association Human Rights Institute

IDS	Institute of Development Studies
Katz Commission	Katz Commission of Inquiry into Certain Aspects of the Tax Structure in South Africa
Law Journal	LJ
Margo Commission	Margo Commission of Inquiry into the Tax Structure of the Republic of South Africa
NDPP	National Director of Public Prosecutions
OECD	Organisation for Economic Co-operation & Development
OTO	Office of the Tax Ombud
PBO	Public Benefit Organisation
SABC	South African Broadcasting Corporation
SALC	South African Law Commission
SARS	South African Revenue Service
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
SIR	Secretary for Inland Revenue
UCT	University of Cape Town
UJ	University of Johannesburg
UK	United Kingdom
UKZN	University of KwaZulu-Natal
UN	United Nations
UNISA	University of South Africa
US	University of Stellenbosch
USA	United States of America
VAT	Value-Added Tax
WC	Western Cape

(vi) Cases

For a full citation of each case report, see the bibliography section of this dissertation.

Affordable Medicines: Affordable Medicines Trust and Others v Minister of Health and Others

ARMSA: Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others

August: August and Another v Electoral Commission and Others

Australian Tape Manufacturers: Australian Tape Manufacturers Association Ltd v Commonwealth

Bato Star Fishing: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others

Bernstein: Bernstein and Others v Bester and Others NNO

Bertie van Zyl: Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others

Blue Moonlight Properties: City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another

Capstone 556: Capstone 556 (Pty) Ltd v CSARS and Another; Kluh Investments (Pty) Ltd v CSARS and Another

Carlson Investments: Carlson Investments Share Block (Pty) Ltd v CSARS

Carmichele: Carmichele v Minister of Safety and Security and Another

Case and Curtis: Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others

Certification 1: Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996

Certification 2: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996

Christian Education SA: Christian Education SA v Minister of Education

<i>Cool Ideas:</i>	<i>Cool Ideas 1186 CC v Hubbard and Another</i>
<i>Dawood:</i>	<i>Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others</i>
<i>De Klerk:</i>	<i>Du Plessis and Others v De Klerk and Another</i>
<i>Democratic Alliance 1:</i>	<i>Democratic Alliance v President of the Republic of South Africa and Others (2013)</i>
<i>Democratic Alliance 2:</i>	<i>Democratic Alliance v President of the Republic of South Africa and Others (2014)</i>
<i>DVB Behuising:</i>	<i>Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another</i>
<i>Emary:</i>	<i>CIR v Emary NO</i>
<i>eTradex:</i>	<i>CSARS v eTradex (Pty) Ltd and Others</i>
<i>Fedsure Life:</i>	<i>Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others</i>
<i>Ferreira:</i>	<i>Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others</i>
<i>Ferucci:</i>	<i>Ferucci and Others v CSARS and Another</i>
<i>FNB:</i>	<i>First National Bank of SA Ltd t/a Wesbank v CSARS and Another; First National Bank of SA Ltd v Minister of Finance</i>
<i>Gaertner:</i>	<i>Gaertner and Others v Minister of Finance and Others</i>
<i>Goqwana:</i>	<i>Goqwana v Minister of Safety NO and Others</i>
<i>Glenister:</i>	<i>Glenister v President of the Republic of South Africa and Others</i>
<i>Grootboom:</i>	<i>Government of Republic of South Africa and Others v Grootboom and Others</i>

<i>Harksen:</i>	<i>Harksen v President of the Republic of South Africa and Others (2000)</i>
<i>Hlophe:</i>	<i>Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law and Others</i>
<i>Hodel:</i>	<i>Hodel v Virginia Surface Mining Reclamation Association</i>
<i>Hyundai Motors:</i>	<i>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</i>
<i>JAOSA:</i>	<i>Justice Alliance of South Africa v President of the Republic of South Africa and Others; Freedom Under Law v President of the Republic of South Africa and Others; Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others</i>
<i>Jeeva:</i>	<i>Jeeva v Receiver of Revenue, Port Elizabeth</i>
<i>Kaunda:</i>	<i>Kaunda and Others v President of the Republic of South Africa and Others</i>
<i>Khosa:</i>	<i>Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others</i>
<i>Krok:</i>	<i>Krok and Another v CSARS</i>
<i>Kungwini:</i>	<i>Kungwini Local Municipality v Silver Lakes Home Owners Association and Another</i>
<i>Langeberg Municipality:</i>	<i>Independent Electoral Commission v Langeberg Municipality</i>
<i>Lawrence:</i>	<i>S v Lawrence; S v Negal; S v Solberg</i>
<i>Law Society:</i>	<i>Law Society of South Africa and Others v Minister for Transport and Another</i>
<i>Limpopo 1:</i>	<i>Limpopo Province v Speaker, Limpopo Provincial Legislature and Others (2011)</i>
<i>Limpopo 2:</i>	<i>Premier: Limpopo Province v Speaker, Limpopo Provincial Legislature and Others (2012)</i>

<i>Link Africa:</i>	<i>City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others</i>
<i>Liquor Bill:</i>	<i>Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill</i>
<i>Magajane:</i>	<i>Magajane v Chairperson, North West Gambling Board and Others</i>
<i>Makwanyane:</i>	<i>S v Makwanyane and Another</i>
<i>Mamabolo:</i>	<i>S v Mamabolo (E TV and Others intervening)</i>
<i>Manamela:</i>	<i>S v Manamela and Another</i>
<i>Masetlha:</i>	<i>Masetlha v President of the Republic of South Africa and Another</i>
<i>Matatiele Municipality:</i>	<i>Matatiele Municipality and Others v President of the Republic of South Africa and Others</i>
<i>Mazibuko:</i>	<i>Mazibuko and Others v City of Johannesburg and Others</i>
<i>Metcash:</i>	<i>Metcash Trading Ltd v CSARS and Another</i>
<i>Mhlungu:</i>	<i>S v Mhlungu and Others</i>
<i>Miles Plant Hire:</i>	<i>CSARS v Miles Plant Hire (Pty) Ltd</i>
<i>Mistry:</i>	<i>Mistry v Interim Medical and Dental Council of SA and Others</i>
<i>Mohamed:</i>	<i>Mohamed and Another v President of the Republic of South Africa and Others</i>
<i>MOP v Premier, WC:</i>	<i>Minister of Police and Others v Premier, Western Cape and Others</i>
<i>My Vote Counts:</i>	<i>My Vote Counts NPC v Speaker of the National Assembly and Others</i>
<i>NJMPF:</i>	<i>Natal Joint Municipal Pension Fund v Endumeni Municipality</i>
<i>New Clicks:</i>	<i>Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others</i>

New National Party: New National Party of SA v Government of Republic of South Africa and Others

Olitzki: Olitzki Property Holdings v State Tender Board & Another

OUTA: National Treasury and Others v Opposition to Urban Tolling Alliance and Others

Park-Ross: Park-Ross and Another v Director: Office for Serious Economic Offences

Pharmaceutical Manufacturers: Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of RSA & Others

Pretoria East Motors: CSARS v Pretoria East Motors (Pty) Ltd

Prinsloo: Prinsloo v Van der Linde and Another

Rivonia Primary School: MEC for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others

SARFU: President of the Republic of South Africa and Others v South African Rugby Football Union and Others

Shoprite Checkers Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others

Shuttleworth: South African Reserve Bank and Another v Shuttleworth and Another

Singh: Singh v CSARS

Soobramoney: Soobramoney v Minister of Health (KwaZulu-Natal)

TAC: Minister of Health and Others v Treatment Action Campaign and Others (No. 2)

Thint: Thint (Pty) Ltd v NDPP and Others; Zuma and Another v NDPP and Others

Van der Merwe: CSARS v Van der Merwe

Van Rooyen: S and Others v Van Rooyen and Others

Zuma: S v Zuma and Others

NOTATION OF AUTHOR'S PRIOR WORK

The undermentioned published works authored by me are referred to in this dissertation in support of relevant submissions made:

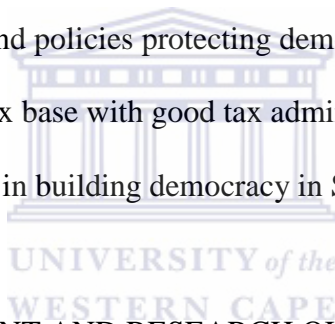
- 'Tax amnesty: An appraisal' (1997) 11(1) *TP* 21
- 'Borrowing from Peter to pay less to Paul: Tax planning with borrowed funds' (1998) 6(1) *JBLJ* 20
- 'An interpretation of "non-disclosure of material facts" in section 79 of the Income Tax Act 58 of 1962' (2001) 13(2) *SA Merc LJ* 186
- 'The power to search and seize without a warrant under the Tax Administration Act' (2012) 24(3) *SA Merc LJ* 338
- 'A warrantless search of "premises" under the Tax Administration Bill' (2012) 27(2) *ITJ* 3
- '*CSARS v NWK Ltd* – a tax planning sham(e)?' (2012) 27(3) *ITJ* 3
- 'Letters and assessments: What is an income tax "assessment"?' (2012) 26(2) *TP* 32
- 'Meaning of alienation: Interpreting a double taxation agreement' (2012) 26(5) *TP* 118
- 'Rescission of a tax judgment' (April 2012) *DR* 30
- 'The scope of the expression "necessarily incurred" in section 18(1) of the Income Tax Act' (2013) 25(2) *SA Merc LJ* 184
- 'Knight or pawn?' (2016) 24(2) *Step Journal* 78

I also rely on my own unpublished thesis, University of Cape Town, September 1997, submitted in partial fulfilment of the requirements for the LLM degree dealing with the question: 'Discuss the use of trusts as a vehicle for estate (tax) planning in South Africa. Reference should be made to the implications of tax statutes on trusts as well as to any relevant developments in the law with regard to the taxation of trusts'.

CHAPTER ONE

TAX, DEMOCRACY & HUMAN RIGHTS: AN INTRODUCTION

	<u>Pages</u>
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*'Death and taxes and childbirth! There's never any convenient time for any of them!'*¹

1.1 BACKGROUND TO THE STUDY

1.1.1 Taxation as a tool of protest founding democracy in South Africa

The Republic of South Africa (RSA) is one, sovereign, democratic State with a supreme Constitution, 1996² entrenching the foundational values enumerated in s 1 thereof. These include, inter alia, human dignity, the achievement of equality and the advancement of human rights and freedoms (s 1(a)). Democracy in SA, born on 27 April 1994,³ was preceded by apartheid, a repressive political system geared to social engineering through a brutal, violent onslaught on human rights that created a system of privilege and disadvantage. Apartheid is a crime against humanity.⁴ The Constitution is a product of, and has its roots firmly planted in, SA's painful, chequered history under apartheid. That era was marred by grave human rights violations. Thus, transformation is the primary mission of the Constitution. Its provisions are transformative in nature and effect.⁵ It aims to bring about an inclusive, egalitarian, tolerant, pluralistic, non-sexist society upholding and fostering democratic values and social justice. This society must be based on active solidarity, must respect and protect human rights, and the basic needs of all who live in it must be provided for.⁶ When interpreting the Constitution all textually and contextually relevant factors are to be considered, including SA's legal and institutional history.⁷

¹ Mitchell M *Gone with the Wind* (1936) 471.

² The Citation of Constitutional Laws Act 5 of 2005 prescribes the mode of citing the Constitution. Judicial legitimisation of the Constitution's text occurred partly in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*Certification 1*) and partly in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (*Certification 2*).

³ For an overview of SA's constitutional history from its unionisation in 1910 to independence in 1961 and then to its democracy in 1994, see Edwards AB *The History of South African Law - An Outline* (1996) 85-7; Le Roux W 'Descriptive Overview of the South African Constitution and Constitutional Court' in Vilhena O, Baxi U & Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 135 139-41.

⁴ United Nations (UN) General Assembly Resolution 2202 A (XXI), 16 December 1966.

⁵ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 8 (*Soobramoney*).

⁶ Murphy J 'The constitutional review of taxation' 1995 *Acta Juridica* 89.

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (*Bato Star Fishing*); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

Apartheid's system of 'racial oligarchy'⁸ left a deeply polarised society in its wake. Inequality in its many manifestations, including access to land, quality basic education, health care, water and sanitation services, is an apartheid legacy that continues to scar the people of SA and erodes the dignity of those afflicted by it. South Africans suffer from crime, poverty, homelessness, unemployment and other social ills.⁹ Large portions of SA's mainly Black¹⁰ citizenry live in undignified conditions. They aspire to a life with equality and human dignity. These human rights are part of the core moral code common to all societies. Human rights are inviolable, inalienable, universal claims necessary to grant every human being a decent life.¹¹ Such rights are embodied in various international legal instruments which, under the Constitution (s 232, s 233, s 234), may be binding in SA. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights (African Charter). A remnant of apartheid is the class cleavages that exist between SA's economically marginalised communities and the rest of its society. This creates a barrier hindering the building of social cohesion, national unity, nationhood and the realisation of a single, national identity. Achieving substantive equality (as distinct from formal equality)¹² is at the epicentre of the constitutional project. It preoccupies constitutional thinking in SA.¹³ The Constitution (s 9(2)) envisages the empowerment of Black people disadvantaged by unfair discrimination rife during SA's apartheid era.¹⁴ While there is 'no simple or immutable standard of what constitutes a democratic society',¹⁵ true democracy will remain elusive if substantive economic inequality prevails. Without economic freedom, political freedom is far less valuable.

⁸ Per Cameron J in *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 492.

⁹ *Minister of Police and Others v Premier, Western Cape and Others* 2013 (12) BCLR 1365 (CC) para 4 (*MOP v Premier, WC*); *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 2.

¹⁰ In this dissertation, unless the context indicates otherwise, 'Black' bears the meaning as defined in the Employment Equity Act 55 of 1998, namely, 'Africans, Coloureds and Indians'.

¹¹ Cullet P 'Definition of an environmental right as part of a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 25 26; Wenar L 'The Nature of Human Rights' in Follesdal A & Pogge T (eds) *Real World Justice* (2005) 285.

¹² De Vos P '*Grootboom*: The right of access to housing and substantive equality as contextual fairness' (2001) 17(2) *SAJHR* 258 262 adopts the notion of 'real' equality.

¹³ *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) paras 22-3.

¹⁴ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 29-33.

¹⁵ Murphy J (1995) 104.

Apartheid is a ‘fundamental “mischief” to be remedied’¹⁶ through the Constitution. During the apartheid era, SA was governed by a White minority regime lacking a human rights culture. Its legal system was redolent with laws that stripped Black people of their dignity and humanity.¹⁷ This system institutionalised manifestly unjust discrimination.¹⁸ Apartheid’s fault lines – a deeply divided, vastly unequal citizenship with segregated property, political and socio-economic rights - ‘generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge’.¹⁹ Discrimination under the edifice of apartheid was, in the field of tax, exemplified by its dual income tax system, one for Black Africans and another for other racial groups.²⁰ Such dualism was uneconomical and unjust. In 1979, the Minister of Finance announced a unitary tax system for SA. Dockel and Mirrilees²¹ then penned arguments favouring retention of the status quo. Their rationale, epitomising the discriminatory mindset pervading SA at that time, is evident in the following quote:

¹⁶ Per Froneman J in *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E) 635. Bachmann SD & Frost T ‘Colonialism, justice and the rule of law: Southern African and Australian narrative’ (2012) 45(2) *De Jure* 306 316 point out that apartheid, a crime against humanity with origins in British colonialism, differed from other examples of racial segregation, discrimination and hate because it systematically institutionalised a legal framework for such treatment. On the one hand, apartheid legislation governed the fields of racial segregation, jobs and employment, political rights and freedoms, citizenship, land and property rights, education and freedom of movement; on the other hand, the judiciary was a trusted pillar enforcing apartheid’s laws. See Dugard J *Human Rights and the South African Legal Order* (1978) 295-302.

¹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 6 (*Grootboom*). In *Certification 1* para 7 the CC stated: ‘Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.’ See also Koen R & Budlender D “‘The law is fraught with racism’: Report on interview research into perceptions of bias in the criminal justice system’ (1997) 8 *Stell LR* 80. The Constitution (s 1 (b)) expressly entrenches non-racialism as a core foundational value.

¹⁸ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) para 152 (*Lawrence*); *Premier, Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 1. For an in-depth study into discrimination under apartheid and the post-1994 initiatives to reverse its ill-effects, see le Roux W & van Marle K (eds) *Law, Memory and the Legacy of Apartheid: Ten Years After AZAPO v President of South Africa* (2007) 93-182.

¹⁹ Paragraph 3 of the postscript ‘National Unity and Reconciliation’ in the 1993 interim Constitution.

²⁰ For discussion of discrimination in tax, see Croome BJ ‘Constitutional law and taxpayers’ rights in South Africa – an overview’ 2002 *Acta Juridica* 1 3-6; Goldswain GK ‘Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law’ (2011) 15 *SABR* 1 14-15; Smith T ‘Women and tax in South Africa’ available at

<http://www.undp.mn/publications/GenderBudgets/Budgets%20CD%20subsection%204.4/4.4e%20women%20and%20tax%20in%20south%20africa.pdf> (accessed 21 October 2013).

²¹ Dockel JA & Mirrilees RI ‘The extension of the personal income tax to all population groups in South Africa’ (1982) 4 *Modern Business LJ* 138 139.

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‘Illiteracy is another major obstacle to the inclusion of Black taxpayers in the present income tax system. The strength of this system lies in its ability to provide for differing abilities to pay. ... But it is obvious that the completion of a tax return demands a certain level of literacy, and equally obvious that many Blacks have not reached this level, so that major problems could result if existing rules were applied to all taxpayers on a uniform and supposedly non-discriminatory basis. ... The discussion above provides good grounds for entertaining misgivings regarding the feasibility of extending the tax system that is currently applied to Whites, Coloureds and Asians to encompass all taxpayers in South Africa.’

The defiance campaign against apartheid included the clarion call to the oppressed masses to withhold payment of taxes. It financed the State machinery enforcing repressive, draconian laws and policies suppressing the legitimate struggle for democracy and freedom.²² Taxation was, thus, a tool of protest; another frontier where the battle lines against apartheid was drawn. This citizen activism, propagated by Henry David Thoreau in his seminal work *On the Duty of Civil Disobedience* (1849), was motivated by conscientious political reasons akin to the battle cry of the Boston Tea Party during the American Revolution (1776), namely, ‘no taxation without representation’.²³ The United States of America (USA) President Franklin D Roosevelt referred to this as the ‘fight for democracy in taxation’.²⁴ Non-payment of tax compounded the pressures exerted on the apartheid regime reigning over a pariah State. By the late 1980s, SA’s economy was

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- ²² Sisulu W ‘No taxation without representation’ (July 1957) *Liberation* 15: ‘Thus for the people in both town and country the struggle against "taxation without representation" is a vital one, closely linked with their everyday demands for increased wages, for more land; against pass laws and Bantu Authorities. It is a struggle which must inevitably bring fuller understanding of and determination to fight for the broad democratic perspectives of the Freedom Charter.’ Available at <http://www.disa.ukzn.ac.za/webpages/DC/Lin2657.1729.455X.000.026.Jul1957.5/Lin2657.1729.455X.000.026.Jul1957.5.pdf> (accessed 30 September 2014). Tax resisters must be distinguished from tax protesters. The refusal by tax resisters to paying tax does not arise because they consider tax illegal or contend that it does not apply to them, but rather because, for conscientious reasons, they do not wish to support the government or some of its activities. The failure by tax protesters to pay tax, on the other hand, arises from an attempt to evade the payment of tax using disingenuous interpretations of tax laws. See *Cheney v Conn (Inspector of Taxes)* [1968] 1 All ER 779 where the Court in the United Kingdom (UK) dismissed the taxpayer’s objection to paying a tax due to the revenue being used to procure nuclear arms in violation of the Geneva Convention.
- ²³ This implies that the duty to pay tax is accepted once taxpayers are represented in government. In other words, there is ‘no taxation without solidarity’. See Sommerhalder RA ‘Taxpayer rights in the Netherlands’ (1997) 7(1) *RLJ* 58.
- ²⁴ Roosevelt F D, Worcester, Massachusetts, 21 October 1936 (quoted in (1998) 6(1) *JBLJ* 14 ex Rosenman SI (ed) *Public Papers and Addresses of Franklin D Roosevelt* vol 5 (1938) 523).

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decimated by economic sanctions.²⁵ The government then opted for a negotiated settlement. This led to political freedom and a democratic governance structure. A constitution making process, the Convention for a Democratic South Africa, was convened in December 1991.²⁶ However, it failed. Its replacement, namely, the Multi-Party Negotiating Place (or Forum), produced an interim Constitution for SA.²⁷ This process averted a cataclysm by enabling political leaders to negotiate a largely peaceful transition from White minority rule to a wholly democratic constitutional dispensation.²⁸ The zenith of SA's political revolution was reached on Freedom Day, 27 April 1994, when South Africans voted for a government of national unity.²⁹ This culminated in Nelson Mandela being inaugurated as SA's first, democratically elected President. Its democratisation was complete and SA regained its rightful place as a full member of the global community, also known as the 'family of nations'.³⁰

²⁵ For a discussion of the international isolation and economic sanctions on SA during apartheid, and its role in securing democratisation, see Sang-Hyun S *A Study on Democratic Transition in South Africa: Democracy Through Compromise and Institutional Choice* (unpublished Doctor of Literature and Philosophy thesis, UNISA, 2009) 171-73. Tax resistance created unpaid tax liabilities and a culture of non-payment of tax. Granger H *Economics Topic Guide: Taxation and Revenue* (January 2013) 1 available at http://zunia.org/sites/default/files/media/node-files/ec/457742_economics_topic_guide_taxation_and_revenue.pdf (accessed 9 January 2014) points out that tax amnesty is a recognised tool used in the sociology and psychology disciplines involved in tax administration. Several amnesties were legislated in the post-1994 era to, inter alia, enable taxpayers to legitimise their tax affairs and cultivate a culture of compliance through behavioural change. For example, Tax Amnesty Act 19 of 1995, Final Relief on Tax, Interest, Penalty and Additional Tax Act 101 of 1996 and Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006. See Moosa F 'Forgive the trespasses ... and the debts' (1997) 46(1) *The Taxpayer* 18-19; Moosa F 'Tax amnesty: An appraisal' (1997) 11(1) *TP* 21-24. A permanent voluntary disclosure program, a kind of tax amnesty, is contained in the TAA (Chapter 16 Part B).

²⁶ For an analysis of the constitution-making process, the transition to democracy and the lessons to be learnt, see Davis D *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 1-6; Currie I & de Waal J *The New Constitutional and Administrative Law Volume 1: Constitutional Law* (2001) ch 1; Sang-Hyun S (2009) 371-412; Woolman S & Swanepoel J 'Constitutional History' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Revision Service 5 2013) 2-34 – 2-45.

²⁷ Constitution of the Republic of South Africa Act 200 of 1993. For an overview of the interim Constitution, see Cachalia A, Cheadle H & Davis D *et al Fundamental Rights in the New Constitution* (1994) 3-16. See also Venter F 'Milestones in the evolution of the new South African Constitution and some of its salient features' (1994) 9(2) *SAPL* 211.

²⁸ *Certification 1* para 10. See also *Azanian People's Organisation and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) paras 1-2.

²⁹ The CC held, in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) para 17 (*August*), that the right to vote is a badge of dignity and personhood. On 27 April 1994, at voting stations across SA, eligible voters of all races exercised the franchise by making a historic mark in the first democratic, free and fair elections held in SA.

³⁰ *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) para 222 (*Kaunda*).

1.1.2 Taxation as a means to finance fundamental human rights

Two narratives of taxation exist. First, a positive outlook: tax is the price ‘we pay for civilized society’;³¹ ‘I like to pay taxes; with them, I buy civilization’;³² and tax is a ‘badge, not of slavery, but of liberty’.³³ Secondly, a negative perception in which tax is ‘a bane of the civilised’, a ‘tribute to Leviathan’³⁴ – a pure involuntary extraction from those engaged in economic production to those who control coercive power producing no reciprocal benefit. In SA, freedom and democracy were not attained, nor can they be maintained, free of charge. The Preamble of the Constitution (Preamble) honours ‘those who suffered for justice and freedom in our land’. This is the human cost of freedom and democracy. Taxation is its attendant financial cost. Freedom and democracy, with their associated civil, political and other human rights benefits, carry with them the duty to pay tax.³⁵ Thus, Art 29(6) of the African Charter, signed and ratified by SA on 9 July 1996, obliges individuals ‘to pay taxes imposed by law in the interest of the society’.

In a constitutional State based on the rule of law, as applies in SA,³⁶ non-payment of a tax lawfully imposed is unlawful and inimical to the values of democracy. However, this does not detract from a person’s right in the BOR (s 17) ‘to assemble, to demonstrate, to picket and to present petitions’ against excessive taxation.³⁷ Democracy entitles citizens to vote out an unpopular government and replace it with one whose tax policies are attuned to the needs and financial means of its citizenry. The Constitution brought about

³¹ Per Justice Oliver Wendell Holmes in *Compania de Tabacos v Collector of Inland Revenue* (1927) 275 US 87 100. This statement led to the following retort by Haupt PK *Advanced Tax Planning in South Africa* (1992) 10: ‘If this is true, we in South Africa must be fairly civilised.’ See also *Federal Commissioner of Taxation v Spotless Services Ltd* (1997) 34 ATR 183.

³² *South African Reserve Bank & Another v Shuttleworth & Another* 2015 (5) SA 146 (CC) para 1.

³³ Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) 704 available at <http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf> (accessed 5 January 2014).

³⁴ Pritchett L & Aiyar Y *Taxes: Price of Civilization or Tribute to Leviathan?* (2015) CGD Working Paper 412 at 1 available at <http://www.cgdev.org/publication> (accessed 21 September 2015).

³⁵ Holmes S & Sunstein CR *The Cost of Rights: Why Liberty Depends on Taxes* (1999) 18-19.

³⁶ Janse van Rensburg A *The Constitutional Framework for Broad-Based Black Economic Empowerment* (unpublished LLD thesis, University of the Free State, 2010) 146 describes SA as a social law State or social constitutional State.

³⁷ The Constitution (s 17) reads: ‘Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’ See also Braithwaite V *Defiance in Taxation and Governance – Resisting and Dismissing Authority in a Democracy* (2009) 1-2 12-15.

the democratisation of public finance. Sections 213 to 230 thereof outline SA's public finance system. It is 'both path-dependent and context-specific, reflecting the outcome of complex social and political interactions between different groups in a specific institutional context established by history and state administrative capacity'.³⁸ This system reflects the State's capacity to access wealth through taxation. It is a mechanism for financing government expenditure. The BOR (s 7(2) read with s 9(2)) obliges the State to fulfil the right to equality of Black people disadvantaged by discrimination under apartheid. The Constitution sets the standards for resolving competing interests or claims. The State must, when imposing tax, balance the competing interests of entrepreneurial freedom with meeting basic human needs and expectations.

Taxation does not occur in a vacuum. Programmes and initiatives aimed at ameliorating the undignified living conditions of so-called 'previously disadvantaged persons' require substantial financial resources. To this end, taxation is pivotal. Revenue collected from taxation capacitates the government with the cash resources that ensure its financial stability and functional ability to perform its obligations and fulfil the transformation objectives envisioned by the Constitution. Thus, revenue from taxation finances measures that protect human dignity and defend SA's democracy.³⁹ Unless finances in the national treasury are on a firm footing, governance cannot be efficient or effective. Therefore, taxation is a fiscal pillar upon which hinges the success of the constitutional enterprise. Taxation is an inexpensive source of finance when compared to, for example, interest-bearing loans. This is so because, whilst taxation brings about a tax system requiring administration and the attendant incurrence of administrative and compliance costs,⁴⁰ it

³⁸ Das-Gupta A & Bird RM *Public Finance in Developing Countries* (June 2012) Rotman School of Management Working Paper 2111065 at 2 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111065 (accessed 8 November 2014).

³⁹ Dae JY 'No taxation, no democracy? Taxation, income inequality and democracy' (2012) 15(2) *Journal of Economic Policy Reform* 71-72 is an empirical study hypothesising, rather convincingly, that taxation promotes the achievement of equality through democracy more strongly in societies, such as in SA, with more inegalitarian structures of income distribution because 'higher income inequality can amplify the extent and depth of dissatisfaction citizens derive from higher levels of taxation'. See also Ross ML 'Does taxation lead to representation?' (2004) 34 *British Journal of Political Science* 229-233-36.

⁴⁰ Granger H (2013) 23-5; Slemrod J & Yitzhaki S 'Tax Avoidance, Evasion, and Administration' in Auerbach AJ & Feldstein M (eds) *Handbook of Public Economics* vol 3 (2002) 1447-49.

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does not create the inflationary pressures accompanying interest-bearing loans. Taxation is also not a tool used for punitive or vindictive purposes.⁴¹ It is an economic policy tool deployed in the public interest to generate resources required to fulfil a range of social, economic, cultural, civil and political human rights. Without taxation, human rights will remain unfulfilled constitutional objectives. Socio-economic rights are expensive to fulfil. In a developing country like SA, taxation finances the costs attendant upon these rights.⁴²

Taxes are both certain and inconvenient: a necessary fiscal evil that is ‘a natural concomitant of the growth in the administrative state’.⁴³ Tax legislation is aimed at exacting ‘from each citizen his due’⁴⁴ ‘for the public benefit and to provide a service in the public interest’.⁴⁵ This is the *governmental purpose* of taxation. De Vos⁴⁶ describes taxation as ‘in essence an inflow of cash to government and therefore should seldom translate into a liability other than where overpayment of taxes were made by the taxpayer’. Allan⁴⁷ states that taxation ensures that private wealth is used for public benefit. He asserts that taxation enables a government to provide social goods and merit goods, and to subsidise the poor without causing inflation or balance-of-payment difficulties. From an economic point of view, taxation is important for balanced and sustainable economic growth, and for expanding State capacity.⁴⁸ Croome⁴⁹ writes: ‘Taxation is an

⁴¹ *Law Society of Zimbabwe and Another v Minister of Finance* (1999) 61 SATC 458 470.

⁴² Elson D, Balakrishnan R & Heintz J ‘Public Finance, Maximum Available Resources and Human Rights’ in Nolan A *et al* (eds) *Human Rights and Public Finance Budgets & The Promotion of Economic and Social Rights* (2013) 13.

⁴³ Emslie TS & Davis DM *Income Tax Cases and Materials* 4 ed (2012) 1.

⁴⁴ *GB Mining and Exploration SA (Pty) Ltd v CSARS* (2014) 76 SATC 347 (SCA) para 24.

⁴⁵ *Carlson Investments Share Block (Pty) Ltd v CSARS* 2001 (3) SA 210 (W) 231 (*Carlson Investments*); *Metcash Trading Ltd v CSARS and Another* 2001 (1) SA 1109 (CC) para 60 (*Metcash*); *Capstone 556 (Pty) Ltd v CSARS and Another*; *Kluh Investments (Pty) Ltd v CSARS and Another* 2011 (6) SA 65 (WCC) para 9 (*Capstone 556*). The public benefit derived from taxes spent is not a ‘value’ for insolvency law purposes. See *CIR v Bowman NO* 1990 (3) SA 311 (A) 317F-I. For a foreign law perspective, see *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 276; *Moore v Commonwealth* (1951) 82 CLR 547 561; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 (*Australian Tape Manufacturers*); *Nyambirai v National Social Security Authority and Another* 1996 (1) SA 636 (ZS) 643C-D.

⁴⁶ De Vos GJ *Generally Recognized Accounting Practice: A Critical Evaluation of the Impact of Grap 23 on Administrative Tax Legislation and Recommendations* (unpublished Magister Commercii (Taxation) thesis, University of Pretoria, 2009) 13.

⁴⁷ Allan CM *The Theory of Taxation* (1971) 23.

⁴⁸ Organisation for Economic Co-operation & Development (OECD) *Citizen-State Relations - Improving Governance through Tax Reform* (2010) 13 available at

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instrument used by government to achieve certain economic objectives.’ Sydness⁵⁰ contends that taxation raises government revenue for redistribution to reduce social inequality and to ensure that all persons in society can enjoy the benefits of societal development. Thus, taxation is key to effective State building. It enables the government to achieve allocative, distributive and stabilising economic and/or monetary objectives.⁵¹ From a commercial perspective, taxation brings about a regulatory regime by imposing an economic impediment to the activity taxed as compared to those untaxed.⁵² From a human rights perspective, taxation serves a triad of functions.⁵³ First, a resourcing role: to generate wealth for human rights related expenditure. Secondly, a redistributive function: to redistribute resources so as to mitigate, and redress, social inequalities. Thirdly, an accountability function: to cement the bonds of accountability between the State and its citizenry thereby promoting better social citizenship and a more responsive government.

Revenue from national taxes finances the budgets of the three spheres of government. Parliament and the national executive control the public purse.⁵⁴ The Constitution requires national taxes to be paid into the National Revenue Fund (s 213(1)) and provincial taxes into the Provincial Revenue Fund (s 226(1)). Sections 214(1) read with 227(1) stipulates that national taxes are to be shared equitably among the spheres of government. This enables them to satisfy the basic needs of people living in their jurisdiction. Taxes collected are utilised, inter alia, to defray expenditure related to supporting human rights (such as, housing,⁵⁵ health care,⁵⁶ food and water,⁵⁷ social

⁴⁹ <http://www.oecd.org/dac/governance-development/46008596.pdf> (accessed 10 January 2014).

⁵⁰ Croome BJ *Taxpayers’ Rights in South Africa* (2010) 3.

⁵¹ Sydness LS *Extensive Tax Minimization as an Obstacle to Human Rights Compliance* (unpublished LLM thesis, University of Oslo, 2010) 26-31.

⁵² Murphy J (1995) 102-03; Muller E A *Framework for Wealth Transfer Taxation in South Africa* (unpublished LLD thesis, University of Pretoria, 2010) 14-15.

⁵³ *Sonzinsky v United States* (1937) 300 US 506 513.

⁵⁴ Saiz I ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in Nolan A *et al* (eds) *Human Rights and Public Finance Budgets & The Promotion of Economic and Social Rights* (2013) 77 81-3.

⁵⁵ *S and Others v Van Rooyen and Others* 2002 (5) SA 246 (CC) para 140 (*Van Rooyen*).

⁵⁶ Section 26, Constitution. See *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); *Van der Burg and Another v NDPP* 2012 (2) SACR 331(CC).

⁵⁷ Section 27(1)(a), Constitution. See *Minister of Health and Others v Treatment Action Campaign and Others (No.2)* 2002 (5) SA 721 (CC) (*TAC*). See also Wayburne PA *Developing a*

security⁵⁸ and education).⁵⁹ In this way, taxation facilitates the progressive realisation of socio-economic rights.⁶⁰ This is its *transformative aim*. Most South Africans are afflicted by poverty and landlessness. It denies them the human rights to dignity and equality. Within the discipline of the constitutional framework, the State has a positive duty to bring about transformation by redressing social injustice through fulfilling socio-economic rights.⁶¹ These are inalienable, universal human rights based on shared ideas and common values about the constituent elements of a dignified life.⁶² Rights of this nature provide a legal basis for basic needs advocacy and strengthen the accountability of government.⁶³ The Constitution provides in, for example, s 26(2), s 27(2) and s 152(2) that the realisation of certain socio-economic rights is dependent on the availability of adequate funds.⁶⁴ These internally qualified rights have budgetary implications. Thus, a

Constitutional Law Paradigm for a National Health Insurance Scheme in South Africa (unpublished PhD thesis, University of Witwatersrand, 2014) 96-131.

⁵⁷ Section 27(1)(b), Constitution. See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (*Mazibuko*).

⁵⁸ Section 27(1)(c), Constitution. See *Khosa and Others v Minister of Social Development & Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) (*Khosa*).

⁵⁹ Section 29, Constitution. See *Governing Body of the Juma Masjid School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC); *MEC for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others* 2013 (6) SA 582 (CC) (*Rivonia Primary School*). See also Rossouw JP ‘The potential remedial function of the law in the deteriorating public education system in South Africa’ (2013) 46(1) *De Jure* 285.

⁶⁰ The CC held, in *Grootboom* para 45, that ‘progressive realisation means ... that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time’. Currie I & de Waal J *The Bill of Rights Handbook* 6 ed (2014) 564 describe socio-economic (or second generation) rights as “‘positive” rights that impose obligations on government. ... The socio-economic rights ... oblige the state to do as much as it can to secure for all members of society a basic set of social goods – education, health care, food, water, shelter, access to land and housing.’ See also Murray C ‘South Africa’s financial constitution: towards better delivery?’ (2000) 15(2) *SAPL* 477; Chenwi L ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) 46(3) *De Jure* 742.

⁶¹ *Grootboom* para 20. Heyns C & Brand D ‘Introduction to socio-economic rights in the South African Constitution’ (1998) 9 *LDD* 153 155 refer to this as ‘norm setting’. See also Liebenberg S & Goldblatt B ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative Constitution’ (2007) 23(2) *SAJHR* 335; Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 139-76.

⁶² International Bar Association Human Rights Institute (IBAHRI) *Tax Abuses, Poverty and Human Rights* (October 2013) 96 available at http://www.ibanet.org/Human_Rights_Institute/TaskForce_IllicitFinancialFlows_Poverty_Human_Rights.aspx (accessed 17 October 2013) (IBAHRI Report (2013)).

⁶³ In *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 31 (*Olitzki*) the Court held that ‘public accountability is central to our new constitutional culture’.

⁶⁴ *Capricorn District Municipality and Another v SANCO* 2014 (4) SA 335 (SCA) para 10. Heyns C & Brand D (1998) 155 refer to this as ‘norm enforcement’. Article 2(1) of the International

balance must be struck between, on the one hand, the commitment to socio-economic justice⁶⁵ and equality and, on the other, the capacity of the State to comply with its duties arising from the BOR.

Liebenberg⁶⁶ asserts, convincingly: ‘Human dignity as a relational concept requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.’⁶⁷ The overall responsibility of the national government in this regard is intertwined with that of the provincial and local governments.⁶⁸ Each governmental sphere must devise, fund and supervise the implementation of measures aimed at realising socio-economic rights. The fulfilment of this duty will advance the achievement of equality among SA’s disparate classes. This will ensure that they enjoy all the other rights enshrined in the BOR. Thus, the realisation of the right of access to social goods must be a common focal point in SA.⁶⁹

Covenant on Economic, Social and Cultural Rights oblige a State Party ‘to the maximum of its available resources’ to take legislative and all other appropriate measures ‘to achieving progressively the full realisation of the rights recognised in the present Covenant’. For the State’s duty to enforce such rights, see Eide A ‘Realization of social and economic rights and the minimum threshold approach’ (1989) 10 parts 1-2 *Human Rights LJ* 35 37; Starck C ‘State duties of protection and fundamental rights’ (2000) 3(1) *PELJ* 21; Pillay K ‘Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights’ (2002) 5 *LDD* 255; Chetty K ‘The public finance implications of recent socio-economic rights judgments’ (2002) 4 *LDD* 231; Bilchitz D ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19(1) *SAJHR* 1; Williams LA ‘Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis’ (2005) 21(3) *SAJHR* 436.

⁶⁵ For a discussion of the meaning of ‘social justice’ and ‘economic justice’, their inter-relationship under the Constitution and the duties of the State, see Janse van Rensburg A (2010) 121-41.

⁶⁶ Liebenberg S ‘The value of human dignity in interpreting socio-economic rights’ (2005) 21(1) *SAJHR* 1. See also van der Walt A ‘A South African Reading of Frank Michelman’s Theory of Social Justice’ in Botha H, van der Walt A & van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 163 164-65; Liebenberg S *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) chs 1-2.

⁶⁷ The CC, in *TAC* para 34, held that socio-economic rights do not contain a minimum core which the State must provide and the courts must determine. The CC, in *Mazibuko* para 66, stated that the Constitution envisages reasonable legislative measures to be the primary instrument for giving content to socio-economic rights. See also Liebenberg S ‘Towards a transformative adjudication of socio-economic rights’ (2007) 21(1) *SJ* 41; Hagenmeier C ‘Defining the minimum essential levels of socio-economic rights: The role of comparative analysis in delimiting the minimum core of socio-economic rights’ (2008) 22(2) *SJ* 90.

⁶⁸ *Grootboom* para 46; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 45 (*Blue Moonlight Properties*).

⁶⁹ Stein T ‘Constitutional socio-economic rights and international law: “you are not alone”’ (2013) 16(1) *PELJ* 13 14.

1.1.3 Tax principles and policies protecting democracy and human rights

Fulfilment of the Constitution's goals is dependent on the degree of success achieved by the implementation of government policy. Nationalisation of the burgeoning, capitalist economy in SA, or key sectors of the economy (such as, mining and banking), is not part of the national government's macro-economic policies articulated in the National Development Plan,⁷⁰ New Growth Path⁷¹ and Industrial Policy Action Plan.⁷² In a developing, non-industrialised economy, such as SA, revenue from taxation is a key source of State finance.⁷³ Historically, the legal landscape of SA has been characterised by a deep-rooted taxing culture that may be traced to the apartheid era where taxation was fragmented into a panoply of taxes enacted in a plethora of legislation that distended the statute books.⁷⁴ An unfashionably high incidence of taxation can lead to corporate disinvestment from SA.⁷⁵ If this occurs, it will hinder long-term sustainable economic prosperity that, in turn, will undermine the achievement of SA's transformation goals (such as the realisation of socio-economic rights).⁷⁶ To avoid this, sound tax policies integrated with prudent fiscal and monetary policies must be developed and maintained.⁷⁷

⁷⁰ Available at <http://www.info.gov.za/issues/national-development-plan/> (accessed 6 November 2013). For a discussion of the National Development Plan and its role in SA's tax system, see Davis Tax Committee *First Interim Report on Macro Analysis* (December 2014) 8-12 available at <http://www.taxcom.org.za/library.html> (accessed 18 June 2015).

⁷¹ Available at <http://www.economic.gov.za/communications/publications/new-growth-path-series> (accessed 6 November 2013).

⁷² Available at <http://www.thedti.gov.za/parliament/IPAP.pdf> (accessed 6 November 2013).

⁷³ Mansfield CY 'Tax administration in developing countries: An economic perspective' (1988) 35(1) *Staff Papers IMF* 181 192-93 available at <http://www.jstor.org/stable/3867282> (accessed 5 January 2014).

⁷⁴ See Kruger D, Stein M & Dachs P *et al Broomberg on Tax Strategy* 5 ed (2012) 2.

⁷⁵ Economic Policy Research Institute (EPRI) *South Africa's Tax Capacity: A Developing Country Analysis* (2002) Research Paper 28 at 17 available at <http://epri.org.za/wp-content/uploads/2011/03/rp28.pdf> (accessed 12 November 2013) points out that the national average tax rate in SA is, despite high taxation levels, relatively low by both international and developing country standards.

⁷⁶ Granger H (2013) 12 points out factors which indicate a link exists between taxation, government revenue and economic growth. These are: (i) taxation affects growth through its impact on efficiency, equity and addressing market failures, and as a tool for behavioural change to increase growth enhancing investment; (ii) growth feeds through to revenue through buoyancy of the tax system; and (iii) good financial and economic governance and strong institutions are important to collect tax revenue efficiently and to manage the revenues raised to finance growth enhancing investment and public services.

⁷⁷ In *South African Reserve Bank & Another v Shuttleworth & Another* 2015 (5) SA 146 (CC) paras 53 69-70 (*Shuttleworth*) the CC confirmed that a policy of exchange control benefits the public

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Fiscal policy,⁷⁸ part of a macro-economic policy, is aimed at ensuring fiscal discipline and sustainability, economic unity and proper management of a country's economy.⁷⁹ The national fiscal policy of SA is contained in the national budget tabled annually in Parliament for approval. The budget and budgetary processes must 'promote transparency, accountability and the effective financial management of the economy, debt and the public sector'.⁸⁰ This is part of democracy in finance. Fiscal policy is a key instrument in SA's nascent democracy seeking to stabilise fluctuations in the macro-economy and create an environment conducive to economic growth, employment creation and national financial security. Fiscal policy plays a crucial role in ensuring the availability of the financial resources required by the government to fulfil its constitutional mandate. The national executive authority devises and implements fiscal and economic policy for SA.⁸¹ The Constitution (s 228(2)(a) and s 229(2)(a)) protects the integrity and efficacy of national policies by prohibiting Provincial Legislatures and Municipal Councils from exercising taxing powers in a way that 'materially and unreasonably prejudices national economic policies'. Also, the South African Reserve Bank⁸² and the Financial and Fiscal Commission⁸³ are constitutional institutions serving to protect the national fiscal and economic interests of SA.

and its retention serves an important national financial and economic interest. Another example of a sound fiscal policy is in s 18A read with Part II of Schedule 9 in the Income Tax Act 58 of 1962 (ITA). These provisions permit a deduction for donations made to an approved public benefit organisation (PBO). This promotes philanthropy. It enables PBOs to fulfil a constitutional imperative, namely, to improve the quality of life for persons who live in SA. The deduction is not a true loss to the State because of the public benefits it creates. For a discussion of these provisions, see *ITC 1872* (2014) 76 SATC 225.

⁷⁸ This includes, inter alia, the government's key economic policy on taxation, expenditure priorities, incentive measures, and budgetary management targets. Chetty K (2002) 236-37 warns that fiscal policy can either aid or retard the resources available for realising socio-economic rights.

⁷⁹ Goldman Sachs International *Two Decades of Freedom – A 20-year Review of South Africa* (November 2013) 8 available at <http://www.goldmansachs.com/our-thinking/focus-on-growth-markets/colin-coleman/20-yrs-of-freedom.pdf> (accessed 6 November 2013) identifies 'macro fiscal and monetary balances' as key areas where SA has 'since 1994 made decisive structural advances'. For a discussion of the key roles played by the State, broader fiscal policy and the tax system in SA, see Davis Tax Committee *First Interim Report on Macro Analysis* (December 2014) 7-8.

⁸⁰ Section 215(1), Constitution. See also ss 195(1)(b), (f) and (g) of the Constitution. For a discussion of the legal principles applicable to budgetary processes, see Wayburne PA (2014) chs 2-3.

⁸¹ Section 85(2)(b), Constitution. See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 67 (*OUTA*). A detailed discussion of the way in which fiscal policy is devised and implemented falls beyond the purview of this dissertation.

⁸² The Constitution (s 224(1)) provides that the primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth.

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Tax policy is part of the overall national fiscal policy and must satisfy the constitutional imperatives of non-discrimination and equality.⁸⁴ A good tax policy must include measures aimed at encouraging tax compliance and counteracting non-compliance. Self-assessment by taxpayers, the emergence of a global economy and electronic commerce are but a sample of factors that have serious tax policy implications, particularly about the manner in which a tax system is to be administered.⁸⁵ Equity, certainty, convenience, efficiency, neutrality, simplicity and universality are internationally recognised canons of taxation. They are ideal objectives of tax policy and represent the hallmarks of the design of an efficient, fair, credible and politically acceptable tax system.⁸⁶ In *Metcash Trading Ltd v CSARS and Another (Metcash)*,⁸⁷ the Constitutional Court (CC), SA's apex Court, noted that 'general tax morality in [SA] is low and ... there is a high rate of tax evasion and fraud'. This confirms the need for a strong tax collection agency and laws designed to ensure increased levels of tax compliance and the promotion of tax morality and integrity. It is in this regard that the TAA will play a key role.

Proper tax administration ensures the availability of adequate funds that will enable the government to fulfil its obligations to its citizenry. Efficient management of public finances is, at the same time, crucial to building and maintaining public confidence in the government. The Auditor General's Report of 2016 highlighted recurring instances of financial mismanagement, fraud, corruption, nepotism, tender irregularities, incompetence and poor service delivery by public officials that leads to a lack of faith in the elected government and feeds the perception that tax revenues are wasted. This

⁸³ Section 220(1), Constitution.

⁸⁴ Elson D, Balakrishnan R & Heintz J 'Public Finance, Maximum Available Resources and Human Rights' in Nolan A *et al* (eds) *Human Rights and Public Finance Budgets & The Promotion of Economic and Social Rights* (2013) 28.

⁸⁵ James S & Alley C 'Tax compliance, self-assessment and tax administration' (2002) 2 *Journal of Finance and Management in Public Services* 27 28.

⁸⁶ Mansfield CY (1988) 183. For a discussion of the canons of taxation, see Muller E (2010) 45-54; Granger H (2013) 7-8; Davis Tax Committee *First Interim Report on Macro Analysis* (December 2014) 12-3; Gutuza T *An Analysis of the Methods Used in the South African Domestic Legislation and in Double Taxation Treaties Entered into by South Africa for the Elimination of International Double Taxation* (unpublished PhD thesis, UCT, 2013) 2-9. Alley C & Bentley D 'A remodelling of Adam Smith's tax design principles' (2005) 20 *Australian Tax Forum* 579 586-88 set out a useful summary of legal principles that ought to be applied when designing a tax system.

⁸⁷ 2001 (1) SA 1109 (CC) para 20. See also *ITC 1865* (2013) 75 SATC 250 in which a VAT vendor issued fictitious invoices to create a sham revenue stream. See also Granger H (2013) 17.

fosters reluctance by taxpayers to pay their fair share of tax. This undermines the cultivation of a voluntary tax compliance culture.⁸⁸ Klue,⁸⁹ convincingly, warns that when ‘a government is inefficiently managed and tainted by corruption, taxpayers rightfully start questioning the fairness of the system and the social contract’.

1.1.4 Protecting the tax base with good tax administration strategies

The global economy suffered a financial meltdown during 2008/09. Its effect was catastrophic. Economies worldwide plunged into recession. Whilst this financial crisis caused certain economies (such as, those of Greece, Ireland and Iceland) to collapse altogether, others (such as, those of Italy and Spain) teetered on the brink of collapse. Even large economies (such as, those of the USA, the United Kingdom (UK), France and Germany) were adversely affected.⁹⁰ The crisis was so debilitating that certain governments introduced cost-cutting measures aimed at maintaining their national budget deficits within manageable levels. To avoid spiralling unemployment, the USA and UK governments, for example, used public funds to rescue multi-national corporations and

⁸⁸ Voluntary tax compliance is higher when taxpayers have faith and trust in the State. See Slemrod J ‘On voluntary compliance, voluntary taxes and social capital’ (1998) 51 *National Tax Journal* 485. A crisis of democracy in SA is epitomised by chronic inefficiency in service delivery, financial mismanagement and corruption scandals involving public officials and State departments. See, for example, *Selebi v S* 2012 (1) SA 487 (SCA). For discussion of the pernicious effects of corruption on democracy and the social fabric of SA, see *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) paras 1 194 220-21.

⁸⁹ Klue S ‘The social contract, fair share tax and other myths’ available at <http://www.thesait.org.za/news/93372/The-social-contract-fair-share-taxes-and-other-myths.htm> (accessed 20 October 2013). Likewise, Greenbaum A ‘Taxpayers’ Bills of Rights 1 and 2: A charter to be followed by the rest of the world or just another attack on the tax authority?’ (1997) 7(1) *RLJ* 138 162 states that the ‘level of compliance with the tax law can often be greatly influenced by the perception of the taxpayer as to the fairness of the tax system’. See also Li J ‘Taxpayers’ rights in Canada’ (1997) 7(1) *RLJ* 83; Andreoni J, Erard B & Feinstein J ‘Tax compliance’ (1998) 36 *Journal of Economic Literature* 818; Bentley D *Taxpayers Rights: Theory, Origin and Implementation (International Taxation)* (2007) 50.

⁹⁰ Amadeo K ‘Could the mortgage crisis and bank bailout have been prevented?’ available at http://useconomy.about.com/od/criticalissues/a/prevent_crisis.htm (accessed 10 October 2013). This article contains a useful chronology of important events leading to the financial crisis in the USA that had an infectious (toxic) domino effect on other world economies. For a discussion of the financial crisis and the lessons to be learnt as regards financial regulation, see Barker H ‘*Regulation of Financial Reporting: A Critical Analysis of Recent Amendments to South African Legislation*’ (unpublished Magister Commercii thesis, UJ, 2013).

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banks whose businesses were bankrupted.⁹¹ By 2016, most economies, including that of SA, had weathered the storm and are en route to economic recovery. However, a global assessment by the International Monetary Fund⁹² (IMF) indicates that the consequences of the financial crisis will be felt worldwide for many years to come. The Fund's prognosis for the short to medium term is that economic growth will occur at the proverbial snail's pace. The global economic turmoil provided a stern test for public finances in countries worldwide as well as for their national economic policy frameworks and regulatory environments. This, in turn, tested the resilience of each country's tax policy framework and its revenue collection system.

South Africa was not immunised against, or insulated from, the global economic ills. Thus, it too endured economic hardship. This prompted its national government to introduce cost-cutting measures.⁹³ The financial crisis caused tax collection to suffer. Statistics reveal a sharp decline in collections during 2009/10 (R598.7 billion) from that in 2008/09 (R625.1 billion).⁹⁴ However, increased tax revenue collection occurred over the period 2010/11 (R674.1 billion), 2011/12 (R742.6 billion), 2012/13 (R813.8 billion), 2013/14 (R900 billion) and 2014/15 (R986.2 billion). This turnaround is indicative of the economic recovery underway in SA and, possibly too, of improved tax collection. The adverse effects of the financial crisis on SA's economy accentuated pressures on the South African government. This has caused it to suffer setbacks in its service delivery targets which, in turn, has increased discontent among poor, mainly Black, communities in SA thereby resulting in them embarking on more frequent, often violent, street protests.⁹⁵

⁹¹ For a list of the USA financial institutions rescued under the Emergency Economic Stabilization Act of 2008, see Nankin J & Schmidt KK 'History of US gov't bailouts' available at <http://www.propublica.org/special/government-bailouts> (accessed 16 October 2013).

⁹² International Monetary Fund (IMF) *Global Financial Stability Report: Vulnerabilities, Legacies and Policy Challenges* (October 2015) chapter 1 available at <http://www.imf.org/external/pubs/ft/gfsr/2013/02/index.htm> (accessed 16 October 2013).

⁹³ Creamer T 'Cost containment the new mantra as SA seek to navigate its fiscal constraints' available at <http://www.polity.org.za/article/cost-containment-the-new-mantra-as-sa-seeks-to-navigate-its-fiscal-constraints-2013-10-23> (accessed 25 October 2013).

⁹⁴ National Treasury & SARS *2015 Tax Statistics* (March 2016) 3-8 available at www.sars.gov.za/About/SATaxSystem/Pages/Tax-Statistics.aspx (accessed 26 April 2016).

⁹⁵ Centre for Constitutional Rights *Human Rights Report Card 2014* (March 2014) 3 available at

Future economic and fiscal stability is dependent on, first, the swiftness with which governments are able to adapt to financial challenges and, secondly, the effectiveness of measures undertaken by them, individually and collectively. To address budget deficits exacerbated by the global economic meltdown, governments, including the South African government and that of the remaining Group of 20 (G20) nations,⁹⁶ are pursuing other available, but untapped, income streams.⁹⁷ A common focal area is tax minimisation or fiscal leakage⁹⁸ brought about by tax holidays, tax evasion, tax avoidance,⁹⁹ creative accounting practices, illicit exploitation of tax loopholes,¹⁰⁰ abuse of assessed losses, and

<http://www.cfc.org.za> (accessed 28 March 2014). See also *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* 2015 (1) BCLR 72 (CC) para 16.

⁹⁶ For a list of countries comprising the G20, see Croome BJ ‘Global tax information exchange a step closer’ available at <https://saii.site-ym.com/news/142519/Global-Tax-Information-Exchange-a-Step-Closer-htm> (accessed 20 October 2013). Charlton A ‘Russia: G-20 leaders champion international tax reform’ available at <https://saii.site-ym.com/news/138755/Russia-G-20-leaders-champion-international-tax-reform-htm> (accessed 28 September 2013) discusses the steps taken by the G20 to reform the international tax system.

⁹⁷ For example, in 2010 the USA government passed the Foreign Account Tax Compliance Act (FATCA) as part of the Hiring to Restore Employment Act. FATCA aims to deter, detect and discourage offshore tax evasion and recover federal taxes through increased transparency, enhanced reporting and strong sanctions. The strict tax compliance measures imposed by FATCA prompted certain USA citizens to renounce their citizenship in favour of countries with less burdensome tax duties. See <http://www.foxnews.com/politics/2013/08/12/americans-renouncing-citizenship-in-record-numbers-seek-to-avoid-tax/?test=latestnews> (accessed 10 October 2013).

⁹⁸ In *CSARS v Airworld CC and Another* [2008] 2 All SA 593 (SCA) para 23 the Court noted that ‘the legislator in this imperfect world must be ever alert to thwart the relentless ingenuity of accountants, tax consultants, lawyers and even the lay person, by anticipating possible ways and means by which the prescripts of tax legislation might be avoided’. See also Peacock B ‘Concern over foreign tax leakages’ (6 October 2013) *Sunday Times* 14.

⁹⁹ Tax avoidance schemes include the ‘double Irish structure’ (see Worsdale R ‘Taxation of digital media: Is the playing field level?’ available at <http://www.thesaii.org.za/news/198311/Taxation-of-digital-media-Is-the-playing-field-level.htm> {accessed 27 October 2014}) and corporate expatriation or inversion (see Morse SC ‘Startup Ltd: Tax planning and initial incorporation location’ (October 2013) 14 *Florida Tax Review* 319; Allen EJ & Morse SC ‘Tax haven incorporation for U.S. headquartered firms: No exodus yet’ (2013) 66(2) *National Tax Journal* 395; Marchgraber C ‘The avoidance of double non-taxation in double tax treaty law: A critical analysis of the subject-to-tax clause recommended by the European Commission’ (2014) 23 *European Community Tax Review* 293). Tax avoidance structures ‘are designed to achieve an adventitious tax benefit ... and in truth are not more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable’ (per Lord Goff in *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] 2 All ER 275 (HL) 295e).

¹⁰⁰ For example, a company may manipulate its place of effective management so that its residence for tax purposes is in a more favourable tax jurisdiction that has ‘little or no connection with the entity’s actual economic and business links’. See van der Merwe BA ‘The phrase “place of effective management”: Effectively explained?’ (2006) 18(2) *SA Merc LJ* 121 124-25. The change of ‘residence’ must be viewed in the context of a company’s freedom of movement (s 21(1)) and its right to leave SA (s 21(2)) as entrenched in the BOR.

the illegitimate use of trusts and tax havens (such as, Switzerland and the Isle of Man).¹⁰¹ Multi-national corporations often shift trade profits across international borders resulting in low income taxation or double non-taxation, both in the countries where they are 'resident' for income tax purposes or the places from whence their income is sourced, and in the countries to which their income is shifted. Tax minimisation erodes a tax base,¹⁰² undermines the integrity of a tax system, and restricts a government's capacity to fulfil its obligations to its citizenry.¹⁰³ Principles of good governance and fiscal management oblige governments to deal decisively with tax minimisation.¹⁰⁴ It must be combatted because of its potential to destabilise the security of the public treasury and its adverse effects on economic efficiency and equity. Key elements in countering tax minimisation are a well-designed tax system, a capable tax administration authority, a supportive legal system and active legislature,¹⁰⁵ and a modicum of trust between the State and its citizens.¹⁰⁶ To achieve this requires an appropriate legal framework.

The realisation of socio-economic and other human rights in SA necessitates that its government's finances are maintained at optimal levels. This requires proper tax administration regulated by the Constitution and legislation. Laws are the dominant tools available to any government desirous of intervening in society. The Katz Commission of

¹⁰¹ For a discussion of the use of tax havens, see Olivier L & Honiball M *International Tax - A South African Perspective* 5 ed (2011) 666-687.

¹⁰² In this context, 'tax base' means 'the collective value of taxable assets or taxable activities subject to the levy of taxation'. See Muller E (2010) 15.

¹⁰³ See Ratner ST 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale LJ* 443 461; Sydness LS (2010) 26-40; IBAHRI Report (2013) 27-39.

¹⁰⁴ Saint-Amans P 'Bringing international tax rules into the 21st century' available at <https://sait.site-ym.com/news/139703/Bringing-International-Tax-Rules-Into-the-21st-Century.htm> (accessed 28 September 2013). See also Aujean M 'Fighting tax fraud and evasion: In search of a tax strategy' (2013) 22 *European Community Tax Review* 64; Vanessa H & Javier B 'Global: G20 to back moves to expose tax evaders' available at <https://sait.site-ym.com/news/138619/Global-G20-to-back-moves-to-expose-tax-evaders.htm> (accessed 28 September 2013). Goldswain GK *The Winds of Change- An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers* (unpublished Doctor of Accounting Science thesis, UNISA, 2012) 26 asserts, probably correctly, that the 'only real cure' for tax avoidance and evasion is to end taxes.

¹⁰⁵ Separation of powers precludes the judiciary from remedying legislative inaction and augmenting the legislature's duty to counteract fiscal (tax) leakage. See *ITC 1611* (1997) 59 SATC 126 145.

¹⁰⁶ Das-Gupta A & Bird RM *Public Finance in Developing Countries* (June 2012) Rotman School of Management Working Paper 2111065 at 10-11. See also Das-Gupta A 'Implications of Tax Administration for Tax Design: A Tentative Assessment' in Alm J, Martinez-Vazquez J & Rider M (eds) *The Challenges of Tax Reform in a Global Economy* (2006) 363-412.

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Inquiry into Certain Aspects of the Tax Structure in South Africa (Katz Commission)¹⁰⁷ emphasised that proper tax administration is a hallmark of good governance ensuring financial stability, thereby rendering the government functionally able to govern efficiently and effectively.¹⁰⁸ Proper tax administration maintains ‘the integrity of the tax system and any reform programme’.¹⁰⁹ The absence thereof (for example, due to a lack of audit capacity, incompetence or corruption of tax officials) causes tax collection to suffer, resulting in lower government income. This, in turn, has potential adverse economic effects (such as increasing the fiscal deficit) curtailing the government’s ability to fulfil its obligations. The efficiency and effectiveness of tax collection is, thus, essential for fiscal stability.¹¹⁰ To this end, SARS plays a key role.

Governments, including the South African government, have concluded bilateral and multi-lateral tax administration agreements that oblige the tax authorities of signatory countries to share information through a common database accessible to their respective tax authorities.¹¹¹ This is aimed at facilitating easier detection of undeclared corporate income sheltered in offshore bank accounts or siphoned through foreign entities and investments. The Organisation for Economic Co-operation & Development (OECD) developed the Base Erosion and Profit Shifting¹¹² (BEPS) action plan that came into

¹⁰⁷ The Katz Commission (1994-99) issued nine reports containing tax reform recommendations. The third to ninth reports are available at <http://www.treasury.gov.za/publications/other/katz/default.aspx> (accessed 19 October 2013). For an overview of the reports, see Croome BJ & Olivier L *Tax Administration* (2010) 5-7.

¹⁰⁸ *Third Interim Report of the Katz Commission, 1995* para 3. See also Davis Tax Committee *First Interim Report on Macro Analysis* (December 2014) 5-7.

¹⁰⁹ Manuel T ‘The South African tax reform experience since 1994’ (24 October 2002) available at http://www.treasury.gov.za/comm_media/speeches/2002/2002102501.pdf (accessed 21 October 2013).

¹¹⁰ McClellan CB *The Consequences of Poor Tax Administration: Collections, Growth, and Corruption* (unpublished PhD thesis, Georgia State University, USA, 2013) 12 points out that ‘[t]he history of taxation is replete with governments that have failed due to poor taxation administration and policies’.

¹¹¹ McCracken SK ‘Going, going, gone ... global: A Canadian perspective on international tax administration issues in the “exchange of information age”’ (2002) 50(6) *Canadian Tax Journal* 1869; Quinn A, Livingston M & Fogarty W *et al* ‘Worldwide tax information exchange – where are we now?’ available at <http://www.thesait.org.za/news/152402/Worldwide-Tax-Information-Exchange--Where-Are-We-Now.htm> (accessed 22 February 2014).

¹¹² For full details of the BEPS, see OECD ‘Base Erosion Profit Shifting project’ (2015) available at <http://www.oecd.org/tax/beps> (accessed 26 April 2016).

operation during 2015. It applies to OECD members States. South Africa is not a member State. BEPS aims to reform the international tax system by eliminating the risk of income being artificially diverted through complex investment strategies resulting in a low or no corporate income tax footprint. Furthermore, BEPS aims to render ineffective the diversion of income by taxing corporate profits in its originating country, that is, where the economic activity creating the profits is performed and the value created. This endeavour is an important shift away from the pre-existing position in which co-operation was confined to countries with bilateral double taxation treaties with one another.¹¹³

A new global standard of co-operation in tax matters has emerged.¹¹⁴ Nanavati¹¹⁵ claims, with merit, that this development is a positive move protecting the integrity of a country's tax base by stepping up the fight against offshore tax evasion and money laundering, by fostering improved tax administration, and by enhancing tax collection capabilities across international borders. From a tax administration perspective in SA, the TAA will play a crucial role. Amid a poor economic climate, ailing financial resources and increased public frustration at the government's failure to provide a better quality of life for SA's people, the TAA became law, for the most part, with effect from 1 October 2012. It is a national tax related statute that adds considerable new powers to SARS's arsenal. This aims to enhance SARS's tax detection and collection capabilities. It also signals Parliament's commitment to combat the mischief of tax minimisation and to honour SA's international obligations in the fight against this scourge transnationally. To the extent that the TAA's provisions pass constitutional muster, they are to be carried out in full.

¹¹³ South Africa is bound by a network of double taxation treaties and other tax information exchange agreements. For a list thereof, see <http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/default.aspx> and [http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-\(Bilateral\).aspx](http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx) (accessed 22 October 2014). For a discussion of double tax agreements generally, see *CSARS v Tradehold Ltd* 2013 (4) SA 184 (SCA). For their interpretation, see Olivier L & Honiball M (2011) 297-319; Moosa F 'Meaning of alienation: Interpreting a double taxation agreement' (2012) 26(5) *TP* 118.

¹¹⁴ In 2014, the OECD member and G20 countries, including SA, endorsed the OECD's new Standard for Automatic Exchange of Financial Account Information in Tax Matters available at <http://www.oecd.org> (accessed 6 November 2014).

¹¹⁵ Nanavati JR 'United States: G20 representatives strike historic agreement on automatic tax information exchange' available at <https://sai.site-ym.com/news/140011/United-States-G20-Representatives-Strike-Historic-Agreement-On-Automatic-Tax-Information-Exchange.htm> (accessed 28 September 2013). See also *Krok and Another v CSARS* 2015 (6) SA 317 (SCA); *Ben Nevis (Holdings) Ltd and Another v Revenue and Customs Commissioners* 76 SATC 243.

1.1.5 Role of taxation in building democracy in South Africa

In every democracy, as SA, human rights will be meaningful only if it translates into an improved quality of life for the ‘man on the street’. To this end, taxation is key. In SA, it enables State and nation building, as well as human rights development. Taxation is, thus, a matter of real public interest. As mentioned before, the realisation of socio-economic rights is constitutionally dependent on the availability of adequate resources derived from taxation. The Constitution seeks to strike a fair balance between, on the one hand, its goals of restorative and corrective social justice, enhancing human dignity and equality through the fulfilment of human rights and, on the other, the financial means required for attaining these goals. Therefore, taxation is a precondition for the maintenance of democracy and the advancement of human rights and freedoms. But for revenue from taxation, achieving substantive (or real) equality will remain an unfulfilled communal aspiration penned on paper. This also applies to freedom, a never-ending process of refinement and engagement.¹¹⁶ Financial considerations determine the degree to which SA’s government can embark on programmes designed to free South Africans from the bondage of poverty, the ravages of homelessness, and the sorrows of unemployment, as well as to ameliorate the indignities of economic and social inequalities permeating its society. This is a challenging part of building and shaping a truly free SA for all.

The fiscal health of SA is crucial for advancing democracy through transformation. To this end, taxation plays a pivotal role. A direct link exists between taxation and democracy, on the one hand, and the realisation of the Constitution’s human rights objectives on the other.¹¹⁷ As mentioned above, tax minimisation diminishes State revenue. This, in turn, hampers the government’s ability to deliver on the Constitution’s promise of a better life for SA’s inhabitants. Combatting tax minimisation is, therefore,

¹¹⁶ For a discussion of the elements comprising ‘freedom’ as a value, see Wayburne PA (2014) 77-95.

¹¹⁷ Guttman D ‘Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU’ in Kofler G, Maduro MP & Pistone P (eds) *Human Rights and Taxation in Europe and the World* (2011) 105 106-08 states that it is in the realm of socio-economic rights that the link between taxation and human rights is the strongest. Taxation and human rights are also linked in the protection of taxpayers’ rights. See Nykiel W & Sek WNM (eds) *Protection of Taxpayers’ Rights: European, International and Domestic Tax Law Perspective* (2009) 115-19.

not simply a matter of good governance. It is a serious human rights issue because it ‘deprive[s] governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights’.¹¹⁸ Early CC jurisprudence¹¹⁹ refers to a hierarchy (or ranking) of fundamental rights in which the rights to life and human dignity ‘form the point of the pyramid’.¹²⁰ Later judgments, however, held that no hierarchy of rights exists.¹²¹ Thus, all fundamental rights have equal status in law. By parity of legal reasoning, it is submitted that the same ought to apply to constitutional values.¹²²

The emphasis above on the human rights dimension of taxation is not intended to suggest that taxation does not serve other purposes or that any such other purpose pales into comparative insignificance as against any constitutional purpose. The focus on the human rights dimension serves a triad of purposes relevant to this study. First, it contextualises the significance of sound fiscal policies and tax administration strategies, and the national need to curb tax minimisation for the benefit of the South African *fiscus* (or public treasury) and, by extension, the people of SA. Secondly, it reflects the significance of taxation in pursuing the fulfilment of the Constitution’s transformation agenda. Thirdly, the objectives underpinning the need for taxation and good tax administration tools are relevant considerations when a provision of the TAA is analysed with a view to determining whether it is consonant with the BOR and the Constitution read as a whole.

¹¹⁸ IBAHRI Report (2013) 2. See also Sydness LS (2010) 3. Currie I & de Waal J (2014) 564 state that civil and political (first-generation) rights ‘are based on the idea that individuals should be free of government interference when it comes to what they do in their private lives and in their personal and political associations with others’. For an analysis of CC jurisprudence on socio-economic rights, see Kende MS ‘The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective’ (2003) 6 *Chapman Law Review* 137.

¹¹⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 144 214 (*Makwanyane*). In constitutional matters, jurisprudence develops incrementally. See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 18 20 (*Prinsloo*); *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 82.

¹²⁰ Blaauw-Wolf L & Wolf J ‘A comparison between German and South African limitation provisions’ (1996) 113(2) *SALJ* 267 282.

¹²¹ *Gardener v Whitaker* 1996 (4) SA 337 (CC) 343E; *South African Broadcasting Corporation Ltd v NDPP and Others* 2007 (1) SA 523 (CC) paras 55 91 125; *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) para 148.

¹²² A contrary approach is adopted by Barak A *Human Dignity: The Constitutional Value and the Constitutional Right* (2015) 255 who ranks the fundamental values of human dignity, equality and freedom as ‘the supreme values of the constitution’.

1.2 PROBLEM STATEMENT AND RESEARCH QUESTIONS

South Africa is a constitutional State (*Rechtsstaat*)¹²³ that, in relative terms, is a fledgling democracy. The State and all its machinery, as well as all laws (including the common law),¹²⁴ are subject to a supreme, humanitarian oriented Constitution. Rights lie at the heart of SA's open and democratic society based on human dignity, equality and freedom. Various texts of the Constitution exemplify its nature as a rights conscious legal instrument geared to establishing, promoting and maintaining a culture of fundamental human rights.¹²⁵ Under SA's constitutional, statutory and common law, taxpayers¹²⁶ have legal rights with teeth. This is so because taxpayers' rights¹²⁷ protect taxpayers during tax administration conducted by SARS and the Commissioner for the South African Revenue Service (CSARS). Equipping tax administrators with adequate powers that give them bite to optimise tax collection, serves SA's national fiscal interest. To this end, the TAA is pivotal. Whilst the TAA vests SARS and the CSARS with various pre-existing legal and administrative powers, it also grants extraordinary new powers, some of which place SARS and the CSARS on a collision course with taxpayers' fundamental rights. To defend their rights against onslaught and diminution, foreign and domestic taxpayers affected by tax administration occurring in terms of the TAA may attack the validity of the TAA itself, or the TAA provisions that confer wide-ranging powers on SARS and/or the CSARS and/or other officials that limit taxpayers' rights entrenched in the BOR.

¹²³ Blaauw LC 'The *Rechtsstaat* idea compared with the rule of law as a paradigm for protecting rights' (1990) 107(1) *SALJ* 76 explains that *Rechtsstaat* is a German expression comprising the words 'Recht' (law) and 'Staat' (state). Moreover, the *Rechtsstaat* principle 'is a norm which originated to discipline state authority in the interest of those who are subject to it' (at 87).

¹²⁴ 'Common law' refers to the suite of legal rules and principles forming part of current South African law that is not written into any particular statute and which emanates from SA's colonial heritage comprising a combination of Roman-Dutch and English law as may be developed by the judiciary in conformity with the Constitution (s 39(2)). See de Vos P, Freedman W (eds) & Brand D *et al South African Constitutional Law in Context* (2014) 782.

¹²⁵ Dickson B 'Protecting human rights through a Constitutional Court: The case of South Africa' (1997) 66(2) *Fordham Law Review* 531 538-39.

¹²⁶ In this dissertation, unless otherwise stated or a contrary meaning is apparent from the context, 'taxpayer' bears the meaning as defined in s 151 of the TAA (discussed below in chapter five).

¹²⁷ Holmes S & Sunstein CR (1999) 17 describe a right in the legal sense as a 'child of the law'. In other words, a right is a product of a legal system. 'Rights', in the expression 'taxpayers' rights', denotes legal rights recognised and protected in law. In this dissertation, unless expressly stated otherwise or implied by context, 'taxpayers' rights' means the justiciable procedural and substantive rights of a taxpayer under South African law (discussed below in chapter seven).

CHAPTER ONE: TAX, DEMOCRACY & HUMAN RIGHTS: AN INTRODUCTION

Prior to Parliament approving the Tax Administration Bill 11B, 2011 (TAB 11B, 2011), the Bill underwent a process of public scrutiny.¹²⁸ A literature survey, including a review of the public's submissions to Parliament's Standing Committee on Finance, shows that the most controversial of SARS's far-reaching TAA powers adversely affecting taxpayers' rights are its warrantless information gathering powers in the form of inspections (s 45) and searches and seizures (s 63). Despite vociferous objections against these specific administrative powers on the basis that they unduly limit taxpayers' rights to privacy, Parliament conferred this formidable arsenal of powers on SARS thereby ushering in a substantially more powerful tax administration agency. The erosion of taxpayers' fundamental privacy in ss 45 and 63 creates areas of potential contestation as to whether the powers concerned satisfy the prescripts of the limitation clause in s 36(1) of the BOR.

The framework of the BOR's application arising from ss 7 and 8 of the Constitution renders the constitutional problem referred to above more challenging. This is so because, first, some CC jurisprudence has been construed as limiting the BOR's application to persons who are physically present within SA, that is, 'in our country' (s 7(1)). If this legal position is applied strictly in a tax context, then it would create a constitutional problem for taxpayers located outside SA's borders from whom SARS, for example, seeks access to privileged documents under s 64 of the TAA, or wishes to recover a local or foreign tax debt by levying execution against the taxpayers' property in SA. In such circumstances, a rigid application of the CC's jurisprudence alluded to above would preclude the affected taxpayers from enforcing fundamental rights in the BOR that are available to persons located within SA's territorial borders. Secondly, as regards juristic taxpayers (that is, persons other than natural persons), the BOR limits the entitlement to fundamental rights to those satisfying the requirements of s 8(4). The Constitution does not define the term 'juristic person'. From a tax administration perspective, this creates uncertainty as to whether juristic taxpayers in the form of trusts, estates of deceased persons and insolvent estates are, owing to their common law status as *personae non iuris*, entitled to the fundamental rights in the BOR for TAA and tax purposes generally.

¹²⁸ For further details of the public participation process relating to the TAB 11B, 2011, see chapter five below.

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Against the background outlined above, this study ventilates and postulates answers to the general research question whether the TAA achieves a fair balance between efficient tax administration and taxpayers' rights, and also to specifically the following questions:

- (i) Did Parliament comply with the correct legislative procedural requirements under the Constitution when it passed the TAA? This question, touching on the legality of the TAA, necessitates determining whether the TAB 11B, 2011 was a 'money Bill' for the purposes arising from s 77 of the Constitution.
- (ii) Are natural persons who are taxpayers for TAA purposes entitled to the fundamental rights in the BOR during tax administration conducted under the TAA if they are located beyond SA's territorial limits? This question touches on the extraterritoriality of the BOR's application for the purposes of tax law.
- (iii) Are taxpayers in the form of trusts, deceased estates and insolvent estates entitled to the fundamental rights in the BOR during tax administration conducted pursuant to the TAA? This question touches on whether these tax 'persons' are 'juristic persons' within the contemplation of s 8(4) of the BOR.
- (iv) Do ss 45(1), (2), 63(1) and (4) of the TAA, hereafter 'the impugned TAA provisions', impose limits on taxpayers' privacy under s 14 of the BOR that pass muster under s 36(1) thereof? The question posed here touches on whether the impugned TAA provisions satisfy the prescripts of the general limitation clause in the BOR *vis-à-vis* taxpayers' fundamental privacy rights.

The research questions necessitate discussions of various provisions of the Constitution and the values, principles, ethos and culture underlying SA's open and democratic society, particularly as far as these are relevant in the tax arena. Discussion is also required of the legislative process of taxation, the principles governing tax administration, and taxpayers' rights under the laws of SA. In addition, focussed attention is required in relation to the TAA, its aims and its impact on the landscape of tax administration in SA.

1.3 SIGNIFICANCE OF THE RESEARCH: LITERATURE SURVEY

The TAA is SA's premier statute regulating tax administration. The TAA altered the landscape of the administration of certain national taxes when it acquired the force of law on 1 October 2012. This study will be an important work in relation thereto because, unlike existing studies, it explores the TAA's impact in the tax arena as regards taxpayer rights and the constitutionality of SARS's administrative powers arising from the impugned TAA provisions. This study will break new ground by researching the constitutionality of these provisions. In the legislative process leading up to the enactment of the TAA, the submissions made by SARS as to their constitutionality prevailed. However, the arguments for and against their constitutionality have hitherto not been tested in a South African court. Thus, uncertainty exists as to whether specifically ss 45(1), (2), 63(1) and (4) of the TAA will pass constitutional muster. This study aims to provide an answer to this critical issue. Equally significant, based on the literature survey, it appears that this is the first study researching whether taxpayers in the form of trusts, deceased estates and insolvent estates are 'juristic persons' for purposes of s 8(4) of the BOR. South African courts have hitherto also not considered this question.

Tax administration in SA is the subject of a number of publications. *Tax Administration* (2010) by Croome BJ and Olivier L discusses the subject in the pre-TAA era. Both *Tax Administration 2 ed* (2015) and *Silke on Tax Administration* (2015) (online version) by Klue S, Arendse JA and Williams RC discuss the TAA and its implications for taxpayer rights. However, neither work tests the constitutionality of any TAA provision. *Taxpayers' Rights in South Africa* (2010) by Croome BJ is an authoritative work on taxpayer rights. It, however, pre-dates the TAA. Thus, its provisions are not considered therein. This also applies to other books surveyed.¹²⁹ *LexisNexis Concise Guide to Tax Administration* (2012) by Clegg D is a 'guide' to the TAA. However, it does not critically analyse this Act. *Tax Law: An Introduction* (2013) by Croome BJ, Oguttu A and Muller E *et al* and *Silke: South African Income Tax 2016 vol 2* (2015) by Stiglingh M (ed),

¹²⁹ These include Meyerowitz D *Meyerowitz on Income Tax 2007- 2008* (2008); Williams RC *Income Tax in South Africa Law and Practice* 4 ed (2006); Kruger D, Stein M & Dachs P *et al* (2012).

Koekemoer AD and van Zyl L *et al* discuss various TAA provisions. However, neither book contains a critical reflection on the TAA, nor assesses the constitutionality of its provisions. SARS's website (www.sars.gov.za) contains an explanatory manual for the TAA. Its assessment thereof is not objective or balanced. The manual only outlines SARS's understanding thereof. As regards case law,¹³⁰ there is currently only a handful of case reports dealing with the TAA.¹³¹ This statute is still largely in its infancy. None of the cases decided thus far have considered the constitutionality of any TAA provision. A number of publications (such as, articles¹³² and dissertations)¹³³ dealing with aspects of the TAA have appeared. They do not deal with the research questions raised in this study.

1.4 LIMITATION OF SCOPE

This dissertation seeks to undertake a jurisprudential analysis of tax administration in SA by SARS through the lens of the TAA. Hence, reference to other tax statutes will be

¹³⁰ 'Case law' refers to binding legal principles developed in judicial pronouncements on the interpretation and application of the law, including statutes, common and customary law. See de Vos P, Freedman W (eds) & Brand D *et al* (2014) 781.

¹³¹ These include, inter alia, *CSARS v Miles Plant Hire (Pty) Ltd* 2014 (3) SA 143 (GP) (*Miles Plant Hire*); *GW van der Merwe and Others v CSARS and Others* (2014) 76 SATC 273 (WCC); *Chittenden NO and Another v CSARS and Another* (2014) 76 SATC 397 (GNP); *Medox Ltd v CSARS* (2014) 76 SATC 369 (GNP); *CSARS v C-J van der Merwe (In re: CSARS v GW van der Merwe and Others)* (2014) 76 SATC 138; *MTN International (Mauritius) Ltd v CSARS* 2014 (5) SA 225 (SCA); *A Company and Others v CSARS* 2014 (4) SA 549 (WCC); *Krok and Another v CSARS* 2015 (6) SA 317 (SCA) (*Krok*); *CSARS v Van der Merwe* 2016 (1) SA 599 (SCA) (*Van der Merwe*); *CSARS v eTradex (Pty) Ltd and Others* [2015] JOL 33381 (WCC) (*eTradex*); *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA).

¹³² See, for example, Moosa F 'The power to search and seize without a warrant under the Tax Administration Act' (2012) 24(3) *SA Merc LJ* 338; Moosa F 'A warrantless search of "premises" under the Tax Administration Bill' (2012) 27(2) *ITJ* 3; Keulder C & Legwaila T 'The constitutionality of third party appointments – before and after the Tax Administration Act' (2014) 77(1) *THRHR* 53. For further published articles, see the bibliography at the end of this study.

¹³³ See, for example, Bovijn S *Warranted and Warrantless Search and Seizure in South African Income Tax Law: The Development, Operation, Constitutionality and Remedies of a taxpayer* (unpublished MCom (Taxation) thesis, US, 2011); Keulder C *Does the Constitution Protect Taxpayers against the Mighty SARS? – An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (unpublished LLM thesis, University of Pretoria, 2011); van Niekerk A *Reviewing Administrative Action by SARS, the Commissioner and Other Delegated SARS Officials* (unpublished LLM thesis, University of Pretoria, 2013); Erasmus DN *An Analysis of Challenging the Commissioner's Discretionary Powers Invoked in terms of Sections 74A and 74B of the Income Tax Act 58 of 1962 in light of the Constitution of the Republic of South Africa 108 of 1996* (unpublished PhD thesis, UKZN, 2013); van Dijk EC *A Probe into the Constitutionality of Relevant Sections of the Tax Administration Act* (unpublished LLM thesis, University of Pretoria, 2014). For further unpublished dissertations, see the bibliography at the end of this study.

limited to such instances where doing so is necessary for the purposes of this study. This dissertation is, furthermore, limited to dealing with the administration of taxes expressly covered by the TAA to the exclusion of taxes not covered thereby. Therefore, this study does not cover the administration of, for example, municipal and provincial taxes.

A significant aspect of the TAA is the administrative powers it confers that *prima facie* encroach on taxpayers' fundamental rights. The constitutional review in this study focuses on the powers conferred by ss 45(1), (2), 63(1) and (4) of the TAA to the exclusion of other administrative powers. This is so because, in the public consultation process preceding Parliament passing the TAA, as dealt with in chapter five, the powers in the corresponding provisions of the TAB 11B, 2011 formed the subject of objection on constitutional grounds. Objections were also raised against other proposed provisions. Whilst some related to provisions that did not adversely affect taxpayers' rights, others suggested technical amendments to proposed provisions without raising a constitutional issue. Hence, this study excludes those other provisions from its constitutionality enquiry.

The TAA comprises 20 chapters containing a multitude of administrative powers. It is impractical for this study to investigate the constitutionality of every such power. At any rate, not every TAA power will raise a constitutional challenge. Most of them originate in tax statutes that pre-date the TAA. Whilst the overwhelming majority have never raised a constitutional issue, and are unlikely to do so in the future, the courts in SA have upheld the remainder. This explains the absence of challenges to their constitutionality during the public participation process prior to the TAA's enactment. Thus, for the purposes of this study, research thereof will be unnecessary. Hence, they are excluded from this study.

This dissertation will advocate a rights-oriented approach to tax administration. Attention will be given to taxpayer rights generally under South African constitutional, statutory and common law. However, the constitutional review in relation to the impugned TAA provisions will, by and large, be confined to the fundamental right to privacy. This is so because, first, those provisions implicate this right directly. Secondly, the right to privacy formed the basis for the public's outcry and constitutional objections referred to above.

1.5 OUTLINE OF STUDY: ROADMAP OF THE DISSERTATION

To answer the research questions requires an interpretation of the Constitution and TAA with reference, where necessary, to comparable foreign law. To this end, reference will be made to the laws in Australia, Canada and USA.¹³⁴ Chapter two of this study will discuss the cardinal principles of constitutional and statutory interpretation.¹³⁵ This is aimed at setting the scene, and laying a legal framework, for the interpretational exercises to be undertaken later in this study. Since the Constitution is a common denominator to answering each research question, chapter three will discuss its transformative aims and effect, and those constitutional values and principles that are germane for this study. In so doing, chapter three will lay a firm theoretical foundation for the discussions thereafter.

Chapter four will deal with the research question listed above in para 1.2 (i). This question relates to the TAA's constitutionality from a procedural perspective. This issue will be discussed with reference to Parliament's power to tax and pass legislation governing taxation and tax administration, the meaning of a 'money Bill' in s 77, and the meaning of 'tax' for constitutional purposes. The case will be made that the TAA is not a 'money Bill' and that the correct procedure was followed when Parliament passed the TAA so that it is a lawful statute creating justiciable rights and obligations for taxpayers.

Chapter five will discuss tax administration within the realm of the TAA. The relevance hereof is self-evident from the title of this dissertation. This chapter will discuss, inter alia, the TAA's aim, the meaning of 'administration of a tax Act', the values and principles in s 195(1) of the Constitution that apply in public administration, as well as the roles of SARS, the Tax Ombud and the office of the Tax Ombud (OTO) under the TAA.

¹³⁴ Australia is useful because its tax laws have much in common with SA. See *Richards Bay Iron & Titanium (Pty) Ltd and Another v CIR* 1996 (1) SA 311 (A); *CSARS v Foskor (Pty) Ltd* [2010] 3 All SA 594 (SCA) para 20. Canada and the USA are democracies whose jurisprudence are referred to by South African courts for general comparative purposes. For the judicial approach to foreign law generally, see *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) paras 28-33.

¹³⁵ In this dissertation, unless otherwise stated or the context indicates differently, 'constitutional' and 'statutory' interpretation means the process of construing the meaning of a provision in the Constitution and statute respectively by applying all legitimate aids and canons of interpretation.

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Chapter six will deal with the research questions formulated in paras 1.2 (ii) and (iii), namely, first, whether, for tax administration purposes, the BOR applies extraterritorially and, secondly, whether a juristic taxpayer in the form of a trust, insolvent estate and the estate of a deceased person is a 'juristic person' under s 8(4) of the BOR. Since both questions relate, in essence, to the application of the BOR, they will be discussed in the same chapter. The research questions concerned will be answered in relation to ss 7 and 8 of the Constitution respectively, and with reference to the values of equality and its achievement, transformation, freedom, the 'spirit, purport and objects of the Bill of Rights', as well as relevant legal principles and tools of interpretation. The argument will be made that, for purposes of the TAA, the fundamental rights entrenched in the BOR ought to apply to each and every 'taxpayer' as this term is defined in s 151 of the TAA, irrespective of a taxpayer's physical locality or juridical (legal) nature.

Chapter seven will discuss taxpayer rights under South African constitutional, statutory and common law. The relevance hereof is also self-evident from the title of this dissertation. It envisages research into taxpayer rights in South African law generally. Attention will be given to, inter alia, fundamental rights in the BOR that may be applied in a tax context. This is important for the constitutional review to be conducted in chapter ten. In addition, an array of taxpayer rights codified in the TAA will be extrapolated. The discussion in this chapter is important for the rights-oriented approach to tax administration advocated here.

Chapter eight will interpret and discuss the constituent elements of the general limitation clause contained in s 36(1) of the BOR. This discussion is relevant because the impugned TAA provisions will, in chapter ten, be tested through the prism of s 36(1). Chapter nine will analyse and interpret the impugned TAA provisions. Chapter ten will deal with the research question formulated above in para 1.2 (iv), namely, whether the impugned TAA provisions are constitutional. Their validity will be tested with reference to s 36(1) upon an application of the principles of interpretation discussed in chapter two and by utilising relevant constitutional values and principles discussed in chapter three. Finally, chapter eleven will contain a synthesis of the findings in this study and related recommendations.

CHAPTER TWO

CONSTITUTIONAL AND STATUTORY INTERPRETATION

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CHAPTER TWO: CONSTITUTIONAL AND STATUTORY INTERPRETATION

“When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean - neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be the master – that’s all.” (Lewis Carroll)¹

2.1 INTRODUCTION

As stated above in chapter one, the constitutionality of the impugned TAA provisions will be examined below in chapter ten. In that review, a fair balance² must be struck between the need for fiscal efficiency, on the one hand, and the protection of taxpayers’ fundamental rights, on the other. The discussion below in chapter six concerning the natural and juristic taxpayers’ entitlement to fundamental rights provides an important backdrop to the constitutional review conducted below in chapter ten. For that purpose, chapter nine will entail an interpretation of the impugned TAA provisions. To this end, it is incumbent that the limitation clause in s 36(1) of the BOR be analysed through interpretation. This analysis will take place below in chapter eight. Accordingly, chapters six, eight, nine and ten below will engage in an interpretation of the BOR and the TAA (as the case may be). Consequently, the provisions of ss 39(1) and (2) of the BOR are important for this dissertation.³ Whereas the former deals with BOR interpretation, the latter pertains to statutory interpretation. A detailed discussion of s 39, and of the principles regulating interpretation as formulated in case law, is, thus, undertaken in the present chapter. This discussion aims to lay a firm basis for the interpretative exercises undertaken in later chapters of this dissertation and is a necessity to fulfil the objectives of this study as outlined above in chapter one. For the purposes of this dissertation, it is unnecessary to engage in the debate among academics regarding the legal theories of interpretation. For this reason, a detailed discussion thereof is not pursued here.⁴

¹ Carroll L (Charles L Dodgson) *Through the Looking-Glass* (1934) 205.

² ‘[A] wholesome balance’ must be struck between the rights of persons and State interests. See *Goqwana v Minister of Safety NO and Others* [2016] 1 All SA 629 (SCA) para 14 (*Goqwana*).

³ Currie I & de Waal J (2014) 134-5 state that the instructions in s 39 ‘are themselves sufficiently abstract as to require a great deal of interpretation’.

⁴ For a discussion of the theories of interpretation, see de Ville JR *Constitutional & Statutory Interpretation* (2000) 1-69; du Plessis L *Re-interpretation of Statutes* Reprinted (2007) 89-120.

2.2 CONSTITUTIONAL FRAMEWORK FOR INTERPRETATION

2.2.1 A transformative approach to interpretation

Within the framework of SA's 1961⁵ and 1983⁶ constitutions, Parliament was the sovereign legislative body. In that legal system, judicial review of administrative action was subject to severe restrictions. A dominantly 'executive-minded' judiciary functioned as interpreters and enforcers of Parliament's will.⁷ This was exemplified in the rule *iudicis est ius dicere sed non dare* ('it is the function of a judge to interpret the law and not to make it'). During that era, courts applied a strict, literal approach (or 'golden' rule) to interpretation.⁸ Its cardinal aim was ascertaining Parliament's intention with reference to the language used in an enactment and, once determined, to give effect thereto by stamping a particular meaning with the legislature's *imprimatur* by way of the fiction of parliamentary intent.⁹ When construing a statute, emphasis was placed on the plain meaning of words used to express the legislature's intention, unless a court was satisfied that such meaning would lead to an unintended anomaly, absurdity, inconsistency or hardship.¹⁰ This mode of interpretation paid little, if any, attention to fairness and equity. Hence, grave injustice was perpetrated by the enforcement of laws that permitted, inter alia, racial segregation, insensitive evictions, discriminatory land expropriations without payment of compensation, the denial of the right to vote, the creation of Bantustans for certain Black persons, and, generally, the unequal and unfair treatment of Black people. Regrettably, this 'old' orthodox methodology was applied in certain post-1994 cases.¹¹ This reflected an untransformed judicial mindset steeped in a common law tradition of interpretation.

⁵ Republic of South Africa Constitution Act 32 of 1961.

⁶ Republic of South Africa Constitution Act 110 of 1983.

⁷ Du Plessis L (2007) xi. See also Haysom N & Plasket C 'The war against law: Judicial activism and the Appellate Division' (1988) 4(3) *SAJHR* 303.

⁸ De Ville JR (2000) 94-7; du Plessis L (2007) 103-05.

⁹ *Treatment Action Campaign and Another v Rath and Others* [2008] 4 All SA 360 (C) paras 36-40. Sher AJ, in *Ahmed and Others v Minister of Home Affairs and Another* [2016] JOL 36695 (WCC) para 15, refers to this as a 'geneflective approach' to interpretation.

¹⁰ *Bhyat v Commissioner of Immigration* 1932 AD 125 129.

¹¹ See, for example, *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T) 269C-G; *S v F* 1999 (1) SACR 571 (C); *CSARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273.

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In post-apartheid SA, Parliament remains SA's highest legislative authority. However, constitutional supremacy displaced parliamentary sovereignty. Parliament is, thus, subject to a supreme Constitution.¹² Its will is subservient to, and qualified by, the Constitution. Parliamentary intent is no longer the litmus test for interpretation. The Constitution brought about a crucial paradigm shift that changed the context of all legal thought and decision-making in SA.¹³ The Constitution enjoins interpreters to break away from a strictly legalistic approach to constitutional and statutory interpretation and cross the Rubicon to a normative, value-based approach. Froneman J, in *Qozeleni v Minister of Law and Order and Another*,¹⁴ pointed out that, to establish a culture of constitutionality consistent with the vision of the Constitution, judicial officers must embrace the new constitutional order on both an emotional and an intellectual level. Doing so will bring about transformative constitutionalism, described by Klare¹⁵ as including constitutional interpretation committed to transforming SA's social, political and legal institutions and power relationships 'in a democratic, participatory and egalitarian direction'. To this end, interpretation within the discipline of the Constitution is not confined to intra-textual considerations (such as, text, purpose clause, pre- and postamble, long and short title, and definitions clause). It also takes account of extra-textual interpretive tools outside the four corners of an instrument (such as, fairness, unwritten fundamental values that underlie the rights in the BOR, public policy, social values and their implications, historical and existential contexts, explanatory memoranda, and such other legally relevant circumstances that will aid in arriving at an 'equitably principled judgment').¹⁶ Thus, du Plessis¹⁷ argues, convincingly, that the 're-interpretation of statutes ... means coming to terms with the Constitution's all-pervading effect on reading, understanding and applying statutes and on the law relating to statutory interpretation – as it used to stand'.

¹² *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 25. In accordance with the dictates of the principle in, and constitutional value of, separation of powers, a high degree of judicial deference is shown to policy-laden matters. See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) paras 87 93 95-111.

¹³ *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 486.

¹⁴ 1994 (3) SA 625 (E) 635 637.

¹⁵ Klare KE 'Legal culture and transformative constitutionalism' (1998) 14(1) *SAJHR* 146 150.

¹⁶ Per Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue of Land and Shelter* 2000 (2) SA 1074 (SE) 1081G. Du Plessis L (2007) 269, citing certain judicial *dicta*, argues that explanatory memoranda may be relied upon to determine the purpose of a statutory provision.

¹⁷ Du Plessis L (2007) viii.

2.2.2 Interpretation under s 39 of the Bill of Rights

In a wide sense, interpretation is an objective process of giving meaning to words in any document or instrument.¹⁸ Interpretation is a matter of law, not fact.¹⁹ It is not an exact science or mechanical process in which a meaning for words is determined with clinical or mathematical precision 'of join-the-dots or paint-by-numbers'.²⁰ Rather, interpretation is a craft in which a practical meaning is ascribed to a text through juridical logic and integrated, sound reasoning by applying the aids, maxims and canons of interpretation crystallised in case law.²¹ As explained below at para 2.2.3.3, there ought to be little difference in the overall approach to BOR and statutory interpretation.²² Section 39 of the BOR altered the process of interpretation. It is an interpretive force that ushered in a new methodology for interpretation in which the constitutional values listed below in chapter three play a prominent role. Section 39 provides direction to the interpretation of the BOR and legislation under a supreme Constitution. The relevant extract of s 39 reads:

'(1) When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. ...'

¹⁸ *Mistry v Interim Medical and Dental Council of SA and Others* 1998 (4) SA 1127 (CC) para 3 (*Mistry*); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (*NJMPPF*). For a useful summary statement of the primary principles of interpretation, see *Corpelo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA) para 20.

¹⁹ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.
²⁰ Botha CJ *Statutory Interpretation: An Introduction for Students* Reprinted 4 ed (2010) 1.

²¹ For a discussion of the principles of interpretation, see *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) paras 43-6; *DPP, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) paras 81-3 (and the authorities cited there at footnote 80); *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) paras 14-15; *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) paras 28-32. See also Davis D, Chaskalson M & de Waal J 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 1-130.

²² *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA). For a useful collation and summary of the jurisprudential development in the law relating to the interpretation of documents generally, see *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16-20.

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Section 39 does not prescribe the way in which the Constitution is, generally, to be interpreted.²³ This section applies to statutory and BOR interpretation engaged in by ‘a court, tribunal or forum’ in SA.²⁴ The word ‘every’, in s 39(2) quoted above, casts an extremely wide net for the relevant ‘court, tribunal or forum’. This is consistent with the reference to ‘a court, tribunal or forum’ appearing in s 39(1) quoted above. In this context, ‘a’ has the effect of meaning ‘any’. Thus, the wording of ss 39(1) and (2) is sufficiently broad or flexible to encompass the Tax Court, Tax Board and other tribunals or forums where justiciable tax disputes are adjudicated in terms of the law. In relation to the TAA, these include inquiry proceedings (s 52), dispute resolution proceedings (s 103(2)), and a ‘forum’ where an attorney acting under s 64(5) makes a ‘determination’ of whether legal professional privilege is attached to an item seized by SARS during a search of premises.

Sections 39(1)(a) and (2) are couched in mandatory terms. They use the word ‘must’ in the sense of a command, namely, ‘must promote ...’. Their peremptory text and tone have the effect that a meaning given to a BOR and statutory provision must be sensitive to the Constitution and its expressly stated or implied underlying (constitutional) values. An interpretation is sustainable if it promotes the spirit, purport and objects of the BOR, namely, to establish a society based on democratic values, social justice and fundamental human rights (as discussed below in chapter three). The society referred to in s 39(1)(a) is not the present South African society, but rather an abstract or ideal (Utopian) one.²⁵ A democratic society is ‘a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all’.²⁶ The ‘notion of an open and democratic society is ... not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct’.²⁷

²³ Currie I & de Waal J (2014) 134.

²⁴ The Constitution does not define ‘tribunal or forum’. For its s 39 ambit, see *Mkhize v Commission for Conciliation, Mediation and Arbitration and Another* 2001 (1) SA 338 (LC) para 18.

²⁵ Currie I & de Waal J (2014) 146.

²⁶ *Speiser v Randall* (1958) 357 US 513 537.

²⁷ *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para 46.

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When interpreting the BOR, s 39(1)(b) imposes a mandatory obligation, namely, ‘must consider international law’.²⁸ The duty to ‘consider’ does not impose a duty to ‘apply’ international law. When interpreting statutes, s 39(2) applies in tandem with s 233. The latter reads: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’²⁹ The tone and imperative language of s 39(2) (‘must promote’) and s 233 (‘must prefer’) indicate that their commands are ‘categorical imperative[s]’³⁰ involving ‘mandatory constitutional canon[s] of statutory interpretation’.³¹ They do not distinguish between different types of legislation. ‘Any’ in ‘any legislation’ is an indefinite term that, in this context, is not used in a limited sense. ‘Any’ casts the net of ‘legislation’ very widely.³² The TAA and all other tax related statutes are encompassed thereby. Thus, for the purposes of ss 39(1) and (2), interpreters are enjoined to consider public international law and, as far as is possible, to harmonise every interpretation with international human rights law. Compliance with the directives in s 39 and s 233 is secured by the duties arising from s 2 and s 237.³³

²⁸ De Vos P ‘Pious wishes or directly enforceable human rights? Social and economic rights in South Africa’s 1996 Constitution’ (1997) 13(1) *SAJHR* 67 77 opines that ‘international law’ in s 39(1)(b) includes those sources recognised in Art 38(1) of the Statute of the International Court of Justice. Section 39(1)(b) covers non-binding international law norms and principles. See *Makwanyane* paras 36-7. Also, see Dugard J ‘International law and the “final” Constitution’ (1995) 11(2) *SAJHR* 241; Keightley R ‘Public international law and the final Constitution’ (1996) 12(3) *SAJHR* 405. Hall WE *A Treatise on International Law* 8 ed (1924) 1 defines ‘international law’ as consisting of ‘certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement’.

²⁹ Section 233 is a confirmation of the principle that statutes must, as far as possible, be interpreted constitutionally. See Botha CJ (2010) 55. For a discussion of s 233, see *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 98 (*Glenister*).

³⁰ Per van Heerden J in *Sayers v Khan* 2002 (5) SA 688 (C) 693G. For the distinction between directory and peremptory provisions, see the authorities cited below at footnote (fn) 71 in chapter nine below.

³¹ *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) para 43; *Phumela Gaming and Leisure Ltd v Grundlingh and Others* 2007 (6) SA 350 (CC) paras 26-7.

³² *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 371. See also *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) 18-19; *CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) 618; *Commissioner for Customs and Excise v Capital Meats CC (in liquidation) and Another* (1999) 61 SATC 1 (SCA) 5; *Body Corporate of Greenacres v Greenacres Unit 17 CC and Another* 2008 (3) SA 167 (SCA) para 5; *ARMSA v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC) paras 33-5 (*ARMSA*).

³³ Section 2 reads: ‘The Constitution is the supreme law ... and the obligations imposed by it must be fulfilled.’ Section 237 reads: ‘All constitutional obligations must be performed diligently’

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Unlike s 39(1)(b), s 39(1)(c) grants an interpreter a discretion ('may consider') whether to have regard to foreign law when interpreting the BOR.³⁴ Although s 39(2) does not refer to foreign law, nothing precludes an interpreter of statutes from having regard to comparable foreign law sources. This is referred to as comparative interpretation. It is appropriate for statutes which stem from foreign law or which have provisions worded similarly to those found in a foreign statute.³⁵ For BOR interpretation, comparative sources, labelled 'transnational contextualization',³⁶ generate new ways of understanding fundamental rights and their scope. This cross-pollination of human rights jurisprudence bolsters the opportunity for transformative interpretation. Comparative research from mature democracies based on human dignity, equality and freedom is invaluable to SA's relatively young democracy whose indigenous constitutional jurisprudence is developing incrementally. The usefulness of comparative sources is, however, subject to limitation. They must at all times be approached with due caution.³⁷ Foreign precedent cannot, without more, be transplanted wholesale onto SA's domestic scene. Whilst interpreters should 'think global', they ought to 'act local'.³⁸ Thus, allowance ought to be made for a local context, the language and subject matter of the provisions being construed, and any other relevant consideration relating to local conditions that may affect the application of a right or operationalisation of a statutory provision in SA (as opposed to a foreign State).

Constitutional rights and values 'give shape and colour to all law'.³⁹ Thus, the Constitution is an external aid in statutory interpretation promoting fairness and equity.⁴⁰ Section 39(2) makes it imperative that an interpreter tilts the balance in favour of a result that promotes the spirit, purport and objects of the BOR. Implicit in this command are

³⁴ For an exposition of the general approach to foreign law sources, see *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) paras 28-33.

³⁵ For an application of this rule in a tax context, see *Richards Bay Iron & Titanium (Pty) Ltd and Another v CIR* 1996 (1) SA 311 (A); *CSARS v Foskor (Pty) Ltd* [2010] 3 All SA 594 (SCA).

³⁶ Venter F 'Why should the South African Constitutional Court consider German sources? Comment on Du Plessis and Rautenbach' (2013) 14(8) *German LJ* 1579 1586.

³⁷ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) paras 20-4.

³⁸ Udombana NJ 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5(1) *African Human Rights LJ* 47 58. See also Liebenberg S (2010) 102; Ackermann LWH 'Constitutional comparativism in South Africa' (2006) 123(3) *SALJ* 497.

³⁹ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para 51 (*My Vote Counts*).

⁴⁰ Goldswain GK (2012) 58.

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two propositions. First, an interpretation must, where possible, advance at least one identifiable value of the BOR. Secondly, a statute's text must be reasonably capable of sustaining the interpretation concerned.⁴¹ If a provision is able to sustain different plausible meanings, the preferred interpretation is that which 'better' or best promotes the spirit, purport and objects of the BOR because such a methodology 'is a more effective [means of] "interpretation through the prism of the Bill of Rights"'.⁴² The contours of the phrase 'the spirit, purport and objects of the Bill of Rights' in s 39(2), is undefined. An understanding of its import is necessary. However, to do so requires an analysis thereof within its proper context in the environment of the Constitution viewed as a whole.

Although the BOR borrows from foreign constitutions, it has a distinctly South African flavour.⁴³ It identifies various independently delineated rights deserving of constitutional protection, 'reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse'.⁴⁴ As a charter, the BOR is inseparable from, and inextricably linked to, the rest of the Constitution. It is a product of the same chequered history discussed above in chapter one. That history shaped the character and transformative mission of the BOR and the rights entrenched in it.⁴⁵ Thus, the BOR cannot be read in isolation. Rather, its content must be viewed as integrated within its existential context in the Constitution read holistically. The phrase 'spirit, purport and objects of the Bill of Rights' is broad in ambit and encompasses, inter alia, the normative standards, values, ethos and principles underlying the Constitution, and 'the enactment's sense, tenor and ostensible meaning'.⁴⁶ The BOR's 'spirit' is freedom, equality, justice, democracy, human rights and democratic values. This is evident from s 7(1) proclaiming the BOR to be 'a cornerstone of democracy' that 'enshrines the rights of all people in our

⁴¹ *Bato Star Fishing* para 72.

⁴² *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46-84.

⁴³ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 59 (*Law Society*). See also Sarkin J 'The effect of constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' (1998) 1(2) *University of Pennsylvania Journal of Constitutional Law* 176.

⁴⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 150.

⁴⁵ Davis DM 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1(2) *International Journal of Constitutional Law* 181-185-89.

⁴⁶ *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 491.

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country and affirms the democratic values of human dignity, equality and freedom'. The BOR's 'purport' is its declaration that it 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state' (s 8(1)), and 'binds a natural or a juristic person if, and to the extent that, it is applicable' (s 8(2)). The BOR's 'objects' are to be found in the rights it guarantees and the values underlying the rights.⁴⁷ Those rights do not operate as independent normative regimes isolated from each other. Their disparate textual protections are unified by the values immanent in them all. Thus, the relationship between such rights and values is described as 'osmotic rather than hermetic'.⁴⁸

The BOR and the rest of the Constitution share a common heritage. Their shared historical origins resulted in them having common aims. As shown below in chapter three, the Constitution's aims are reflected by inter alia: (i) the Preamble's expression of mutual interests and common aspirations or convictions (such as, building a united and democratic SA, healing the divisions of the past, and establishing a society based on democratic values, social justice and fundamental human rights); (ii) the re-definition of a common, objective, normative value system (s 1); (iii) the displacement of parliamentary sovereignty by constitutional supremacy (s 2); (iv) the recognition of a common South African citizenship (s 3(1)); (v) the establishment of a human rights culture and the advancement of the human rights enshrined in a BOR which imposes obligations on the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (s 7(2)); (vi) the creation of an independent judiciary (s 165(2)) with a diverse make-up (ss 174(1), (2)); (vii) the subjection of government (s 41) and public administration (s 195(1)) to a set of democratic values and principles; and (viii) the establishment of a culture of democracy (s 234). These aims inform and give shape and substance to the BOR, and advance SA's 'democratic hygiene'.⁴⁹ In this dissertation, when interpreting the TAA in the light of the BOR's 'objects' under s 39(2), the aforementioned objectives will be taken into account to the extent that any of them are legally relevant. A meaning will be chosen which best promotes any such constitutional goal or aim. This is part of purposive interpretation.

⁴⁷ *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others* 2015 (6) SA 440 (CC) paras 34-5 (*Link Africa*).

⁴⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 151.

⁴⁹ *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC) para 43.

2.2.3 Guiding principles of constitutional and statutory interpretation

2.2.3.1 Constitutional values and their role in teleological interpretation

The Constitution embraces a set of higher, fundamental legal values of an open and democratic society based on human dignity, equality and freedom. Some values are expressly stated in the Constitution; others are implied therein. An original method of constitutional interpretation must apply: it will uncover ‘the values immanent in the Constitution’.⁵⁰ Such values apply in all areas of law. They act ‘as a guiding principle and stimulus’⁵¹ for the three branches of government. Constitutional values are not Holy (or sacred) cows. They are norms formulated and expressed in general terms.⁵² They have equal rank and status. The Constitution, read as a whole, envisages a value-based process of interpretation. This is referred to as teleological interpretation. It promotes the development of a normative constitutional jurisprudence.⁵³ The values form part of the Constitution’s ‘spirit’. They orientate interpreters to understand the purpose of a provision or a common law norm in a manner that underscores respect for, and promotes, protects or fulfils the Constitution’s transformational aims and/or the rights in the BOR.

⁵⁰ Erasmus G ‘Limitation and Suspension’ in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 630.

⁵¹ *Thint (Pty) Ltd v NDPP and Others; Zuma and Another v NDPP and Others* 2009 (1) SA 1 (CC) para 375 (*Thint*). See also *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para 54 (*Carmichele*). Moseneke D ‘The fourth Bram Fischer memorial lecture: Transformative adjudication’ (2002) 18(3) *SAJHR* 309 316 states that resorting to constitutional values in constitutional interpretation provides the most effective response to the ‘countermajoritarian dilemma’. For a discussion of this dilemma, see Devenish GE *A Commentary on the South African Bill of Rights* (1999) 4-5; Venter F ‘The politics of constitutional adjudication’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 129 144-45.

⁵² In *Matiso and Others v Commanding Officer, Port Elizabeth Prison and Another* 1994 (4) SA 592 (SE) 597I-J Froneman J held: ‘In terms of the Constitution the Courts bear the responsibility of giving specific content to those [constitutional] values and principles in any given situation.’ See also *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para 46.

⁵³ For a discussion of valued-based or ‘value-activating’ interpretation according to a ‘scheme of values’ (du Plessis L (2007) 119), see Kroeze IJ ‘Doing things with values: The role of constitutional values in constitutional interpretation’ (2001) 12(2) *Stell LR* 265; Venter F ‘Utilizing constitutional values in constitutional comparison’ (2001) 4(1) *PELJ* 20; Devenish GE ‘*Department of Land Affairs v Goedgelegen Tropical Fruits* – a triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of ubuntu’ (2008) 125(2) *SALJ* 231; Singh A ‘An illustration of teleological interpretation *par excellence* – *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*’ (2009) 72(2) *THRHR* 336.

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Teleological interpretation promotes the fullest protection of constitutional guarantees.⁵⁴ However, a value-laden approach is not a licence to ignore the language used by a lawgiver in favour of a 'generalised resort to constitutional values'.⁵⁵ The result of textual disrespect 'is not interpretation but divination'.⁵⁶ Subject to the use of reading-in, reading down or severance techniques,⁵⁷ courts may not trespass the separation of powers divide existing between the judiciary and the legislator in order to 'fill the gap'⁵⁸ in an instrument by way of 'amendment, enactment or innovation'.⁵⁹ If two competing values lead to two mutually destructive interpretations, one leading to constitutional validity and the other to constitutional incongruity, then the scales will be tipped in favour of validity. This is known as 'reading in conformity'.⁶⁰ Effect will then be given to the meaning that, having regard to 'all legitimate interpretive aids',⁶¹ reasonably conforms to the applicable constitutional values.⁶² The interpretation selected in any instance must be plausible and constitutionally compliant.⁶³ Thus, it must not be 'unduly strained'⁶⁴ or 'far fetched'.⁶⁵

⁵⁴ *Soobramoney* para 17; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53. The enquiry into constitutional values is 'deeply imbricated in the judicial process' (per Davis J in *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust and Others* 2012 (3) SA 184 (WCC) 190I).

⁵⁵ *Brendenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) para 39.

⁵⁶ *S v Zuma and Others* 1995 (2) SA 642 (CC) para 18 (*Zuma*). See de Ville JR (2000) 33-6.

⁵⁷ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 788 define 'reading down' as the 'principle of legal interpretation which requires that ordinary legislation is interpreted in line with the spirit, purport and object of the Bill of Rights if the words are reasonably capable of such an interpretation or are not unduly strained'. 'Reading down' is distinguishable from 'reading in conformity'. For an explanation of 'reading-in' and 'severance', see fn 125 in chapter eight below.

⁵⁸ *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) para 52.

⁵⁹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 100. See also *My Vote Counts* paras 150-51; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) paras 25-6. Also, see O' Regan K 'Checks and balances – reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8(1) *PELJ* 120; Langa P 'Symposium: "A delicate balance": The place of the judiciary in a constitutional democracy: The separation of powers in the South African Constitution' (2006) 22(1) *SAJHR* 2; Venter F 'Judges, politics and separation of powers' (2007) 21(1) *SJ* 60; Mojapelo PM 'The doctrine of separation of powers (a South African perspective)' (2013) 26(1) *Advocate* 37.

⁶⁰ Du Plessis L (2007) 140-43. De Vos P, Freedman W (eds) & Brand D *et al* (2014) 788 define 'reading in conformity' as the 'principle of legal interpretation requiring that the courts must prefer interpretations that fall within the boundaries of the Bill of Rights over those that do not, provided that such an interpretation can be reasonably ascribed to the provision'.

⁶¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 24.

⁶² *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11.

⁶³ Currie I & de Waal J (2014) 59. See also *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28 (*Cool Ideas*).

2.2.3.2 Textual, contextual, generous, intentionalist and purposive interpretation

(a) Textual interpretation

Section 39 of the BOR does not identify authorial intention as relevant to interpretation. Thus, interpreting the Constitution does not entail giving effect to its framers' intention.⁶⁶ Historically, statutory interpretation involved giving effect to the fiction of parliamentary intent. However, a new approach to interpretation has emerged that 'is unrelated to whatever intention those responsible for the words may have had [in their minds] at the time they selected them'.⁶⁷ Thus, the expression 'intention of the legislature' is no longer apt, except as shorthand when referring to the legislature's purpose or the mischief it aims to address. Effect must not be given to a meaning of a text that would lead, for example, to an absurdity or to a result that would stultify the operation of the instrument being construed.⁶⁸ An interpretation must be reconcilable with the Constitution, its spirit, purport and objects.⁶⁹ Interpretation does not involve a distortion of language but rather giving words their plain, ordinary, natural, dictionary meaning.⁷⁰ This is the meaning that they bear in common parlance or in ordinary colloquial speech.⁷¹ This is referred to as grammatical (or textual) interpretation. This method applies to all forms of interpretation.

⁶⁴ *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* 2001 (1) SA 545 (CC) para 24 (*Hyundai Motors*).

⁶⁵ *Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* 2010 (2) SA 181 (CC) para 23 (*Bertie van Zyl*).

⁶⁶ *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 27. Also see Michelman FI 'Constitutional authorship, "Solomonic solution", and the unoriginalist mode of constitutional interpretation' 1998 *Acta Juridica* 208 219. Moseneke D (2002) 316 states that 'austere legalism' and the 'intention of the drafter' are ill-suited to constitutional interpretation. Also, de Ville JR (2000) 36 contends that a resort to authorial intention as a basis for constitutional interpretation is an evasion of responsibility for judicial decision-making and must be avoided. However, for a contrary approach, see Botha CJ (2010) 120.

⁶⁷ *NJMPF* para 23. For the changed role of intention in the process of interpretation, see du Plessis L (2007) 143-47.

⁶⁸ *Zuma* paras 13-14; *Cool Ideas* para 28.

⁶⁹ *Standard Bank Investment Corporation v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) paras 16-22; *S v FM* [2012] 4 All SA 351 (GNP) para 19.

⁷⁰ *Bato Star Fishing* paras 88-92.

⁷¹ *Association of Amusement & Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (A) 660.

(b) Contextual interpretation

Interpretation does not entail excessive peering at the text ‘without sufficient attention to the contextual scene’.⁷² This is referred to as contextual (or systematic) interpretation. The Constitution effected a seismic shift from strictly textual to contextual interpretation. ‘In law, context is everything.’⁷³ Contextualist interpretation ascribes meaning to words according to, inter alia, SA’s legal traditions and the linguistic usages thereof.⁷⁴ This ‘does not imply a return to literalism and the orthodox “plain meaning rule” but merely accepts the authoritative constitutional [or statutory] text as a very important piece in the jigsaw puzzle of constitutional [or statutory] interpretation’.⁷⁵ Grammar and dictionary meanings are ‘merely principal (initial) tools rather than determinative tyrants’.⁷⁶ A word must ‘take its colour, like a chameleon, from its setting and surrounds’,⁷⁷ even though its meaning may be clear and unambiguous.⁷⁸ Contextualist interpretation ‘is not limited to the language of the rest of the statute [or Constitution] “as throwing light of a dictionary kind on the part to be interpreted” and “often of more importance is the matter of the statute [or Constitution], its apparent scope and purpose and within limits, its background”’.⁷⁹ Context includes considering inter alia (i) the actual words used and the interplay between the text being construed and other provisions in the enactment ‘which may reveal the purpose of the interpreted section’⁸⁰ (such as, the preamble and long title), (ii) ‘the consequences in relation to justice and convenience of adopting one view rather than another’,⁸¹ and (iii) extraneous *indicia*⁸² (such as, ‘evolving standards’ and the

⁷² Per Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) 664H. See also *Bato Star Fishing* para 90; *Olitzki* para 12; *Thoroughbred Breeders’ Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 12.

⁷³ *Aktiebolaget Hassle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 1.

⁷⁴ *Zuma* paras 14-15.

⁷⁵ Botha CJ (2010) 122.

⁷⁶ *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 17.

⁷⁷ *Standard General Ins v Commissioner for Customs and Excise* 2005 (2) SA 166 (SCA) para 25.

⁷⁸ *Link Africa* para 33; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

⁷⁹ *Ahmed and Others v Minister of Home Affairs and Another* [2016] JOL 36695 (WCC) para 15.

⁸⁰ *Link Africa* para 33.

⁸¹ *Leibbrandt v South African Railways* 1941 AD 9 12-13. See also *Kuhne & Nagel (Pty) Ltd v Elias and Another* 1979 (1) SA 131 (T) 133E-F.

⁸² However, contrast the approach adopted in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) 632G-H.

normative framework of the Constitution,⁸³ the aims of an open and democratic society, the relevant social, economic, historical and institutional factors, the factual matrix, the mischief aimed at,⁸⁴ the existing state of the law, and explanatory memoranda).⁸⁵

(c) Purposive interpretation

Purposive interpretation refers to an interpretive process that gives effect to a meaning that best advances the fulfilment of the broader aims of a legal instrument.⁸⁶ Such an approach is conditional on, first, the provision being reasonably capable of sustaining the meaning assigned to it⁸⁷ and, secondly, the meaning must promote an identifiable constitutional value. An instrument's purpose is reflected in its language read with its underlying policy or object, and its overall scheme and scope. Purpose is distinguishable from the mischief that a statute or a provision therein aims to overcome.⁸⁸ The CC⁸⁹ has reaffirmed that the meaning of a constitutional right or freedom must be determined by

⁸³ *Prinsloo* para 18. Sachs J, in *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 19, held: 'Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated by s 1 of the Constitution and the Bill of Rights.' See also *Grootboom* para 22. Justice Wendell Holmes, in *Gompers v United States* (1914) 233 US 604 610, held: 'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions ... Their significance is a vital, not formal one; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.'

⁸⁴ *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 39.

⁸⁵ *XO Africa Safaris v CSARS* (unreported case no. 395/15) [2016] ZASCA 160 (3 October 2016) para 20. See also du Plessis L (2007) 269. For a discussion of the various contextual considerations, see *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) paras 40-2; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 22; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20; *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC) para 30; *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) paras 22-3. Also, see Lenta P 'Looking sideways: Constitutional interpretation, ethics and theory' (2002) 13(1) *Stell LR* 3; Davis DM & Klare K 'Transformative constitutionalism and the common and customary law' (2010) 26(3) *SAJHR* 403 494-96.

⁸⁶ *Hyundai Motors* paras 21-6. See also *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 17-20. For a useful summary of the factors to be considered when ascertaining legislative purpose, see *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC) 422. In *NJMPF* paras 23-4 and *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) 943A-F the Court distinguished a legislature's intention from the purpose of legislation. However, Botha CJ (2010) 67 characterises the distinction drawn between 'intention' and 'purpose' as 'artificial'.

⁸⁷ *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20.

⁸⁸ *NJMPF* paras 21-2.

⁸⁹ *Makwanyane* para 9. See also *Soobramoney* paras 16-17; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 para 116.

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analysing its purpose, namely, the interest that it is meant to protect. To this end, relevant considerations include: (i) the values embodied in the right or freedom concerned, (ii) the character and larger objects of the BOR, (iii) the language used to articulate the specific right or freedom in question, (iv) the historical origin of the particular right or freedom, and (v) where applicable, the meaning and purpose of other rights with which the right in question is associated within the BOR's text as a whole.⁹⁰

Purposive interpretation avoids the 'austerity of tabulated legalism'⁹¹ that is a hallmark of the traditional interpretive methodology engrained in the 'golden' rule of interpretation explained above. A purposive construction is broader in scope than the orthodox 'golden' rule. Purposive interpretation is irreconcilable with strict literalism that is a characteristic, and indeed a weakness of, the pre-constitutional era interpretive methodology. Strict adherence to the *ipsissima verba* carries the potential for doing violence to the objects of the Constitution.⁹² The 'process of interpretation does not stop at a perceived literal meaning of ... words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being'.⁹³ Words are meaningless if read in the abstract or in isolation, or divorced from their context.⁹⁴ The CC, in *Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others*,⁹⁵ held that purpose 'plays an important role in establishing a context that clarifies the scope and intended effect of a law'. The CC cautioned, however, that 'a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute'.⁹⁶

⁹⁰ Davis J, in *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust and Others* 2012 (3) SA 184 (WCC) 190J-191A warns, correctly, that 'invoking the Constitution should not be seen or employed as a bland jurisprudential war cry'.

⁹¹ *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) para 27.

⁹² *S v Mhlungu and Others* 1995 (3) SA 867 (CC) paras 2-24 (*Mhlungu*).

⁹³ Per Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

⁹⁴ Wallis JA, in *NJMPF* para 25, held: 'Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise.' See also *Novartis v Maphil* 2016 (1) SA 518 (SCA) para 28.

⁹⁵ 2010 (2) SA 181 (CC) para 21. For a discussion of the TAA's purpose, see chapter five below.

⁹⁶ At para 22. When interpreting words, a balance must be struck between the language and context of a text. See *Bertie van Zyl* para 46. Any meaning given thereto should advance or be reconcilable with the instrument's broader purpose or aim. See van der Westhuizen Y 'Abusing the Income Tax Act by misusing the letter of the Act' (2008) 71(4) *THRHR* 613 616-19.

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If a statutory provision limits a fundamental right, then effect ought to be given to a meaning that is least restrictive of the right.⁹⁷ Interpretation ought, as far as is reasonably possible, to secure the fullest protection or benefit of the rights in the BOR. This requires ‘a generous construction [of a provision] over a merely textual or legalistic one’.⁹⁸ Such a construction envisages a high degree of ‘flexibility’ and ‘generosity’.⁹⁹ Consequently, interpreters ought, generally speaking, to construe the law-text expansively, that is, in the widest possible way by having regard to, inter alia, the spirit, ethos and tenor of the Constitution: they must transcend the entire process of interpretation.¹⁰⁰ However, a text may not sustain a meaning that gives the widest effect to a fundamental right where its context indicates that ‘in order to give effect to the purpose of a particular provision “a narrower or specific meaning” should be given to it [that is, the right]’.¹⁰¹ In such instances, the more limited meaning avoids an ‘overshoot’¹⁰² of the right’s purpose.

The Constitution contains an objective, normative legal framework.¹⁰³ Its provisions are to be interpreted broadly, liberally and purposively so that the Constitution can ‘play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation’.¹⁰⁴ Accordingly, fundamental rights ‘conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law’.¹⁰⁵ This is part of a ‘generous’ and ‘full benefit’ interpretive approach.¹⁰⁶ However, in contradistinction to such an approach, purposive interpretation is ‘predicated upon the purpose of a right, with the result being that the widest possible interpretation will not inevitably be the one which will be supported’.¹⁰⁷

⁹⁷ *SATAWU and Others v Moloto NO and Another* 2012 (6) SA 249 (CC) para 43.

⁹⁸ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

⁹⁹ Botha CJ (2010) 120.

¹⁰⁰ *S v Acheson* 1991 (2) SA 805 (Nm) 813C.

¹⁰¹ *Soobramoney* para 17.

¹⁰² *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS) para 37. See also *Bertie van Zyl* para 44.

¹⁰³ *Carmichele* paras 54-5 58; *Thebus and Another v S* 2003 (6) SA 505 (CC) paras 27-8.

¹⁰⁴ *Mhlungu* para 8.

¹⁰⁵ *Zuma* para 15 and the authority cited above in the present chapter at fn 98.

¹⁰⁶ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 58 (*Ferreira*).

¹⁰⁷ Basson DA *South Africa’s Interim Constitution: Text and Notes* (1994) 56.

2.2.3.3 Bill of Rights and statutory interpretation: Are there material differences?

The foregoing discussion shows that constitutional and statutory interpretation is not ‘a process that occurs in stages but is “essentially one unitary exercise”’.¹⁰⁸ There is considerable overlapping or commonality in the modalities of constitutional and statutory interpretation. Undeniably, the Constitution lies at its epicentre. It is the starting point of that process and the promotion of the Constitution’s spirit, purport and objects, as influenced by the BOR, is the end-point thereof. Ultimately, interpreters must construe constitutional and statutory provisions ‘fairly and broadly, without being too astute or subtle in finding defects’.¹⁰⁹ As discussed above, ss 39(1) and (2) impose obligations on courts, tribunals and forums engaged in the interpretation of the BOR or statutes. In terms of s 237 of the Constitution, these obligations ‘must be performed diligently and without delay’. It would be remiss to overlook that, in the Constitution’s structural design, ss 39(1) and (2) distinguish between BOR and statutory interpretation. This dichotomy begs the question: Does the Constitution envisage the application of a different process to BOR interpretation than that applicable to the interpretation of statutes? The relevance of this question is heightened when consideration is given to the following *dictum* in *Matiso and Others v Commanding Officer, Port Elizabeth Prison and Another*,¹¹⁰ per Froneman J, as to the difference in the nature and aim of constitutional and statutory interpretation:

‘The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution. Constitutional interpretation in this sense is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of statutes.’

¹⁰⁸ Per Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12. De Ville JR ‘Proportionality as a requirement of the legality in administrative law in terms of the new Constitution’ (1994) 9(2) *SAPL* 360 365 points out that constitutional provisions ‘form a logical and systematic unity’ requiring integrated interpretation in which provisions are ‘not [to] be interpreted in isolation from the rest of the constitution’.

¹⁰⁹ Per Hoexter JA in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) 514B-F.

¹¹⁰ 1994 (4) SA 592 (SE) 597G-H.

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Differences between statutory and constitutional (including, by extension, BOR) interpretation are understandable since the Constitution is an organic, *sui generis* instrument. Its provisions are, for the contextual reasons outlined above, somewhat distinctive (or unique).¹¹¹ De Ville¹¹² and Kruger¹¹³ point out certain structural or formal differences between the Constitution and ordinary statutes that have been used to justify departing from the traditional approach to statutory interpretation. These differences include, inter alia: (i) more stringent requirements apply for amending constitutional provisions than those applicable to statutory amendments; (ii) the Constitution is both backward and forward-looking in its nature; (iii) constitutional supremacy means that the Constitution is a permanent point of reference at the apex of the *Rechtsstaat* in SA; (iv) the Constitution is drafted in a style that differs from that used in ordinary statutes; and (v) the Constitution is premised on a value system, and its provisions viewed as a whole have inherent coherence or unity (so-called intra-textual holism).¹¹⁴ Therefore, du Plessis¹¹⁵ states, justifiably, that constitutional interpretation ‘cannot be just a technique-driven analysis of the provisions of a constitutional text’ but rather ‘is a consequential practice, an observance, rooted in and emanating from a culture of constitutionalism’ (discussed below in chapter three).

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The differences existing between the Constitution and statutes ought not to overshadow the process of interpretation to such a degree that they result in a wholly or significantly (or materially) different approach to BOR interpretation than that applicable to interpreting ordinary statutes. Such a state of legal affairs would lead to two separate and distinguishable processes of interpretation operating parallel to each other. This is

¹¹¹ Du Plessis L (2007) 134.

¹¹² De Ville JR (2000) 58-60.

¹¹³ Kruger J ‘Is interpretation a question of common sense? Some reflections on value judgments in section 35’ (1995) 28(1) *Comparative and International Law Journal of Southern Africa* 1 2-5. Kruger contends that a *sui generis* approach ought to apply when interpreting the Constitution.

¹¹⁴ Intra-textual holism requires each part of the Constitution to be read and understood in relation to all the other parts thereof. See Du Plessis LM & de Ville JR ‘Bill of Rights interpretation in the South African context (3): Comparative perspectives and future prospects’ (1993) 4(3) *Stell LR* 356 369. Also, see Kruger J (1995) 12. Botha CJ (2010) 62 characterises this as a ‘part-whole approach’ to interpretation or ‘hermeneutical circle’ that ‘underlines the importance of the context of a specific phrase or sentence’.

¹¹⁵ Du Plessis L (2007) 135.

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undesirable as it carries the risk of causing confusion as regards the applicable legal principles guiding the interpretive process. This would be at odds with the principle of certainty in the rule of law (discussed below in chapter three). The interpretation of the BOR and any legislation is subject to adherence to the same Constitution, the promotion of the same constitutional values, and regulation by s 39 of the Constitution. Thus, although subtle differences exist, a *largely* or *essentially* uniform approach to interpretation of the BOR and legislation applies. To this end, de Ville¹¹⁶ states: ‘Although there are important differences between a supreme constitution and ordinary statutes, the differences between statutory and constitutional interpretation should not be stretched too far.’ The uniform approach to interpreting the BOR and ordinary statutes, as contended for here, is echoed per Wallis JA in the following celebrated *dictum*:¹¹⁷

‘*Whatever the nature of the document*, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.’ (my emphasis)

The Constitution does not prescribe any particular method for BOR or statutory interpretation (such as, grammatical, purposive, contextual, historical, teleological or comparative). These are practical, interrelated aspects or techniques of interpretation that serve as indexes when a meaning for a BOR or statutory provision is determined. These techniques are complementary to each other and apply in conjunction with one another. Their utilisation will result in interpretation being all-embracing and all-encompassing

¹¹⁶ De Ville JR (2000) 58. See also Botha CJ (2010) 114.

¹¹⁷ *NJMPF* para 18. Wallis JA describes, at para 19, the proper approach to interpretation as one that ‘considers the context and the language together, with neither predominating over the other’.

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because it will include competing techniques of interpretation. In this way, a preferred meaning can be determined for a statutory provision that, in the circumstances of a particular case, best promotes the values of the Constitution, including those democratic values that underlie the fundamental rights that are entrenched in the BOR.¹¹⁸ In statutory interpretation, the starting and ending point is the Constitution, its transformative ethos, spirit and objectives. The law-text being interpreted is, thus, not the point of departure.

2.2.3.4 Fiscal and non-fiscal statutory interpretation: Do the approaches differ?

There is nothing special about tax laws.¹¹⁹ Thus, historically, the principles governing statutory interpretation applied uniformly to fiscal and non-fiscal statutes.¹²⁰ This position remains unchanged under the Constitution. Section 39 thereof draws no differentiation between the interpretations of different kinds of statutes. Section 39(2) reads: ‘When interpreting any legislation ...’. In this context, as in s 233 discussed above, ‘any’ casts very widely the net of affected ‘legislation’. ‘Any’ covers all ‘legislation’ irrespective of whether it is passed by Parliament, a Provincial Legislature or a Municipal Council.¹²¹ It is unnecessary for statutes to expressly incorporate the terms of the Constitution into their texts.¹²² As explained above, by virtue of the Constitution’s supremacy (s 2), all statutes, including fiscal ones, must be read subject thereto. Any statutory provision found to be incompatible with the Constitution may be invalidated. Langa DP, in *Hyundai Motors*,¹²³ held that s 39(2) ‘means that all statutes must be interpreted through the prism of the Bill of Rights’. Thus, all types or forms of legislation fall within the remit of s 39(2). This includes tax (that is, fiscal) statutes (such as the TAA). Ackermann J, in *First National*

¹¹⁸ Sachs J, in *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para 46, held that interpreters ought to ‘focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case’.

¹¹⁹ *CIR v Delfos* 1933 AD 242 254; *SIR v Kirsch* 1978 (3) SA 93 (T) 94D.

¹²⁰ *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A) 727G-H. A ‘commercial meaning’ must be given to a concept used in fiscal legislation (*CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) para 34; *CLDC v CSARS* [2016] ZATC 6 (5 September 2016) para 15).

¹²¹ For the legislative competencies of the three spheres of government in SA, see chapter four below.

¹²² *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) para 18 (*Harksen*).

¹²³ 2001 (1) SA 545 (CC) para 21.

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*Bank of SA Ltd t/a Wesbank v CSARS and Another: First National Bank of SA Ltd v Minister of Finance*¹²⁴ (FNB), encapsulates this legal position as follows:

‘In doing so it is first necessary to emphasise that even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards.’¹²⁵

Consequently, when interpreting any fiscal legislation, preference must be given to an interpretation that best promotes the spirit, purport and objects of the BOR.¹²⁶ In this way, fiscal statutes are ‘filtered’¹²⁷ through the fundamental rights entrenched in the BOR and the values underlying those rights. These unwritten values form part of the ‘extra-textual contextualisation’¹²⁸ that is inextricably associated with the interpretation of statutes. This new teleological methodology requires interpreters ‘to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making’.¹²⁹ The nature of the composition of SA’s legislatures at the three levels of government, discussed below in chapter four, makes it impossible for any lawgiver to be summoned to a court, tribunal or forum to testify as to its aim, policy or objective in relation to a law passed by it. Therefore, extra-textual (or curial) *indicia* (such as, legal precedent, earlier ‘kindred’

¹²⁴ 2002 (4) SA 768 (CC) para 31.

¹²⁵ See also *Bato Star Fishing* para 72. For a discussion of the interpretation of fiscal legislation, see Goldswain GK ‘Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes’ (2012) 16 *SABR* 30. Australian courts adopt a similar approach to those in SA. See Tretola J ‘The interpretation of taxation legislation by the courts – a reflection on the views of Justice Graham Hill’ (2006) 16(1) *RLJ* 73 81-6.

¹²⁶ In promoting the BOR’s ‘objects’, s 39(2) requires that consideration be given to all fundamental rights implicated by a statutory provision. See *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 29. If more than one right is affected, a meaning must be ascribed that promotes each right. It is inappropriate to settle on a meaning that advances only one implicated right while such meaning is at odds with another affected right. See *Link Africa* para 36.

¹²⁷ Botha CJ (2010) 114.

¹²⁸ Du Plessis LM & de Ville JR (1993) 367 explain ‘extra-textual contextualisation’ as being external factors (such as, history and existential contextualisation) which, though contained in the environment outside of an instrument, are important interpretive tools because they decisively influence and shape texts written in the instrument. Du Plessis & de Ville explain (367) that ‘intra-textual contextualisation’ refers to both the particular text being interpreted as well as the broader text in the instrument read holistically (such as, the long and short titles, the pre- and postambles, and any schedules).

¹²⁹ *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11.

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legislation,¹³⁰ explanatory memoranda¹³¹ and *travaux preparatoires*)¹³² may be explored to determine a legislative aim.¹³³ However, it is impermissible to use external or extrinsic interpretive aids in a manner that has the effect of adding to, or modifying, or contradicting the meaning of any statutory provision. As stated above, interpreters must not trespass onto the terrain of the lawgiver. Some dosage or degree of deference is required. The process of interpretation must respect the language used in an enactment as well as be respectful of the principle and constitutional value of the separation of powers.

Ngcobo J, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others (Bato Star Fishing)*,¹³⁴ held that the ‘starting point in interpreting any legislation is the Constitution’.¹³⁵ Thus, when interpreting the TAA, its text is not the first port of call: the Constitution and its values are first considered. In other words, factors and circumstances outside the legislative text are immediately involved.¹³⁶ This approach to interpretation promotes constitutional supremacy and, thus, ought to be favoured.¹³⁷ As stated above, the TAA must be interpreted purposively. A meaning is ascribed that best gives effect to

¹³⁰ De Ville JR (2000) 233-34.

¹³¹ *CLDC v CSARS* [2016] ZATC 6 (5 September 2016) para 25.

¹³² *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 27.

¹³³ The Court, in *AM Moolla Group Ltd and Others v CSARS and Others* [2003] JOL 10840 (SCA) para 20, held that any interpretation ‘carries no weight’ if it ‘is plainly not consonant with the express provisions of the Act’.

¹³⁴ 2004 (4) SA 490 (CC) para 72.

¹³⁵ The Constitution’s pre-eminence in any interpretive process is eloquently summed up per Kriegler J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 123 (*De Klerk*) as follows: ‘One also knows that the Constitution did not spring pristine from the collective mind of its drafters. Much research was done and many sources consulted. It is therefore no surprise that the Constitution, in terms, requires its interpreters to have regard to precedents and applicable learning to be found in other jurisdictions. *But when all is said and done, the answer to the question before us is to be sought, first and last, in our Constitution.*’ (my emphasis)

¹³⁶ Botha CJ (2010) 54.

¹³⁷ However, in *Link Africa* para 33, the minority (per Jafta J, Tshiqi AJ, Moseneke DCJ and Nkabinde J) held that ‘the text of a statutory provision continues to be the starting point in the process of interpretation’. At first blush, this approach appears to be diametrically opposed to that enunciated in *Bato Star Fishing*. The approach in *Link Africa* suggests a re-shifting of the focus in statutory interpretation towards the law-text so that the Constitution and its values become secondary considerations. It is submitted that the minority Judges did not intend to alter or adapt the interpretive approach formulated in *Bato Star Fishing*. Rather, it reinforced that which it previously stated per Kentridge AJ in *Zuma* para 18, namely, that respect must be shown to the language used by a lawgiver so that interpretation does not amount to ‘divination’. Moreover, it can hardly be that the CC, SA’s apex court and ultimate guardian of the Constitution and its values, would relegate them from their position of primacy to one of secondary relevance or importance.

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Parliament's aims or objectives in the TAA (discussed below in chapter five).¹³⁸ If a provision is susceptible of more than one meaning, then a sensible meaning is to be preferred over one that 'leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation'.¹³⁹ To be valid, Parliament's purpose must be fair, just and reasonable. As explained below in chapter three, the rule of law demands the existence of a rational connection between a legislative purpose and the means chosen by the lawgiver to give effect to such aim. This demonstrates that in the *Rechtsstaat* of SA based on the rule of law, 'justice is not a cloistered virtue'.¹⁴⁰ As in all areas of law, the constitutional norms of justice, fairness and equity are woven into the fabric (or fibre) of SA's system of taxation and tax administration. Thus, the following *dictum* per Gubbay JA in *COT v CW (Pvt) Ltd*¹⁴¹ is, it is submitted, inapposite in SA's constitutional era: 'Generally speaking, where taxation is concerned, it has to be acknowledged that justice and equity have little significance.'¹⁴² Additionally, in the light of the field of taxation being sensitive to the demands of the Constitution, the continued appropriateness of the age-old adage that 'there is *no* equity about tax',¹⁴³ described by Corbett JA in *CIR v Nemojim (Pty) Ltd*¹⁴⁴ as a 'guiding principle in the interpretation of fiscal legislation', is questionable. Based on the foregoing discussion, it is probably more appropriate (or correct) to say that 'there is *some* equity and *some* inequity about tax'.¹⁴⁵

¹³⁸ For the rules of purposive interpretation of tax laws, see van der Westhuizen Y (2008) 616-19; Goldswain GK 'The purposive approach to the interpretation of fiscal legislation – the winds of change' (2008) 16(2) *MAR* 107 117-19.

¹³⁹ *Really Useful Investments 219 (Pty) Ltd v City of Cape Town and Others* [2015] JOL 33067 (WCC) para 21.

¹⁴⁰ *S v Mamabolo (E TV and Others intervening)* 2001 (3) SA 409 (CC) paras 1 27 (*Mamabolo*).

¹⁴¹ 1990 (2) SA 245 (ZS) 266D. The Court held that the constitutionality of a tax cannot be challenged simply on the basis that it produces a result that is actually or potentially harsh. It is submitted that unconstitutionality must be premised on grounds rooted in the Constitution. For a discussion of the relationship between justice and equity in statutory interpretation, see Goldswain GK (2011) 3-6 8-12; van Zyl DH 'The significance of the concepts "Justice" and "Equity" in law and legal thought' (1988) 105(2) *SALJ* 272 279-80. See also *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BG) 557-58 (and the authorities cited there).

¹⁴² For the rules applicable to interpretation of court judgments and orders, see *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) para 33; *Eke v Parsons* 2016 (3) SA 37 (CC) paras 29-30.

¹⁴³ *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA) 322I-323B.

¹⁴⁴ 1983 (4) SA 935 (A) 958. See also *CIR v George Forest Timber Co* 1924 AD 516 531-32. The CC, in *FNB* para 27, referred to the adage that 'there is no equity about a tax' without commenting on its applicability in SA's legal landscape owing to the sea of change introduced by the Constitution.

¹⁴⁵ In *COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 266D the Court acknowledges that justice and equity have some ('little') significance in matters of taxation.

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Fiscal statutes must impose a tax burden in clear terms. To this end, the following rule of interpretation applies: ‘There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.’¹⁴⁶ When interpreting fiscal statutes, there is no presumption as to a tax. It is widely acknowledged that, although ‘tax avoidance is an evil, ... it would be the beginning of much greater evils if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved’.¹⁴⁷ Thus, interpretation must not lead, as far as is reasonably possible, to harsh, unfair, inequitable, unjust, unreasonable or oppressive results for taxpayers.¹⁴⁸ When interpreting a fiscal statute, the courts in SA apply certain canons, maxims and presumptions that, in some instances, minimise the adverse impact of an interpretation. This includes, inter alia, the *contra fiscum* (‘against the *fiscus*’) rule that applies only to laws imposing monetary burdens.¹⁴⁹ It brings about a restrictive interpretation. If a provision imposing a burden is ambiguous in that one reasonably inferred meaning places a more onerous burden on taxpayers than another reasonably capable meaning, then, unless a manifest, contrary intention appears, such ambiguity is resolved by giving effect to the least onerous burden. In other words, the statute is construed against the *fiscus*.¹⁵⁰ The *contra fiscum* rule embodies the common law maxim *semper in dubiis benigniora praeferenda sunt* (‘in cases of doubt the most beneficial interpretation is always to be preferred’) which is traditionally expressed as a presumption favouring the least arduous or burdensome interpretation.¹⁵¹

¹⁴⁶ Per Centlivres JA in *CIR v Simpson* 1949 (4) SA 678 (A) 695. Fourie AJA, in *Medox Ltd v CSARS* 2015 (6) SA 310 (SCA) para 16, held that words may only be read into a statute in exceptional instances of necessity ‘in the sense that without it effect cannot be given to the statute as it stands’.

¹⁴⁷ *Vestey’s (Lord) Executors & Another v Inland Revenue Commissioners* (1949) 1 AER 1108 1120.

¹⁴⁸ *ITC 1384* (1984) 46 SATC 95 100-03. Corbett JA, in *CIR v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) 958, held that ‘there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and from the point of view of the *fiscus*. And it may be fairly inferred that such a result is in conformity with the intention of the Legislature.’

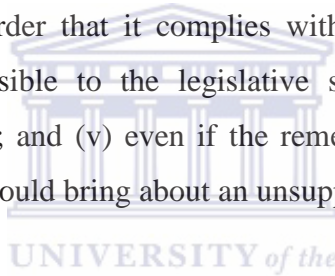
¹⁴⁹ See *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A) 727A-H; *Conshu (Pty) Ltd v CIR* 1994 (4) SA 603 (A); *Shell’s Annandale Farm (Pty) Ltd v CSARS* 2000 (3) SA 564 (C); *CSARS v Multichoice Africa (Pty) Ltd* 2011 JDR 0275 (SCA) para 19. The TAA distinguishes between the interests of SARS (see definition of ‘SARS’ in s 1) and that of the *fiscus* (see, for example, ss 92, 221 and 223(3)(a)). The *fiscus* is duly represented by the CSARS. See *CIR v I H B King*; *CIR v A H King* 1947 (2) SA 196 (A) 216. See also du Plessis L (2007) 159.

¹⁵⁰ *Dibowitz v CIR* 1952 (1) SA 55 (A) 61. Goldswain GK (2012) 37 67 74-8 contends that the *contra fiscum* rule is incorporated indirectly into the Constitution through s 8(3) thereof.

¹⁵¹ Du Plessis L (2007) 161.

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If fiscal provisions are reviewed through the prism of the Constitution and found to be inconsistent therewith, then, in accordance with s 172(1)(b) of the Constitution, a court *may* read words into the statute in order to bring the provision into line with the Constitution. Reading-in, as a remedial measure in statutory interpretation, may be utilised only if it is ‘just and equitable’ to do so. Owing to the separation of powers between the legislative and judicial branches of government, courts are discouraged from reading words into a statute. The power to do so must be exercised sparingly and only in exceptional circumstances.¹⁵² The CC has stipulated certain principles to guide courts when considering if the technique of ‘reading-in’ under s 172(1)(b) is to be employed.¹⁵³ The applicable principles are: (i) a provision to be read into a statute should be consonant with the Constitution; (ii) the result achieved by reading-in should interfere with an enacted law as little as possible; (iii) a court should define with sufficient precision how a statute may be extended in order that it complies with the Constitution; (iv) a court should be as faithful as possible to the legislative scheme or purpose within the constraints of the Constitution; and (v) even if the remedy of reading-in is justified, it ought not to be used where it would bring about an unsupportable budgetary intrusion.



Various common law presumptions apply as auxiliary aids in statutory interpretation.¹⁵⁴ Taxpayers are entitled to the benefits arising from their application. For the purposes of this dissertation and the constitutional review to be conducted below in chapter ten, the relevant presumptions of interpretation are:¹⁵⁵ the presumption that a legislature does not intend irrational, unjust, unfair, unreasonable or inequitable results from an enacted

¹⁵² *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) paras 82-4 (*Gaertner*).

¹⁵³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) paras 74-5; *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC) paras 27-8.

¹⁵⁴ In *CIR v Insolvent Estate Botha t/a Trio Kulture* 1990 (2) SA 548 (A) 559 the Court confirmed that presumptions are ancillary aids in construction that may be invoked only in circumstances where uncertainty or doubt exists as to the true meaning of a statutory provision. The Court emphasised that, in the presence of clear and unambiguous indications of the intended meaning, presumptions must give way to other considerations (such as, language, context and circumstance).

¹⁵⁵ For a list of interpretive presumptions applicable in a tax law context, see Goldswain GK (2012) 62-8. For a discussion of interpretive presumptions generally, see de Ville JR (2000) 164-225; du Plessis L (2007) 149-96; Botha CJ (2010) 90-4; van Staden M ‘A comparative analysis of common-law presumptions of statutory interpretation’ (2015) 26(3) *Stell LR* 550 556-81.

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law;¹⁵⁶ the presumption that a legislature does not intend to enact invalid or purposeless provisions;¹⁵⁷ the presumption against double taxation;¹⁵⁸ the presumption that legislation does not intend to alter the existing common and statutory law more than is necessary;¹⁵⁹ the presumption that a legislature does not intend to bind the State or organs of state;¹⁶⁰ the presumption that a legislature does not intend statutes to operate extraterritorially;¹⁶¹ the presumption that the legislature uses language consistently so that the same words in an enactment bear the same meaning throughout;¹⁶² the presumption that a legislature intends to advance the public interest; the presumption that modes of conduct in a statute refer to legally valid and/or permissible conduct; and the presumption that statutes do not operate retrospectively.¹⁶³ A presumption is rebutted if an express or implied statutory provision indicates that, in a particular context, a contrary legislative intention applies to that reflected in an interpretive presumption.

2.3 CONCLUSION

The present chapter shows that constitutional and statutory interpretation is not a free-wheeling (or free-floating), haphazard exercise. It is a question of law that involves first considering the ‘the content and sweep of the ethos expressed in the structure of the

¹⁵⁶ *Mhlungu* para 36.

¹⁵⁷ *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) para 57 (*Case and Curtis*).

¹⁵⁸ *Isaacs v CIR* 1949 (4) SA 561 (A).

¹⁵⁹ This presumption is important for purposes of the application of taxpayers’ rights stemming from the common law. For a discussion of common law rights of taxpayers, see chapter seven below.

¹⁶⁰ *Administrator Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) 262A. However, du Plessis L (2007) 176-77 contends that this presumption ‘is inherently incompatible’ with constitutionalism and the democratic value of legality (discussed below in chapter three).

¹⁶¹ *Minister of Law and Order, KwaNdebele and Others v Mathebe and Another* 1990 (1) SA 114 (A).
¹⁶² *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 47;
3M South Africa (Pty) Ltd v CSARS and Another [2010] 3 All SA 361 (SCA) para 25.

¹⁶³ For the rules governing retrospective statutory provisions, see *Fouldien and Others v House of Trucks (Pty) Ltd* (2002) 23 ILJ 2259 (LC) para 9; *3M South Africa (Pty) Ltd v CSARS and Another* [2010] 3 All SA 361 (SCA) paras 34-6. In relation to the TAA, see *ITC 1882* (2016) 78 SATC 165 170. For a discussion of the presumption against retrospectivity, see de Ville JR (2000) 204-15; van Staden M (2015) 568-70. Also, see Laitos JG ‘Legislative retroactivity’ (1997) 52 *Washington University Journal of Urban and Contemporary Law* 81; Fisch JE ‘Retroactivity and legal change: An equilibrium approach’ (1997) 110(5) *Harvard Law Review* 1055; Troy DE ‘Toward a definition and critique of retroactivity’ (2000) 51(3) *Alabama Law Review* 1329; Bobbett CS ‘Retroactive or retrospective? A note on terminology’ (2006) 1 *British Tax Review* 15.

CHAPTER TWO: CONSTITUTIONAL AND STATUTORY INTERPRETATION

Constitution¹⁶⁴ and thereafter striking a fair balance between conflicting considerations reflected in the text being interpreted within its context, having regard to all relevant internal and external interpretive aids. Thus, constitutional and statutory provisions cannot be peered at with blinkers on. They are to be read and understood in their proper 'context'. Thus, the present chapter shows that neither the Constitution nor any statute means whatever an interpreter wishes it to mean. Interpreters must act as informed, open-minded, thoughtful and objective observers sensitive to SA's complex social, financial and economic realities. They must guard against succumbing to the influences of their own personal intellectual and moral preconceptions. Interpreters must give effect to a meaning for a word that is contextually and linguistically justifiable and legally sound.

The present chapter demonstrates further that the Constitution is the point of departure and the end-point of the interpretive process. It provides the context for the interpretation of all laws in SA, including legislation and the Constitution.¹⁶⁵ In so doing, interpretation promotes the Constitution's 'juridical ideology'.¹⁶⁶ Constitutional values play an integral role in interpretation. Every such process must take place in accordance with, and subject to, the directives in s 39 of the BOR.¹⁶⁷ These directives, and those contained in their counterpart in s 35 of the interim Constitution, transformed the pre-constitutional process of interpretation by displacing 'subjective ethical or intellectual preferences with a transparent and justiciable set of values'.¹⁶⁸ Thus, the processes involved in constitutional and statutory interpretation are largely value judgments that must occur on a principled basis. Any departure from this salutary rule is inimical to due legal process applying in SA's open and democratic society. Moreover, a departure therefrom would put at risk the main edifice upholding, in SA, the pillars of constitutional supremacy, democracy and constitutionalism discussed below in chapter three as potent symbols of SA's hard-won

¹⁶⁴ Per Mahomed J in *Makwanyane* para 265.

¹⁶⁵ *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) paras 44-5. See also the minority judgment of Krieger J *et Didcott J* in *De Klerk* paras 123-49.

¹⁶⁶ Moseneke D 'Transformative adjudication in a post-apartheid South Africa – taking stock after a decade' (2007) 21(1) *SJ* 2 4. The CC, in *Mhlungu* para 129, describes constitutional and, by implication, statutory interpretation as 'a principled judicial dialogue'.

¹⁶⁷ Section 39(1) is an interpretive force informing all legal institutions and decisions with the power of constitutional values. See *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 486.

¹⁶⁸ Moseneke D (2007) 4.

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transition to a culture of human rights and freedoms. A value-coherent (teleological) approach to interpretation leads to a purposive approach involving ‘an investigation into the reasonable goals and/or the social functions of the [Constitution’s] norm’.¹⁶⁹

The present chapter also shows that the Constitution’s values enables interpretation to occur in an open-ended (not rigid) process¹⁷⁰ that promotes a humanistic oriented and extensive, generous or liberal¹⁷¹ jurisprudential approach to fundamental and statutory rights interpretation. Such an approach enhances respect for, and protection of, rights. This underpins the rights-based culture established and advanced by the Constitution. Failure to comply with the commands in ss 39(1) and (2) of the BOR will violate a constitutional duty and will be incongruent with s 237 of the Constitution. Thus, the Constitution’s aims, normative values and democratic principles, as well as any relevant international and foreign law norms and principles,¹⁷² will be utilised below when the research questions formulated above in chapter one are answered. To this end, a discussion will now be undertaken in chapter three of the Constitution’s transformative aims and the fundamental values and democratic principles therein that are relevant in the heartland of tax administration under the TAA (discussed below in chapter five).

¹⁶⁹ Kruger J (1995) 9. See also Devenish GE *Interpretation of Statutes* (1992) 39-48.

¹⁷⁰ Friedman J, in *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BG) 566F-G, held the following to be a rule of interpretation of a written constitution containing a Bill of Rights: ‘The method of interpretation or construction is an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context. Therefore, interpretation is not a conclusion but a process which searches for the exact meaning of words and use of terms.’ For a commentary on this case, see Du Plessis LM & de Ville JR ‘Bill of Rights interpretation in the South African context (2): Prognostic observations’ (1993) 4(2) *Stell LR* 199 205-06.

¹⁷¹ The use of the labels ‘generous’, ‘liberal’ and ‘purposive’ interpretation has been criticised (even discouraged). See *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E) 633G; *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C) 471-73. For a discussion of this criticism, see Carpenter G ‘Constitutional interpretation by the existing judiciary in South Africa: Can new wine be successfully decanted into old bottles?’ (1995) 28(3) *Comparative and International Law Journal of Southern Africa* 322 333-35. These labels are used in this study as they are commonplace in literature on the subject of interpretation. Also, the usage of these labels in the case law cited above in the present chapter and in foreign case law (for example, *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS) para 37) reflects that they have acquired the judicial stamp of approval.

¹⁷² Despite reliance on foreign and international law sources, the ‘South African Constitution must be interpreted within the context and historical background of the South African setting’. See *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) 160G-H (*Park-Ross*).

CHAPTER THREE

TAX LAW THROUGH THE PRISM OF THE CONSTITUTION

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'A nation's culture resides in the heart and in the soul of its people.' (Mohandas K Gandhi)

3.1 INTRODUCTION

Taxation, democracy and human rights are interconnected, as argued above in chapter one. It sketched the historical background to the Constitution and the socio-politico-legal order in SA that preceded it. The research questions formulated above in chapter one (para 1.2) raise, inter alia, the issue of the application of the BOR to certain natural and juristic taxpayers, of whether the TAA is lawful, of whether the impugned TAA provisions limit the privacy of taxpayers and, if so, whether any such limitation is valid. These issues will be investigated in this dissertation. As is evident from chapter one above, the Constitution affects each of the research questions. They cannot be answered without reference thereto. Therefore, to lay a proper foundation for the investigation below into the research questions, the present chapter discusses tax law through the prism of the Constitution. In this regard, the Constitution's objectives, values, principles, ethos and democratic cultures are outlined, particularly in so far as these are relevant in the tax arena when the TAA is analysed from the perspective of, first, the national legislature which enacted it; secondly, SARS which is responsible for administering its provisions; and thirdly, taxpayers who must comply therewith. The discussion in the present chapter commences with an overview of the constitutional enterprise. Thereafter, a discussion is undertaken of: (i) the principle of constitutional supremacy, (ii) the spirit, purport and objects of the Constitution, (iii) the values underpinning an open and democratic society, and (iv) the application of the rule of law, democracy and *ubuntu* as values in the tax arena. Attention is given to these aspects because they highlight critical factors that play a role when the TAA is itself examined for constitutionality in chapter four below, and the impugned TAA provisions are examined for constitutional congruence in chapter ten below. Moreover, they set the scene for the discussion in chapter six concerning the application of the BOR in the tax arena. In addition, they prepare the groundwork for the discussions in chapter seven concerning the protection of taxpayers *via* rights codified in the BOR and the TAA, and in chapter eight concerning the interpretation and application of the general limitation clause in s 36(1) of the BOR.

3.2 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

3.2.1 An overview of the constitutional enterprise

The interim Constitution ushered in a new system of governance. It transformed SA from rule by parliament to a representative democracy.¹ Its architects crafted universally accepted principles that laid the foundation upon which the text of the final Constitution is built.² On 4 February 1997, the final Constitution superseded the interim Constitution. These legal instruments pioneered change in all facets of life in SA, including social, economic, political, cultural and legal. The BOR in the final Constitution is the embodiment of basic (fundamental) human rights for citizens and non-citizens.³ Equality pervades and defines the ethos and spirit on which the Constitution is premised.⁴ The constitutional architecture is both ‘backward- and forward-looking’.⁵ Whilst it seeks to redress the injustices of apartheid that divided society in SA into disparate classes, it also seeks to nurture SA into becoming a just and equal society for future generations. Thus, transformation characterises the entire constitutional project. It entails a lengthy process of transition from a diverse society based on inequality, division, injustice and exclusion from the democratic process to one respecting the dignity of all, placing a premium on human rights and freedoms, and embracing a representative, participatory process of governance.⁶ Chapter 9 of the Constitution creates institutions supporting and strengthening democracy in SA. The reconfiguration of SA fashioned along these lines is enunciated in the Preamble as an objective to ‘[b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations’.

¹ The interim and final Constitutions did not choose a specific model of democracy for SA but rather ‘hedged its bets’ by sketching ‘the contours of a peculiarly South African form of democracy, leaving it to the legislature and the judiciary to fill in the details’. See Roux T ‘Democracy’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-2.

² For a discussion of the constitutional principles and their role, see Venter F ‘Requirements for a new constitutional text: The imperatives of the constitutional principles’ (1995) 112(1) *SALJ* 32. Kriegler J, in *De Klerk* para 127, describes SA’s Constitution as being ‘constructed on unique foundations, built according to a unique design and intended for unique purposes’.

³ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 31.

⁴ *Fraser v Children’s Court, Pretoria North and Others* 1997 (2) SA 218 (CC) para 20.

⁵ Liebenberg S (2010) 25. See also *Hunter v Southam Inc* [1984] 11 DLR (4th) 641 (SCC) 649.

⁶ *Hyundai Motors* para 21.

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The Constitution and the BOR in Chapter 2 thereof has a cascading effect. Section 8(1) superimposes constitutional values on relationships between State and non-State actors. Section 8(2) does likewise for private relationships between non-State actors *inter se*.⁷ The Constitution is the touchstone creating a programmatic scheme for a cultural transformation of SA. The Constitution rejects injustice and, *via* the BOR, establishes a culture of human rights and freedoms. Section 36 of the BOR is designed to combat the malpractice of State action unduly interfering with basic rights and freedoms. The BOR lays the ground rules for the lawful exercise of legislative and executive action affecting such rights. The BOR articulates a minimum threshold that cannot be trespassed. The Constitution changed the context of all legal reasoning and decision-making.⁸ It commands a transformed mindset and establishes the ‘never again’ principle: never again will the right of ordinary people to freedom be permitted to be taken away.⁹ Thus, under the Constitution, it will not be business as usual. The Preamble records the common commitment or conviction of SA’s people and its government to the fulfilment of the Constitution’s lofty goals of achieving unity in diversity,¹⁰ national security, peace, social and economic justice, equality, a non-racial and non-sexist society, an improved quality of life for all citizens, and freeing the potential of each person. Thus, the ethos of the 1993 and 1996 Constitutions may be described as a **APE**

‘historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’.¹¹

⁷ Whereas s 8(1) entrenches the ‘vertical application’ of the BOR, s 8(2) entrenches its ‘horizontal application’. See *De Klerk* para 8. Also, see Davis D (1999) 99-126. For a discussion of the operation of ss 8(1) and (2) of the BOR, see chapter six below.

⁸ *Holomisa v Argus Newspapers Ltd* 1996 (1) All SA 478 (W) 486.

⁹ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 46. Klare KE (1998) 153 describes the Constitution as ‘social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission’.

¹⁰ ‘Diversity’, in this context, refers to the fact that SA’s people consist of individuals and communities with different racial, ethnic, religious, cultural and linguistic profiles, and who, whether for historical reasons or simply by accident of birth, do not all share the same socio-economic position. For case law on ‘diversity’ as a value, see below at fn 68 in the present chapter.

¹¹ Paragraph 1 of postscript ‘National Unity and Reconciliation’, interim Constitution (postamble).

3.2.2 Supremacy of the Constitution

During the apartheid era, law was a means to enforce repression, coercion and discrimination. Under the Constitution, law is a means used to enforce respect for, and the protection, promotion and fulfilment of, basic rights and freedoms. To bolster its efficacy, the Constitution proclaims its supremacy above all other laws enforceable in SA. All law and conduct must conform to the Constitution's strictures and prescripts. Section 2 records its position of primacy. It reads: 'This Constitution *is* the supreme law of the Republic; law or conduct inconsistent with it *is* invalid, and the obligations imposed by it *must* be fulfilled.' Thus, rule by the Constitution replaced rule by Parliament. The Constitution's dominance on the socio-politico-legal landscape is engrained in its text. For example, s 8(3)(b) permits a court to develop rules of the common law to limit the operation of a fundamental right, provided the limitation is consistent with s 36(1) of the BOR. In addition, 'Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution' (s 44(4)). The same applies to Provincial Legislatures (s 104(3)), the judiciary (s 165(2)),¹² and those State institutions established under s 181(1) to strengthen SA's liberal democracy (s 181(2)). The institution, status and role of traditional leaders under SA's customary laws¹³ are also recognised, but subject to the Constitution (s 211(1)). Customary international law is adopted as 'law in the Republic unless it is inconsistent with the Constitution' (s 232). All the provisions referred to exemplify constitutional pre-eminence. The all-pervasiveness of the Constitution is succinctly summed up in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*¹⁴ (*Pharmaceutical Manufacturers*) in the *dictum* that 'all law, including the common law, derives its force from the Constitution and is subject to constitutional control'. Accordingly, SA has a single system of law shaped by a supreme Constitution.

¹² A significant development in the interim Constitution (s 98 read with s 99) and final Constitution (s 166(a) read with s 167) is the creation of the CC whose role is not simply to monitor procedural compliance with the Constitution but, more importantly, to reinforce democracy by developing incrementally, in the fullness of time, a strong, coherent constitutional jurisprudence.

¹³ 'Customary law' is the common rules and practices subscribed to by SA's indigenous people.

¹⁴ 2000 (2) SA 674 (CC) para 44 (*Pharmaceutical Manufacturers*). See also Dendy M 'In the light of the Constitution I: The supremacy of the Constitution' (January/February 2009) *DR* 60.

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The Constitution is *sui generis*. It is short on specifics and long on generalisations.¹⁵ Supremacy of the Constitution is clear from the set of societal values imposed by it against which all statutes and other law, including the common law, is tested for validity. The government and its agencies must comply with its provisions when fulfilling their functions. This supremacy is augmented by s 165(5) that reads: ‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’¹⁶ Moreover, s 172(1) empowers a competent court to declare any law or conduct inconsistent with the Constitution to be invalid to the extent of such inconsistency. Constitutional supremacy includes supremacy of the BOR grafted into the Constitution. Section 8(1) thereof records the BOR’s dominance as follows: ‘The Bill of Rights applies to all law’ Thus, no law is beyond its radar. Its spirit, purport and objects infuse all laws. The pre-eminence of the BOR is also evident from s 39(3) recognising ‘the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’.

Whilst certain constitutional provisions differentiate between ‘the Constitution and the law’, s 2 declares the Constitution itself to be in the nature of a ‘law’. In this context, ‘law’ bears the meaning as defined in s 2 of the Interpretation Act,¹⁷ namely, ‘any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law’. This includes the common law and indigenous law.¹⁸ However, the Constitution is a *lex fundamentalis* (that is, an overarching, overriding ‘law’, superseding any other, including statutory law, common law, customary law, by-laws, regulations and rules, irrespective of whether such law is of pre-constitutional vintage or enacted after the dawn of democracy).

¹⁵ *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C) 471B-D. The CC, in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 57, held: ‘Our Constitution is the supreme law of the Republic. It is not subject to any law including national legislation unless otherwise provided by the Constitution itself.’

¹⁶ See also de Vos P, Freedman W (eds) & Brand D *et al* (2014) 54-7.

¹⁷ Act 33 of 1957 (Interpretation Act).

¹⁸ For the meaning of ‘law’, see *De Klerk* para 44; *ITC 1788* (2005) 67 SATC 161 164; *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another* 2012 (3) SA 441 (WCC) paras 60-1. See also van der Vyver JD ‘The meaning of ‘law’ in the Constitution of South Africa’ (1994) 111(3) *SALJ* 569 571; Kritzinger KM ‘The meaning of ‘law’ in the interim Constitution’ (1995) 112(1) *SALJ* 135 139; Woolman S ‘Application’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 02-05) 31-56.

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Although the Constitution is a societal construct, it is not in the nature of a social contract, pact or other non-binding charter of norms and standards. The Constitution is part of SA's substantive law. Its provisions are binding and enforceable on all natural and juristic persons, arms of government, organs of state, public enterprises and public institutions.

Constitutional supremacy is a founding value of the Constitution (s 1(c)). It is, however, not confined to being a mere value but is expressed as an indisputable, inviolable rule 'for the construction of a determinate, hierarchical relation among legal norms emanating from various, recognized sources of law'.¹⁹ The clear, unambiguous language of s 2, namely, that the Constitution 'is the supreme law' and 'is invalid', proclaims constitutional supremacy as an incontrovertible fact and declares the invalidity of 'law or conduct inconsistent with it' as a fundamental legal principle. The Constitution does not define 'conduct' for its purposes. 'Conduct' includes, inter alia, acts and omissions of an administrative nature performed by, for example, SARS and its officials. Thus, the TAA and any 'conduct' pursuant thereto is invalid if it is incongruent with the procedural or substantive precepts of the Constitution.²⁰ This is part of the principle of legality, an incident of the rule of law discussed below at para 3.3.2.2.2. Invalidity, however, does not operate automatically. It only follows upon a declaration of invalidity by a court of law competent to grant such an order pursuant to an application.²¹ Any such declaration will be made only to the extent of an inconsistency with the Constitution (s 172(1)(a)).

¹⁹ Michelman FI 'The Rule of Law, Legality and the Supremacy of the Constitution' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 02-05) 11-35.

²⁰ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 62.

²¹ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) paras 13-17. The Constitution (s 170) provides that 'courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or conduct of the President'. Thus, the constitutionality of TAA provisions can be tested by a High Court or other court of equal or superior status. Regional and district courts operate under the Magistrates' Court Act 32 of 1944. They can interpret and apply the Constitution. See *Municipality of the City of Port Elizabeth v Prut NO and Another* 1996 (4) SA 318 (E) 326-29. Although s 170 implicitly extends limited constitutional jurisdiction to these lower courts, as creatures of statute (see *Van Rooyen* paras 25 28) they lack any such jurisdiction. The Tax Board and Tax Court lack constitutional jurisdiction. See *ITC 1806* (2006) 68 SATC 117; *De L and Another v CSARS* (unreported cases nos. IT 12291, VAT 596) [2010] ZATC 3 (4 November 2010) para 6. For a discussion of their limited powers of review, see *Irvin & Johnson (SA) Ltd v CIR* 1946 AD 483; *Holden's Estate v CIR* 1960 (3) SA 497 (A); *Kommissaris van Binnelandse Inkomste v Du Toit se Boedel* 1985 (4) SA 594 (NC); *Kommissaris van Binnelandse Inkomste v*

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Democracy, the rule of law and *ubuntu* are fundamental values rendering as antithetical to the Constitution any refusal or resistance to paying a lawfully imposed tax. In so doing, the Constitution creates a legal environment conducive to fostering a culture of tax compliance. It also establishes a legal system empowering the national legislature, namely Parliament comprising the National Assembly and National Council of Provinces, to pass laws imposing national taxes and conferring powers on SARS to administer the tax system. Thus, the Constitution creates a legal framework that facilitates the State to comply with its constitutional duty of providing a better quality of life for all persons living in SA. Constitutional supremacy replaced Parliamentary sovereignty.²² Parliament 'can no longer claim supreme power'.²³ Its will is subservient to, and qualified by, the Constitution. Parliament must, when passing laws, comply with all procedural safeguards and substantive legal requirements. Failure to do so renders the law, and the process of its enactment, susceptible to being set aside on judicial review.²⁴ This is part of the principle of legality in the rule of law.²⁵ All tax laws, as well as conduct by SARS and its officials, are subject to constitutional control.²⁶ Most of their conduct qualifies as administrative action affecting taxpayers' positive rights under the BOR to, inter alia, privacy (s 14), property (s 25), access to information (s 32), and just administrative action (s 33).

Transvaalse Suikerkorporasie Bpk 1987 (2) SA 123 (A); *ITC 1866* (2013) 75 SATC 268. Jurisdiction is determined with reference to the pleadings of a case, not the substantive merits thereof. See *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) para 75.

²² Parliamentary sovereignty connotes a politico-legal system in which the legislature is supreme and has the final word in the event of inter-branch conflict. See Roux T 'Democracy' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-18. The principle of popular sovereignty (see Henkin L 'Constitutionalism, democracy and foreign affairs' (1992) 67(4) *Indiana LJ* 879 885) is embodied in the Preamble, the relevant portion whereof reads that '[w]e, the people of South Africa ... adopt this Constitution as the supreme law ...'.

²³ *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C) para 25. The Constitution obliges members of the legislative, executive and judicial branches of government to swear or affirm faithfulness to the Constitution. See, s 48 and s 107 (re legislature), s 95 and s 135 (re executive) and Schedule 2 para 6 (re judiciary). This reaffirms supremacy of the Constitution.

²⁴ For a review at common law and under the Constitution, see *Pharmaceutical Manufacturers* paras 31-42 45; *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*; *Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) para 20.

²⁵ *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) para 179 (*Masetlha*). See also Kruger R 'The South African Constitutional Court and the rule of law: The *Masetlha* judgment, a cause for concern?' (2010) 13(3) *PELJ* 468.

²⁶ *First National Bank of SA Ltd t/a Wesbank v CSARS and Another* 2002 (4) SA 768 (CC) para 31 (*FNB*). The CC, in *Pharmaceutical Manufacturers* paras 19-20, held: 'Section 2 of the Constitution lays the foundation for the control of public power. The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law.'

3.2.3 Transformational spirit and objectives of the Constitution

The Constitution is not a narrow ideological formulation but a solid premise upon which a broad-based system of restorative and corrective social justice is to be built.²⁷ It is a codification of a common set of norms, objective values and democratic principles that are the true strands from which the fabric of a new socio-politico-legal order is woven. It is a living instrument that constitutionalises human rights recognised at international law and seeks to ensure compliance with Art 28 of the UDHR.²⁸ The spirit of transition and transformation characterises the constitutional enterprise.²⁹ Whilst apartheid SA followed a culture of coercion, discrimination, secrecy and autocratic rule, the central features of the new order are constitutionalism, democracy, a justiciable BOR, independent judiciary, and accountable and transparent public administration. The interim and final Constitutions transformed SA by (i) replacing a parliamentary autocracy with a constitutional democracy, (ii) substituting minority rule with majoritarianism, and (iii) establishing a culture of rights, openness, constitutionality, democracy and justification.³⁰

The Constitution facilitates the building of a 'new' SA on the ruins of the 'old' apartheid SA. The intrinsic worth of the Constitution lies in it being meaningful in the daily lives of its intended beneficiaries. The Constitution provides moral, ethical, economic, legal, social and political direction. It is the roadmap and moral compass navigating South Africans en route to a common national destiny.³¹ Fulfilment of social, political, legal, cultural, economic and institutional transformation is its main aim. Transformation in this context does not have one, all embracing meaning. It may also mean different things to different people. Naturally, transformation is not simply a declaration or other once-off

²⁷ Skelton AM 'Face to face: Sachs on restorative justice' (2010) 25(1) *SAPL* 94.

²⁸ The UDHR (Art 28) reads: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' South Africa is, as a member of the United Nations, bound by the UDHR. For a discussion of the constitutionalisation of rights in SA and Africa generally, see Udombana NJ (2005) 51-5.

²⁹ *Hyundai Motors* para 21; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 47.

³⁰ Langa P 'A new Constitution and a Bill of Rights' (2000) 12 *LDD* 115 116. Thus, it is submitted that the Constitution establishes a legal framework for a cultural transformation in SA.

³¹ The destinies of SA's people are 'intertwined in a single interactive polity' (*August* para 17).

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event. Transformation is a process of renewal, redevelopment, reconstruction, reconciliation and transition that will occur in the fullness of time over many decades. In this sense, it is an evolutionary process carried out in accordance with constitutional principles.³² Transformative constitutionalism is a value lying at the heart of the Constitution.³³ The spirit, purport and objects of the Constitution serve as catalysts for transformation in both these senses. Constitutional provisions are to be construed according to their transformative potential. The word ‘transformation’, ‘transformative’, ‘transformatory’ or other variation thereof does not appear in the Constitution. However, its transformative character, mission, effect and orientation are unmistakable.³⁴ This is traceable in the following declaration of intent in the Preamble:

‘We therefore ... adopt this Constitution as the supreme law of the Republic so as to-
Heal the divisions of the past and *establish a society* based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and *every citizen is equally protected* by law;
Improve the quality of life of all citizens and *free the potential* of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.’ (my emphasis)

³² *Soobramoney* para 8; *Hyundai Motors* para 21; *De Klerk* para 157; *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 25. Ngcobo J, in *Bato Star Fishing* para 71 at fn 3 thereof, explains transformation as ‘redressing the historical imbalance caused by past unfair discrimination’. Chaskalson CJ, in *Van Rooyen* para 50, stated that ‘transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 were largely under the control of whites and, in particular, white men’. Davis DM ‘Transformation and the democratic case for judicial review: The South African experience’ (2007) 5(1) *Loyola University Chicago International Law Review* 45 46 identifies s 1, s 7, s 8, s 9, s 23, s 36 of the 1996 Constitution, as well as the various socio-economic rights in the BOR, as distinctive features serving as a blueprint for transformation in SA. This can be achieved by, inter alia, the implementation of equality enhancing programmes or initiatives. For a discussion of transformation, see de Vos P, Freedman W (eds) & Brand D *et al* (2014) 26-9.

³³ Liebenberg S (2010) 98 distinguishes between transformative (‘positive’) and preservative (‘negative’) constitutionalism. For present purposes, the former is important. It is aimed at measures to redress the legacies of apartheid (such as measures protecting or advancing persons disadvantaged by past unfair discrimination). A detailed analysis of the concept ‘transformative constitutionalism’ falls beyond the purview of this dissertation. For a discussion thereof, see Janse van Rensburg A (2010) 109-20; Langa P ‘Transformative constitutionalism’ (2006) 17(3) *Stell LR* 351; Davis DM & Klare K ‘Transformative constitutionalism and the common and customary law’ (2010) 26(3) *SAJHR* 403.

³⁴ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 17. The spirit of the Constitution must be used in defence of human rights. See Udombana NJ (2005) 57.

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The Constitution and the BOR are aimed at social engineering and transformation.³⁵ They share a common conviction for remedial action aimed at redressing the legacies of past repression, political and social exclusion, inequality and dispossession. The BOR buttresses constitutional protection by entrenching new fundamental rights and freedoms, and extending the application of some 'old' rights and freedoms to persons to whom they were denied under apartheid.³⁶ The BOR comprises a catalogue of guaranteed social, political, economic, civil and other human rights and freedoms encapsulated in s 9 to s 35. In addition, s 39(3) reads: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' Accordingly, the BOR creates an unparalleled paradigm facilitating the realisation of the Constitution's transformation objectives. In this regard, s 7(2) and s 8(1) of the BOR are instructive.

Section 7(2) reads: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'³⁷ As a concept, 'state' does not have a universal meaning. Its ambit must be determined within its 'context'.³⁸ In s 7(2), 'state' is utilised in its widest sense to include organs of state (such as, SARS and the CSARS). In *Glenister v President of the Republic of South Africa and Others*³⁹ (*Glenister*) the CC held that s 7(2) creates a duty 'beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the State to take deliberate, reasonable measures to give effect to all of the fundamental rights in the Bill of Rights.' This requires financial

³⁵ Mahomed J held, in *S v Acheson* 1991 (2) SA 805 (Nm) 813A-C, that 'the Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.' This description of a constitution's ethos is apposite for SA's 1993 interim and, it is submitted, 1996 final Constitution. See also *Makwanyane* para 262.

³⁶ Van der Walt A 'A South African Reading of Frank Michelman's Theory of Social Justice' in Botha H, van der Walt A & van der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 163 174.

³⁷ Owing to the obligations arising from s 7(2), Ngcobo J, in *Kaunda* para 157, describes the Constitution as a 'promissory note'. De Vos P (1997) 79-86 describes the State's duty to respect rights as a 'primary obligation', the duty to protect rights as a 'secondary obligation', and the duty to promote and fulfil rights as a 'tertiary obligation'.

³⁸ *Minister of Defence and Military Veterans v Thomas* 2016 (1) SA 103 (CC) para 19; *The Isibaya Fund v Visser and Another* [2016] JOL 34756 (SCA) para 10.

³⁹ 2011 (3) SA 347 (CC) para 105.

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resources. The Constitution leaves it to the State to choose the means by which it will comply with its duties.⁴⁰ The State has chosen taxation as a finance measure to capacitate itself for this purpose. From a tax law perspective, s 7(2) creates positive and negative duties. On the one hand, ‘respect’ entails a negative duty to refrain from interfering with a taxpayer’s constitutional rights. On the other hand, ‘protect’ entails a positive duty to, first, take appropriate steps to ensure that there is no unwarranted interference with the enjoyment of any constitutional right of a taxpayer and, secondly, to provide an effective remedy against an intrusion on any such right. The State is, thus, also a guardian of rights. This is a basic tenet of the constitutional State.⁴¹ ‘Promote’ consists of a positive duty to bring the rights in the BOR to a taxpayer’s attention. Access to justice in taxation requires that taxpayers are aware of their rights. A taxpayer cannot enforce a right of which he/she/it is unaware. ‘Fulfil’ imposes a positive duty to proactively develop and implement measures that will fully realise basic rights. Examples hereof are the Promotion of Access to Information Act⁴² and Promotion of Administrative Justice Act.⁴³

The BOR reinforces constitutional supremacy. Section 8(1) stipulates that the BOR ‘binds ... all organs of state’. This means that the BOR applies to all their actions and the results thereof.⁴⁴ The CC, in *Carmichele v Minister of Safety and Security and Another*⁴⁵ (*Carmichele*), held that, in addition to the negative duty on the State and its organs not to infringe rights in the BOR, the Constitution imposes ‘a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection’. As explained below at para 3.3.2.2.2, SARS and the CSARS are organs of state engaged in public administration in the form of

⁴⁰ *Glenister* para 107.

⁴¹ Van der Walt AJ ‘The State’s duty to protect property owners v the State’s duty to provide housing: Thoughts on the *Modderklip* case’ (2005) 21(1) *SAJHR* 144; du Bois F ‘State liability in South Africa: A constitutional remix’ (2010) 25 *Tulane European & Civil Law Forum* 139.

⁴² Act 2 of 2000 (PAIA). This is a national statute contemplated by s 32(2) of the Constitution that gives effect to the right, in s 32(1), of access to information held by the State and other persons that is required for the exercise or protection of any right. See *My Vote Counts* paras 142-49.

⁴³ Act 3 of 2000 (PAJA). This is national legislation contemplated by s 33(3) of the Constitution that gives effect to the right, in s 33(1), to lawful, reasonable and procedurally fair administrative action, as well as to the right to have written reasons furnished. See *My Vote Counts* para 148.

⁴⁴ Rautenbach IM *Rautenbach-Malherbe Constitutional Law* 6 ed (2012) 289.

⁴⁵ 2001 (4) SA 938 (CC) para 44. See also *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20. For a discussion of state liability, see du Bois F (2010) 139.

tax administration. As such, they are part of SA's broader governance structure. The irresistible inference is, thus, that the BOR applies in taxation and tax administration. 'Binds' in s 8(1) is narrower in meaning than 'respect, protect, promote and fulfil' contained in s 7(2). Both s 7(2) and s 8(1) have financial resource or budgetary implications for the State when it undertakes measures designed to 'promote and fulfil' rights in the BOR. From a tax law perspective, s 8(1) obliges SARS and the CSARS to conduct tax administration in a manner that respects and protect taxpayers' constitutional rights. This construction is compatible with the duties arising from s 10,⁴⁶ and the new constitutional ethos of respect and tolerance. Hence, the impugned TAA provisions must be applied in a way that evinces respect for, and protection of, fundamental rights.

3.2.4 Constitutional values of an open and democratic society

The Constitution is 'not merely a contemporization and incremental articulation of previously accepted and entrenched values shared in our society'.⁴⁷ It is underpinned by interrelated, interdependent and indivisible values that facilitate the achievement of transformation. In SA, constitutional values are, in all spheres of public and private life, authoritative guides to constitutionally acceptable conduct and laws. The Constitution establishes a new legal order in which every person, public official, organ of state, public enterprise, sphere of government and institution is obliged to subscribe to, be infused with, and adhere to, its values. They are an important part of the Constitution's 'spirit' that are relevant considerations during any process of constitutional and statutory interpretation. Interpretation of the BOR must, under s 39(1)(a), 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. This reinforces a dominant constitutional theme, namely, that the Constitution is a bridge between a past based on injustice and oppression, and a future premised on equality, pursuit of social justice and peace, and the recognition of human rights and freedoms.

⁴⁶ The Constitution (s 10) reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' For a discussion of dignity, see *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 35-37 (*Dawood*).

⁴⁷ *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) para 28.

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The Constitution in, for example, ss 195(1) and (3) distinguishes between ‘values’ and ‘principles’. This dichotomy is important. The Constitution does not define either term. Constitutional values are general norms formulated rather broadly.⁴⁸ Venter contends,⁴⁹ persuasively, that ‘value’ does not connote something of ‘material worth’ but rather an abstract concept indicating a certain ‘standard or a measure of good’ which ‘set requirements for the appropriate or desired interpretation, application and operationalisation of the constitution and everything dependent thereupon’. Thus, as Venter contends, if a law or conduct fails to conform to the standards of a constitutional value, then it would mean that it conforms to standards of a lower, different, conflicting or extra-constitutional measure, thereby leading to unconstitutionality. In other words, constitutional values are the barometers or yardsticks against which law and conduct are tested for validity. On the other hand, constitutional principles are, as Venter explains, those principles founded in, and which give expression to, a specific constitutional value. For example, the principle that law must be applied fairly and equitably is premised on the values of justice and equality. In this dissertation, unless otherwise stated or indicated by context, constitutional ‘values’ and ‘principles’ bear the meaning ascribed by Venter.

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Public policy and society’s *boni mores* (‘good morals’) are rooted in the Constitution and infused with its values.⁵⁰ To be valid, they must pass constitutional muster.⁵¹ They cannot be repugnant to the Constitution. The community’s convictions take on constitutional contours. They are ‘underpinned and informed by the norms and values of our society’ as embodied in the Constitution.⁵² Society’s *mores* evolve as social dynamics, values or

⁴⁸ Du Plessis LM ‘The Bill of Rights in the working draft of the new Constitution: An evaluation of aspects of a constitutional text *sui generis*’ (1996) 7(1) *Stell LR* 3.

⁴⁹ Venter F ‘Utilizing constitutional values in constitutional comparison’ (2001) 4(1) *PELJ* 20 25-6. Michelman FI ‘The Rule of Law, Legality and the Supremacy of the Constitution’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 02-05) 11-35 states: ‘Values ... serve as reasons for rules; conversely rules ... serve to implement values.’ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 789 define ‘values’ as follows: ‘Important and lasting beliefs or ideals contained in a constitution and/or shared by the members of a culture about what is good or bad and desirable or undesirable.’

⁵⁰ *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) 218.

⁵¹ *Cool Ideas* para 126; *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) para 39; *Combined Developers v Arun Holdings and Others* 2013 JDR 2017 (WCC) 19-25.

⁵² *Loureiro and Others v Invvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 34.

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conceptions change.⁵³ However, despite ‘tectonic shifts in the attitudes and *mores* of society’,⁵⁴ the Constitution’s text remains constant until formally amended.⁵⁵ This is a hallmark of democracy. Whilst its provisions are open to interpretation, no words may be read into its texts that are not expressly written therein, nor may words expressly written therein be ignored or overlooked.⁵⁶ As explained above in chapter two, these are crucial principles that guide the process of constitutional interpretation. The Constitution is a living document ‘capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers’.⁵⁷ *Tempora mutantur et nos mutamur in illis* (‘times change and we change with them’). The flexibility and adaptability in the application of the Constitution is a pillar of its strength and durability. Without a formal amendment to its text, the values enumerated therein do not change or alter. However, since the values are general norms open to interpretation, their content is not static and may be developed incrementally by reference to ‘new’ or enlightened values that underlie an open and democratic society. This reflects their flexibility and dynamism.⁵⁸ The common law and customary law are also subject to development in accordance with the BOR (s 39(2)). In this way, they adapt to keep abreast with, and reflect, the changing social, moral and economic fabric of SA.⁵⁹

⁵³ *DE v RH* 2015 (5) SA 83 (CC) paras 17-22. The CC, in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 97, confirms that the texture and meaning of human rights are not ‘frozen’ but are ‘open to elaboration, reinterpretation and expansion’ as ‘the conditions of humanity alter and as ideas of justice and equity evolve’.

⁵⁴ *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C) 471D.

⁵⁵ Henkin L (1992) 884-85 states that an interpreter of a constitution ‘cannot modify the text of the Constitution: when there is text, we respect it (or are stuck with it). But when the text is silent or uncertain, two themes ought to be relevant: one is constitutionalism, the other, democracy’. For a discussion of the judiciary’s role when interpreting the Constitution, see Davis DM ‘Integrity and ideology: Towards a critical theory of the judicial function’ (1995) 112(1) *SALJ* 104.

⁵⁶ *Zuma* para 17.

⁵⁷ *Hunter v Southam Inc* [1984] 11 DLR (4th) 641 (SCC) 649. Udombana NJ (2005) 56 writes: ‘In determining the meaning and scope of guaranteed rights, a constitutional court should constantly remind itself that a constitution is not a document frozen in time but is a living instrument to be applied to the changing needs of a society still in the process of maturation.’

⁵⁸ Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 88 writes: ‘Formalism and flexibility are intrinsically opposed to each other. The one makes for certainty of the law, the other for equity – the two principles on which justice is based. These principles are antagonistic. Yet the legal system must try to realize both simultaneously. That makes ideal justice a Utopian idea, for the one principle must always be precariously balanced against the other. To carry through the one without any regard to the other would lead to extreme injustice.’

⁵⁹ *DE v RH* 2015 (5) SA 83 (CC) paras 16 23-7.

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Constitutional values are the building blocks of democracy in SA. As stated above in chapter one, there is no hierarchy of constitutional values. Each is equal in status and prominence. Constitutional values are not discrete and enforceable rights, except to the extent that a value (such as, human dignity and equality) is elevated to the status of a fundamental right.⁶⁰ The paramountcy of the founding values in s 1 of the Constitution is self-evident from the high threshold requirements imposed by s 74(1) thereof for an amendment to s 1 and s 74(1) itself. To pass, an amendment Bill must be supported by at least 75 percent of the members in the National Assembly and at least six provinces in the National Council of Provinces. This requirement is more stringent than that applicable to an amendment of any other provision in the Constitution. Sections 1 and 74(1) are, thus, the Constitution's most entrenched provisions. This exemplifies the significance attached to the values in s 1. They inform and give substance to all the Constitution's provisions.

Whereas the interim Constitution mentioned values only in s 35,⁶¹ the final Constitution has various references thereto. Section 1 lists the founding values, namely, human dignity,⁶² achievement of equality,⁶³ and the advancement of human rights and freedoms (s 1(a)), non-racialism and non-sexism (s 1(b)), constitutional supremacy and rule of law (s 1(c)), as well as universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government in a unitary State, to ensure

⁶⁰ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) para 21; *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) paras 74-6. For a detailed analysis and comparison between human dignity as a constitutional value and a constitutional right, see Barak A (2015) 67-242.

⁶¹ For a discussion of s 35, see Davis D, Chaskalson M & de Waal J 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in van Wyk D, Dugard J & Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 127-30.

⁶² Jackson VC 'Constitutional dialogue and human dignity: States and transnational constitutional discourse' (2004) 65 *Montana Law Review* 15 23 states that 'dignity of the human being is the "moral basis for democratic government"', and implies the "essential equality" of all people before the law'. For a discussion of human dignity, see *Kylie v CCMA and Others* 2010 (4) SA 383 (LAC); *Le Roux and Others v Dey* 2011 (3) SA 274 (CC). See also Muswaka L 'Sex worker and the right to fair labour practices: *Kylie v Commissioner for Conciliation, Mediation and Arbitration*' (2011) 23(3) *SA Merc LJ* 533.

⁶³ For a discussion of equality, see *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) paras 60-1. See also de Vos P 'The right of a lesbian mother to have access to her children: Some constitutional issues' (1994) 111(4) *SALJ* 687; Cachalia A, Cheadle H & Davis D *et al* (1994) 24-32; Albertyn C & Goldblatt B 'Equality' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 3 (Original service 03-07) 35-1 – 35-85.

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accountability,⁶⁴ responsiveness and openness (s 1(d)).⁶⁵ Implicit in the Constitution's text, tone and structure are other values of a mature society.⁶⁶ These include fairness,⁶⁷ democratic and co-operative government (s 40, s 41), diversity,⁶⁸ inclusiveness,⁶⁹ constitutionalism, democracy, *ubuntu*, transformation, separation of powers,⁷⁰ and social justice. This is not an exhaustive list of fundamental values (or *grundnorms*) in SA.⁷¹

⁶⁴ Accountability requires persons responsible for discharging public office to account or take responsibility for their actions. Openness reflects the government's candour about its structures, functions and operations. See Kriel RR & Monadjem M 'Public Finance' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) 27-26.

⁶⁵ Accountability and transparency are essential for achieving transformation. See Kriel RR & Monadjem M 'Public Finance' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) 27-24 – 27-27. OXFAM describes their importance for socio-economic rights as follows: 'Unaccountable government represents a substantial obstacle to development, preventing people from exercising their rights and accessing essential services. At a minimum, it can lead to mismanagement of public funds; at its worst, it can lead to outright corruption. When citizen oversight is absent and the power to allocate public resources lies in the hands of an elite group of unaccountable decision makers, it is all too easy for resources to be diverted from their intended use and abused for private gain. As a result, people fail to receive the public services, such as health care and education, to which they are entitled and which would enable them to work their way out of poverty.' See OXFAM International *Held to Account: Putting Democratic Governance at the Heart of Development Finance* (October 2013) at 5 available at <http://www.oxfam.org/en/policy/held-account> (accessed 6 November 2013).

⁶⁶ *Makwanyane* para 222. Roederer C 'Founding Provisions' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original Service 12-05) 13-3 points out that the values contained in the Constitution are neither fixed, exhaustive nor settled.

⁶⁷ *Cool Ideas* para 126.

⁶⁸ *Van Rooyen* para 34; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 49; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) para 75. As a value, 'diversity' is a norm based on pluralism in society requiring tolerance, care and respect for all persons and things and an accommodation of their differences.

⁶⁹ *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 67.

⁷⁰ For a discussion of separation of powers, see *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 60; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95; *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) para 47; *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA) para 12; *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA); *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others* 2013 (5) SA 571 (CC) paras 13-38. The TAA (ss 111(3) and 120(4)) provides for the executive power of the Minister of Finance and the President of the RSA to terminate the appointment of any member of the Tax Board or Tax Court respectively. The TAA (s 108(1)(b) and s 116(1)) provides for their executive authority to abolish Tax Boards and Tax Courts respectively. It is submitted that the independence of Tax Courts and Tax Boards must be maintained for the proper administration of justice in tax appeals. *Prima facie*, these TAA provisions appear to offend the principle of separation of powers and the independence of the Tax Board and Tax Court. An investigation of this question falls outside the scope of this dissertation.

⁷¹ Cornell D 'Is There a Difference That Makes a Difference Between Ubuntu and Dignity?' in Woolman S & Bilchitz D (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 222 explains that a *grundnorm* is the grounding moral or ethical principle that undergirds not only a legal system but also society as a whole. Where competing values are at play, legal effect must be given to the value(s) whose

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Sachs J, in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁷² captured the essence of constitutional values etched in SA's democratic make-up as follows:

'The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation.'

Not all the constitutional values are relevant to taxation and tax administration. The relevant ones include: (i) those aiding in interpretation (discussed above in chapter two), (ii) those governing public administration (discussed below in chapter five), and (iii) those assisting in determining the validity of the impugned TAA provisions (discussed below in chapter ten). Except for equality and its achievement, discussed below in chapter six, the present chapter will discuss the other relevant constitutional values.

3.3 CONSTITUTIONAL VALUES APPLICABLE IN THE TAX ARENA

3.3.1 An overview of South Africa's tax laws

Most, if not all, commercial transactions, even illegal ones, have 'fiscal consequences'.⁷³

The duty to pay tax and perform acts ancillary thereto does not expressly arise from the

protection is, in the particular circumstances of a case, the one(s) which 'most closely illuminates the constitutional scheme to which we have committed ourselves' (per Cameron J in *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 495).

⁷² 2008 (2) SA 24 (CC) para 149. For a general discussion of constitutional values, see Botha H 'The values and principles underlying the 1993 Constitution' (1994) 9(2) *SAPL* 233; Beukes M 'Justice and other values: Does the judiciary have a monopoly on their content?' (1997) 12(2) *SAPL* 437; Henderson AJH 'Putting section 1 to work: Some preliminary thoughts on the first of the founding provisions of the new constitution' (1998) 115(1) *SALJ* 215 216; Nishihara H 'The significance of constitutional values' (2001) 4(1) *PELJ* 2.

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Constitution or the uncodified common law.⁷⁴ Consistent with the English common law tradition of SA,⁷⁵ this duty arises *ex lege* from statute. Taxation is a creation of statute.⁷⁶ South Africa has a labyrinth of national taxes imposed by, inter alia, the Customs and Excise Act (C&EA),⁷⁷ Income Tax Act (ITA), Value-Added Tax Act (VATA),⁷⁸ Estate Duty Act (EDA),⁷⁹ Securities Transfer Tax Act,⁸⁰ Transfer Duty Act (TDA),⁸¹ Skills Development Levies Act⁸² and Unemployment Insurance Contributions Act.⁸³ This list is not exhaustive. It is, however, illustrative of SA's strong taxing culture. Its tax structure⁸⁴ comprises a portfolio of direct taxes (such as, income tax⁸⁵ and estate duty)⁸⁶ and indirect taxes (such as, value-added tax,⁸⁷ transfer duty,⁸⁸ securities transfer tax,⁸⁹ donations tax and capital gains tax).⁹⁰ Except for the C&EA, each statute mentioned above is included in the constellation of 'tax Acts' administered under the auspices of the TAA.

The national tax base of SA comprises broadly two categories of statutory 'persons',⁹¹ namely, natural persons and persons other than natural persons. The latter category

⁷³ *MP Finance Group CC (in liquidation) v CSARS* 2007 (5) SA 521 (SCA) para 12. For tax law purposes, a 'transaction must be considered in its entirety from a commercial perspective and not be broken into component parts or subjected to narrow legalistic scrutiny' (*CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) para 34).

⁷⁴ It is submitted that the duty to pay tax is an implied correlative of the constitutional entitlements in s 3(2). It reads: 'All citizens are- (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship.'

⁷⁵ Dicey *AV Introduction to the Study of the Law of the Constitution* 8 ed (1931) 311 states that in English law, 'all taxes are imposed by statute, and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under Act of Parliament'.

⁷⁶ Meyerowitz D (2008) 1-1 para 1.2; Croome BJ, Oguttu A & Muller E *et al* (2013) 19.

⁷⁷ Act 91 of 1964.

⁷⁸ Act 89 of 1991.

⁷⁹ Act 45 of 1955.

⁸⁰ Act 25 of 2007.

⁸¹ Act 40 of 1949.

⁸² Act 9 of 1999.

⁸³ Act 4 of 2002.

⁸⁴ 'Tax structure' refers to a set of national taxes responsible for the total tax revenue of SA.

⁸⁵ Section 5, ITA.

⁸⁶ Section 3, EDA.

⁸⁷ Section 7, VATA.

⁸⁸ Section 2, TDA.

⁸⁹ Section 2, Securities Transfer Tax Act.

⁹⁰ Section 54 read with 26A (and the Eighth Schedule), ITA.

⁹¹ In this dissertation, reference hereafter to 'statutory persons' is a general reference to every natural and juristic person included in the definition of 'person' contained in any South African statute.

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includes private companies, state-owned companies, close corporations, certain collective investment scheme portfolios, trusts, the estates of insolvent and deceased persons, and municipal authorities. For reasons discussed above in chapter one, the national government has introduced measures designed to (i) protect SA's tax base from erosion,⁹² and (ii) expand its tax base, for example, by introducing new taxes (such as, capital gains tax⁹³ and turnover tax),⁹⁴ by increasing tax rates (such as estate duty), by converting SA from an exclusively source based income tax regime to a hybrid system that is mainly residence based and to a lesser degree source based,⁹⁵ by introducing a voluntary disclosure programme for taxpayers,⁹⁶ and by eliminating certain tax deductible items. Such measures are, on their own, insufficient to maintain adequate levels of tax revenue required to meet the South African society's demands on its government.⁹⁷ The plethora of SA's tax laws requires a sophisticated, technologically advanced tax administration agency able to cope with the onerous task of administering a complex tax system for the benefit of the public and the *fiscus*. Thus, to maximise tax collection and combat tax minimisation efficiently and effectively, SARS must be structured properly and have adequate powers (discussed below in chapters and nine respectively). However, a fair balance must be struck between, on the one hand, achieving the objectives of taxation, discussed above in chapter one, and, on the other, the transformative goals of the Constitution (discussed above at para 3.2.3). In this regard, constitutional values play an important role in guiding an interpreter to a result that conforms to the Constitution.

⁹² For example, the introduction of more stringent requirements in s 30 of the ITA for tax exemption status, and the introduction of revised general anti-avoidance rules in ss 80A-L of the ITA.

⁹³ Capital gains tax was introduced by the Taxation Laws Amendment Act 5 of 2001. For a discussion of the legislative framework of this tax, see *ITC 1871* (2014) 76 SATC 109 paras 23-32; *New Adventure Shelf 122 (Pty) Ltd v CSARS* [2016] 2 All SA 179 (WCC) paras 38-55. Williams RC *Capital Gains Tax: A Practitioner's Manual* 2 ed (2005) 1 points out that 'capital gains tax' is a colloquial term that is not utilised in the ITA.

⁹⁴ Turnover tax is a separate tax regime for micro businesses designed to lower their administrative burden. This system replaces income tax, value-added tax, capital gains tax, provisional tax and dividends tax for qualifying micro businesses with an annual turnover as prescribed by law. See <http://www.sars.gov.za/TaxTypes/TT/Pages/default.aspx> (accessed 8 November 2014).

⁹⁵ The Revenue Laws Amendment Act 59 of 2000 introduced the residence based income tax system with effect from the tax year commencing 1 January 2001. For a discussion of this regime, see Olivier L 'Residence based taxation' (2001) 1 *TSAR* 20.

⁹⁶ Chapter 16 Part B, TAA.

⁹⁷ Critical among the demands of SA's people are the legitimate expectations, reflected in the national commitments outlined in the Preamble, of social justice, fulfilment of socio-economic rights, and an improved quality of life for all South African citizens and others living in SA.

3.3.2 The rule of law

3.3.2.1 Conceptualisation of the rule of law

The rule of law, a founding value in s 1(c), is the formula expressing the notion that in legal systems with a written constitution and Bill of Rights, the constitution (not statute and judicial *dicta*) is the source of security for those rights.⁹⁸ The rule of law keeps the exercise of public power and functions within acceptable limits by requiring the State and its officials to act lawfully.⁹⁹ The rule of law entails the absolute predominance of regular law. It excludes arbitrariness¹⁰⁰ and untrammelled prerogative or discretion in the hands of government officials. Thus, the rule of law is umbilically linked to the notion of a *Rechtsstaat*: principles of justice in governance requiring public institutions to be accountable to laws that are clear and publicly promulgated, equally enforced, uniformly interpreted, independently adjudicated, and are consonant with international human rights norms and standards.¹⁰¹ When viewed in this light, the rule of law prohibits sanction, except for a clear breach of the law established by a competent authority following due legal process. In this way, the rule of law benefits and protects all persons equally against capricious, oppressive, authoritarian or discriminatory laws and conduct.¹⁰²

⁹⁸ Dicey AV (1931) 198-99. See de Ville JR 'The rule of law and judicial review: Re-reading Dicey' 2006 *Acta Juridica* 62. For development of the rule of law, see South African Law Commission (SALC) *Project 58: Group and Human Rights* (August 1989) Working Paper 25 at 17-22. The UDHR records that 'it is essential ... that human rights should be protected by the rule of law'.

⁹⁹ Devenish GE (1999) 14. For the legal test to determine if a power or function is of a public nature, see *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) para 53; *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) paras 24 38-40; *M&G Ltd and Others v 2010 FIFA World Cup Organising Committee SA Ltd and Another* 2011 (5) SA 163 (GSJ) paras 220-22.

¹⁰⁰ Arbitrariness connotes caprice, or the exercise of the will instead of (justifiable) reason or principle, or a decision reached without consideration of the merits or without following due process. See *Johannesburg Liquor Licensing Board v Kuhn* 1963 (4) SA 666 (A) 671C; *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) para 128. In *ITC 1717* (2002) 64 SATC 32 40 Davis J held that a 'justifiable' decision is one grounded in 'rational justification'. See also *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC) para 37.

¹⁰¹ United Nations *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General* (August 2004) 4 available at http://www.un.org/en/rule_of_law (accessed 13 June 2014).

¹⁰² *FNB* paras 62-71; *New National Party of SA v Government of the Republic of SA and Others* 1999 (3) SA 191 (CC) paras 19 24 (*New National Party*). For a foreign law perspective, see

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The rule of law establishes a government of laws, not people. Although described as an ‘unruly horse’ devoid of a fixed meaning,¹⁰³ a basic tenet of the rule of law is the equal subjection of everyone to the law administered by courts without fear, favour or prejudice.¹⁰⁴ Hence, under the rule of law, no person of whatever rank or status is above the law and cannot claim exemption from the duty to obey the laws governing everyone, nor can any person claim exemption from the courts’ jurisdiction.¹⁰⁵ The rule of law underlies the legal order created by the Constitution. Respect for the rule of law ‘is crucial for a defensible and sustainable democracy’.¹⁰⁶ The rule of law requires measures that serve to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to and fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The Constitution adds depth and content to the rule of law through, inter alia, the core founding values (s 1), constitutional supremacy (s 2), the rights in the BOR (Chapter 2), and the delineation between the powers of the three arms of government, namely, the legislature (s 40), executive (s 83, s 85, s 125, s 156) and the judiciary (s 165). The rule of law is an alternative basis for reviewing legislation over and above an inconsistency with the BOR or a procedural irregularity. Incongruence with the rule of law is a ground for a declaration of invalidity by a competent court of law.

MacCormick v Federal Commissioner of Taxation (1984) 158 CLR 622 639-40; *Deputy Federal Commissioner of Taxation v Truehold Benefit (Pty) Ltd* (1985) 158 CLR 678 684; *Law Society of Zimbabwe and Another v Minister of Finance* (1999) 61 SATC 458 470.

¹⁰³ Matthews AS ‘A bridle for the unruly horse’ (1964) 81(3) *SALJ* 312 313.

¹⁰⁴ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) paras 65-8 76. See also *ARMSA v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC); *Savoi and Others v NDPP and Another* 2014 (5) BCLR 606 (CC). For the quintessential characteristics of the rule of law, see Malan K ‘The rule of law versus decisionism in the South African constitutional discourse’ (2012) 45(2) *De Jure* 272 276-80. For the principles encapsulated in the rule of law generally, see also Radin MJ ‘Reconsidering the rule of law’ (1989) 69 *Boston University Law Review* 781; Craig P ‘Formal and substantive conceptions of the rule of law: An analytical framework’ (1997) *Public Law* 467; Luoga FDAM ‘Taxpayers’ rights in the context of democratic governance: Tanzania’ (2002) 33(3) *IDS Bulletin* 1 2-4; Stewart C ‘The rule of law and the tinkerbell effect: Theoretical considerations, criticisms and justifications for the rule of law’ (2004) 4 *Macquarie LJ* 135; Dyzenhaus D ‘The past and the future of the rule of law in South Africa’ (2007) 124(4) *SALJ* 734.

¹⁰⁵ In *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA) para 14 Mahomed CJ explains the operation of rule of law as follows: ‘No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution.’

¹⁰⁶ *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) paras 16-17.

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The rule of law is not ‘an empty vessel into which any law could be poured’.¹⁰⁷ In *Savoi and Others v National Director of Public Prosecutions (NDPP) and Another*¹⁰⁸ the Court commented that this sacrosanct rule is paramount to the success of all nations. Ngcobo J, in *Masetlha v President of the Republic of South Africa and Another*¹⁰⁹ (*Masetlha*), linked the rule of law to the founding values of accountability, openness and responsibility and held that non-arbitrariness ‘refers to a wider and deeper principle: fundamental fairness’. The operation of the rule of law ensures that government and its officials at all levels perform their functions subject to the law.¹¹⁰ The rule of law, as a legal *cum* political code of conduct, is a true benchmark against which the constitutionality of the exercise of power pursuant to any impugned TAA provision may be tested. An application of the rule of law may also lead to the invalidity of a TAA provision where, for example, the language of a provision is so inarticulate, vague or unclear that it creates a reasonable degree of uncertainty as to its precise meaning or import.¹¹¹ Likewise, this would be the case if, viewed objectively, there is no rational connection between, on the one hand, a measure adopted in the TAA and, on the other, the purpose sought to be achieved thereby¹¹² or the purpose for which a particular public power is conferred.¹¹³

¹⁰⁷ Per Chief Justice Arthur Chaskalson, World Justice Forum, 2008 available at http://www.ifaisa.org/Accountability_and_the_rule_of_law.html (accessed 31 January 2014).

¹⁰⁸ [2013] 3 All SA 548 (KZP) para 105.

¹⁰⁹ 2008 (1) SA 566 (CC) para 179.

¹¹⁰ At the International Ombudsman Institute VIIth International Conference on Balancing the Exercise of Governmental Power and its Accountability, Durban, 2000 Nelson Mandela stated: ‘Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.’

¹¹¹ *Veldman v DPP*, WLD 2007 (3) SA 210 (CC) para 26.

¹¹² The CC held, in *New National Party* para 19, that ‘there must be a rational relationship between the scheme ... and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.’ See also *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) paras 74-5 (*Affordable Medicines*). Thus, an arbitrary, capricious or unnecessary tax or one not aimed at achieving a social, economic or other constitutionally desirable objective of tax, is unsustainable. The courts in the USA apply the rational basis test in matters of economic regulation. See *Hodel v Virginia Surface Mining Reclamation Association -* (1981) 452 US 264 276 (*Hodel*). This test postulates that legislation does not need to be logically consistent in every respect with the aims of the statute concerned. It is sufficient if there is an ‘evil’ sought to be corrected and the measure imposed is directed at addressing that mischief. Therefore, the issue is simply whether the law is rationally related to a legitimate public interest.

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The rule of law is a bedrock value upon which the culture of constitutionalism rests. Constitutionalism is a national commitment or compact to limit public power and balances fundamental values against the exercise of such power.¹¹⁴ The notion of a *Rechtsstaat* cannot be reconciled with untrammelled or uncontrolled public power by State authorities, organs, functionaries and institutions. The exercise thereof is always subject to constitutional control.¹¹⁵ Thus, in *Pharmaceutical Manufacturers*,¹¹⁶ the CC held that the Constitution is a legal watershed, shifting constitutionalism from the realm of the common law to the precepts of a written instrument. However, constitutionalism means more than simply limiting governmental arbitrariness. It combines two main pillars. First, the idea of a government and its organs limited in its action by constitutional constraints based on clearly defined core values. Secondly, a government and its organs are accountable to the citizenry for its actions by way of a clearly defined mechanism for ensuring that the limitations on the government and its organs are legally enforceable. Fombad¹¹⁷ identifies the core elements of constitutionalism as: (i) the recognition and protection of fundamental rights and freedoms; (ii) the separation of powers between the legislature, executive and judiciary; (iii) an independent judiciary; (iv) the review of the constitutionality of laws; (v) the control of amendments to the Constitution; and (vi) the presence of institutions that support or reinforce democracy.

¹¹³ *Pharmaceutical Manufacturers* paras 85-90. Rationality in this sense means that if, viewed objectively, a rational connection is lacking then the exercise of the taxing power is irrational, arbitrary and, thus, unlawful. Kruger R (2010) 483 points out that this rationality enquiry requires that consideration be given to the purpose for which the public power being exercised was granted 'without necessarily considering specific rights or the standards set by specific rights' although consideration is given to 'substantive standards in relation to a particular context'.

¹¹⁴ Mhlaba MW 'The operation of democracy and the role of the judiciary in a constitutional state' (2010) 24(1) *SJ* 43 44. A single definition of constitutionalism has proved elusive. Cachalia A, Cheadle H & Davis D *et al* (1994) 3 explain constitutionalism to be 'about balancing the principles of liberty and equality against power'. Currie I & de Waal J (2014) 8-10 contend that constitutionalism is the idea that a government derives power from a written instrument and that its powers are proscribed by limitations therein. Henkin L (1992) 885-86 states that constitutionalism requires respect for rights and implies that governance is subject to checks and balances of an overriding constitution monitored by the judiciary through a process of review. Devenish GE (1999) 5 defines constitutionalism as a 'commitment to limitations on ordinary political power, and very often involves an anti-democratic strategy'.

¹¹⁵ *Minister of Justice & Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) para 27; *Democratic Alliance v Speaker of the National Assembly and Others* 2015 (4) SA 351 (WCC) para 29. See also *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 654.

¹¹⁶ *Pharmaceutical Manufacturers* para 45.

¹¹⁷ Fombad CM 'The Constitution as a source of accountability: The role of constitutionalism' (2010) 24(2) *SJ* 41 44. See also de Vos P, Freedman W (eds) & Brand D *et al* (2014) 38-59.

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It is submitted that, based on the foregoing discussion, the following principles lie at the heart of the rule of law as it applies in SA under its Constitution:

- (a) equality of all persons before the law and the right of all persons to equal protection of the law. This principle is encapsulated in the Constitution (s 9(1));
- (b) the protection of rights and liberties. This principle is incorporated in the Constitution (s 1) in so far as it provides for 'the advancement of human rights and freedoms' as well as the adoption of the BOR therein (Chapter 2).
- (c) a uniform interpretation of the law. This is provided in s 39 of the Constitution.
- (d) the government, its organs and their officials are accountable under the law. This democratic principle is contained in the Constitution (s 195(1)(f));
- (e) laws must be clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and their property;¹¹⁸
- (f) the process whereby laws are enacted, administered, amended and enforced is accessible, comprehensible, predictable, fair and efficient.¹¹⁹ These principles are grafted into the Constitution in, for example, s 33 and s 195(1)(d) and (g); and
- (g) access to, or the pursuit of, justice (s 34) requires competent, independent, impartial and ethical adjudicators (judicial officers) who are of sufficient number, have adequate resources and reflect the make-up of the society they serve.¹²⁰

¹¹⁸ Currie I & de Waal J (2014) 10.

¹¹⁹ *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) para 52. Craig P (1997) 467, Kruger R (2010) 475-79 and Raz J 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195 198-99 each distinguish between formal and substantive conceptions of the rule of law. The former concerns the manner, form and procedures for the enactment of laws, their clarity, and whether laws operate prospectively only or retrospectively. The latter seeks to develop certain substantive rights emanating from, or premised upon, the rule of law. Thus, this rule can be used to distinguish 'good' laws complying with such rights from the 'bad' laws that do not. See Bachmann SD & Frost T (2012) 308. Apartheid laws lacked a substantive component of the rule of law because they were inherently unfair: laws were passed by a government that was undemocratic, and the laws were discriminatory, not susceptible to judicial review, vested wide discretionary powers in the national executive, and failed to recognise and protect human rights.

3.3.2.2 Operation of the rule of law in taxation and tax administration

3.3.2.2.1 Implications of vagueness in tax legislation

Croome and Olivier¹²¹ state: ‘It is an international phenomenon that the rules governing the administration of taxes are often complicated, confusing and arbitrary.’ Such a state of affairs, if true, would run counter to the rule of law. Complexity in a tax system fosters uncertainty. Simplicity and certainty are hallmarks in the design of a credible tax system.¹²² They are engrained in the values of accountability, openness and the rule of law. The Meade Committee¹²³ emphasised that certainty and simplicity mean that

¹²⁰ The Constitution (s 174(1)) imposes two pre-requisites for judicial competence, namely, an ‘appropriately qualified woman or man who is a fit and proper person’. For the meaning of ‘appropriately qualified’ and ‘fit and proper person’, see *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) paras 13-26 (*Democratic Alliance 1*). Judicial independence is guaranteed by the Constitution (s 165(2)). See *Justice Alliance of South Africa v President of the Republic of South Africa and Others*; *Freedom Under Law v President of the Republic of South Africa and Others*; *Centre for Applied Legal Studies and Another v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) paras 66-8 (*JAOSA*); *Hlophé v Premier of the Western Cape Province*; *Hlophé v Freedom Under Law and Others* 2012 (6) SA 13 (CC) para 24 (*Hlophé*). Judicial independence is an ‘evolving concept’ (*Van Rooyen* para 75). The Constitution (s 34) requires courts, tribunals and forums (including Tax Courts and Tax Boards) to be independent. This is a component of a taxpayer’s right of access to justice under the rule of law. The TAA (s 120(6)) reads: ‘A member of the tax court must perform the member’s functions independently, impartially and without fear, favour or prejudice.’ Although no comparable provision exists concerning the Tax Board, it is submitted that this standard applies equally to it by virtue of the operation of the rule of law in s 1(c) of the Constitution.

¹²¹ Croome BJ & Olivier L *Tax Administration 2* ed (2015) xxi. Bentley D *A Model of Taxpayers’ Rights as a Guide to Best Practice in Tax Administration* (unpublished PhD thesis, Bond University, 2006) 109 writes: ‘Tax law is complex and voluminous.’ Similarly, Williams B ‘Taxpayers’ rights in South Africa’ (1997) 7(1) *RLJ* 1 3 states: ‘Around the world, taxing statutes are notorious for their incomprehensibility and South Africa is no exception.’ Kruger D, Stein M & Dachs P *et al* (2012) 2 state that the ‘Internal Revenue Code of the United States ... contains some provisions so complex that the consensus of opinion is that there is no human brain alive today capable of determining all their implications’.

¹²² Margo Commission *Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa* (1987) ch 4 part III (Margo Commission Report (1987)). See also Emslie TS & Davis DM (2012) 7-8 13. For a discussion of certainty and simplicity as essential qualities of a good tax system, see Alley C & Bentley D (2005) 597-99.

¹²³ Meade Committee *Structure and Reform of Direct Taxation* (1978) ch 2 (Meade Committee Report (1978)). See also Emslie TS & Davis DM (2012) 3-11. Sommerhalder RA (1997) 79 states that tax simplification consists of simplicity in tax administration and simplicity of tax laws. He explains this as follows: ‘Simplicity for taxpayers occurs if they can know and determine their tax liability clearly and simply. ... For the tax authorities, simplification means a reduction of the complexity of their tax assessment task. Simplicity of the tax law means that the law must clearly, simply and unambiguously stipulate the elements for determining the amount of tax.’

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taxpayers are empowered with sufficient information to determine, without much further ado, the principle on which the tax base is chosen, the intended purpose of a particular tax, what is taxable and what is not in a given set of circumstances, and what the law commands of a taxpayer and what it forbids. Adam Smith¹²⁴ succinctly explained the importance of clarity in taxation by pointing out that ‘a very considerable degree of inequality ... is not near so great an evil as a very small degree of uncertainty’.

Stability in law is part of the rule of law established by consistency in the interpretation and application of tax laws. Stability breeds certainty. The judiciary in SA adheres to the doctrine of precedent encapsulated in the maxim *stare decisis* (‘to stand by previous decisions’).¹²⁵ By this doctrine, a lower court is bound by a precedent set by a decision of a court with superior status;¹²⁶ and a court of final jurisdiction will not depart from a prior decision of its own unless it is satisfied that the earlier decision was clearly wrong. The operation of this doctrine promotes the basic tenets of the rule of law: certainty, predictability, reliability, equality, uniformity and convenience.¹²⁷ Thus, *stare decisis* is a manifestation of the rule of law in the interpretation and application of all tax and other laws. The TAA (s 132) provides that a judgment of the Tax Court ‘must be published for general information’. Although its judgments do not create binding precedent, this provision promotes stability to the extent that judgments of the Tax Court may have persuasive value in later tax cases.¹²⁸ The interpretation notes of SARS reinforce stability. This is so despite the notes not being law and, generally, not binding on taxpayers.¹²⁹ The notes permit taxpayers to know in advance SARS’s interpretation of tax provisions. Thus, taxpayers can manage their fiscal affairs in a manner consistent with the notes.

¹²⁴ Smith A (1776) 677.

¹²⁵ *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 39; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) paras 94-5.

¹²⁶ For the judicial hierarchy, see s 166 of the Constitution read with Superior Courts Act 10 of 2013.

¹²⁷ *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28. Brand AJ held (para 28): ‘To deviate from this rule is to invite legal chaos.’ Also, *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) para 55.

¹²⁸ Decisions of the Tax Board and Tax Court are binding only on immediate parties. See *Estate Brownson v President and Members of the Income Tax Special Court and Another* 1933 WLD 116.

¹²⁹ By virtue of the TAA (s 89(3)), an interpretation note is legally binding if it constitutes a ‘binding general ruling’ as defined in the TAA (s 75). For the legal status of SARS’s interpretation notes generally, see *ITC 1675* (2000) 62 SATC 219 229; *CSARS v Marshall NO and Others* (unreported case no. 816/2015) [2016] ZASCA 158 (3 October 2016) para 33.

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Croome, Keulder and Erasmus¹³⁰ contend that a taxpayer's right to administrative justice, taken with the doctrine of legitimate expectation incorporating *estoppel*,¹³¹ binds SARS to an interpretation in its notes, except if it contains an error of law. Stability in tax law is accentuated by the TAA providing for the binding nature of a practice generally prevailing as 'set out in an official publication regarding the application or interpretation of a tax Act' (s 5(1)). This is exemplified by the rule that, in statutory interpretation, evidence that a statutory provision 'has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation'.¹³² The rule of law is reinforced by the advance tax ruling system applicable in SA.¹³³ This is evident from the TAA. Section 76 thereof stipulates that the 'purpose of the "advance ruling" system is to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of an advance ruling'. The TAA (s 82) stipulates that an advance ruling¹³⁴ has 'binding effect' on SARS. This is so unless the ruling is rendered void (s 83), or ceases to have effect upon the occurrence of any circumstance described in s 85(1), or the ruling is withdrawn (s 86).

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The rule of law obliges taxpayers to comply with tax laws. A tax debt is sourced from the clear and unambiguous wording in a fiscal enactment.¹³⁵ Effect is given to a statute's aim to tax a particular person in respect of property, unless the words 'are intractable'.¹³⁶ Verbal precision in a taxing statute is essential because '[n]othing that is not stated is to

¹³⁰ Croome BJ (2010) 249-53; Keulder C (2011) 20-6; Erasmus DN (2013) 101-04.

¹³¹ For a discussion of *estoppel* in tax law, see Wunsh B 'Issue Estoppel in Tax Cases' in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 146. See also *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1995] 1 All SA 517 (A).

¹³² *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA) para 17. See also *Nissan SA (Pty) Ltd v CIR* 1998 (4) SA 860 (SCA) 870E-H.

¹³³ For critical analysis of the role played by advance rulings, see Givati Y 'Resolving legal uncertainty: The unfulfilled promise of advance tax rulings' (2009) 29 *Virginia Tax Review* 137.

¹³⁴ The TAA (s 75) defines an 'advance ruling' to mean 'a "binding general ruling", a "binding private ruling" or a "binding class ruling"'. Each term bears the meaning ascribed thereto in s 75.

¹³⁵ *CIR v Insolvent Estate Botha t/a Trio Kulture* 1990 (2) SA 548 (A) 558.

¹³⁶ Per Steyn CJ in *CIR v MacNeillie's Estate* 1961 (3) SA 833 (A) 838. In *Coltness Iron Co v Black* (1881) 6 App Cas 315 (HL) Lord Blackburn held: 'No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him.'

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be read in'.¹³⁷ The so-called doctrine of vagueness in the rule of law requires that, to be lawful, every rule, regulation, convention or other law must be clear, accessible, comprehensible and predictable.¹³⁸ Thus, every law must be framed in language that is precise in the sense of 'reasonable certainty and not perfect lucidity'.¹³⁹ 'Reasonable certainty' implies that 'some imprecision is unavoidable'.¹⁴⁰ Some measure of vagueness is permitted because of the generality with which legislation is drafted.¹⁴¹ A fair balance must be struck between constitutionally impermissible vagueness and permissible generality. From a tax administration perspective, there are various benefits arising from precision in fiscal statutes. These include: (i) it minimises the costs associated with taxation, both to the taxpayer and the *fiscus*; (ii) it ensures clarity and avoids complexity in legislation; (iii) it enables SARS officials to understand their powers and duties thereby rendering tax administration easier by persons untrained in law; (iv) it promotes enhanced understanding by taxpayers of their rights and duties; (v) it fosters improved tax compliance because of a taxpayer's ability to comprehend his obligations and to appreciate the penalty regime for non-compliance; and (vi) it minimises tax disputes and costly litigation. Accordingly, the language of the TAA must be sufficiently clear to enable taxpayers to know (i) their TAA rights (discussed below in chapter seven), (ii) their TAA duties (discussed below in chapter five), and (iii) the TAA powers of SARS (some of which are discussed below in chapters five and nine). Such reasonable clarity would enable taxpayers to conform their conduct in compliance with the TAA.

¹³⁷ *Metcash* para 53. Lord Cairns, in *Partington v Attorney General* (1869) 21 LT 370 375, held that 'if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be.' This principle was accepted in *CIR v Insolvent Estate Botha t/a Trio Kulture* 1990 (2) SA 548 (A) 558A and the cases cited there.

¹³⁸ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) paras 96 -104; *De Reuck v DPP, WLD and Others* 2004 (1) SA 406 (CC) para 57. In *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 46 the CC held: 'Laws must ... be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law For the "law" to "rule", it must be reasonably clear and certain.' See also *Dawood* para 47.

¹³⁹ *Affordable Medicines* paras 108-09. See also *Hyundai Motors* para 24; *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) paras 64-7.

¹⁴⁰ Per O' Regan J in *Bertie van Zyl* para 102. O' Regan J (minority judgment) held further: 'Where the penumbral sphere of uncertainty is limited, it will not fall foul of the constitutional standard. However, where a provision has no certain core meaning at all, or where it has a significant penumbral scope of uncertainty, it will probably be constitutionally impermissible.'

¹⁴¹ *Bertie van Zyl* para 52.

3.3.2.2 Principle of legality in the rule of law

The principle of legality is an incident of the rule of law.¹⁴² During the apartheid era, this ‘value-neutral’¹⁴³ principle was construed narrowly at common law to be no more than a limitation on administrative action. This failed to reflect a broad normative commitment to the rule of law in a substantive sense.¹⁴⁴ Legality is, in SA’s post-apartheid democratic era, wider in meaning. It is a constitutional principle requiring public power to be exercised in a just, fair, rational, non-arbitrary, non-capricious manner. Also, legality requires public power to be duly authorised in a law that is both accessible to the public and couched in clear, non-contradictory, understandable language.¹⁴⁵ By regulating the way in which all public power must be exercised, the Constitution sets boundaries for the lawful exercise thereof.¹⁴⁶ Hoexter describes¹⁴⁷ legality as evolving into a ‘complete parallel universe of administrative law’. Fundamental to this principle is determining the proper source of power. All public power, including the power to tax, stems from the Constitution or legislation contemplated by it.¹⁴⁸ Subjecting public power to legality is a primary object of constitutionalism, namely, ‘the idea of legality writ large’.¹⁴⁹

¹⁴² *Minister of Justice & Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) para 27. See also de Vos P, Freedman W (eds) & Brand D *et al* (2014) 787.

¹⁴³ Currie I & de Waal J (2014) 12.

¹⁴⁴ Baxter L *Administrative Law* (1984) 77-9.

¹⁴⁵ Hoexter C *Administrative Law in South Africa* 2 ed (2012) 122 states: ‘The fundamental idea it [legality] expresses is that “the exercise of public power is only legitimate where lawful”.’

¹⁴⁶ *Limpopo Province v Speaker, Limpopo Provincial Legislature and Others* 2011 (6) SA 396 (CC) paras 20-2 (*Limpopo 1*); *Premier: Limpopo Province v Speaker, Limpopo Provincial Legislature and Others* 2012 (4) SA 58 (CC) para 2 (*Limpopo 2*).

¹⁴⁷ Hoexter C (2012) 124.

¹⁴⁸ *Pharmaceutical Manufacturers* paras 17-20; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56-9 (*Fedsure Life*). For example, in accordance with the Constitution (s 228(2)(b)), provincial taxing powers are regulated by the Provincial Tax Regulation Process Act 53 of 2001. The CC held, in *Certification 1* paras 439-40, that the policy framework created by s 228(2)(b) requiring all provincial taxing powers to be regulated by national legislation is designed ‘to ensure the coherence of the taxing system and is not directed at providing the underpinning of the taxing power itself’. In relation to municipal taxing powers, the Constitution (s 229(1)(b)) provides that national legislation may confer additional taxing powers on municipalities to those that are conferred by s 229(1). In accordance with s 229(2)(b), municipal taxing powers are regulated by the Municipal Fiscal Powers and Functions Act 12 of 2007. To the extent that a taxing power is derived from the Constitution, it may aptly be called ‘constitutional power’. See *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) para 23.

¹⁴⁹ Michelman FI ‘The Rule of Law, Legality and the Supremacy of the Constitution’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 02-05) 11-27.

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Legality regulates the behaviour of all persons, spheres of government, state organs, structures and institutions exercising any constitutional power as autonomous agents.¹⁵⁰ In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁵¹ (*Fedsure Life*) the CC emphasised that legality constrains the legislature and executive so that ‘they may exercise no power and perform no function beyond that conferred upon them by law’. The Constitution decentralises¹⁵² power from the national government by conferring taxing powers on the three spheres of government (so-called ‘original constitutional power’).¹⁵³ For tax purposes, Parliament may select such criteria it deems necessary in order for a person to fall within a tax net created by it. However, Parliament must exercise this public power within constitutional limits.¹⁵⁴ The process by which a decision is made to impose a tax must satisfy the principle of legality. This requires that a tax law (i) must be aimed at achieving a legitimate governmental purpose, (ii) must be rationally related to achieving that purpose,¹⁵⁵ (iii) must be passed in accordance with all procedural and substantive legal requirements, (iv) must be *intra vires* the powers of the legislative authority enacting it,¹⁵⁶ (v) must impose or regulate the administration of a constitutional financial charge or monetary burden, and (vi) must authorise tax administration techniques which are

¹⁵⁰ Kruger R (2010) 477-78. See also *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).

¹⁵¹ 1999 (1) SA 374 (CC) para 58. The CC, in *Ngqokumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 13, held that legality requires not only that government entities act under the ‘colour of a law’ but also within the law. See also *Blue Moonlight Properties* para 59; *Pharmaceutical Manufacturers* paras 19-20 44 50; *DPP, WC v Prins and Others* 2012 (2) SACR 183 (SCA) para 6.

¹⁵² For a discussion of the decentralisation of government power under the Constitution, see de Vos P, Freedman W (eds) & Brand D *et al* (2014) 59; Du Plessis L (2007) 33. For a discussion of the taxing power exercisable by each sphere of government in SA, see chapter four below.

¹⁵³ *Kungwini Local Municipality v Silver Lakes Home Owners Association and Another* 2008 (6) SA 187 (SCA) paras 14 44 (*Kungwini*).

¹⁵⁴ Section 44(4), Constitution. Yakoob J, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 29, held: ‘The exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution.’ For a useful discussion of when a power or function is ‘public’ in nature for administrative law purposes, see *CSARS v Brown* [2016] ZAECPEHC 17 paras 47-9.

¹⁵⁵ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC) para 100 (*Matatiele Municipality*). See also *Minister of Home Affairs and Others v Scalabrini and Others* 2013 (6) SA 421 (SCA) para 69. Hefer JA, in *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA) 322J-323A, commented that ‘it is often said ... that there is no equity in tax legislation (nor, I would add, complete rationality)’.

¹⁵⁶ *Kungwini* para 44. For the limitations on the taxing powers of the Provincial Legislatures and Municipal Councils under the Constitution in s 228(2)(a) and s 229(2)(a), see chapter four below.

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reasonably justifiable in an open and democratic society based on human dignity, equality and freedom. Accordingly, a taxing provision cannot be indiscriminate (or arbitrary), irrational, capricious or despotic.¹⁵⁷ If it is, then such provision is susceptible to a declaration of invalidity for want of legality under the rule of law.

Constitutionalism, as part of the rule of law,¹⁵⁸ requires that, for the lawful exercise of a taxing power, a charge or burden imposed as a tax must serve a constitutional purpose.¹⁵⁹ It is not required that such purpose be the main or sole objective sought to be achieved by a taxing statute. It suffices if this is a secondary or ancillary objective.¹⁶⁰ Therefore, constitutionalism constrains a legislature to exercise its powers within the straightjacket of the Constitution. This entails that (i) a taxing power must be exercised *intra vires*; (ii) a taxing power may not be misconstrued; and (iii) a decision to impose a tax or other related measure must be rationally connected to the purpose for which the power was conferred.¹⁶¹ If these requirements are not met, then the exercise of any such power is arbitrary and at odds with the Constitution. Thus, it is permissible for a tax to be levied as a means of bringing about redistributive justice.¹⁶² Such an aim is consistent with the Constitution's social justice and human rights objectives. However, the legality of such a measure will, by and large, be determined with reference to whether the burden imposed is in the mould of a 'tax' or a punitive, arbitrary or discriminatory imposition.¹⁶³

¹⁵⁷ For an example of a tax collection procedure found to be incongruent with democratic values, see *Law Society of Zimbabwe and Another v Minister of Finance* (1999) 61 SATC 458 470.

¹⁵⁸ Corder H, Federico V & Orru R (eds) *The Quest for Constitutionalism: South Africa since 1994* (2014) 3 state that constitutionalism 'goes beyond the formal recognition of the rule of law' and 'entails the idea of an open and democratic society and of social justice'.

¹⁵⁹ The imposition of a 'sugar tax' was announced by SA's Minister of Finance in his budget speech of 24 February 2016. See <http://mg.co.za/article/2016-02-24-pravin-gordhans-full-2016-budget-speech> (accessed 25 February 2016). *Prima facie*, a sugar tax serves a legitimate governmental purpose arising from the State's duty under s 7(2) read with s 27 of the BOR, namely, to promote good health care by addressing the potential health risks associated with excessive sugar consumption. In principle, a sugar tax would not discriminate against persons consuming sugar-laden products. Such a tax is in the same mould as so-called 'sin' taxes imposed on, for example, alcohol and tobacco consumption. Therefore, a sugar tax may not fall foul of s 9(3) of the BOR.

¹⁶⁰ *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 569.

¹⁶¹ *Democratic Alliance 1* para 27; *Pharmaceutical Manufacturers* para 20; *Masetlha* para 81.

¹⁶² Deak D 'Pioneering decisions of the Constitutional Court of Hungary to invoke the protection of human dignity in tax matters' (2011) 39(11) *Intertax* 534 539.

¹⁶³ In SA, there are proponents for the imposition of a once-off wealth tax on White South Africans for redistributive purposes owing to the benefits derived by the White race under apartheid. See

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South African law requires that all taxes must satisfy certain minimum standards for constitutionality. A constitutional tax is a pre-requisite for lawful tax administration by SARS.¹⁶⁴ As far as could be established, *De L and Another v CSARS*¹⁶⁵ is, so far, the only case in which a taxpayer challenged the constitutionality of a tax, namely income tax. Molemela J sidestepped this issue by finding that the Tax Court lacked constitutional jurisdiction. A constitutional challenge against any tax presently applicable in SA is, if it is submitted, doomed to fail.¹⁶⁶ This is so because, first, direct and indirect taxes pre-dating democracy in SA apply in other democratic societies too (such as, the USA, India and Australia).¹⁶⁷ Capital gains tax, which post-dates democracy in SA, likewise conforms to international benchmarks.¹⁶⁸ Secondly, as discussed below at para 3.3.3.1, the interim and final Constitutions retained all taxes imposed during the apartheid era. Thirdly, even if a taxpayer challenges the constitutionality of a tax administered under the TAA then, by virtue of the ‘pay now, argue later’ rule¹⁶⁹ codified in s 164(1) thereof, the tax remains

Williams M ‘Tutu calls for wealth tax on whites’ (12 August 2011) available at <http://www.iol.co.za/news/politics/tutu-calls-for-wealth-tax-on-whites-1.1116744> (accessed 18 February 2014). When determining the reasonableness or justifiability of such a tax, relevant factors include the nature of any right infringed thereby, the underlying purpose of the tax, the extent and urgency of the mischief sought to be remedied thereby, the disproportion (if any) of its imposition, and the prevailing conditions at the time of its imposition. See *Balaji v IT Officer* AIR 1962 SC 123. The proposed wealth tax for SA is punitive in effect: it amounts to the payment of reparations. Since race would determine the identity of persons liable for its payment, the tax may be unfair discrimination envisaged by the equality clause in the BOR (s 9(3)) and may offend the founding value of non-racialism (s 1(b)). The ‘core business of the State ... is equal treatment of its citizens and the pursuit of what redounds to the common good of all’ (*Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 51). However, a measure taxing formerly disadvantaged (Black) persons at a lower rate than previously advantaged (White) persons will probably not offend the Constitution if its aim is remedial or restitutionary. See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C).

¹⁶⁴ Tax laws must conform to democratic principles and norms that express the rule of law (such as, legality, equality, fair play, annuality, certainty and non-retroactivity). See *Luoga* FDAM (2002) 3. (unreported case nos. IT 12291, VAT 596) [2010] ZATC 3 (4 November 2010).

¹⁶⁵ See Joffe H ‘*Hindry v Nedcor Bank Ltd*: Another constitutional attack on an income tax provision fails’ (1999) 14(4) *ITJ* 13; van Schalkwyk L ‘Constitutionality and the Income Tax Act’ (2001) 9 *MAR* 285; van Schalkwyk L ‘Constitutionality and the Income Tax Act revisited’ (2004) 12(2) *MAR* 185.

¹⁶⁶ For example, the Constitution of India (Art 265) reads: ‘No tax shall be levied or collected except by authority of law.’ Section 51(ii) of the Commonwealth of Australia Constitution Act 1900 (Commonwealth Constitution) confers on its Parliament the authority to pass laws with respect to ‘taxation’. The USA Constitution (Art 1 s 8 clause 1) confers on the USA Congress the power to ‘lay and collect taxes, duties, imposts and excises’.

¹⁶⁷ Williams RC (2005) 1.

¹⁶⁸ In *Metcash* paras 34-42 59-63 the CC declared the operation of this rule constitutional in the context of the VATA. The CC (para 60) explains its benefit to be that it ‘reduces the number of

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payable pending the outcome of a judicial pronouncement on its constitutionality.¹⁷⁰ This legal position prevails unless the duty of the taxpayer to pay the tax is suspended by a senior SARS official acting under the provisions of s 164(2) of the TAA.

When determining the constitutionality of the impugned TAA provisions below in chapter ten, consideration will be given to whether there is a rational relationship between the scheme adopted by Parliament and the advancement of ‘a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism’.¹⁷¹ To survive a rationality review, the provision(s) reviewed need not be shown to be reasonable or appropriate.¹⁷² The enquiry into rationality is objective.¹⁷³ A finding of rationality must be reasonably supported by concrete evidence.¹⁷⁴ A statute (or a provision in it) may be invalid because its purpose is inconsistent with the Constitution, irrespective of its actual effects.¹⁷⁵ An objector bears the onus to establish the absence of such purpose or lack of a rational connection.¹⁷⁶ Although a ‘statute is facially neutral’,¹⁷⁷ it may be declared invalid if its effect is unconstitutional.

frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality’. See also *Singh v CSARS* 2003 (4) SA 520 (SCA) para 18 (*Singh*). Rogers J, in *eTradex* para 74, refers to this rule as the ‘pay- now- fight- later regime’.

¹⁷⁰ The requirement that payment of a tax assessment be effected despite an objection or appeal being lodged against it has been described by the CC in *Motsepe v CIR* 1997 (2) SA 898 (CC) para 28 as ‘one of the major policy features of the Act’.

¹⁷¹ *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 51. Fourie J held, in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2014] JOL 32401 (GP) para 28, that the exclusion of juristic persons from the right conferred on natural persons by the Criminal Procedure Act 51 of 1977 (CPA) to institute private criminal prosecutions is an instance of fair differentiation which is constitutional because it serves a legitimate, identifiable governmental purpose.

¹⁷² *New National Party* para 24; *Pharmaceutical Manufacturers* paras 86 89-90. For a critique of rational basis review, including a comparative analysis with the USA, see Bishop M ‘Rationality is Dead! Long Live Rationality! Saving Rational Basis Review’ in Woolman S & Bilchitz D (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1-36. For further discussion of that test, see Price A ‘The content and justification of rationality review’ (2010) 25(2) *SAPL* 346; Price A ‘Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*’ (2010) 127 *SALJ* 580; Kohn LM *The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?* (unpublished LLM thesis, UCT, 2013).

¹⁷³ *Pharmaceutical Manufacturers* paras 85-6; *ARMSA* para 50.

¹⁷⁴ Erasmus DN (2013) 55 (and the authorities cited there at fn 143 and fn 144).

¹⁷⁵ *De Klerk* para 123.

¹⁷⁶ *Glenister* para 55; *Matatiele Municipality* para 100.

¹⁷⁷ *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005(3) SA 589 (CC) para 90.

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No government can operate except through functionaries. Thus, for tax administration purposes, the South African Revenue Service Act¹⁷⁸ (SARSA) gave birth to SARS and certain officials (such as the CSARS). Both SARS and the CSARS are constitutional ‘organs of state’.¹⁷⁹ Whilst the CSARS is a public ‘functionary’, SARS is a public ‘institution’. Both exercise public power and perform judicially reviewable administrative action in terms of fiscal legislation.¹⁸⁰ All issues concerning the power of an organ of state are constitutional matters.¹⁸¹ The BOR (s 8(1)) binds organs of state to respect the fundamental rights protected thereunder. To be valid, conduct by SARS and its officials must satisfy the requirements of legality in the rule of law. The rationality of decisions is a pre-requisite for their validity. Rationality in this context entails that a rational link must exist between a decision taken in terms of a power conferred (that is, the means employed) and the aim the State seeks to achieve by the power (that is, the end).¹⁸² For such rationality to exist, a decision must be ‘founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made’.¹⁸³

¹⁷⁸ Act 34 of 1997 (SARSA).

¹⁷⁹ *CSARS v Trend Finance (Pty) Ltd and Another* 2007 (6) SA 117 (SCA) para 25; *Pearse v CSARS* (unreported case no. 10498/11) [2012] ZAGPPHC 75 (4 May 2012) paras 49-51. The relevant extract of the ‘organ of state’ definition in the Constitution (s 239) is ‘(b) any functionary or institution - ... (ii) exercising public power or performing a public function in terms of any legislation ...’. Compare this definition of ‘organ of state’ with that in s 1 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. See *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NWM) para 7. See also Ramonyai E ‘What is an organ of state?’ (September 2011) DR 51.

¹⁸⁰ *Plasma View Technologies (Pty) Ltd v CSARS* (2010) 72 SATC 44 (T) 57. The relevant part of the term ‘administrative action’ is defined in the PAJA (s 1) to mean ‘any decision taken, or failure to take a decision, by – (a) an organ of State, when ... (ii) exercising a public power or performing a public function in terms of any legislation ... which adversely affects the rights of any person and which has a direct, external legal effect. ...’. For the test as to whether conduct is ‘administrative’, see *ARMSA* paras 41-5; *SARFU* paras 140-43; *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) paras 20-5; *Pearse v CSARS* [2012] ZAGPPHC 75 paras 52-7. In *Capstone 556* para 48, SARS’s decision to decline a request for the suspension of the ‘pay now, argue later’ rule was held to be ‘administrative’. Smith J, in *CSARS v Brown* [2016] ZAECPEHC 17 paras 50-1, held a request for ‘relevant material’ under the TAA is not administrative because it entails a preliminary investigation that does not adversely affect the taxpayer’s rights. This decision accords with *City of Cape Town v Bouley Properties (Pty) Ltd* [2010] ZAWCHC 650 para 32 and *Corpelo 2290 CC t/a U-Care v Registrar of Banks* [2013] 1 All SA 127 (SCA) para 26. However, *contra* van Dijk EC (2014) 26-8. For further examples of administrative decisions, see *Hendricks and Another v City of Cape Town* 2011 (6) SA 88 (WCC) paras 29-38; *Chittenden NO and Another v CSARS and Another* 76 SATC 397 (GNP) para 6.

¹⁸¹ *Competition Commission v Loungefoam (Pty) Ltd and Others* 2012 (9) BCLR 907 (CC) para 16.

¹⁸² *ARMSA* paras 50-1. See also de Vos P, Freedman W (eds) & Brand D *et al* (2014) 787.

¹⁸³ *Minister of Home Affairs and Others v Scalabrini and Others* 2013 (6) SA 421 (SCA) para 65.

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No tax is payable, and no taxpayer can be burdened with a tax liability or penalty, at the whim of SARS or its officials. Under the principle of legality, their conduct is lawful provided a power exercised by them is authorised in an enabling statute and their mode of conduct conforms thereto. This is a basic principle of tax law expressly stated in the TAA (s 143(1)). SARS and the CSARS are creatures of statute with no inherent power. They are imbued with those powers (or competencies) that are derived from a statute.¹⁸⁴ They cannot arrogate to themselves an authority not conferred by law. The SARS Act (s 3) prescribes SARS's objective to be the efficient and effective collection of revenue.¹⁸⁵ Section 4 outlines its functions. These include securing the efficient and effective collection of revenue under legislation listed in Schedule 1 of the SARS Act and any other legislation concerning the collection of revenue assigned to SARS in terms of legislation or an agreement between SARS and the organ of state or institution entitled to the revenue concerned (ss 4(1)(a)(i) and (ii)). In terms of the SARS Act (s 4(1)(b)(i)), SARS also serves to advise the Minister of Finance on 'all matters concerning revenue'.

SARS has the general powers listed in the SARS Act. Section 5(1) stipulates that it 'may do all that is necessary or expedient to perform its functions properly, including' the powers enumerated in ss 5(1)(a) to (k). 'Including' is a word of extension; its effect is that the powers listed are not a *numerus clausus*.¹⁸⁶ Section 5(1)(k) provides that it is empowered to 'do anything that is incidental to the exercise of any of its powers'. Although 'anything' suggests that this authority is cast in very wide terms, it is submitted that, understood within its context, SARS can perform only such other acts as are *reasonably* related or ancillary to the powers conferred by law. The TAA augments SARS's powers.

¹⁸⁴ Erasmus DN (2013) 40. Likewise, the Tax Court and Tax Board are creatures of statute whose powers are limited to that conferred by their respective enabling legislation (that is, the TAA).

¹⁸⁵ The term 'revenue' is defined in the SARS Act (s 1) to mean 'income derived from taxes, duties, levies, fees, charges, additional tax and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys'.

¹⁸⁶ For the legal effect of 'includes' in contra-distinction to 'means', see *Warwick Investments (Pty) Ltd v Maharaj* 1954 (2) SA 470 (N); *Rogut v Rogut* 1982 (3) SA 928 (A); *Southern Life Association Ltd v CIR* 1985 (2) SA 267 (C) 269-70; *S v Tshilo* 2000 (4) SA 1078 (CC) para 9; *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 (3) SA 54 (W); *S v Dzukuda and Others*; *City of Tshwane v Marius Blom and Others* [2013] 3 All SA 481 (SCA) para 12. Sometimes 'includes' can have the same effect as 'means', synonymous with 'comprise', so that the definition following it is exhaustive. See *Estate Brownstein v CIR* 1957 (3) SA 512 (A) 521A-F; *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] 4 All SA 384 (SCA) para 20.

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Section 6(1) thereof provides that ‘powers and duties of SARS under this Act may be exercised for the purposes of the administration of a tax Act’.¹⁸⁷ Conduct in contravention of the TAA is judicially reviewable. In the context of s 6(1), ‘may’ reflects discretionary power to decide whether to exercise an authority or not to do so. Such a decision by an ‘administrator’ is ‘administrative action’ as defined in the PAJA (s 1).¹⁸⁸ Conduct that is not ‘administrative action’, as statutorily defined, remains judicially reviewable under either the principle of legality in the rule of law or on any ground of review recognised in the common law (for example, bias, ignoring relevant facts, and material error of fact).¹⁸⁹

3.3.3 Democracy

3.3.3.1 Democracy in taxation

Although taxation interferes with a taxpayer’s unfettered, undisturbed use, enjoyment or exploitation of private property (such as, earnings from labour and accretions to capital),¹⁹⁰ the imposition of tax is cloaked with constitutionality.¹⁹¹ Croome¹⁹² states in this respect: ‘Taxation constitutes a deprivation of property but is generally lawful

¹⁸⁷ For discussion of a similar provision in Australia’s Tax Administration Act 1953, see Bentley D ‘The Commissioner’s powers: Democracy fraying at the edges?’ (1994) 4 *RLJ* 85 90-2. See also *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649 659.

¹⁸⁸ See the authorities cited at fn 180 above. For analysis of the terms ‘administrative action’ and ‘administrator’ as defined in the PAJA (s 1), see Plasket C *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (unpublished PhD thesis, Rhodes University, 2002) 112-60. The PAJA is not a model of legislative clarity. Plasket C ‘Post-1994 administrative law in SA: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the common law’ (2007) 21(1) *SJ* 25 27 describes the PAJA as ‘a flawed piece of legislation that shows all the signs of the rushed job that it was’.

¹⁸⁹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) paras 93-6 (*New Clicks*); *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) 160C-E; *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) para 26-33. See also Hoexter C ‘The principle of legality in South African administrative law’ (2004) 4 *Macquarie LJ* 165.

¹⁹⁰ See Murphy J (1995) 105 and the various authorities cited by the author at fn 75 of his article.

¹⁹¹ Some political philosophers espouse that taxation is State sanctioned theft, extortion or slavery and is, therefore, immoral, coercive governance that violates taxpayers’ property rights. See, for example, Nozick R *Anarchy, State and Utopia* (1974) ch 3; Tame CR ‘Taxation is theft’ (1989) *Political Notes No. 44* available at <http://www.libertarian.co.uk/lapubs/polin/polin044.pdf> (accessed 10 January 2014); Feser E ‘Taxation, forced labor and theft’ (2000) 5(2) *The Independent Review* 219. Taxation in SA is clothed with legality because the Constitution expressly caters for it. This legal position is consonant with the CC’s pronouncement, in *FNB* para 27, that ‘[t]axation could not amount to deprivation or expropriation’.

¹⁹² Croome BJ (2010) 23.

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because the state requires funding from its citizens to meet its obligations.’ Eisenstein¹⁹³ describes taxation as ‘a constitutional means of appropriating private property without just compensation’.¹⁹⁴ Taxation is, as shown above in chapter one, the financial cost of freedom and democracy. Taxation creates the resources that are necessary for sustainable government and the attainment of the Constitution’s transformation objectives. Without income from taxation, transformation will remain no more than an aspiration or goal. Tax revenue is, thus, the lifeblood of SA that, in the absence of nationalisation of key income-generating industries, keeps the machinery of the State continuously functional.

As explained above in chapter one, citizens should not be subjected to taxation without political representation. In an inclusive democracy, as in SA, consent by the governed is the defining characteristic of the relationship between a government and its subjects.¹⁹⁵ The existence of a governance structure in SA ‘based on the will of the people’¹⁹⁶ removes any justification for the wilful non-payment of a tax lawfully imposed. Democracy, in the sense of regular elections, keeps a government accountable and can be used to keep taxation in check (that is, within certain acceptable limits and at affordable levels). This is particularly important in SA that is plagued by high unemployment rates and substantial disparity in income levels among employed persons. Voting in regular elections is an effective tool that can ‘curb the predatory appetites of the state’.¹⁹⁷

¹⁹³ Eisenstein L *Ideologies of Taxation* (1961) 3 (quoted by Williams RC *Income Tax in South Africa Cases and Materials* 4 ed (2015) 6).

¹⁹⁴ The term ‘appropriation’ and ‘appropriating’ and any variation of the term in relation to taxation is, in a South African context, problematic and to be avoided. This is so because the Constitution distinguishes taxation from appropriation. See the definition of ‘money Bill’ in s 77(1) and s 120(1) of the Constitution. The term ‘appropriation’ is not defined in the Constitution or any public finance legislation. Kriel RR & Monadjem M ‘Public Finance’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) 27-32 state that ‘appropriation’ refers to ‘an authorisation made by an Act of Parliament directing payment out of the National Revenue Fund for specific purposes’. Since the definitions of ‘money Bill’ in the Constitution differentiate between Bills appropriating money and those imposing taxes, taxation cannot, in SA, be described as an appropriation. Thus, its characterisation as an appropriation is legally untenable as it conflicts with the express provisions of the Constitution.

¹⁹⁵ Currie I & de Waal J (2014) 14.

¹⁹⁶ Preamble, Constitution. The Freedom Charter of 1955, Art 13 of the African Charter and Art 21(3) of the UDHR recognise the principle that government must be based on the will of the people. For a discussion hereof, see generally Suttner R & Cronin J *30 Years of the Freedom Charter* (1986).

¹⁹⁷ Ross ML (2004) 234. In *OUTA* para 93 Froneman J held: ‘The playing field for the contestation of executive government policy is the political process, not the judicial one.’

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The interim Constitution metamorphosed SA from a parliamentary autocracy to a democratic *Rechtsstaat* based on the rule of law.¹⁹⁸ The democratic pedigree of SA is engraved into its legal fabric. The final Constitution nurtures a democracy in which governance of the State (s 41(1)) and of public administration (s 195(1)) is premised on, inter alia, effectiveness, transparency, coherence, fairness, equity, efficiency and accountability.¹⁹⁹ There is no singular, authoritative meaning of ‘democracy’ for constitutional purposes.²⁰⁰ Venter²⁰¹ describes democracy as an ‘elusive and often abused concept’. ‘Democracy’ is a term that is undefined in the Constitution. Roux²⁰² contends that ‘the conception of democracy in the Final Constitution, and the normative standard it seeks to impose, must develop out of the liberal tradition, rather than deviate from it’.

Constitutional jurisprudence has failed to provide a concrete definition of ‘democracy’ because the Constitution utilises this term in several senses, namely, as a system of government (s 1(d) and s 152(1)(a)), a form of society (s 36(1), s 39(1)(a), s 59(2), s 72(2) and s 118(2)), a principle (s 195(1)), a culture (s 234) and a value (s 7(1) and s 195(1)). Democracy, in these senses, is a characteristic of a *Rechtsstaat*. It is, however, submitted that, at its core, ‘democracy’ encompasses a basket of constitutional rights (such as, equal entitlement to the rights, privileges and benefits of citizenship (s 3(2)(a)), political rights (s 19), and the rights to assemble, to demonstrate, to picket and to present petitions peacefully and unarmed (s 17)). It also entails correlative legal obligations (such as the duty to pay taxes).²⁰³ The duty to pay tax is an integral part of a citizen’s relationship with the State (or government). In SA, this duty is implied in the express constitutional obligation to fulfil the duties and responsibilities of citizenship (s 3(2)(b)).

¹⁹⁸ De Ville JR (2006) 65 describes SA as a ‘material *Rechtsstaat*’, the main characteristic of which is subject to a set of higher values contained in a written constitution.

¹⁹⁹ Mureinik E ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10(1) *SAJHR* 31 32 states that the interim Constitution is a bridge away from a ‘culture of authority’ en route to ‘a culture of justification – a culture in which every exercise of power is expected to be justified’.

²⁰⁰ For a discussion of the different conceptions of democracy, see de Vos P, Freedman W (eds) & Brand D *et al* (2014) 86-95.

²⁰¹ Venter F (1995) 34.

²⁰² Roux T ‘Democracy’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-24.

²⁰³ It is trite law that the existence of a right creates a corresponding justiciable duty. See du Bois F (ed), Bradfield G & Himonga C *et al Wille’s Principles of South African Law* 9 ed (2014) 3-7.

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During the apartheid era, tax laws were passed by ‘a Parliament that had been elected undemocratically and was not representative of all our people’.²⁰⁴ Those laws were fraught with provisions offensive to a democratic value system. For example, some provisions discriminated on the grounds of gender and marital status, others violated rights to, inter alia, privacy and just administrative action.²⁰⁵ The absence of a Bill of Rights at that time meant that human rights were non-existent in the substantive law of SA. The interim and final Constitutions changed all this. They democratised taxation. Both Constitutions provide for the continued operation of the tax laws emanating from the old legal order and, by extension, its tax regime.²⁰⁶ This legal position prevails until any such law is amended, repealed or struck down by a competent court of law. Thus, both instruments tread ‘a prudent path between legal revolution and legal continuity’.²⁰⁷ The recognition of the pre-constitutional era tax laws does not stem from the democratisation of SA, or its territorial integrity and sovereignty, or from Parliament or a political party, or from a fiscal contract. It emanates directly from the interim and final Constitutions. The retention of the old order tax laws and tax system indicates that SA’s people, their political representatives, and the CC that certified the final Constitution, view taxation as congruent with the spirit, purport and objects of the Constitution.²⁰⁸

3.3.3.2 Democratic values and principles applicable in tax administration

The SARS Act (s 2) stipulates that SARS is ‘an organ of state within public administration’. Thus, the administration of taxes falls under the rubric of public administration that is

²⁰⁴ *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC) 994G.

²⁰⁵ See Williams B (1997) 7; Croome BJ (2002) 3-6; Goldswain GK (2011) 14-15 21-2.

²⁰⁶ Section 229, interim Constitution read with para 2(1) of Schedule 6, Constitution. Paragraph 2(1) of Schedule 6 reads: ‘All law that was in force when the new Constitution took effect, continues in force, subject to – (a) any amendment or repeal; and (b) consistency with the new Constitution’. The ‘new Constitution’ is defined (Schedule 6 para 1, Constitution) to mean the Constitution, 1996. The ‘old legal order’ is defined (Schedule 6 para 1, Constitution) to mean ‘legislation enacted before the previous Constitution took effect’. The ‘previous Constitution’ is defined (Schedule 6 para 1, Constitution) to mean the interim Constitution.

²⁰⁷ *Holomisa v Argus Newspapers Ltd* 1996 (1) All SA 478 (W) 491.

²⁰⁸ In *Shuttleworth* para 42, Moseneke DCJ affirmed that ‘the power to tax residents is an incident of, and subservient to, representative democracy’. This democratic rule is traceable to the generally accepted principle that there can be no taxation without political representation. For a discussion of the democratic foundations of taxation generally, see Luoga FDAM (2002) 2-4.

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part of the executive arm of government.²⁰⁹ Public administration concerns the everyday management of the State through the implementation of laws and policies by line departments categorised as administrative agencies, statutory agencies and service delivery agencies (such as SARS).²¹⁰ During the apartheid era, SA had no Bill of Rights, nor charter of taxpayer rights, nor a code of conduct regulating tax officials. This state of affairs enabled the tax authority at that time to operate without a high degree of professionalism and without a culture of respect for taxpayers or their rights.²¹¹ The tax authority and its officials were perceived as being above the law (that is, as a law unto themselves). Their image was tainted in the eyes of the taxpaying public.²¹² The interim and final Constitutions revolutionised public administration and the manner in which tax administration would take place. Constitutional supremacy obliges tax administration to occur in a manner that conforms to constitutional rights, norms, values and standards.

Section 195(1) of the Constitution provides a uniform standard for public administration based on democratic values and principles. In addition to the values expressly outlined therein (such as, transparency, fairness, impartiality, equity and justification), s 195(1) also includes, by implication, those values enumerated elsewhere in the Constitution (such as, in ss 1, 2, 7 and 41). Thus, s 195(1) creates a framework conducive to fostering the establishment of an honest, dignified, efficient, professional, equitable, ethical and moral public administration that is open, accountable and responsive to the general

²⁰⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 133 (SARFU).

²¹⁰ Bodasing A 'Public Administration' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) 23A-4 – 23A-6.

²¹¹ The Court, in *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) 441G (*Jeeva*), held that the practices of SA's tax authority in the pre-1994 era are 'entirely inconsistent with modern values of openness and accountability in a democratically orientated administration'. Mokgoro J, in *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) para 72, held: 'In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals. It ... aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past.'

²¹² The apartheid era tax authority comprised the Commissioner for Inland Revenue (CIR) and the Controller of Customs and Excise. For a discussion of the democratic reforms in taxation, see Manuel T 'The South African tax reform experience since 1994' (24 October 2002) available at http://www.treasury.gov.za/comm_media/speeches/2002/2002102501.pdf (accessed 21 October 2013).

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public.²¹³ Section 195(2)(b) obliges SARS and the CSARS as organs of state involved in public administration to adhere to the values and principles embodied in s 195(1). The SARSA (s 4(2)) also expressly imposes this duty on SARS. Adherence to democratic values and principles will transform tax administration and instil integrity in the national tax grid by building SARS's institutional integrity through nurturing a culture in which respect for taxpayers and their rights is paramount. The commands in the SARSA (s 4(2)) and the Constitution (s 195(1)) use the word 'must'. Their tenor and language reflect that compliance with the values and principles in s 195(1) is mandatory. Consequently, SARS and the CSARS are compelled to (i) promote and maintain a high standard of professional ethics (s 195(1)(a)); (ii) promote efficient, economic and effective use of resources (s 195(1)(b));²¹⁴ (iii) be development orientated (s 195(1)(c));²¹⁵ (iv) provide services impartially, fairly, equitably and without bias (s 195(1)(d));²¹⁶ (v) put peoples' needs first (so-called *batho pele*) by responding to taxpayers' needs and encourage them to participate in policy-making (s 195(1)(e));²¹⁷ (vi) be accountable (s 195(1)(f)); and (vii) foster transparency by providing timely, accessible, accurate information (s 195(1)(g)) thereby ensuring that 'there are no favourites and no sacrificial victims'.²¹⁸

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The language and syntax of s 195(1) is such that its provisions do not create rights that sustain a cause of action. Rather, s 195(1) provides 'valuable interpretive assistance'.²¹⁹

²¹³ *New Clicks* paras 620-25; *SARFU* para 133.

²¹⁴ The SARSA (s 22(c)) obliges the CSARS to 'ensure that the available resources of SARS are properly safeguarded, and used economically and in the most efficient and effective way'.

²¹⁵ For a discussion of the development-orientated nature of the Constitution as a means to advance fundamental rights, see Janse van Rensburg A (2010) 141-54.

²¹⁶ Ishimura K 'The state of taxpayers' rights in Japan' (1997) 7(1) *RLJ* 164 167 explains that fairness and transparency in tax administration is beneficial because it enhances voluntary co-operation and confidence on the part of taxpayers, and because it ensures that taxpayers are 'able to participate in tax procedures on an equal footing with the tax authorities'.

²¹⁷ *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T) 1068A. Braithwaite V 'Tax System Integrity and Compliance: The Democratic Management of the Tax System' in Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 284 states that 'responsiveness', in a tax administration context, is part of taxpayer management and means 'listening, and publicly acknowledging and resolving identified problems'.

²¹⁸ *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 651G.

²¹⁹ *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) paras 74-6. De Ville JR (2000) 268 refers to the principles in 195(1) as '*provision substantiating*' because '[t]hese provisions do not confer rights or impose obligations by themselves but lend substance to other provisions'. Goldswain GK (2012) 248 states that s 195(1) creates justiciable rights. This view is irreconcilable

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Non-compliance with s 195(1) does not give rise to a justiciable claim that a right has been infringed. Conduct inconsistent therewith that involves the violation of a recognised right is, by judicial review, susceptible to a declaration of invalidity under s 2 and s 237 on the basis that it offends an identifiable democratic value or principle. In exceptional circumstances, public policy also permits the imposition of civil liability.²²⁰

The operational objective of SARS is the efficient and effective collection of tax. Effectiveness requires ‘conduct’ that instils a culture of voluntary tax compliance. SARS and its officials must maintain high standards of professional ethics, integrity, fairness, equity, impartiality, accountability and transparency. Maintaining the moral high ground carries the benefit of garnering the public’s faith, confidence and trust in SARS as a public institution. This will create a climate conducive to enhancing tax compliance. This is important because of the greater reliance in SA on self-assessment and electronic filing of tax returns. There are continuing staffing challenges facing SARS (such as insufficient trained auditors). This does not permit it to audit every commercial transaction having a tax implication nor every tax return lodged with it. Thus, SARS relies to a considerable degree on the honesty and integrity of taxpayers (and tax practitioners). If SARS or its officials are perceived as abusing their power, then this may well lead taxpayers opting instead to run the gauntlet (so to speak) and not be tax compliant. Such an adversarial environment in the tax arena carries the real risk of causing a decrease in tax collection, defeat SARS’s objective and undermine the achievement of the objectives of taxation.²²¹ Importantly, non-compliance by SARS and its officials with their legal obligations, and low levels of tax morality by taxpayers, would reflect a breakdown in the rule of law. Such eventuality must be avoided in order that democracy is defended and advanced.

with the decision in *Chirwa supra* that constitutional values and principles do not create enforceable rights.

²²⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) paras 44-50.

²²¹ Macdonald JP, in *COT v Ferera* 1976 (2) SA 653 (RAD) 656F-G, held: ‘I endorse the opinion expressed that the avoidance of tax is an evil. Not only does it mean that a taxpayer escapes the obligation of making his proper contribution to the fiscus, but the effect must necessarily be to cast an additional burden on taxpayers who, imbued with a greater sense of civic responsibility, make no attempt to escape Moreover, the nefarious practice of tax avoidance arms opponents of our capitalistic society with potent arguments that it is only the rich, the astute and the ingenious who prosper in it and that “good citizens” will always fare badly.’

3.3.4 *Ubuntu*

Umuntu ngumuntu ngabantu, commonly known as *ubuntu*, is a communitarian philosophy deeply engrained in the cultural heritage of most South Africans.²²² It recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance from fellow society or community members. It also recognises the converse, namely, the corresponding duty to give unconditional respect, dignity, value and acceptance.²²³ In so doing, *ubuntu* engenders the ideas of humaneness, social justice and fairness; it envelops 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic values and collective unity'.²²⁴ *Ubuntu* is, thus, a humanistic orientation fostering anti-individualistic conduct. It embraces the belief that self-fulfilment is achieved through collective ideals and aspirations (such as those formulated in the Constitution), to be striven for by all in a society or a community for mutual benefit.

Ubuntu affirms that South Africans are not islands unto themselves.²²⁵ Its spirit suffuses SA's constitutional order. It serves as 'a unifying motif of the Bill of Rights, which is

²²² *Ubuntu* is 'part of our "rainbow" heritage' (per Mokgoro J in *Makwanyane* para 307). Cornell D 'Is There a Difference That Makes a Difference Between Ubuntu and Dignity?' in Woolman S & Bilchitz D (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 221-223 states that *ubuntu* is part of the rich intellectual heritage of African humanism forming the ethical law of post-1994 SA. In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) paras 68-9 the Court held that 'human dignity relates closely to *ubuntu* or *botho*', a value 'emphasising restorative rather than retributive justice'. For a discussion of the difference between *ubuntu* and dignity, see Mokgoro Y & Woolman S 'Where Dignity Ends and Ubuntu Begins: Answer to Drucilla Cornell' in Woolman S & Bilchitz D (eds) (2012) 241-50. See also Mokgoro Y 'Ubuntu, the Constitution and the rights of non-citizens' (2010) 21 *Stell LR* 221.

²²³ *Makwanyane* paras 223-25 308; *Soobramoney* para 54; *Blue Moonlight Properties* para 38; *Ferreira* para 251; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 150 (*Bernstein*); *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (EqC) para 18. See also Mokgoro Y 'Ubuntu and the law in South Africa' (1998) 1(1) *PELJ* 15; Kroeze IJ 'Doing things with values II: The case of *ubuntu*' (2002) 13(2) *Stell LR* 252; Church J 'Sustainable development and the culture of *uBuntu*' (2012) 45(3) *De Jure* 511; Himonga C, Taylor M & Pope A 'Reflections on judicial views of *ubuntu*' (2013) 16(5) *PELJ* 370.

²²⁴ *Everfresh Market Virginia (Pty) Ltd v Shoptrite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71.

²²⁵ Sachs J held, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 117, that 'the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.' The CC, in *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 53, held: 'The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the

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nothing if not a structured, institutionalised and operational declaration ... of the need for human interdependence, respect and concern'.²²⁶ *Ubuntu* regulates the exercise of rights. It engenders the idea that members of society are interconnected within the broader social fabric with responsibilities toward each other that must be fulfilled to ensure mutual, co-enjoyment of rights. The spirit of *ubuntu* finds expression in, for example, the UDHR.²²⁷ Article 1 thereof obliges all human beings to 'act towards one another in a spirit of brotherhood'. In addition, Art 29(1) reads: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' The CC, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*,²²⁸ held that *ubuntu* should be applied broadly so that it, and other values inspiring the constitutional compact, are infused into the law of contract. For parallel reasons, this applies equally to tax law.

Chapter one above demonstrates the importance of taxation to achieve substantive or real equality by progressively realising the human rights of SA's marginalised communities. Attaining this will improve the quality of their lives and ensure that they live in dignified conditions. In this way, the value of human dignity in the Constitution is upheld, and the constitutional right of such persons to human dignity is respected and made meaningful. In so doing, taxation becomes a means to realise 'the economic, social and cultural rights indispensable for [a person's] dignity and the free development of his personality' (Art 22, UDHR). When viewed from this perspective, *ubuntu* instils a consciousness

²²⁶ phrase *umuntu ngumuntu ngabantu* which emphasises "communality and the interdependence of the members of a community" and that every individual is an extension of others.' *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37. Goldswain GK (2011) 6 points out that '[t]he word *ubuntu* was not incorporated into the Final Constitution, but the spirit, purport and objective of the Constitution, as detailed in the preamble, are similar to the concept of *ubuntu*, and thus remain a cornerstone in the interpretation of the Constitution'.

²²⁷ Similarly, the American Declaration of the Rights and Duties of Man 1948 stipulates that '[a]ll men ... should conduct themselves as brothers one to another'. This spirit of brotherhood, and of unity, includes the duty of persons to contribute to the public treasury by paying a fair share of tax. See Article XXXVI. Jackson VC (2004) 18 notes that jurisdictions, such as Germany, whose constitutional system entrenches human dignity as a core human right, impose 'social solidarity obligations'. Georgopoulos T *Tax Treaties and Human/Constitutional Rights: Bridging the Gap? Tax Relief in a Cosmopolitan Context* (2004) 9-14 available at http://www.law.nyu.edu/sites/default/files/upload_documents/gffgeorgopoulospaper.pdf (accessed 17 November 2014) characterises a person's concern for other human beings as 'cosmopolitanism'.

²²⁸ 2012 (1) SA 256 (CC) para 71. See also Lubbe G 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121(2) *SALJ* 395.

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underscoring the importance for society and community members, both natural and juristic, to fulfil their responsibility of contributing their fair share of the cost of governance through paying taxes. Thus, *ubuntu* in taxation fosters good fiscal citizenship and corporate social responsibility in relation to the social-fiscal contract.²²⁹

Ubuntu fosters a culture of respect for human dignity. It engenders that tax administration occur in a dignified and decent manner that is neither degrading to taxpayers nor disrespectful of their rights. *Ubuntu* also indicates that the duty to contribute to the cost of governance through taxation is not simply a legal obligation but a moral, ethical, patriotic, civic duty arising from a person's membership of a broader societal group or social structure.²³⁰ Moreover, *ubuntu* infuses the notion that a contribution to the public treasury must be made because residents and citizens enjoy the benefits arising from State expenditure, including protection by the government and its armed forces.²³¹ Thus, they ought to contribute their fair share of the costs to provide such benefits and protection.

²²⁹ For a discussion of *ubuntu* as a value in the interpretation of fiscal statutes, see Goldswain G 'Ubuntu – a principle of interpretation' (2012) 26(1) *TP* 15. Bilchitz D 'Human Rights Beyond the State: Exploring the Challenges' in Vilhena O, Baxi U & Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 580 597 argues that the horizontal application of the BOR means that corporate social responsibility is no longer voluntary. The exercise of corporate power is permissible to the extent that it does not violate the human rights of others. See also Vettori S 'Corporate social responsibility' (2005) 19(1) *SJ* 89; Sacks B 'Tax morality in corporate tax' (2013) 42 *Tax Talk* 38. Corporate governance is regulated by the *King Code of Governance Principles for South Africa, 2009* (the Code) read with the Companies Act 71 of 2008 (Companies Act). The Code seeks to cultivate a culture of transparency, accountability and compliance. The Companies Act seeks to 'promote compliance with the Bill of Rights ... in the application of company law' (s 7(a)). See Harvie MA *Analysis of the New Proposed Companies Act Compared to the Old Companies Act 61 of 1973 and the King II Report on Corporate Governance with Specific Focus on Directors' Liabilities and Responsibilities* (unpublished MBA thesis, US, 2009); Good S 'King III review' (August 2009) *DR* 17; Parekh A 'Directors' duties in a vastly different corporate landscape' (March 2010) *DR* 12 14. Part 6 of the Code and ch 6 of the *King Report on Governance for South Africa, 2009* embody the principle that corporations must comply with all laws, including tax laws. Failure to comply gives rise to a duty to explain the reason(s) for non-compliance. Thus, the Code obliges corporate managers to proactively engage in the tax affairs of corporations under their control. In so doing, the Code promotes responsible corporate citizenship.

²³⁰ Macdonald JP describes, in *COT v Ferera* 1976 (2) SA 653 (RAD) 656F, the payment of tax as a 'civic responsibility'. Frey BS & Torgler B 'Tax morale and conditional co-operation' (2007) 35 *Journal of Comparative Economics* 136 153 argue that paying tax is a social act reflecting a desire to participate in a group rather than economic maximisation.

²³¹ *County of Mobile v Kimball* (1881) 102 US 691. Residence based taxation is usually justified on the view that a resident should contribute to the cost of governance of the country of residence.

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As a philosophy, *ubuntu* advances a voluntary tax compliance culture. It is contrary to the spirit of *ubuntu* for persons to wilfully fail, neglect or refuse to pay taxes, whilst enjoying the protection and benefits conferred by the State. In this way *ubuntu* serves to encourage society and community members to contribute their equitable share of the cost of financing public expenditure that keeps the machinery of State operational. Consequently, *ubuntu* advances social equity through taxation.²³² *Ubuntu* imbues a consciousness that promotes tax awareness, encourages tax discipline and breeds tax morality. This fosters the inculcation of a culture of tax compliance.²³³ In so doing, *ubuntu* can assist in effecting a cultural shift away from tax non-compliance towards greater co-operation with SARS and its officials. This facilitates building nationhood in a unified SA. Thus, the spirit of *ubuntu* is, like democracy, a further string to the bow affirming that taxation is not antithetical to the Constitution but rather promotes the attainment of the Constitution's transformation goals. Therefore, *ubuntu* is a constitutional value that is to be used as a guide when interpreting fiscal statutes imposing obligations on taxpayers.

Ubuntu does not require payment of tax by those exempted by law from the duty to do so,²³⁴ nor does it require taxpayers to confess to tax crimes, nor does it detract from a taxpayer's right to purposefully structure financial affairs in a manner having the effect of reducing, even excluding, exposure to a potential tax liability.²³⁵ Indeed, this latter right

²³² See Olivier L & Honiball M (2011) 19. For further discussion, see Nagac A *Three Essays in Public Finance* (unpublished PhD thesis, University of Texas, 2009) vi; Sydness LS (2010) 26-31. Equity is an established canon of taxation serving as a hallmark of a good, credible tax system. For the distinction between vertical and horizontal equity, see Slemrod J & Yitzhaki S (2002) 1445-46.

²³³ For a discussion of tax culture in SA, see Reddy Y *A Discussion of a Tax Culture from a South African Perspective* (unpublished Master in Commerce (Taxation) thesis, UKZN, 2005). For a discussion of tax compliance from an economic perspective, see James S & Alley C 'Tax compliance, self-assessment and administration in New Zealand – is the carrot or the stick more appropriate to encourage compliance?' (1999) 5 *New Zealand Journal of Taxation Law and Policy* 3; James S & Alley C (2002) 27.

²³⁴ For example, under the ITA (s 30), a PBO may be granted tax exemption status. Similarly, the ITA (s 10) exempts from income taxation certain amounts received by or accrued to a taxpayer.

²³⁵ For a taxpayer's right to plan financial affairs, see *CIR v Conhage (Pty) Ltd* 1999 (4) SA 1149 (SCA) para 1; *CSARS v NWK Ltd* 2011 (2) SA 67 (SCA) para 42; *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA) para 40. See also Azzie J 'Spotless: A lesson in form and substance but not in substance over form' (1998) 8(1) *RLJ* 175; Chadwick I 'How far can the taxpayer go in "ordering his affairs"?' (1998) 6(1) *JBLJ* 13; Moosa F 'Borrowing from Peter to pay less to Paul: Tax planning with borrowed funds' (1998) 6(1) *JBLJ* 20; Moosa F '*CSARS v NWK Ltd* - a tax planning sham(e)?' (2012) 27(3) *ITJ* 3; Legwaila T 'The substance over form doctrine in taxation:

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must be interpreted with reference to *ubuntu* and applied in a manner consistent with its spirit. *Ubuntu* reinforces the notion that it is impermissible for taxpayers to cross the Rubicon from engaging in legitimate tax planning to engaging in inequitable tax arbitrage techniques (such as, sham transactions,²³⁶ tax evasion,²³⁷ tax avoidance,²³⁸ or non-disclosure of material facts).²³⁹ This creates an impermissible tax benefit and causes financial loss to the *res publica*. It may be an offence under chapter 17 of the TAA²⁴⁰ or a serious tax offence.²⁴¹ In addition to criminal sanction, a recalcitrant taxpayer may be punished with a fixed amount²⁴² or percentage based²⁴³ administrative non-compliance penalty, or an understatement penalty.²⁴⁴ These civil sanctions aim to deter tax abuses.²⁴⁵

The application of the doctrine after the judgment in *CSARS v NWK Ltd* (2016) 28(1) *SA Merc LJ* 112.

²³⁶ *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A) 949; *Michau v Maize Board* 2003 (6) SA 459 (SCA) para 4; *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA) paras 22-37; *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA) paras 38-40.

²³⁷ Tax evasion is a crime (s 235, TAA). See also *Van Heerden and Others v S* (2011) 73 SATC 7. Tax avoidance is an artificial (contrived) measure taken to reduce a tax liability. It is not an economic crime but is subject to a (civil) sanction. See *Glen Anil Development Corporation Ltd v SIR* 1975 (4) SA 715 (A) 727-28; *ITC 1862* (2013) 75 SATC 34. For a discussion of tax evasion and avoidance, see Morris JRP 'Tax avoidance and tax evasion' (1985) 34(3) *The Taxpayer* 55; Mansfield CY (1988) 184-90; Derksen AG 'To what extent does the common law allow the avoidance of statutes?' (1995) 112(1) *SALJ* 88-89; Meyerowitz D (2008) paras 29.1-29.2; Braithwaite V 'Dancing with Tax Authorities: Motivational Postures and Non-compliant Actions' in Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 15-39; Williams RC (2006) 771-98; Nagac A (2009) 2; Sydness LS (2010) 33-9; Kruger D, Stein M & Dachs P *et al* (2012) 257-69; Stiglingh M (ed), Koekemoer AD & van Zyl L *et al Silke: South African Income Tax 2016* vol 2 (2015) 811-22.

²³⁸ See, for example, the general anti-tax avoidance rules of the ITA (s 80A – s 80L).

²³⁹ The TAA (ss 99(2)(a) and (b)) authorises SARS to issue a tax assessment after the expiry of the prescription period stipulated in s 99(1) where an amount has not been properly assessed due to fraud, misrepresentation or non-disclosure of material facts. For a discussion of the meaning of 'non-disclosure of material facts', see Moosa F 'An interpretation of "non-disclosure of material facts" in Section 79 of the Income Tax Act 58 of 1962' (2001) 13(2) *SA Merc LJ* 186. It is submitted that the meaning of the expression 'non-disclosure of material facts' in s 99(2) remains as it was understood in its predecessor (s 79, ITA).

²⁴⁰ For example, non-compliance offences committed 'wilfully and without just cause' (s 234) and tax evasion (s 235). Prosecution for a tax offence can occur in a court having jurisdiction over the geographical area where an accused resides or carries on a business (s 238, TAA).

²⁴¹ The TAA (s 1) defines 'serious tax offence' as 'a tax offence for which a person may be liable on conviction to imprisonment for a period exceeding two years without the option of a fine or to a fine exceeding the equivalent amount of a fine under the Adjustment of Fines Act, 1991'. For the definition of 'tax offence', see fn 166 in chapter ten below. For a discussion of these definitions, see Clegg D *LexisNexis Concise Guide to Tax Administration* (2012) 107; Croome BJ & Olivier L (2015) 27 518-20.

²⁴² Section 210 read with s 211(1), TAA.

²⁴³ Section 213, TAA.

²⁴⁴ Section 222 read with s 223(1), TAA.

Ubuntu is a useful point of reference when interpreting the TAA with a view to ascertaining its outer limits as regards persons caught in its net, or determining the range of persons who may benefit from the compromise or write off provisions in the TAA.²⁴⁶ Applying *ubuntu* when interpreting s 195, s 197 and s 200 of the TAA favours a conclusion that these provisions are to be interpreted narrowly, thereby bringing within its radar only a limited range of taxpayers who can be relieved of a tax debt. This construction is congruent with the strictness and rigidity of the rule in the TAA (s 193(1)), namely, ‘it is the duty of SARS to assess and collect all tax debts according to a tax Act and not to forgo any tax debts’, except ‘if it would be to the best advantage of the State’ (s 193(2)). Thus, when construing the BOR and the TAA’s provisions, consideration must be given to *ubuntu* as an interpretive aid, but only when doing so is appropriate.

3.4 CONCLUSION

The present chapter shows that SA is a constitutional democracy, foundational to which is an open and democratic society based on human dignity, equality and freedom. The advent of this democracy brought momentous, unprecedented change. However, after more than two decades of democracy, SA remains a developmental State in transition. Its society is evolving in a manner that reflects the commitment of SA’s people to democratic values, social justice and human rights.²⁴⁷ As stated above in chapter one, in the absence of social and economic justice for all, true freedom will remain elusive for most South Africans. Political freedom and democracy do not equate to socio-economic freedom and democracy. To achieve socio-economic transformation in SA, governmental

²⁴⁵ The Court held in *Lord Howard De Walden v Inland Revenue Commissioners* (1942) 1 KB 389 397: ‘It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.’

²⁴⁶ The TAA caters for a temporary write off (s 195) and a permanent write off (s 197) of a tax debt, as well as a compromise of such a debt (s 200). The TAA (s 192) defines ‘write off’ as meaning ‘to reverse an outstanding tax debt either in whole or in part’ and ‘compromise’ to mean ‘an agreement entered into between SARS and a “debtor” in respect of a tax debt in terms of which— (a) the “debtor” undertakes to pay an amount which is less than the full amount of the tax debt due by that “debtor” in full satisfaction of the tax debt; and (b) SARS undertakes to permanently “write off” the remaining portion of the tax debt on the condition that the “debtor” complies with the undertaking referred to in paragraph (a) and any further conditions as may be imposed by SARS’. In this context, the TAA (s 192) defines ‘debtor’ to mean ‘a taxpayer with a tax debt’.

²⁴⁷ Murphy J (1995) 89 opines, with merit, that the Constitution gives ‘content to an evolving economic, social and political citizenship’.

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policies must be geared to merging social redistribution with economic growth. This is done so that government officials can tackle social ills, whilst simultaneously rendering the economy more dynamic, innovative, just and equitable.²⁴⁸ Tax revenue capacitates the government to achieve broad-based transformation. However, the resources in the National Revenue Fund were dented by the 2008/2009 global financial crisis referred to above. Naturally, this has constricted the South African government's capacity to fulfil its constitutional mandate of managing the process of transformation expeditiously and ensuring that its benchmarks are delivered to the people of South Africa as promised in the Constitution. Unless taxes are paid, the government of SA will not be financially stable or functionally able to fulfil its popular mandate. The present chapter shows that freedom and responsibility are key values of a democratic society in SA governed by a fiscal Constitution. Political freedom in 1994 brought with it the concomitant responsibility for each person to pay his/hers/its fair share of taxes. As shown above, a culture of tax compliance accords favourably with the values of democracy, *ubuntu* and the rule of law. The present chapter reaffirms that 'tax law is not the only set of rules which governs the administration of tax'.²⁴⁹ The Constitution and SA's administrative law underpin tax administration conducted by SARS and its officials in terms of the TAA.

The Constitution is a silver-lining evidencing a crucial paradigm shift from SA's apartheid history. It is a mirror reflecting the soul of SA's people and their commitment to a holistic program of restorative and corrective (not retributive) social justice. This is the signature tune of the Constitution. Its spirit, purport and objects seek to create a transformed society in which every person, including taxpayers, is fully and equally protected by, and benefits from, the rights and freedoms in the BOR, all of which are potent symbols of the hard-won transition to democracy and serve as a safe and stable foundation of the law in SA. The present chapter demonstrates that the Constitution is the crucible for determining the substantive and procedural validity of all law and conduct affecting tax administration. In chapter four below, discussion will take place of the question whether the TAA's enactment satisfied the Constitution's procedural prescripts.

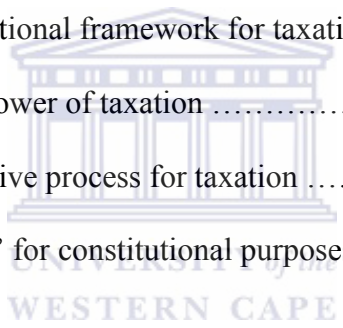
²⁴⁸ Janse van Rensburg A (2010) 142.

²⁴⁹ Croome BJ & Olivier L (2015) xxi.

CHAPTER FOUR

PROCEDURAL VALIDITY OF THE TAX ADMINISTRATION ACT

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*'A modern Midas might complain that everything he touches turns into tax.'*¹

4.1 INTRODUCTION

The Constitution establishes a society based on democratic values, social justice and fundamental human rights in which every person is equal before the law and entitled to equal protection and benefit of the law. The solemn declaration in the Preamble records the commitment of the people of SA to '[i]mprove the quality of life of all citizens and free the potential of each person'. The promise of a better life refers, inter alia, to the fulfilment of the socio-economic rights in the BOR, the maintenance of law and order, the availability of jobs, and the building of infrastructure required for a united, prosperous and secure democracy. Good governance, including sound management of SA's economy and tax system, are critical ingredients for the attainment of the Constitution's aims. However, the proverbial wheels of government cannot turn without the attendant financial cost. This necessitates taxation and proper tax administration. To this end, Chapter 13 of the Constitution regulates finance, including taxation.

Whereas chapter three above focussed on the Constitution in a general sense, the present chapter discusses the Constitution in a narrower sense by focussing on its framework for taxation and the national legislative process prescribed therein. This is done because research question (i) formulated above in chapter one necessitates an investigation into the constitutionality of the TAA from a procedural perspective. That question, in turn, raises the issue as to the legality of action taken thereunder. Non-compliance with the Constitution's procedural prescriptions for passing legislation would provide taxpayers with a further string to their bow when challenging the TAA. Such non-compliance would violate the rule of law and render the TAA susceptible to being declared invalid. Against this backdrop, the present chapter discusses (i) the constitutional power of taxation, (ii) the national legislative process for passing a 'money Bill', and (iii) the meaning of 'money Bill' under s 77 of the Constitution and of 'tax' for constitutional purposes.

¹ Kruger D, Stein M & Dachs P *et al* (2012) 1.

4.2 TAXATION UNDER THE CONSTITUTION

4.2.1 General constitutional framework for taxation

The Constitution shapes democracy in SA. It is the *fons et origo* of all public power. It directs the levers of control by regulating the substantive and procedural requirements for the lawful exercise of all forms of public power.² Thus, the Constitution governs the outer limits of government power that may not be transcended. The authority to impose tax is a power relating to finance dealt with in the Constitution (Chapter 13). It is both the originating source from which that power is derived and the source that sets its limits.³ Thus, SA has a fiscal Constitution because that law incorporates into its matrix an income generating mechanism for sustainable government. Taxation bridges the gap between government functions and the resources required for the proper execution thereof. Revenue from taxation equips the State with the resources required to fulfil its duties to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. Accordingly, taxation is a means to an end and not an end in and of itself. By virtue of the Constitution expressly providing for taxation, it is constitutionalised. Taxation is, thus, a constitutional mechanism by which the government of SA, like its counterparts in other democracies, is empowered to raise finances for achieving its objectives. Unlike other similar instruments,⁴ the Constitution does not expressly impose a duty to pay tax. It merely creates the framework for its imposition. However, the duty to be tax compliant may be inferred from, first, the values of democracy, the rule of law and *ubuntu*, and, secondly, from Art 29(6) of the African Charter (referred to above at para 1.1.2 in chapter one).⁵

² *Pharmaceutical Manufacturers* para 20; *Limpopo 1* paras 20-2; *Limpopo 2* para 2.

³ For critical discussion of a constitution’s role in regulating a government’s taxing power, see Brennan G & Buchanan JM *The Collected Works of James M Buchanan (The Power to Tax: Analytical Foundations of a Fiscal Constitution)* vol 9 (1980) 3-59.

⁴ For example, the Constitutions of Italy 1947 (Art 53), Japan 1947 (Art 30), Spain 1978 (Art 31) and Uganda 1995 (Art 17(g)) expressly impose a duty to pay tax. See Kasimbazi E *Taxpayers’ Rights and Obligations: Analysis of Implementation and Enforcement Mechanisms in Uganda* (2004) Danish Institute for International Studies Working Paper 2004/12 at 15 available at <http://hdl.handle.net/10419/84505> (accessed 21 June 2014). See also Article XXXVI of the American Declaration of the Rights and Duties of Man 1948. This Art reads: ‘It is the duty of every person to pay the taxes established by law for the support of public services.’

⁵ The African Charter was, on 9 July 1996, adopted in terms of s 234 of the Constitution.

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The primary sources of government revenue in SA are taxes, namely, VAT, income tax (personal and corporate) and customs duty. Tax revenue generated by each province and municipality is a secondary source of income. The fiscal structure of SA is characterised by centralised taxation and decentralised service delivery. This is hampered by ‘vertical fiscal imbalances’⁶ existing between revenue raised by the national,⁷ provincial and local spheres of government⁸ and expenditure incurred by each sphere. To this end, the Constitution provides for the following: (i) a National Revenue Fund (s 213(1)) and a Provincial Revenue Fund (s 226(1)) into which monies received by the national and provincial governments respectively are deposited, except for money statutorily excluded; (ii) an equitable sharing and allocation of national tax revenue among the spheres of government so as to enable them to provide services and perform their functions;⁹ and (iii) a national treasury to control government expenditure (s 216(1)). The Constitution, as the repository of all state (or public) power, decentralises¹⁰ authority by dispersing taxing and other public power among the three spheres of government.¹¹

⁶ Kriel RR & Monadjem M ‘Public Finance’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-07) 27-17.

⁷ For the meaning of ‘national sphere of government’, see *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 25 (*Langeberg Municipality*); *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) para 21.

⁸ Du Plessis L (2007) 34 contends that reference to ‘spheres’ rather than ‘tiers’ of government connotes a shift away from a rigidly hierarchical division of government powers and functions.

⁹ Section 214(1) read with s 227(1), Constitution. Section 214(1) reads: ‘An Act of Parliament must provide for – (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government; (b) the determination of each province’s equitable share of the provincial share of that revenue; and (c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations may be made.’ The annual Division of Revenue Act serves this purpose. Section 227(1) reads: ‘Local government and each province – (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and (b) may receive other allocations from national government revenue, either conditionally or unconditionally.’ Allocations due to provinces and municipalities may not be reduced by the value of revenue raised by them (s 227(2)). For a discussion of financial equalisation through revenue allocation and sharing, see Brand DJ *Distribution of Financial Resources and Constitutional Obligations in Decentralised Systems – A Comparison between Germany and South Africa* (unpublished LLD thesis, US, 2005) 81-8 182-221.

¹⁰ Du Plessis L (2007) 33 states that decentralisation of the government is a compromise between centralist and federalist sentiments. He submits that the Constitution ‘provides for federalism as a *process* rather than a *system* of government subjecting, as it were, law-making to an interplay of centralist and decentralist mechanisms and procedures’. De Vos P, Freedman W (eds) & Brand D *et al* (2014) 59 state that the Constitution adopts a model of co-operative or integrated (quasi-) federalism which differs from the traditional federal system such as in the USA where, for example, Congress has only those limited powers enumerated in the USA Constitution and its

4.2.2 Constitutional power of taxation

Legislative authority of the national sphere is vested in Parliament (s 43(a)), the provincial sphere in Provincial Legislatures (s 43(b)) and the local sphere in Municipal Councils (s 43(c)). The Constitution does not confer a general power of taxation. Legislatures have varying degrees of power to impose tax on persons subject to their authority. The taxing power is, thus, a concurrent competence. The exercise of taxing powers, including the specification of persons liable to pay a tax and the basis for such liability, is not ‘administrative action’.¹² A defining feature of the Constitution’s scheme is its express delineation of provincial¹³ and municipal taxing powers.¹⁴ Their power is

State legislatures have wider, general governance authority (so-called police power), including powers not sourced in the USA Constitution. See *United States v Morrison* (2000) 529 US 598 618–19. See also Motlale Z ‘Socio economic rights, federalism and the courts: comparative lessons for South Africa’ (1995) 112(1) *SALJ* 61. Parliament is vested with plenary powers not listed in s 44 of the Constitution (see *Limpopo 1* paras 22-4). The USA Congress, in contrast, is vested with only those powers expressly conferred by the USA Constitution (see *McCulloch v Maryland* (1819) 4 Wheat. 316 405). On the other hand, Provincial Legislatures and Municipal Councils are vested with only such authority conferred by the Constitution or national legislation. See, inter alia, s 104, s 114, s 151, s 155 and s 156. The Constitution (for example, in sections 228(2)(a) and 229(2)(a)) protects Parliament’s superior status by rendering the exercise of certain taxing powers by Provincial Legislatures and Municipal Councils subservient to Parliament’s authority.

¹¹ Steytler N ‘Global governance and national sovereignty: The World Trade Organisation and South Africa’s new constitutional framework’ (1999) 6 *LDD* 89 91 95 distinguishes between vertical dispersal of power at national, provincial and local levels, and the horizontal dispersal of power between the central government and other bodies operating with a measure of independence from the government. The latter bodies referred to would include, inter alia, the South African Reserve Bank and the institutions created in Chapter 9 of the Constitution.

¹² *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* [2015] 4 All SA 58 (ECP) para 13.

¹³ The Constitution (s 228(1)) reads: ‘A provincial legislature may impose – (a) taxes, levies, and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.’ Provincial Legislatures share concurrent legislative competence with national government to impose taxes, levies or duties in respect of, inter alia, casinos, racing, gambling and wagering (excluding lotteries), property transfer fees and vehicle licensing. See s 228 read with Schedule 4 Part A, Constitution. The CC held, in *Certification 1* paras 438-39, that, in addition to the ‘specific and guaranteed taxing powers’ afforded by s 228, Provincial Legislatures have the power to impose user charges. This authority forms part of the ‘implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of an NT sch 4 or 5 competence’. This accords with the maxims *quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest* (‘when the law grants something to someone, that too is granted without which the main purpose cannot be achieved’) and *ex accessorio eius, de quo verba loquuntur* (‘if the principal thing is forbidden (or permitted), the accessory thing too is forbidden (or permitted)’). See also Van Zyl A ‘The fiscal autonomy of provinces in the 1996 Constitution and in practice’ (2003) 22(1) *Politeia* 22. Also, see *Certification 1* paras 437-42.

limited. Provincial taxing powers are, in accordance with s 228(2)(b), regulated by the Provincial Tax Regulation Process Act.¹⁵ For municipalities, unless stated otherwise in national legislation, s 229(1) restricts their taxing power to the imposition of property rates and surcharges on fees. Provincial Legislatures and Municipal Councils must exercise their taxing power because ‘there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base’ (s 227(2)). Sections 229(3)(a) and (d) respectively provide for ‘[t]he need to comply with sound principles of taxation’ and ‘[t]he effectiveness and efficiency of raising taxes’. Although these relate to the exercise of municipal fiscal powers, it is submitted that they apply equally when any other legislature exercises a taxing power. Provincial and municipal taxing powers are significant devolutions of power from the central government. This fiscal decentralisation exemplifies SA’s deeper federalist-like attributes.¹⁶ Parliament’s taxing powers are not delineated in the Constitution. This power is implied¹⁷ in its plenary legislative powers in s 44.¹⁸ Its taxing power is broader in scope and ambit than that of the other legislatures.¹⁹

¹⁴ The Constitution (s 229(1)) reads: ‘Subject to subsections (2), (3) and (4), a municipality may impose – (a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.’ This differs materially from s 178(2) of the interim Constitution. For a discussion of municipal taxing powers, see *Kungwini* paras 14-15 42-5. The CC held, in *Rademan v Moqhaka Local Municipality and Others* 2013 (4) SA 225 (CC) para 39, that a municipality is entitled to cut off or withhold the supply of any service to a ratepayer or resident who is in breach of its conditions of payment for taxes or other service charges. Failure to pay confers on the municipality a lien over the property in respect of which the amount is owed. This constitutes a charge upon the property. See *City of Tshwane Metropolitan Municipality v Mathabathe and Another* 2013 (4) SA 319 (SCA) paras 9-11. This entitles the municipality to withhold a rates clearance certificate for purposes of a property transfer. Such conduct is constitutional. See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) paras 44-73. For a discussion of municipal competencies generally in comparison to other spheres, see *Minister of Local Government, Environmental Affairs & Development Planning, Western Cape v The Habitat Council and Others*; *Minister of Local Government, Environmental Affairs & Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC) paras 11-12. Act 53 of 2001.

¹⁶ For a useful discussion of the structure of the South African state, see Federico V ‘South African Quasi-Federalism’ in Corder H, Federico V & Orru R (eds) *The Quest for Constitutionalism: South Africa since 1994* (2014) 15-24. See also the authorities cited at fn 152 in chapter three above.

¹⁷ Constitutional power is conferred expressly or by implication. See *Certification 1* paras 438-39; *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 20 (*DVB Behuising*). See also

The Constitution provides the key pillar-stones for the establishment and operation of a properly functional democracy. Section 40(1) thereof provides that ‘government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated’. Section 40(2) requires that each sphere of government and organs of state within each sphere, ‘must observe and adhere to the principles’ contained in ss 41(1)(a) to (h) of co-operative government and intergovernmental relations.²⁰ A co-operative partnership ‘must’ exist. The affirmative character of ‘must’ exemplifies the peremptoriness of the obligation created by s 40(2).²¹ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*²² (Certification 1) the CC described the obligations imposed by s 41 as being ‘largely of a general kind which are sensible and might in any event be inferred without these provisions’. In *Independent Electoral Commission v Langeberg Municipality*²³ (*Langeberg Municipality*) the CC held further that s 41(1) ‘renders them binding on all spheres of government and all organs of state within each sphere. The principles are concerned with the way in which spheres of government and organs of state within each sphere must relate to each other.’ It is submitted that this puts it beyond doubt that s 41 imposes peremptory obligations. In terms of s 2 of the Constitution, discussed above in chapter three, conduct inconsistent with s 41 is invalid.

18 Kriel RR & Monadjem M ‘Public Finance’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 3 (Original service 03-07) 27-8; Croome BJ & Olivier L (2010) 7.

19 ‘Plenary legislative power’ is the full, unlimited power conferred by the Constitution to pass laws. The CC held, in *Limpopo 1* para 22, that Parliament’s plenary powers authorises it to ‘legislate on “any matter”, including a matter within the functional areas listed in Schedule 4 and, subject to certain specified circumstances, a matter within the functional areas listed in Schedule 5’.

Hyatali CJ held, in *Attorney-General of Trinidad and Tobago v Ramesh Dipraj Kumar Mootoo* (1976) 28 WIR 326, that the ‘power to tax is inherent in any sovereignty’. Marshall CJ stated, in *McCulloch v Maryland* (1819) 4 Wheat. 316 428-29, that ‘the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident.’

20 In *Certification 1* para 469, the CC described co-operative governance as ‘a new philosophy’. The CC held, in *Langeberg Municipality* para 20, that ‘[t]he concept of intergovernmental relations ... is inescapably a reference to relations between spheres of government and organs of state within those spheres’. Section 41(1) recognises collegiality and friendly relations as principles of good governance. For a discussion of co-operative governance in SA, see Reddy PS ‘Intergovernmental relations in South Africa’ (2001) 20(1) *Politeia* 21; Leonardy U & Brand D ‘The defect of the Constitution: Concurrent powers are not co-operative or competitive powers’ (2010) 4 *TSAR* 657.

21 *Prinsloo* para 13 and the authorities cited at fn 31 in chapter two above.

22 1996 (4) SA 744 (CC) para 470.

23 2001 (3) SA 925 (CC) para 20.

Section 41(1) states that all spheres of government and organs of state within them must ‘not assume any power or function except those conferred on them in terms of the Constitution’ (s 41(1)(f)). Nor must they ‘exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere’ (s 41(1)(g)). Thus, no legislature can exercise its taxing power by impinging on the terrain of another legislature. The Constitution (ss 228(2)(a) and 229(2)(a)) forbids Provincial Legislatures and Municipal Councils from exercising a taxing power in a manner which ‘materially²⁴ and²⁵ unreasonably prejudices national economic policies’.²⁶ This engages the separation of powers doctrine, a constitutional premise aimed at accountability, responsiveness, openness and transparency.²⁷ The Constitution allocates powers in accordance with the functional vision of what is appropriate to each governmental sphere. However, ‘powers are not contained in hermetically sealed compartments’.²⁸ Thus, the exercise thereof by different spheres may overlap. When this happens, each sphere of government acts within its own competence but is commanded by the Constitution to co-operate with the other governmental sphere(s) in mutual trust and good faith, and must co-ordinate their actions. The Constitution (ss 85(2)(b) and (d)) vests the executive authority to develop national economic and fiscal policy, and to implement it through legislation, in the President of the RSA acting with the other members of the Cabinet (s 91(1)). The national executive has a wide discretion to select the means for achieving its constitutionally permissible objectives. The separation of powers doctrine insulates government policy by precluding a court from interfering with the means selected because it, for example, considers other

²⁴ ‘Material’ is not defined in the Constitution. It is submitted that, in this context, ‘material’ bears its ordinary dictionary meaning. For a discussion of the dictionary meanings of this word, see *Oatorian Properties (Pty) Ltd v Malan* 1973 (3) SA 779 (A) 785 and *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) 74H-J. It is a factual question in each case whether the exercise of a taxing power has the effect contemplated by s 228(2)(a) and s 229(2)(a).

²⁵ The use of the conjunctive ‘and’ indicates that both the materiality and unreasonableness criteria must be met for a contravention to occur. For the legal effect of ‘and’, see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50.

²⁶ Murphy J (1995) 98-9 argues that the rational basis test of the USA (see *Hodel*) should apply when determining if a provincial or municipal tax encroaches upon a national economic interest.

²⁷ *Certification 1* para 45; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (4) BCLR 469 (CC) paras 25-8. Separation of powers disperses and apportions public power. Moseneke D (2007) 6 aptly describes separation of powers as ‘an antidote for tyranny and abuse of power’. See also the authorities cited at fn 70 in chapter three.

²⁸ *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) para 47.

more appropriate means to be available. However, if the means chosen is challenged on the grounds of irrationality, then a court must examine them to determine whether they are rationally related to their objective(s). If they fall short of the standard imposed by the Constitution, then the decision may be set aside for irrationality.²⁹

4.2.3 National legislative process for taxation

The TAA regulates the administration of national taxes. All South African taxes are enacted in laws passed in accordance with the Constitution. In terms thereof, a national tax statute originates as a 'money Bill' defined in s 77(1) and, under s 77(3), is passed by the procedure in s 75.³⁰ In terms of s 73(2), the Minister of Finance introduces a money Bill in the National Assembly. According to s 55(1)(b) and s 68(1)(b) respectively, the National Assembly and National Council of Provinces cannot initiate or prepare money Bills. Section 73(3) prohibits the introduction of a money Bill in the National Council of Provinces. The tagging³¹ of a Bill as a 'money Bill' means that additional provisions apply to it that are inapplicable to an 'ordinary Bill'. Section 77(1) outlines the requirements for a national money Bill.³² It 'may not deal with any other matter except'

²⁹ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 51. For the formulation of the rationality test, see *ARMSA* para 50 and *Pharmaceutical Manufacturers* paras 85-90. Moseneke DCJ held, in *OUTA* para 67, that 'the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament'. For the link between legislation and policy, see *Rivonia Primary School* para 55; *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7.

³⁰ *Minister of Finance and Another v Paper Manufacturers Association of SA* 2008 (6) SA 540 (SCA) para 17. The Money Bill Amendment Procedure and Related Matters Act 9 of 2009, envisaged by the Constitution in s 77(3), governs the procedure for amending a money Bill before Parliament. Provincial money Bills are passed in terms of s 104 read with s 121 of the Constitution.

³¹ For an analysis of tagging of Bills, see *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) (*Liquor Bill*); *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) paras 45-6; *Democratic Alliance v President of the Republic of South Africa and Others* [2014] 2 All SA 569 (WCC) paras 5-13 (*Democratic Alliance 2*); *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs and Others* [2016] JOL 35538 (GP). See also Murray C & Simeon R "'Tagging" bills in Parliament: Section 75 or 76?' (2006) 123(2) *SALJ* 232.

³² The Constitution (s 77(1)) reads: 'A Bill is a money Bill if it - (a) appropriates money; (b) imposes national taxes, levies, duties or surcharges; (c) abolishes or reduces, or grants exemption from, any

those matters listed in s 77(2).³³ Having regard to the tenor and language of s 77(2) read with s 2, in the context of s 77(2) ‘may not’ is the equivalent of ‘shall not’. Thus, its peremptory epithet is self-evident. A money Bill falling foul of its mandatory injunction may, thus, be declared invalid under s 172(1)(a) of the Constitution.³⁴

Proper tax administration is a key factor determining the resources available for financing public expenditure in all spheres of government. However, tax administration is not listed in s 77(2) as a matter that may be dealt with in a national (or provincial) money Bill. ‘Any’ in the phrase ‘may not deal with *any* other matter except’ is of wide import and unqualified generality. Its legal and practical effects are that, other than the exclusionary matters listed in ss 77(2)(a) to (d), *all* other matters are hit by the prohibition and are to be dealt with in an ordinary Bill. This interpretation is reinforced by a linguistic analysis of the word ‘except’. Its effect is that the list enumerated in sub-paras (a) to (d) is not open to expansion.³⁵ Accordingly, the Constitution requires taxation to occur under two statutes, namely, a money Bill levying the tax and fixing the tax rates and an ordinary Bill dealing with matters incidental or ancillary thereto (such as tax administration). A similar position exists in Australia. Section 55 of the Commonwealth of Australia Constitution

national taxes, levies, duties or surcharges; or (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.’ ‘Appropriates money’ refers to ‘the allocation of revenue raised as tax and not as a regulatory charge’. This term does not refer to ‘any instance where revenue is incidentally raised’. See *Shuttleworth* para 46.

³³ The Constitution (s 77(2)) reads: ‘A money Bill may not deal with any other matter except – (a) a subordinate matter incidental to the appropriation of money; (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges; (c) the granting of exemption from national taxes, levies, duties or surcharges; or (d) the authorisation of direct charges against the National Revenue Fund.’ Sections 120(1) and (2) of the Constitution applies to a provincial money Bill. They are, *mutatis mutandis*, in *pari materia* with ss 77(1) and (2) of the Constitution.

³⁴ The executive branch of government in SA does not have plenary legislative powers to impose revenue-raising tax legislation. See *Shuttleworth* paras 64-5. In *Shuttleworth* para 42 Moseneke DCJ held: ‘An executive government may not impose a tax burden or appropriate public money without due and express consent of elected public representatives. That authority, and indeed duty, is solely within the remit of the Legislature.’ At para 46, Moseneke DCJ held further that the Executive may be authorised by a law, other than a money Bill, to impose regulatory fees, tariffs, levies, duties, charges and surcharges.

³⁵ It is an accepted canon of interpretation that terms with a wide meaning may be restricted by terms with a narrower meaning to which the former are connected. This rule is expressed by the maxim *noscitur a sociis*, that is, the measuring of a word may be ascertained by reference to those associated with it. This is so because words take ‘their colour from each other, that is, the more general is restricted to a sense analogous to the less general’. For a discussion and application hereof, see *Ovenstone v SIR* 1980 (2) SA 721 (A); *Bertie van Zyl* para 44 (and the authorities cited there at fn 47); *ITC 1880* (2016) 78 SATC 103 para 24. See also de Ville JR (2000) 124-25.

CHAPTER FOUR: PROCEDURAL VALIDITY OF THE TAX ADMINISTRATION ACT

Act 1900 (Commonwealth Constitution) renders it impermissible for the imposition of a tax and its incidence to be dealt with in a single statute.³⁶ Although SA's Constitution does not contain a provision identical to s 55 of the Commonwealth Constitution, the comparable counterpart of the SA Constitution is s 77(2) thereof that operates likewise.

For the sake of continuity and governmental, administrative and economic stability, the apartheid era tax regime and tax laws were retained under the interim and final Constitutions.³⁷ All tax statutes in force under the former Constitution and carried forward to operate under the latter Constitution remain binding and enforceable until amended or repealed by Parliament, or invalidated by an order of court to the extent of any inconsistency with the Constitution.³⁸ Prior to the commencement of the TAA, each tax statute regulated its own administration. It is submitted that this did not accord with the requirement emanating from s 77(2) that tax administration is to be governed by a law separate from the statute imposing a tax. This state of affairs was, however, constitutional. This is so because both the interim and final Constitutions operate prospectively only.³⁹ The interim Constitution commenced operation on 27 April 1994. Section 60(1) thereof dealt with Parliament's power to pass money Bills. It provided that 'Bills ... imposing taxation shall be introduced in the National Assembly only'. The interim Constitution did not have a provision comparable to s 77(2) of the final Constitution. Therefore, the requirement of a separate tax administration statute did not apply under the interim Constitution. On 4 February 1997, the final Constitution became law. Therefore, from then onwards, s 77(2) thereof applies.

³⁶ The Commonwealth Constitution (s 55) reads: 'Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.' In this context, the phrase 'imposition of taxation' has been interpreted narrowly, thereby excluding from its ambit penalties for non-compliance. See *Re Dymond* (1959) 101 CLR 11. For a discussion of the provisions in s 55, see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 569. See also Morabito V & Barkoczy S 'What is a tax? The erosion of the "Latham definition"' (1996) 6(1) *RLJ* 43 47.

³⁷ *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC) 994F.

³⁸ Section 172(1) read with para 2(1) of Schedule 6, Constitution.

³⁹ *De Klerk* para 13; *Rudolph and Another v CIR and Others* 1996 (4) SA 552 (CC) para 15; *S v Pennington* 1997 (4) SA 1076 (CC) para 36; *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1997 (1) SA 585 (CC) para 6; *S v Basson* 2005 (1) SA 171 (CC) para 36.

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Section 77(2) provides no grounds for reviewing any pre-existing tax law in order to have it declared invalid because of an inconsistency with the requirement that a tax statute may not impose a tax and contemporaneously regulate tax administration. The TAA overhauled tax administration by aligning each ‘tax Act’ (as defined) with the imperative of s 77(2). However, its definition of ‘tax Act’ (s 1) does not include the C&EA.⁴⁰ The administrative provisions in that statute continue to be of full force and effect until the administration of customs and excise is regulated separately under its own statute.⁴¹ Although this legal position will not be in harmony with that envisaged by s 77(2), for the reasons already explained, this state of affairs under the C&EA will pass muster.

The TAA is included in its own definition of ‘tax Act’ in s 1 thereof. Thus, the TAA regulates its own administration as well as that of other national tax statutes falling within the scope and ambit of the term ‘tax Act’ (as statutorily defined).⁴² The TAA regulates the administration of taxes pre-dating SA’s constitutional era (such as, VAT, income tax and estate duty), as well as taxes post-dating democracy in SA (such as capital gains tax). If the South African government introduces a new tax at any time in the future (for example, a sugar tax), then it may make the provisions of the TAA applicable to the administration thereof. The TAA is, thus, part of a broader context of fiscal transformation. However, s 4(3) of the TAA provides that if an inconsistency exists between any TAA provision and that contained in another ‘tax Act’, then the latter will prevail. This means that the TAA is subservient to the provisions distending any other ‘tax Act’. Accordingly, provisions in other tax Acts remain legally relevant to tax administration, albeit to a limited degree only. It is submitted that this legal position is incongruous with that apparent from s 77(2) of the Constitution. This is so because s 77(2) implicitly favours the predominance of provisions in a designated tax administration law, such as the TAA, over those in a dedicated taxing statute, such as the ITA and VATA.

⁴⁰ However, as a transitional arrangement only, s 2(2) of the Tax Administration Laws Amendment Act 21 of 2012 authorises very limited application of the TAA to the C&EA.

⁴¹ In future, customs will be regulated by the Customs Duty Act 30 of 2014 read with the Customs Control Act 31 of 2014. Excise will be governed by the Excise Duty Act 91 of 1964 (formerly the C&EA). Copies of these statutes are available at www.sars.gov.za/legal.

⁴² See the discussion of ‘tax Act’ (s 1, TAA) read with s 3(2) of the TAA in chapter five below.

4.2.4 Meaning of ‘tax’ for constitutional purposes

The legislative history of the TAA may be summarised as follows:⁴³ Four draft Bills⁴⁴ were issued, namely, the Tax Administration Bill, 2009,⁴⁵ Tax Administration Bill, 2010,⁴⁶ Tax Administration Bill 11, 2011,⁴⁷ and the TAB 11B, 2011. The latter Bill was, on 22 June 2011, introduced in the National Assembly as an ordinary Bill not affecting the provinces.⁴⁸ The Assembly passed that Bill on 17 November 2011 and then, per the Constitution (s 75(1)), it was referred to the National Council of Provinces which passed it on 29 November 2011.⁴⁹ The President of the RSA assented to and signed the Bill on 7 May 2012 as required by the Constitution (s 84(2)(a)). Thereafter, by Proc 51 GG 35491 of 14 September 2012, it became law. However, the TAA only acquired the force of law with effect from 1 October 2012, although the implementation of certain provisions therein was delayed until its promulgation later in the Government Gazette.

⁴³ An overview of the legislative process leading to the enactment of the TAA is available at http://www.sars.gov.za/Legal/Tax_Admin/Pages/History.aspx (accessed 28 September 2013). A public consultation process, conducted by the Standing Committee on Finance, preceded the formal legislative process. Full details of the public hearings, including copies of submissions made and audio recordings thereof, are available at <http://www.pmg.org.za/report/20110816-tax-administration-bill-tab-b11-2011-public-hearings> and <http://www.pmg.org.za/report/20110817-public-hearings-%E2%80%93-tax-administration-bill-tab> (accessed 28 September 2013).

⁴⁴ These Bills are materials underlying the passing of the TAA. They are excluded from consideration when interpreting the TAA. For a discussion hereof, see de Ville JR (2000) 226.

⁴⁵ A copy of the Tax Administration Bill, 2009 is available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013). See SARS ‘Draft explanatory memorandum on the draft Tax Administration Bill, 2009’ 18 available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013).

⁴⁶ A copy of the Tax Administration Bill, 2010 is available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013). The comments by the Law Society of SA on the Tax Administration Bill, 2010 is available at http://www.lssa.org.za/?q=con,160,LSSA_comments (accessed 28 September 2013).

⁴⁷ A copy of the Tax Administration Bill 11, 2011 is available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013). See also SARS ‘Memorandum on the objects of the Tax Administration Bill, 2011’ available at <http://www.sars.gov.za/Legal/Preparation-of-Legislation/Pages/Explanatory-Memoranda.aspx> (accessed 27 September 2013). Du Plessis L (2007) 269, referring to *NUMSA v Driveline Technologies* 2000 (4) SA 645 (LAC) paras 79-80 and *Shoprite Checkers (Pty) Ltd v Ramdaw* 2001 (3) SA 68 (LC) para 59, argues that explanatory memoranda may be relied upon to determine the purpose of a statutory provision.

⁴⁸ For a discussion of the procedure to pass an ordinary Bill, see *Democratic Alliance* 2 paras 6-7. A Bill is an ‘ordinary Bill’ if it does not seek to amend the Constitution. An ordinary Bill may be a money Bill. If so, s 77 of the Constitution also applies thereto. See *Democratic Alliance* 2 para 5.

⁴⁹ For a discussion of the role of the National Council of Provinces, see Malherbe EFJ ‘The South African National Council of Provinces: Trojan horse or white elephant’ (1998) 1 *TSAR* 77.

The TAA caters for the imposition of civil penalties. A penalty is a monetary exaction imposed as punishment for an unlawful act or omission.⁵⁰ It has a deterrent purpose. The TAA⁵¹ and other tax statutes (such as the ITA)⁵² include a penalty in their definitions of 'tax'. This raises the legal question whether the TAB 11B, 2011 was a money Bill under the Constitution (s 77(1)(b)). If so, then s 77(2) of the Constitution applied to it. This would mean that the TAA violates the requirement of s 77(2), namely, that provisions dealing with the imposition of tax must be contained in legislation separate from that regulating tax administration. This would render those parts of the TAA dealing with the imposition of penalties susceptible to a constitutional challenge by virtue of the principle of legality that applies to the TAA. If this legislation does not satisfy all the procedural and substantive requirements for lawfulness, then it may be declared invalid in accordance with ss 172(1)(b)(i) and (ii) of the Constitution. As stated above in chapter three, SA's legal framework requires that taxation, tax administration and related legislative processes comply with the rule of law. An examination into whether the TAB 11B, 2011 was correctly passed as an ordinary Bill is relevant for this study because the answer thereto bears directly on the question of the legality of the TAA and, hence, the enforceability of its provisions as a whole, or at least those pertaining to civil penalties.

To answer the aforementioned legal question requires a determination as to whether, for the purposes of s 77(1)(b), 'national taxes' includes penalties. The Constitution does not define 'tax' for its purposes. In accordance with the discussion above in chapter two, the term 'tax' must be interpreted textually, contextually, purposively and teleologically. In

⁵⁰ *United States v La Franca* (1931) 282 US 568 572; *United States v Reorganized CF&I Fabricators of Utah Inc* (1996) 518 US 213 224.

⁵¹ The TAA (s 1) defines 'tax' as including 'a tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act'. The breadth hereof is evident from its broad-ranging constituent elements. This is consistent with the TAA's purpose, namely, 'aligning the administration of the tax Acts to the extent practically possible' (s 2(a), TAA). 'Includes' indicates the definition is open to expansion. This view is reinforced by the phrase 'and any other moneys imposed under a tax Act'. It permits the 'tax' definition to be expanded. Applying the *eiusdem generis* rule of interpretation, the scope of these words is restricted to things of the same kind as those in the list preceding it, namely, a monetary charge or financial burden imposed by a 'tax Act'. See the authorities cited above at fn 35 in the present chapter. Klue S, Arendse JA & Williams RC *Silke on Tax Administration* (2015) (online version) para 1.3 state that 'penalty' in the 'tax' definition of the TAA encompasses civil (not criminal) sanctions. For the legal effect of 'includes', see the authorities cited at fn 186 in chapter three above.

⁵² The ITA (s 1) defines 'tax' to mean 'tax or a penalty imposed in terms of this Act'.

*South African Reserve Bank and Another v Shuttleworth and Another (Shuttleworth)*⁵³ the CC held that ‘national taxes, levies, duties [and] surcharges’ in s 77(1)(b) cannot be interpreted literally; they must be ascribed meanings which are consistent with their contexts and the purpose for which a tax, levy, duty or surcharge is imposed in a statute. The word ‘tax’ has no single, universal, all-embracing meaning of invariable application.⁵⁴ This is evident from its dictionary meaning. *Black’s Law Dictionary*⁵⁵ defines ‘tax’ as ‘[a] charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue’. Thus, the term ‘tax’ embraces all burdens imposed by a legislative authority to support a government, irrespective of whether the ‘tax’ is characterised as a contribution, charge, exaction, toll, tribute, tallage, gabel, impost, duty, customs, excise, subsidy, aid or supply. The characteristics of a monetary charge or financial burden that point toward it being a ‘tax’ under s 77(1)(b), will be outlined below. This will establish a set of guidelines to serve as a yardstick for testing whether a charge or burden is a ‘tax’, in general, for constitutional purposes.

The Constitution establishes a normative, democratic value system. Any feature or characteristic of a ‘tax’ must be congruent with the Constitution and its context therein. A monetary charge or financial burden ought also to be consistent with the constitutional scheme of a ‘money Bill’, the objectives of taxation, the language and syntax used in the Constitution, and the ordinary dictionary meaning of ‘tax’. A survey of case law in SA shows that courts have not defined ‘tax’ because it ‘defies precise description outside the context of a specific statute and its purpose’.⁵⁶ For this reason, it is unwise, even futile, to attempt a concrete definition of ‘tax’. Thus, the formulation given here is not intended to be comprehensive or all-embracing. For constitutional and general legal purposes, ‘tax’ may, for reasons given below, *loosely* be defined as a non-penal means whereby a competent legislature imposes a compulsory monetary charge or financial burden on persons subject to its authority for purposes of raising revenue, which ‘tax’ serves a

⁵³ 2015 (5) SA 146 (CC) para 43. By parity of legal reasoning, the decision *in casu* applies with equal force to provincial taxes (s 120) and municipal taxes (s 229) dealt with in the Constitution.

⁵⁴ *Shuttleworth* paras 47-52 (and the authorities cited there).

⁵⁵ 10 ed (2014) 1685. For the dictionary meanings of ‘tax’, see *City Treasurer and Rates Collector, Newcastle Town Council v Shaikjee and Others* 1983 (1) SA 506 (N) 507F.

⁵⁶ *Shuttleworth* para 49. For further discussion of the meaning of ‘tax’, see Williams RC (2015) 1-8.

public benefit or legitimate public purpose, non-compliance with which may be punishable by law. It is submitted that in the absence of a nexus between a 'tax' and an identifiable objective consonant with the Constitution, the charge or burden may be an arbitrary imposition and, thus, an unlawful deprivation of property in violation of the principle of legality in the rule of law (discussed above in chapter three).

The general objectives of taxation are discussed above in chapter one. Thus, they are not restated here. Public benefit or public purpose in pursuit of a legitimate public interest is a common element of the objectives of taxation. Therefore, an essential requirement to be a 'tax' under the Constitution is that a monetary charge or financial burden must have a public benefit or serve a legitimate public purpose. In addition to *Shuttleworth*, this is also recognised in *Metcash*,⁵⁷ *Carlson Investments Share Block (Pty) Ltd v CSARS*⁵⁸ (*Carlson Investments*) and *Capstone 556 (Pty) Ltd v CSARS and Another; Kluh Investments (Pty) Ltd v CSARS and Another*⁵⁹ (*Capstone 556*). This requirement also features prominently in foreign law (such as in Australia).

In *Matthews v Chicory Marketing Board*⁶⁰ Latham CJ described a tax as 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered'⁶¹ (Latham formula). The public purpose served by taxation is aptly illustrated by Muller⁶² who defines a 'tax' as a

⁵⁷ At para 60. Although the public benefit of taxation is recognised in that case with reference to VAT, it is submitted that, by parity of reasoning, the same applies equally to all other taxes.

⁵⁸ 2001 (3) SA 210 (W) 231.

⁵⁹ 2011 (6) SA 65 (WCC) para 9.

⁶⁰ (1938) 60 CLR 263 276. See also *Morabito V & Barkoczy S* (1996) 43; *Morabito V 'Tax or Penalty?: The latest sequel'* (1999) 2 *Journal of Australian Taxation* 391; Hyde N 'The hidden power of taxation: How the High Court has enabled punitive legislation to bypass the Senate' (2008) 11 *Journal of Australian Taxation* 1.

⁶¹ See also Lymer A & Hasseldine J (eds) *The International Tax System* (2002) 2 who define 'tax' as a 'compulsory levy made by public authorities for which nothing is received directly in return'. *Morabito V & Barkoczy S* (1996) 52 argue that the Latham formula cannot be mechanically applied as this will lead to rigidity as to what constitutes a tax. In Australia, greater flexibility has been generated over time because of the judicial erosion of the positive criteria contained in the Latham formula. For example, the Court, in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 467-68, held that, whilst the Latham formula contains the positive attributes which are *prima facie* sufficient to stamp a charge with the character of a tax, it is not an exhaustive definition. Thus, 'there is in principle no reason why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not

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‘monetary-based compulsory contribution payable by the public as a whole or a substantial sector thereof to a government (at a national or sub-national level). Its primary purpose is to defray government expenditures, but it can also serve as an instrument to attain socio-economic and political objectives’.

An exaction of money does not bear the imprint of a tax merely because it is paid into a public fund. However, such payment is proof that the monies have public benefit.⁶³ Penalties are sanctions against impermissible conduct designed to have a deterrent effect and encourage fulfilment of tax obligations. In so doing, penalties foster the creation of a tax compliance culture. This benefits the *fiscus* and society as a whole. Thus, penalties have a public benefit or, at least, serve a clear public purpose. They are collected by SARS and assist in capacitating the State with resources required to fulfil its obligations and attain the Constitution’s goals. However, this public utility does not itself mean that a penalty is a ‘tax’ under s 77(1)(b) or the Constitution read as a whole. Although public benefit or purpose is, thus, an indicator that a charge or burden may be a ‘tax’, it is not a decisive criterion or determinative factor. Other considerations too play a role.

properly be seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public’. The majority in *Australian Tape Manufacturers 500* endorsed the *dicta* in *Air Caledonie International v Commonwealth* modifying the Latham formula. It held that ‘the better view is that it is not essential to the concept of a tax that the exaction should be by a public authority’. Thus, *Morabito V & Barkoczy S* (1996) 49 express the view that ‘the requirement of “public authority” appears to have been absorbed into the concept of “public purposes”’. This is in the sense that a judicial finding that the levy in question is to be expended on public purposes will ensure that the requirement of “public authority” will not prevent the characterisation of the levy as a tax.’ *Hyde N* (2008) 9 concludes that the positive limb of the Latham formula has been reduced to the requirement that the exaction is both compulsory and legally enforceable. *Hyde* opines that the public purpose limb has been extinguished and rendered virtually non-justiciable by the majority judgment in *Australian Tape Manufacturers* which reduced the ‘public purpose’ requirement to one of ‘public interest’. Therefore, *Hyde N* (2008) 37 defines a ‘tax’ as being simply ‘a theoretical exaction of money enforceable by law which, if collected, would go toward a matter in the public interest’. *Johnston P* ‘A taxing time: The High Court and the tax provisions of the Constitution’ (1993) 23(2) *University of Western Australia Law Review* 362 369 criticises the approach of the majority judgment in *Australian Tape Manufacturers* on the basis that ‘by effectively reducing “public purpose” to “public interest” the majority have stripped the former notion of any distinguishing content and force. ... A public purpose then becomes whatever the Parliament determines to be in the public interest’.

⁶² *Muller E* (2010) 14-15.

⁶³ *Australian Tape Manufacturers 503*. See also *Moore v Commonwealth* (1951) 82 CLR 547 561. *Ramsbottom J* held, in *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) 259, that money paid into general revenue and used for general purposes for which the payer thereof receives no specific service in return for his payment, is a tax.

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‘Tax’ is a generic, collective term incapable of precise definition. Its aforesaid dictionary meaning exemplifies that ‘tax’ may take a multiplicity of forms, including a duty, levy and penalty. Whilst the Constitution, (for example, s 228(1) and s 229(1)), expressly refers to different forms of tax (such as, VAT and income tax), it also differentiates between taxes, levies and duties.⁶⁴ Levies (such as, a skills development levy and fuel levy) and duties (such as, estate duty and transfer duty) are, for constitutional purposes, excluded from the term ‘tax’.⁶⁵ Thus, in a constitutional context, ‘tax’ is narrower in scope and ambit than its dictionary meaning.⁶⁶ Its restricted meaning in s 77(1)(b), and the Constitution read holistically, lends support and credence for the view expressed here that a penalty imposed under the TAA (or any tax statute) is not a ‘tax’ for constitutional purposes. A strong indicator hereof is that the imposition of a penalty does not stem from a constitutional power to tax. Rather, it emanates from an implied ancillary power applicable to all legislatures. Every legislature is granted the competence to legislate on matters reasonably related or incidental to their legislative power.⁶⁷ It is for this reason that the imposition of a penalty for non-compliance with a statutory provision is not confined to tax legislation. It may be imposed in relation to any legislation, irrespective of its subject matter. Since the power to impose a penalty does not stem from the power to tax but rather from a general legislative authority, the exercise of a legislative power to impose a penalty cannot be said to constitute the exercise of a constitutional taxing power. Hence, the imposition of a penalty cannot be a ‘tax’.⁶⁸

⁶⁴ See, for example, s 77(1)(b) and (c), s 77(2)(b) and (c), s 120(1)(b) and (c), and s 120(2)(b) and (c).

⁶⁵ Statutes often use tax, levy and duty synonymously and interchangeably. See *Shuttleworth* para 43.

⁶⁶ The Constitution (s 156(1)(a)) confers on municipalities executive authority and the right to administer the matters listed in Schedule 5 Part B. This includes the licensing of dogs and licensing of undertakings that sell food to the public. Subject to ss 155(6)(a) and (7) of the Constitution, Schedule 5 Part B confers concurrent competence on Provincial Legislatures in respect of such matters. Licensing fees constitutes a ‘tax’. See *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) 259.

⁶⁷ For example, the Constitution (s 156(5)) reads: ‘A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.’ See also s 44(3) and s 104(4), Constitution.

⁶⁸ Klue S, Arendse JA & Williams RC (2015) (online version) para 1.3 state, convincingly, that ‘administrative non-compliance penalties and interest may be collected in terms of the Tax Administration Act as though they were a ‘tax’. In reality, however, an administrative penalty is not a tax and neither is interest on unpaid tax.’ For a discussion of a taxpayer’s claim against SARS for the payment of ‘interest’, see *Annique Health and Beauty (Pty) Ltd v CSARS* (unreported case no. 36127/2015) [2016] ZAGPPHC 413 (10 June 2016) paras 22-9.

The legal position expounded above compares favourably with that in Australia where a penalty is viewed as an administrative imposition.⁶⁹ Section 53 of the Commonwealth Constitution precludes a taxing statute from being penal in nature. Section 55 reads: 'Laws imposing taxation shall deal only with imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.' Consequently, in Australia, penalties are incorporated in a separate administrative statute dealing with the incidence, assessment and collection of tax. Although the SA Constitution does not have provisions corresponding to s 53 and s 55 of the Commonwealth Constitution, s 77 thereof operates likewise. Thus, a penalty is not a 'tax'. An instructive test of this conclusion is the general rule, applicable in both Australia and SA, that a fine or penalty imposed for a crime or breach of a statutory duty is not a tax.⁷⁰ This rule reinforces the conclusion reached here. The true legal nature of a penalty does not alter because, in exceptional instances, it is included in a statutory definition of 'tax'. Such inclusion simply means that in the particular context, it is regarded as a 'tax'. This does not render a penalty to be a 'tax' for all purposes. Therefore, a penalty under the TAA is not a 'tax' for constitutional purposes. Equally important, in *Shuttleworth*,⁷¹ the CC held that the dominant purpose of a statute is the seminal test for determining whether it is taxing or regulatory in nature. For reasons explained below in chapter five, the TAA's main purpose is to regulate tax administration. This reinforces the conclusion that the imposition of penalties in terms thereof does not render the TAA to be a 'money Bill'.

The legal issue whether a monetary charge or financial burden is a 'tax', must be decided with reference to the facts surrounding each statute and the charge or burden imposed. No

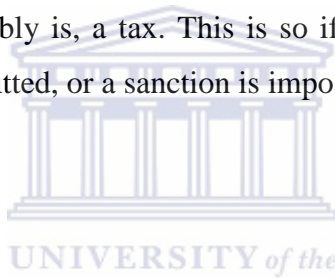
⁶⁹ Morabito V & Barkoczy S (1996) 43; Morabito V (1999) 391; Hyde N (2008) 1.

⁷⁰ *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 467. The Court, in *CIR v McNeil* 1959 (1) SA 481 (A) 487, held that 'additional tax' was in essence a penalty to ensure that returns 'shall be honest and accurate'. In terms of the applicable legislation dealt with *in casu*, the amount payable was only indirectly determined with reference to the taxpayer's income. The degree of default directly determined the sum payable. The Court held that it 'does not conform with ordinary usage to speak of a tax on misconduct as a kind of tax on income. Where a tax takes the form of a percentage of a tax on income it is natural to regard it as itself a tax on income. But a percentage of a penalty imposed for failure to make a return or for an omission from a return or for an incorrect statement in a return is not at all like a tax on income.' Whereas s 210 and s 213 of the TAA empower SARS to impose administrative non-compliance penalties, s 222 thereof provides for an 'understatement penalty' regime. The TAA provides for criminal penalties in s 234 to s 237.

⁷¹ At para 48.

hard and fast rules can, or ought to be, laid down in advance.⁷² A charge or burden is not a ‘tax’ merely because it is called by that name. Conversely, a charge or burden may be a ‘tax’ despite not being labelled as such.⁷³ Ultimately, if the ‘pith and substance’⁷⁴ of the charge or burden, that is, its essence, true or dominant purpose, is to raise revenue, as distinct from merely regulating conduct or charging for services rendered, then it is a ‘tax’, regardless of its form, description or designation. In the USA, this is called the ‘substance and application’ approach.⁷⁵ When determining the purpose of a charge or burden, relevant factors include, inter alia, the aim of the legislation,⁷⁶ the method of computing the charge or burden, the circumstances giving rise to liability for its payment, the attributes of the charge or burden, the manner of its collection and enforcement, and its practical effect or implementation. As regards the latter consideration, if a charge or burden operates in a manner akin to a tax, then this lends credence to the conclusion that it is intended to be, and probably is, a tax. This is so if, for example, an exemption is granted, or a deduction is permitted, or a sanction is imposed for non-compliance.

4.3 CONCLUSION



Chapter one above explains that freedom and democracy, as well as the maintenance and defence thereof, comes with a substantial price tag. They are not free of charge. Chapter three above shows that the Constitution imposes obligations on the State that are designed to realise the ideal of an improved quality of life for all persons living in SA.⁷⁷

⁷² For example, in dismissing a contention that increases in certain permit tariffs were akin to a tax, Makgoka J held, in *Central African Services (Pty) Ltd and Another v Minister of Transport and Another* (unreported case no. 32238/2011) [2013] ZAGPPHC 549 (15 February 2013) para 45, that ‘in an unequal society like ours, government has [an] obligation to address the imbalances of the past. It is done in other spheres of our society.’

⁷³ *Shuttleworth* para 43. See also *Williams RC* (2015) 2-3.

⁷⁴ *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134 para 30, quoted with approval in *Shuttleworth* para 48 at fn 79 thereof. For a discussion of the ‘pith and substance’ of legislation in general, see *DVB Behuising* para 36; *Democratic Alliance 2* para 63.

⁷⁵ *United States v Constantine* (1935) 296 US 287 294; *Quill Corporation v North Dakota* (1992) 504 US 298 310; *National Federation of Independent Businesses v Sebelius* (2012) 132 S Ct 2566.

⁷⁶ A statute can have both a main and a secondary purpose. See *Liquor Bill* para 62. For purposes of determining whether it is a taxing statute, effect must be given to the statute’s dominant purpose.

⁷⁷ For example, the right to property in s 25(5) reads: ‘The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.’ The right to housing in s 26(2) reads: ‘The state must take

The present chapter demonstrates that the Constitution creates a legal framework for the imposition of tax as a legitimate means by which the State can raise financial resources that capacitate it to '[b]uild a united and democratic South Africa'⁷⁸ and comply with its constitutional obligations to 'protect, promote and fulfil the rights in the Bill of Rights'.⁷⁹ South Africa has, as shown above in chapter three, a plethora of national taxes that serve important public purposes for the public benefit, most (but not all) of which are administered in terms of the TAA. National taxation and tax administration in SA involve a tripartite relationship between Parliament (as legislator), SARS (as tax administrator), and State and non-State payers of tax. The present chapter argues that the TAB 11B, 2011 was, for constitutional purposes, not a 'money Bill' and that Parliament followed the correct procedure for its enactment as the TAA.⁸⁰ Accordingly, it is submitted that taxpayers have no justifiable constitutional basis upon which to mount a successful challenge against the TAA's legality on the grounds of a procedural irregularity relating to its enactment. On this basis, the TAA binds taxpayers and SARS until its provisions are either amended or repealed by Parliament, or are declared invalid by the CC on constitutional grounds. Hence, tax administration under the TAA is discussed below in chapter five with reference to, inter alia, its historical background, the rationale for its enactment, the purpose sought to be achieved by the TAA, its significance in SA's tax landscape, and the democratic principles applicable in tax administration thereunder. These aspects are, for the purposes of this dissertation, important because they are relevant to the constitutional review of the impugned TAA provisions conducted below in chapter ten. Also, chapter five will discuss the organisational structure and operational autonomy of SARS, the Tax Ombud and the OTO with a view to showing the manner in which they, respectively, facilitate improved tax administration and the attainment of the TAA's objectives. These aspects are canvassed because they enhance an overall understanding of the way in which public finance and administration are regulated in SA.

reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' The rights in s 27(2) to health care, food, water and social security reads: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

⁷⁸ Preamble, Constitution.

⁷⁹ Section 7(2), Constitution.

⁸⁰ It is further submitted that any Tax Administration Amendment Bill is likewise not a 'money Bill'.

CHAPTER FIVE

TAX ADMINISTRATION UNDER THE TAX ADMINISTRATION ACT

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‘One sure way to determine the social conscience of a government is to examine the way taxes are collected and how they are spent.’ (Franklin D Roosevelt, Worcester, Massachusetts, 1936)

5.1 INTRODUCTION

The Constitution embodies the ideals bonding South Africans who must cohere and transcend their divisions to reconstruct society and change the condition of peoples’ lives. A key challenge is determining how to successfully implement SA’s first-class Constitution to its Third-World conditions dogged by various social ills (such as, poverty, homelessness, joblessness and inequality). Financial constraints hinder the achievement of social justice through the realisation of socio-economic rights.¹ Unless the problem of scarce financial resources is overcome, the aspiration of a transformed society with human dignity, freedom and equality for all will have a hollow ring.² Finances derived from taxes are, thus, crucial. Success of the transformation project hinges on the efficiency and effectiveness of tax collection and its disbursement or deployment. Inadequacy of finances will hamstring the South African government’s ability to fulfil the rights in the BOR. Failure to do so will give rise to cries that the government is failing in its duty under the Constitution to perform ‘[a]ll constitutional obligations ... diligently and without delay’ (s 237).³ The imposition of taxes and the enforcement of prompt and honest payment of taxes are, therefore, key matters of national importance. Proper tax administration maintains a regular income stream that will keep the government and its functionaries continuously liquid, solvent and operational. In other words, public finance is vital for enabling effective governance, maintaining law and order, promoting peace and prosperity, facilitating the reconstruction and redevelopment of national infrastructure, and providing access to social goods (such as, housing, education, health care, food, water and social security). It is against this backdrop that the present chapter discusses tax administration with the TAA and the Constitution as its frame of reference.

¹ Chenwi L (2013) 742.

² *Soobramoney* para 8; *Azanian People’s Organisation and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) para 43.

³ Section 237 elevates to a legal obligation the expeditious and diligent compliance with constitutional duties by SARS, an ‘organ of state’. The principle is, thus, a requirement of legality. See *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 46.

5.2 TAX ADMINISTRATION UNDER ACT 28 OF 2011

5.2.1 Background to the TAA

South Africa's tax system is complex owing to its sprawling legislative infrastructure. Historically, each tax statute dealt with its own procedures, duties and remedies. This created high levels of duplication across statutes. Whilst some provisions were identical,⁴ others differed but to varying degrees.⁵ This caused confusion in interpretation and application that contributed to increased disputes, thereby rendering tax administration more convoluted and expensive.⁶ In his 2005 Budget Review, the Minister of Finance announced that a single, comprehensive statute would be passed that eliminates this overlapping by aligning and consolidating generic administrative provisions replicated in multiple statutes.⁷ This is the avowed rationale that motivated the enactment of the TAA, a visionary statute.⁸ The scale of the legislative process to streamline complex, disparate tax provisions was enormous. The process lasted about seven years and included, inter alia, internal and external workshops with stakeholders,⁹ public consultation,¹⁰ and an

⁴ For example, prior to repeal by the TAA, (i) preservation of secrecy was dealt with in the ITA (s 4) and VATA (s 6); (ii) the duty to furnish SARS with information and documents was dealt with in the ITA (s 74A), VATA (s 57A), EDA (s 8B) and TDA (s 11B); (iii) the liability of representative taxpayers and third party agents was dealt with in the ITA (ss 95- 101), VATA (ss 47-49), EDA (ss 12A-12B) and TDA (ss 13B-13C); and (iv) the conducting of an inquiry was dealt with in the ITA (s 74C), VATA (s 57C), EDA (s 8D) and TDA (s 11D).

⁵ For example, in relation to the recovery of tax by filing a statement with the clerk or registrar of a court, compare the ITA (s 91(1)(b)), VATA (s 40(2)(a)), EDA (s 25(2)(a)) and TDA (s 13A) prior to their repeal by the TAA. Compare also the repealed search and seizure provisions of the ITA (s74D), VATA (s 57D), EDA (s 8E) and TDA (s 11E). In addition, see also the repealed objection and appeal process dealt with in the ITA (ss 81-88), VATA (ss 32-37), EDA (s 24) and TDA (s18).

⁶ For a discussion of the causes of increased costs associated with tax collection and compliance, see the Meade Committee Report (1978) ch 2 and Margo Commission Report (1987) ch 4 part III.

⁷ For relevant excerpts from the 2005 Budget Review, see the *Release of the Draft Tax Administration Bill for Second Round of Public Comment 1* available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013).

⁸ For a discussion of the background to the TAA, see Croome BJ & Olivier L (2015) 3-10.

⁹ For details of the workshops held during 2009 and 2010, see SARS 'Draft memorandum on the objects of the Tax Administration Bill, 2010' 31 available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013).

¹⁰ Full details and audio recordings of the public hearings on TAB 11, 2011 are available at <http://www.pmg.org.za/report/20110816-tax-administration-bill-tab-b11-2011-public-hearings> and <http://www.pmg.org.za/report/20110817-public-hearings-%E2%80%93-tax-administration-bill-tab> (accessed 28 September 2013).

external constitutional review.¹¹ This is all part of an inclusive legislative process that reflects SA's mode of participatory democracy, a distinctive principle in SA's new national ethos arising from the Constitution.¹²

5.2.2 Impact of the TAA

The level of tax collection is a critical determinant of the *quantum* of funds that can be mobilised for government measures aimed at transformation. The TAA overhauled the landscape of tax administration. Section 4(1) thereof reads: 'This Act applies to every person¹³ who is liable to comply with a provision of a tax Act (whether personally or on behalf of another person) and binds SARS.' Since SARS must comply with obligations imposed by the TAA, s 4(1) rebuts the presumption that a legislature does not intend to bind the State (or its organs). The TAA has 20 chapters, each covering a different aspect of tax administration. The TAA's overall structure resembles that of New Zealand's Tax Administration Act.¹⁴ The TAA introduces a step-by-step methodology which aligns the

¹¹ For reference to the legal opinion by SARS's counsel on the constitutionality of TAB 11B, 2011, see SARS 'Standing Committee on Finance: Report-back hearings Tax Administration Bill, 11 of 2011 response document' 1 available at <http://www.pmg.org.za/report/20110921-report-back-sars-tax-administration-bill-ta> (accessed 28 September 2013). A copy of the legal opinion is available at <http://www.pmg.org.za/report/20110816-tax-administration-bill-tab-b11-2011-public-hearings>. Two other documents by SARS, namely, 'Tax Administration Bill, B11-2011 briefing note: Tax Ombud: Clauses 14-21' and 'Tax Administration Bill, B11-2011 briefing note: Search without warrant: Clause 63' are available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013).

¹² The CC, in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 115, emphasises that the public's participation in the legislative process 'strengthens the legitimacy of legislation ... [and] is an important counterweight to secret lobbying and influence-peddling'. It held (paras 110-11 130-33) that this participation is part of an open society where there is responsive and transparent governance 'based on the will of the people'. See also *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No.2)* 2007 (6) SA 477 (CC) paras 40 97; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) para 44. Also, see Quinot G 'Snapshot or participatory democracy? Political engagement as fundamental human right' (2009) 25(2) *SAJHR* 392; Seforo L 'Get in the game – taxpayer involvement in the drafting of a reasonable tax law' (2014) 48 *Tax Talk* 62; Phooko MR 'What should be the form of public participation in the lawmaking process? An analysis of South African cases' (2014) 35(1) *Obiter* 39.

¹³ It is submitted that, in this context, 'person' means any taxpayer or other third party who is obliged to fulfil an obligation imposed by a 'tax Act' as defined in the TAA (s 1). That definition excludes the C&EA, the Customs Control Act 31 of 2014 and the Customs Duty Act 30 of 2014.

¹⁴ Act 166 of 1994. For a discussion of tax administration in New Zealand, see Alston A 'Taxpayers' rights in New Zealand' (1997) 7(1) *RLJ* 211.

essential order of tax administration to the administrative life cycle of taxpayers. This is illustrated by its chapter headings,¹⁵ a relevant factor in purposive interpretation.¹⁶ The TAA contains innovative tax administration strategies geared to ensuring that tax collection occurs in an orderly, structured, efficient and effective way. These features characterise a credible tax system. They advance the cultivation of a tax compliance culture that, if realised, will foster enhanced tax collection beneficial to the *fiscus* and, thus, the public purse. The promotion of tax compliance is a central value of the TAA.

SARS and certain of its office bearers (such as, the CSARS and Acting Commissioner) are creatures of statute. As such, they can perform no function and exercise no power unless authorised to do so by an enabling statute.¹⁷ The TAA is a source of such power. It confers wide-ranging audit, investigative and general legal and administrative powers. As noted above in chapter one, certain of these powers have the potential of encroaching on taxpayers' rights. The TAA imposes obligations on SARS and its officials,¹⁸ and outlines procedures¹⁹ to be followed. SARS officials must ensure that tax returns and declarations are timeously received and processed promptly, and that tax liabilities are assessed accurately and collected expeditiously. This requires tax capacity, that is, the ability to collect taxes efficiently and effectively. Errors in filing tax returns, auditing capacity and tax morality are some of the practical considerations that adversely affect the level of tax assessment and collection. Thus, it is imperative that SARS, in addition to employing adequate and competent staff, must be conferred powers that sharpen its bite so that it may achieve optimal tax compliance. To this end, the TAA is an important instrument.

¹⁵ SARS 'Short guide to the Tax Administration Act, 2011' (June 2013) 5 available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/Guides.aspx> (accessed 28 September 2013).

¹⁶ Botha CJ (2010) 80.

¹⁷ In *AM Moolla Group Ltd and Others v CSARS and Others* [2005] JOL 15456 (T) 3 Roux J held: 'Being a creature of statute the first respondent [CSARS] must perform his task as laid down in the Act and not by will.'

¹⁸ For example, ss 42 (keeping taxpayers informed of audit completion), 69 (preservation of secrecy of taxpayer information), 82(2) (advance rulings are binding on SARS), 91-96 (duty to issue and give notice of a tax assessment), 106 (duty to decide a valid objection), 190 (duty to pay refunds), 207 (reporting of tax debts written off or compromised), and 216-218 (duty to remit a penalty).

¹⁹ For example, ss 50 (process for obtaining prior authorisation for inquiry proceedings), 59 (process for warrant application), 172 (application for a civil judgment pending objection and appeal), 199 (procedure for writing off a tax debt), 204 (procedure for compromise of a tax debt), and 214 (procedure for imposing an administrative non-compliance penalty).

The TAA bolsters the efficiency and effectiveness of tax administration by catering for, inter alia, the issuing of identity cards to SARS officials (s 8(1)), the recognition of a deemed or presumed authority by SARS officials in civil proceedings (s 11(2)),²⁰ the granting of a right of appearance to a senior SARS official in certain judicial proceedings (s 12), the creation of the Tax Ombud and OTO to address taxpayer complaints (ss 15-21), the confidentiality of taxpayer information (ss 67-74), the issuing of advance tax rulings (ss 75-90) and tax assessments (ss 91-100), the imposition of a more onerous burden of proof (s 102(1)),²¹ the objection and appeal procedures (ss 104-107), the Tax Court's jurisdiction (s 117), the application for a civil judgment to recover taxes (s 172), the payment of refunds (ss 190-191), the service of documents electronically (s 251(d)), the granting of tax relief under a voluntary disclosure agreement (ss 225-233), the imposition of criminal sanctions for non-compliance with a 'tax Act' (ss 234-238), the registration of tax practitioners entitled to practise, and the reporting of unprofessional conduct on their part (ss 239-243), and the issuing of tax clearance certificates (s 256).

The TAA strengthens SARS's arsenal of powers by conferring authority on it, inter alia, to conduct audits and criminal investigations (s 41), to conduct inspections (s 45), to request 'relevant material' (s 46), to convene inquiry proceedings (ss 50-58),²² to oblige taxpayers to answer questions at an inquiry even if an answer is self-incriminating (s 57), to apply for search warrants (s 59), to conduct warrantless searches of the taxpayer's person, taxpayer's business premises and such part of a residence used for trade purposes (ss 61, 63), to seize relevant material found during a search (s 61(3)), to issue jeopardy assessments (s 94), to institute sequestration, liquidation and winding-up proceedings in a court (s 177), to collect a tax debt from a third party who pays it on a taxpayer's behalf (ss 179-184), to provide assistance to foreign governments under an international tax agreement (s 185), to prevent taxpayers from trading whilst owing a tax debt (s 186(3)), to obtain a court order for the repatriation of a taxpayer's foreign assets (s 186), and to impose non-compliance penalties (ss 208-220) and understatement penalties (ss 221-224).

²⁰ *CSARS v Brown* (unreported case no. 561/2016) [2016] ZAECPEHC 17 (5 May 2016) paras 19-21.

²¹ For the legal test to be applied when determining if a taxpayer has discharged an evidential onus, see *CSARS v Klüh Investments (Pty) Ltd* [2016] 2 All SA 317 (SCA) para 9.

²² See *Huang & Others v CSARS & Another: In re CSARS v Huang & Others* 2015(1) SA 602 (GP).

5.2.3 Purpose of the TAA

As discussed above in chapter two, purposive interpretation of the TAA requires that effect be given to its overall purpose as is determinable from various objective factors apparent *ex facie* the statute.²³ These include, inter alia, the language of its provisions, its long and short titles, its preamble, and its aims as set forth in s 2 of the TAA. Curbing tax minimisation is incontestably a mischief at which certain TAA provisions are aimed (such as, s 94 and s 95 dealing with the issuing of jeopardy and estimated assessments respectively). However, the TAA's overall scheme is to harmonise (or synchronise) tax administration across a litany of tax statutes applicable in SA so as thereby to improve the efficiency in, and effectiveness of, tax collection. Whilst the short title of the TAA indicates firmly that tax administration is its core subject matter, its long title affirms the overall objective of the statute. The relevant extract from the long title reads as follows:²⁴

'To provide for the effective and efficient collection of tax; to provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible; to determine the powers and duties of the South African Revenue Service and officials ...'

Section 2 of the TAA is a purpose clause that expresses the statute's objectives. It reads:

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

- (a) aligning the administration of the tax Acts to the extent practically possible;
- (b) prescribing the rights and obligations of taxpayers²⁵ and other persons²⁶ to whom this Act²⁷ applies;

²³ Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 20, refers to the conventional description of 'ascertaining the intention of the legislature' as a 'misnomer' that 'is entirely artificial' and to be avoided during interpretation.

²⁴ For the use of a statute's long title as an aid in interpretation, see *Bertie van Zyl* para 43.

²⁵ Taxpayers' duties include, inter alia, (i) to register for tax (s 22); (ii) to communicate any change of particulars (s 23); (iii) to be honest by submitting 'full and true' and 'accurate' returns (ss 25, 27, 96(3)); (iv) to submit a certificate or statement supporting financial statements or accounts (s28); (v) to keep records for certain prescribed periods (ss 29, 30, 31, 32); (vi) to make a translation of a document when called upon to do so (s 33(1)); (vii) disclose information concerning a reportable arrangement (s 38); (viii) to attend an interview with SARS and be

- (c) prescribing the powers and duties of persons engaged in the administration of a tax Act;
and
- (d) generally giving effect to the objects and purposes of tax administration.’

The TAA is unmistakably aimed at advancing the public interest. The kernel of its aims is ensuring the efficient and effective collection of tax. This purpose is reconcilable with the principle in the Constitution (s 195(1)) requiring efficiency in public administration and it is, furthermore, consistent with the SARSA (s 3) stating that SARS’s objective is the ‘efficient and effective collection of revenue’. These objectives of the TAA serve to enhance the fulfilment of the Constitution’s objectives in that they are geared towards ensuring the availability of adequate resources in the public treasury for the public benefit or use in the public interest.²⁸ Though this pursuit is a legitimate governmental purpose, each provision in the TAA remains subject to scrutiny for rationality²⁹ and, thus, validity.

The content of ss 2(a) to (d) are not aims *per se*. They outline, in general terms, the means chosen by Parliament to give effect to a stated aim or objective. The use of ‘and’ between sub-paras (c) and (d) indicates that sub-paras (a) to (d) are to be read conjunctively (that is, not disjunctively).³⁰ Recurring reference is made in sub-paras (a), (c) and (d) to tax administration. This fact lends credence to the construction that improved tax administration is the key method selected by Parliament for giving effect to its ultimate aim in the TAA of ensuring ‘the efficient and effective collection of tax’.

subjected to questioning (s 47); (ix) to attend and answer questions at an inquiry even if the answers are incriminating (s 57); (x) not to obstruct or refuse reasonable assistance to SARS officials executing a search and seizure warrant (s 61(7)); (xi) to disclose incriminating information in returns (s 72); (xii) to prove an entitlement to a deduction or exemption (s 102(1)); and (xiii) to give security for tax liability when called upon to do so by SARS (s 161).

²⁶ The duties of third parties include, inter alia, (i) to submit full and true returns (ss 26, 27); (i) to keep records pertaining to a taxpayer’s affairs (ss 29, 30, 31, 32); (iii) to attend an inquiry and answer questions even if the answers are incriminating (s 57); (iv) not to obstruct or refuse reasonable assistance in the carrying out of a warrant by SARS (s 61(7)); and (v) to pay taxes for a taxpayer (ss 154, 157, 159, 179, 180, 181, 182, 183, 184).

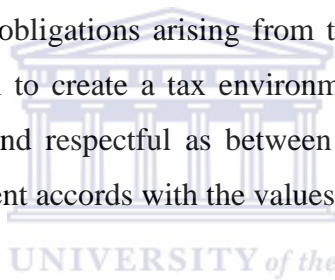
²⁷ The TAA (s 1) defines ‘this Act’ as including ‘the regulations and a public notice issued under this Act’.

²⁸ *CSARS v Africa Cash & Carry (Pty) Ltd and Others* (2015) 77 SATC 242 (GNP) para 19.

²⁹ *United Democratic Movement v President of the Republic of South Africa and Others* 2002 (11) BCLR 1179 (CC) para 55.

³⁰ *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50.

The TAA (s 2(b)) refers to ‘prescribing the rights ... of taxpayers’. Chapter seven below catalogues those rights stemming from the TAA. Parliament’s choice of ‘prescribing’ taxpayers’ rights as a means to give effect to the statute’s aims is significant for various reasons. First, it underscores the legal culture of rights established by the Constitution. By ‘prescribing’ rights for taxpayers, Parliament has imposed a corresponding duty on SARS and its officials to respect those rights. Secondly, s 2(b) highlights that respect for rights is a means chosen by Parliament for promoting efficiency and effectiveness in tax collection. This is a relevant value to be considered when the impugned TAA provisions are reviewed below in chapter ten. Also, it reinforces the view expressed above in chapter three, namely, that a deeper culture of voluntary tax compliance will be established if SARS and its officials conduct themselves within the bounds of the law. Respect for the law, taxpayers and their rights fosters respect for SARS and its officials and breeds respect by taxpayers for their obligations arising from the TAA and other tax statutes. This, in turn, has the potential to create a tax environment that is less adversarial and more co-operative, dignified and respectful as between taxpayers and SARS officials. The creation of such environment accords with the values and ethos of the Constitution.



5.2.4 Meaning of ‘administration of a tax Act’ in the TAA

The process of tax administration is a natural consequence flowing from the imposition of a tax. In a broad sense, tax administration involves the formulation and development of tax policies underpinning domestic revenue laws and international tax treaties, as well as the administration, management, conduct and supervision of the execution and application of tax laws, policies and agreements.³¹ This includes, inter alia, information gathering and sharing, tax audits, assessment, collection, enforcement and litigation.³² Tax administration is a concept used in the TAA in a technical, legal sense. Section 3(2) thereof provides a comprehensive definition of ‘[a]dministration of a tax Act’.

³¹ Stiglingh M (ed), Koekemoer A & van Zyl L *et al* (2015) 1134 define ‘tax administration’ as ‘the process under which a person registers for a specific tax, submits relevant returns or information, retains prescribed documentation, is assessed for the tax and makes payment of the amount assessed’. In this narrow sense, tax administration serves merely as a means to audit a set of tax laws and ‘carries out the orders’ of tax policy (see Mansfield CY (1988) 183).

³² For a list of standard or usual functions included in tax administration, see Granger H (2013) 23-4.

Tax administration is the key subject of the TAA.³³ In terms of s 3(2), '[a]dministration of a tax Act means to', inter alia, (i) obtain full information; (ii) ascertain whether a person has filed or submitted correct returns, information or documents as required by a tax Act; (iii) establish a person's identity for the purpose of determining a tax liability; (iv) determine a tax liability; (v) collect taxes and refund taxes overpaid; (vi) investigate whether a tax related criminal offence has been committed pursuant to the provisions of a tax Act and, if so, lay criminal charges and provide assistance for the investigation and prosecution of tax offences or related common law offences; (vii) enforce SARS's powers and duties under a tax Act to ensure tax compliance; (viii) perform any other administrative function necessary to carry out the provisions of a tax Act; and (ix) give effect to SA's obligation to provide assistance under an international tax agreement.³⁴

From the foregoing, it is evident that s 3(2) crystallises the different components involved in tax administration under the TAA and amplifies the scope and ambit of the terms used in s 2. Section 3(2) gives form and substance to the phrase 'administration of a tax Act' used in s 2(c) and enhances an understanding of the phrase 'objects and purposes of tax administration' as used in s 2(d). Accordingly, s 2 and s 3(2) must be read in conjunction with, and not independent of, each other. In terms of s 3(2), 'administration of a tax Act' is a formal process encapsulating a broad spectrum of functions, duties and powers to be performed by SARS and its officials in relation to the affairs of a 'taxpayer' as defined. Tax collection is but a single element of this process. Tax administration under the TAA is, thus, not confined to recovering unpaid taxes. Section 3(2) is couched in terms having broad strokes (or effect). It extends to various associated or ancillary activities aimed at enhancing the efficiency and effectiveness of tax collection.

The intended scope of a definition may be determined by parameters imposed in its text. The definition in s 3(2) is introduced by the word 'means' which, generally, indicates that

³³ Croome BJ & Olivier L (2015) xxi contend, with merit, as follows: 'An effective tax administration is an essential pillar of an effective state.'

³⁴ A discussion of the individual components of the tax administration process (such as, tax registration, submission of returns, maintenance of records, issuing of tax assessments, objections and appeals), falls beyond the scope of this dissertation and, therefore, is not undertaken here.

the definition following it is comprehensive and all-encompassing (that is, complete, fixed, finite).³⁵ Nothing more can be read into it. On this basis, ss 3(2)(a) - (i) appears to contain a closed list of activities comprising tax administration. However, s 3(2)(h) opens up the list by empowering SARS to ‘perform any other administrative function necessary to carry out the provisions of a tax Act’. ‘Any’ is a word of wide import and unqualified generality.³⁶ Its effect is that *all* things related to its subject are covered by the provisions to which it relates, except things restricted by its subject matter or context. ‘Any’ casts wide the net of functions falling within the ambit of s 3(2)(h). Thus, SARS is empowered to perform a range of functions not expressly listed in s 3(2). This construction fits naturally with, first, the inclusion in the SARSA (s 5(1)(j)) of SARS’s power to engage in ‘any activity, whether alone or together with other organisations in the Republic or elsewhere, to promote proper, efficient and effective tax administration, including customs and excise duty administration’. Secondly, the construction contended for here is also consistent with the SARSA (s 5(1)(k)) which empowers SARS to ‘do anything that is incidental to the exercise of any of its powers’. In the context of ss 5(1)(j) and (k) respectively, ‘any’ and ‘anything’ casts extremely widely SARS’s intended authority.

Accordingly, SARS’s powers are not confined to a closed list of functions enumerated in s 3(2). SARS is empowered to perform ‘any’ such other administrative function which is necessary to carry out the provisions of a ‘tax Act’. Hoexter³⁷ states that implied powers may be ancillary to the express powers granted to an administrator, or may exist either as a necessary or reasonable consequence of the express powers conferred on any such decision maker. Therefore, according to Hoexter, ‘what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorized’.

The TAA (s 3(2)(h)) prescribes that SARS’s authority to act is subject to the requirement that the function performed is ‘administrative’ and ‘necessary’. These words are

³⁵ For the effect of ‘means’, as distinct from ‘includes’, see the authorities cited at fn 186 in chapter three above.

³⁶ For the legal effect of ‘any’, see the authorities cited at fn 32 in chapter two above.

³⁷ Hoexter C (2012) 43-4. The extract quoted above was cited with approval in *Potwana v University of KwaZulu-Natal* 2014 JDR 0156 (KZD) para 34.

undefined in the TAA. As discussed above in chapter two, statutory words are to be interpreted textually, contextually, purposively and teleologically.³⁸ A statutory word must bear its primary meaning, unless cogent internal indications point to it meaning something else.³⁹ An ‘administrative’ act entails conduct that implements or gives effect to a policy, legislation or an adjudicative decision.⁴⁰ The adjective ‘necessary’ admits of various degrees of comparison. It is not synonymous with ‘indispensable’, neither does it have the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’.⁴¹ The *Concise Oxford Dictionary*⁴² defines ‘necessary’ to mean ‘needed to be done, achieved, or present; essential requiring to be done, essential, needed for a purpose’. Thus, ‘necessary’ connotes a pressing need. It is often connected with a word increasing or decreasing the impression of urgency. Thus, a thing may be necessary, very necessary, reasonably necessary, absolutely or indispensably necessary.⁴³ In such instances, the meaning of ‘necessary’ is coloured by the word with which it is associated. For the purposes of s 3(2)(h), ‘necessary’ must satisfy the touchstone of reasonableness. Accordingly, a function falls within the contemplation of this provision if its performance is ‘reasonably necessary’ to realise ‘the ostensible legislative intention or to make the statute workable’.⁴⁴ The question of necessity is a factual issue to be decided with reference to the fiscal interests or needs served by the performance of a particular function. Whenever SARS seeks to invoke the administrative function, it would bear the onus to prove that the necessity precondition is met.⁴⁵

³⁸ An interpreter must strike a fair balance between the language of a text and the context of the provision being interpreted. See *Bertie van Zyl* para 46.

³⁹ *Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another* 1975 (4) SA 1 (T) 12.

⁴⁰ *New Clicks* para 592; *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24. See also Hoexter C *The New Constitutional & Administrative Law* vol II (2002) 28.

⁴¹ *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T) 1064C. See also SALC *Project 58: Final Report on Group and Human Rights* (October 1994) 167.

⁴² *Oxford Dictionaries Online* at <http://www.oxforddictionaries.com> (accessed 23 February 2014).

⁴³ *McCulloch v Maryland* (1819) 4 Wheat. 316 414. For the test for ‘necessary’, see *Van der Merwe v Randryk Beleggings (Edms) Bpk* 1976 (2) SA 414 (O); *Kommissaris van Binnelandse Inkomste v Van der Walt* 1986 (4) SA 303 (T) 308. See also de Ville JR ‘Guidelines for judicial reviews on “division of powers” grounds’ (1995) 6 *Stell LR* 139 153; Moosa F ‘The scope of the expression “necessarily incurred” in section 18(1) of the Income Tax Act’ (2013) 25(2) *SA Merc LJ* 184 194.

⁴⁴ *Masetlha* para 192. See also *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 28.

⁴⁵ For a discussion of burden of proof and ‘reverse onus’, see Goldswain GK (2012) 80-102. For a discussion of onus in tax matters under the TAA, see Goldswain GK (2012) 105-19.

5.2.5 Meaning of ‘taxpayer’ in the TAA

An analysis of the definition of ‘taxpayer’ in the TAA is significant for various reasons. First, unpacking its meaning enhances an understanding of taxpayers potentially subject to SARS’s authority under the TAA read with s 4(1)(a) and Schedule 1 of the SARSA. Secondly, the definition of ‘taxpayer’ demarcates the scope and ambit of this term in the TAA (s 2(b)) in the context of the phrase ‘the rights and obligations of taxpayers ... to whom this Act applies’. Thirdly, an understanding of its meaning sheds light on the categories of persons who, as taxpayers, are potential claimants of fundamental rights in the BOR that are relevant during tax administration. The TAA (s 1 read with s 151) defines ‘taxpayer’ as ‘means - (a) a person chargeable to tax; (b) a representative taxpayer;⁴⁶ (c) a withholding agent;⁴⁷ (d) a responsible third party;⁴⁸ or (e) a person who is the subject of a request to provide assistance under an international tax agreement’.⁴⁹ This definition encompasses natural and juristic persons, including persons located outside SA. Section 151(e) applies to a ‘taxpayer’ who is liable for a foreign tax debt to a foreign government. In terms of the TAA, SARS may recover such debt by co-operating with a foreign tax authority. To this end, SARS may take steps under s 185 of the TAA⁵⁰ to recover the debt from assets located in SA that are owned by the taxpayer or in which the taxpayer has a legal interest.

⁴⁶ The TAA (s 153(1)) defines ‘representative taxpayer’ to mean ‘a person who is responsible for paying the tax liability of another person as an agent, other than as a withholding agent, and includes a person who – (a) is a representative taxpayer in terms of the Income Tax Act; (b) is a representative employer in terms of the Fourth Schedule to the Income Tax Act; or (c) is a representative vendor in terms of section 46 of the Value-Added Tax Act’.

⁴⁷ The TAA (s 156) defines ‘withholding agent’ to mean ‘a person who must under a tax Act withhold an amount of tax and pay it to SARS’.

⁴⁸ The TAA (s 158) defines ‘responsible third party’ to mean ‘a person who becomes otherwise liable for the tax liability of another person, other than as a representative taxpayer or as a withholding agent, whether in a personal or representative capacity’.

⁴⁹ The TAA (s 155, s 157, s 159) provides that the taxpayers mentioned in sub-paras (b), (c) and (d) of s 151 are personally liable for the tax debt otherwise payable by their (tax) principals. For a discussion of the term ‘taxpayer’ in the TAA, see Clegg D (2012) 86 and the case law cited there. For an interpretation of a statutory definition of ‘taxpayer’ read with a double taxation agreement, see *CSARS v van Kets* (2012) 74 SATC 9.

⁵⁰ The TAA (s 185) empowers SARS to recover a foreign tax debt by levying execution against the local assets of a foreign tax debtor found in SA. This SARS may do if, as in *Krok*, it acts in terms of an ‘international tax agreement’ defined in s 1 as including ‘an agreement entered into with the government of another country in accordance with a tax Act’. For the procedure to be followed for such an agreement to form part of the domestic laws of SA, see Croome BJ & Olivier L (2015) 32.

The definition of ‘taxpayer’ elucidates the categories of taxpayers who, under s 38(a) of the BOR discussed below in chapter eight, have standing to apply to a competent court for appropriate relief in respect of an infringement or threatened infringement by SARS of a fundamental right that the taxpayer seeks to enforce in his own interest. This is subject to the taxpayer being a natural or juristic person qualifying for BOR protection. For TAA purposes, the term ‘taxpayer’ is cast broad in scope and ambit. It encompasses natural and juristic entities. As shown below in chapter six, ‘taxpayer’ includes persons who are physically present in SA and persons who have no physical presence in SA.

5.2.6 Acquisition of legal status as a ‘taxpayer’

Whilst registration or incorporation is a legal requirement for the *de jure* existence of certain statutory juristic persons (for example, companies and close corporations), it is not a legal requirement for a natural or juristic person to be a taxpayer under the laws of SA. Although the TAA (s 22) provides for taxpayer registration, this is not a legal prerequisite for anyone to be a taxpayer. For example, a minor is, strictly speaking, a taxpayer by virtue of paying tax (such as VAT) on the purchase of any item (such as sweets). For TAA purposes, a person is *ex lege* a ‘taxpayer’ as defined therein from the moment he/she/it is caught in the web of a taxing statute. Registration as a ‘taxpayer’ is but a formality that is necessary to formalise and regularise a taxpayer’s fiscal affairs in circumstances where the TAA (or other tax law) demands that registration takes place. Therefore, taxpayer registration is simply a confirmation of a pre-existing legal fact or state of affairs. Registration does not create or confer the ‘taxpayer’ status on anyone. This is clear from the fact that taxpayer registration does not apply to all taxpayers or for all taxes governed by the TAA. For example, a land purchaser who is liable for transfer duty under the TDA, and a deceased estate liable for estate duty under the EDA, are not required to register for these purposes. Likewise, all recipients of goods or services are obliged to pay VAT to a supplier registered as a vendor under the VATA. The VATA does not require a payer of VAT to register as a taxpayer in order to be liable to pay VAT. Any payer of transfer duty, estate duty and VAT is a ‘taxpayer’, *stricto sensu*. Thus, a person is a taxpayer not by virtue of any formal process of registration but by reason that

he/she/it, *ex lege*, falls within the four corners of a tax statute. In view of the foregoing, non-registration as a taxpayer does not disentitle a taxpayer from the benefits of the common law, statutory and fundamental rights that are discussed below in chapter seven.

5.2.7 Tax collection under the TAA

The TAA (s 3(2)(e)) incorporates tax collection, a core TAA objective, as a facet of tax administration. Section 169(1) thereof provides that an ‘amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund’.⁵¹ The definition of ‘tax offence’ in s 1 of the TAA includes ‘theft of moneys due or paid to SARS for the benefit of the National Revenue Fund’ as an offence.⁵² Tax collection under the TAA covers domestic and foreign taxes. Section 3(2)(i) caters for SARS’s responsibility to give effect to SA’s obligation to provide assistance under an ‘international tax agreement’. Section 3(3)(b) read with s 185 empowers SARS to collect unpaid foreign taxes by, for example, applying for a preservation order under s 163 of the TAA.⁵³ Section 3(3)(a)(i) provides further that, when a request for information is received, ‘SARS may’⁵⁴ disclose or obtain the information⁵⁵ for transmission to the competent authority of the other country as if it were relevant material required for purposes of a tax Act and must treat the information obtained as taxpayer information’.

⁵¹ The TAA (s 169(3)) reads: ‘SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt.’ In *CSARS v Hawker Air Services (Pty) Ltd: In re CSARS v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA) para 17 the Court recognised SARS as a creditor with *locus standi*. Section 169(3) reinforces the conclusion in *DPP, WC v Parker* [2015] 1 All SA 525 (SCA) paras 9-16 that, unless otherwise provided, a statutory debtor-creditor relationship (not agency) exists between SARS and a taxpayer. See also Roch *MTS Tax Administration vs Taxpayer: A New Deal?* (undated) 3-5 available at <http://www.eatlp.org/uploads/public/Reports%20Rotterdam/Moessner%20lecture.pdf>. In so far as concerns business rescue under the Companies Act, 2008, SARS is not a preferential creditor. See *CSARS v Beginsel NO and Others* 2013 (1) SA 307 (WCC) paras 21-35.

⁵² For a discussion of the legal effect of this inclusion, see Croome BJ & Olivier L (2015) 519-20.

⁵³ For a discussion of preservation order applications, see *Krok; Van der Merwe; eTradex*.

⁵⁴ For a discussion of the permissive and predictive roles of ‘may’ in a statute, see *CIR v I H B King; CIR v A H King* 1947 (2) SA 196 (A) 209; *MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings (Pty) Ltd* 2005 (1) SA 428 (SCA) 439C; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) paras 14-20. It is submitted that, having regard to the language of s 3(2)(i) as a whole and its purpose, in this context ‘may’ indicates a discretionary power which is not mandatory for SARS to exercise; ‘may’ does not connote ‘shall’ or ‘must’.

⁵⁵ The TAA (s 1) defines ‘information’ to include ‘information generated, recorded, sent, received, stored or displayed by any means’.

It is in the public interest that taxes payable by a taxpayer are collected.⁵⁶ Tax collectors are the engines driving a State's effort to swell the public treasury. Tax collection must occur in a principled way consistent with the Constitution and the enabling statute. The rule of law, discussed above in chapter three, prohibits arbitrariness in tax collection and precludes financial considerations being used to justify an infringement of entrenched rights.⁵⁷ Thus, for example, SARS cannot require taxpayers to pay more tax than is due in law, nor can it claim taxes in advance of their due dates.⁵⁸ No tax may be collected unless there is a tax debt due and payable as determined by statute.⁵⁹ A tax liability arises when a taxable event⁶⁰ occurs. A taxing statute determines the nature of the event that gives rise to a tax debt. Thus, for example, a VAT liability ensues if there is a taxable supply of goods or services.⁶¹ An income tax liability is regulated by the definition of 'taxable income' of which 'gross income' is an integral part.⁶² The gross income of a 'resident' for any tax year of assessment means 'the total amount in cash or otherwise⁶³ received by⁶⁴ or accrued to⁶⁵ or in favour of such resident ... excluding receipts or accruals of a capital nature'.⁶⁶ For a non-resident, income is taxable if it is from a 'source' in SA.⁶⁷

⁵⁶ *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA) para 26.

⁵⁷ *Schachter v Canada* [1992] 2 SCR 679 709. See also Brand DJ 'Financial constitutional law – a new concept in South Africa?' (2008) 1 *TSAR* 89 97.

⁵⁸ Deak D 'Taxpayer rights and obligations: The Hungarian experience' (1997) 7(1) *RLJ* 18 19 states: 'In any tax system one of the greatest benefits for taxpayers is where the tax laws are binding not only on taxpayers but also on the tax authorities. The rule of law in the taxation field and the provision of extensive taxpayer rights depend upon a well-established order of tax administration.'

⁵⁹ The TAA (s 1 read with s 169(1)) defines 'tax debt' to mean 'an amount of tax due or payable in terms of a tax Act'. In this context, 'tax' is defined in the TAA (s 1) as including a 'penalty' and 'interest'. A tax debt is 'due' when there is a 'liquidated money obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately' (per Olivier AJA in *Singh* para 25). The TAA, for example, s 169(1) and s 172(1), distinguishes taxes 'due' from those that are 'payable'. For a discussion of this distinction, see *Capstone 556* para 13; *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 289E-G.

⁶⁰ The TAA (s 1) defines 'taxable event' to mean 'an occurrence which affects or may affect the liability of a person to tax'.

⁶¹ The CC, in *Metcash* para 16, described VAT as 'a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying'. For an analysis of taxation via VAT, see Kreyer R 'Design and Structure of the VAT' in Kreyer R (ed) *VAT in Africa* (2008) 9-28.

⁶² For the definitions of 'taxable income' and 'gross income', see ITA (s 1). For an analysis of these terms, see *CIR v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) 946.

⁶³ For the meaning of 'amount', see *CIR v Butcher Brothers (Pty) Ltd* 1945 AD 301; *CIR v Hersov* 1952 (1) SA 485 (A) 491-93; *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA) paras 11-19.

⁶⁴ For the meaning of 'received by', see *CSARS v Cape Consumers (Pty) Ltd* 1999 (4) SA 1213 (C) 1221-23 (and the authorities cited there).

A tax assessment is not a prerequisite for a tax liability.⁶⁸ The TAA (s 1) defines ‘assessment’ to mean ‘the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS’.⁶⁹ Thus, its purpose is to compute a tax debt or refund due to a taxpayer.⁷⁰ ‘Assessment’ is distinguishable from ‘notice of assessment’. The latter, dealt with in the TAA (s 96), is not necessarily the same as the former.⁷¹ Although the dictionary meaning of ‘tax’ given above in chapter four includes an ‘assessment’, this meaning is not included in the definition of ‘tax’ in s 1 of the TAA. This notwithstanding, if another ‘tax Act’ incorporates an ‘assessment’ as part of its meaning of ‘tax’, then such meaning would be covered by the TAA because the definitions clause in s 1 expressly stipulates that, for TAA purposes, ‘a term which is assigned a meaning in another tax Act has the meaning so assigned’. Although a tax assessment is a ‘mental act in the nature of a decision’,⁷² generally no tax is recoverable through judicial intervention until after this mental act manifests itself outwardly in the form of a written assessment furnished to the taxpayer.⁷³ This notification is a procedural pre-requisite for the lawful enforcement thereof by SARS. The TAA codifies this requirement. Section 172(1) thereof provides that once a tax debt is payable, ‘SARS may, after giving the person at least 10 business days’ notice, file with the clerk or registrar of a competent court a certified statement setting out the amount of tax payable and certified

⁶⁵ For the meaning of ‘accrued to’, see *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A) 365A-367D; *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA) 320H.

⁶⁶ For the test to distinguish between capital and revenue income, see *CSARS v Founders Hill (Pty) Ltd* 2011 (5) SA 112 (SCA) paras 18-52; *Stellenbosch Farmers’ Winery Ltd v CSARS*; *CSARS v Stellenbosch Farmers’ Winery Ltd* 2012 (5) SA 363 (SCA) paras 23-46; *CSARS v Capstone 556 (Pty) Ltd* [2016] 2 All SA 21 (SCA) paras 22-32.

⁶⁷ For the principles of ‘source’, see *Essential Sterolin Products (Pty) Ltd v CIR* 1993 (4) SA 859 (A) 870C-I; *First National Bank of Southern Africa Ltd v CIR* 2002 (3) SA 375 (SCA) paras 12-18.

⁶⁸ *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) 289; *Contract Support Services (Pty) Ltd and Others v CSARS and Others* (1998) 61 SATC 338 351.

⁶⁹ Some fiscal statutes, such as the ITA, elaborate on the definition of ‘assessment’. See Clegg D (2012) 21. For the characteristics of an ‘assessment’, see *First South African Holdings (Pty) Ltd v CSARS* (2011) 73 SATC 221 226E-F; *CSARS v South African Custodial Services (Pty) Ltd* 2012 (1) SA 522 (SCA) paras 28-32. See also Moosa F ‘Letters and assessments: What is an income tax “assessment”?’ (2012) 26(2) *TP* 32. For the definition of ‘self-assessment’, see TAA (s 1). Rule 6(1) of GG 37819 of 2014 for objections and appeals permits an ‘aggrieved’ taxpayer to request reasons for an assessment. For the meaning of ‘aggrieved’ in this context, see van Dorsten JL ‘The right to reasons for decisions in taxation matters’ part II (2005) 54(11) *The Taxpayer* 206 208.

⁷⁰ *CIR v Lazarus’ Estate* 1958 (1) SA 311 (A) 326.

⁷¹ Clegg D (2012) 24.

⁷² Per Schreiner JA in *Irvin & Johnson (SA) Ltd v CIR* 1946 AD 483 494.

⁷³ *Singh* para 15.

by SARS as correct'. Section 172(3) provides for a relaxation of this notice requirement 'if SARS is satisfied'⁷⁴ that giving notice would prejudice the collection of the tax'.

No tax liability arises unless a taxpayer is brought within the reach of a legislative text expressing the legislature's will.⁷⁵ It is impermissible for SARS to waive payment of any tax, unless it is authorised by law to do so. This principle of taxation, traceable to *Collector of Customs v Cape Central Railways Ltd*,⁷⁶ is reinforced by the SARS Act. Section 4(1) thereof provides that SARS's function is to secure the widest possible enforcement of tax laws. Thus, it is incumbent on it to take all reasonably necessary steps to recover unpaid taxes.⁷⁷ This principle also finds expression in the TAA. Section 143(1) provides that '[a] basic principle in tax law is that it is the duty of SARS to assess and collect tax according to the laws enacted by Parliament and not to forgo a tax which is properly chargeable and payable'.⁷⁸ Consequently, the TAA stipulates the following: (i) '[t]ax must⁷⁹ be paid by the day and at the place notified by SARS, the Commissioner by public notice or as specified in a tax Act' (s 162(1)), and (ii) '[a]s a general rule, it is the duty of SARS to assess and collect all tax debts according to a tax Act and not to forgo any tax debts' (s 193(1)). Section 193(2) refers to this latter duty as 'strict' and 'rigid'. Thus, the legislative scheme of the TAA is structured in a way that will ensure maximum collection of tax debts due to the *fiscus* in SA. This is a legitimate governmental objective and a relevant factor when the impugned TAA provisions are examined below in chapter ten. In that context, it must be determined whether there is a rational connection between this objective and the means chosen by Parliament for giving effect thereto.

⁷⁴ For the legal meaning of 'satisfied', see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) 228A-B; *ITC 1470* (1990) 52 SATC 88 92; *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (5) BCLR 579 (LCC) para 41 (per Dodson J). As regards proof of SARS's 'satisfaction', see *Natal Estates Ltd v CIR* 1975 (4) SA 177 (A) 208.

⁷⁵ *Welch's Estate v CSARS* 2005 (4) SA 173 (SCA) para 89.

⁷⁶ 1888 (6) SC 402 405-06. See also *CIR v The Master and Another* 1957 (3) SA 693 (C) 701-02; *AM Moolla Group Ltd and Others v CSARS and Others* [2003] JOL 10840 (SCA) paras 18-20.

⁷⁷ Therefore, SARS is not merely an organ of state dealing exclusively with the management of, and legislation relating to, revenue collection. See *SARS and Another v Armsec Professional Services (Pty) Ltd* (1998) 66 SATC 277 (SECLD) 279.

⁷⁸ This provision is comparable to s 6A(3) of New Zealand's Tax Administration Act 1994.

⁷⁹ The imperative tag of s 162 (1) is unmistakable from its use of mandatory language, namely 'must'. See *Prinsloo* para 13. The peremptoriness of s 162(1) is reinforced by the 'pay now, argue later' rule in the TAA (s 164 (1)).

The duty on SARS to collect unpaid taxes applies strictly, except as is otherwise provided by law.⁸⁰ The TAA (s 193(2)) permits SARS to ‘deviate from the strictness and rigidity of the general rule referred to in subsection (1) *if it would be to the best advantage of the State*’ (my emphasis). The italicised words contain the prescribed jurisdictional fact⁸¹ that is a precondition which must exist, and be shown to exist, when a decision is taken to deviate from the stipulated norm (or general rule) concerned. If it does not exist, then no valid deviation may take place. Under these circumstances, the administrative decision permitting the waiver of a tax debt, or any part thereof, may, on application by a competent SARS official, be judicially reviewed and set aside for illegality, irrespective of whether the objectionable decision was made in good faith or negligently.⁸² However, since such illegal act exists in fact, it gives rise to valid consequences until it is set aside by a court.⁸³ The meaning of the phrase ‘to the best advantage of the State’ is fleshed out in the TAA’s requirements for the granting of a ‘write off’ and ‘compromise’ of a tax debt. Section 195(1)(a) of the TAA provides that a senior SARS official ‘may decide to temporarily “write off” an amount of tax debt if satisfied⁸⁴ that the tax debt is uneconomical to pursue as described in section 196 at that time’. Section 197(1) of the TAA provides that a senior SARS official ‘may authorise the permanent “write off” of an

⁸⁰ The TAA (s 169(4)) provides that ‘SARS need not recover a tax debt under this Chapter if the amount thereof is less than R100 or any other amount that the Commissioner may determine’.

⁸¹ The CC, in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 98, held: ‘Jurisdictional facts refer broadly to preconditions or conditions precedent that [objectively] must exist before the [valid] exercise of power, and the procedures to be followed when exercising that power.’ In tax administration, this often consists of the CSARS being satisfied of the existence of certain facts giving rise to a decision causing a ‘particular fiscal result’. See *ITC 1876* (2015) 77 SATC 175 para 21. For a discussion of the role of jurisdictional facts in administrative law, see Plasket C (2002) 313-30; de Ville JR *Judicial Review of Administrative Action in South Africa* Revised 1 ed (2005) 156-62. Contrary to Erasmus DN (2013) 118, in *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (5) BCLR 579 (LCC) 590-96 the ‘jurisdictional fact doctrine’ in review cases was rejected.

⁸² *Merafong City v AngloGold Ashanti Ltd* 2016 (2) SA 176 (SCA) paras 15-17; *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) para 27.

⁸³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) paras 26-31; *Pikoli v President of the Republic of South Africa and Others* 2010 (1) SA 400 (GNP) 408C-E. The CC, in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) 834F, held that unconstitutional conduct is a nullity ‘even before Courts have pronounced it so’. The CC held, in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 85, that the ‘anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience.’

⁸⁴ For the legal meaning and effect of ‘satisfied’, and the discharge of the onus arising therefrom, see the authorities cited above at fn 74 in the present chapter.

amount of tax debt – (a) to the extent satisfied that the tax debt is irrecoverable at law as referred to in section 198; or (b) if the debt is “compromised” in terms of Part D’. In terms of s 200 of the TAA, a senior SARS official ‘may authorise the “compromise” of a portion of a tax debt upon request by a “debtor”, which complies with the requirements of section 201, if - (a) the purpose of the “compromise” is to secure the highest net return from the recovery of the tax debt; and (b) the “compromise” is consistent with considerations of good management of the tax system and administrative efficiency’.

A taxpayer does not have a right or entitlement to a write off or compromise of a tax debt. At best, there is a right to apply for this benefit. This right is useful where the duty to pay tax is, as in SA, not based on economic capacity or financial ability.⁸⁵ Every compromise or write off application must be considered on its merit. The determination of its outcome amounts to administrative power to be exercised within constitutional limits,⁸⁶ and subject to the dictates of procedural and substantive administrative fairness regulated by the PAJA read with the TAA (such as, prior notice of an intended decision, clear grounds for a decision, and adequate notice of the right to request reasons for a decision).⁸⁷ Every decision reached must constitute a legitimate exercise of public power.⁸⁸ In terms of the TAA, a designated senior SARS official is responsible for ensuring the integrity of the process. In practice, however, decisions regarding compromise and write off applications are decided at a branch of SARS by a panel or committee of senior SARS officials. This ensures that a taxpayer’s right to just administrative action is not illusory but remains real. The expressions ‘may decide’ and ‘may authorise’ confers a discretion that must not be exercised capriciously but with due regard to constitutional and general legal principles.⁸⁹

⁸⁵ A contrary legal position appears in the Constitutions of Italy 1947 (Art 53) and Spain 1978 (Art 31). See Roch MTS *Tax Administration vs Taxpayer: A New Deal?* (undated) 10 available at <http://www.eatlp.org/uploads/public/Reports%20Rotterdam/Moessner%20lecture.pdf>.

⁸⁶ The CC held, in *Pharmaceutical Manufacturers* para 20, that the ‘exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law’.

⁸⁷ SARS ‘Short guide to the Tax Administration Act, 2011’ (June 2013) 10. For a discussion of fairness in administrative action, see *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) paras 69-70.

⁸⁸ *Van Eck NO and Van Rensburg v Etna Stores* 1947 (2) SA 984 (A).

⁸⁹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3)

All relevant facts and circumstances must be considered, including the reason for the conferral of the discretion.⁹⁰ The decision taken must be rationally related to the purpose for which the power was granted. If not, then the decision taken is judicially reviewable on the grounds of arbitrariness and inconsistency with the rule of law.

5.2.8 Section 195(1) of the Constitution applied in tax administration

Tax administration involves the exercise of public power in terms of legislation. Tax administration is an integral part of public administration. Thus, the powers of SARS and its officials are an extension of government power. Section 195(1) of the Constitution, discussed above in chapter three, sets a uniform standard for all public administration that incorporates, inter alia, the democratic culture of professional ethics, efficiency and accountability. Failure by SARS and its officials to administer tax in accordance with the values and principles of s 195(1) that results in a violation of a recognised right of a taxpayer would entitle an aggrieved taxpayer to seek legal redress by way of judicial review,⁹¹ a declaration of rights or other appropriate relief (such as, a claim for damages).⁹² Failure to comply with the TAA entitles a taxpayer to enforce the remedies provided for in the TAA. These include lodging a complaint with the Tax Ombud (s 16), instituting a claim for compensation for physical damage caused during a search and seizure (s 66(2)), or filing an objection or an appeal (s 104 and s 107).⁹³

SA 936 (CC) paras 47-56; *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) paras 182-83.

⁹⁰ *Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another* 1975 (4) SA 1 (T) 12-13.
⁹¹ *Carlson Investments* 221H-222A. See also the PAJA (s 6). For a discussion of the process of judicial review and the legal principles applicable thereto, see Plasket C (2002) 506-38; Hoexter C 'The future of judicial review in South African administrative law' (2000) 117(3) *SALJ* 484; Allan TRS 'The constitutional foundations of judicial review: Conceptual conundrum or interpretive inquiry' (2002) 61(1) *Cambridge LJ* 87; Craig P 'Constitutional foundations, the rule of law and supremacy' (2003) *Public Law* 92.

⁹² Section 38, Constitution. For a discussion of constitutional damages, see Dendy M 'In the light of the Constitution II: Damages in delict for violations of constitutionally entrenched rights' (March 2009) *DR* 48.

⁹³ For tax objections and appeals generally, see *Hicklin v SIR* 1980 (1) SA 481 (A); *CIR v Da Costa* 1985 (3) SA 768 (A); *Matla Coal Ltd v CIR* 1987 (1) SA 108 (A). For a discussion of objections and appeals under the TAA, see Clegg D (2012) 52-8. 'An appeal' to the Tax Court is a full hearing akin to a trial; the case is heard *de novo*. See *Metcash* para 47. The Tax Court is not a court of appeal in the strict sense; it is a court of revision. See *CIR v City Deep Ltd* 1924 AD 298

In SA, ‘public administrators and State institutions are guardians of the public weal’.⁹⁴ This principle applies to public administration by all organs of state. Thus, SARS and its officials cannot subvert the law by using tax administration powers to pursue any ulterior motives.⁹⁵ If this occurs, then the relevant conduct is *ultra vires*. To be lawful, conduct must be *intra vires*. The Constitution (s 33) obliges SARS and its officials to act reasonably and lawfully when exercising administrative power. All public power must be exercised in a principled way. SARS ‘must follow due process and “tread respectfully when dealing with rights”’.⁹⁶ The Constitution (s 237), and the rule in the maxim ‘justice delayed is justice denied’, requires tax officials to act diligently and without unreasonable delay.⁹⁷ In the execution of their duties, SARS officials must be honest, dignified, competent, service oriented, professional, punctual, polite, accessible, accountable, efficient, fair, equitable, impartial, unbiased, ethical, non-arbitrary, open, transparent and responsive to the public.⁹⁸ These are core values and principles for the maintenance of a functioning and efficient democracy in which service excellence is a key facet of public administration. This view is echoed in *CSARS v Hawker Aviation Services Partnership*⁹⁹ where the fundamental purpose of the public accountability doctrine is held as being ‘to check the over-zealous and sweeping misuse of power by the public administrator in a democratic State’. Accordingly, qualities that are unassociated with a credible tax administrator acting with integrity when performing official functions include, inter alia, hostility towards a taxpayer, coercion, disrespect, partiality, bias, arrogance, bullying,

306; *CSARS v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA) para 2 (*Pretoria East Motors*); *CSARS v Afri-Guard (Pty) Ltd* [2016] ZAGPJHC 144 (27 May 2016) para 59. For appeals from a Tax Court, see *CSARS v Stepney Investments (Pty) Ltd* [2016] 1 All SA 1 (SCA) paras 12-13; *Wingate-Pearse v CSARS* [2016] ZASCA 109 (1 September 2016) paras 5-16.

⁹⁴ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA) para 2.

⁹⁵ Van Dijk EC (2014) 28-9.

⁹⁶ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 50. See also *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T) 1068A.

⁹⁷ *Ackermans Ltd v CSARS* (2015) 77 SATC 191 (GNP) paras 21-31. For the factors that are to be considered when determining the reasonableness of administrative delays and administrative action generally, see *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) para 10. See also van Dijk EC (2014) 19.

⁹⁸ See *Trend Finance (Pty) Ltd and Another v CSARS and Another* 2006 (2) BCLR 304 (C) para 94.

⁹⁹ 2005 (5) SA 283 (T) para 25. Although the decision in this case was overturned on appeal in *CSARS v Hawker Air Services (Pty) Ltd: In re CSARS v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA), the *dictum* quoted remains unaffected. For a discussion of the principle of accountability, see Plasket C (2002) 326-30; Fombad CM (2010) 54-64.

incivility, lateness, abusiveness, unresponsiveness, defensiveness, close-mindedness, deafness to criticism, unethical behaviour, maladministration and corruption.¹⁰⁰ Qualities of this nature are antithetical to the Constitution and the values embraced therein.¹⁰¹

The Constitution subjects SARS and its officials to a new regimen of openness and fair dealing¹⁰² so that, where taxpayer rights are at stake, they cannot ‘play possum’.¹⁰³ The TAA (s 172(1)) empowers SARS to recover a tax debt by applying to court for a civil judgment. To do so it files a statement with the court clerk or registrar that sets forth the tax payable and certified by a SARS official as correct. Although the constitutionality of the procedure in s 172(1) is beyond doubt,¹⁰⁴ the procedure itself, a vital part of SARS’s arsenal, was described in *Mokoena v CSARS*¹⁰⁵ as ‘draconian’. The TAA has tempered this procedure by including within s 172(1) the notice requirement imposed by *Singh v CSARS*¹⁰⁶ (*Singh*). Section 172(1) applies in tandem with the ‘pay now, argue later’ rule codified in s 164(1). The latter provides that, unless payment of a tax debt is suspended under s 164(3) by a senior SARS official, ‘the obligation to pay tax’, and ‘the right of SARS to receive and recover tax’, is not ‘suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal’. The conferral on SARS of a *right* to payment cements its claim for payment. This strengthens its legal position considerably.

Tax administration cannot be dysfunctional because it plays a pivotal role in capacitating the government of SA with the resources required to fulfil its constitutional mandate. To this end, the SARSA and the TAA confer on SARS and the CSARS ‘extraordinary and

¹⁰⁰ Braithwaite V ‘Tax System Integrity and Compliance: The Democratic Management of the Tax System’ in Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion*’ (2003) 271. Corruption entails acts evincing disrespect for constitutional values (such as legality).

¹⁰¹ See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 4; *S v Shaik and Others* 2008 (5) SA 354 (CC) para 72; *Coetzee v National Commissioner of Police and Others* 2011 (2) SA 227 (GNP) para 91.

¹⁰² To determine the fairness of conduct is a pressing value judgment that is to be exercised based on findings of fact and opinion. See *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 106. For a discussion of the test for evaluating ‘fairness’, see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 63-79.

¹⁰³ Per Cameron J in *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) 850A.

¹⁰⁴ The CC, in *Metcash* paras 51-2, upheld the constitutionality of the predecessor to s 172(1).

¹⁰⁵ 2011 (2) SA 556 (GSJ) para 10. See also Olivier L ‘An important limitation on SARS’ collection procedures reaffirmed: *Sepataka v CSARS* 72 SATC 279’ (2011) 74(4) *THRHR* 695.

¹⁰⁶ 2003 (4) SA 520 (SCA) para 15.

wide-ranging powers' relating to tax collection.¹⁰⁷ They are administrators of national taxes imposed by Parliament.¹⁰⁸ SARS is the sole national tax administration institution. It administers SA's national tax laws and tax system. Its conduct, and that of its officials, is mainly 'administrative action' as defined in the PAJA (s 1). This is so because SARS's conduct 'adversely affects' taxpayers' rights, or it has 'a direct, external legal effect'.¹⁰⁹ Failure by SARS and its officials to comply with their legal duties violates the rule of law and undermines the protection afforded to taxpayers by the Constitution and the law in general.¹¹⁰ Fulfilment of their obligations is a critical act in defence of constitutionalism and the legal culture nurtured by the Constitution. Their duty to respect and protect taxpayers' rights is reaffirmed by various provisions in the TAA. These include:

- (a) Section 7 prohibits the Commissioner or a SARS official¹¹¹ from exercising a power or becoming involved in a matter in circumstances identified in ss 7(a) or (b) 'that will reasonably be regarded as giving rise to bias'.¹¹² This ensures respect for, and protection of, a taxpayer's constitutional right to just administrative action (s 33) and reinforces the democratic principle in s 195(1)(d) of the Constitution which requires services in public administration to be 'without bias'.

¹⁰⁷ *CSARS v Sassin and Others* [2015] 4 All SA 756 (KZD) para 68.

¹⁰⁸ *ITC 963* (1962) 24 SATC 705 709; *Amor van Zyl Trust v Kommissaris van Binnelandse Inkomste* 1995 (4) SA 1007 (T) 1013G.

¹⁰⁹ For the relevant extract from the 'administrative action' definition in the PAJA (s 1), see fn 180 in chapter three above. The CC held, in *ARMSA* para 41, that the determination of whether conduct is 'administrative' is not 'a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions' under the PAJA. The focus of the enquiry is instead on the nature of the power exercised; not upon the functionary. The starting point for this determination is s 33 of the Constitution. See *New Clicks* paras 101-08 446.

¹¹⁰ Olivier L 'Tax collection and the Bill of Rights' (2001) 1 *TSAR* 192 196-98. Rights violations are severe 'when they stem from the deliberate conduct [of SARS officials] or are flagrant in nature' (*S v Tandwa and Others* 2008 (1) SACR 613 (SCA) para 117). The possibility that CSARS, SARS and its officials may abuse any power conferred by statute is no legal basis for challenging the constitutionality of an empowering law. In such circumstances, the remedy lies in challenging the validity of the exercise of that power by the functionary concerned. See *Van Rooyen* para 37; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 72.

¹¹¹ The TAA (s 1) defines 'Commissioner' to mean the CSARS or the Acting CSARS under the SARS Act. For the definition of 'SARS official', see fn 125 below in the present chapter.

¹¹² The test for bias is the existence of a reasonable suspicion of actual or perceived bias. See *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) 690-91; *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources and Others* [2016] ZALCJHB 31 (3 February 2016) paras 81-98 130-33.

- (b) Section 33(1) provides that in relation to ‘information that is not in one of the official languages of the Republic, a senior SARS official may by notice require a person who must furnish the information to SARS, to produce a translation in one of the official languages determined by the official’. SARS’s power in s 33(1) may only be invoked in the specific circumstances indicated therein. Section 33(1) implicitly obliges SARS to accept documentation written in any of SA’s eleven constitutionally recognised (official) languages. Thus, SARS must respect a taxpayer’s constitutional right in s 30 to use the language of his choice.
- (c) Section 44(1) reads: ‘During a criminal investigation, SARS must apply the information gathering powers in terms of this Chapter with due recognition of the taxpayer’s constitutional rights as a suspect in a criminal investigation.’
- (d) Section 61(5) reads: ‘The SARS official must conduct the search with strict regard for decency and order, and may search a person if the official is of the same gender as the person being searched.’ This provision obliges SARS to respect and protect a taxpayer’s right to human dignity (s 10),¹¹³ the right to security in and control over his body (s 12(1)(b)), the right not to be treated in a degrading way (s 12(1)(e)),¹¹⁴ and the right to bodily integrity (s 12(2)).¹¹⁵ Thus, SARS officials cannot act with indecency, disorderliness, threats, coercion or in any other manner unbecoming of dignified, decent, credible tax officials.¹¹⁶

¹¹³ Human dignity is a constitutional value (s 1(a)) and a fundamental right (s 10). See *Dawood* para 35. Whilst ‘human dignity’ applies only to natural persons (see *Hyundai Motors* para 18), dignity is not reserved exclusively for humans. The Constitution (s 165(4)) expressly refers to the protection of the ‘dignity ... of the courts’. Juristic persons have commercial dignitas in, for example, a business name and reputation for which they have protection. See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) para 22. Thus, s 61(5) of the TAA only applies to taxpayers who are natural persons. This is so because the nature of the fundamental right to human dignity excludes juristic taxpayers from its scope of operation.

¹¹⁴ Langa J held, in *Makwanyane* paras 224-25, that *ubuntu* ‘recognises a person’s status as a human being, entitled to unconditional respect, dignity, value’ and treatment which is ‘cruel, inhuman or degrading is bereft of *ubuntu*’. Accordingly, the spirit of *ubuntu* promotes decency in tax administration by dignified tax administrators.

¹¹⁵ *DPP, WC v Prins and Others* 2012 (2) SACR 183 (SCA) para 1 held: ‘The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone.’

¹¹⁶ Navsa J held, in *Carlson Investments* 232H, that ‘[h]arrassment by revenue officials, arbitrary, malicious and vindictive conduct, ostensibly under the guise of a legitimate exercise of State power, can always be attacked by a citizen in a Court of law’. Likewise, Hoexter C

- (e) Section 61(8) provides that '[i]f the SARS official seizes relevant material, the official must ensure that the relevant material seized is preserved and retained until it is no longer required' for a purpose stated in s 61(8)(a) or (b). This obliges SARS to respect and protect a taxpayer's right to property in s 25 of the BOR.
- (f) Sections 45(2), 62(2) and 63(4) reads: 'A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade,¹¹⁷ under this section without the consent of the occupant.' These provisions oblige SARS to respect privacy rights guaranteed by s 14(a) of the BOR.
- (g) Section 69(1) reads: 'A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.' This obliges a SARS official to respect a taxpayer's privacy rights guaranteed by the BOR in s 14(d) as regards 'taxpayer information'¹¹⁸ communicated to SARS. The sanctity of the obligations is exemplified by the oath of secrecy or solemn declaration taken by SARS's officials under s 67(2) of the TAA. The secrecy provision in s 69(1) does not entail an absolute bar against disclosure of confidential taxpayer information. The TAA caters for exceptions to this general rule.¹¹⁹

'Administrative justice and dishonesty' (1994) 111(4) *SALJ* 700 701 emphasises that the values of accountability and transparency are 'liberal ideas which pervades our ... legal system as a whole' and is grounded in the 'proper aspiration' that public administration will not be infected by administrative decisions made with improper motives such as malice, fraud, dishonesty, personal self-interest, or personal animosity. Accordingly, a key factor that differentiates officials involved in tax administration from taxpayers seeking to subvert the law through unlawful conduct is that the former are, or ought to be, committed 'to moral ends and moral means'. It is submitted that the struggle for, and aspiration of, a just tax administration system in SA can only be won 'through means that have moral authority' (*S v Tandwa and Others* 2008 (1) SACR 613 (SCA) para 121).

¹¹⁷ The TAA does not define 'trade'. The TAA (s 1) states that for its purposes, 'unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned'. Generally, for TAA purposes, 'trade' ought to bear the meaning thereof as defined in the ITA (s 1). For that definition, see fn 80 in chapter six below. For the meaning of 'for purposes of trade', see *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A) 35-7; *Solaglass Finance Co (Pty) Ltd v CIR* 1991 (2) SA 257 (A) 271-72; *Burgess v CIR* 1993 (4) SA 161 (A) 179-82.

¹¹⁸ The TAA (s 67(1)(b)) defines 'taxpayer information' to mean 'any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information' (as defined in s 1 of the TAA).

¹¹⁹ See, for example, s 69(2), s 70 and s 71 of the TAA. These limitations of a taxpayer's right to privacy must satisfy the requirements of s 36(1) of the BOR (discussed below in chapter eight).

5.3 ORGANISATIONAL AND OPERATIONAL PARADIGMS PROMOTING EFFICIENT AND EFFECTIVE TAX ADMINISTRATION IN SA

As noted above in chapter one, SA's economic well-being is an imperative in pursuit of its developmental goals to improve the quality of life of all citizens and liberate their potential.¹²⁰ To this end, efficient and effective tax collection is vital. Under the SARS Act (s 3), this is SARS's sole objective. Tax administration is part of public administration, a key facet of governance in a broader sense. However, SARS and the CSARS do not fall within the hierarchy of the national, provincial and local spheres of government referred to in s 40(1) of the Constitution.¹²¹ Thus, although the principles of comity between spheres of government and intergovernmental relations decreed in s 41(1) of the Constitution are, strictly speaking, inapplicable to SARS and the CSARS,¹²² they ought to adhere thereto in their dealings with the various spheres of government. Without proper organisational and operational paradigms for SARS, tax collection will suffer. If this occurs, it will hamper the fulfilment of the human rights objectives of the Constitution that, in turn, will prevent the realisation of its lofty transformation goals. Thus, the organisational structure and the degree of operational autonomy enjoyed by SARS must be considered to determine the extent to which it can fulfil its objectives and the TAA's main purpose, namely, to promote efficient and effective collection of tax.

5.3.1 Organisational structure of the South African Revenue Service

In terms of s 3(1) of the TAA, SARS administers that Act under the control or direction of the 'Commissioner', defined in s 1 as the CSARS. The TAA (s 6(2)) stipulates that all powers and duties assigned to the CSARS must be exercised personally or by a person to whom they have been delegated under s 10 of the TAA.¹²³ Certain powers and duties

¹²⁰ *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T) 1068D.

¹²¹ For a discussion of s 40(1), see *MOP v Premier, WC* para 58.

¹²² De Ville JR (2000) 268 refers to the principles in s 41(1) as 'provision substantiating' because they 'lend substance to other provisions'.

¹²³ The true repository of public power must exercise that power. Any delegation is subject to the rebuttable rule in the maxim *delegatus delegare non potest* ('a delegated power cannot be further delegated'). See *Chairman, Board on Tariffs and Trade and Others v Teltron (Pty) Ltd* 1997 (2)

must be exercised by a 'senior SARS official';¹²⁴ others by a 'SARS official'.¹²⁵ The dichotomy between these officials does not create a formal hierarchical structure in the internal organisational order of SARS. This distinction applies only in the realm of the TAA. As creatures of the TAA, a 'senior SARS official' and 'SARS official' are imbued with only such power as is conferred on them directly in the TAA or indirectly by way of delegation in accordance with its express provisions. Accordingly, for TAA purposes, a three-tiered structure for decision-making is created, namely, the 'Commissioner' (tier one), 'senior SARS official' (tier two) and 'SARS official' (tier three).¹²⁶

Section 2 of the SARSA gave birth to SARS. It reads: 'The South African Revenue Service is hereby established as an organ of state within the public administration but as an institution outside the public service.' The SARSA creates an organisational structure for SARS headed by the CSARS who, by virtue of s 6, is appointed by the President of the RSA. The CSARS is both SARS's chief executive officer¹²⁷ and its accounting officer responsible for the performance of the functions designated by the SARSA (s 9(1)(d)).¹²⁸ As such, the CSARS is SARS's administrative head. The SARSA (s 7(1)) authorises the appointment of an Acting Commissioner if a vacancy occurs in the office of the CSARS, or the latter is absent or otherwise unable to perform his duties. Except for the CSARS and Acting Commissioner, the SARSA does not create any other positions in the organisational design of SARS. It also does not delineate SARS's internal organisational

SA 25 (A) 34E-F. See also the Constitution (s 238(a)) which is dealt with in *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) para 21.

¹²⁴ The TAA (s 1 read with s 6(3)) defines 'senior SARS official' as '(a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner in writing for this purpose'.

¹²⁵ The TAA (s 1) defines 'SARS official' to mean '(a) the Commissioner; (b) an employee of SARS; or (c) a person contracted or engaged by SARS for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner'.

¹²⁶ SARS 'Short guide to the Tax Administration Act, 2011' (June 2013) 11-14.

¹²⁷ In terms of the SARSA (s 9(2)), the CSARS is, as chief executive officer, responsible for '(a) the formation and development of an efficient administration; (b) the organisation and control of the staff; (c) the maintenance of discipline; and (d) the effective deployment and utilisation of staff to achieve maximum operational results'.

¹²⁸ In terms of the SARSA (s 9(3)), the CSARS is, as accounting officer, responsible for '(a) all income and expenditure of SARS; (b) all revenue collected by SARS; (c) all assets and the discharge of all liabilities of SARS; and (d) the proper and diligent implementation of Part 5'.

structure. This is an operational matter falling within SARS's exclusive preserve.¹²⁹ The SARSA also provides that the CSARS performs all SARS's functions (s 9(1)(a)), takes all decisions in the exercise of SARS's powers (s 9(1)(b)), and performs all functions and exercises all powers assigned in legislation or by agreement between SARS and an organ of state (s 9(1)(c)). Generally, tax legislation stipulates that the CSARS is responsible for carrying out the provisions thereof.¹³⁰ The SARSA empowers the CSARS (i) to assign management and other duties to SARS employees with appropriate skills (s 10(1)(a)), (ii) to delegate powers under the SARSA to a SARS employee (s 10(1)(b)), and (iii) to instruct a SARS employee to perform any of the CSARS's duties (s 10(1)(c)).¹³¹

5.3.2 Operational autonomy of the South African Revenue Service

Section 3 of the SARSA provides a simple and focussed objective for SARS, namely, to ensure that there is 'efficient and effective collection of revenue'.¹³² The fulfilment of this objective is enhanced by a high degree of institutional autonomy enjoyed by SARS. This autonomy, and its operational benefits, is evident from the following objective facts:

- (i) SARS is empowered to administer and enforce tax laws without reference to any third parties or other bodies.¹³³
- (ii) As suggested by its name, SARS is a revenue *service* agency. It is empowered to set performance standards for service delivery in SA's contemporary democratic tax administration system. The Constitution, the

¹²⁹ In terms of the SARSA (s 5(1)(a)), SARS may 'determine its own staff establishment, appoint employees and determine their terms and conditions of employment in accordance with section 18'.

¹³⁰ See, for example, s 2(1) of ITA, s 4(1) of VATA, s 6(1) of EDA, and s 10(1) of TDA.

¹³¹ The SARSA (s 11(1)) creates an Advisory Board to advise and consult on matters concerning the administration of the revenue collecting system. In 2002 this Board was replaced by specialist committees. See OECD Forum on Tax Administration (Centre for Tax Policy and Administration) 'Tax administration in OECD and selected non-OECD countries: comparative information series (2006)' (February 2007) 12 (OECD (2006)) available at <http://www.oecd.org> (accessed 14 November 2013).

¹³² For the definition of 'revenue' in the SARSA (s 1), see fn 185 in chapter three above.

¹³³ The TAA (s 5(1)(i)) provides that SARS may 'perform legal acts, or institute or defend any legal action in its own name'. See also s 11, s 12, s 59, s 63 and Chapter 11 of the TAA.

principles of *batho pele* ('putting people first') and the constitutional value of *ubuntu*,¹³⁴ enjoin SARS officials to promote and maintain a high standard of professional ethics,¹³⁵ to treat taxpayers in a manner that is respectful of their dignity and other fundamental rights, and to avoid unnecessary confrontation with taxpayers and their representatives.

- (iii) The SARS (s 5(1)) provides that SARS is responsible for determining its internal organisational structure. This enables SARS to respond swiftly to changed circumstances and enhances its operational effectiveness and efficiency. This ensures that tax administration takes place in accordance with the democratic principle of development-orientatedness.¹³⁶
- (iv) SARS is empowered to interpret laws and issue advance public and private rulings.¹³⁷ Provided this function is performed impartially, fairly and equitably,¹³⁸ the rulings will serve to clarify complexities in tax laws shrouded in uncertainty. This minimises the opportunity for costly, time-consuming disputes. This facilitates cost efficiency and effectiveness in tax administration and promotes the democratic principle and culture of '[e]fficient, economic and effective use of resources'.¹³⁹
- (v) The SARS (s 25(1)) provides that the primary funding for SARS's operations is money appropriated annually by Parliament.¹⁴⁰ Thus, the CSARS is required, for debate and adoption by the National Assembly, to prepare an annual estimate of SARS's income and expenditure for the forthcoming financial year.¹⁴¹ This is part of democracy in finance.

¹³⁴ *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) para 62.

¹³⁵ Section 195(1)(a), Constitution. For a suggested meaning of 'professional ethics', see Erasmus DN (2013) 132-41. See also *Carlson Investments* 232H.

¹³⁶ Section 195(1)(c), Constitution.

¹³⁷ Chapter 7, TAA.

¹³⁸ Section 195(1)(d), Constitution.

¹³⁹ Section 195(1)(b), Constitution.

¹⁴⁰ The SARS (s 24) outlines SARS's secondary income sources (such as, government grants, fees, charges levied and moneys lawfully acquired by it).

¹⁴¹ Section 26(1) read with s 26(4), SARS.

- (vi) In accordance with the democratic principle and culture of accountability in public administration,¹⁴² the SARS Act (s 28) provides that SARS is accountable to the Auditor-General who audits its records. SARS is, under the SARS Act (ss 22-26) responsible for its own financial management. This ensures that it determines its own operational needs and expends funds accordingly. This fosters greater operational efficiency and effectiveness; it also promotes the efficient, economic and effective use of resources. To this end, SARS is empowered to acquire and dispose of a right in property including ownership (s 5(1)(d)), operate a bank account (s 5(1)(e)), and insure itself against any loss, damage, risk or liability (s 5(1)(f)).
- (vii) SARS plays a pivotal role as the sole collector and administrator of national taxes on behalf of the government for the public benefit.¹⁴³ To promote optimal advantage for the public treasury through efficient and effective execution of SARS's functions, the SARS Act (s 2) locates SARS outside of the public service.¹⁴⁴ This independence provides SARS with managerial flexibility and enables it to be more effective and efficient in exercising its powers including, inter alia, controlling recruitment of staff (s 5(1)(a)), determining staff remuneration (s 5(1)(b)) and staff pension rights (s 19), and conducting staff training and education (s 20).¹⁴⁵ In this way, SARS is able to retain suitably able and qualified staff and motivate

¹⁴² Section 195(1)(f), Constitution. The Court, in *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) para 1, held: 'Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy.' See also *Matatiele Municipality* para 110; *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 (SCA) para 55.

¹⁴³ *Porritt and Another v NDPP and Others* [2015] 1 All SA 169 (SCA) para 19.

¹⁴⁴ In SA, the Public Service Act 103 of 1994 regulates the public service. The Constitution (s 197(1)) reads: 'Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.' For a discussion hereof, see *Premier, Western Cape v President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC) paras 45-7.

¹⁴⁵ The Constitution (s 195(1)(i)) reads: 'Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

them appropriately.¹⁴⁶ Whilst this enhances its tax administration capabilities,¹⁴⁷ it also enables SARS to maximise human potential by cultivating ‘[g]ood human-resource management and career-development practices’.¹⁴⁸ In so doing, SARS is enabled to meet the demands placed on it as SA’s national tax administration agency.

- (viii) The SARS Act (s 5(1)(j)) empowers SARS to engage in ‘any activity, whether alone or together with other organisations in the Republic or elsewhere, to promote proper, efficient and effective tax administration, including customs and excise duty administration’. When this power is viewed alongside SARS’s other powers, then its position as a unified, semi-autonomous tax authority becomes more pronounced. This is the so-called ‘executive agency’ model. Its benefits are, first, that a single agency can focus on an individual task that enhances the prospect for efficiency and effectiveness in tax administration. Secondly, SARS can manage its affairs in a business-like way, largely free from political interference.¹⁴⁹



5.4 POLICING OF SARS BY AN OMBUD

5.4.1 Statutory role of the Tax Ombud

In a *Rechtsstaat*, as SA, checks and balances are required to ensure that when organs of state (such as, SARS and the CSARS) act aberrantly or out of kilter with their obligations, remedial measures are available to enforce compliance with the law. In foreign jurisdictions, checks and balances include the referral of a taxpayer’s complaint to, for

¹⁴⁶ The CC, in *Metcash* para 19, referred to the ‘heavy burden on the revenue authorities’ to ‘administer a sophisticated system and supervise the performance of a large body of vendors with limited human and material resources’, including chronic insufficiency ‘of skilled staff’.

¹⁴⁷ OECD *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2010)* (3 March 2011) 20-1 (OECD (2011)) available at <http://www.oecd.org> (accessed 14 November 2013).

¹⁴⁸ Section 195(1)(h), Constitution.

¹⁴⁹ OECD (2011) 19-21.

example, a Taxpayers' Ombudsman (as in Canada), a Tax Adjudicator (as in the UK), a Taxpayer Advocate Service (as in the USA), and a Special Advisor on Taxation (as in Australia).¹⁵⁰ In SA, this now takes the form of a referral to the Tax Ombud. This new method by which taxpayers can seek redress against SARS or its officials is a positive innovation introduced by the TAA onto SA's legal landscape.

The Katz Commission, in its *Third Interim Report, 1995* floated the idea of an independent Tax Ombud operating separately from the office of the Public Protector created in Chapter 9 of the Constitution. This idea was part of the Katz Commission's proposals for a reformed tax administration system in SA where emphasis would be on taxpayers and their rights.¹⁵¹ This proposal met stern resistance.¹⁵² Hence, the lengthy delay in its implementation. Ultimately, the Katz Commission's view prevailed, albeit that the Tax Ombud fashioned in the TAA is a much watered-down version from that which the Commission proposed. Parliament has not moulded the Tax Ombud and its office in a manner akin to the Public Protector under s 181(1) of the Constitution.¹⁵³

The Tax Ombud is a public official performing a public function that is related to tax administration. This office is a creature (or creation) of the TAA. As such, the Tax Ombud is imbued with only those functions and powers as is conferred by the TAA.¹⁵⁴ Section 16(1) frames the Tax Ombud's role narrowly. It reads: 'The mandate of the Tax Ombud is to review and address any complaint by a taxpayer regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS.' Whereas s 18(1) provides that the Tax Ombud may review any issue

¹⁵⁰ For a discussion of the position in foreign jurisdictions, see Croome BJ & Olivier L (2015) 39-75.
¹⁵¹ At para 18.89.

¹⁵² For alternative proposals, see Joint Standing Committee on Finance *Final Draft Report of the Joint Standing Committee on Finance on the Third Interim Report of the Katz Commission of Inquiry into Taxation* (1995) 28 available at <http://www.treasury.gov.za/publications/other/katz/default.aspx> (accessed 12 October 2015).

¹⁵³ The Public Protector is a State institution supporting constitutional democracy whose powers are within the remit of s 182 of the Constitution. Taxpayers may lodge complaints to the Public Protector against improper conduct by SARS or the CSARS. See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 65. Also, see Croome BJ (2010) 311.

¹⁵⁴ *Mustapha and Another v Receiver of Revenue, Lichtenburg and Others* 1958 (3) SA 343 (A) 347; *AM Moolla Group Ltd and Others v CSARS and Others* [2005] JOL 15456 (T) 3.

within its mandate ‘on receipt of a request from a taxpayer’, s 18(4) stipulates that the ‘Tax Ombud may only review a request if the requester has exhausted the available complaints resolution mechanisms in SARS, unless there are compelling circumstances for not doing so’.¹⁵⁵ The Tax Ombud must discharge every mandate within its functional area of jurisdiction under s 16(1) by acting in accordance with the standards or benchmarks in s 16(2) of the TAA. In this regard, the Tax Ombud is obliged to ‘review a complaint and, if necessary, resolve it through mediation or conciliation’ (s 16(2)(a)), to ‘act independently in resolving a complaint’ (s 16(2)(b)), to ‘follow informal, fair and cost-effective procedures in resolving a complaint’ (s 16(2)(c)), to ‘provide information to a taxpayer about the mandate of the Tax Ombud and the procedures to pursue a complaint’ (s 16(2)(d)), to ‘facilitate access by taxpayers to complaint resolution mechanisms within SARS to address complaints’ (s 16(2)(e)), and to ‘identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act [that is, the TAA] or procedural or administrative provisions of a tax Act that impact negatively on taxpayers’ (s 16(2)(f)). For purposes of reviewing a complaint, s 18(2) empowers the Tax Ombud to exercise discretion in determining both ‘how a review is to be conducted’ and ‘whether a review should be terminated before completion’.¹⁵⁶ Section 20(1) stipulates that the ‘Tax Ombud must attempt to resolve all issues within the Tax Ombud’s mandate at the level at which they can most efficiently and effectively be resolved and must, in so doing, communicate with SARS officials identified by SARS’. Section 20(2) provides that the ‘Tax Ombud’s recommendations are not binding on taxpayers or SARS’.¹⁵⁷

¹⁵⁵ When determining if ‘compelling circumstances’ exist, the Tax Ombud must consider any relevant factors. Examples of such factors are in s 18(5) of the TAA, namely, whether the request raises systemic issues, whether insisting on strict compliance with s 18(4) will cause undue hardship to the taxpayer or is unlikely to yield a result within a reasonable time determined by the Tax Ombud.

¹⁵⁶ When exercising the discretion conferred by s 18(2), the Tax Ombud must consider such factors as listed in s 18(3). These are (i) the age of the request or issue, (ii) the time period that elapsed since the taxpayer became aware of the issue, (iii) the nature and seriousness of the issue at hand, (iv) the *bona fides* of the taxpayer’s request, and (v) the findings of other redress mechanisms with regards to the request at hand.

¹⁵⁷ The CC, in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 70, held: ‘Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits.’ However, the Tax Ombud lacks ‘authority to make any determinative decision’ (*New Adventure Shelf 122 (Pty) Ltd v CSARS* [2016] 2 All SA 179 (WCC) para 18).

5.4.2 Status of the Tax Ombud as a constitutional ‘organ of state’

The Tax Ombud performs a public oversight function that aims to provide enhanced, external protection for taxpayers’ rights, discussed below in chapter seven, against bureaucratic hostility thereto, or other improper conduct, by SARS and its officials.¹⁵⁸ Since the Tax Ombud’s operations are largely in their infancy, the jury is out as to whether the Tax Ombud is a successful watchdog. Unlike the Public Protector, the Tax Ombud is not an independent functionary. As explained more fully below at para 5.4.3, operationally, there is a close nexus between SARS and the OTO.¹⁵⁹ However, their close association does not detract from the Tax Ombud being, arguably, an ‘organ of state’ as defined in s 239 of the Constitution, namely, ‘any other functionary ... performing a public function in terms of any legislation’ (sub-para (b)(ii)). In this context, ‘any’ casts extremely widely the net of its subjects, namely, ‘functionary’ and ‘legislation’. Their reach is cast sufficiently broadly so that the Tax Ombud functioning in terms of the TAA would be encompassed thereby.¹⁶⁰ In terms of s 8(1) of the Constitution, the Tax Ombud would, as a constitutional organ of state, be bound by the BOR. As discussed above, the Tax Ombud exercises public power in public administration relating to tax administration by SARS and its officials. In accordance with s 195(2) of the Constitution, the Tax Ombud would have to adhere to the values and principles outlined in s 195(1) thereof. Consequently, the Tax Ombud would have to promote and maintain a high standard of professional ethics (s 195(1)(a)), promote the efficient, economic and effective use of its resources (s 195(1)(b)), provide services to the public impartially, fairly, equitably and without bias (s 195(1)(d)), and respond to taxpayers’ needs (s 195(1)(e)). Although the TAA (s 18(6)) permits the Tax Ombud to inform a taxpayer of the outcome of a review or action taken in response to a complaint ‘at the time and in the manner chosen by the Tax Ombud’, s 195(1)(g) of the Constitution requires that the public be provided ‘with timely, accessible and accurate information’.

¹⁵⁸ For a discussion of the protection of taxpayers’ rights in, inter alia, the UK, Canada, New Zealand, Pakistan, Australia, Tanzania and the USA, see Croome BJ (2010) 266-303.

¹⁵⁹ SARS ‘Short guide to the Tax Administration Act, 2011’ (June 2013) 12.

¹⁶⁰ As explained above in chapter three, the CSARS is a constitutional ‘organ of state’ in its own right within SARS. Thus, there is no cogent reason why the same legal position cannot apply to the Tax Ombud whose office is closely connected, on a functional level at least, with SARS.

5.4.3 Tax Ombud and OTO: institutional structure and functional autonomy

Section 14(1)(a) of the TAA stipulates that the Minister of Finance (Minister) ‘must appoint a person as Tax Ombud’ for a renewable term of three years¹⁶¹ and, during a vacancy in that position, the Minister, acting in terms of s 14(3), ‘may designate a person in the office of the Tax Ombud to act as Tax Ombud’. Section 14(1)(b) empowers the Minister to determine the Tax Ombud’s terms and conditions of service. The TAA stipulates that the Tax Ombud ‘is accountable to the Minister’ (s 14(5)(a)) and must ‘report directly to the Minister’ (s 19(1)(a)). Furthermore, the Tax Ombud ‘may be removed by the Minister for misconduct, incapacity or incompetence’ (s 14(2)). The cumulative effect of the provisions regulating the appointment, employment, removal and accountability of the Tax Ombud reflects an unacceptably high level of governmental executive control over the OTO. Its institutional dependence and the Tax Ombud’s subservience to a member of the National Executive is the potential Achilles heel of the Tax Ombud and its office being effective tools for the public benefit in tax administration.

The TAA distinguishes between the ‘Tax Ombud’ and ‘office of the Tax Ombud’. Whereas s 14(1) deals with the appointment of ‘a person as Tax Ombud’, s 15(1) deals with the appointment of the ‘staff of the office of the Tax Ombud’. The distinction referred to is clear from the provisions of ss 15(1) and (2) of the TAA. They read:

‘(1) The staff of *the office of the Tax Ombud* must be employed in terms of the SARS Act and be seconded to *the office of the Tax Ombud* at the request of *the Tax Ombud* in consultation with the Commissioner.¹⁶²

(2) When *the Tax Ombud* is absent or otherwise unable to perform the functions of office, *the Tax Ombud* may designate another person *in the office of the Tax Ombud* as acting Tax Ombud.’ (my emphasis)

¹⁶¹ The draft Tax Administration Laws Amendment Bill, 2016 proposes an increase to ‘five years’.

¹⁶² For the meaning of ‘in consultation with’, see *President of the Republic of South Africa and Others v Reinecke* 2014 (3) SA 205 (SCA) para 9 (and the authorities therein at fn 11). The draft Tax Administration Laws Amendment Bill, 2016 proposes to amend s 15(1) so that it would read: ‘The Tax Ombud must employ the staff of the office of the Tax Ombud in terms of the SARS Act.’

The distinction between the Tax Ombud and the OTO makes it important to understand the different rules pertaining to the accountability of the Tax Ombud, on the one hand, and that of staff in the OTO on the other. Whereas s 14(5) and s 19(1) of the TAA renders the Tax Ombud accountable to the Minister, the human resources deployed to the OTO are accountable to both the Tax Ombud and SARS. This is so because, as a matter of law, the staff are SARS employees whilst seconded to the OTO. In their dual role, the staff are under SARS's control in its capacity as their employer who pays the costs and other financial benefits associated with their employment. This deployment of staff by SARS reflects the *de facto* existence of a close functional (or working) relationship between the offices of SARS and the Tax Ombud. As SARS employees, the staff in the OTO is subject to SARS's code of conduct for employees and its internal disciplinary processes. Any such SARS employee remains duty bound in law, by virtue of the continuing employment relationship with SARS, to be faithful and loyal to his 'true' employer and serve to promote the best interests of that employer, namely, SARS. Failure to do so would be a breach of binding and enforceable contractual duties that would render such employee susceptible to disciplinary action by SARS. In the light hereof, the secondment of SARS employees creates fertile ground for potential conflicts of interest that may reasonably give rise to bias or the reasonable fear of bias. This is an unhealthy state of affairs because the staff in the OTO provides important administrative support to the Tax Ombud relating to taxpayer complaints against SARS.

In addition to providing human capital that enables the Tax Ombud and its office to perform their statutory functions, SARS is also the source of the financial capital¹⁶³ and infrastructural facilities for the OTO. Although the TAA does not expressly deal with the latter, SARS has decided to provide infrastructure for the OTO in an attempt to reduce costs associated with establishing and operating that office.¹⁶⁴ The ability of SARS to

¹⁶³ The TAA (s 15(4)) reads: 'The expenditure connected with the functions of the office of the Tax Ombud is paid out of the funds of SARS.' The draft Tax Administration Laws Amendment Bill, 2016 includes a proposal to amend s 15(4) by adding the words 'in accordance with the budget approved by the Minister for that office'. If legislated, this amendment would provide greater financial independence for the OTO in that the Tax Ombud would control the budget of the OTO, subject to the budget being 'approved' by the Minister of Finance (not SARS).

¹⁶⁴ SARS 'Short guide to the Tax Administration Act, 2011' (June 2013) 15.

make this determination speaks volumes about the unacceptably high level of control that it is able to exert in relation to the operational affairs of the OTO. The TAA provisions creating a framework that makes SARS the provider of human and financial capital for the OTO are objective considerations showing that, by Parliamentary design, the Tax Ombud and its office are fashioned in a way that renders them highly dependent on SARS. This state of affairs creates the real prospect that an informed public may perceive the Tax Ombud and its office as aligned with, or as an extension of, SARS. The structural and institutional independence of the Tax Ombud and its office are critical determinants and hallmarks of public administration in a *Rechtsstaat*.¹⁶⁵ Independence of the nature alluded to here is presently lacking in relation to the Tax Ombud and the OTO.¹⁶⁶

The absence of organisational independence between SARS as an institution and the Tax Ombud as a public functionary is worsened by the TAA, albeit impliedly, permitting a SARS employee to be appointed as Tax Ombud and acting Tax Ombud. This is evident from, first, the absence of any requirement that a person must be independent from SARS to be eligible for appointment in the capacity as Tax Ombud or acting Tax Ombud. Secondly, ss 14(3) and 15(2) of the TAA expressly stipulate that an acting Tax Ombud will be a 'person in the office of the Tax Ombud'. As explained above, in terms of s 15(1), it is obligatory ('must') that all staff in the OTO be seconded from persons employed within the ranks of SARS. Therefore, every acting Tax Ombud will, of necessity, be a SARS employee. This increases the potential for conflicts of interest¹⁶⁷ that may reasonably give rise to bias or the reasonable apprehension of bias in the eyes of informed, objective, reasonable taxpayers who, on justifiable grounds, reasonably believe

¹⁶⁵ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] 4 All SA 719 (SCA) paras 24-5.

¹⁶⁶ When reviewing legislation of an economic character, such as the TAA or any other fiscal statute, questions of institutional function and competence are relevant in relation to any public or other authority (for example, SARS and the Tax Ombud) that is responsible for administering the statutory provisions or any part thereof. See *Prinsloo* para 18.

¹⁶⁷ The TAA (s 7) prohibits a SARS employee from engaging in a matter where a conflict of interest arises in the 'administration of a tax Act' as defined in s 3(2) of the TAA. On a strict interpretation of the text in s 7, it does not apply to SARS employees seconded to the OTO. This is so because neither the Tax Ombud nor the OTO engage in any activity that falls within the remit of s 3(2) discussed above at para 5.2.4. Under these circumstances, the common law rules pertaining to the avoidance of conflicts of interest will apply.

that the Tax Ombud or acting Tax Ombud will not bring an impartial mind to bear on the review of the taxpayer's complaint. This would be so if he/she will not be open to persuasion based on the facts of the case and the taxpayer's submissions.¹⁶⁸ The reasonable perception of bias would potentially undermine the role of the Tax Ombud as an effective means to enhance the protection of taxpayer rights against attack by SARS and its officials in the execution of their official duties under the tax laws of SA.

As stated above, in terms of s 15(4), expenditure related to the OTO 'is paid out of the funds of SARS'. The effect hereof is that neither the Tax Ombud nor the staff in its office exercise any direct control or management of its budget (that is, income and expenditure). On a practical level, and by necessary implication, SARS controls and manages the 'purse strings' of the Tax Ombud and its office. It does so because Parliament has not empowered the Tax Ombud and its office to, inter alia, operate a banking account, acquire and dispose of assets, and insure against any loss or damage. Since the Tax Ombud is a creature of statute, the absence of an empowering provision renders it impotent to perform any such act. This too signifies the considerable degree to which the TAA renders the Tax Ombud and its office dependent on SARS and its officials. The position worsens when consideration is given to the fact that, by virtue of the financial support structure created in the TAA, the Tax Ombud and its office is accountable to SARS on all matters of finance. This may readily be gleaned from SARS being responsible for paying expenses incurred by the OTO. Moreover, s 19(1)(c) obliges the Tax Ombud to 'submit a report to the Commissioner [of SARS] quarterly or at such other intervals as may be agreed'. Although s 19(2) does not include financial matters in the items listed for inclusion in a report contemplated by s 19(1) of the TAA, it is submitted that such matters ought to be dealt with therein. This is so because, first, they have a direct bearing on whether the OTO promotes the efficient, economic and effective use of its financial resources as envisaged by s 195(1)(b) of the Constitution. Secondly, a financial report is a critical determinant for establishing the future financial needs of the OTO to enable it to operate more efficiently and effectively.

¹⁶⁸ For a statement of the test in relation to appearances and perceptions, see *Van Rooyen* paras 33-4.

The general (legal) test for institutional and structural independence is objective.¹⁶⁹ The TAA has not formally integrated the Tax Ombud and its office within the SARS organogram. However, the statutory framework created by the TAA provides for a high degree of dependence on, and accountability to, SARS that may reasonably lead informed, thoughtful, objective taxpayers, their representatives and advisors to be wary of the Tax Ombud, its *bona fides* and the genuineness of its review of taxpayer complaints and mediation or conciliation of disputes with SARS. When viewed through the taxpayers' eyes, the inescapable conclusion is that, under the TAA in its present form, the Tax Ombud and the OTO is not sufficiently independent and free from the influence and control of SARS and its officials. Accordingly, taxpayers have reasonable grounds to fear that the Tax Ombud and its office staff would not be capable of rendering services that are impartial, fair, equitable and without bias. The obligation created by s 16(2)(b) of the TAA that the Tax Ombud must 'act independently in resolving a complaint' provides cold comfort to taxpayers. First, this, in no way, equates with institutional independence. Secondly, as with all other public servants, the Tax Ombud would suffer from human weaknesses, frailties and poor judgment. Hence, the positive duty to 'act independently' is no guarantee that the Tax Ombud would act without fear, favour or prejudice.

5.4.4 Evaluating the Tax Ombud's efficacy to protect taxpayers' rights

The secondment of SARS employees to the OTO is cause for concern. It is likely to dent the public's faith and confidence in the Tax Ombud and its processes. This is so because the TAA lacks a provision similar to s 181(4) of the Constitution. The latter reads: 'No person or organ of state may interfere with the functioning of these [Chapter nine] institutions.' Thus, there is no obligation on SARS and its officials to desist from unduly interfering with the affairs of the Tax Ombud to the detriment of a taxpayer. This situation is more problematic by the absence of any sanction for SARS or its officials

¹⁶⁹ See *Van Rooyen* paras 32-3. Although *Van Rooyen* dealt with the independence of the judiciary, the general test laid down for evaluating the degree of its institutional independence may be applied, *mutatis mutandis*, to the Tax Ombud and the OTO. For a discussion of the concept of independence, see *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources and Others* [2016] ZALCJHB 31 (3 February 2016) paras 105-07.

who unduly interferes in the execution of the Tax Ombud's mandate. SARS justifies the deployment of its staff to the OTO as a matter of operational expediency. SARS describes this as 'a practical matter which will ensure staff are knowledgeable about tax and SARS's internal processes and will simplify the administration of secrecy around taxpayers' affairs'.¹⁷⁰ This justification is flawed. First, the legal duty of staff at the OTO to treat sensitive taxpayer information in confidence does not stem from such persons being SARS employees but rather from the obligations imposed by the TAA itself.¹⁷¹ Secondly, it is implausible for SARS to suggest that only its employees are knowledgeable in both tax and SARS's internal organisational processes. At any rate, knowledge of such processes can be acquired through disclosure thereof by SARS when the need to do so arises in any particular matter. Thirdly, knowledge of SARS's internal operations ought not to assume such prominence that it takes precedence over institutional independence and public trust in the Tax Ombud and its office. Without that trust, the system of review, mediation or conciliation conducted by the Tax Ombud will not garner or command the public's respect and acceptance that is essential for the Tax Ombud's effectiveness and success. The needs of taxpayers (or *batho pele*) must be put ahead of that of SARS and its operational expediency argument.

Although s 16(1) empowers the Tax Ombud to review a complaint pertaining to a service delivery failure ('service matter'), there is presently no SARS Service Charter in SA or a statement outlining the standards of service to which a taxpayer is entitled during tax administration by SARS and its officials. In the absence thereof, the democratic values and principles of public administration in s 195(1) of the Constitution provides the only yardstick by which the Tax Ombud can assess and evaluate the standards of service

¹⁷⁰ SARS 'Short guide to the Tax Administration Act, 2011' (June 2013) 15.

¹⁷¹ The TAA (s 21) reads: 'Confidentiality --- (1) The provisions of Chapter 6 apply with the changes required by the context for the purpose of this Part. (2) SARS must allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud's powers and duties under this Act. (3) The Tax Ombud and any person acting on the Tax Ombud's behalf may not disclose information of any kind that is obtained by or on behalf of the Tax Ombud, or prepared from information obtained by or on behalf of the Tax Ombud, to SARS, except to the extent required for the purpose of the performance of functions and duties under this Part.' For a discussion of 'confidentiality' in tax administration, see van der Walt J 'Tax confidentiality – a relic from a bygone era' (20 September 2016) available at <https://sait.site-ym.com/news/308538/Tax-Confidentiality--A-Relic-from-a-Bygone-Era-.htm> (accessed 28 September 2016).

adhered to by SARS.¹⁷² Section 17 imposes various limits on the Tax Ombud's authority. It is powerless to review (i) legislation or tax policy (s 17(a)), (ii) SARS policy or a practice generally prevailing, other than to the extent that it relates to a service matter or a procedural or administrative matter stemming from the application of the provisions of a tax Act by SARS as defined (s 17(b)),¹⁷³ and (iii) a decision of, or a proceeding in or matter before, the Tax Court (s 17(d)).¹⁷⁴ The nature and extent of these limitations imposed by the TAA on the Tax Ombud's authority results in its role being watered-down to such a degree that it will probably have minimal (real) impact on taxpayers' relationships with SARS. Section 17(c) of the TAA expressly excludes from the Tax Ombud's jurisdiction any matter that is subject to an objection or appeal under a tax Act, except administrative matters related thereto. Accordingly, the Tax Ombud's jurisdiction covers matter that is not subject to objection or appeal, as well as a matter that is not, in terms of s 104, objectionable or appealable.¹⁷⁵ This is a sensible limitation on the Tax Ombud's authority. It would be unwise to confer concurrent jurisdiction on the Tax Ombud in relation to the same matter that is subject to a formal objection or appeal at another forum. If permitted, it would create confusion and an opportunity for taxpayers to engage in the unpalatable practice of 'forum shopping'.

Section 257(2) of the TAA bolsters the ability of the Tax Ombud to be effective in the execution of its duties. In terms thereof, the Minister may, after consultation with the Tax Ombud, issue regulations extending the Tax Ombud's jurisdiction in relation to a particular taxpayer's complaint. This variation in jurisdiction may be granted after having

¹⁷² The Tax Ombud's mandate excludes an authority to prepare a SARS Service Charter or a Bill of Taxpayers' Rights as a roadmap for efficient and effective tax administration. For a discussion of taxpayers' rights in SA generally, see chapter seven below. For a proposed charter of norms and standards of good service to taxpayers, and a proposed Bill of Taxpayers' Rights for SA, see the recommendations in chapter eleven below and the draft Taxpayer Protection Bill in the Appendix.

¹⁷³ The limitation in s 17(b) is subject to the proviso that the Tax Ombud has authority to the extent that a SARS policy or practice generally prevailing 'relates to a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS'.

¹⁷⁴ The TAA (s 17(d)) refers only to the 'tax court' (as defined in s 1). Thus, the express wording used in s 17(d) does not extend the application of the limitation therein to, inter alia, a court of law, 'inquiry proceedings' by a presiding office under s 52, or a 'determination' by an attorney pursuant to s 64. This is a *lacuna* in s 17(d) which would require legislative intervention to cure.

¹⁷⁵ Examples of non-objectionable or non-appealable decisions under the TAA include those pertaining to, inter alia, an application for the suspension of the payment of a tax (s 164), and a taxpayer's request for a write off or compromise of a tax debt (s 195, s 197, s 200).

regard to, inter alia, the factual or legal complexity of the complaint, the nature of the taxpayer whose complaint is under consideration, and the maximum amount which may be involved in the dispute between the taxpayer and SARS (s 257(2)(b)).¹⁷⁶ Regulations may also be issued relating to ‘the proceedings of the Tax Ombud’ (s 257(2)(a)).¹⁷⁷

Notwithstanding the foregoing, from a taxpayer’s perspective, the efficacy of the Tax Ombud as a tool in tax administration is to some degree undermined by the absence of a legal duty on SARS and its officials to co-operate with the Tax Ombud in the execution of its mandate. The TAA (s 21(2)) simply requires SARS to ‘allow the Tax Ombud access to information in the possession of SARS that relates to the Tax Ombud’s powers and duties under this Act’. Moreover, since the TAA (s 20(1)) only permits the Tax Ombud to ‘communicate with SARS officials identified by SARS’, SARS’s position is unduly strengthened *vis-à-vis* the Tax Ombud. The TAA contains no mechanism by which SARS can be compelled to co-operate with the Tax Ombud. Thus, its participation in the processes of the Tax Ombud is entirely voluntary and at SARS’s discretion.

In accordance with international best practice, referral of a taxpayer’s complaint to the Tax Ombud ought to be a measure of last resort, not a first port of call. The TAA (s 18(4)) permits a Tax Ombud to review a complaint only if the taxpayer has exhausted all available internal complaints resolution mechanisms within SARS, except if ‘there are compelling circumstances for not doing so’ having regard to those factors listed in s 18(5). These are: (i) whether the request raises systemic issues; (ii) whether exhausting the internal complaints resolution mechanisms will cause undue hardship to the taxpayer; and (iii) whether exhausting the complaints resolution mechanisms is unlikely to produce a result within a reasonable time. When resolving a complaint under the TAA, the Tax Ombud must ‘follow informal, fair and cost-effective procedures’ (s 16(2)(c)). However, in doing so, the Tax Ombud does not function as ‘an independent tribunal or forum’ as envisaged by s 34 of the Constitution. This is so because the Tax Ombud has no decision-

¹⁷⁶ Section 257(2)(b) envisages regulations for specific taxpayer complaints which are otherwise beyond the purview of the Tax Ombud’s jurisdiction.

¹⁷⁷ At the time of completion of this dissertation, no regulation had been issued.

making powers and, thus, cannot resolve a procedural or administrative dispute by way of a decision upon application of the law. In terms of the TAA (s 20(2)), the Tax Ombud is only empowered to make non-binding recommendations to the taxpayer and SARS. Thus, these are, strictly speaking, unenforceable in law against SARS. *Prima facie*, this would suggest that the Tax Ombud is a largely toothless official in tax administration and may prove ineffective as an alternative for taxpayers to obtain redress concerning complaints levelled at SARS or its officials. However, in practice, SARS would require strong justification for not implementing a Tax Ombud's recommendation. For this reason, a Tax Ombud's recommendation may well carry weight and provide some protection for taxpayers and their rights during tax administration conducted by officials of SARS.

5.5 CONCLUSION

The present chapter addresses the general research question posed above in chapter one at para 1.2. It shows that the TAA transformed the landscape of tax administration, an integral facet of fiscal transformation. The TAA is a comprehensive statute that fosters greater cohesion and harmonisation in the administration of those taxes that are within its remit. The TAA simplifies tax administration and lays a solid foundation for future development and modernisation of tax administration in SA.¹⁷⁸ The TAA aims to strike a fair balance, on the one hand, between the powers and duties of SARS and, on the other hand, the rights and obligations of taxpayers and affected third parties. This balance aims to bring about justice and equity in tax administration.¹⁷⁹ Furthermore, the present chapter shows that the TAA confers wide-ranging administrative powers to SARS that are exercisable against taxpayers who, in addition to the main duty to pay tax, have other formal obligations ancillary thereto. These obligations relate primarily to co-operating with SARS officials during the 'administration of a tax Act' as defined and is included in the Taxpayer Protection Bill, 2016 proposed in the Appendix annexed to this dissertation.

¹⁷⁸ SARS 'Explanatory memorandum on the draft Tax Administration Bill, 2009' para 2.4 and SARS 'Memorandum on the objects of the Tax Administration Bill, 2010' para 2.1, both documents are available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/History.aspx> (accessed 28 September 2013). Also, SARS 'Memorandum on the objects of the Tax Administration Bill, 2011' para 2.1.

¹⁷⁹ SARS 'Short guide to the Tax Administration Act, 2011' (5 June 2013) Version 2 4-5 available at <http://www.sars.gov.za/Legal/TaxAdmin/Pages/Guides.aspx> (accessed on 28 September 2013).

There is no universal, one-shoe fits all approach to tax administration. Territorial sovereignty entitles every government to determine the tax policies and rules for their respective countries.¹⁸⁰ Thus, every tax authority operates in varied environments with individualised policies, laws, rules, administrative practices and cultures. The present chapter demonstrates that the overarching Constitution with its entrenched BOR is, in part, a fiscal instrument outlining a set of basic rules, values and principles that guide fiscal policy decision-making and tax administration. The relevant constitutional rules, values and principles regulate and control the exercise of all public power by SARS and its officials.¹⁸¹ Administrative conduct found to be in violation thereof is unconstitutional and subject to such a declaration.¹⁸² The present chapter shows further that the TAA promotes key values (such as, efficiency and effectiveness in tax administration, fairness, respect for taxpayers and their rights, and a tax compliance culture based on honesty and integrity). These values are aids when interpreting the TAA. Purposive interpretation requires that a meaning be ascribed to provisions that would promote fulfilment of their underlying values. An interpretation that undermines them ought to be rejected for not advancing the purpose of the text. Using the nomenclature of the marketplace, taxpayers are ‘clients’ or ‘customers’ who are entitled, on the one hand, to treatment that is, inter alia, courteous, decent, dignified, ethical, fair, humane, lawful and respectful and, on the other, to a quality service that is, inter alia, accurate, efficient, effective, honest, punctual, prompt and professional. Section 195(1) of the Constitution sets norms and standards for tax administration that SARS and the CSARS are, as organs of state, required to satisfy. Therefore, the present chapter shows the important role that democratic values and principles play in promoting efficient and effective tax administration under the TAA.

¹⁸⁰ Lymer A & Hasseldine J (eds) (2002) 8.

¹⁸¹ As explained above, tax administration is part of public administration. The CC, in *SARFU* para 133, held: ‘Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. ... In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations ... which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.’

¹⁸² Jafta J (minority judgment), in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 60, held: ‘Under our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional. What may be done by the courts is to regulate the consequences of their declaration of invalidity.’

The ‘privilege of serving the citizenry who invest their trust and taxes in the public administration’¹⁸³ necessitates that SARS and its officials must act in the public interest and for the public benefit. SARS’s statutory mandate does not require perfection. Indeed, South African law does not recognise a right to perfect administration.¹⁸⁴ Consequently, taxpayers do not have a right or a legitimate expectation that SARS and its officials will act without erring. As an organ of state bound by the BOR (s 8(1)), SARS cannot, during tax administration, engage in conduct that either is or may be perceived as being hostile to fundamental rights, accountability, transparency or any other democratic value embraced by the Constitution. Accordingly, the present chapter shows that SARS is obliged to act in accordance with the law and the Constitution, which includes being subject to correction by way of judicial review when SARS or its officials err.

The present chapter shows that SARS’s organisational structure and operational autonomy is such that, as an institution, SARS is sufficiently independent to enable it to fulfil its functions efficiently and effectively. The duty to adhere to the norms of efficiency and effectiveness also stems from the Constitution. This is so because s 237 thereof impels SARS, as an organ of state, to perform its constitutional duties ‘diligently and without delay’. Mothele J, in *Ackermans Ltd v CSARS*,¹⁸⁵ held that an unreasonable delay by SARS in the fulfilling its duties will result in procedurally unfair administrative action that is reviewable in terms of s 6 of the PAJA. Since the Constitution does not define what period would constitute an unreasonable delay, the reasonableness or otherwise thereof is a factual issue to be decided in each case.¹⁸⁶ SARS’s duty to be efficient and effective in performing its functions does not exist in a vacuum. Taxpayers’ rights balance this duty. In terms of CC jurisprudence, referred to above in chapter one, some fundamental rights are inapplicable to certain legal ‘persons’. By extension, this means that those rights in the BOR may not apply to every taxpayer. This is an unexamined constitutional issue forming the subject of discussion below in chapter six.

¹⁸³ *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 36.

¹⁸⁴ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 17; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 88.

¹⁸⁵ (2015) 77 SATC 191 (GNP) para 27 (and the authorities cited there at para 28).

¹⁸⁶ *Ackermans Ltd v CSARS* (2015) 77 SATC 191 (GNP) para 31.

CHAPTER SIX

APPLICATION OF FUNDAMENTAL RIGHTS TO TAX 'PERSONS'

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‘All animals are equal, but some animals are more equal than others.’ (George Orwell)¹

6.1 INTRODUCTION

Chapter three above shows that SA has a plethora of taxing statutes imposing a wide variety of taxes on a broad spectrum of qualifying ‘persons’ encompassing natural persons and persons other than natural persons (such as, companies, close corporations, trusts, insolvent estates and estates of deceased persons). Whilst some taxpayers are physically present or otherwise ‘resident’² in SA for tax purposes, others are not. Regardless of their legal nature, their places of residence, location (*situs*), domicile, establishment, effective management or formation (origin), every ‘taxpayer’ (as defined in the TAA) is subject to tax administration conducted by SARS and its officials. As discussed above in chapter five, the TAA empowers SARS to exercise administrative powers in relation to the affairs of taxpayers liable for a tax debt under a domestic (SA) tax statute or for a foreign tax debt recoverable in SA under an agreement between the South African government and that of the country whose tax authority raised the liability.

In the course of tax administration under the TAA, a taxpayer may consider that SARS or its officials have infringed or threaten to infringe a fundamental (basic) right(s) applying to the taxpayer. In terms of s 8 of the Constitution, fundamental rights apply to natural and juristic persons. No other category of ‘person’ is identified or mentioned therein as a holder of fundamental rights. Thus, for tax purposes, a taxpayer is a beneficiary of fundamental rights if the taxpayer is a natural or juristic person contemplated by s 8.³ If not, then the taxpayer would, in law, not be entitled to the fundamental rights and would then lack a direct interest to enforce any such right under s 38(a) of the BOR. However, the taxpayer may, as discussed below in chapter eight, have *locus standi* to act, either on behalf of taxpayers generally in terms of s 38(c) or in the public interest under s 38(d).

¹ Orwell G *Animal Farm* (1945) 51-2.

² For example, for income tax purposes, see the definition of ‘resident’ in the ITA (s 1). Similarly, see the definition of ‘resident of the Republic’ (s 1, VATA).

³ *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 443 (CC) paras 30-1.

Chapter seven below will discuss the fundamental rights relevant to tax administration. Chapter ten below will review the constitutionality of the impugned TAA provisions *vis-à-vis* a taxpayer's fundamental right to privacy guaranteed by s 14 of the BOR. For these purposes, it is important to know which taxpayers are entitled to assert a constitutional guarantee. Accordingly, the present chapter will discuss the application of the cluster of fundamental rights in s 14 to those natural persons and juristic entities who are 'persons' for tax purposes. That discussion will be undertaken in a manner that will answer research questions (ii) and (iii) formulated above in chapter one at para 1.2. Research question (ii) relates to whether the BOR has extraterritorial application so that the fundamental rights entrenched therein apply for the benefit of taxpayers located beyond SA's geographical boundaries ('the first constitutional issue'). Research question (iii) relates to whether, by virtue of s 8(4) of the BOR, juristic taxpayers in the form of trusts, estates of deceased persons, and estates of insolvent persons are entitled to the benefits of the fundamental rights entrenched in the BOR ('the second constitutional issue').

The answers to the first and second constitutional issues will determine whether the taxpayers to whom each question relates can assert that their fundamental rights are infringed when SARS or its officials exercise the powers conferred on them by the impugned TAA provisions. Since both the first and second constitutional issues have hitherto not been the subject of judicial consideration in SA, reliance will be placed on general principles of South African law to answer them. Since these constitutional issues require an interpretation of the BOR provisions, both are 'constitutional matter[s]' contemplated by s 167(7) of the Constitution.⁴ In this regard, the relevant principles of constitutional interpretation, discussed above in chapter two, and the constitutional values identified above in chapter three, are utilised. However, in order to lay a firm foundation for a proper understanding of the internal mechanism and external operation of the BOR, its overall scheme of application is discussed at the outset. Thereafter, the degree to which the BOR applies extraterritorially is discussed. Finally, the application of fundamental rights to juristic persons is discussed with reference to s 8(4) of the BOR.

⁴ *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC) paras 55-6. It is submitted that a matter with constitutional colouring does not necessarily entail constitutional substance.

6.2 GENERAL SCHEME OF APPLICATION OF THE BILL OF RIGHTS

6.2.1 Bill of Rights – a charter of fundamental rights for 'persons'

Unlike some declarations of human rights (for example, the African Charter) that apply exclusively to natural persons, s 8(4) of the BOR extends the application of entrenched fundamental rights to juristic persons as well. Whereas s 23(4) expressly grants labour rights to trade unions and employer organisations, ss 25(6) and (7) expressly grant property rights to a 'community'. The application of fundamental rights to juristic entities probably accounts for the charter being named 'Bill of Rights' (not 'Bill of *Human / Peoples*' Rights'). The fundamental rights entrenched in the BOR are also not categorised as 'human rights'. The BOR refers to 'a right' / 'the rights in the Bill of Rights'.⁵ The only textual hook in the BOR to 'human' is in 'human dignity' and 'inhuman'.⁶ The only other references in the Constitution to 'human rights' are outside the BOR, namely, in the Preamble,⁷ s 1(a)⁸ and s 184 ('South African *Human Rights* Commission'). The absence of any reference to 'human rights' in the BOR is attributable, at least in part, to the fundamental rights therein not being reserved exclusively for human beings as legal subjects. In terms of s 8 of the BOR, constitutional rights and duties are conferred on natural persons and juristic persons. Thus, it may be more appropriate to refer to the BOR as a 'Bill of Persons' Fundamental Rights'. This description is bolstered by the numerous references to '*person(s)*' in the BOR. In this regard, reference is made to the following examples: (i) 'a natural or a juristic person' (ss 8(2), (3) and (4)), (ii) 'measures designed to protect or advance persons, or categories of persons' (s 9(2)), (iii) 'freedom and security of the person' (s 12(1)), and (iv) 'a group or class of persons' (s 38(c)).

⁵ See, for example, ss 8(3) and (4), s 36(1) and s 38(1). The interim Bill of Rights in the interim Constitution did not use the term 'human rights'. It referred to 'fundamental rights'.

⁶ Human dignity is referred to in the BOR in s 7(1), s 10, s 35(2)(e), s 36(1), s 37 and s 39(1)(a). The only reference to 'inhuman' in the BOR is in s 12(1)(e).

⁷ The relevant extract from the Preamble reads: 'We therefore ... adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights ...'

⁸ The relevant extract of s 1 reads: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. ...'

The Constitution does not define 'person' or 'juristic person' for its purposes. This creates uncertainty as to their precise meaning in the BOR and is the cause of the uncertainty as to whether trusts, and the estates of deceased and insolvent persons are 'persons' for tax and general constitutional purposes. The term 'person' plays a key role in tax statutes, as it does in the BOR. This term is central to the application of the TAA.⁹ For its purposes, 'taxpayer' in s 151 includes 'a person chargeable to tax'.¹⁰ Section 152 of the TAA reads: 'A person chargeable to tax is a person upon whom the liability for tax due under a tax Act¹¹ is imposed and who is personally liable for the tax.' Despite the TAA's various references to 'person', it does not define this term. For TAA purposes, 'person' covers anyone qualifying under the definition of 'person' in a tax Act. This is clear from s 1 of the TAA. It stipulates that '[i]n this Act, unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned'. The ITA, VATA and TDA are examples of tax Acts that utilise the term 'person' and set out a definition for their respective purposes. For example, 'person' is defined in the ITA so as to include '(a) an insolvent estate; (b) the estate of a deceased person; (c) any trust;¹² and (d) any portfolio of a collective investment scheme other than a portfolio of a collective investment scheme in property, but does not include a foreign partnership'. A similar definition of 'person' appears in the VATA (s 1) and TDA (s 1). However, the term 'juristic person' is not used in tax statutes to refer to any category of taxpayer. Instead, tax legislation refers to 'persons other than natural persons' (such as companies, close corporations, municipalities, trusts, insolvent estates and deceased estates).¹³ This is unlike s 8(4) of the BOR that refers to 'juristic person'.

⁹ In addition to the definition of 'a person chargeable to tax' (s 152), 'person' is also a central feature of the TAA's definition of 'representative taxpayer' (s 153), 'withholding agent' (s 156) and 'responsible third party' (s 158).

¹⁰ Similarly, for its purposes, the ITA (s 1) provides that a 'taxpayer' is 'any person chargeable with any tax leviable under this Act'.

¹¹ The TAA (s 1) defines 'tax Act' to mean 'this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding Customs and Excise legislation'. The TAA (s 1) defines 'SARS Act' to mean 'the South African Revenue Service Act, 1997 (Act No. 34 of 1997)' (SARSA). In this dissertation, unless the context indicates otherwise, all references to 'tax Act' bear the meaning thereof in s 1 of the TAA.

¹² Trust includes, inter alia, a 'special trust' as defined in, for example, the ITA (s 1).

¹³ *Friedman and Others NNO v CIR: In re Phillip Frame Will Trust v CIR* 1991 (2) SA 340 (W) 342; *CIR v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) 232.

6.2.2 Application of the Bill of Rights to natural and juristic persons

The BOR strengthens democracy by facilitating the achievement of the Constitution's aims (discussed above in chapter three). Fulfilment thereof is enhanced by, first, the entrenchment of core values, namely, human dignity, equality and freedom;¹⁴ secondly, by enshrining 'the rights of all people in our country'. Regardless of whether natural or juristic persons are entitled to benefit from the rights in the BOR, they are all persons entitled to the benefits flowing from the operation of the constitutional values. This is so because constitutional values have general application to all persons and not only to a specific category of persons identified in the BOR. As discussed above in chapter two, values of 'an open and democratic society based on human dignity, equality and freedom' play key roles in constitutional and statutory interpretation. As discussed below in chapter eight, they are also important in the adjudication of the constitutionality of a statutory provision that seeks to limit a fundamental right entrenched in the BOR.

Section 8 of the BOR is headed 'Application'. In terms of s 8(2), the BOR binds natural and juristic persons in their private relationships.¹⁵ Therefore, they must respect the fundamental rights of others. Section 8(3) deals with the application and development of

¹⁴ See, for example, s 1(a) and s 7(1).

¹⁵ Section 8(2) reads: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' This entrenches constitutional horizontality (or 'seepage', as referred to in the SALC *Project 58: Final Report on Group and Human Rights* (October 1994) 121). Constitutional horizontality is also entrenched in s 32(1) of the BOR. See *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC). A further indication of horizontality is in *Meintjies NO v Coetzer and Others* 2010 (5) SA 186 (SCA) para 15 where it was held that 'a contract that is inimical to the values enshrined in our constitution is contrary to public policy and is unenforceable' even though the parties thereto consented to its terms. A focussed discussion of constitutional horizontality falls beyond the scope of this dissertation. For a discussion thereof, see van der Walt JWG 'Perspectives on horizontal application: *Du Plessis v De Klerk* revisited' (1997) 12(1) *SAPL* 1; Cheadle H & Davis D 'The application of the 1996 Constitution in the private sphere' (1997) 13(1) *SAJHR* 44; Sprigman C & Osborne M '*Du Plessis* is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15(1) *SAJHR* 25; van der Walt J 'Horizontal application of fundamental rights and the threshold of the law in view of the *Carmichele* saga' (2003) 19(4) *SAJHR* 517; Chirwa DM 'The horizontal application of constitutional rights in a comparative perspective' (2006) 9 *LDD* 21; Ferreira G 'Direct and indirect application of the Bill of Rights: Constitutional imperative or questionable academic innovation?' (2006) 20(2) *SJ* 241; Froneman J 'The horizontal application of human rights norms' (2007) 21(1) *SJ* 13; Abrahams P 'In defence of *Barkhuizen*: Preferring the methodology of direct application' (2009) 23(1) *SJ* 20.

the common law by a court when 'applying a provision of the Bill of Rights to a natural or juristic person'. Section 8(4) reads: 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.' Whilst s 8(4) expressly confers on qualifying juristic persons an entitlement to fundamental rights, s 8 read holistically does not contain such an express provision for natural persons.¹⁶ Their entitlement to fundamental rights is by necessary implication. After all, it was natural (not juristic) persons who 'suffered for justice and freedom in our land' (Preamble). Reference to fundamental rights applying to natural persons is made in s 7. It is headed 'Rights'. Section 7(1) has incidental value to the BOR's application. This is evident from *Kaunda and Others v President of the Republic of South Africa and Others*¹⁷ (*Kaunda*). Section 7(1) reads: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Since the BOR 'enshrines the rights of all people in our country', the conclusion is that, by implication, it entrenches fundamental rights for all qualifying natural persons. This is clear from its reference to 'people'. Naturally, 'people' excludes non-human persons. 'People in our country' renders the rights in the BOR applicable to living natural persons. This is clear from the text and context of s 8(2), and of the several references thereto in the Preamble quoted above in chapter three. The physical existence of natural persons ensures that they can be 'in our country', can 'live in it' and can express a 'will' through voting. These textual considerations, taken in conjunction with the clear, unambiguous wording of 'people in our country', lead to the ineluctable conclusion that the BOR contemplates its application to living 'people'.¹⁸ Thus, the rights therein do not apply to a living foetus,¹⁹ a stillborn child, an unborn child, a viable unborn child, or an unborn human being.²⁰

¹⁶ Bilchitz D 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25(1) *SAJHR* 38 67.

¹⁷ 2005 (4) SA 235 (CC).

¹⁸ For example, the Protection of Personal Information Act 4 of 2013 protects the constitutional right to privacy concerning 'personal information' as defined in s 1 thereof only in relation to 'an identifiable, *living*, natural person, and where it is applicable, an identifiable, *existing* juristic person'. (my emphasis) Accordingly, this Act does not protect the 'personal information' of deceased persons and former juristic persons (such as a deregistered company).

¹⁹ A foetus is not a person to whom the constitutional right to life (s 11) applies. See *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T)

Fundamental rights apply universally to natural persons. This is subject to an internal restriction imposed in the structure of a right as regards its scope and ambit of application. Thus, whilst some fundamental rights may apply only to an identified or an identifiable group or class of natural persons (such as, citizens,²¹ workers and employers (s 23), children (s 28), members of a cultural, linguistic or religious community (s 31), and arrested, detained and accused persons (s 35)), others may apply more generally to 'everyone'.²² The subject of some fundamental rights is delineated in the negative: they may be denied to 'no one'.²³ The words 'everyone' and 'no one' expand the breadth of their intended subjects.²⁴ However, this is counter-balanced by the requirement that the beneficiary must be a qualifying natural or juristic person. As regards the latter, their claim to fundamental rights exists within the defined parameters of s 8(4), discussed below at para 6.4.5, namely, the nature of the right and the nature of the juristic person.

1121-23. Grosskopf JA concluded, in *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) 797B-798C, that 'person' does not, in the context of the Inquests Act 58 of 1959, include an unborn child. However, the Court left open the question whether a foetus should be regarded as a legal person and to what extent life before birth is protectable in law. See also *Groenewald NO and Another v BEHR and Others NNO* 1998 (4) SA 583 (T) 591; *S v Mshumpa and Another* 2008 (1) SACR 126 (E) 150B; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC). Mojapelo J, in *Christian Lawyers Association of SA v Minister of Health and Others* 2005 (1) SA 509 (T) 527D-F, recognised 'the protection of pre-natal life as an important value in our society' in which the State has a 'legitimate role' and that the enforcement of this constitutional value cannot unjustifiably encroach upon a fundamental constitutional right vested in any person. For a review of the constitutional position of the unborn foetus (embryo), see Pickles C 'Termination of pregnancy rights and foetal interests in continued existence in SA: The Choice of Termination of Pregnancy Act 92 of 1996' (2012) 15(5) *PELJ* 403. For a comparative foreign law perspective, see Roden GJ 'Unborn children as constitutional persons' (2009-10) 25(3) *Issues in Law & Med.* 185; Brodersen PM 'Personhood and the constitutional puritan covenant: Can the federal government dictate State constitutional definitions?' (2011-12) 6 *Liberty University Law Review* 379.

²⁰ None of the categories of children listed above is a taxpayer under South African law.

²¹ Section 3 of the Constitution read with s 19 (political rights), s 20 (citizenship), s 21(3) (freedom of residence), s 21(4) (right to a passport) and s 22 (freedom of trade, occupation and profession).

²² For example, equality (s 9(1)), human dignity (s 10), life (s 11), freedom and security of the person (s 12(1)), privacy (s 14), freedom of religion, opinion and belief (s 15(1)), freedom of expression (s 16), freedom of assembly, demonstration, picket and petition (s 17), freedom of association (s 18), freedom of movement (ss 21(1) and (2)), fair labour practices (s 23(1)), environment (s 24), housing (s 26), health care, food, water and social security (s 27(1)), education (s 29), language and culture (s 30), access to information (s 32(1)), just administrative action (ss33(1) and (2)), and access to courts (s 34). For a discussion of the meaning of 'everyone' in the Constitution, see *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) 1118H.

²³ For example, the BOR (s 13) reads: 'No one may be subjected to slavery, servitude or forced labour.' In addition, the BOR (s 25(1)) reads: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' Similarly, see also the fundamental right to housing in s 26(3) of the BOR.

²⁴ See, for example, *Khosa* para 47.

As regards artificial entities, s 8(4) grants an entitlement to fundamental rights for an eligible 'juristic person'. The BOR expressly refers to various juristic persons on which it, either expressly or by implication, confers fundamental rights. These are a political party (s 19), federation, trade union, juristic employer, employers' organisation (s 23), community (ss 25(6) and (7)), independent educational institution (s 29(3)), cultural, religious²⁵ and linguistic association, and an organ of civil society (s 31). This is, however, not an exhaustive list of juristic persons envisaged by the BOR as being entitled to fundamental rights. Companies and close corporations are not mentioned in the BOR. However, as explained below, it is settled law that s 8(4) applies to them. Section 8(4) is also pivotal in determining the eligibility as beneficiaries of other entities not expressly referred to in the text of the BOR (such as, a trust, deceased estate, insolvent estate, partnership, body corporate, voluntary association, project, fund, and portfolio).

Section 8(4) of the BOR is instructive in relation to determining the scope and ambit of the application of the entrenched fundamental rights. Section 8(4) contains twin eligibility requirements ('the general qualification formula') that determine whether a juristic person is entitled to benefit from the fundamental rights in the BOR and, if so, the degree of any such entitlement. To apply the provisions of s 8(4) requires an interpretation of its text using the relevant tools of constitutional interpretation articulated in s 39 of the BOR (discussed above in chapter two). This is a 'constitutional matter' as contemplated by s 167(7) of the Constitution. A discussion of the inner workings and external operation of s 8(4) is essential for a proper understanding of which entities have juridical (or legal) personality under the BOR so as to be eligible as beneficiaries of the fundamental rights guaranteed therein. The present chapter investigates this constitutional issue. The discussion is, however, limited to trusts, deceased estates and insolvent estates in their capacity as taxpayers under the TAA. In the course of the discussion, the view is expressed that these juristic taxpayers are entitled to the fundamental right to privacy that forms the subject of the constitutional review in relation to the impugned TAA provisions to be dealt with below in chapter ten.

²⁵ Other democracies, such as India, also recognise religious institutions as juristic persons with the capacity to be holders of rights. See *Baba Kishore Dev v State of Orissa* AIR 1964 SC 1501.

6.2.3 Vertical application of the Bill of Rights in tax administration

The BOR is a general, all-purpose charter conferring fundamental rights. Constitutional supremacy includes supremacy of the BOR in the Constitution.²⁶ Neither taxation nor tax administration was, *per se*, in mind when the BOR was drafted. Accordingly, the BOR does not use the term 'taxpayer', nor does it include taxpayer rights as a specific or special category of rights, nor does it expressly confer rights on taxpayers as a group or class of persons, nor does it refer to tax disputes.²⁷ Unlike other similar legal instruments, the BOR does not expressly state that its provisions apply to fiscal matters.²⁸ The absence of such direct reference does not mean that the BOR does not apply to tax matters or to taxpayers. Indeed, as will be shown below, a contrary legal position appears from its text.

As stated above, the beneficiaries of fundamental rights are natural and juristic persons. As discussed below in the present chapter, juridically, they have legal personality (that is, they have the competence to bear rights and incur duties).²⁹ As discussed below in chapter seven, it is axiomatic that a right imposes a correlative, enforceable duty on anyone bound thereby. There is nothing in the BOR restricting the application of its guaranteed rights to persons acting in a specific capacity only. Accordingly, natural and juristic persons are entitled to the protection of fundamental rights in all capacities recognised in law (for example, as taxpayers, prisoners, immigrants, refugees, and consumers). In the light hereof, a natural or juristic person's legal status in any particular capacity has no bearing, for BOR purposes, on his/her/its eligibility to be the holder of an entrenched right. The determining criterion is the constitutional status of the beneficiary as a qualifying 'natural or ... juristic person' that satisfies the threshold eligibility requirements in the BOR to be entitled to be the bearer of entrenched fundamental rights.

²⁶ Per Sachs J in *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) para 26 (*Christian Education SA*).

²⁷ Udombana NJ (2005) 56 points out, justifiably, that constitutional rights are not designed or formulated as detailed sets of rules 'to deal with specific, envisaged situations'.

²⁸ Contra, for example, Art 8(1) of the American Convention on Human Rights, 1969, the relevant portion whereof reads: 'Every person has the right to a hearing ... for the determination of his rights and obligations of a civil, labor, *fiscal*, or any other nature'. (my emphasis)

²⁹ *CIR v Friedman and Others NNO* 1993 (1) SA 353 (A) 371C.

Accordingly, the BOR refers to taxpayers only *indirectly by implication*. This legal position is bolstered by the operation of the BOR to all public law relationships between the State and its legal subjects.³⁰ As explained above in chapter three, by virtue of s 7(2), the State must ‘respect, protect, promote and fulfil the rights’ in the BOR. This embodies the vertical application of the BOR. Constitutional verticality is reinforced by s 8(1). It reads: ‘The Bill of Rights applies to all law, and binds³¹ the legislature, the executive, the judiciary and all organs of state.’³² In terms hereof, SA’s three branches of government and all organs of state must obey, respect, protect and uphold fundamental rights entrenched for the benefit of their intended lawful bearers. For example, the right to human dignity in s 10 applies only to natural persons.³³ Consequently, a juristic taxpayer cannot be the holder thereof. This fundamental right is, therefore, unenforceable by any such taxpayer for its own benefit in relation to tax administration conducted by SARS or its officials in a manner alleged to be in breach of this right entrenched in the BOR.

The word ‘all’ in s 8(1) broadens the scope and ambit of its subjects, namely, ‘law’ and ‘organs of state’. ‘All’ brings every ‘law’ of whatsoever nature, including the common

³⁰ Kentridge AJ explains, in *De Klerk* para 8, that BOR verticality denotes that the rights conferred therein serve ‘as a protection against the legislative and executive power of the state in its various manifestations’. Kentridge AJ then stated that constitutional horizontality, on the other hand, denotes that fundamental rights in the BOR ‘also govern the relationships between individuals, and may be invoked by them in their private law disputes’. For further discussion hereof, see Davis D (1999) 106-12; Currie I & de Waal J (2014) 41-4; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 331-36. ‘Private law’ concerns legal relations between private actors; ‘public law’ concerns legal relations between State and non-State, as well as other State, actors. See Goldberg JCP ‘Introduction: Pragmatism and private law’ (2012) 125(7) *Harvard Law Review* 1640.

³¹ The word ‘bind’ means ‘to subject to a specific legal obligation’. See Davis D (1999) 109.

³² Yakoob J held, in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) paras 40-1, that the Constitution has ‘a relatively broad definition of an organ of state. ... If [an entity] performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle and the privacy protection. In our constitutional structure, [the entity] does not have to be part of government or the government itself to be bound by the Constitution as a whole.’ See also *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 53. Thus, s 8(1) applies to organs of state operating as private companies. See *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 6.

³³ O’ Regan J, in *Dawood* 962F, succinctly articulated this position as follows: ‘The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of *all human beings*. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.’ (my emphasis) See also *Ferreira* paras 48-9.

law and customary law, into the architecture of the BOR.³⁴ 'All' enables the BOR to be all-embracing and all-encompassing regarding the laws and organs of state subject to BOR control.³⁵ This fortifies its stature as 'a cornerstone of democracy' (s 7(1)) that shapes SA with a strong human rights culture and democratic values (such as, human dignity, equality and freedom). As stated above, constitutional rights and values 'give shape and colour to all law'.³⁶ Therefore, the BOR applies to the TAA and all other tax statutes of SA. Moreover, since SARS and the CSARS are, as explained above in chapter three, 'organs of state' within the meaning and contemplation of this term in s 8(1), the provisions of the BOR are binding on them when they perform their legal duties under SA's tax laws. It is submitted that this applies both when they act territorially (that is, in SA), and extraterritorially (that is, outside SA's territorial limits). This is so because nothing in the text of s 8(1) limits to SA the operation of the obligations created therein.

In the light of the foregoing, the BOR applies vertically in the public law relationship between SARS, including all its officials, and taxpayers that arise from the tax laws under SARS's administration. Accordingly, the BOR applies *directly* to every dispute of whatsoever nature and kind arising from the TAA. In addition, it applies to any other matter in which a taxpayer alleges that a fundamental right entrenched therein is infringed or threatened with infringement in circumstances where a duty rests on SARS and its officials not to commit any such infringement.³⁷ In accordance with the rule of law, discussed above in chapter three, the resolution of a dispute of any nature referred to here must occur by way of a fair hearing adjudicated by a competent, independent and impartial court, tribunal or forum adhering to the values underlying an open and democratic society premised on human dignity, equality and freedom. In every case, the provisions of the BOR in ss 36 (limitation of rights), 38 (enforcement of rights) and 39 (interpretation of the BOR) will apply. The provisions of s 36 and s 38, as well as their practical operation and implementation, are discussed below in chapter eight.

³⁴ Cheadle H 'Application' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 3-12 – 3-15.

³⁵ *Harksen* para 18.

³⁶ *My Vote Counts* para 51.

³⁷ Currie I & de Waal J (2014) 31; Woolman S 'Application' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 02-05) 31-141 – 31-146.

6.3 EXTRATERRITORIAL APPLICATION OF THE BILL OF RIGHTS

6.3.1 Intra- and extraterritorial effect of South Africa’s tax laws

South Africa’s system of taxation is structured in a way that tax consequences are imposed on events that occur within and beyond its territory. Therefore, South African taxpayers include persons onshore in SA and persons offshore in the sense that they lack a physical presence (or footprint) in SA. This point may be illustrated with reference to SA’s income taxation regime. South Africa has a hybrid income tax system that is mainly residence-based and to a lesser degree source-based. A natural and juristic person who is a ‘resident’ of SA in the technical legal sense as defined in the ITA (s 1) is liable for income tax on their worldwide income. On the other hand, a non-resident is liable to pay income tax to SARS only on such taxable income ‘received by’³⁸ or ‘accrued to’³⁹ the taxpayer from a South African ‘source’.⁴⁰ In terms of the ITA (s 1), a natural person is a ‘resident’ of SA for a particular tax year if he/she is either ‘ordinarily resident’⁴¹ there during that period or is physically present there for certain minimum periods prescribed in the legislation. The ITA (s 1) provides that a ‘person (other than a natural person)’ is a ‘resident’ of SA if it ‘is incorporated, established or formed in the Republic’⁴² or ... has its place of effective management in the Republic’.⁴³ In addition to being potentially liable for income tax under the ITA, natural and juristic persons located inside and outside SA’s geographical borders may be liable for other taxes contained in tax statutes gazetted in SA (such as, transfer duty, VAT, donations tax and capital gains tax).

³⁸ For the meaning of ‘received by’, see *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA); *MP Finance Group CC (in liquidation) v CSARS* 2007 (5) SA 521 (SCA).

³⁹ For the meaning of ‘accrued to’, see *CIR v People’s Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A); *Cactus Investments (Pty) Ltd v CIR* 1999 (1) SA 315 (SCA).

⁴⁰ For an exposition of the principles of ‘source’, see *Essential Sterolin Products (Pty) Ltd v CIR* 1993 (4) SA 859 (A); *First National Bank of Southern Africa Ltd v CIR* 2002 (3) SA 375 (SCA).

⁴¹ For the legal meaning of ‘ordinarily resident’, see *Cohen v CIR* 1946 AD 174 175; *CIR v Kuttel* 1992 (3) SA 242 (A) 247-48. For a discussion of the meaning of ‘resident’ in tax law, see *Estate Kootcher v CIR* 1941 AD 256 260; *H v COT* 1960 (2) SA 695 (SR) 696-97.

⁴² For a discussion of a juristic person’s residence, see *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 493-99.

⁴³ For the meaning of ‘place of effective management’, see *Oceanic Trust Co Ltd NO v CSARS* (2012) 74 SATC 127 (WCC). See also Ala C de M ‘Place of effective management criterion for determining the tax residence of persons other than natural persons: *Oceanic Trust Co Ltd v CSARS*’ (2015) 132(1) SALJ 41.

As stated above in chapter three, the Constitution is SA's supreme law (or *lex fundamentalis*). Consequently, the BOR in Chapter 2 thereof is a supreme charter or declaration of fundamental human rights. The Constitution read in its entirety applies intraterritorially to all conduct occurring in SA and to all tax and other laws enforceable there. By virtue of s 8(1) of the Constitution, the BOR binds, inter alia, all organs of state. Thus, it binds SARS and all its officials whenever they perform an act within SA's territorial limits that constitutes the 'administration of a tax Act' as defined in s 3(2) of the TAA (discussed above in chapter five). This obligation applies irrespective of whether the affected taxpayer is inside or outside SA. The term 'taxpayer' in s 151 of the TAA encompasses persons located outside SA. In practice, SARS will seek to enforce its TAA powers extraterritorially in respect of taxpayers located offshore. Enforcing SA's tax laws in foreign jurisdictions raise complex legal issues. Cross-border enforcement of the TAA raises two important questions requiring investigation in this study. First, does the TAA permit SARS to exercise, across international borders, the various powers conferred by the TAA? To the extent that any such power applies extraterritorially, the second issue is this: Does the BOR apply extraterritorially for the benefit of a 'taxpayer' as defined in the TAA (s 151), discussed above in chapter five, who is adversely affected by SARS's cross-border exercise of its TAA powers? Both questions identified here are answered below. Neither the TAA nor the BOR expressly state that their provisions apply extraterritorially. Whether they do so impliedly is a matter to be determined by interpreting their provisions. Whilst a detailed discussion of s 39 in the BOR, and of the various principles governing interpretation, was undertaken above in chapter two, a summary of the salient principles discussed there is outlined below because it is beneficial for purposes of the discussion to be undertaken below in the present chapter.

6.3.2 Synopsis of constitutional and statutory interpretation principles

Interpretation is not a scientific or mechanical process by which the meaning of words is determined with clinical or mathematical precision. Rather, a meaning is ascribed based on juridical logic and sound reasoning, and by applying accepted canons of interpretation. As stated above, the Constitution is an organic instrument; a statute *sui generis*. Thus,

constitutional interpretation cannot follow the exact same process or protocol as is applicable when interpreting an ordinary statute. However, as will become evident from the ensuing discussion, certain principles are common to both interpretive processes. Section 39 of the Constitution contains directives regulating interpretation of the BOR and legislation. Section 39(1) provides that interpreters of the BOR 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom', 'must consider international law' and 'may consider foreign law'. Section 39(2) provides that interpreters of statutes 'must promote the spirit, purport and objects of the Bill of Rights'. The directives in ss 39(1) and (2) have transformed judicial decision-making by displacing 'subjective ethical or intellectual preferences with a transparent and justiciable set of values'⁴⁴ that serve to promote the Constitution's so-called 'juridical ideology'.⁴⁵ The spirit and tenor of the Constitution read as a whole must therefore transcend every process of interpreting the BOR and the TAA.⁴⁶

The BOR has a distinctly South African flavour.⁴⁷ Thus, any interpretation thereof must consider its peculiar historical origins and SA's legal traditions and linguistic usages of words appearing in the BOR to formulate constitutional guarantees of fundamental rights and freedoms.⁴⁸ This is part of contextualist interpretation. It applies equally to statutory interpretation.⁴⁹ The Constitution as a whole is transformative in character, objective and effect.⁵⁰ Thus, all its provisions must be construed according to their transformative potential. Constitutional interpretation does not entail giving effect to the intention of its framers.⁵¹ Their provisions are to be interpreted on a principled basis. Effect must be given to a construction that best promotes the spirit, purport and objects of the BOR and

⁴⁴ Moseneke D (2007) 4. In *Zuma* para 18, Kentridge AJ cautioned that '[i]f the language used by the lawgiver is ignored in favour of a general resort to 'values', the result is not interpretation but divination.' For a critical analysis of this statement, see de Ville JR (2000) 33-6.

⁴⁵ Moseneke D (2007) 4.

⁴⁶ *S v Acheson* 1991 (2) SA 805 (Nm) 813C.

⁴⁷ *Law Society* para 59.

⁴⁸ *Zuma* paras 14-5.

⁴⁹ *NJMPF* paras 18-20.

⁵⁰ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) para 17. For a discussion of constitutional transformation, see de Vos P, Freedman W (eds) & Brand D *et al* (2014) 26-9.

⁵¹ *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 27.

Constitution as a whole, namely, to establish a society based on democratic values, social justice and fundamental human rights. This is achieved by having regard to, inter alia, the language, context, history and purpose of the constitutional provision under the spotlight, relevant constitutional values,⁵² comparative international and foreign law, the interplay between different constitutional provisions, legal precedent, SA common law, factual considerations bearing on the matter at hand, 'the content and sweep of the ethos expressed in the structure of the Constitution ... [and] the balance to be struck between different and ... potentially conflicting considerations reflected in its text'.⁵³

When interpreting a text of the Constitution or a statute, the ordinary, dictionary meaning of words must be considered. This is referred to as grammatical interpretation. Effect must be given to their usual meaning, unless a different meaning is apparent which, in the overall constitutional or statutory scheme, is preferable to give effect to an overriding constitutional or legislative aim. This is referred to as purposive interpretation. When there is documentary evidence reflecting that aim, consideration may, in appropriate cases, be given to the *travaux préparatoires* (that is, preparatory works recording the negotiations, drafting and discussions that precede the creation of a document).⁵⁴ A literalist construction must be avoided, particularly where strict adherence to the *ipsissima verba* will undermine the attainment of the objectives sought to be achieved.⁵⁵ A meaning ascribed to words must be reconcilable with their context in the provision being construed and must, furthermore, be consistent with the overall context of the provision in the Constitution or statute read holistically. This is referred to as contextual interpretation. As explained above, SA is a value-centric constitutional democracy with a normative structure that gives substance and texture to the Constitution. Constitutional values are an integral part of interpretation referred to as teleological interpretation.

⁵² Ngcobo J, in *Thint* para 375, stated that the Constitution embodies an objective, normative value system 'for all areas of the law [which should act] as a guiding principle and stimulus for the Legislature, Executive and Judiciary'. Also, see *Carmichele* para 54.

⁵³ Per Mahomed J in *Makwanyane* para 266. The CC, in *Laugh It Off Promotions CC v SAB International (Finances) BV and Another* 2006 (1) SA 144 (CC) para 44, held: 'The injunction to construe statutes consistent with the Constitution means that, where reasonably possible, the Court is obliged to promote the rights entrenched by it.'

⁵⁴ *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 27.

⁵⁵ *Mhlungu* paras 2-24. Also, see du Plessis L (2007) 103.

6.3.3 Does the Tax Administration Act, 2011 apply extraterritorially?

As stated above, the TAA regulates tax administration in relation to a tax Act. As part of the South African State's substantive jurisdiction to tax its subjects,⁵⁶ some tax Acts impose tax on a 'taxable event'⁵⁷ occurring outside the territory of SA. This, however, does not mean that SARS's powers of enforcement extend beyond SA's borders. It would be empowered to do so if the TAA applies extraterritorially. The general rule applicable in international law is that the domestic tax and other laws of a State are limited in application to its territory.⁵⁸ The exercise of jurisdiction beyond territorial limits creates conflicts of law problems.⁵⁹ Tensions arise between States owing to interference with their respective exclusive territorial jurisdiction.⁶⁰ Thus, 'when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law'.⁶¹ A South African statute that imposes a tax on an event that occurs beyond SA's geographical limits is nevertheless lawful under international law. This is so because such tax does not impinge on the sovereignty of the foreign State in which the taxable event occurs. The latter retains its sovereign substantive power to tax any economic or other effect that occurs within its territorial borders. This is a trite principle of international law.⁶²

⁵⁶ Hellerstein W 'Jurisdiction to tax income and consumption in the new economy: A theoretical and comparative perspective' (2003) 38(1) *Georgia Law Review* 1 3-4.

⁵⁷ A 'taxable event' is defined in the TAA (s 1) for its purposes as 'an occurrence which affects or may affect the liability of a person to tax'.

⁵⁸ Roch argues, with merit, that the principle of territoriality is 'the Achilles' heel of an international tax system based on the priority of the residence principle and, more precisely, on the aim of taxing worldwide income or capital, because this limitation does not guarantee the effective taxation of tax events produced in the territory of another State, not to mention the influence of this circumstance in the field of international tax fraud; furthermore, this limitation may also be a problem in the case of non-resident taxpayers if the withholding tax instrument does not sufficiently guarantee the effective levying of the tax by the Tax Administration in the State of source'. See Roch MTS *Tax Administration vs Taxpayer: A New Deal?* (undated) 16 available at <http://www.eatlp.org/uploads/public/Reports%20Rotterdam/Moessner%20lecture.pdf> (accessed 23 January 2016).

⁵⁹ Midkiff CF 'Extraterritorial enforcement of tax claims' (1970) 12(1) *William and Mary Law Review* 111.

⁶⁰ *Kaunda* para 38.

⁶¹ *Kaunda* para 40.

⁶² For a discussion of the international law principle that the power to tax is a manifestation of a State's sovereignty, see Jeffery RJ *The Impact of State Sovereignty on Global Trade and International Taxation* (1999) 26. See also Hellerstein W (2003) 4-8.

The enforceability of a foreign revenue debt arose in *Krok and Another v CSARS*⁶³ (*Krok*). The taxpayer, Krok, resided in the UK and owed a tax debt to the Australian Tax Office. Krok was subject to SARS's authority. He owned assets in SA and fell within the definition of the term 'taxpayer' in s 151(e) of the TAA, namely, 'a person who is the subject of a request to provide assistance under an international tax agreement'. Pursuant to a request from its Australian counterparts, SARS assisted in the collection of tax from Krok by obtaining, in terms of ss 163 read with 185 of the TAA, a preservation order in respect of Krok's assets in SA. In so doing, SARS prevented Krok from dissipating the assets that were subject to the conservancy order. This provided security for payment of the Australian tax debt. On appeal, the nub of Krok's contention was that the conflicts of law 'revenue rule', applicable in customary international law, precluded SARS from assisting the Australian Tax Office in the manner that it did so that the Court a quo was wrong in granting the preservation order. In terms of the revenue rule, which is part of South African law, 'the courts of one state are precluded, in the absence of a permissive rule to the contrary, from entertaining legal proceedings involving the enforcement of the revenue laws of another state — an attribute of sovereignty'.⁶⁴ In *Krok*, the Supreme Court of Appeal (SCA) explained the rationale underlying the revenue rule as follows:

'This is so because international comity does not extend to the recognition of tax liabilities imposed by a state on its subjects for its own domestic management and regulation. Thus, a foreign state may not have a claim for taxes payable to its *fiscus* enforced in another state, as this would be tantamount to derogation of the other state's territorial supremacy.'

In the final analysis, the SCA dismissed Krok's appeal. This decision was premised on the acknowledgement that the revenue rule was abrogated by s 163 read with s 185 of the TAA and Art 25A of the Agreement for the Avoidance of Double Taxation and the

⁶³ 2015 (6) SA 317 (SCA). For the South African law pertaining to the enforcement of foreign civil judgments, see *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC). See also Schulze C 'International jurisdiction in claims sounding in money: Is *Richman v Ben-Tovim* the last word?' (2008) 20(1) *SA Merc LJ* 61.

⁶⁴ *Krok* para 26. As stated above in chapter three, constitutional supremacy dictates that any foreign tax or other law enforceable in SA must be consistent with the Constitution. For a general discussion of the enforceability of foreign tax debts in domestic courts, see Dirkis M 'Being caught up by the past: The enforcement of foreign revenue debts' (2009) 19(1) *RLJ* 1.

Prevention of Fiscal Evasion with respect to Taxes on Income concluded between the governments of SA and Australia in 1999. This decision accords favourably with s 232 of the Constitution. It recognises customary international law as valid and binding law in SA 'unless it is inconsistent with the Constitution or an Act of Parliament' (such as the TAA).

Based on the international law principle of territoriality and the 'principle of non-intervention in the reserved domain of domestic jurisdiction',⁶⁵ the general norm is that the TAA and SARS's ordinary powers of administration are limited to SA. Any deviation from this rule would be 'a radical departure from the norm' and 'would have to be authorised in clear terms'.⁶⁶ In cases of doubt, the norm prevails. In SA, it is a principle of statutory interpretation that a rebuttable presumption operates to the effect that statutes only apply territorially, unless a contrary intention appears from the statute itself.⁶⁷ Thus, SARS may lawfully enforce a tax debt in foreign courts and exercise, on foreign soil, its administrative powers under the TAA (such as, audit, investigative, search and seizure powers) if the TAA 'in clear terms', either expressly or impliedly, provide for its extraterritorial application.⁶⁸ As stated above, the TAA does not do so in express terms.

As regards the question whether the TAA impliedly authorises its extraterritorial application, there can be no doubt that enlarging the territorial application of the TAA beyond SA's borders would reinforce Parliament's purpose expressed in s 2 of the TAA, namely, to achieve effectiveness in tax collection. However, this objective itself does not permit an interpretation to the effect that the TAA authorises SARS to enforce tax debts extraterritorially, or to exercise any of its functions or powers in a foreign sovereign State. Owing to the radical effect of a provision permitting such operation, the seriousness of its implications for territorial sovereignty of foreign States, and the prevailing international law principles discussed above, it can readily be expected that a Parliamentary intention to extend SARS's powers beyond SA's borders would be expressed with adequate clarity.

⁶⁵ Jeffery RJ (1999) 37.

⁶⁶ *Minister of Law and Order, KwaNdebele and Others v Mathebe and Another* 1990 (1) SA 114 (A) 120F.

⁶⁷ For a discussion of the presumptions of interpretation, see chapter two above.

⁶⁸ De Ville JR (2000) 190.

Ex facie the TAA, there are 'no clear, or sufficiently clear, indications'⁶⁹ emerging therefrom that reflect a legislative intention that the TAA applies extraterritorially. Any such intent, if it exists, would have to be winkled out of contextual crevices. South Africa is bound by the twin complementary international law principles of jurisdiction and territoriality: First, States may not exercise their power in the territory of another State, unless there is a permissive rule to the contrary. Secondly, States retain a wide discretion to exercise jurisdiction within their own territory with regard to acts committed beyond their borders.⁷⁰ On the strength of these principles, Croome and Olivier⁷¹ contend that SARS cannot exercise their TAA powers in a foreign jurisdiction unless such conduct is specifically approved under the aegis of a bilateral or multilateral agreement. The South African government has concluded agreements with its foreign counterparts that provide, inter alia, for the enforcement of SA's tax laws in foreign jurisdictions and *vice versa*.⁷² Accordingly, in any instance when SARS seeks to enforce the TAA in a foreign State with whom SA has a binding agreement providing for mutual co-operation and assistance by their respective tax authorities, SARS would formally request a designated official in the foreign State to act as its agent. In such instances, the agent and SARS would have *locus standi* in the courts of the foreign State to enforce SA's tax laws as far as they may be enforceable there.⁷³ The cross-border enforcement of SARS's TAA powers raises the question whether taxpayers affected thereby are, whilst physically in the foreign State, entitled to the protection of the BOR. This will now be discussed.

⁶⁹ *Minister of Law and Order, KwaNdebele and Others v Mathebe and Another* 1990 (1) SA 114 (A) 120G.

⁷⁰ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) para 26.

⁷¹ Croome BJ & Olivier L (2015) 124-25. See also Dachs P & du Plessis B 'A field audit outside South Africa – can SARS do this?' (April 2015) *The Africa Tax Journal* available at <http://www.africataxjournal.com/?p=334> (accessed 1 May 2015). Midkiff CF (1970) 114-15 points out that foreign courts, unless compelled to do so by their domestic laws, would be 'very reluctant to assume the burden of administering an intricate tax system [of a foreign State] with which it is totally unacquainted'.

⁷² For a list of treaties or conventions concluded by the government of SA, see SARS's website at <http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/default.aspx?country=> (accessed 24 January 2016). For a discussion of the types of provisions that may be inserted into tax treaties and conventions, see da Cunha RC *Extraterritorial Enforcement of Tax Laws* available at http://www.ttn-taxation.net/pdfs/Essays/Rita_Correia_Essay.pdf (accessed 26 January 2016).

⁷³ See, for example, *Ben Nevis (Holdings) Ltd and Another v Revenue and Customs Commissioners* 76 SATC 243.

6.3.4 Does the Bill of Rights apply extraterritorially in tax law?

The need to protect and promote fundamental human rights is a core foundational value in s 1(a) of the Constitution. It informs all obligations imposed by the BOR upon organs of state. As stated above in chapter three, s 2 of the Constitution, read with s 237 thereof, compels SARS and the CSARS to fulfil, diligently and expeditiously, all constitutional obligations imposed on them as organs of state. Their constitutional duties during the performance of their tax administration functions include, inter alia, an obligation to respect and protect taxpayers' fundamental rights. However, the corollary of any such duty is that the taxpayer must be a lawful beneficiary of the BOR and of the particular right asserted. If not, then the taxpayer is not entitled to the BOR protection. As explained below in chapter eight, such taxpayer would furthermore lack sufficient own-interest standing under s 38(a) to enforce a fundamental right and a third party may not seek to enforce any such right by acting under s 38(b) on behalf of, or for the benefit and protection of, the taxpayer. As stated above, since the BOR does not contain a provision dealing pertinently with its extraterritorial application, this is a matter of constitutional interpretation. This issue arose in *Mohamed and Another v President of the Republic of South Africa and Others*⁷⁴ (*Mohamed*) and later in *Kaunda*. A literature survey shows that these are the leading cases on the issue as to the extraterritorial application of the BOR. A survey also shows that this issue has hitherto not arisen in a South African court in a tax related context. Hence, the issue as to the BOR's extraterritorial application in tax administration is approached with reference to the legal principles crystallised in case law.

6.3.4.1 Judgments of the Constitutional Court in *Kaunda* and *Mohamed*

Kaunda concerned 69 South Africans arrested and detained in Zimbabwe for allegedly plotting a coup in Equatorial Guinea. The Zimbabwean authorities intended to extradite the detainees to Equatorial Guinea for trial. The detainees sought diplomatic protection from the South African government which they contended would, if granted, enforce

⁷⁴ 2001 (3) SA 893 (CC).

their rights to human dignity (s 10), life (s 11), freedom and security of the person (s 12), and fair conditions of detention and trial (ss 35(2), (3)). The detainees relied on the obligations imposed on the State by the BOR. They sought an order directing the government of SA, first, to take steps to secure their release and extradition to SA and, secondly, to seek assurances from the Zimbabwean and Equatorial Guinean governments that they would not pursue the death penalty against the detainees, a punishment outlawed in SA. The CC was divided on the matter. The majority dismissed the application. A key finding of the majority is that the positive duties on the State arising from s 7(2) 'does not mean that the rights nationals have under our Constitution attach to them when they are outside of South Africa, or that the state has an obligation under section 7(2) to "respect, protect, promote, and fulfil" the rights in the Bill of Rights which extends beyond its borders'.⁷⁵ The issue as to whether the detainees were entitled to the protection of the BOR depended on whether the Constitution applies extraterritorially. To this end, the kernel of the majority judgment is at para 36 thereof. For present purposes, the relevant part thereof reads as follows:

'First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2) contemplate that the state's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?'

In answering this question, the majority judgment in *Kaunda* considered s 7(1) of the Constitution, the relevant portion whereof reads: 'It [the BOR] enshrines the rights of all people in our country.'⁷⁶ The CC, in *Lawyers for Human Rights and Another v Minister*

⁷⁵ *Kaunda* para 32.

⁷⁶ In *Kaunda* para 66, the majority (per Chaskalson CJ) held: 'The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution

of *Home Affairs and Another*,⁷⁷ interpreted 'all people in our country' as including foreign nationals who are physically present in SA at its seaports and airports even though any such person may not as yet have been granted formal permission to enter SA. In light of this decision, actual residence in SA is not a legal pre-requisite for an entitlement to fundamental rights entrenched in the BOR. This means that such rights apply to natural persons irrespective of whether they reside in SA or not, or are passing through its territory by land, sea or air.⁷⁸ Furthermore, in *Mohamed*, the CC held that the fundamental rights apply to natural persons irrespective of the legality of their presence in SA. Accordingly, the reference in s 7(1) to 'all people in our country' encompasses within its remit, inter alia, illegal foreigners (or immigrants, aliens) living and/or working in and/or visiting SA. 'Everyone' is the beneficiary of the socio-economic rights entrenched in s 27(1) of the BOR (namely, to health care, food, water and social security). The CC, in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others (Khosa)*,⁷⁹ held that 'everyone' in s 27(1) includes a non-citizen who is in SA (for example, a person who is granted the legal status of a 'permanent resident'). Consequently, an entitlement to fundamental rights is not reserved only for South African citizens. However, as stated above, some rights in the BOR apply only to citizens. The cumulative effect of the aforecited cases is that they establish the principle that people are entitled to fundamental rights in the BOR, regardless of whether they are citizens of SA or not, and irrespective of whether they are legally or illegally in SA, or legally or illegally carrying on a 'trade' there.⁸⁰

and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.'

⁷⁷ 2004 (4) SA 125 (CC) para 26. However, the CC left open the question 'whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country' (para 26).

⁷⁸ It is unclear from existing case law whether a natural person is 'in our country' (s 7(1)) if he/she is in SA airspace (though not physically on land). It is submitted that entrance into SA airspace (or its territorial waters) suffices for BOR protection. Such an approach provides wider and better BOR protection which accords with the ethos, spirit and tenor of the Constitution.

⁷⁹ 2004 (6) SA 505 (CC) paras 46-7.

⁸⁰ In this context, 'trade' bears the meaning in s 1 of the ITA, namely, including 'every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent as defined in the Patents Act or any

In *Kaunda*, the majority held: ‘The bearers of the rights [in the BOR] are people in South Africa. Nothing suggests that it [the BOR] is to have general application beyond our borders.’⁸¹ The preposition ‘in’ forming part of the phrase ‘people in our country’ (s 7(1)) was a key hook upon which the gravamen of the majority judgment hung their justification for the finding that the BOR does not apply extraterritorially. On this basis, the majority held that the detainees could not rely on the BOR nor enforce its provisions. The majority distinguished the facts of *Kaunda* from those of *Mohamed* discussed below on the basis that, whilst the violation of Mohamed’s rights occurred *in SA*,⁸² the detainees in *Kaunda* were *outside SA* at the time of the State’s alleged duty to act under s 7(2). On the strength hereof, the majority held that the outcome in *Mohamed* favouring the applicant could not be transplanted onto *Kaunda*. The essence of the minority judgments in *Kaunda* regarding the extraterritorial application of the BOR is expressed in the quote: ‘It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that ... the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. ... It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.’⁸³

As stated above, *Mohamed* is also relevant in relation to the extraterritorial application of the BOR. In *Mohamed*, the applicant was an unlawful immigrant in SA. He sought asylum under an assumed name using a false passport. Pursuant to his arrest and

design as defined in the Designs Act or any trade mark as defined in the Trade Marks Act or any copyright as defined in the Copyright Act or any other property which is of a similar nature’.

⁸¹ *Kaunda* para 37. In *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (1) SACR 323 (SCA) a foreign company with no presence in SA sought the review of administrative decisions taken in SA by State officials that adversely affected its right to confidentiality of information. The Court held that *Kaunda* did not deprive the company of legal standing since it did not deal with standing but with s 7(1) that defines a class of beneficiary of rights in the BOR. See also *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 443 (CC).

⁸² Chaskalson CJ (para 49), referring to the dissenting judgment of the minority, held: ‘O’Regan J refers to the fact that Mohamed was in the USA at the time. But the relevant events in that case all took place in South Africa. His rights were infringed in South Africa by government officials and not in the USA where he found himself as a result of their having violated his rights. This Court therefore had no difficulty in finding that his constitutional rights had been breached.’

⁸³ Per O’ Regan J at para 228. See also the separate minority judgment per Ngcobo J paras 181-83.

detention in Cape Town by South African immigration authorities, Mohamed was transferred into the custody of the USA law enforcement officials for interrogation in SA and deportation to the USA for trial in New York on terrorism charges for which the USA authorities sought to invoke the death penalty. Despite their knowledge that Mohamed potentially faced the death penalty, the immigration authorities of SA facilitated his deportation without seeking assurances that the USA authorities would not seek the death penalty. Whilst incarcerated *in the USA*, Mohamed challenged, in SA, the legality of the actions by the SA authorities. He did so on the basis that they violated his fundamental rights in the BOR. The CC recognised the legal standing of Mohamed to assert fundamental rights under the BOR despite him being, at all times material to the application, outside SA. The CC held that, despite the illegality of Mohamed’s presence in SA at the time of his arrest, he was protected by the BOR.⁸⁴ The CC found that the SA immigration officials colluded with the USA law enforcement officials in securing the expedited removal of Mohamed from SA to the USA. The CC held that in conducting themselves in the manner that they did, the SA officials acted illegally and in violation of Mohamed’s rights entrenched in the BOR under s 10, s 11 and s 12(1)(d).

The majority judgment in *Kaunda* has been criticised by academic writers. The thrust of the criticism is that, first, the majority adopted a linguistic, literalist approach to the interpretation of ‘all people in our country’ (s 7(1)) leading to a truncated meaning thereof that resulted in the obligations in s 7(2) being denied to the detainees. In this regard, Woolman writes: ‘The *Kaunda* Court’s entire textual argument on the lack of extraterritoriality turns on the presence of a word – the preposition ‘in’ – that could never have been intended to carry such weight.’⁸⁵ A second criticism levelled at the majority

⁸⁴ The benefit of universal rights is that they may be claimed by anyone in the national territory of SA, irrespective of whether their presence is legal or illegal, temporary or permanent. See Currie I & de Waal J (2014) 35. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) para 20 Yacoob J held that the ‘very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity’.

⁸⁵ Woolman S ‘Application’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original Service: 02-05) 31-117. Woolman writes further at fn 5: ‘The *Kaunda* Court’s reading leads to a *reductio ad absurdum*: it suggests that if all of us in South Africa today were to go to

judgment in *Kaunda* is that its interpretive approach led to a restrictive application of the BOR that denied 69 South African nationals its protection. Owing to the doctrine of precedent reflected in the maxim *stare decisis*, discussed above in chapter three, the majority judgment is binding on all courts. To put it pithily, a strict interpretation and rigid adherence to the majority judgment would have undesirable results.⁸⁶ For example, a natural person seeking legal redress in SA would have to prove that he/she was, at the time of an infringement or threatened infringement of a fundamental right, physically present in SA. If not, the BOR would be inapplicable. Such a legal position would create fertile ground for abuses of power and violations of rights by the State and its machinery. In this regard, Woolman argues, convincingly, that:⁸⁷

‘*Kaunda* cuts back *Mohamed*’s understanding of extraterritoriality. ... There seems to be no good reason why abuses of state power within South Africa’s borders should be subject to Chapter 2, but abuses of state power outside the borders should not be similarly subject. To relax the strictures on extra-territorial exercise of state power – and even private power – seems to offer a license to the state – or another party burdened by Chapter 2 – to abuse persons abroad in ways it would never contemplate at home. FC [Final Constitution] s 8(1) tells us that the Bill of Rights binds the conduct of the government [and organs of state]. It does not distinguish home from abroad.’

⁸⁶ Mozambique tomorrow, the Bill of Rights would, tomorrow, cease to enshrine the rights of any and all South Africans.’

An example of a dogmatic, staunch adherence to the interpretive approach of the majority in *Kaunda* appears in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* [2011] ZAGPJHC 234 (6 June 2011) paras 20-2. The Court held that the scope and effect of s 7(1) of the Constitution ‘is clearly that physical presence [in SA] is a precondition for any constitutional benefits to operate’. Therefore, it held that a peregrine juristic person with no presence in SA cannot be a beneficiary of a fundamental right. However, on appeal, in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* 2013 (2) SACR 443 (CC) paras 27-31, the Court confirmed that that a foreign litigant with a protectable interest in SA has standing to enforce its rights in a South African court against unlawful acts. It is noteworthy that, unlike the position in Art 19(3) of the German Bill of Rights (see Blaauw LC *The Constitutional Tenability of Group Rights* (unpublished LLD thesis, UNISA, 1988) 388-89), both foreign and domestic juristic persons are entitled to rights in SA’s BOR. Section 7(1) only refers to ‘people’. It does not cover juristic persons. Unlike s 7(1) in relation to natural persons, the BOR does not refer to ‘a juristic person *in our country*’. Thus, the situs of a juristic person (such as, the place of its central management and control, or from where the nerve centre of its business is conducted), is not a consideration determining its entitlement to fundamental rights in the BOR.

⁸⁷ Woolman S ‘Application’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 02-05) 31-114. Du Plessis L (2007) 194 also contends that abuses of public power outside SA by organs of state ought to be judicially reviewable in SA in terms of the BOR.

6.3.4.2 Kaunda's effect on the application of the Bill of Rights in tax administration

By way of paying taxes, taxpayers contribute to SA's financial well-being. On this basis alone, all taxpayers ought to be entitled to benefit from the fundamental rights in the BOR that, as listed below in chapter seven, are relevant in the realm of tax law and tax administration. Democracy in taxation, discussed above in chapter three, requires there to be equality in the treatment of taxpayers. *Ubuntu* as a value in tax administration, discussed above in chapter three, also favours the operation of the BOR to taxpayers located outside SA. *Ubuntu* engenders respect for the dignity and equality of all persons, irrespective of their location. Conduct incongruent with the BOR ought not to escape judicial scrutiny through the crucible of the BOR simply because the taxpayer affected thereby is located outside SA's territorial borders when the offending conduct occurs. Constitutional supremacy and verticality must prevail in such circumstances so that the BOR has bite and the rights therein are not rendered sterile. Thus, extending the reach of the BOR to taxpayers outside SA ought to be favoured. This would enable the conduct of SARS and its officials, and laws conferring power(s) on them, to be kept in check by every natural and juristic person who is a 'taxpayer' as defined in the TAA, irrespective of whether they are on foreign or domestic soil. Such a legal position would provide equal protection and benefit of the law to all taxpayers of SA. In so doing, equal justice for all is fostered. This is consonant with the fundamental values of equality, the achievement of equality, and the advancement of human rights and freedoms for all. Disparity in the BOR's treatment of taxpayers based on their physical location is unfair, inequitable and inimical to the values underlying an open and democratic society based on human dignity, equality and freedom. Moreover, such a state of affairs would undermine the stature of the BOR as 'a cornerstone of democracy' (s 7(1)). In addition, it would violate Art 26⁸⁸ of the International Covenant on Civil and Political Rights that is binding on SA. This provision prohibits discrimination based on status. A taxpayer's residence in law affects his legal status. Thus, residency may not be used in a manner that leads to the unequal treatment of persons. This would be discriminatory.

⁸⁸ The relevant portion of Art 26 reads: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. ...'

The *fiscus* and, by extension, the National Revenue Fund, ought not to reap the fruits of information procured or taxes collected through conduct tainted with dishonesty or that is in any other manner incongruent with the Constitution or its values.⁸⁹ This ought to be so irrespective of whether the impugned conduct occur intra- or extraterritorially and irrespective of whether it relates to a taxpayer inside or outside SA's territorial borders. Rights emanating from the Constitution, particularly fundamental rights in the BOR, are important weapons in a taxpayer's arsenal. They serve as legitimate counterweights against SARS and its officials exercising unfettered or unbridled powers under the law. The majority judgment in *Kaunda* caters for the possibility that the entrenched fundamental rights may apply extraterritorially in tax and other commercial matters. This is evident from the fact that the majority judgment refers to instances where a South African company or the government of SA conducts business beyond SA's borders. Citing *R v Cook*,⁹⁰ the majority emphasised that 'nothing in this judgment should be construed as excluding [the] possibility' that claims are justiciable in SA pertaining to 'an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by persons bound under section 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign state'.⁹¹ If the argument in favour of the extraterritorial application of the BOR in tax matters contended for here does not resonate with the courts of SA and is found to be constitutionally wanting, then this does not leave affected taxpayers remediless. Such taxpayer may still challenge, in any judicial proceedings, the legality of a TAA provision on which SARS relies to confer authority on it to act in a particular way. A taxpayer need not be a beneficiary of rights under the BOR to mount such a constitutional challenge.

Kaunda lays down general guidelines regarding the application of the BOR that are not fixed rules of invariable application. Exceptions thereto are permitted. *Kaunda* concerned

⁸⁹ The Court, in *TM v NM and Others* 2014 (4) SA 575 (SCA) para 14, held: 'Deliberate deceit in the procurement of a document must taint its entire subsequent existence, and the law cannot permit propagation of the fruits of dishonesty.' For a discussion of the treatment of evidence obtained unconstitutionally in a search, see *Thint* paras 215-24. Also, see de Vos WLR 'Illegally or unconstitutionally obtained evidence: A South African perspective' (2011) 2 *TSAR* 268.

⁹⁰ [1998] 2 SCR 597.

⁹¹ *Kaunda* para 45.

the issue whether detainees outside SA were entitled to enforce a constitutional duty on the government of SA in a situation where the government was not a party. This fact distinguishes *Kaunda* from tax administration cases because SARS is an organ of state involved in all tax administration matters under the TAA. It is an active role-player pursuing national governmental fiscal interests in tax collection and the enforcement of tax laws. This fact provides a sound legal basis for the approach adopted by the majority in *Kaunda* not finding application when the issue arises as to the BOR’s extraterritorial application in a tax administration context. Furthermore, *Kaunda* related neither to tax administration, nor to the issue whether the BOR binds SARS when its officials engage in cross-border tax administration activities, nor did *Kaunda* relate to the entitlement of juristic persons to the protection of the BOR in circumstances where they lack a presence in SA. Consequently, the majority judgment in *Kaunda* has limited precedential value in a tax administration context. As regards the extraterritorial application of the BOR to SARS, it is submitted that s 8(1) of the Constitution binds SARS to the BOR wherever it may act, that is, territorially and extraterritorially. This is so because, unlike the reference in s 7(1) to ‘in our country’, no such reference is contained in 8(1). Thus, s 8(1) does not stipulate that ‘[t]he Bill of Rights applies *in our country* to all law, and binds ... all organs of state *in our country*’. The nub of the majority judgment’s reasoning in *Kaunda* centred on its interpretation of ‘in our country’ and the legal effect thereof in s 7(1) within the phrase ‘[i]t enshrines the rights of all people in our country’. The absence from s 8(1) of reference to ‘in our country’, or words having a similar effect, renders the majority judgment’s interpretation of s 7(1) inapplicable to the application of s 8(1). Consequently, s 8(1) is couched in sufficiently broad terms to sustain an interpretation that the BOR binds SARS wherever it acts in tax administration (that is, territorially and extraterritorially). A purposive interpretation of the BOR supports this view because it extends BOR protection to a much broader group of persons. This is consonant with the spirit, purport and objects of the BOR.⁹²

⁹² If SARS enforces its powers under the TAA extraterritorially then a taxpayer affected thereby is entitled to the benefit of all taxpayer rights codified in the TAA (discussed below in chapter seven). Moreover, the taxpayer would be entitled to enforce the constitutional obligations arising for SARS under the BOR as well as the fundamental rights therein applicable to taxpayers in tax administration. This is so because the CC, in *Harksen* para 18, held: ‘The Constitution is the

6.4 APPLICATION OF FUNDAMENTAL RIGHTS TO JURISTIC PERSONS

6.4.1 Freedom to use trusts, insolvent estates and deceased estates

Freedom, a constitutional value recognised in ss 1(a) and 39(1)(a) of the Constitution, is a broad concept.⁹³ It includes (i) the freedom of natural persons belonging to a cultural, religious or linguistic community to form, join and maintain cultural, religious and linguistic associations and other organs of civil society (s 31(1)(b) of the BOR); (ii) the common law freedom of taxpayers to plan their financial affairs tax efficiently;⁹⁴ (iii) the freedom to operate a trade;⁹⁵ and (iv) the freedom of natural persons to select the entity of their choice through which to exercise any fundamental right. Thus, a citizen may choose any recognised form of business entity⁹⁶ to exercise the freedom to trade entrenched in

supreme law of the land. It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto.' Thus, the spirit, purport and objects of the BOR are incorporated in the TAA so that any enforcement of its provisions is subject to constitutional control, regardless of whether enforcement occurs intra- or extraterritorially.

⁹³ Ackermann J, in *Ferreira* para 50, held that 'freedom' must be generously defined so that 'persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfill their own humanness and to question all received wisdom without limitations placed on them by the State. The "open society" suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the "good life".' Jordaan DW 'The open society' 64(1) *THRHR* 107 114 contends that an 'open society' is a 'society which rejects the absolute authority of merely established social arrangements, while trying to preserve and develop social arrangements based on the principles of freedom, humaneness, rationality and diversity'. For further discussion of the meaning of 'freedom', see Wayburne PA (2014) 77-95; Woolman S & Davis D 'The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism, and the application of fundamental rights under the interim and final Constitutions' (1996) 12(3) *SAJHR* 361 382-83; Hill JL 'The five faces of freedom in American political and constitutional thought' (2004) 45 *Boston College Law Review* 499.

⁹⁴ For the authorities dealing with this common law right, see fn 235 in chapter three above. Other freedoms are also recognised. For example, s 25 of the BOR protects freedom of testation. See *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) para 26. See also du Toit F 'Discriminatory testamentary bequests – a good fit between common law and civil law in South Africa's mixed jurisdiction' (2012) 27 *Tulane European & Civil Law Forum* 97 110-14.

⁹⁵ Section 186(3) of the TAA potentially encroaches on a taxpayer's freedom to practise a trade. Whilst s 186(3)(b) empowers a senior SARS official to obtain a High Court order that 'withdraw[s] a taxpayer's authorisation to conduct business in the Republic', s 186(3)(c) permits a court order that 'require[s] the taxpayer to cease trading'.

⁹⁶ For discussion of the different forms of business entities, see Nagel CJ, Boraine A & de Villiers WP *et al Business Law* 2 ed (2000) 309-92; Benade ML, Henning JJ & du Plessis JJ *et al Entrepreneurial Law* 4 ed (2008) 9-383. The freedom under s 22 to engage in productive work is an integral component of human dignity because, as held in *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 27, 'mankind is pre-eminently a social

the BOR (s 22).⁹⁷ These business entities include a company, close corporation, body corporate, association, partnership and a trust. Any such entity may be utilised for exercising other entrenched fundamental rights, such as in s 18 of the BOR. It reads: 'Everyone has the right to freedom of association.' 'Everyone' is a word of neutral gender and has wide import and unqualified generality.⁹⁸ Under s 18, natural persons may form and join a voluntary association, such as a community forum, a movement, a body corporate, a stokvel, a friendly or other society, a co-operative, a sports and/or social or recreational club/union/federation, a taxpayers' association,⁹⁹ as well as a home owners', ratepayers'¹⁰⁰ or other civic association. Furthermore, a trust may be utilised as a vehicle for exercising the fundamental right to operate an independent educational institution for the purposes of s 29(3) of the BOR, or to operate a cultural, religious or linguistic association under s 31(1)(b) thereof. Whenever a natural person(s) utilises any type or class of juristic entity to give effect to a fundamental right, then the juristic entity itself ought to be a constitutional juristic person entitled to the benefits arising from s 8(4) of the BOR. A contrary view would be absurd and would render largely ineffectual the cluster of 'freedom rights' underpinned and guaranteed by the BOR.

species with an instinct for meaningful association. Self-esteem and the sense of self-worth ... is most often bound up with being accepted as socially useful.' In *Affordable Medicines* para 59 the CC held that 'work is part of one's identity and it is constitutive of one's dignity'.

⁹⁷ Section 22 reads: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.' Section 22 confers on citizens the freedom to engage in different professions or occupations and to carry on a wide range of different trades that would enable them to earn incomes that are necessary to sustain and uplift their families, communities and, ultimately, the nation of SA. This includes the freedom to trade as individuals, in partnership, in association with others, and by persons organising themselves and contributing their collective resources to structured corporations and enterprises that, by their sheer size and resources, are in a better position to make larger and more meaningful contributions to the development and welfare of South African society. See also *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS) para 35.

⁹⁸ *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) 1118H. Textually and contextually in s 18, 'everyone' is all-embracing and broad in its extent: it includes all and excludes none. Thus, s 18 of the BOR applies to natural and juristic persons.

⁹⁹ Croome BJ & Olivier L (2015) 76 point out that taxpayers in various countries have formed taxpayers' associations. The reference in s 18 to 'everyone' ought to cover *all* natural and juristic taxpayers so that they each have the freedom to join a similar taxpayers' association established for the benefit of South African taxpayers. An interpretation excluding certain juristic taxpayers from the application of s 18 will undermine the purpose it seeks to achieve.

¹⁰⁰ As owners of immovable property, insolvent estates, deceased estates and trusts may also be members of homeowners' and ratepayers' associations. The fundamental right entrenched in s 18 may, thus, be beneficial to juristic entities of this nature.

In practice, trusts, insolvent estates and the estates of deceased persons are utilised for, inter alia, general commercial purposes. Trusts are utilised for a myriad of business purposes, whether for profit or charitable purposes.¹⁰¹ Whilst some may register or incorporate as a company under the Companies Act, 2008, others may not. Under South African law, there is no duty to register a trust as a ‘company’ so that it may be used for commercial purposes. Trusts are incontestably vehicles used for estate and tax planning purposes.¹⁰² They are a reality of modern social, economic and juridical life with their own ethos derived from a trust deed, governance structure and compliance with laws. Trusts *mortis causa* are tools used for the exercise of freedom of testation. In *inter vivos* and *mortis causa* trusts, a trust founder will transfer an asset(s) to the trust that may accumulate, in time, further assets. The objective(s) of a trust depends on the intention of its founder. A trust can, just like a corporation, operate a ‘trade’¹⁰³ (as defined in s 1 of the ITA) in which it employs workers.¹⁰⁴ Similarly, an insolvent estate¹⁰⁵ and a deceased estate¹⁰⁶ may carry on a ‘trade’, as a result of which a tax liability may be incurred.¹⁰⁷

¹⁰¹ Wunsh B ‘Trading and business trusts’ (1986) 103(4) *SALJ* 561 564-70. A profit motive is not a legal pre-requisite for carrying on any trade. See *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A) 35-7. Olivier PA, Strydom S & van den Berg GPJ *Trust Law and Practice* 2 ed (2014) Issue 1 5-18 state: ‘The nucleus of a business trust relates to beneficiaries who themselves provide the trust capital for a specified goal which is managed and undertaken by the trustees for the benefit of the beneficiaries. In return for the capital he contributes, each beneficiary receives a share certificate as proof of his pro rata interest in the venture.’

¹⁰² For a discussion of the anatomy of tax planning, see Kruger D, Stein M & Dachs P *et al* (2012) 1-5. Kruger D, Stein M & Dachs P *et al* (237) state that trusts are not ‘some kind of tax panacea’ which solves all tax problems. See also Moosa F ‘Discuss the use of trusts as a vehicle for estate (tax) planning in South Africa.’ (unpublished LLM thesis, UCT, 1997) 55.

¹⁰³ The ITA (s 1) defines ‘trade’ extensively, but not comprehensively. For the definition thereof, see fn 80 above in the present chapter. For examples of cases involving a trust carrying on a trade, see *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA); *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA). Under s 2(3) of the Communal Property Associations Act 28 of 1996, a trust is a ‘similar entity’ defined in s 1 thereof and may, thus, be a holder of communal land for the purposes of benefitting a ‘community’ contemplated by s 25(7) of the BOR. For a discussion of the use of trusts under Act 28 of 1996, see Jacobs PJ *Tenure Security under the Communal Property Associations Act 28 of 1996: An Analysis of Establishment and Management Procedures with Comparative Reference to the Sectional Titles Act 95 of 1986* (unpublished LLM thesis, US, 2011) 62-4.

¹⁰⁴ A trust may become embroiled in a labour dispute as an employer. See *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others* (2009) 30 ILJ 2513 (LC).

¹⁰⁵ The Insolvency Act 24 of 1936 (s 38(1)) stipulates that the granting of a sequestration order suspends all employment contracts. See *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) BCLR 358 (CC) paras 1-2. However, s 38(6) thereof permits the lifting of the suspension by agreement with the employees. This restores the employment relationship. In this regard, the insolvent estate is the employer. See *Estate late Mavuna and Another v National Sorghum*

6.4.2 Personification of trusts, insolvent estates and deceased estates as 'taxpayers'

In practice, trusts, insolvent estates and deceased estates are, at times, utilised for commercial purposes in transactions that will often attract a tax liability for the entity itself (such as, the acquisition or disposal of property, and the investment in shares or other commodities).¹⁰⁸ In the ordinary course of commerce, the aforementioned juristic entities may employ workers and, as such, acquire contractual and statutory labour relations rights and duties.¹⁰⁹ As an employer, these entities ought to be entitled to the labour rights in s 23 of the BOR. Tax obligations arising for these entities from their employment relationships include, inter alia, the duty to pay unemployment insurance contributions,¹¹⁰ skills development levies,¹¹¹ and employees' tax.¹¹² The taxability of trusts, insolvent estates and estates of deceased persons has historically been a thorny issue in South African law because of their peculiar legal status under the common law. None of them is, at common law, legal 'persons' (hereafter 'common law person(s)'). Hence, at common law, they each lack legal personality and, thus, the capacity in law to possess rights and incur duties (such as the duty to pay tax). This led to courts¹¹³

Breweries Ltd (1996) 17 ILJ 785 (IC) 789A. Section 80(1) of the Insolvency Act empowers a trustee of an insolvent estate, if duly authorised, to continue carrying on an insolvent's business. See *Klatzkin v Noble NO* 1915 AD 713 717; *Thorne v The Master* 1964 (3) SA 38 (N).

¹⁰⁶ Employment contracts of a deceased's business terminate upon death. See *Estate late Mavuna and Another v National Sorghum Breweries Ltd* (1996) 17 ILJ 785 (IC) 788B. An executor administering an estate of a deceased person may continue carrying on the deceased person's business. See *Fakroodeen v Fakroodeen and Others NNO* 1972 (1) SA 178 (D). Thus, anyone employed by an estate executor in the deceased's business is an employee of the estate.

¹⁰⁷ The BOR applies to trading and non-trading juristic entities. See *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) para 30.

¹⁰⁸ For the legal nature of rights and claims against trusts, deceased estates and other estates generally, see *De Leef Family Trust and Others v CIR* 1993 (3) SA 345 (A) paras 13-23.

¹⁰⁹ The Basic Conditions of Employment Act 75 of 1997 does not define 'employer' for its purposes. However, this statute includes in its definition of 'employee' in s 1 '(b) any other person who in any manner assists in carrying on or conducting the business of an employer'. The words 'an employer' permits an interpretation that *any* entity of whatsoever nature and kind employing staff may be 'an employer'. This can, thus, include trusts, insolvent estates and deceased estates.

¹¹⁰ See s 5 of the Unemployment Insurance Contributions Act 4 of 2002.

¹¹¹ See s 3 of the Skills Development Levies Act 9 of 1999.

¹¹² The ITA (Fourth Schedule) obliges an 'employer' (as defined) to withhold 'employees' tax' (as defined) from the 'remuneration' (as defined) earned by an 'employee' (as defined) and to pay such tax to SARS at fixed, periodic intervals.

¹¹³ See, for example, *CIR v Emary NO* 1961 (2) SA 621 (A) 624A (*Emary*) (re deceased estates); *CIR v MacNeillie's Estate* 1961 (3) SA 833 (A) 840 F-H (re trusts); *Thorne & Molenaar NNO v Receiver of Revenue, Cape Town* 1976 (2) SA 50 (C) (re insolvent estates).

declaring that these entities, and others similarly positioned (such as partnerships),¹¹⁴ are non-taxable and, hence, immune from taxation, except to the extent that legislation makes express provision for their taxability. Such judicial *dicta* had the effect of narrowing the tax base of SA. Parliament thereupon amended tax statutes so that they expressly refer to trusts, and insolvent and deceased estates in their definitions of 'person'. In so doing, these artificial entities are personified as juridical persons within the contemplation of the tax laws.¹¹⁵ Accordingly, they have, for tax law purposes, legal personality independently of their representatives (namely, trustees and executors) and are, on this legal basis, statutory juristic persons liable to taxation in their own name and separately from the representatives positioned behind their respective statutory 'corporate veil'.¹¹⁶

In view of the foregoing, juristic taxpayers in SA include trusts,¹¹⁷ insolvent estates¹¹⁸ and the estates of deceased persons.¹¹⁹ They are statutory tax 'persons' directly affected

¹¹⁴ Unlike a corporation, a partnership is, at common law, not a legal person existing separately from the partners or owners. See *Hülse-Reuter and Others v Godde* 2001 (4) SA 1336 (SCA) 1346. Thus, a partnership is not a taxable entity. See *Metlika Trading Ltd and Others v CSARS* 2005 (3) SA 1 (SCA) para 28; *Chipkin (Natal) (Pty) Ltd v CSARS* 2005 (5) SA 566 (SCA) 574.

¹¹⁵ Some non-tax statutes also declare trusts, insolvent estates and estates of deceased persons to be juristic persons with legal personality for specific legislative purposes. For example, the Insolvency Act 24 of 1936 (s 2) defines 'debtor' as 'in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the laws relating to Companies'. Thus, a partnership and its estate, and a deceased estate, are debtors with estates susceptible to sequestration. Similarly, a partnership and a trust are included in the definitions of 'juristic person' in ss 1 of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. Binns-Ward J, in *ABSA Bank Ltd v Trustees for the Time Being of the Johan Rademan Family Trust No.1 and Others* (case no. 12046/2010) [2014] ZAWCHC 158 (28 October 2014) para 12, describes the characterisation of a trust as a statutory juristic person as 'rather arbitrary and puzzling'.

¹¹⁶ *Van der Merwe NO and Others v Minister of State Expenditure and Others* 1999 (4) SA 532 (T) 546E-G; *CIR v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) 232B-D.

¹¹⁷ The Trust Property Control Act 57 of 1988 (s 1) defines a trust as 'the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed' to a trustee or to beneficiaries designated in the trust instrument. For tax purposes, the ITA (s 1) defines 'trust' to mean 'any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person'. The TDA (s 1) contains a similar definition of 'trust'. See also 'trust fund' as defined in the VATA (s 1).

¹¹⁸ For tax purposes, 'insolvent estate' means 'an insolvent estate as defined in s 2 of the Insolvency Act, 1936'. See, for example, the ITA (s 1). For a discussion hereof, see *Van Zyl NO v CIR* 1997 (1) SA 883 (C) 889-90; *Van der Merwe NO and Others v Minister of State Expenditure and Others* 1999 (4) SA 532 (T) 546.

¹¹⁹ The estate of a deceased person is dealt with under the Administration of Estates Act 66 of 1965.

by tax administration occurring under the TAA. This Act applies to ‘every person who is liable to comply with a provision of a tax Act’ (s 4(1)). ‘Every’ extends considerably the legal subject (‘person’) to which it relates. ‘Every’ covers all taxpayers. The TAA (ss 234 and 235) criminalise certain taxpayer conduct. Under s 43(1), every taxpayer, including a trust, and an insolvent and deceased estate, may be criminally prosecuted.¹²⁰ As accused, these juristic taxpayers ought to be entitled to the same fair trial rights as would apply to other accused in terms of s 35(3) of the BOR.¹²¹ Under the TAA, civil legal proceedings may also be instituted against every juristic taxpayer for the recovery of a tax debt.

6.4.3 Need for trusts, insolvent estates and deceased estates to have basic rights

Property, possessions, communications, information and any other constitutionally protected interest held by or in a juristic entity for the benefit of a natural person(s) ought to be protected irrespective of the legal nature of the entity. Every type of juristic entity used by a natural person for trade or other desired, legitimate ends (purposes) ought to be conferred BOR protection. It is socially, economically and legally desirable to do so.¹²² Such protection reinforces the protection of basic (fundamental) rights in the hands of the real people (natural persons) who are behind the entities (such as, company shareholders and officers, members and employees of close corporations, trust donors and beneficiaries, heirs and legatees of deceased estates, and creditors of insolvent estates).

¹²⁰ The TAA (s 43(1)) reads: ‘If at any time before or during the course of an audit it appears that a taxpayer may have committed a serious tax offence, the investigation of the offence must be referred to a senior SARS official responsible for criminal investigations for a decision as to whether a criminal investigation should be pursued.’ For tax cases, the deeming provision in s 249 of the CPA is important. For certain TAA offences, intention is an element. A juristic person’s intention is determined with reference to the directing mind or *animus* of those individuals operating its levers of control. See *Elandsheuwel Farming (Edms) Bpk v Suid Afrikaanse Binnelandse Inkomste* 1978 (1) SA 101 (A) 110-11; *CIR v Malcomess Properties (Isando) (Pty) Ltd* 1991 (2) SA 27 (A) 36-8; *CSARS v Founders Hill (Pty) Ltd* 2011 (5) SA 112 (SCA) paras 18-28; *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) paras 36-7. In criminal tax cases, the ordinary criminal law principles apply. See *Van Heerden and Others v S* (2011) 73 SATC 7 paras 81 92-3. In civil tax cases, the criminal law principle of *dolus eventualis* does not apply. See *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) para 28.

¹²¹ For example, in *Miles Plant Hire v CSARS* [2015] JOL 33326 (SCA), a representative taxpayer was convicted for criminal tax offences that were committed by a taxpayer company.

¹²² Van Coller A ‘The minority defending the interests of the vulnerable [an evaluation of the minority judgment in *NCSPCA v Openshaw* 2008 (5) SA 339 (SCA)]’ (2011) 22(2) *Stell LR* 306 309; Pollman E ‘Reconceiving corporate personhood’ 2011 *Utah Law Review* 1629 1663-75.

Trading activities by taxpayers, including trusts, and the estates of insolvent and deceased persons, give rise to trade debts (such as to suppliers) and non-trade debts (such as to SARS and employees).¹²³ The TAA (s 169(2)(b)) empowers SARS to recover a tax debt by levying execution against 'any assets of the taxpayer'. For tax collection, s 172(1) permits SARS to file a certified statement with the clerk of a Magistrates' Court having jurisdiction over a tax debtor. Such a statement, once filed, is 'treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt' (s 174). Tax debt recovery processes under the TAA include, inter alia, SARS obtaining an order from a High Court preserving a taxpayer's assets (s 163), instituting sequestration or liquidation proceedings against a taxpayer (s 177(1)), compelling a taxpayer to repatriate assets outside of SA (s 186(2)), and obliging a taxpayer 'to cease trading' (s 186(3)(c)).¹²⁴

The aforementioned TAA processes expose *all* taxpayers to the risk of loss of their 'property' in the widest sense. This shows the importance for all taxpayers to be entitled to fundamental rights that are relevant to tax administration. The TAA's debt recovery processes puts at risk the vested and contingent rights, interests and claims that natural persons (such as, heirs, beneficiaries, employees and creditors) may have against juristic taxpayers. If a juristic taxpayer, such as a trust, insolvent or deceased estate, is denied an entitlement to fundamental rights on account of its common law status then it, and any natural person with rights, interests or claims in any such entity, is exposed to the grave

¹²³ In terms of ss 23(3) and (4) of the BOR, labour rights are granted to 'every employer'. This term is couched extensively (that is, without any limitation). Thus, the labour rights apply to all employers, regardless of their legal nature and kind. In the light hereof, a trust, insolvent estate and deceased estate ought, in their capacity as employers, to be entitled to the labour rights entrenched in s 23. This consideration reinforces the view expressed in this dissertation that s 8(4) of the BOR ought to apply to these aforementioned entities.

¹²⁴ The TAA (for example, s 163, s 169(2)(b), ss 186(2) and (3)(c)) implicates the right to property in the BOR. Unless juristic taxpayers qualify as juristic persons under s 8(4) of the BOR, their property rights will not enjoy constitutional protection under s 25 of the BOR. These rights will be 'sitting ducks' for an attack by SARS. Neither the TAA nor any other tax statute provides protection against an incursion on taxpayers' property rights. The common law is also inadequate in protecting property rights. Its deficiency in this regard enabled gross violations of property rights to occur during SA's apartheid era. To prevent a recurrence of the injustices arising from property rights abuses, the BOR introduced a property clause in s 25. For a discussion thereof, see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC); *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC).

risk that the State, or an organ of state, would have licence to deprive them of their property rights and any other right(s) associated therewith. Therefore, a real need exists for the fundamental rights in the BOR to apply to all juristic taxpayers of whatsoever nature and kind. This need is heightened by the TAA's failure to confer on taxpayers the rights, inter alia, to privacy and property. As regards the application of fundamental rights to juristic persons generally, the following *dictum* by the CC is instructive:¹²⁵

'Even more so than in relation to the right to privacy, denying companies entitlement to property rights would "... lead to grave disruptions and would undermine the very fabric of our democratic State". It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons.'

The keystone of the above *dictum* reinforces the CC's earlier decision that 'South Africa [has] countless small companies and close corporations that need and deserve protection no less than do natural persons'.¹²⁶ The rationale reflected in these quoted *dicta* applies with equal fervour to juristic entities commonly used by natural persons for commercial and/or estate planning purposes (such as trusts). Similarly, the same rationale applies to insolvent estates and the estates of deceased persons because they have creditors (such as SARS and trade suppliers) and/or other third parties (such as heirs, beneficiaries and employees) with proprietary claims against, or pecuniary interests in, them. Accordingly, all such juristic entities ought to be beneficiaries under s 8(4) of the BOR, particularly in their capacity as taxpayers. To this end, Petersen¹²⁷ contends, rather persuasively, that all taxpayers of whatsoever nature and kind 'should have the accompanying rights as a taxpayer'. Naturally, this would include not only the rights conferred by legislation but also the rights recognised by the common law and the fundamental rights in the BOR, discussed below in chapter seven, that apply to everyone personified as a taxpayer.

¹²⁵ FNB para 45. See also *Burwell v Hobby Lobby Stores Inc* (2014) 134 S Ct 2751 (per Alito J).

¹²⁶ *Certification 1* paras 57-8.

¹²⁷ Petersen S 'The rights of third-party taxpayers under the taxpayers' Bill of Rights' (1997) 1 *Journal of Small & Emerging Business Law* 325 338.

6.4.4 Restatement of the problem related to the second constitutional issue

Natural persons express their fundamental 'private' interests through the medium of juristic entities (such as corporations and trusts). In *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*¹²⁸ the Court held: 'Behind the "corporate veil" of juristic persons are their members; behind the legal fiction of a separate legal entity are, ultimately, real people. They are the final beneficiaries of the corporate structures which they have created.' Currie and de Waal¹²⁹ contend that 'juristic persons are not in and of themselves worthy of protection, but they become so when they are used by natural persons for the collective exercise of their fundamental rights'. Bilchitz¹³⁰ also contends that the attribution of fundamental rights to juristic persons is largely derivative: it is required to protect the rights of natural persons more effectively. Therefore, it is submitted that when determining if a juristic entity is entitled to a fundamental right under s 8(4) of the BOR, a relevant consideration is the aim or purpose of the entity. This is to be determined with reference to the natural person(s) who establish, form, register or incorporate the entity. Its form is less important (if legally relevant at all). In other words, a functional analysis of substance (not form) ought to occur in the determination at hand.

Human rights apply universally to natural persons, irrespective of race, gender, sex, status, ethnicity, origin, colour, sexual orientation, age, disability, religion, conscience and birth. However, they do not apply universally to juristic persons. Juristic persons are not original bearers of fundamental rights. Their entitlement to such rights must stem from a

¹²⁸ [2011] 1 BLLR 15 (NmS) para 40. Deiser GF 'The juristic person' (1908) 57(3) *University of Pennsylvania Law Review* 131 138 states that, as a legal expression, 'juristic person' refers to the fact that 'above the individual or specific human existence there stands generic human existence'. For further discussion, see Pienaar GJ 'Regspersone: Fiksie of feit?' (1994) 57(1) *THRHR* 92.

¹²⁹ Currie I & de Waal J (2014) 37. See also *Lategan and Others NNO v Boyes and Another* 1980 (4) SA 191 (T) 201A. For a discussion of 'corporate personhood' in a constitutional context, see Robinson K 'Corporate rights and individual interests: The corporate right to privacy as a bulwark against warrantless government surveillance' (2015) 36(6) *Cardozo Law Review* 2283 2288-96.

¹³⁰ Bilchitz D (2013) 594. Bilchitz D 'Privacy, surveillance and the duties of corporations' (2016) 1 *TSAR* 45 54 points out, perhaps correctly so, that the power of juristic entities to affect the fundamental rights of natural persons also provides the basis for a recognition of the juristic entity's obligation to protect the fundamental rights of the same natural persons. Based on this rationale, it is submitted that recognition of trusts, and the estates of deceased and insolvent persons as constitutional juristic persons will provide a legal basis for such entities to incur the obligations arising from s 8(2) of the BOR when the rights entrenched therein apply horizontally.

written constitution.¹³¹ Section 8(4) of the BOR serves this purpose. The second constitutional issue identified above raises the issue whether trusts,¹³² insolvent estates,¹³³ and the estates of deceased persons¹³⁴ qualify as juristic persons under s 8(4).

The problem for trusts, insolvent estates and deceased estates is that, whilst their position in tax law has been clarified through legislation, their constitutional status remains unclear because the Constitution does not define the terms ‘person’ or ‘juristic person’ for its purposes, nor does it utilise the terms ‘taxpayer’, ‘trust’, ‘insolvent estate’ or ‘deceased estate’. Also, the fundamental rights in the BOR do not apply to anyone by

¹³¹ Blaauw LC (1988) 386-87.

¹³² Trusts are utilised as tools in tax and estate planning initiatives. It is a legal institution *sui generis*. See *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) para 1; *Theron NO and Another v Loubser NO and Others; In re Theron NO and Another v Loubser and Others* 2014 (3) SA 323 (SCA) para 5. A trustee administers a trust as per its trust deed. See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) para 10; *CSARS v Dyefin Textiles (Pty) Ltd* 2002 (4) SA 606 (N) 610-11. A trustee is not an agent of the trust or its beneficiary. See *Hoosen and Others NNO v Deedat and Others* 1999 (4) SA 425 (SCA) para 21; *Thorpe NNO and Another v Trittenwein and Another* 2007 (2) SA 172 (SCA) para 9. A trust is not a person in law with legal capacity, except as otherwise provided by law. See *CIR v Friedman and Others NNO* 1993 (1) SA 353 (A) 370; *Standard Bank Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA) paras 7-9. In *CIR v MacNeillie's Estate* 1961 (3) SA 833 (A) 840 the Court held: ‘Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a *persona* or legal entity consisting of an aggregate of assets and liabilities.’ Thus, Murray IB ‘Is a trust or an estate a legal *persona*?’ (1962) 79(1) SALJ 37 42 and van Zyl FJ ‘Die Regsubjek van ‘n Trustvermoë’ in Coetzee JA (ed) *Gedenkbundel H.L. Swanepoel* (1976) 1 10-11 express the view that trusts are legal persons. This view has not found favour with most South African academics and jurists.

¹³³ An insolvent estate comes into existence upon a court sequestrating the estate of a ‘debtor’ as defined in the Insolvency Act 24 of 1936 (s 2). Such estate comprises the insolvent’s assets and liabilities. It is administered by a trustee. The estate is not a person in law with legal personality, except as otherwise decreed by law. See *Thorne & Molenaar NNO v Receiver of Revenue, Cape Town* 1976 (2) SA 50 (C); *Van Zyl NO v CIR* 1997 (1) SA 883 (C); *Van der Merwe NO and Others v Minister of State Expenditure and Others* 1999 (4) SA 532 (T).

¹³⁴ A deceased estate exists *de facto* upon a person’s death. The estate consists of the aggregate of a deceased’s assets and liabilities. It has no legal personality, except as conferred by law. See *Emary* 624-25; *Estate Smith v CIR* 1960 (3) SA 375 (A); *Groenewald NO and Another v BEHR and Others NNO* 1998 (4) SA 583 (T) 590-91; *ABSA Bank Ltd v Majiedt NO* 2009 JDR 0829 (WCC) para 14. An executor is, under the Administration of Estates Act 66 of 1965, responsible for winding up a deceased estate. See *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A) 302. The legal position of a deceased under a tax statute as at the date of death is enforceable against an executor. See *CIR v Bowman NO* 1990 (3) SA 311 (A) 316C. Executors do not step into a deceased’s *persona*. They are separate legal personae. See *SA General Electric Co (Pty) Ltd v Sharfman and Others NNO* 1981 (1) SA 592 (W) 597H-598A. For the juristic nature of a deceased estate and an executor’s legal position, see Erasmus HJ & de Waal MJ ‘Wills and Succession’ in Joubert WA & Faris JA (eds) *The Law of South Africa* 2 ed vol 31 (2011) 139-43 paras 212-13; Meyerowitz D *The Law and Practice of Administration of Estates and their Taxation* Reprinted (2016) 12-18 – 12-21.

virtue of his status under SA’s tax laws. They apply to a beneficiary who is a natural or juristic person satisfying the requirements of the BOR. Uncertainty exists as to whether trusts, insolvent estates and deceased estates are entitled to fundamental rights. This issue has a wrinkle of complexity and will be answered below by interpreting s 8(4) of the BOR, including analysing ‘person’ and ‘juristic person’ as used in its context. Although the issue at hand will be investigated from a tax law perspective, the views expressed apply equally in all constitutional settings because general principles are used to answer it.

6.4.5 Analysis of s 8(4) of the Bill of Rights

Section 8(4) of the BOR does not confer a blanket entitlement on all juristic persons for every fundamental right entrenched in the BOR. It regulates a juristic person’s potential entitlement by setting forth twin, interlocking criteria, referred to in this dissertation as ‘the general qualification formula’, that must be satisfied in order for a juristic person to be actually entitled to benefit from a fundamental right.¹³⁵ The criteria imposed are ‘the nature of the rights and the nature of that juristic person’. These criteria are benchmark determinants of whether a fundamental right may, on a practical level, find application to a particular juristic person. They determine the degree or extent to which a juristic person may be entitled to fundamental rights. Textually, the formulaic requirements imposed by s 8(4) are joined by ‘and’ which renders their application conjunctive (that is, not disjunctive in the alternative).¹³⁶ Consequently, both criteria must be considered and applied when a determination is made as to whether a juristic person is an actual beneficiary of a fundamental right entrenched in the BOR.¹³⁷

¹³⁵ Du Plessis LM (1996) 11 describes s 8(4) as adopting a ‘belts and braces’ approach. See also du Plessis LM ‘Evaluative reflections on the final text of South Africa’s Bill of Rights’ (1996) 7(3) *Stell LR* 283 290.

¹³⁶ For the legal effect of ‘and’, see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50. For its difference from the disjunctive word ‘or’, see *CIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A) 376; *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para 22; *SS v Presiding Officer of the Children’s Court: District of Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 6; *Master Currency (Pty) Ltd v CSARS* [2013] 3 All SA 135 (SCA) para 15.

¹³⁷ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2014] JOL 32401 (GP) para 20. See also *Weare and Another v Ndebele NO and Others* 2008 (5) BCLR 553 (N) para 34. Although the declaration of unconstitutionality in *Weare* was reversed on appeal, Rall AJ’s interpretation of s 8(4) in the Court

Section 8(4) reads: 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by ...'. Contextually, '[a]' means 'any'. Thus, s 8(4) confers entitlement to rights on 'any' eligible juristic person. Textually, the operation of an entitlement is circumscribed or curtailed to the degree ('extent') necessitated, demanded or warranted by ('required by') the legal nature of the fundamental right sought to be applied and that of the juristic person to which the right is to be applied. '[T]o the extent' has a constricting effect: it tempers a juristic person's claim to being entitled to a fundamental right. The ordinary meaning of the word 'required' ranges from 'desired' to 'necessary' through to 'indispensable'.¹³⁸ Thus, 'required' has been described as 'ambiguous'.¹³⁹ Its meaning must be determined in each instance with reference to the context in which it is utilised. It is submitted that when 'required by' is interpreted contextually in s 8(4) it means 'reasonably required by'. This meaning best gives effect to the objective of s 8(4), namely, to extend the application of fundamental rights to juristic persons. Thus, an entitlement must be reasonably necessary as determined by, or with reference to, the dual factors listed in s 8(4). Each of these considerations will now be considered in turn.

6.4.5.1 First leg of s 8(4): 'the nature of the rights'

As stated above, a juristic person's entitlement to a fundamental right is subject to, inter alia, the nature of the right that permits its application to a juristic person. If it does not, the right is inapplicable. Whilst some fundamental rights in the BOR are appropriate for natural persons alone, others apply universally to natural and juristic persons.¹⁴⁰ Rights in the former category are those whose subject matter relates to human beings. These are: human dignity (s 10);¹⁴¹ life (s 11); freedom and security of the person (s 12); slavery,

a quo was left intact. See *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) 616D.

¹³⁸ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 11 (and the authorities cited there).

¹³⁹ *Khala v Minister of Safety and Security* 1994 (2) SACR 361 (W) 367E.

¹⁴⁰ Rautenbach IM (2012) 267-69; Woolman S 'Application' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 02-05) 31-40.

¹⁴¹ Juristic persons lack human dignity. See *Hyundai Motors* para 18. Despite lacking this human trait or characteristic, they do possess a corporate *dignitas* as part of their justiciable personality rights. See *Boka Enterprises (Pvt) Ltd v Manatse and Another NO* 1990 (3) SA 626 (ZH) 632I-633A; *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA); *Mthembi-Mahanyele v Mail*

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servitude and forced labour (s 13); searching of ‘their person’ (s 14(a)); freedom of religion, belief, opinion (s 15); assembly, demonstration, picketing and presenting petitions (s 17); campaigning for a political party or cause (s 19(1)(c)); free, fair and regular elections for a legislature (s 19(2)); citizenship (s 20); entry into, remaining and residing in SA (s 21(3)); a passport (s 21(4)); freedom of choice of a trade, occupation or profession (s 22); an environment not harmful to health or well-being (s 24(a)); housing (s 26); health care, food, water and social security (s 27); childrens’ rights (s 28); education (s 29); language and cultural life (s 30); rights of persons in a cultural, religious or linguistic community (s 31); and arrested persons and detainees (ss 35(1) and (2)).

The CC has held¹⁴² that a juristic person’s entitlement to fundamental rights ‘can never be as intense as that of human beings’. Thus, fewer fundamental rights will apply to it and its claim to BOR protection ought not to be as strong (‘intense’) as that of natural persons. Determining whether the nature of a right justifies its application to a particular juristic person entails objectively weighing various relevant considerations. These include: (i) the content and purpose of the right, (ii) whether conferral of the right would promote its purpose, (iii) the terms imposed for the right’s operation, (iv) the right’s intrinsic value or benefit as a means to secure a protectable interest, and (v) considerations of justice and equity in applying the right to a juristic person as opposed to not doing so. Based hereon, the rights distilled from the BOR that may apply to juristic persons are: equality (s 9);¹⁴³ privacy rights (ss 14(b) - (d)); the freedoms of expression (s 16),¹⁴⁴ of association (s 18), and of movement (s 21(1)); the right to leave SA (s 21(2));¹⁴⁵ labour relations (ss 23(1),

and Guardian and Another [2004] 3 All SA 511 (SCA); *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) paras 30 43-9. See also Neethling J, Potgieter JM & Visser PJ *Neethling’s Law of Personality* Reprinted 2 ed (2007) 68-73.

¹⁴² *Hyundai Motors* para 18. See also *Certification 1* para 57; *FNB* paras 41-2.

¹⁴³ See *AK Entertainment CC v Minister of Safety and Security and Others* 1994 (4) BCLR 31 (E) 38; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) paras 48 73; *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA) para 18.

¹⁴⁴ See *Certification 1* para 57; *Laugh It Off Promotions CC v SAB International (Finances) BV and Another* 2006 (1) SA 144 (CC) para 55.

¹⁴⁵ The rights contained in ss 21(1) and (2) are part of ‘economic freedom’ for juristic persons. See Anderson RG ‘Juristic Persons and Fundamental Rights’ in Reid E & Visser D (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) 365 370.

(3), (4), (5));¹⁴⁶ property rights (s 25);¹⁴⁷ access to information (s 32);¹⁴⁸ the right to just administrative action (s 33);¹⁴⁹ access to courts (s 34);¹⁵⁰ and the rights of an accused person (s 35(3)).¹⁵¹ These fundamental rights apply, *mutatis mutandis*, to natural persons.

6.4.5.2 Second leg of s 8(4): ‘the nature of that juristic person’

Qualification as a beneficiary under s 8(4) does not mean that an entity is entitled to all the fundamental rights in the BOR. Section 8(4) limits an entitlement to those entities whose character (‘nature’) is such that an application of a specific right to them is reasonably necessary (‘required’). Thus, a juristic person’s ‘nature’ is relevant when determining if an entitlement is justified. In s 8(4), the phrase ‘the nature of that juristic person’ indicates that the application of a fundamental right to a juristic entity must be determined in each case with reference to its ‘nature’. However, it is unclear from s 8(4), and the Constitution read holistically, whether ‘nature’ refers to legal or factual nature (or both). Legal nature, in the sense intended here, refers to an entity’s status in law (for example, as a company, trust, insolvent estate, or estate of a deceased person). Factual nature, in the sense contemplated here, refers to the peculiar factual circumstances surrounding an entity (such as, its type, class or category, and its purpose, aim or objective for utilisation by natural persons). It is submitted that a juristic entity’s legal nature in the above sense is relevant to determining whether it qualifies as a juristic person under s 8(4). Once an entity’s legal nature is such that s 8(4) applies in respect

¹⁴⁶ The values promoted by s 23 include industrial fairness and freedom of association. They ‘serve as a counterweight to the more individualistic rights’ (such as, equality, privacy and property). See du Toit D, Woolfrey D & Murphy J *et al The Labour Relations Act of 1995* (1996) 46-7. For a discussion of the inner workings of s 23, see *National Union of Metalworkers of South Africa and Others v Bader BOP (Pty) Ltd and Another* 2003 (3) SA 513 (CC); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

¹⁴⁷ See *Chevron SA (Pty) Ltd v Wilson t/a Wilson’s Transport and Others* 2015 (10) BCLR 1158 (CC) para 16; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 32 (*Shoprite Checkers*).

¹⁴⁸ See *My Vote Counts* paras 137-42; *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC).

¹⁴⁹ See *SARFU* para 168; *Pharmaceutical Manufacturers*.

¹⁵⁰ See *Metcash; Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) paras 7 14-23; *De Beer NO v North-Central Local and South-Central Local Council and Others* 2002 (1) SA 429 (CC) paras 10-15.

¹⁵¹ See *S v Shaik and Others* 2008 (2) SA 208 (CC) paras 8 42.

thereof, then the 'nature' requirement is no longer relevant for any other purpose arising from s 8(4). Thus, it is submitted that an entity's factual nature plays no meaningful role in the limitations analysis of s 8(4) referred to above. For its purposes, 'the nature of that juristic person' refers to the legal nature of an artificial being in the sense indicated above.

When interpreting 'juristic person' in s 8(4) of the BOR to ascertain its scope and ambit, consideration must be given to the BOR as a whole because s 8(4) does not operate in isolation. In other words, an integrated approach to the interpretation of s 8(4), taking account of its context and purpose, ought to be adopted so that the content of 'juristic person' is aligned with the BOR read holistically. Section 23(5) of the BOR expressly confers labour rights on '[e]very trade union, employers' organisation and employer'. Sections 25(6) and (7) of the BOR expressly grant property rights to a 'community'. Other BOR provisions are impliedly directed at artificial persons whose purpose entails, wholly or partly, the performance of activities envisaged by the BOR. These include: (i) freedom of the press and other media (s 16(1)(a)), applying to entities operating a press or other media business (such as television news media); (ii) freedom to receive or impart information or ideas (s 16(1)(b)), applying to entities engaged in the acquisition or dissemination of information or ideas (such as, internet search engines, libraries and information centres); (iii) freedom of artistic creativity (s 16(1)(c)), applying to, inter alia, entities pursuing the creative arts (such as, dance, music, film, animation, scriptwriting and design); (iv) academic freedom (s 16(1)(d)), applying to, inter alia, entities involved in teaching, research and the pursuit of knowledge through modes of academia (such as, schools, colleges, technikons, academies and universities); and (v) freedom of scientific research (s 16(1)(d)), applying to, inter alia, entities engaged in research of a scientific nature (such as, medical and dental research, and research in astronomy, physics, science and biology). Other provisions in the BOR impliedly grant fundamental rights to, inter alia, a political party (s 19(1)),¹⁵² labour federation (s 23(4)), an independent educational institution (s 29(3)),¹⁵³ and a cultural, religious or linguistic community (s 31(1)(b)).

¹⁵² For BOR purposes, a political party is a juristic person. See *My Vote Counts* paras 105-112.

¹⁵³ Other democracies, such as India, also recognise universities as juristic persons with the capacity to have rights. See, for example, *Bansidhar v University of Rajasthan* AIR 1963 Raj 172.

The discussion above shows that there are at least five identifiable types, classes or categories of juristic persons that qualify for fundamental rights under s 8(4). These are: (i) entities that are expressly recognised by, and referred to in, the BOR (such as, a trade union and employers' organisation), (ii) entities recognised by specific legislation as persons for certain legal purposes (such as, certain partnerships and trusts), (iii) entities whose creation stems from a general empowering statute governing their registration and functions (such as, companies and close corporations), (iv) entities created by special statute (such as, Eskom and the SABC), and (v) entities recognised at common law (such as, certain institutions and associations). As explained below, companies that are organs of state ought, generally, not to qualify under s 8(4), except in their dealings with other public enterprises or organs of state. On this basis, any such excluded company would be entitled to the fundamental rights in the BOR in its capacity as a juristic taxpayer for any purpose arising from tax administration conducted in terms of the TAA or other tax law.

6.4.6 Equality and the achievement of equality as justifications for conferring basic rights on trusts, insolvent estates and deceased estates

As explained above in chapter three, constitutional values must suffuse the interpretation and application of the BOR, including its meaning of 'person' and 'juristic person'. Equality (ss 7(1) and 39(1)(a)) and the achievement of equality (s 1(a)) are values that go to the bedrock of the constitutional architecture.¹⁵⁴ The heightened importance of equality is evident from its status as a constitutional right and value.¹⁵⁵ Its significance is aptly summed up as follows: 'Like justice, equality delayed is equality denied.'¹⁵⁶ Equality

¹⁵⁴ *Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC) para 22. The driving force that inspired the aspirations of SA's people for freedom, justice and peace, and led them to secure fundamental rights in a justiciable BOR, is the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'. See *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS) para 33.

¹⁵⁵ The Constitution (s 9(1)) reads: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' For present purposes, the relevant portion of s 9(2) of the Constitution reads: 'Equality includes the full and equal enjoyment of all rights and freedoms. ...'

¹⁵⁶ Per Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 60. The CC, in *Prinsloo* para 20, held that the Court 'should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be

eschews arbitrary distinctions between different types of entities¹⁵⁷ and demands equal treatment of the diverse groups of natural and juristic persons who comprise the modern, democratic South African society. Equality entails the equal protection and benefit of the law, and the equal enjoyment of the rights, freedoms and privileges guaranteed by the BOR.¹⁵⁸ In a *Rechtsstaat*, as SA, equality underpins equal justice for all. Equality, and its achievement among legal *cum* constitutional subjects, justifies the BOR's application to all natural and juristic taxpayers. Such a positive result would reveal SA to be an enlightened, progressive minded society committed to human rights values and norms.¹⁵⁹

'Person' and 'juristic person' in s 8(4) are to be construed in a manner that best advances the transformative potential of the BOR.¹⁶⁰ By interpreting these terms broadly (liberally or generously), effect will be given to the full measure of the basic rights in the BOR. Such an approach adheres to the directives in s 39(1)(a) of the BOR that require every interpretation of the BOR to promote the values of an open and democratic society based on human dignity, equality and freedom. Moreover, such an interpretation promotes fulfilment of the purpose of constitutional guarantees, and secures the benefit of BOR protection to a very wide group of beneficiaries. A narrow, overly formal, legalistic approach to the interpretation of 'person' and 'juristic person' ought to be rejected because it unduly restricts the reach of s 8(4), thereby undermining the fabric (or fibre) of SA's democracy by eroding the core values of equality and the achievement of equality.

dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.' Also, see the case law cited at fn 119 in chapter one above.

¹⁵⁷ Bilchitz D (2009) 67. The majority judgment, per Alito J, in *Burwell v Hobby Lobby Stores Inc* (2014) 134 S Ct 2751 rejected the notion, endorsed per the principal dissent of Ginsburg J, that the protection of religious rights extend to non-profit corporations and not to for-profit corporations.

¹⁵⁸ Venter F (2001) 36 (and the authorities cited there at fn 37).

¹⁵⁹ Price A 'The influence of human rights on private common law' (2012) 129(2) *SALJ* 330 332-34 identifies three categories of human rights, namely, moral human rights (that is, human rights as used in ethics and political philosophy), international legal human rights (that is, human rights as used in public international law), and domestic legal human rights (that is, human rights enacted as part of a domestic legal system). Price (334) explains domestic legal human rights norms to be the human rights themselves and the reciprocal duties that they impose on persons bound thereby, as well as the values and purposes served by both the rights and their corresponding duties.

¹⁶⁰ The interim Constitution also left it to the courts to decide which juristic persons are bearers of constitutional rights. See Cachalia A, Cheadle H & Davis D *et al* (1994) 21-4. The jurisprudence of the CC pertaining to an interpretation of the interim Constitution is, largely, equally applicable to the final Constitution. See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 15.

In the tax arena, equality would entail, inter alia, that *all* taxpayers are entitled to the equal benefit and protection of the law, including the BOR. As discussed above, the BOR applies to tax administration. Indeed, the TAA (s 44(1)) provides that when a taxpayer is a suspect in a criminal investigation, SARS must respect the taxpayer's rights under s 35 of the BOR. If a juristic taxpayer is denied access to s 8(4) of the BOR, then it would not have rights under s 35. This would expose it to the danger of treatment that is repugnant to s 35.¹⁶¹ Such a state of legal affairs would be offensive to the spirit and ethos of the Constitution. A denial of BOR protection would also impoverish the BOR of its efficacy and create fertile opportunity for abuse of power by SARS, thereby potentially causing 'grave disruptions' and an undermining of 'the very fabric of our democratic State'.¹⁶²

Every taxpayer is, regardless of its legal nature, subject to the same duties imposed by the TAA and is also equally entitled to the protection of the rights conferred therein (discussed below in chapter seven). This legal position reflects a substantial measure of equality in the treatment of taxpayers that ought to be replicated in the operation of s 8(4) of the BOR. Equality among taxpayers is critical for democracy in taxation (discussed above in chapter three). Conversely, inequality among taxpayers is antithetical to the spirit, purport and objects of the BOR.¹⁶³ Whilst the levying of varying rates of tax on different categories of taxpayers is part of the ethos of efficient governance and fair taxation in a modern democratic society,¹⁶⁴ the denial to some juristic taxpayers of the equal enjoyment of fundamental rights and freedoms would be anathema to equality under the BOR, both as a fundamental value (s 7(1)) and a constitutional right (s 9).

¹⁶¹ For the possibility that corporations may incur criminal liability under South African law, see *S v Coetzee and Others* 1997 (3) SA 527 (CC) paras 69 85-6 97.

¹⁶² *Hyundai Motors* para 18.

¹⁶³ In *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 187 Ngcobo J held: 'Discrimination conveys to the person who is discriminated against that the person is not of equal worth.'

¹⁶⁴ The CC, in *Prinsloo* paras 17 24, recognised that laws do not breach the equality clause of the BOR merely because they classify persons differentially for the imposition of any burden. Hodes AJ held, in *Van Zyl NO v CIR* 1997 (1) SA 883 (C) 895G, that levying income tax at unequal rates does not cross the border of constitutional impermissibility. This is so because differential treatment of this nature is rationally linked to a legitimate governmental purpose. This practice is part of a 'reasonable system of taxation' in a democratic society (*COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 266D-F) because it embodies equity (fairness), an important component in the design of a good, credible tax system. For a discussion of the principle of equity in taxation generally, see Alley C & Bentley D (2005) 599-602; Gutuza T (2013) 2-9.

An interpretation of 'juristic person' in s 8(4) that extends its scope to taxpayers in the form of trusts, and estates of deceased and insolvent persons, is consistent with the values of a *Rechtsstaat*. This is because such an interpretation would, first, foster equality among taxpayers and provide impetus to the ideal of achieving equality among the diverse types of taxpayers comprising SA's tax base. Secondly, such an interpretation would advance basic (fundamental) rights and freedoms in the tax arena among trusts, and the estates of deceased and insolvent persons. These results are consonant with the transformative ethos of SA's supreme law.¹⁶⁵ South Africa is, under its Constitution, a rights-based society whose people aspire to equality among all societal members, both natural and juristic. A construction of the BOR in a manner conforming to that contended for here would not only render the BOR to be truly an all-embracing and pervading charter, 'a cornerstone of democracy', but would also be a positive move away from SA's common law heritage that denies constitutional protection to trusts, insolvent estates and deceased estates.

6.4.7 Interpreting 'person' and 'juristic person' in s 8(4) of the Bill of Rights

The discussion above provides a theoretical, legal framework for the argument that juristic taxpayers, namely, trusts, and the estates of deceased and insolvent persons, ought, under s 8(4), to be entitled to fundamental rights in the BOR. As explained below in chapter seven, such rights may be confined to those that are relevant in tax administration. The legal theory discussed above is, on its own, insufficient to sustain the argument referred to above. The meanings of 'person' and 'juristic person' in the context of s 8(4) must also justify the personification of the juristic taxpayers concerned for constitutional purposes. As explained above in chapter two, whilst a contextualist interpretive approach demands that the meanings ascribed to both legal terms must accord with the substantive provisions of the Constitution, guidance on their scope and ambit ought also to be found in their dictionary and statutory meanings. These are aids in constitutional interpretation. In addition, their meanings ought to be determined purposively and teleologically.

¹⁶⁵ For a discussion of s 9 of the Constitution and the equality jurisprudence of the CC, see Loenen T 'The equality clause in the South African constitution: Some remarks from a comparative perspective' (1997) 13(3) *SAJHR* 401; Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23(2) *SAJHR* 253.

6.4.7.1 Dictionary meaning of 'person'

A useful starting point of the analysis is to consider the ordinary, dictionary meaning of 'person'. This word does not have a single, uniform, immutable meaning. 'Person' is a generic, gender-neutral term whose ordinary, dictionary meaning excludes animals and things but encompasses an 'individual human being; a man, woman or child; [t]he living body of a human being'.¹⁶⁶ That meaning does not refer to juristic persons. Thus, a grammatical interpretation¹⁶⁷ of 'person' would confine the application of fundamental rights to natural persons only. Such a narrow formulation for BOR purposes will have the unpalatable effect of undermining a key BOR objective, namely, the inculcation of a deep culture of rights, including the protection of (vulnerable) juristic persons.¹⁶⁸ A narrow construction of 'person' is inapposite because the scope and ambit of 'person' in its BOR context is 'plainly very wide'.¹⁶⁹ A purposive interpretation yields a result that the meaning of 'person', for BOR purposes, encompasses juristic persons. This interpretation accords favourably with s 8(4) of the BOR. Its provisions unambiguously confer an entitlement to fundamental rights on juristic persons that satisfy the twin requirements imposed therein. This aim, as well as the constitutional values of equality, diversity, the achievement of equality, and the advancement of human rights and freedoms, bolsters the argument favouring an expansive (generous or liberal) meaning of 'person' in the BOR. When interpreting 'person' in any BOR provision, a rebuttable presumption operates that this word bears the same meaning wherever it is utilised in the Constitution.¹⁷⁰ However, this presumption of interpretation is rebutted if the specific context in which 'person' is used in a particular provision indicates that its meaning is not confined to natural persons but extends also to juristic persons. Section 8(4) of the BOR is clearly such a provision.

¹⁶⁶ *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) 796; *Groenewald NO and Another v BEHR and Others NNO* 1998 (4) SA 583 (T) 591.

¹⁶⁷ 'Grammatical interpretation' refers to a method of interpretation described as involving 'an investigation into the semantic content and the syntactic structure of the text or part thereof'. See Kruger J (1995) 8.

¹⁶⁸ Chaskalson P, in *Makwanyane* para 88, stated that 'it is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected'.

¹⁶⁹ *My Vote Counts* para 105. See also *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* [2011] 1 BLLR 15 (NmS) para 37.

¹⁷⁰ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 47.

6.4.7.2 Meaning of ‘person’ in the Interpretation Act

The Interpretation Act¹⁷¹ contains definitions of terms utilised in the laws of SA. In terms of s 1 thereof, this Act applies to the interpretation of ‘every¹⁷² law ... unless there is something in the language or context of the law ... repugnant to such provisions or unless the contrary intention appears therein’.¹⁷³ Section 2 thereof stipulates that the definitions contained in the Interpretation Act apply to any law unless ‘the context otherwise requires or unless in the case of any law it is otherwise provided’. The Interpretation Act (s 2) defines ‘law’ as ‘any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law’. Thus, the Interpretation Act applies to the interpretation of the TAA and the Constitution. As discussed above in chapter three, the Constitution is a ‘law’. Indeed, it is proclaimed ‘the supreme law of the Republic’. The Constitution does not contain a provision excluding the operation of the Interpretation Act to an interpretation of any constitutional provision. Therefore, the courts in SA have applied the Interpretation Act when interpreting the BOR.¹⁷⁴ Consequently, in order to understand the scope and ambit of ‘person’ for the purposes of s 8(4) of the BOR, consideration ought to be given to the definition of ‘person’ in the Interpretation Act.

Section 2 of the Interpretation Act defines ‘person’ so as to include ‘(a) any divisional council, municipal council, village management board, or like authority; (b) any company incorporated or registered as such under any law; (c) any body of persons corporate or unincorporate’.¹⁷⁵ Although this definition does not expressly refer to natural persons, in *Friedman and Others NNO v CIR: In re Phillip Frame Will Trust v CIR*¹⁷⁶ the Court held that it would be absurd to suggest that, by reason of this fact, Parliament intended natural

¹⁷¹ Act 33 of 1957.

¹⁷² ‘Every’ renders unlimited the reach of its subject. See *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 (1) SA 254 (A) 261; *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) 18-19.

¹⁷³ For the approach to determine a ‘contrary intention’, see *Berman Brothers (Pty) Ltd v Sodastream Ltd and Another* 1986 (3) SA 209 (A) 240F.

¹⁷⁴ For example, see *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC) para 7; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 97.

¹⁷⁵ In some statutory contexts, ‘any sphere of the Government of the Republic [of SA]’ is regarded as a ‘person’. See, for example, the definition of ‘person’ in s 1 of the Securities Transfer Tax Act 25 of 2007.

¹⁷⁶ 1991 (2) SA 340 (W) 342. See also *CIR v NST Ferrochrome (Pty) Ltd* 1999 (2) SA 228 (T) 232.

persons to be excluded as legal persons. Thus, the definition of 'person' in the Interpretation Act is not determinative of the parameters of the concept 'person' wherever it appears in a 'law'. This is further indicated by the term 'person' being defined in the Interpretation Act with reference to the word 'includes'. That word permits the scope and ambit of 'person' to be enlarged beyond its stated content in the Act.¹⁷⁷ Thus, the aforementioned definition of 'person' in s 2 is no litmus test for determining the meaning of 'person' and, concomitantly, of 'juristic person' in s 8(4) of the BOR. That definition is simply a guide to giving content to these terms. Ultimately, the meaning of 'juristic person' in the context of s 8(4) is a matter of interpretation under s 39(1) of the BOR.

In addition to the foregoing, the scope and ambit of 'person' in the Interpretation Act is limited. That definition refers mainly to artificial entities consisting of people or having people underlying their existence.¹⁷⁸ That definition of 'person' does not extend to persons consisting of, or based upon, things (such as, foundations, insolvent estates, and estates of deceased persons).¹⁷⁹ If the narrow meaning of 'person' in the Interpretation Act is grafted wholesale, without more, onto the landscape of s 8(4) of the BOR, then it would have the undesirable effect of casting beyond its shadow all entities that consist of, or are based upon, things. Such a state of affairs would be incompatible with the spirit, purport and objects of the BOR that seeks to advance equality and the achievement of equality in a diverse society, and the advancement of human rights and freedoms. Thus, the socio-politico-legal context of the Constitution, its values and goals, and the historical matrix of the fundamental rights in the BOR, all discussed above in chapter three, demand that the ambit of 'person' and 'juristic person' in s 8(4) as a constitutional subject be considerably broader in meaning than its definition in the Interpretation Act.

¹⁷⁷ Du Plessis L (2007) 207-08.

¹⁷⁸ *Emary* 623H. See also du Plessis L (2007) 208.

¹⁷⁹ For example, 'person', as defined in s 1 of the Restitution of Land Rights Act 22 of 1994 (RoLRA), includes 'a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices'. In terms of the RoLRA (s 2(1)), such a deceased estate has the right to claim land restitution. In that legislative context, the deceased estate is a statutory person with statutory personality. The idea that deceased estates can have rights is not foreign outside of taxation. See, for example, *Estate late Mavuna and Another v National Sorghum Breweries Ltd* (1996) 17 ILJ 785 (IC) 788E-789A and *Estate Late W G Jansen van Rensburg v Pedrino (Pty) Ltd* (2000) 21 ILJ 494 (LAC).

Notwithstanding the aforescribed shortcomings of the Interpretation Act’s definition of ‘person’, the statutory persons contemplated by that definition provide some indication of the categories of ‘juristic person’ that may be covered by s 8(4) of the BOR. Paragraph (a) of that definition refers to organs of state at local government level.¹⁸⁰ The State and organs of state are juristic persons with legal personality.¹⁸¹ However, the issue at present is whether they are entitled to rights under s 8(4). Subject to an exception stated below, the State and organs of state ought not to fall into the ambit of s 8(4). This legal position ought to prevail because fundamental rights are public law rights aimed at protecting private persons *against* the State and its machinery (not *vice versa*).¹⁸² On this basis, during tax administration processes, SARS and the CSARS, as organs of state, ought not to be entitled to assert, as against a taxpayer, any fundamental right guaranteed in the BOR. A ‘taxpayer’, as defined in s 151 of the TAA, discussed above in chapter five, include State institutions (for example, a public authority and municipality). Whilst such institutions are exempt from the duty to pay certain taxes (such as transfer duty), they are, however, liable to pay other taxes (such as VAT levied on goods or services) and must account to SARS for taxes received (such as VAT) and taxes withheld (such as employees’ tax). Cheadle¹⁸³ contends, convincingly, that whilst repositories of state power ought not to be entitled to fundamental rights in their dealings with private persons, such repositories ought to be entitled thereto in their dealings with other public juristic persons imbued with state power. In that setting only, a juristic person in para (a) of the definition of ‘person’ in the Interpretation Act ought to be a constitutional person with constitutional personality under s 8(4). Therefore, a juristic person in para (a) ought to be entitled, as a taxpayer, to assert against SARS and the CSARS fundamental rights entrenched in the BOR that are relevant in tax administration. The view espoused here takes account of the realities and dynamics of a modern, functioning democracy, as SA.

¹⁸⁰ *Minister of Water Affairs and Forestry and Others v Swissborough Diamond Mines (Pty) Ltd and Others* 1999 (2) SA 345 (T) 353. See also de Ville JR (2000) 109.

¹⁸¹ Paton GW *A Text-Book of Jurisprudence* Reprinted 3 ed (1967) 311-16. Also, Rautenbach IM (2012) 75-8.

¹⁸² Anderson RG ‘Juristic Persons and Fundamental Rights’ in Reid E & Visser D (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) 375.

¹⁸³ Cheadle H ‘Application’ in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 3-25 – 3-26. See also Rautenbach IM (2012) 268-69.

Companies within the ambit of para (b) of the Interpretation Act’s definition of ‘person’ ought to qualify as constitutional persons for the purposes of s 8(4) of the BOR.¹⁸⁴ Indeed, companies and close corporations registered, respectively, under the Companies Act¹⁸⁵ and the Close Corporations Act¹⁸⁶ have been judicially recognised as ‘juristic persons’ in the context of s 8(4). As stated above, the CC¹⁸⁷ recognises that these entities play critical roles in the social, economic and juridical life of real people. Thus, the rights and interests of natural persons in them ought to be protected as if they had not acted through a corporate medium. It is now a settled principle in SA that fundamental rights apply to corporations because they are universal phenomena used by individuals for business and other general purposes (such as, to make investments, to structure a pension scheme, and to earn a living).¹⁸⁸ The Companies Act (s 1) defines ‘company’ so as to include: (i) a ‘juristic person’ incorporated in terms of that Act, (ii) a domesticated company,¹⁸⁹ and (iii) a ‘juristic person’ registered as a company under the erstwhile Companies Act 61 of 1973 or the Close Corporations Act, or was recognised as an ‘existing company’ under Act 61 of 1973 or was deregistered in terms of that Act and re-registered under the Companies Act, 2008. For the purposes of the Companies Act, ‘juristic person’ is defined to include ‘(a) a foreign company; and (b) a trust, irrespective of whether or not it was established within our outside the Republic’.¹⁹⁰ In the light hereof, a trust ‘company’ registered or incorporated under the Companies Act must be a constitutional person on par with other

¹⁸⁴ In *Ebrahim and Another v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 15 Cameron JA held that ‘it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute’. General legal personality, including constitutional personality, for any company as defined in the Companies Act, 2008 commences upon its registration or incorporation under the law. The statutory *cum* constitutional personhood of a company, and its constitutional personality, end when the juristic entity is terminated in a manner provided by law (whether by dissolution, deregistration, extinction or otherwise). Whilst a corporation’s status as a legal person does not alter when placed under business rescue or liquidation in terms of the Companies Act, its legal capacity to act is adversely affected.

¹⁸⁵ Act 71 of 2008.

¹⁸⁶ Act 69 of 1984.

¹⁸⁷ *Certification 1* paras 57-8. Other democracies, such as India, also recognise companies as persons with legal personality. See *State Trading Corporation of India v Commercial Tax Officer* AIR 1963 SC 1811.

¹⁸⁸ *FNB* para 44. See also Pop AI *Criminal Liability of Corporations – Comparative Jurisprudence* (King Scholar Program, Michigan State University, 2006) 17.

¹⁸⁹ The Companies Act, 2008 (s 1) defines ‘domesticated company’ as ‘a foreign company whose registration has been transferred to the Republic in terms of section 13(5) to (11)’.

¹⁹⁰ For purposes of the Companies Act, a ‘trust’ includes a unit trust and a corporate property trust. For an example, see *Ngonyama Trust v Ethekwini Municipality* 2013 (1) SA 564 (SCA) para 2.

companies that are eligible for rights under s 8(4) of the BOR. An interpretation of its provisions that yields such a result is preferable because it advances equality and fosters equal treatment, protection and benefit of the law among all types of companies.

Fundamental rights are, as stated above, aimed at protecting private persons *against* the State and its machinery (not *vice versa*). Thus, a State-owned company that is an organ of state or public enterprise ought to be excluded from the operation of s 8(4) in the vertical application of the BOR. This is so because such entities are instruments of government or the *alter ego* of the State.¹⁹¹ If State-owned companies are, as a rule, included in s 8(4), then the danger exists of bringing about the sterilisation of fundamental rights guaranteed to protect private persons in their public law relationships with the State and its functionaries. This would render such rights largely impotent or ineffectual. However, the legal bar contended for here ought not to apply to State-owned corporate enterprises that are not organs of state, nor should it apply when a State-owned company seeks to assert a fundamental right against the State, an organ of state, or other State-owned company.¹⁹² Thus, as a juristic taxpayer under, for example, the ITA and VATA, a State-owned company ought to be entitled to fundamental rights as against SARS and the CSARS.

The notion that a juristic entity may have, contrary to the common law position discussed above, legal personality despite not existing separately from its membership, is not foreign to South African law. In *CIR v Witwatersrand Association of Racing Clubs*¹⁹³ the Court held that an unincorporated association lacking legal personality distinct from its membership falls into the definition of 'person' in the Interpretation Act (s 2) with the requisite legal capacity to incur a tax liability.¹⁹⁴ That provision includes unincorporated

¹⁹¹ For a discussion of relevant considerations when determining if a State enterprise is an 'alter ego of the State' or 'instrument of governance', see *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) 333E-335F; *Post and Telecommunications Corporation v Modus Publications (Pvt) Ltd* 1998 (3) SA 1114 (ZS) 1123-24; *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 6.

¹⁹² Currie I & de Waal J (2014) 36; Pienaar GJ 'Regspersone as staatsorgane en nie-staatsorgane ingevolge die Grondwet' (1998) 1(1) *PELJ* 151 154.

¹⁹³ 1960 (3) SA 291 (A) 296B-E 302A-B.

¹⁹⁴ At 303D-E.

associations and bodies of persons that are not *universitates* at common law. The Court concluded that the nature of persons encompassed by para (c) is such that legal personality is not a pre-requisite for their legal recognition as a ‘person’ (that is, for personhood). Separate legal personhood and personality is, thus, not co-extensive with a legal duty to pay tax. This confirms that an independent existence in law is not in every instance a pre-requisite for the capacity to bear rights and duties.

6.4.7.3 Statutory meanings of ‘juristic person’

In addition to the aforesaid definition of ‘juristic person’ in s 1 of the Companies Act, 2008, this term is defined in various other statutes for its specific purposes.¹⁹⁵ For example, the National Credit Act¹⁹⁶ (s 1) defines ‘juristic person’ as including ‘a partnership, association or other body of persons, corporate or unincorporated, or a trust if - (a) there are three or more individual trustees; or (b) the trustee is itself a juristic person, but does not include a stokvel’. The Consumer Protection Act¹⁹⁷ (s 1) defines ‘juristic person’ so as to include ‘(a) a body corporate; (b) a partnership or association; or (c) a trust as defined in the Trust Property [Control] Act, 1988’. It is submitted that the inclusion of trusts as statutory juristic persons with statutory personality in the context of these (and any other) legislation ought to entitle trusts to qualify as constitutional persons in the specific context of the statutes concerned for the purposes of s 8(4) of the BOR.

6.4.8 Legal personhood and legal personality under South African law generally

South African law recognises that natural persons and juristic persons may acquire rights, benefits and privileges, as well as incur duties and responsibilities. The efficacy thereof lies in their justiciability in a court of law. Enforceability requires that both the legal subject seeking enforcement and the legal subject against whom enforcement is sought,

¹⁹⁵ Some statutes, without defining ‘juristic person’, declare certain entities or institutions to be a juristic person. For example, the Office of the Public Protector is a juristic person under s 5(1) of the Public Protector Act 23 of 1994.

¹⁹⁶ Act 34 of 2005.

¹⁹⁷ Act 68 of 2008.

must be recognised as a person in the eyes of the law.¹⁹⁸ This is so because ‘only a person can have rights, duties and capacities and can therefore participate in legal intercourse’.¹⁹⁹ When viewed through this prism, legal personality is the essence of personhood: it is the capacity to hold legal rights and incur enforceable duties stemming from private sources (such as contract) or public sources (such as statute), and is a legal construct or fiction.²⁰⁰

As a figment of the juridical mind, legal personality is granted to whomsoever the law desires and is overlooked or withdrawn from whomsoever the law sees fit when it is apposite to do so.²⁰¹ Therefore, legal personality may stem from the Constitution (herein ‘constitutional personality’), statute (herein ‘statutory personality’) and the common law (herein ‘common law personality’). Exceptionally, it may also stem from case law. For example, although the definition of ‘debtor’ in s 2 of the Insolvency Act, 1936 does not refer to trusts, it is interpreted as including trusts.²⁰² The Companies Act, 2008 has not altered this position.²⁰³ Thus, for insolvency law, a trust is a ‘debtor’ with a separate estate susceptible to sequestration and voluntary surrender. Piercing the ‘corporate veil’,²⁰⁴ whether in terms of a statute²⁰⁵ or by a court exercising its discretion,²⁰⁶ is a key instance when the fiction of legal personality can be, judicially, rended aside.

¹⁹⁸ Cronje DSP & Heaton J *The South African Law of Persons* 3 ed (2008) 2.

¹⁹⁹ Cronje DSP ‘Persons’ in Joubert WA & Faris JA (eds) *The Law of South Africa* 2 ed vol 20 part 1 (2010) 431 para 438. For a foreign law view, see Paton GW (1964) 248-49 349-53. The most important capacities are legal capacity (that is, the capacity to have rights and duties), the capacity to act (that is, the capacity to perform valid acts having legal consequences), the capacity to litigate, and the capacity to be held accountable for conduct (such as, crimes and delicts). See Cronje DSP & Heaton J (2008) 37-9. Legal capacity means that a juristic person may, like a natural person, also sue and be sued civilly, and be charged criminally. For a discussion of corporate criminal liability, see Ramirez MK ‘The science fiction of corporate criminal liability: Containing the machine through the corporate death penalty’ (2005) 47 *Arizona Law Review* 933; Pollman E (2011) 1647-49; du Toit P & Pienaar G ‘Korporatiewe identiteit as die basis van strafregtelike aanspreeklikheid van regs persone (2): Die praktyk’ (2011) 14(2) *PELJ* 98. For a discussion of the theories pertaining to the nature of corporate personality, see Paton GW (1964) 365-76; Pollman E (2011) 1633-42; Robinson K (2015) 2289-92.

²⁰⁰ *Botha v Van Niekerk en ‘n Ander* 1983 (3) SA 513 (W) 519C; *Boka Enterprises (Pvt) Ltd v Manatse and Another NO* 1990 (3) SA 626 (ZH) 632I-633F; *Ebrahim and Another v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 15. See also Robinson K (2015) 2288-92.

²⁰¹ Ramirez MK (2005) 937; Pollman E (2011) 1636 1638-39.

²⁰² *Magnum Financial Holdings v Summerly NO* 1984 (1) SA 160 (W).

²⁰³ *Melville v Busane and Another* 2012 (1) SA 233 (ECP) para 17.

²⁰⁴ This refers to instances when the veneer of juristic personhood is permissibly overlooked (or looked through) and the ordinary legal consequences arising from separate legal personality are bypassed so that the natural person behind the entity is exposed and cannot benefit from the

Under the law of persons in SA, human beings are legal persons with personhood and legal personality starting at birth²⁰⁷ and ending on death.²⁰⁸ For juristic persons, such legal status and capacity arise when an entity exists *de facto* and *de jure*, whether by incorporation, registration, formation, establishment or otherwise. Their legal personality ends on deregistration or dissolution. Based on SA’s common law heritage, the law of persons recognises only certain juristic entities as legal persons.²⁰⁹ Generally, consensus exists that a hallmark of personhood is the capacity in law for an ‘entity’ to bear rights and incur duties.²¹⁰ In this context, ‘entity’ means ‘anything which exists in the very broadest sense of the word even if it exists only in the imaginations of men’.²¹¹ Academic writers describe the characteristics of personhood in various ways. For example, Hahlo and Kahn²¹² describe ‘person’ as ‘any being or object or aggregate of beings or objects

‘corporate veil’. In such instances, a person cannot escape from the natural consequences of commercial sins committed. For a discussion hereof, see *ITC 1611* (1997) 59 SATC 126 136-40.

²⁰⁵ For example, a court may, under the Companies Act (s 20(9)(a)), declare a company ‘to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration’ if the court ‘finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity’. See *Ex parte Gore NO and Others* [2013] 2 All SA 437 (WCC). A further example of piercing the ‘corporate veil’ is in s 181 of the TAA that provides for the joint and several liability of company shareholders for the tax debts of a liquidated company in defined instances.

²⁰⁶ For example, courts may go behind the trust form where the trust is a sham or *alter ego* of its founder who is unconscionably abusing its institutional form. If the trust form is pierced, then the legal consequences may be, inter alia, that the trustees are held personally liable for an obligation ostensibly undertaken in their capacity as trustees. See *Van Zyl NO and Another v Kaye NO and Others* 2014 (4) SA 452 (WCC) paras 19-24.

²⁰⁷ South African law confers rights on persons before birth in exceptional instances. For a discussion of the various exceptions, see du Plessis JR & Kok L *An Elementary Introduction to the Study of South African Law* 2 ed (1989) 57-8.

²⁰⁸ Chaskalson P held, in *Makwanyane* para 26, that death ‘puts an end not only to the right to life itself, but to all other personal rights’. This is the common law position. See Cockrell A ‘The Law of Persons and the Bill of Rights’ in *The Bill of Rights Compendium* 2015 (online version) 3E5.

²⁰⁹ Sinclair J ‘Introduction’ in van Heerden B, Cockrell A & Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2 ed (1999) 4-5.

²¹⁰ However, Bilchitz D (2009) 43 argues that ‘person’ embraces all beings or entities ‘capable of having *either* legal rights *or* duties and that such a person need not be capable of having *both* legal rights and duties’. For discussion of the various theories of legal personhood, see Wolff M ‘On the nature of legal persons’ (1938) 54 *Law Quarterly Review* 494; Koessler M ‘The person in imagination or *persona ficta* of the corporation’ (1949) 9(4) *Louisiana Law Review* 435.

²¹¹ Du Plessis JR & Kok L (1989) 57.

²¹² Hahlo HR & Kahn E *The South African Legal System and its Background* (1973) 103. Visser C (ed), Pretorius JT & Sharrock R *et al South African Mercantile and Company Law* 8 ed (2003) 259 describe ‘person’ in the legal sense as ‘any entity that can acquire rights and duties’. See also Hall CG *Maasdorp’s Institutes of South African Law – Law of Persons* 9 ed vol 1 (1968) 1.

which the law endows with the capacity of acquiring rights and incurring duties'. Sinclair²¹³ defines a 'person' as 'a being, entity or association which is capable of having legal rights and duties' and contends that things can 'neither have, nor are they capable of having rights and duties'. Cronje and Heaton distinguish between legal subjects (that is, entities capable of having rights, duties and capacities) and legal objects (that is, objects with economic value which lack the requisite capacity in law to have rights, duties and capacities and which, therefore, cannot participate in 'legal and commercial traffic').²¹⁴

6.4.9 Constitutional personhood and personality under the Bill of Rights

Section 8 of the BOR confers fundamental rights on natural persons and juristic persons. This conferral is counter-balanced by the imposition, in s 8(2), of constitutional duties. There are no general criteria set out in the Constitution applicable to both natural and juristic persons that regulate the BOR's application to such persons as potential legal subjects (hereafter 'constitutional subjects') who may be eligible holders of fundamental rights and liable to perform constitutional duties arising from the BOR. As such, the Constitution does not contain a provision that expressly provides for constitutional personality (that is, the competence to bear rights and incur duties arising from the BOR) as a legal pre-requisite for a natural or juristic person to be a constitutional subject. Since the BOR confers rights and imposes duties, its provisions ought to be interpreted as containing an implied requirement that the rights and duties therein apply to constitutional subjects with constitutional personality, a species of legal personality. On this basis, owing to an entity that is objectively non-existent (such as, an unincorporated or deregistered corporation) being *de jure* non-existent, it cannot be a constitutional subject and, consequently, cannot have constitutional personality.²¹⁵ This principle cannot apply to trusts, and the estates of deceased and insolvent persons in their capacity as taxpayers because, although these juristic entities are not recognised as common law persons with

²¹³ Sinclair J 'Introduction' in van Heerden B, Cockrell A & Keightley R (eds) *et al Boberg's Law of Persons and the Family* 2 ed (1999) 3 6.

²¹⁴ Cronje DSP & Heaton J (2008) 2.

²¹⁵ For an outline of the legal position pertaining to deregistered companies, see *Newlands Surgical Clinic (Pty) Ltd (Newlands) v Peninsula Eye Clinic (Pty) Ltd (Peninsula)* 2015 (4) SA 34 (SCA).

common law personality, they are each, for tax purposes, statutory persons with statutory personality. Hence, they have a juridical existence in this context and ought, thus, to be recognised as constitutional persons with constitutional personality in a tax context.²¹⁶

The question requiring an answer in the present discussion is the following: What is the legal source whence constitutional personhood and constitutional personality are derived for juristic taxpayers as far as they concern purposes arising from the BOR? Is it the Constitution, the common law, statute or case law? It is submitted that the answer is the Constitution. As explained above in chapter three, it is SA's *lex fundamentalis*. As such, the Constitution pre-dominates all other laws, including the common law and statute. They are subservient to the supreme law. Indeed, the Constitution obliges courts to develop the common law to the extent that doing so is necessary to bring it into line with the Constitution, its principles and values. The Constitution is the ultimate source whence all other laws derive their legal force and effect.²¹⁷ Thus, any law subordinate to the Constitution cannot determine if a natural person or juristic entity is a constitutional person with constitutional personality. The Constitution must itself be the source whence this decision is made through a process of constitutional interpretation in accordance with s 39(1) (discussed above in chapter two). To this end, the BOR is interpreted above to reinforce the hypothesis that statutory persons, including all juristic taxpayers, ought to be recognised as constitutional persons for the purposes of s 8(4) of the BOR. This approach is consonant with the view that a broader notion of 'right' than that used in private law would be appropriate for constitutional purposes arising from the BOR.²¹⁸

²¹⁶ The notions of constitutional personality, common law personality and statutory personality referred to in this dissertation must be distinguished from human personality and corporate personality. To this end, Paton GW (1964) 350 writes: 'The concept of human personality is difficult to define and has become a storm centre of intellectual controversy; many of the matters in dispute have been transferred to the legal field.' Paton explains further (361): 'In mature systems of law the doctrine of corporate personality is fully developed and a clear-cut distinction is made between the individuals who compose a corporation and the corporation itself.'

²¹⁷ Chaskalson P, in *Pharmaceutical Manufacturers* para 44, held: 'I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

²¹⁸ Currie I & de Waal J (2014) 662 (and the authorities cited there at fn 88).

6.4.10 Unsuitability of the common law as a source for constitutional personality

The Constitution has not displaced the common law or rendered it insignificant in matters of law. Rather, the Constitution recognises and gives effect thereto within limits.²¹⁹ The Constitution (s 39(3)) gives formal recognition to the 'existence of any other rights or freedoms that are recognised or conferred by common law ... to the extent that they are consistent with the Bill [of Rights]'. Furthermore, when applying a BOR provision to a natural or juristic person, s 8(3)(a) enjoins a court to develop the common law 'to the extent that legislation does not give effect to ... [a] right [in the BOR]' and s 8(3)(b) provides that a court 'may develop rules of the common law to limit the right [in the BOR]'.²²⁰ Thus, the common law remains a valid source of South African law.²²¹

Cockrell, Pienaar and Wood-Bodley,²²² steeped in the tradition of the private law of persons,²²³ espouse that eligibility for rights under s 8(4) of the BOR is, by implication, dependent on an entity satisfying the common law requirements for juristic personhood. Cronje and Heaton²²⁴ state these requirements to be: (i) an entity must have a continuous existence (or perpetual succession), irrespective of any variation in its membership; (ii) an entity must be a legal subject with rights, duties and capacities, or be able to have

²¹⁹ *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) para 39.

²²⁰ For the test as to whether to develop the common law, see *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2015 (1) SA 621 (CC) paras 38-9. Mohamed CJ, in *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) para 23, describes the importance of the evolution of the common law as follows: "The common law is not to be trapped within the limitations of its past." If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.'

²²¹ Kentridge AJ, in *Zuma* para 17, held that legal principles that applied prior to SA's constitutional dispensation cannot be ignored as they 'obviously contain much of lasting value'. Thus, the common law of SA continues to apply to the extent that its principles may be harmonised with the 'democratic constitutional ethos'. See *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) para 50.

²²² Cockrell A 'The Law of Persons and the Bill of Rights' in *The Bill of Rights Compendium 2015* (online version) 3E2; Pienaar GJ (1998) 154; Wood-Bodley MC 'Freedom of testation and the Bill of Rights: *Minister of Education v Syfrets Trust Ltd NO*' (2007) 124(4) *SALJ* 687 694.

²²³ Cronje DSP & Heaton J (2008) 1 define the 'law of persons' loosely as 'that part of private law which determines which entities are legal subjects, when legal personality begins and ends, what legal status involves, and what effect various factors ... have on a person's legal status'.

²²⁴ Cronje DSP & Heaton J (2008) 6.

rights, duties and capacities, independent of the natural person(s) managing or controlling its affairs; and (iii) an entity’s objective must not be the acquisition of gain. Pienaar²²⁵ adds that an entity must be capable of suing and being sued in its own name,²²⁶ an entity must have a fixed internal organisational structure, and must have a lawful aim. These characteristics, qualities or properties of personhood apply in private law where ‘without legal personality there can be neither active nor passive transactional capacity’.²²⁷ For reasons outlined below, it is submitted that, whilst common law persons are examples of constitutional persons, the former does not define the scope or ambit of the latter.

The aforementioned view espoused by Cockrell, Pienaar and Wood-Bodley raises the spectre that ‘person’ and ‘juristic person’ in s 8 of the BOR are drawn in their common law image. If correct, then the common law notion of these terms would suffuse the Constitution and be superimposed onto its landscape. The consequences hereof would be that an entity which is not a common law juristic person, a so-called *universitas*,²²⁸ (i) is not a *persona iuris* with legal capacity, (ii) is not absorbed into the rubric of the terms ‘person’ and ‘juristic person’ in the BOR, and, thus, (iii) cannot be a holder of fundamental rights. On this legal basis, neither a trust, an insolvent estate nor a deceased estate would be a juristic person entitled to any fundamental right entrenched in the BOR. Put differently, they would not qualify as constitutional subjects with constitutional personality. Wood-Bodley²²⁹ suggests that, as regards trusts, fundamental rights vest in their registered representative *qua* owner/trustee. By parity of legal reasoning, on Wood-Bodley’s view, the same would apply to insolvent and deceased estates. In other words,

²²⁵ Pienaar GJ ‘Regsubjektiwiteit: ‘n Prinsipiele benadering’ (1983) 48(1) *Koers Bulletin for Christian Scholarship* 7.

²²⁶ Cameron J, in *My Vote Counts* para 110, held that the ‘mere capacity to sue and be sued does not necessarily entail juristic personhood’.

²²⁷ Anderson RG ‘Juristic Persons and Fundamental Rights’ in Reid E & Visser D (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) 365 373.

²²⁸ Du Bois F (ed), Bradfield G & Himonga C *et al* (2014) 396 state the following: ‘A universitas is an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations, and having perpetual succession. ... A universitas is an entity distinct from the individuals who compose it.’

²²⁹ Wood-Bodley MC (2007) 694. A similar view is expressed in *Emary* 624A (re deceased estates); *CIR v MacNeillie’s Estate* 1961 (3) SA 833 (A) 840 F-H (re trusts); *Thorne & Molenaar NNO v Receiver of Revenue, Cape Town* 1976 (2) SA 50 (C) (re insolvent estates) albeit in a context unrelated to the BOR.

on Wood-Bodley’s view, fundamental rights do not vest in these juristic (artificial) entities but rather in the natural persons who stand behind their respective ‘corporate veil’.

Cockrell, Pienaar and Wood-Bodley’s view that, for BOR purposes, an entity must be a common law juristic person, ought to be approached with due caution. Its correctness is doubtful. First, the common law is not an ‘impenetrable obstacle’.²³⁰ Constitutional supremacy means that the Constitution dictates how the common law is interpreted, not *vice versa*. Secondly, the common law is not the *fons et origo* of legal personality, an incident of personhood conferred by the law. Since legal personality is a juridical construct, the capacity to bear rights and incur duties may be derived from other sources (such as, legislation and the Constitution). Thirdly, comparatively, fundamental rights jurisprudence adopts a more flexible approach to legal personality than the common law.²³¹ Fourthly, personhood is evolving due to technological and scientific developments (such as, the creation of artificial life and intelligent beings). The wholesale grafting onto the BOR’s landscape of the rigid common law conception of juristic person would not enable the BOR to deal with the demands of a modern, technologically and scientifically advanced society. Fifthly, constitutional values must permeate the common law and its application.²³² The denial of fundamental rights to an entity owing to its common law status is status-based discrimination. This violates Art 26 of the International Covenant on Civil and Political Rights and s 9(3) of the BOR. In addition, Cockrell, Pienaar and Wood-Bodley’s view is objectionable because it creates two unequal classes of juristic taxpayers, namely, those with and those without fundamental rights. Such a legal position offends the values of equality and the achievement of equality among juristic taxpayers.

²³⁰ *Kruger v SANTAM Versekeringsmaatskappy Bpk* 1977 (3) SA 314 (O) 320G.

²³¹ Anderson RG ‘Juristic Persons and Fundamental Rights’ in Reid E & Visser D (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2014) 365 374-75 cites case law from, inter alia, Germany that recognises constitutional rights for juristic persons lacking a legal personality. Van Coller A (2011) 312 and Bilchitz D ‘Does Transformative Constitutionalism Require the Recognition of Animal Rights?’ in Woolman S & Bilchitz D (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 173 both argue, rather persuasively, that the modern concept of legal personhood must be developed to include the status of animals as the subjects or bearers of rights (not only the objects of rights). In this way, animals would be entitled to fundamental rights. However, for a contrary view, see Metz T ‘Animal rights and the interpretation of the South African Constitution’ (2010) 25(2) *SAPL* 301.

²³² *De Klerk* 885G-H 897E-G; *Gardener v Whitaker* 1996 (4) SA 337 (CC) 347D—H.

Cockrell, Pienaar and Wood-Bodley's aforementioned view is also inconsistent with the Constitution when due consideration is given to the fact that the BOR does not limit the application of fundamental rights to entities with common law personality. The artificial persons contemplated by ss 19(1), 23(3)(a) and (4)(c), 25(6) and (7), 29(3), and 31(1)(b) of the BOR respectively are political parties, employers' organisations, federations, communities, educational institutions, as well as cultural, religious and linguistic associations.²³³ Their legal nature elucidates that constitutional personality applies to a wider array of entities than common law personality. This probably explains the omission from the Constitution of a provision that imposes the common law requirements for personhood as that applicable to determining constitutional personhood and constitutional personality under, inter alia, s 8(4). As discussed above, the principles of constitutional interpretation do not permit reading a text into the Constitution, or interpreting its provisions in a manner incongruent with constitutional values. The requirements to be met for the conferral of fundamental rights are those stated within the four corners of the Constitution. To the extent that any requirement is to be implied, such requirement must be reconcilable with the Constitution's express provisions, its spirit, purport and objects discussed above. The adoption of the view expressed by Cockrell, Pienaar and Wood-Bodley would have the undesirable effect of restricting the application of fundamental rights to a narrower group of entities than is contemplated by the BOR. Their view does not promote the spirit, purport and objects of the BOR and, thus, ought not to be adopted.

To illustrate the contention of the preceding paragraph, reference is made to ss 25(1),²³⁴ (6)²³⁵ and (7)²³⁶ of the BOR that grant 'property' rights to, inter alia, a 'community'. The

²³³ Section 29(3) of the BOR imposes registration 'with the state' as a pre-requisite for constitutional recognition and existence of an independent educational institution. However, registration or incorporation is not imposed as a general requirement for constitutional personhood and constitutional personality. Registration is not a pre-requisite for an entitlement to fundamental rights in relation to, for example, entities envisaged by ss 19(1), 23(3), (4), 25(6), (7), and 31(1)(b). The entities contemplated thereby must simply exist as an objective fact (that is, they must be formed or established). Accordingly, it is submitted that unregistered trade unions, employers' organizations, political parties, social clubs and religious institutions are capable of holding fundamental rights. However, a deregistered juristic entity cannot be the bearer of such rights.

²³⁴ Section 25(1) reads: 'No one may be deprived of property except in terms of law of general application, ...'. The words 'no one' is the negative form of 'anyone' and 'everyone'. See *Khosa* para 47. Thus, the radius of 'no one' extends to a community contemplated by ss 25(6) and (7).

CC²³⁷ has, when formulating a constitutional conception of 'property', held that the kind of property deserving of constitutional protection under s 25 cannot be restricted to the private law notion of property. This, the CC held, is so because, first, it would 'exclude other potential constitutional entitlements that may deserve protection'. Secondly, it 'could also inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms'. Thirdly, '[e]xtending our conception of property to embrace constitutional entitlements beyond the original ambit of private common law property will ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement'. Accordingly, for constitutional purposes, the CC held that the concept of property 'must be derived from the Constitution'.²³⁸ For parallel reasons, it is submitted that the same ought to apply to the formulation of a constitutional conception of 'person' and 'juristic person' in s 8(4) of the BOR. To this end, the aforesaid constitutional values of equality and the achievement of equality play crucial roles.

Sections 25(6) and (7) of the BOR confer rights to a 'community'.²³⁹ At common law, a community is not a *universitas* with common law personality. This is so because, first, it has no *persona* or identity separate and distinct from the natural persons comprising its membership. Secondly, a community does not exist in terms of a written instrument providing for its perpetual succession.²⁴⁰ A community exists because a group of natural

²³⁵ Section 25(6) reads: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

²³⁶ Section 25(7) reads: 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to the restitution of that property or to equitable redress.' In ss 25(6) and (7), 'person' refers to a 'natural person' who suffered past racial discrimination. If 'person' in these contexts include 'juristic person' then the words 'or community' would have the unpalatable effect of suggesting that a 'community' is not a 'juristic person' under s 8(4) but something different.

²³⁷ *Shoprite Checkers* para 46.

²³⁸ *Shoprite Checkers* para 46. See also at paras 57-72 103-29.

²³⁹ Sections 25(6) and (7) are integral parts of a structured paradigm designed to create a framework for social justice and transformation through equitable land reform, land tenure, land restitution and financial compensation designed to redress the imbalances created by racially discriminatory land laws and practices during the apartheid era.

²⁴⁰ The Court held, in *Morrison v Standard Building Society* 1932 AD 229 237-38, that a voluntary association has the status of a corporation or *universitas* if its constitution caters for perpetual

persons connected to each other by a common feature (such as, blood, religion, culture, heritage, tradition, custom, language or other identifiable commonality) live and operate as a communion of people, each member subscribing to a common set of shared values, principles, customs, traditions or rules. As such, a community includes families (or households or kraals), clans, tribes, religious and cultural communities in villages, districts, towns, townships or settlements.²⁴¹ Thus, a community occupies an entirely different constitutional position to that under the common law. Its entitlement to fundamental rights means that the Constitution recognises a ‘community’ as having constitutional personhood and, hence, constitutional personality. This shows that, for BOR purposes, constitutional persons are not limited to common law persons. They also encompass statutory persons (such as juristic taxpayers), and other groups or classes of persons (such as a community) that may be neither a common law nor statutory person.²⁴²

Cockrell, Pienaar and Wood-Bodley’s aforementioned view is inappropriate when the BOR is applied in a tax context. This is so because tax statutes expressly confer a legal status²⁴³ on trusts, and the estates of deceased and insolvent persons different to that which these entities have under the common law. Tax statutes treat them as ‘persons’. By virtue of their statutory personhood, these entities have legal personality for tax purposes

²⁴¹ succession of its membership and it has the capacity to acquire legal rights and incur obligations in its name. For further discussion, see du Bois F (ed), Bradfield G & Himonga C *et al* (2014) 399.

²⁴¹ The RoLRA, a statute contemplated by s 25(7) of the BOR, defines ‘person’ in s 1 as including ‘a community or part thereof’. ‘Community’ is then defined in s 1 as ‘any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group’. For a discussion of the meaning of ‘community’ in the RoLRA read with the BOR (s 25) and the Communal Property Associations Act 28 of 1996, see Pienaar G ‘The meaning of the concept *community* in South African land tenure legislation’ (2005) 16(1) *Stell LR* 60 62; Pienaar G ‘The inclusivity of communal land tenure: A redefinition of ownership in Canada and South Africa?’ (2008) 19(2) *Stell LR* 259 264-65. For case law on the RoLRA, see *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC); *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC); *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).

²⁴² In the light of the view expressed here, it is unnecessary for the common law concept of ‘person’ to be developed to include trusts, and the estates of deceased and insolvent persons.

²⁴³ Status is ‘a term of convenience, shorthand for the cumbersome expression “rights, duties and capacities”’. See Heaton J ‘The Concepts of Status and Capacity: A Jurisprudential Excursus’ in van Heerden B, Cockrell A & Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2 ed (1999) 65. Thus, legal status is a person’s ‘standing’ in law in relation to others and the wider community: the aggregate of rights, duties and capacities. See Cronje DSP & Heaton J (2008) 37.

within the contemplation of SA's labyrinthine tax laws. As juristic taxpayers, they are legal subjects with attributes or properties of individuality: an independent legal identity and capacity to acquire rights and incur duties separately from the natural persons who manage their affairs.²⁴⁴ Their legal status in tax law bolsters the justification for their personification for constitutional purposes under s 8(4) of the BOR in the context of tax law and tax administration. If these entities lack access to fundamental rights in their capacity as juristic taxpayers owing to their common law status, then a conflicting legal position would exist. This is so because, on the one hand, tax legislation would regulate their legal status as taxpayers whilst the common law would, on the other hand, regulate their constitutional position in a tax context. Such a legal position would result in these taxpayers being persons with rights for statutory purposes but contemporaneously non-persons with no fundamental rights for constitutional purposes. It would be absurd if statutory persons with statutory personality for tax purposes are denied entitlement to fundamental rights because they lack common law personhood and personality. If this were so, it would elevate the common law of persons to a position of primacy or prominence above statutory law and the Constitution. Such a state of affairs is untenable.

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Parliament purposefully altered, for tax purposes, the common law status of trusts, and the estates of deceased and insolvent persons. Thus, it can hardly be that, in a tax law context under the Constitution, their common law status is reinstated. Their legal status under the tax laws of SA ought to prevail in such circumstances. A denial of access to fundamental rights and their protection to these, and any other, juristic taxpayers would not only preclude the application of the BOR to a significantly large group of taxpayers, it would also run counter to the culture of rights established by the Constitution. In so doing, it would bring about a result incongruent with the spirit, purport and objects of the BOR. A denial of fundamental rights to any juristic taxpayer of whatsoever nature and kind would also have the undesirable effect of rendering any such entity vulnerable to abuse of power by SARS and its officials. Accordingly, disqualification from the benefits of s 8(4) of the BOR ought to be avoided in so far as is constitutionally permissible.

²⁴⁴ Pienaar GJ (1983) 1 defines 'legal subjectivity' as 'the capacity of an entity to act as a subject in the process of law'.

The transformative aim of the BOR includes developing a strong rights culture for *all* categories, groups and classes of persons. The building of such a culture is undermined if any juristic taxpayer is, for BOR purposes, denied recognition as a 'juristic person'. For the reasons given above, the BOR does not adopt the narrow common law concept of 'person' and 'juristic person'. In a tax context, it is submitted that the legal status in codified tax law of *all* juristic taxpayers as statutory persons with legal capacity ought to determine their eligibility for fundamental rights in the BOR in a tax context. The status of any such entity in uncodified common law ought to play no role in this context. Thus, non-satisfaction of the common law requirements for juristic personhood ought not to be a legal bar or impediment to an entitlement of fundamental rights under the BOR as regards trusts, and the estates of deceased and insolvent persons in their capacity as statutory persons under SA's tax laws (or in any other legal capacity for that matter).

6.5 CONCLUSION

The present chapter answered the first and second constitutional issues. As to the former, it is submitted that, for tax administration purposes, the BOR applies extraterritorially, thereby benefitting and protecting all taxpayers beyond SA's borders. The discussion shows that the duties of SARS and the CSARS arising from s 8(1) of the BOR apply regardless of whether conduct by them or on their behalf occurs in SA or extraterritorially. Thus, when the BOR applies vertically in public administration, the fundamental rights relevant to tax administration benefit all 'taxpayers' as defined in the TAA (s 151), irrespective of their physical geographical location on foreign or domestic soil when such rights are sought to be applied or enforced. As to the second constitutional issue, the present chapter argues that it would be absurd, or at least anomalous, if entities that are *personae non iuris* at common law were deprived of fundamental rights owing to their common law status whilst they are, at the same time, not precluded from having statutory rights. Since statutory and common law rights do not provide protection at levels comparable to fundamental rights, a deprivation of access to fundamental rights would impose a hardship to the affected taxpayers because a denial of BOR protection exposes them to the risk of abuse of power by SARS, a result inimical to the Constitution.

The present chapter argues for a pragmatic approach to the conceptualisation of 'person' and of 'juristic person' in the context of s 8(4) of the BOR. Their respective meanings ought not to be premised on any theory of personhood but should rather be traced within the normative framework of the Constitution and its values, as well as the fundamental rights that underpin them. In addition, the constitutional conceptions of the terms 'person' and 'juristic person' ought not to be based on any preconceived, narrowly formulated common law notions or traditions. The common law *universitas* does not advance or promote the democratic and rights orientated ethos, spirit, purport and objects of the BOR. In the context of s 8(4) and the BOR read holistically, 'person' and 'juristic person' have more depth and breadth of meaning than that which they have respectively under the common law. On this basis too, the common law rules governing personhood cannot simply be transplanted wholesale onto the landscape of the Constitution. Although 'there is no bright line between public and private law',²⁴⁵ it is submitted that a bifurcated concept of both 'person' and 'juristic person' exists in South African law, namely, a narrow common law meaning applied in private law and a wider, more liberal meaning applied in public law for constitutional purposes. This view echoes the distinction between public law and private law rights drawn by Wiechers and Carpenter,²⁴⁶ referred to by the CC with apparent approval.²⁴⁷ In the light of the foregoing, it is submitted that, for BOR purposes, constitutional persons encompass all common law and all statutory persons, as well as such other juristic entities that are recognised by the BOR, even though they may not be recognised by either the common law or in legislation.

The non-applicability of fundamental rights to a taxpayer would place him/her/it in a potentially perilous position that may, if left unchecked, lead to so-called 'palm-tree

²⁴⁵ Per Chaskalson P in *Pharmaceutical Manufacturers* para 45.

²⁴⁶ Wiechers M & Carpenter G *Administrative Law* (1985) 73-5 distinguish between public law and private law rights because, so they argue, it is difficult to explain, in the light of a private law system of rights, those administrative law rights of private persons and subjects that are derived from statute and a democratic constitutional system. The authors contend, convincingly, that public law rights stemming from legislation and a constitution 'differ radically, as regards both character and scope, from private law rights'. The authors' arguments resonate poignantly in the discussion of the issue whether, for administrative and constitutional law purposes arising from tax administration under the TAA, juristic taxpayers in the form of trusts, insolvent estates and estates of deceased persons are constitutional juristic persons under s 8(4) of the BOR.

²⁴⁷ *Shoprite Checkers* para 41.

justice',²⁴⁸ an unpalatable result harking back to the dark days of apartheid. Such non-application would create a *lacuna* in the law that is susceptible of exploitation by over-zealous, unscrupulous tax administrators. The potential for abuse is real and exacerbated by the pressures on SARS to maximise tax collection so that the public purse is fiscally stable and continuously liquid and solvent. Since every tax statute has, as discussed above, a constitutional dimension, it cannot be that, for tax purposes, the law in SA views trusts as well as deceased and insolvent estates as 'persons' with statutory personality but, for constitutional purposes arising from the same fiscal statute, the eyes of law does not see them as 'persons' with constitutional personality. Their status as statutory persons ought to culminate in, and automatically translate into, constitutional personhood.²⁴⁹

In summa, the scope and ambit of 'juristic person' in s 8(4) of the BOR ought to embrace *all* statutory persons, including every juristic taxpayer. Such an interpretation of 'juristic person' is justifiable with reference to (i) the Constitution's transformative aims; (ii) the context in which the terms 'person' and 'juristic person' are utilised in s 8(4); (iii) the meaning of 'person' and 'juristic person' in South African law generally; and (iv) the application of the constitutional values of equality, the achievement of equality, freedom, and the advancement of human rights and freedoms. Furthermore, an interpretation of 'juristic person' that includes a *persona non iuris* at common law would harmonise the tensions existing between democratic principles and the common law notion of 'person'. Owing to the interpretive approach advocated here, it is unnecessary to develop the common law meaning of 'person', as permitted by the BOR, in order to attain the same results achieved through a transformative interpretation of s 8(4). The passing of a Bill of Taxpayers' Rights (BOTR) and the enactment of a definition of 'juristic person' in the Constitution, both of which are recommended below in chapter eleven, would go a long way to resolve certain of the issues discussed in the present chapter. The next question to ask is: What legal rights do taxpayers generally have in tax administration under South African law? This important issue will be the subject canvassed below in chapter seven.

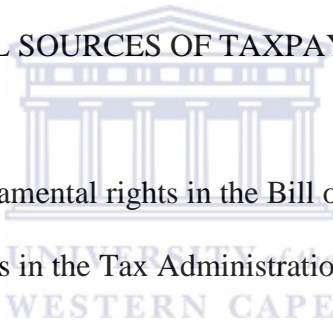
²⁴⁸ Per Flemming J in *Botha v Van Niekerk en 'n Ander* 1983 (3) SA 513 (W) 520E.

²⁴⁹ The CC, in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) paras 20 31, uses the term 'constitutional being' in relation to, for example, the President of the RSA.

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'We declare our right on this earth to be a human being, to be respected as a human being, to be given the rights of a human being in this society, on this earth, in this day' (Malcolm X)

7.1 INTRODUCTION

Taxpayer rights have 'evolved as a new mode of rights'.¹ In 1987, the International Fiscal Association convened a seminar on the connection of taxation with human rights. In 1988, the OECD's Committee of Fiscal Affairs Forum on Tax Administration conducted a survey of taxpayer rights and duties. In 1990, it published a report² that showed taxpayers in OECD member States enjoy a common set of basic rights, namely: (i) the right to be informed, assisted and heard; (ii) the right of appeal; (iii) the right to pay no more than the correct amount of tax; (iv) the right to certainty;³ (v) the right to privacy; and (vi) the right to confidentiality and secrecy. The report concluded that rights must be balanced with duties imposed on taxpayers to comply with certain obligations necessary for the efficient and effective functioning of a tax system. These duties are: (i) to be honest;⁴ (ii) to be co-operative;⁵ (iii) to provide complete and accurate information and documents;⁶

¹ Kasimbazi E (2004) 34. Yutsever H 'Anatomy of taxpayers' rights: Case study of Turkey' (2010) 7(5) *Pakistan Journal of Social Sciences* 334 points out that the concept 'taxpayer rights' is fundamentally premised on the Magna Carta of 1215 so that its development can be traced to it, peaking with the French Revolution in 1789 and then with the Convention on Human Rights. See also Sandford C & Wallschutzky I 'Taxpayers' rights: A model Magna Carta?' (1994) 28(11) *Taxation in Australia* 610.

² *Taxpayers' Rights and Obligations – A Survey of the Legal Situation in OECD countries* (1990) 10. Owens J 'Taxpayers' rights and obligations' (1990) 18(11) *Intertax* 554 discusses this report.

³ Whilst certainty is not a right conferred on taxpayers in SA, it is nevertheless a standard forming part of the rule of law (discussed above in chapter three). However, in Germany, for example, taxpayers' rights include the right to certainty. See Croome BJ & Olivier L (2010) 67.

⁴ Comrie AJ commented, in *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C) 221B-C, that 'honesty in regard to tax matters is often something different and something less than in the rest of our lives.' The TAA imposes the duty to be honest. Section 25(2) requires a tax return to 'be a full and true return'. See also ss 26(2), 27(2) and 205(a) of the TAA. Thus, truthfulness and frankness in disclosure are statutorily recognised values in SA's tax culture under the TAA. This was the position prior to its enactment. For the meaning of 'dishonest', see *Estate Agency Affairs Board v McLaggan and Another* (2005) 67 SATC 280 (SCA) 286-87. For the meaning of 'false declaration', see *CSARS v Formalito (Pty) Ltd* [2006] 4 All SA 16 (SCA) para 8.

⁵ For example, the TAA obliges a taxpayer to 'provide such reasonable assistance as is required by SARS to conduct the audit or investigation' (s 49(1)) and not to 'obstruct a SARS official or a police officer from executing the warrant or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the warrant' (s 61(7)). Other provisions of the TAA incorporating the duty to co-operate with SARS include s 57(1) and s 72(1).

⁶ The duty to provide accurate information is included in the TAA. See, for example, s 205(b).

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(iv) to keep records;⁷ and (v) to pay taxes timeously.⁸ The TAA imposes these (and other ancillary) obligations on taxpayers. Thus, honesty, integrity, accuracy and punctuality are behavioural norms, standards or values serving as benchmarks when evaluating a taxpayer's conduct under the proverbial 'black letter' of the TAA.

As shown above in chapter three, a culture of rights has emerged from the Constitution. The notion of taxpayer rights is a critical part of this study. A literature survey shows that research on taxpayer rights in SA has focussed mainly on taxpayers' constitutional rights and on whether a charter of rights ought to be adopted as in, for example, Australia,⁹ Canada¹⁰ and the USA.¹¹ The present chapter approaches taxpayer rights from a different angle. It commences by discussing the role and meaning of taxpayer rights. This lays a foundation for an understanding of this notion. Thereafter, taxpayers' rights in the BOR, TAA and other sources of South African law are discussed. A detailed list of taxpayers' rights sourced from the TAA is compiled. As far as can be established, no other study has hitherto catalogued the rights in the TAA as comprehensively as *infra*. A full compilation of taxpayer rights emanating from all sources of South African law falls beyond the scope of this study. Finally, the classification of taxpayer rights is discussed with reference to whether this cluster of rights is classifiable as 'human rights'. This issue is significant because, as explained below, in SA, all human rights violations are constitutional matters within the exclusive domain of courts with constitutional jurisdiction.

⁷ This duty is imposed on taxpayers by s 29 read with s 30 of the TAA.

⁸ The TAA (s 162(1)) reads: 'Tax must be paid by the day and at the place notified by SARS ...'. The Taxpayer Protection Bill, 2016 in the Appendix hereto proposes certain basic taxpayer duties.

⁹ See Wheelwright K 'Taxpayers' rights in Australia' (1997) 7(1) *RLJ* 226; Bentley D 'The significance of declarations of taxpayers' rights and global standards for the delivery of tax services by revenue authorities' (June 2002) Law Papers available at http://epublications.bond.edu.au/law_pubs/35 (accessed 9 October 2014); James S, Murphy K & Reinhart M 'The taxpayers' charter: A case study in tax administration' (2004) 7(2) *Journal of Australian Taxation* 336; Braithwaite V *Are Taxpayers' Charters "Seducers" or "Protectors" of Public Interest? Australia's Experience* (June 2005) Centre for Tax System Integrity: Australian National University Working Paper 70 available at <https://digitalcollections.anu.edu.au/bitstream/1885/430812/70.pdf> (accessed 7 November 2014).

¹⁰ See Li J 'Taxpayers' rights in Canada' (1997) 7(1) *RLJ* 83.

¹¹ Greenbaum A (1997) 138 is critical of the USA Bills of taxpayers' rights. He states (139) that in 'both instances the legislation was merely an omnibus law which provided a variety of procedural changes to the Internal Revenue Code without any coherent scheme'. He concludes (159) that the 'provisions are a hotch podge of legislative amendments rather than a coherent document formulating a comprehensive framework of rights, which a Bill or Charter of Rights should'.

7.2 ROLE AND MEANING OF 'TAXPAYER RIGHTS'

In all tax systems, taxpayers ought to be entitled to rights that are justiciable in courts and other fora or tribunals resolving tax disputes.¹² In SA, the conferral of taxpayer rights will avert the injustices of the apartheid past committed during tax administration. This is so because taxpayer rights provide a healthy balance by keeping in check otherwise unlimited power in the hands of tax officials. Such rights are to be construed liberally so that taxpayers are afforded the widest possible protection. As with all other legal rights, taxpayer rights involve a right-duty relationship between the holder of the right (that is, the taxpayer) and the party bound by the duty created thereby (namely, the tax administrator).¹³ In sum, legal rights and duties are correlatives of each other (that is, a right cannot exist without a corresponding duty, and *vice versa*). Section 8(2) of the BOR gives implied recognition to this legal principle. It refers to 'the nature of any duty imposed by the right'. Taxpayers' rights, and the correlative obligations that they impose on tax officials, are an important bulwark against the unbridled, unaccountable exercise of power by tax administrators as governmental agents. Thus, respect for and protection of taxpayers' rights is a mechanism by which SARS may be controlled and its officials compelled to conduct tax administration in conformity with the law. This is part of the principle of legality embodied in the rule of law (discussed above in chapter three).

SARS and its officials cannot exercise any deliberative, investigative or other power 'in a vexatious, oppressive or unfair manner.'¹⁴ A cardinal principle of democratic governance is that there must be appropriate checks and balances on the exercise of all forms of

¹² OECD *Taxpayers' Rights and Obligations – Practice Note* (2003) 3 (OECD (2003)) available at [http://www.oecd.org/tax/administration/Taxpayers' Rights and Obligations-Practice Note.pdf](http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf) (accessed 4 October 2014).

¹³ Croome BJ & Olivier L (2015) 576-77. Paton GW (1964) 248-49 explains that there are four elements in every legal right, namely: (i) the right holder; (ii) the act or forbearance to which the right relates; (iii) the res (or object) of the right; and (iv) the person bound by the duty stemming from the right. For a detailed analysis of the 'rights' concept, see Wenar L 'The nature of rights' (2005) 33(3) *Philosophy & Public Affairs* 223.

¹⁴ *Chairman, Board on Tariffs and Trade and Others v Brenko Inc and Others* (2002) 64 SATC 130 (SCA) para 30.

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power, including the power to tax.¹⁵ Tax law, comprising the laws governing taxation and tax administration, provides fertile ground for tension between the exercise of power by SARS and taxpayer rights.¹⁶ Provided the strict bounds of the separation of powers is maintained,¹⁷ it is submitted that judicial oversight by way of review is the most effective, albeit costly, way of ensuring that the exercise of public power in tax administration is kept within constitutional limits. Provision ought also to be made for less costly mechanisms that would ensure accountability in tax administration (such as, referring disputes to the Tax Board and Tax Court, and lodging complaints with the Tax Ombud).

The constituent elements of the phrase ‘taxpayers’ rights in tax administration’ require amplification. Chapter five above discussed tax administration within the meaning and contemplation of the expression ‘administration of a tax Act’ in the TAA (s 3(2)). It also discussed the meaning of ‘taxpayer’ under the TAA (s 151). Hence, a discussion of these elements in the aforementioned phrase is not repeated here. Although there is common recognition that taxpayers have rights, there is no immutable, universally accepted, concrete definition of the term ‘taxpayer rights’, nor have courts clarified the scope of its meaning. This term means different things to different people. Brzezinski¹⁸ defines this notion as ‘the rights ... that belong to a taxpayer or other person in whom tax law is interested’. Brzezinski contends that such rights entitle taxpayers to demand treatment of a kind and manner that will improve their position in society, the economy or the law. Dogan and Gokbunar¹⁹ explain that taxpayer rights are ‘the system of jural relations between taxpayers and government in the taxation process’. Bentley²⁰ points out that

¹⁵ Vanistendael F ‘Legal Framework for Taxation’ in Thuronyi V (ed) *Tax Law Design and Drafting* vol 1 (1996) 16.

¹⁶ Brokelind C ‘The Role of the EU in International Tax Policy and Human Rights: Does the EU Need a Policy on Taxation and Human Rights?’ in Kofler G, Maduro MP & Pistone P (eds) *Human Rights and Taxation in Europe and the World* (2011) 116.

¹⁷ See Venter F ‘Judges, politics and separation of powers’ (2007) 21(1) *SJ* 60.

¹⁸ Brzezinski B ‘Taxpayers’ Rights: Some Theoretical Issues’ in Nykiel W & Sek WNM (eds) *Protection of Taxpayers’ Rights: European, International and Domestic Tax Law Perspective* (2009) 17.

¹⁹ Dogan A & Gokbunar R ‘Taxpayers’ rights and an evaluation for Utah taxpayer Bill of Rights’ (2012) 38 *Turkish Public Administration Annual* 37 38.

²⁰ Bentley D *Revisiting Rights Theory and Principles to Prepare for Growing Globalisation and Uncertainty* (November 2015) 2-8 available at https://taxpayerrightsconference.com/wp-content/uploads/2015/11/Revisiting_Rights_TheoryPDF.pdf (accessed 25 July 2016).

‘taxpayer rights’ is used in various contexts, including legal, economic, political, behavioural and relational, and that in each context it is ascribed a meaning consonant with the aims of the persons who use the term. To this end, Bentley states that persons involved in tax administration often use ‘taxpayer rights’ to ‘frame the way the administrative rules of the tax system are implemented and interpreted’. On the other hand, Bentley states further that taxpayers, tax ombuds and tax administrators use ‘taxpayer rights’ to ‘describe service standards, behaviours and aspects of the content of the relationship between taxpayers and the tax administration’.

7.3 NATURE AND LEGAL SOURCES OF TAXPAYERS’ RIGHTS

7.3.1 Taxpayers’ fundamental rights in the Bill of Rights

In SA’s pre-constitutional era, taxpayers’ rights were limited to a narrow list stemming common law (for example, the right to plan financial affairs to minimise tax) or statute (for example, rights to object and appeal a tax assessment).²¹ The movement to recognise taxpayer rights as a new genre of rights gained momentum in SA’s post-1994 era. In this regard, the most important developments are the creation of the BOR and the enforcement of fundamental rights through, inter alia, a declaration of rights, and judicial review of tax laws and the conduct of SARS and its officials. The Constitution (ss 167-169, s 172) confers jurisdiction on certain courts to declare invalid legislation and conduct found to be constitutionally wanting.²² The BOR, the high water mark of the Constitution, consists of a basket of 27 flexible, open-ended, interdependent, interrelated rights²³ that include administrative, civil, cultural, economic, environmental, labour,

²¹ The TAA (ss 91 – 95) sets forth the different types of assessments permissible thereunder. Section 99 thereof contains the time limits that apply for the issuance of a tax assessment.

²² De Smith SA *Constitutional and Administrative Law* 3 ed (1977) 16 emphasises the importance of a constitution as a guarantor of rights by describing it as ‘the law behind the law – the legal source of legitimate authority’ which is ‘hierarchically superior to other laws’.

²³ Mokgoro J, in *Case and Curtis* para 27, described the rights in the BOR as being ‘part of a web of mutually supporting rights’. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 150 Sachs J stated that the rights in the BOR are ‘independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special

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linguistic, political, religious and socio-economic rights.²⁴ The nature of each is evident from its text. While the extent of some rights is specified in its text, others are not. Some specified elements are introduced by ‘include’, ‘including’ or ‘which includes the right’. Examples are the rights to privacy (s 14) and the rights of detainees (s 35(2)) and of accused persons (s 35(3)). These are integrated rights comprising a set of closely associated rights, some elements whereof are determined through interpretation.²⁵

As explained above in chapter six, the BOR is a general, all-purpose charter conferring fundamental rights. Since it was not drafted with taxation or tax administration *per se* in mind, the BOR does not expressly confer rights on taxpayers as a group or class.²⁶ Indeed, it does not use the term ‘taxpayer’ nor includes taxpayer rights as a specific or special category. The BOR also does not state that the rights therein apply to tax matters.²⁷ As stated above, reference in the BOR to taxpayers is indirect and implied in its general reference to natural and juristic persons. The extension of rights in the BOR to taxpayers protects them against SARS and its officials, all of whom are repositories of public power. The extension of the BOR’s application to the tax arena promotes its spirit, purport and objects. In addition, it broadens the basis of the sovereign democratic *Rechtsstaat* in SA. The BOR inculcates a strong human rights culture as part of SA’s brand of an open and democratic society based on human dignity, equality and freedom. This pro-rights culture is a critical ingredient of the BOR’s ethos designed to bring about a cultural shift in SA’s socio-politico-legal landscape. A rights-friendly culture is evident from the considerable degree to which the provisions in the BOR accentuate the conferral, protection and enforcement of fundamental rights. First, the imposition in s 7(2) of a cluster of so-called

potential vulnerability and abuse’. See also *Laugh It Off Promotions CC v SAB International (Finances) BV and Another* 2006 (1) SA 144 (CC) paras 45-6.

²⁴ Although the rights in the BOR are generally classified as either first, second or third generation rights, Liebenberg S (2010) 53 points out that ‘[t]here are no watertight divisions between the different rights in the Bill of Rights, nor a universally accepted method of classification’.

²⁵ *S v Dzukuda and Others, S v Tshilo* 2000 (4) SA 1078 (CC) para 9; *Veldman v DPP, WLD* 2007 (3) SA 210 (CC) paras 22-3.

²⁶ This accords with the recommendation by the SALC *Project 58: Final Report on Group and Human Rights* (October 1994) 209 that ‘groups or minorities can be best protected in a bill of rights by protecting the rights of individual persons belonging to the group or minority’.

²⁷ This is unlike the position in, for example, the American Convention on Human Rights, 1969 (Art 8) which provides that ‘every person has the right to a fair hearing ... for the determination of his rights and obligations of a civil, labour, *fiscal* or any other nature’. (my emphasis)

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primary, secondary and tertiary duties on the State (discussed above in chapter three). Secondly, the entrenchment of rights and freedoms in ss 9-35. Thirdly, the prohibition in s 36(2) of a limitation of rights except as provided in s 36(1) or other provision of the Constitution. Fourthly, the conferral in s 38 of the right to seek an appropriate judicial remedy when a fundamental right is 'infringed or threatened'. Fifthly, the recognition of the existence of 'rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill' (s 39(3)).

The BOR does not operate *in vacuo* or *in abstracto* but rather in a particular socio-politico-legal context. Section 8(1) thereof is a keystone of its application in tax law. It reads: 'The Bill of Rights applies to *all* law, and binds the legislature, the executive, the judiciary and all organs of state.' (my emphasis) 'Law' bears the meaning as defined in the Interpretation Act (s 2). 'Law' includes an Act of Parliament. The phrase 'applies to all law' clearly and unequivocally indicates that the BOR permeates every 'law', irrespective of its nature and source. The CC, 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 v Smit NO and Others*²⁸ (Hyundai Motors), held that '*all statutes* must be interpreted through the prism of the Bill of Rights. *All law-making authority* must be exercised in accordance with the Constitution.' (my emphasis) Thus, the inescapable conclusion is that every law, including the TAA and all other tax statutes, must be read subject to the BOR.²⁹ It binds 'all organs of state', including SARS and the CSARS. This broad application of the BOR enables it to be a protective shield for taxpayers and a safeguard for their entrenched rights.³⁰ The efficacy of the BOR as a shield is bolstered by the Constitution being 'the supreme law': it reigns over all 'law'. Thus, every tax statute and all conduct undertaken in terms thereof may be set aside on judicial review to the extent that they are inconsistent with the Constitution.

²⁸ 2001 (1) SA 545 (CC) para 21.

²⁹ *Harksen* para 18.

³⁰ Civil tax cases in which constitutional rights were applied to taxpayers include, inter alia, *Carlson Investments* (right to just administrative action), *FNB* (right to property), *Gaertner* (right to privacy), *Jeeva* (right of access to information) and *Metcash* (right of access to courts). For an overview of the cases, see Silke J 'Taxpayers and the Constitution' (1997) 11(1) *TP* 17; Silke J 'Taxpayers and the Constitution: A battle already lost' 2002 *Acta Juridica* 282.

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The BOR is designed to avert ‘the injustices of our [apartheid] past’.³¹ Failure to apply its provisions to taxation and tax administration cases would undermine the achievement of this objective. This, it is submitted, is an important thread in the argument favouring the application of the BOR in all tax matters, both civil and criminal. A further thread of this argument is contained in s 167(7) of the Constitution. It provides that a ‘constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution’.³² Hence, any tax or other case involving an interpretation of the BOR or in which a litigant asserts a right therein, falls within the parameters of s 167(7). Thus, it is subject to the jurisdictional limits of s 167 to s 170. As shown above, constitutional matters fall outside the jurisdiction of the Tax Board, Tax Court³³ and SA’s lower courts.

Tax law operates within a broader legal framework. It involves a combination of fields of law including, inter alia, administration of deceased estates, administrative law, constitutional law, contract law, conveyancing, criminal law and human rights law.³⁴ This broad reach of tax law is apparent from various considerations. First, most (if not all) commercial transactions involving a disposition of property have a tax implication (such as, VAT, capital gains tax, transfer duty or income tax).³⁵ Secondly, tax is imposed on a myriad of taxable events (such as, estate duty for a dutiable estate on death, and income tax on taxable income earned from labour). Thirdly, the Constitution expressly deals with public administration in s 195, of which tax administration is an integral part. Fourthly, tax administration involves mainly administrative action by SARS and its officials which impacts on a taxpayer’s constitutional right to just administrative action (s 33 read with

³¹ Preamble, Constitution. Blaauw-Wolf L & Wolf J (1996) 287 refers to this as ‘the sins of the past’.

³² The CC held, in *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC) para 23, that a constitutional issue is raised whenever a court is obliged to consider constitutional rights or values. See also *Loureiro and Others v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) para 33.

³³ The TAA (s 109 and s 117) left the Tax Board and Tax Court’s jurisdiction as it was prior to its enactment. For discussion of their jurisdiction, see *Pretoria East Motors* para 2; *ITC 1527* (1992) 54 SATC 227; *Ackermans Ltd v CSARS* (2015) 77 SATC 191 (GNP) paras 15-20; *South Atlantic Jazz Festival (Pty) Ltd v CSARS* (2015) 77 SATC 254 (WCC) paras 22-3 and the authorities cited at fn 21 in chapter three above. For a review of the case law, see van Niekerk A (2013) 99-115.

³⁴ The CC, in *Metcash* para 56, held: ‘And it is notorious that the field of tax law can and often does raise a whole panoply of procedural or substantive issues derived from one or more of the individually complex and usually interlocking fields of law involved in tax disputes.’

³⁵ In this context, the term ‘disposition’ is used in a broad sense to mean, as stated in *CIR v Estate Kohler and Others* 1953 (2) SA 584 (A) 600E-F, ‘all acts in the law which affects property’. See also *Ovenstone v SIR* 1980 (2) SA 721 (A) 734H-735C.

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the PAJA).³⁶ Fifthly, tax statutes create criminal offences (for example, tax evasion) for which a taxpayer may be arrested and detained (whether in SA or abroad) and then criminally charged in a competent SA court. Sixthly, the Constitution applies vertically so that the BOR applies in taxation generally and in tax administration in particular conducted by SARS and the CSARS as constitutional organs of state.

Consequently, the BOR and the Constitution as a whole apply to taxpayers, taxation, tax administration and tax cases irrespective of their nature (that is, both civil and criminal). That their application in the tax arena was foreshadowed is a reasonable and logical inference that may be drawn from the Constitution's tone and text, particularly the fact that Chapter 13 deals with finance, including taxation. The correctness of this submission is reinforced by the instructive observation of the CC in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*³⁷ (SARFU), namely, that the 'importance of ensuring that the [public] administration observes fundamental rights and acts both ethically and accountably should not be understated'.

The Constitution, its normative values and democratic principles, are in the frontline of the defence and advancement of taxpayers' rights. The rights guaranteed in the BOR are concretised in general terms. This permits their application across all branches of law, including public, private and commercial law (such as tax law). It is, however, difficult to conceive of a context in which the nature of certain fundamental rights will permit their application in tax law and tax administration. These include the right to life (s 11), political rights (s 19), environmental rights (s 24) and health care, food, water and social security rights (s 27). On the other hand, from a taxpayer's point of view, fundamental rights which can apply in tax administration are: equality (s 9); dignity (s 10); freedom and security of the person (s 12); privacy (s 14); freedom of association (s 18); freedom

³⁶ For a discussion of s 33 in the tax arena, see Keulder C (2011) 11-42; Erasmus DN (2013) 17-60; van Niekerk A (2013) 62-84; Croome BJ & Olivier L (2015) 571-613. For a discussion of administrative justice in the pre-1994 era, see Landman AA *An Administrative Law Inquiry into the Legal Nature of the Assessment of Normal Tax* (unpublished LLM thesis, UNISA, 1985); Schweitzer AG *Aspects of the Administrative Law Relationship between the Taxpayer and the Commissioner for Inland Revenue* (unpublished LLM thesis, UCT, 1991).

³⁷ (2000) 1 SA 1 (CC) para 133.

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of movement and residence (s 21); freedom of trade (s 22); property rights (s 25); housing rights (s 26); language rights (s 30); access to information (s 32); just administrative action (s 33), access to courts or independent and impartial tribunals or forums (s 34); and fair trial rights of arrested, detained and accused persons (s 35).³⁸

As shown above, for tax law and tax administration purposes, the BOR is one of the primary sources of rights for taxpayers. The TAA is another. Fundamental rights may be asserted by taxpayers for their protection against the unbridled exercise of public power by SARS and its officials. The foregoing list of relevant fundamental rights is not exhaustive but is merely illustrative of those rights that may be accessible to natural and/or juristic taxpayers who, as discussed above in chapter six, are beneficiaries of the rights entrenched in the BOR. Other basic rights may, depending on the circumstances, be applicable in tax law and tax administration. For example, s 46(7) of the TAA stipulates that a 'senior SARS official may direct that relevant material be provided under oath or solemn declaration'. A taxpayer may lawfully refuse to take an oath or make a solemn declaration in circumstances where doing so would conflict with his religion, the practise whereof is guaranteed in the BOR (s 31(1)(a)). Furthermore, the TAA (s 47) empowers a senior SARS official to issue a notice directing a taxpayer 'to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person'. The only ground upon which the TAA permits a taxpayer to decline attending such interview is contained in s 47(4), namely, 'if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner by public notice'. It is submitted that a taxpayer can, as of right, decline to attend any such interview if the time stipulated conflicts with the practise of the taxpayer's religion. In any such instance, SARS and its officials are obliged to respect the taxpayer's right to freedom of religion and must accommodate the taxpayer's legitimate needs by scheduling the interview at a mutually convenient time.

³⁸ As indicated below at para 7.3.2, by virtue of s 44 of the TAA, the full suite of fundamental rights in s 35 of the BOR is applicable to the TAA. For a discussion of s 35, see *Ferreira* para 41; *Zuma* paras 12-40; *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC); *NDPP v King* (2010) 72 SATC 195 (SCA) 209.

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The BOR (s 32, s 33 and s 34) is important in the administrative law relationship between taxpayers and tax administrators.³⁹ Section 32(1) provides: ‘Everyone has the right of access to - (a) any information held by the state ...’⁴⁰ Section 33(1) provides: ‘Everyone has the right to administrative action⁴¹ that is lawful, reasonable and procedurally fair.’⁴² Section 33(2) provides: ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.’⁴³ Sections 32(1), 33(1) and (2) embody the values of transparency, responsiveness, reasonableness, accountability, equality, equity, propriety and the rule of law, which are the hallmarks of the ‘open and democratic society’ envisioned by s 36(1) of the Constitution.⁴⁴

The rights in s 32 and s 33 of the BOR apply *via* the medium of the PAIA⁴⁵ and the PAJA⁴⁶ respectively. The operation of these statutes, both constitutional imperatives and

³⁹ For a case law survey on ss 32, 33 and 34 in the arena of tax administration, see Silke J (2002) 282.

⁴⁰ For a discussion of s 32(1) in the context of tax administration, see Croome BJ (2010) 185-202.

⁴¹ Nugent JA held, in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24, that whether an act is administrative depends mainly on the nature of the power exercised and not on the identity of the person carrying it out. He stated that ‘administrative action’ in general terms refers to conduct of any bureaucratic functionary in performing daily functions of State involving the application of policy, usually after its translation into law, which has direct and immediate consequences for persons. Such action excludes, inter alia, the exercise of legislative and judicial powers, the formulation of policy or the initiation of legislation by the executive, and the exercise of original powers conferred on the President of SA.

⁴² At its most basic level, the right to lawful administrative action means that administrators may only exercise powers lawfully reposed in them, and that any legal requirements and preconditions that attach to the exercise of power must be satisfied. See *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) para 66.

⁴³ The duty to give reasons is central to the duty to act fairly. See *National Lotteries Board and Others v SA Education and Environment Project* (2012) 4 SA 504 (SCA) para 27. Reasons must be informative. An explanation is inadequate if it simply restates statutory provisions. Its character must afford the taxpayer a fair opportunity to make representations. Fairness demands that SARS ‘pins its colours to the mast’ so that taxpayers do not have to ‘grope inferentially’ as to the reasons for a decision. See *ABC (Pty) Ltd (in liquidation) v CSARS* [2016] ZATC 4 paras 29-33. Also, see *Nkondo and Others v Minister of Law and Order and Another* 1986 (2) SA 756 (A) 772-73; *ITC 1811* (2006) 68 SATC 193 200-03; *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) paras 60-4; *CSARS v Sprigg Investments 117CC t/a Global Investment* (2011) 73 SATC 114 (SCA) 120-21. See also Wilson K ‘Taxpayer entitled to reasons for decision not to remit penalties’ (2005) *Australian Weekly Tax Bulletin* 16. For discussion of the adequacy of reasons, see de Ville JR (2005) 292-95; van Dorsten JL ‘The right to reasons for decisions in taxation matters’ part I (2005) 54(10) *The Taxpayer* 185 187-90.

⁴⁴ In a constitutional democracy, core values of administrative justice include lawfulness of action, procedural fairness, reason-giving and justification for administrative action. See Corder H ‘Administrative justice: A cornerstone of South Africa’s democracy’ (1998) 14(1) *SAJHR* 38 41.

⁴⁵ See Plasket C (2002) 486-502; Currie I & de Waal J (2014) 692-709. For the persons entitled to exercise the rights in the PAIA, see the definitions of ‘requester’ read with ‘person’ (s 1, PAIA).

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by-products of the BOR, is mediated by the Constitution and its values. In this context, the twin, related principles of avoidance and constitutional subsidiarity apply. The former 'dictates that remedies should be found in common law or legislation before resorting to constitutional remedies'.⁴⁷ The latter 'holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction'.⁴⁸ These principles enjoin taxpayers to rely, first, on common law and statutory rights before resorting to rights guaranteed in the BOR.⁴⁹ Taxpayers' administrative law rights⁵⁰ find application when conduct by SARS or its officials constitutes 'administrative action' defined in the PAJA (s 1).⁵¹ The BOR (s 33), read with the PAJA, entrench the right to procedural fairness, a part of the rules of natural justice⁵² in the maxims *audi alteram partem* ('hear the other side')⁵³ and *nemo iudex in propria causa* ('no one may be a judge in his own cause').⁵⁴

⁴⁶ See Plasket C (2002) 299-336 461-86; Hoexter C 'Just Administrative Action' in Currie I & de Waal J *The Bill of Rights Handbook* 6 ed (2014) 644-90. All statutes relating to administrative action must be read with the PAJA. See *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) para 101. The rights in the PAJA apply to 'any person'.

⁴⁷ Hoexter C 'Just Administrative Action' in Currie I & de Waal J (2014) 649.

⁴⁸ Hoexter C 'Just Administrative Action' in Currie I & de Waal J (2014) 649-50. Cameron J, in *My Vote Counts* para 46, explained subsidiarity as referring to 'a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail'. See also *My Vote Counts* paras 47-9 160-83; *Grancy Property Ltd and Another v Gihwala and Others; In re: Grancy Property Ltd and Another v Gihwala and Others* (unreported case nos. 1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014) para 198.

⁴⁹ *Mazibuko* para 73; *My Vote Counts* paras 47-61 160-67; *Sali v National Commissioner of the South African Police Service and Others* 2014 (9) BCLR 997 (CC) para 72.

⁵⁰ Taxpayers' administrative law rights are bolstered by the TAA. For example, the injunction in s 7 thereof that the 'Commissioner or a SARS official may not exercise a power or become involved in a matter pertaining to the administration of a tax Act' if a conflict of interest exists, fits naturally with the Constitution (s 33(1)) read with the PAJA.

⁵¹ *Deacon v Controller of Customs and Excise* (1999) 61 SATC 275 (SECLD) 281-87. See also *Plasma View Technologies (Pty) Ltd v CSARS* (2010) 72 SATC 44 (T) 57; *Viking Pony Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC) para 37. For the PAJA definition of 'administrative action', see the relevant part thereof quoted at fn 180 in chapter three above. It is submitted that an exercise of a power conferred by the impugned TAA provisions is 'administrative action' as per the definition of this term in the PAJA.

⁵² For comment on the natural justice rules when power is exercised, see *Chairman, Board on Tariffs and Trade and Others v Brenko Inc and Others* (2002) 64 SATC 130 (SCA) paras 12-14; *Pick 'n Pay Retailers (Pty) Ltd v CSARS and Others* 2008 BIP 187 (C) paras 16-18.

⁵³ *Degussa Africa (Pty) Ltd v International Trade Administration Commission and Others* (2007) 69 SATC 146 (T) 157D. In *Contract Support Services (Pty) Ltd and Others v CSARS and Others* (1998) 61 SATC 338 350 Brett AJ held that the *audi alteram partem* rule is not inflexible or absolute so that it does not necessarily apply to every administrative act of SARS. See also *Arepee Industries Ltd v CIR* (1993) 55 SATC 139 (N) 144. In addition, see Plasket C (2002) 398-400.

⁵⁴ For an analysis of the applicable law concerning bias in public administration, see *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A)

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Democratic values require administrative action to be subject to supervision by an independent judiciary.⁵⁵ A statutory provision rendering the exercise of an executive or administrative discretion⁵⁶ immune from appeal or review⁵⁷ is a 'limitation' of the right contained in s 34 of the BOR. Such limitation must pass muster in s 36 (discussed below in chapter eight). Section 34⁵⁸ provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair⁵⁹ public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' This provision, which incorporates the values of independence, accountability, impartiality and fairness in civil proceedings, as well as access to, or the pursuit of, justice, protects taxpayers against self-help by SARS and its officials.⁶⁰ Moreover, it prevents a dilution of rights by legislation ousting a court's jurisdiction or compelling disputes to be adjudicated by a 'lame duck' tribunal. Section 34 also guarantees a right of judicial review of, inter alia, proceedings in a Tax Court and Tax Board.

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- 690A-695B. For a detailed review of the relevant case law, see Plasket C (2002) 396-98. Patel AJ explained, in *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T) 1068D-G, that whilst SARS has an overriding duty to act reasonably and fairly towards taxpayers, public interest demands that 'those who purloin by means of gratuitous tax profiteering, evasion or avoidance stratagems must face the full rigour of the law without misusing the Constitution which may legitimately supersede those rights of exaggerated individualism'.
- ⁵⁵ For a discussion of judicial independence, see de Vos P, Freedman W (eds) & Brand D *et al* (2014) 224-46. Administrative decisions are judicially reviewable. See Williams RC 'The concept of a "decision" as the threshold requirement for judicial review in terms of the Promotion of Administrative Justice Act' (2011) 14(5) *PELJ* 230. Judicial review is the most effective way to protect taxpayers against unreasonable State action that infringes on taxpayers' rights or freedoms. See Hultqvist A 'Taxpayers' rights in Sweden' (1997) 7(1) *RLJ* 43 54-6.
- ⁵⁶ *Holden's Estate v CIR* 1960 (3) SA 497 (A) 502D-E. See also van Schalkwyk L 'The discretionary powers of the Commissioner for the South African Revenue Service – are they constitutional?' (2004) 12(2) *MAR* 165 170.
- ⁵⁷ For a discussion of the distinction between review and appeal in administrative law and its relevance, see Corder H 'Administrative Justice' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 27-20 – 27-23.
- ⁵⁸ See Budlender G 'Access to courts' (2004) 121(2) *SALJ* 339; Davis D 'Access to Courts' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 28-2. Section 34 does not protect the correctness of decisions. See *Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC) para 4. For a discussion of s 34 in a tax context, see Croome BJ (2010) 254-65; Keulder C (2011) 43-62. Section 34 applies only in civil disputes. See *S v Pennington* 1997 (4) SA 1076 (CC) para 46; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 28. The CC, in *Bernstein* para 51, held that in a democracy the State has a duty to establish independent tribunals for civil disputes.
- ⁵⁹ For a discussion of 'fairness' in this context for tax purposes, see *CSARS v Hawker Aviation Services Partnerships* 2005 (5) SA 283 (T) paras 58-9.
- ⁶⁰ Self-help violates the rule of law. See *Metcash* para 51 (and the kindred cases cited at fn 86 of the judgment); *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC).

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The European Court of Human Rights held⁶¹ that, except in tax cases involving a criminal issue, the European Convention on Human Rights (ECHR) does not protect taxpayers because civil tax cases do not involve issues of ‘civil rights and obligations’ as contemplated by the ECHR.⁶² This means that, in such cases, a taxpayer does not have the right to a fair hearing enjoined under the ECHR (Art 6) which entails, inter alia, the right of access to courts, to justice within a reasonable time, to a public hearing, and to a fair and impartial tribunal.⁶³ This is not the position in SA under the Constitution. Sections 7(2), (3), 8(1), (2), (3), 36, 37, 38 and 39 thereof knit together a blanket of protection around the rights in the BOR. This built-in protective mechanism bolsters the efficacy of the BOR as a guardian of rights. Unlike the ECHR, the BOR does not operate in a manner excluding its operation from civil tax cases. A contrary view runs counter to the spirit, purport and objects of the BOR (discussed above in chapter six). The construction of the BOR contended for here is in harmony with the rights culture established by the Constitution. Moreover, this construction reinforces the stature of the BOR as ‘a cornerstone of democracy in South Africa’ (s 7(1)). Thus, the protection of taxpayers’ rights in civil and criminal tax cases is part of general constitutional protection.

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7.3.2 Taxpayers’ rights in the Tax Administration Act, 2011

Chapter ten below examines the constitutionality of certain limits imposed or permitted by the TAA on taxpayers’ fundamental right to privacy entrenched in s 14 of the BOR. That discussion considers the TAA’s negative impact. To avoid a skewed evaluation of the TAA’s overall impact, and to answer the general research question formulated above in chapter one, consideration must also be given to the TAA’s positive impact. This

⁶¹ See, for example, *Ferrazzini v Italy* (application no. 44759/98) (2001) STC 1314; *Jussila v Finland* (application no. 00073053/2001). See also Tiley J ‘Human rights and taxpayers’ (1998) 57(2) *Cambridge LJ* 269; Freeman J ‘Tax, crime and human rights’ (2002) 6 *British Tax Review* 445; Gregg M ‘The protection of human rights and the rights to a fair trial in the light of the *Jussila* case’ (2007) 35(11) *Intertax* 610.

⁶² See Baker P ‘The application of the European Convention on Human Rights to tax matters in the United Kingdom’ available at http://www.taxbar.com/documents/App_European_Convention_Philip_Baker_OC.pdf (accessed 6 October 2014).

⁶³ Attard R ‘The Classification of Tax Disputes, Human Rights Implications’ in Kofler G, Maduro MP & Pistone P (eds) *Human Rights and Taxation in Europe and the World* (2011) 397.

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ensures that a balanced perspective is given on its cumulative effect. As explained above, rights and duties are correlatives. Thus, the conferral of rights to taxpayers imposes a corresponding legal duty on SARS and its officials to respect those rights.⁶⁴ A violation of any such right would entitle a taxpayer to seek appropriate legal redress in either a competent court of law or other competent statutory forum or tribunal with jurisdiction. Whilst some taxpayer rights in the TAA have historically been part of South African law (for example, the right to secrecy of taxpayer information,⁶⁵ and to finality of a tax assessment),⁶⁶ other rights are new (for example, the rights contained in s 16(1), s 33 and s 42(1)). This marks a definitive turning point for tax administration in SA.⁶⁷ The TAA is not legislation contemplated by the Constitution to give practical expression to any particular constitutional right enjoyed by persons in their capacity as taxpayers. The TAA prescribes a suite of express and implied procedural and substantive rights applying to all natural and juristic taxpayers. However, the TAA does not do so in an orderly, structured fashion. The rights of taxpayers codified in the TAA are scattered across the statute. Therefore, they must be distilled through careful analysis of the TAA's provisions. The following is a catalogue of taxpayer rights extracted from the text of the TAA:

- (i) the right to unbiased, fair and impartial tax administration by SARS officials who cannot 'exercise a power or become involved in a matter pertaining to the administration of a tax Act' if a conflict of interest exists (s 7);⁶⁸

⁶⁴ Since s 8(1) of the BOR provides that 'all organs of state' are bound by the BOR, a positive constitutional duty is imposed on SARS and its officials to respect and protect taxpayers' rights in the BOR. This duty is reinforced by s 195(1) of the Constitution (discussed above in chapter three).

⁶⁵ *Ontvanger van Inkomste, Lebowa en 'n Ander v Meyer NO* 1993 (4) SA 13 (A); *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD).

⁶⁶ *SIR v Trow* 1981 (4) SA 821 (A); *ITC 1776* (2004) 66 SATC 296.

⁶⁷ Luoga FDAM (2002) 12 contends, with merit, that the construction of taxpayers' rights ought to be viewed as part of a holistic effort 'to achieve a more complete democratic governance'.

⁶⁸ SARS 'must with Olympian impartiality hold the scales between the taxpayer and the [*fiscus*]' (*Reckitt and Coleman (New Zealand) Ltd v Taxation Board of Review and Another* (1966) NZLR 1032 (CA), quoted with approval in *South African Co-operative Citrus Exchange Ltd v Director-General Trade and Industry and Another* 1997 (3) SA 236 (SCA) 244H-245A). Impartiality is an inherent quality of an officer exercising a power entrusted to him/her and making a decision that may affect the rights of others. See *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources and Others* [2016] ZALCJHB 31 (3 February 2016) para 96. For a definition of 'impartiality', see *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafood's Division Fish Processing)* 2000 (3) SA 705 (CC) para 13. The TAA (s 7) incorporates the right to a just and fair tax system. This embodies the

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- (ii) the right to request that a SARS official produce an identity card when he/she ‘exercises a power or duty for purposes of the administration of a tax Act in person outside SARS premises’ (s 8(2));
- (iii) the right to presume that a ‘decision made by a SARS official and a notice to a specific person issued by SARS, excluding a decision given effect to in an assessment or a notice of assessment’ is made by an official duly authorised to do so or is duly issued by SARS (s 9(1));
- (iv) the right to finality of a decision if ‘all the material facts were known to the SARS official at the time the decision was made’ (s 9(2));⁶⁹
- (v) the right to lodge a complaint with the Tax Ombud ‘regarding a service matter or a procedural or administrative matter arising from the application of the provisions of a tax Act by SARS’ (s 16(1));
- (vi) the right to communicate with SARS in any of the official languages of SA recognised in s 6(1) of the Constitution (s 33);⁷⁰
- (vii) the right to the production of a written authorisation issued by a senior SARS official for a field audit or criminal investigation to be conducted (s 41(2));⁷¹

values enshrined in the BOR to administrative justice (s 33) and the principles in s 195(1) requiring public administration to promote and maintain high standards of professional ethics and the provision of services impartially, fairly, equitably and without bias (ss 195(1)(a) and (d)). The CC held, in *Van Rooyen* para 37, that abuses by a public functionary acting under a statute are to be remedied in accordance with the Constitution and not by invalidating the empowering statute.

⁶⁹ This provision encapsulates the right to reasonable administrative action in s 33(1) of the BOR. This right is also encompassed by other TAA provisions (such as, s 47(4), s 64(5), s 99, s 171 and s 218(1)). See *Ackermans Ltd v CSARS* (2015) 77 SATC 191 (GNP) paras 27-31. For a discussion of the right in s 33(1), see Plasket C (2002) 338-90; de Ville JR (2005) 195-216; Hoexter C ‘Just Administrative Action’ in Currie I & de Waal J *The Bill of Rights Handbook* 6 ed (2014) 669-71. The Court, in *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA) para 26, held: ‘But it is also in the public interest that disputes should come to an end - *interest reipublicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right - memories fade; witnesses become unavailable; documents are lost.’

⁷⁰ This right flows from the fundamental right to use a language of choice as entrenched in s 30 of the Constitution. It, however, does not include an obligation on SARS to communicate with taxpayers in plain, understandable language. The TAA does not confer any such right on taxpayers.

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- (viii) subject to the exception provided in s 42(5), the right to be informed by way of a ‘report indicating the stage of completion of the audit’ (s 42(1));
- (ix) the right to be informed that an audit or a criminal investigation ‘was inconclusive’ (s 42(2)(a)) or, subject to the exception catered for in s 42(5), to be provided with ‘a document containing the outcome of the audit, including the grounds for the proposed assessment or decision’, unless ‘the right to receive the document’ is waived⁷² (s 42(2)(b) read with s 42(4));⁷³
- (x) the right to respond to the outcome of an audit (s 42(3));
- (xi) the right, during a criminal investigation, to the ‘taxpayer’s constitutional rights as a suspect in a criminal investigation’ (s 44(1));⁷⁴
- (xii) the right to refuse consent to a SARS official to enter, for inspection purposes, ‘a dwelling-house or domestic premises, except any part thereof used for the purposes of trade’ (s 45(2)).⁷⁵

⁷¹ A tax audit is, thus, a process pursuant to the taking of a prior formal decision. This is unlike the position in, for example, Hungary. See Deak D (1997) 30. By virtue of s 6(1) of the TAA, the power to authorise an audit may only be exercised ‘for purposes of the administration of a tax Act’.

⁷² Waiver occurs when a right, remedy, privilege, power, interest or benefit is not asserted. See *Sali v National Commissioner of the SA Police Service and Others* 2014 (9) BCLR 997 (CC) para 53.

⁷³ This provision encapsulates the right to procedurally fair administrative action in s 33(1) of the Constitution. The same applies to other TAA provisions (such as, s 44(1), s 47(3), s 48(1), s 53(1), s 63(2), ss 96(1) and (2), s 172(1) and s 242(2)). For a critical review of this constitutional right, see Plasket C (2002) 394-452; de Ville JR (2005) 217-86; Hoexter C ‘Just Administrative Action’ in Currie I & de Waal J *The Bill of Rights Handbook* 6 ed (2014) 672-82. Fairness is a relative concept with no precise meaning. It is an ‘elastic and organic concept’ taking account of, inter alia, policy considerations and social values, norms and realities. See *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) para 127; *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T); *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) paras 53-65. Fairness is a question decided on the facts of each case. See *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) paras 12-13. In *McNabb v US* (1943) 318 US 332 347, referred with approval in *Ferreira* para 256, Frankfurter J insightfully observed: ‘The history of liberty is the history of procedural safeguards.’

⁷⁴ This includes the right to remain silent entrenched in s 35 of the Constitution. See *Osman v Attorney General, Transvaal* 1998 (2) SACR 493 (CC). The TAA (s 57) limits a taxpayer’s right to remain silent. However, in *Ferreira* para 96, the CC held that self-incriminating evidence given under compulsion is inadmissible.

⁷⁵ This is a derivative of the right to privacy in s 14 of the Constitution. The same applies to other TAA provisions (such as, s 48(5), ss 62(1) and (2), s 63(4) and s 67(4)). Any encroachment on a taxpayer’s privacy rights must be no more intrusive than is reasonably necessary.

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- (xiii) the right to be informed ‘with reasonable specificity’ as to the nature of the relevant material requested by SARS (s 46(6))⁷⁶ or required to be produced at an interview with a SARS official (s 47(3));
- (xiv) the right to ‘decline to attend an interview, if the distance between the place designated in the notice and the usual place of business or residence of the person exceeds the distance prescribed by the Commissioner’ (s 47(4));
- (xv) the right to receive at least 10 business days’ prior written notice of the duty to make available at the taxpayer’s premises such relevant material which a SARS official may require for purposes of conducting an audit or criminal investigation under s 40 (s 48(1) read with s 48(3));
- (xvi) the right to refuse consent to a SARS official to enter, for audit or criminal investigation purposes, ‘a dwelling-house or domestic premises, except any part thereof used for the purposes of trade’ (s 48(5));
- (xvii) the right, with ‘just cause’, to ‘obstruct a SARS official from carrying out the audit or investigation’ or ‘refuse to give the access or assistance as may be required under subsection (1)’ (s 49(2));
- (xviii) the right to recover from SARS the cost for photocopying facilities (s 49(3));
- (xix) the ‘right to have a representative present when’ appearing ‘as a witness’ at an inquiry proceeding authorised under s 50 (s 52(3));⁷⁷
- (xx) the rights to receive prior ‘notice in writing ... to appear before the inquiry’ authorised under s 50 ‘for the purpose of being examined under oath or solemn declaration’ (s 53(1)(a)) and to ‘produce any relevant material in the custody of the person’ (s 53(1)(b));

⁷⁶ The provisions of s 46 of the TAA are peremptory so that compliance therewith is mandatory. See *CSARS v Brown* (unreported case no. 561/2016) [2016] ZAECPEHC 17 (5 May 2016) para 39.

⁷⁷ For the status in law of evidence adduced by a taxpayer at an enquiry conducted in terms of the TAA (s 52), see *CSARS v Sassin and Others* [2015] 4 All SA 756 (KZD) paras 58-69.

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- (xxi) the right to refuse access to premises in the absence of the production of a search warrant by a 'SARS official exercising a power under a warrant referred to in section 60' (s 61(1) read with s 61(2));⁷⁸
- (xxii) the right to decency and order from SARS officials during a search, including the right to be searched by a person of the same gender (s 61(5));⁷⁹
- (xxiii) the right to refuse assistance to a SARS official during the conduct of a search which is not 'reasonably required for the execution of the warrant' (s 61(7));
- (xxiv) the right that SARS will preserve, and not destroy, 'relevant material seized' during a search and will return all such material to the taxpayer (s 61(8));⁸⁰
- (xxv) unless identified in a search warrant, the right to refuse consent to a SARS official to enter and search 'a dwelling-house or domestic premises, except any part thereof used for purposes of trade' (s 62(2));
- (xxvi) the rights, prior to a SARS official carrying out a search without a warrant, to be informed 'that the search is being conducted under this section' (s 63(2)(a)) and 'of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search' (s 63(2)(b));

⁷⁸ This right has its roots in *Haynes v CIR* 2000 (6) BCLR 596 (Tk). As for requirements to issue a warrant, see *Goqwana* paras 15-19. Items searched and seized may include those owned by third parties (see *Deutschmann NO and Others v CSARS*; *Shelton v CSARS* 2000 (2) SA 106 (E)), provided the warrant indicates the nexus between the items and the taxpayer's non-compliance or offence (see *Ferucci and Others v CSARS and Another* 2002 (6) SA 219 (C) (*Ferucci*)). Prior notice of search warrant applications is, in certain circumstances, not required. See *Shelton v CSARS* 2002 (2) SA 9 (SCA) para 17.

⁷⁹ This right is consistent with taxpayers' rights to human dignity (s 10), to freedom and security of the person (s 12(1)) and/or to bodily integrity (s 12(2)). The obligation in s 61(5) is consonant with the *dictum* in *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) para 71. For a discussion of respect for human dignity in tax administration, see Deak D 'Pioneering decisions of the Constitutional Court of Hungary to invoke the protection of human dignity in tax matters' (2011) 39(11) *Intertax* 534-538. See also *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) paras 25-6. The rights in ss 12(1) and (2) of the BOR are implicated when there is an immediate, substantial threat to physical security or bodily integrity. See *Bernstein* paras 139-40; *Ferreira* para 184; *Law Society* para 58. For the inviolability of human dignity at international law, see Jackson VC (2004) 15-20.

⁸⁰ This right is linked with s 25(1) of the BOR. See also *Parak v Receiver of Revenue* 1928 NPD 433.

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- (xxvii) the right to refuse consent to a SARS official to enter and search without a warrant ‘a dwelling-house or domestic premises, except any part thereof used for purposes of trade’ (s 63(4));
- (xxviii) the right to a ‘determination’ by an approved attorney within ‘21 business days’ on whether ‘relevant material’, as defined in the TAA (s 1), seized by SARS during a search is protected by ‘legal professional privilege’ (s 64(5));⁸¹
- (xxix) the right to a review of the ‘determination’ made under s 64(5) (s 64(6));⁸²
- (xxx) the right to examine and copy ‘relevant material seized’ in a search (s 65(1));
- (xxxi) the right to request that SARS ‘return some or all of the seized material’ and ‘pay the costs of physical damage caused’ in a search and seizure’ (s 66(1));

⁸¹ The attorney performs a quasi-judicial function aimed at resolving a dispute concerning the status of ‘relevant material’ seized in a search. For the approach to determine the nature of the function performed, see *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) paras 17-26. Section 34 of the Constitution entrenches the right ‘to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum’. Section 64(5) of the TAA confers a discretion on the attorney to decide the manner of the process as he/she ‘deems fit, including considering representations made by the parties’. There is no obligation on the attorney to convene a ‘hearing’. He/she may simply receive and consider written submissions. Conversely, s 64(5) does not embody the right to a ‘hearing’. The absence of a ‘hearing’ renders the process susceptible to a constitutional attack under s 36 for limiting the taxpayers’ fundamental right contained in s 34.

⁸² The attorney’s ‘determination’ is a quasi-judicial function affecting a taxpayer’s rights to property and/or privacy. See *Receiver of Revenue, Port Elizabeth v Jeeva and Others, De Klerck and Others v Jeeva and Others* 1996 (2) SA 573 (SCA) 579I-580A. The attorney must bring an impartial, independent mind to bear on the dispute. See *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) paras 39 48. The TAA (s 64(6)) provides that if ‘a party is not satisfied with the determination’ then recourse may be made to a court. Thus, a party may *appeal* the correctness of a ‘determination’. This appeal does not take place within the framework of the objection and appeal process in s 104, s 107 and s 133 of the TAA. The manner and form thereof is not specified in the TAA or the regulations promulgated thereunder. The ‘determination’ records a ‘decision’ as defined in the PAJA (s 1). It is a ‘declaration’ (para (e)) and/or a decision relating to the retention of an article (para (f)). The attorney is an ‘administrator’ as defined who is a natural person exercising a public power under the TAA, an ‘empowering provision’ as defined in the PAJA (s 1). The ‘determination’ is ‘administrative action’ as defined in the PAJA (s 1). It does not fall into any category excluded therefrom. Thus, the ‘determination’ is reviewable in terms of the PAJA. The ‘attorney’ is not a tribunal or forum akin to, for example, the Commission for Conciliation, Mediation and Arbitration. The TAA is also not comparable to the Labour Relations Act 66 of 1995. Thus, it is submitted that the *ratio decidendi* in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 104 is inapplicable. If this view is incorrect, then the ‘determination’ is judicially reviewable under the Constitution or the common law.

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- (xxxii) the right, after SARS declines a request for the return of the seized material or payment of compensation, to ‘apply to a High Court for the return of the seized material or payment of compensation for physical damage caused during the conduct of the search and seizure’ by a SARS official (s 66(2)),⁸³
- (xxxiii) the right to secrecy of information disclosed to SARS (s 67(4));
- (xxxiv) the right against self-incrimination in respect of an ‘admission by the taxpayer of the commission of a tax offence’ (s 72(2));
- (xxxv) the right to obtain disclosure from SARS of information pertaining to the taxpayer’s own affairs (s 73(1));⁸⁴
- (xxxvi) the right to apply for a ‘binding private ruling’ and a ‘binding class ruling’ (s79) and a ‘binding general ruling’ (s 89);
- (xxxvii) the right to request a reduced assessment if any of the circumstances listed in ss 93(1)(a) - (d) exists (s 93);
- (xxxviii) the right under s 96 to receive ‘a notice of the assessment made by SARS stating’ the details prescribed in ss 96(1)(a) - (g);⁸⁵
- (xxxix) the right to initiate a review application to a competent High Court against a jeopardy assessment on the grounds stipulated in ss 94(2)(a) and/or (b);
- (xl) in the case of an estimated assessment issued under s 95 ‘or an assessment that is not fully based on a return submitted by the taxpayer’, the right to receive a written ‘statement of the grounds for the assessment’ (s 96(2)(a));⁸⁶

⁸³ The TAA (s 11(4)) imposes certain procedural limitations on a taxpayer’s right to institute ‘legal proceedings in the High Court against the Commissioner’. A threat of legal action is likely to have a deterring ‘chilling effect’ (Greenbaum A (1997) 151) causing SARS officials to think twice before pursuing a course of action in relation to a taxpayer’s property.

⁸⁴ This provision encompasses the right of access to information in s 32 of the Constitution.

⁸⁵ This right has its roots in *Singh* paras 21-2. Taxpayers have ‘the right to [receive] an assessment that reflects the correct amount of tax’. See Croome BJ (2010) 322.

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- (xli) in the case of a jeopardy assessment, the right to be informed by SARS of ‘the grounds for believing that the tax would otherwise be in jeopardy’ (s 96(2)(b));
- (xlii) subject to the exceptions catered for in s 99(2), the right to the finality of an assessment issued by SARS (s 99(1) read with s 100);⁸⁷
- (xliii) the right to object against an assessment or decision (ss 104(1) read with (2));
- (xliv) the right to appeal against an assessment or decision by SARS to an independent forum, namely, the Tax Board or Tax Court (s 107(1));⁸⁸
- (xlv) the right, under the *audi alteram partem* rule, to appear and be heard at an appeal before the Tax Board (s 113(5)) and the Tax Court (s 125(2));
- (xlvi) the right to request consent for legal representation at a hearing before the Tax Board (s 113(8));⁸⁹
- (xlvii) the right to receive, within 60 business days after the conclusion of a hearing, a ‘written statement of the tax board’s decision that includes the tax board’s findings of the facts of the case and the reasons for its decision’ (s 114(2));

⁸⁶ This right is the corollary of the duty on SARS to act ‘in an administratively fair manner’ (*Pretoria East Motors* para 11). As regards the right to receive reasons for decisions taken, see *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) paras 62-4.

⁸⁷ For a discussion of finality of assessments, see *CSARS v Brummeria Renaissance (Pty) Ltd and Others* 2007 (6) SA 601 (SCA) para 26; *Medox Ltd v CSARS* 2015 (6) SA 310 (SCA) para 13. Honesty and integrity in the completion of a tax return is the most effective measure a taxpayer may employ to avoid, object to, or defend against the reopening of a tax assessment by SARS.

⁸⁸ The procedure for objections and appeals are regulated by rules issued under the TAA (s 103), some of which confer rights. For example, the right to request reasons for a tax assessment (rule 6). The CC, in *Metcash* para 33, held that SARS’s decisions that are not susceptible to objection or appeal may be judicially reviewed under the common law or the PAJA. For an exposition on the nature of a review, see *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) paras 34-6. Certain TAA provisions (such as, s 66(2), s 83, s 104(1), s 107(1), s 125(2), s 133, s 163(9) and s 224) underscore the right of access to courts, tribunals or forums in s 34 of the BOR. Tax Courts may consider whether the issuance of a tax assessment involved the proper exercise of discretion. Such ‘appeals’ are in reality a ‘review’ on customary grounds. See *AB (Pty) Ltd v CSARS* [2014] ZATC 1 para 5; *ABC (Pty) Ltd v CSARS* [2015] ZAWCHC 8 (6 February 2015) para 22; *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) paras 19-21.

⁸⁹ A Tax Board is not a court of law. Thus, no automatic right to legal representation exists in that forum. See *CCMA and Others v Law Society, Northern Provinces* 2014 (2) SA 321 (SCA) para 19.

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- (xlviii) the right to appeal a Tax Board (s 115(1)) and Tax Court decision (s 133(1));
- (xlix) the right to ‘abandon the whole or a part of a judgment’ (s 141(1));
- (l) the right to initiate a ‘settlement’ procedure for a ‘dispute’ (s 142 with s 144);
- (li) the right to the recovery of monies by certain taxpayers (s 160);
- (lii) the right to receive notice of a preservation order granted (s 163(5));
- (liii) the right to apply for variation or rescission of a preservation order (s 163(9));
- (liv) the right to apply to a senior SARS official for a suspension of the operation of the so-called ‘pay now, argue later’ rule applicable in tax law (s 164(2));
- (lv) the right to receive a statement of account from SARS ‘reflecting the amounts currently due and the details that SARS considers appropriate’ (s 165(4));
- (lvi) the right to request that a tax debt be paid in agreed instalments (s 167, s 168);
- (lvii) the right to preclude SARS from initiating recovery proceedings for a tax debt after ‘15 years from the date the assessment of tax, or a decision referred to in section 104(2) giving rise to a tax liability, becomes final’ (s 171);
- (lviii) subject to s 172(3), the right to receive 10 business days’ notice of SARS’s intention to file at court a certified statement of the tax payable (s 172(1));⁹⁰
- (lix) the right to request that SARS amend a third party notice ‘to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependents’ (s 179(4));⁹¹

⁹⁰ For a discussion of s 172(1), see *Lifman and Others v CSARS and Others* [2016] 1 All SA 225 (WCC) paras 31-2. The ‘certified statement’ is, under s 174, ‘treated as a civil judgment lawfully given’. Such a statutory ‘judgment’ strengthens SARS’s right to enforce a tax assessment that relates to the debt forming the subject matter of the certified statement. See *CSARS v Hawker Air Services (Pty) Ltd: In re CSARS v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA) para 20. See also Moosa F ‘Rescission of a tax judgment’ (April 2012) *DR* 30.

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- (lx) the right to receive payment of a tax refund (s 190);⁹²
- (lxi) the right to request a senior SARS official to write off a tax debt (s 195 read with s 197) or to compromise a tax debt (s 200);⁹³
- (lxii) the right to request a remission of a penalty (s 216 and s 217);
- (lxiii) the right to remission of a penalty ‘if SARS is satisfied’⁹⁴ that any of the circumstance referred to in s 218(2) rendered the person to whom the penalty was imposed incapable of complying with the relevant obligation (s 218(1));
- (lxiv) the right to object and appeal against a decision not to remit an administrative non-compliance penalty (s 220) and an understatement penalty (s 224);
- (lxv) the right to apply for voluntary disclosure relief (s 226);
- (lxvi) the right to apply for written confirmation of tax compliance status (s 256(1));
- (lxvii) the right to be represented by a tax practitioner duly registered under s 240;⁹⁵

⁹¹ This right is associated with the right to human dignity in s 10 of the BOR. The rights to housing (s 26), health care, food, water and social security (s 27), and education (s 29) may also apply here.

⁹² In law, ‘payment’ means ‘the delivery of what is owed by a person competent to deliver to a person competent to receive’. In other words, “‘the satisfaction or performance’ of an obligation’. See *Nkata v Firstrand Bank Ltd and Others* 2016 (4) SA 257 (CC) paras 48-9. Under the rule of law, SARS cannot collect more tax than a taxpayer is liable to pay. A taxpayer has the implied right to pay no more than the correct amount of tax properly calculated. See *GB Mining and Exploration SA (Pty) Ltd v CSARS* (2014) 76 SATC 347 (SCA) para 24.

⁹³ A refusal by a functionary of SARS to consider an application for a tax write off or compromise, a legal duty under the TAA, may be countered by a mandamus. See *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* [2015] 2 All SA 251 (SCA) para 17. An unreasonable refusal to approve a tax write off or compromise is reviewable under the PAJA. The decision-maker must keep an open mind, have a complete picture of the facts and circumstances within which the administrative decision is taken, and apply an impartial, independent mind to the matter in a fair and regular manner. See *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 24. For a discussion of the requirements for fairness by public officials exercising administrative powers, see *New Clicks* para 152 (and the local and foreign authorities cited there).

⁹⁴ The Court, in *Natal Estates Ltd v CIR* 1975 (4) SA 177 (A) 208, held: ‘Once it is recognised that there should be some evidence of the Secretary’s satisfaction, the taxpayer should be informed of it plainly, and of the particular conduct in respect of which he is satisfied The taxpayer should not have to grope inferentially for the Secretarial satisfaction, or the particular form of dereliction of duty to which it relates.’

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- (lxviii) the right to receive prior written notification of SARS's intention to lodge a complaint under s 241 against a tax practitioner with a 'controlling body' and of its intention, as part of such complaint, to make disclosure of information relating to the taxpayer's tax affairs (s 242(2));⁹⁶
- (lxix) the right to 'lodge with SARS an objection to the lodging of the complaint or disclosure of the information' (s 242(3));
- (lxx) the right to apply for an extension of time in circumstances where 'SARS is authorised to extend a deadline' (s 244(3)); and
- (lxxi) the right of a 'company' as defined to receive service, delivery or transmission of statutory notices and documents at an appointed place (s 247(1)).

An analysis of the minutiae of taxpayers' rights in the TAA falls beyond the scope of this study. All such rights impose duties on SARS and establish an objective standard against which its conduct may be tested. Unlike an entitlement to fundamental rights, an entitlement to rights in the TAA is not dependent on, nor connected to, a taxpayer's legal nature. Thus, the TAA rights apply to every 'taxpayer' as defined in s 151, irrespective of the taxpayers' legal nature and physical location. A taxpayer is also entitled to the rights in the TAA even if the taxpayer is not entitled to benefit from the fundamental rights in the BOR. Some TAA rights give effect to aspects of, or are an application of, the rights in the BOR. This is a positive feature bringing into play the principles of avoidance and subsidiarity discussed above. Thus, to the extent that a fundamental right finds expression in the TAA, whether as a freestanding right or not, a taxpayer must rely on the TAA when seeking to enforce that right and protect it against infringement.⁹⁷ Thus, in SA, the TAA is a primary source of taxpayers' rights. This shows that, in SA, the concept of taxpayers' rights is not simply a legal theory but a reality found in its substantive laws.

⁹⁵ The TAA does not contain a right for taxpayers to be informed of their right to representation. Nor does it codify a taxpayer's right to be informed of his due process rights.

⁹⁶ This provision incorporates the notion of procedural fairness, part of lawful administrative action.

⁹⁷ If legislation exists which fulfils a constitutional right, then the statute (not the Constitution) is the prime mechanism for its enforcement. The embodiment of the right in the Constitution then plays only 'a subsidiary or supporting role'. See *My Vote Counts* para 53.

7.3.3 Other types and other legal sources of taxpayers' rights

The BOR is not an exhaustive code of rights and freedoms.⁹⁸ This is evident from s 39(3) thereof. It reads: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'.⁹⁹ This provision gives recognition to taxpayers' rights and freedoms emanating from other legal sources, subject to them being constitutionally sensitive. To the extent that taxpayers' common law rights and freedoms are inconsistent with the BOR, they are to be developed under s 39(2) in order that they conform to the 'spirit, purport and objects' of the BOR (discussed above in chapter six). Section 39(3) enhances the protection and enjoyment of taxpayers' rights as a legitimate cluster of justiciable rights. The reference in the TAA (s 2(b)) to 'prescribing the rights ... of taxpayers' does not mean that the TAA contains the *only* rights conferred on taxpayers. A contrary interpretation is incompatible with the BOR and would fail to properly reflect the legislative intention in the TAA. Its texts do not indicate an intention to revoke or override taxpayers' rights sourced elsewhere. Nor can such intention be 'winkled out of contextual crevices'.¹⁰⁰ Thus, the TAA is not the *fons et origo* of taxpayer rights. Taxpayers have rights from an array of sources, including the BOR, common law, and fiscal and non-fiscal legislation (for example, TAA, PAIA, PAJA and rules of court). Hence, when considering the conspectus of their rights, a holistic approach demands that reference is made to the rights emanating from the full breadth of South African law.

The defence of double jeopardy applies in SA by virtue of the right in s 35(3)(m) of the BOR. Thus, taxpayers have the right to finality of legal proceedings and cannot be tried or punished more than once for the same offence.¹⁰¹ In addition, taxpayers' rights include

⁹⁸ *Pharmaceutical Manufacturers* para 49; *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA) para 20.

⁹⁹ Rautenbach IM (2012) 267 states forcefully that the rights and freedoms recognised by s 39(3) are not constitutionally entrenched and may be limited without compliance with s 36 of the BOR.

¹⁰⁰ *Rogut v Rogut* 1982 (3) SA 928 (A) 939G.

¹⁰¹ *CSARS v Hawker Aviation Services Partnerships* 2005 (5) SA 283 (T) paras 65-7. The decision pertaining to the application of double jeopardy in tax cases was left intact on appeal in *CSARS v Hawker Air Services (Pty) Ltd: In re CSARS v Hawker Aviation Services Partnership and Others*

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the right to sue SARS for damages caused by intentional or negligent conduct of an official acting in his official capacity during the course of performing duties under the TAA or other tax statute.¹⁰² At common law, taxpayers also have the right to plan their tax affairs effectively to attract minimal, if any, tax liability.¹⁰³ The BOR (s 39(3)) stipulates that a common law right or freedom is valid to the extent that it is ‘consistent with the Bill’. A taxpayer’s right to organise his affairs tax efficiently satisfies this proviso because this right serves as a means for all taxpayers to implement measures designed to protect their property and rights in property from diminution through taxation. In so doing, this common law right bolsters the protection of property rights entrenched in the BOR (s 25) and, thereby, promotes the advancement of human rights, a founding constitutional value in s 1(a). Another indicator that the common law right in question is consistent with the BOR is evident from the fact that it benefits a taxpayer by enhancing his capacity to improve the quality of his own life and that of his family. Alternatively, in the case of a juristic taxpayer, this common law right enhances the taxpayer’s ability to improve the quality of life for its shareholders, members, beneficiaries or other interested persons (as the case may be). This is so because tax savings place additional cash and/or other assets in a taxpayer’s hands which grants access to increased resources for, inter alia, providing better enjoyment of socio-economic rights (such as, housing, food, health care, water and education). This, in turn, facilitates the fulfilment of the right to human dignity in s 10 of the Constitution. Viewed in this light, the freedom to plan financial

2006 (4) SA 292 (SCA). For further discussion, see Olivier L ‘Income tax and the double jeopardy defence: *ITC 1825*’ (2009) 21(2) *SA Merc LJ* 279; Croome BJ & Olivier L (2015) 522-27.

¹⁰² Olivier L ‘Delictual liability of the South African Revenue Service: The wrongfulness element’ (2009) 4 *TSAR* 740. As regards claims for constitutional damages, see *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) paras 20-8. The imperative that tax legislation be passed in accordance with due process and that any tax imposed be constitutional does not give rise to a legal ‘right’ for taxpayers in the sense that ‘right’ is discussed here.

¹⁰³ See *IRC v Duke of Westminster* [1936] AC 1 cited with approval in *Erf 3183/1 Ladysmith (Pty) Ltd v CIR* 1996 (3) SA 942 (A) 949. See also *CIR v Conhage (Pty) Ltd* 1999 (4) SA 1149 (SCA) para 1; *CSARS v NWK Ltd* 2011 (2) SA 67 (SCA) para 42; *CSARS v Bosch and Another* 2015 (2) SA 174 (SCA) para 40. See also Azzie J ‘Spotless: A lesson in form and substance but not in substance over form’ (1998) 8(1) *RLJ* 175; Chadwick I ‘How far can the taxpayer go in “ordering his affairs”?’ (1998) 6(1) *JBLJ* 13; Moosa F ‘Borrowing from Peter to pay less to Paul: Tax planning with borrowed funds’ (1998) 6(1) *JBLJ* 20; Moosa F ‘*CSARS v NWK Ltd* - a tax planning sham(e)?’ (2012) 27(3) *ITJ* 3; Legwaila T ‘Modernising the ‘substance over form’ doctrine: *Commissioner for the South African Revenue Service v NWK Ltd*’ (2012) 24(1) *SA Merc LJ* 115; Visser A ‘Division over “aggressive” tax planning’ (October 2013) available at <https://sait.site-ym.com/news/141937/Division-Over-aggressive-Tax-Planning.htm> (accessed 15 October 2013).

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affairs tax efficiently is an effective tool promoting the realisation of a key human rights objective of the BOR discussed above in chapter one.

The foregoing synopsis of the benefits arising from the common law right in question shows its positive dimensions. Its negative side is the financial loss caused to the *fiscus*. Consequently, tension exists between taxpayers seeking to exercise this right lawfully and tax authorities seeking to extract the maximum tax permissible by law. To counteract the negative fiscal effects of prudent estate planning, amendments to tax legislation are routinely passed with retrospective effect.¹⁰⁴ Such measures may, for example, introduce a new civil sanction for past conduct, impose a new duty affecting pre-existing rights, or plug a loophole in the law, thereby rendering an existing corporate structure less tax efficient. Measures of this nature create uncertainty and unpredictability in the law, essential ingredients for the proper exercise of the common law right in question.

There is presently no universally accepted charter of taxpayers' rights. Thus, for tax administration purposes, a taxpayer of SA may rely on universally accepted human rights norms in international human rights instruments (such as, the African Charter, and the 'International Bill of Human Rights' comprising the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols).¹⁰⁵ The Constitution (s 232) provides that South African law include customary international law, unless it is inconsistent with the Constitution or a Parliamentary statute. The Constitution (s 234) also provides that Parliament may adopt Charters of Rights that are consistent with the Constitution.¹⁰⁶ Customary international law and a Charter so adopted would be a source of rights for taxpayers. They are entitled to assert, as against SARS

¹⁰⁴ For the rules governing retrospective legislation, see the authorities above at fn 163 in chapter two.
¹⁰⁵ Williams P (ed) *The International Bill of Human Rights* (1981) xvi.

¹⁰⁶ In the promotion of the protection of human rights in the international arena, SA has, since 1994, signed and ratified various international human rights conventions, including the International Covenant on Civil and Political Rights (on 10 December 1998), the International Convention on the Elimination of All Forms of Racial Discrimination (on 10 December 1998), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (on 10 December 1998), and the Convention on the Elimination of All Forms of Discrimination Against Women (on 15 December 1998).

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and its officials, their fundamental rights derived from such sources of law. Thus, conduct by tax officials, as well as their TAA powers, may be tested for legality through the lens of international human rights norms suffused into South African law by s 232 and s 234.

Under the TAA, applications may be made to a judge and a magistrate¹⁰⁷ for, inter alia, the authorisation of an inquiry (s 50(1)), the issuance of a search warrant (s 59), the granting of a preservation order against a taxpayer's assets (s 163), sequestration, liquidation and winding-up proceedings (s 178), and the compulsory repatriation of a taxpayer's assets outside SA (s 186(2)). The Superior Courts Act and Magistrates' Court Act impose procedural and substantive requirements for litigants engaged in proceedings in the superior and lower courts.¹⁰⁸ These requirements safeguard the fairness of judicial proceedings. Non-compliance may be fatal thereto. Accordingly, these statutes create justiciable rights for taxpayers as litigants in civil and criminal judicial proceedings. In civil proceedings, taxpayers have evidentiary rights¹⁰⁹ and procedural due process rights (such as, the right to notice of intended legal proceedings¹¹⁰ and the right to access a

¹⁰⁷ A proceeding before a judge in a High Court is regulated by the Superior Courts Act 10 of 2013. In a lower court before a magistrate, it is governed by the Magistrates' Court Act 32 of 1944.

¹⁰⁸ In terms of s 173 of the Constitution, certain courts, such as the CC and the High Courts, have inherent power to determine their own procedures. See *South African Broadcasting Corp Ltd v NDPP and Others* 2007 (1) SA 523 (CC) paras 36-7.

¹⁰⁹ For example, (i) the rule that, as an applicant, SARS bears the burden to prove its case on a preponderance of probabilities; (ii) the rule against hearsay evidence as governed by the Law of Evidence Amendment Act 45 of 1988 (discussed in *S v Ndhlovu and Others* [2002] 3 All SA 760 (SCA)). For discussion of the rules of evidence generally, see Zeffertt DT & Paizes AP *The South African Law of Evidence* 2 ed (2009) chs 5-19; Schwikkard PJ & van der Merwe SE *Principles of Evidence* Revised 3 ed (2010) chs 4-21.

¹¹⁰ Prior notice of intended proceedings signifies respect for a litigant's dignity (*Stratford and Others v Investec Bank Ltd and Others* 2015 (3) BCLR 358 (CC) para 34). The BOR (s 34) protects the fairness of judicial proceedings (*Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC) para 4; *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 14). Rogers J held, in *eTradex* paras 70-5, that, despite the TAA (s 163) catering for *ex parte* applications, principles of fairness and constitutional values dictate that applications for a preservation order be brought on notice to taxpayers. Thus, in the absence of circumstances justifying a departure from ordinary procedure, taxpayers have a right to receive prior notice of such applications because they have a right to be heard before a provisional preservation order is granted. Rogers J held that 'ex parte relief should be confined to that which is reasonably required to secure SARS' position pending the return day' and ought not, as a matter of course, to include ancillary relief such as the appointment of a curator bonis and an authorisation for the seizure and realisation of a taxpayer's assets. Rogers J held that an order for the realisation of preserved assets should be made only at a time when a court is 'able to make an informed and fair decision'. This is so because s 163 contains a procedure for preserving assets and is not an execution mechanism. It applies mainly 'where the amount of tax has not yet been ascertained'. See also *CSARS v Africa Cash & Carry (Pty) Ltd and Others* (2015)

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court file).¹¹¹ Rights of this nature stem from legislation and the common law. They are part of the rules of natural justice. When a taxpayer is investigated for, or is charged with, a common law or statutory offence, then the Criminal Procedure Act¹¹² (CPA) applies. It confers procedural and substantive rights on an arrested, detained and accused person (such as, the right to bail, and the procedure for seizure, forfeiture and disposal of assets linked to a crime). These are part of the panoply of taxpayer rights in a broader sense.

The TAA permits inspections (s 45) and searches (ss 59, 62, 63) of a taxpayer's premises. The TAA does not expressly confer on a taxpayer an entitlement to legal representation at an inspection or search, nor the right to be present at such event.¹¹³ Applying the rules of interpretation in s 39(2) of the BOR, discussed above in chapter two, it is submitted that a denial of these rights would be unreasonable and unjustifiable in an open and democratic society (such as in SA). Such denial would also be inconsistent with the values of openness and transparency in tax administration provided by s 195(1) of the Constitution (discussed above in chapter three). The rights referred to here are to be regarded as enjoyed, albeit impliedly, by taxpayers who are the subjects of inspections and searches. These rights would render the protection afforded by s 64(3) of the TAA effective and more meaningful.¹¹⁴ Unless a taxpayer enjoys these rights, it is difficult to conceive how such person, who is generally unskilled in law, would be able to exercise the right to object to the disclosure of relevant material because of legal professional privilege.

¹¹¹ 77 SATC 242 (GNP) para 16; *CSARS v Bachir and Others* (unreported case no 87306/2014) [2016] ZAGPPHC 251. The judgment in *eTradex* balances taxpayers' rights to property, procedural fairness and equity with SARS's duty to safeguard fiscal interests. It also reverberates the concern expressed in *Mokoena v CSARS* 2011 (2) SA 556 (GSJ) para 10 that SARS's power to seize and realise a taxpayer's assets risks grave consequences because it may jeopardise a taxpayer's cash flow and business. *eTradex* is, thus, authority for the proposition that despite the TAA in s 59(2) providing that 'SARS must apply *ex parte*' for a warrant, a court is duty bound to ensure fairness and may, in appropriate cases, require that prior notice be given to the taxpayer. See also *Haynes v CIR* 2000 (6) BCLR 596 (Tk). As regards the content of a warrant application for it to pass constitutional safeguards, see *Ferucci and Others v CSARS and Another* 2002 (6) SA 219 (C).

¹¹² *Ferela (Pty) Ltd and Others v CIR and Others* 1998 (4) SA 275 (T).

¹¹³ Act 51 of 1977. Section 35 of the Constitution also finds application in this context.

¹¹⁴ *Contra Gaertner and Others v Minister of Finance and Others* 2013 (4) SA 87 (WCC) para 105. The TAA (s 64(3)) reads: 'If, during the carrying out of a search and seizure by SARS, a person alleges the existence of legal professional privilege in respect of relevant material and an attorney is not present under subsection (1) or (2), SARS must seal the material, make arrangements with an attorney from the panel appointed under section 111 to take receipt of the material and, as soon as is reasonably possible, hand over the material to the attorney.'

7.4 CLASSIFICATION OF ‘TAXPAYER RIGHTS’ – A HUMAN RIGHT?

The oft-quoted general classification of taxpayer rights is Bentley’s two-tiered model.¹¹⁵ He classifies such rights as primary¹¹⁶ and secondary¹¹⁷ legal rights, and primary¹¹⁸ and secondary¹¹⁹ administrative rights. This dissertation does not seek to propose a formal classification of taxpayer rights. Thus, a detailed exposition of such classification is not undertaken here. Suffice it to say, Bentley’s classification is useful and there is no reason why it ought not to be adopted and followed as a general guide. Though chapter one above establishes a link between taxation and human rights, it remains to be considered whether taxpayer rights fall under the umbrella of human rights. This issue is relevant for the development of SA’s jurisprudence on taxpayer rights. South African law does not categorise such rights into any specific class or group of rights.

The notion of ‘taxpayer rights’ is distinct from ‘human rights’.¹²⁰ Human rights are universal, inviolable rights enjoyed *by virtue of a person being human*. In short, human rights are ‘inalienable entitlements of human beings’.¹²¹ The Constitution is premised on

¹¹⁵ Bentley D *Taxpayers’ Rights: Theory, Origin and Implementation* (2007) 110-37. See also Bentley D ‘Classifying Taxpayers’ Rights’ in Bentley D (ed) *Taxpayers’ Rights: An International Perspective* (1998) 16-34. For a discussion of the classification of legal rights generally, see Paton GW (1964) 261-71.

¹¹⁶ Primary legal rights focus on the process of law-making and what makes a valid tax law. These rights require constitutional protection and aims to constrain power. See Luoga FDAM (2002) 11.

¹¹⁷ Secondary legal rights focus on the specific operation of the law. They are concerned with the protection of rights at both a general and a specific level. At a general level, these rights provide a standard for the operation of the administration, collection and enforcement processes of the law. For example, the rights to a fair and impartial hearing, the right to confidentiality, and the right to decent and orderly treatment during a search. At a specific level, these rights protect taxpayers within the realm of individual procedures and specific processes within the law. For example, the right to be given reasons for a decision taken by a tax authority. See Bentley D (2006) 123-26.

¹¹⁸ Primary administrative rights encompass those secondary legal rights protected administratively. For example, legal professional privilege in respect of certain communications between a taxpayer and a legal representative. See *Heiman, Maasdorp and Barker v Receiver of Revenue* 1968 (4) SA 160 (W). See also Tiley J ‘Professional privilege and the Tax Man’ (2002) 61 *Cambridge LJ* 540.

¹¹⁹ Secondary administrative rights encompass subjective rights that apply when employees and agents of a tax authority render services to taxpayers. For example, a taxpayer’s right to timely assistance from a tax authority which, in turn, fosters timeous compliance with a tax obligation.

¹²⁰ The CC, in *Makwanyane* para 130 and *De Lange* para 31, held that the Constitution is premised on the assumption that SA will be a constitutional State founded on the recognition of human rights.

¹²¹ *Certification I* para 50. Human rights are not merely legal rights but also moral rights that require moral decision-making. They protect not only persons in a democracy but democracy itself. See Udombana NJ (2005) 57. For a useful discussion of the ‘human rights’ concept and its origins, see

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SA being founded on a range of human rights norms and values (discussed above in chapter three). The Preamble affirms the establishment of a democratic society based on, inter alia, human rights.¹²² Baker, Bentley, Brzezinski, Dogan and Gokbunar, James *et al*, and McCracken are protagonists espousing the view that taxpayer rights are a human rights concern.¹²³ Croome¹²⁴ characterises taxpayer rights as ‘a species of human rights’. Croome’s characterisation requires some refinement so that it properly reflects the status of taxpayer rights in SA’s domestic law. Whilst some human rights are not conferred to certain juristic taxpayers, some taxpayer rights are also not human rights. Thus, the ensuing discussion aims to show that some taxpayer rights are ‘a species of *fundamental rights to the extent that any such right is entrenched in the Bill of Rights*’.

Taxpayer rights should not, as a cluster, be termed ‘human rights’. Not all taxpayers are humans. It is, thus, inappropriate to refer to taxpayer rights in general as human rights. Taxpayer rights are a narrower concept than human rights. The former focuses on rights in the field of tax and in a particular context within that field, namely, tax administration. Human rights are, on the other hand, broad in their outlook and operate as a general set of norms across all areas of law, including tax. Taxpayer rights and human rights do bear some correlation to each other. This is so because certain human rights are also taxpayer rights (such as, the right to equality and human dignity). Other taxpayer rights are a subset of human rights. For example, (i) the right to confidentiality and secrecy is part of the right to privacy, (ii) the right to pay no more tax than required by law is part of the right to property, and (iii) the right to be heard and to appeal are part of the right of access

Nyamakazi v President of Bophuthatswana 1992 (4) SA 540 (BG) 561H-563E. See also Price A ‘The influence of human rights on private common law’ (2012) 129(2) *SALJ* 330 332-34.

¹²² Sachs J, in *Mhlungu* para 112, explains the usefulness of the Preamble as an interpretive tool as follows: ‘The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.’

¹²³ See Baker P ‘Taxation and the European Convention on Human Rights’ (2000) 4 *British Tax Review* 211; McCracken SK (2002) 1869; James S, Murphy K & Reinhart M (2004) 336; Brzezinski B ‘Taxpayers’ Rights: Some Theoretical Issues’ in Nykiel W & Sek WNM (eds) *Protection of Taxpayers’ Rights: European, International and Domestic Tax Law Perspective* (2009) 17; Dogan A & Gokbunar R (2012) 37. Hultqvist A (1997) 45 points out that in Sweden, taxpayer rights are treated as a special branch of human rights issues called *rättssäkerhet* (directly translated as ‘legal certainty’ or ‘legal security’).

¹²⁴ Croome BJ (2010) 14.

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to courts. Some human rights (such as, political rights, citizenship, cultural and religious rights) are enjoyed by natural persons but *not* in their capacity as taxpayers. Thus, rights falling into this category are not taxpayer rights during tax administration.

As a distinct class of rights, taxpayer rights are not *per se* human rights. To the extent that such rights are guaranteed in the BOR, they may more aptly be termed '*taxpayer fundamental rights*'. No South African court has hitherto categorised taxpayer rights into any particular class or group of rights. This is probably because such rights cannot be slotted neatly into any recognised class or group. In addition, they encompass rights of different kinds that originate from various sources of law. Since the nature of taxpayer rights is broad-ranging, the aggregate of all taxpayer rights is not classifiable as 'human rights'. Such classification would, in any event, be apt only for those taxpayer rights sourced in the BOR that apply to natural persons. The 'human rights' concept is fluid (or malleable). It develops incrementally over time and, thereby, addresses other concerns of rights violations. A blanket classification of all taxpayer rights as human rights would be problematic for various reasons. First, an infringement or threatened infringement of such rights would give rise to a human rights issue, despite the affected right stemming from a statute or the common law. Every such case would then be a 'constitutional matter' under the provisions of s 167(7) of the Constitution and beyond the jurisdiction of the Tax Board and Tax Court as regulated by ss 109 and 117 of the TAA respectively. Secondly, the classification of all taxpayer rights as human rights would not only increase the complexity of tax cases but also cause an escalation in the attendant legal costs for taxpayers and the *fiscus* alike. This is so because tax litigation would then mostly take place in the more expensive dispute resolution forums for tax matters, namely, the High Courts, SCA and CC.¹²⁵ This would increase the overall costs of tax administration. Such increase would be an obstacle, even a deterrent, to taxpayers asserting their rights. This would, in turn, adversely affect their right of access to courts and undermine access to justice in tax matters. Such a state of affairs is undesirable and should be avoided.

¹²⁵ In *Capendale and Another v Municipality of Saldanha Bay and Others, Capendale v 12 Main St, Langebaan (Pty) Ltd and Others* [2014] 1 All SA 33 (WCC) para 106 Gamble J commented on the exorbitant cost of litigation by referring to 'the wide highway of High Court litigation, a highway upon which well-healed lawyers gladly drive in their expensive motor cars'.

7.5 CONCLUSION

The present chapter shows that legal rights are at the epicentre of democracy in SA.¹²⁶ In relation to taxpayers in particular, it shows that ‘taxpayer rights’ is not a technical term with a fixed or finite legal meaning. Although without precise definition, it is a term rich in meaning determined by the context of its use. Taxpayer rights are not simply the hopes, aspirations or expectations of taxpayers. Generally, in its broadest sense, taxpayer rights also encapsulate the legal rights, interests, privileges, benefits and immunities to which persons, both natural and juristic, are entitled in their capacity as taxpayers.¹²⁷ In a narrower sense, taxpayer rights refer to the substantive and procedural rights of a taxpayer in tax administration. The present chapter shows that, viewed from a taxpayer’s vantage point, the most significant change effected by the TAA is the codification of a suite of taxpayer rights that are, as required by s 39(3) of the Constitution, consistent with the BOR. These statutory rights, together with taxpayers’ fundamental rights in the BOR as well as those other taxpayer rights sourced in legislation and the common law, provide important checks and balances on the exercise of public power by a bureaucratic tax authority in SA. The rule of law and the enforceability of taxpayer rights in courts and others forums or tribunals of justice adjudicating tax disputes will avert the culture of impunity that permeated in the apartheid era, including by its erstwhile tax authority. The present chapter shows that a culture of taxpayer rights replaced the culture of impunity. The conferral of an array of taxpayer rights by various sources of law creates a more balanced relationship between SARS, as tax creditor, and taxpayers, as tax debtors. However, they are still not on equal footing. The proverbial playing field is not level. The tax laws of SA place SARS firmly in a dominant position. Whilst SARS has an arsenal of powers for use against taxpayers, it also has access to the public purse for financing its administrative and other costs associated with it pursuing litigation against taxpayers.

¹²⁶ For further discussion, see Roux T ‘Democracy’ in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-18 – 10-22.

¹²⁷ *Krok* para 29; *SIR v Kirsch* 1978 (3) SA 93 (T) 94-5; *Bosch and Another v CSARS* 2013 (5) SA 130 (WCC) para 57. Also, see Paton GW (1964) 254-57. For an overview of taxpayers’ rights in SA, see Croome BJ (2010). For an in-depth discussion of the legal framework for the conferral, operation and interpretation of taxpayer rights generally, see Bentley D *Taxpayers’ Rights: Theory, Origin and Implementation* (2007) chs 3 and 5.

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The codification of a suite of taxpayer rights in the TAA reflects Parliament's efforts to infuse a tax administration culture that is oriented towards respect for taxpayers and their rights. Moreover, SARS's duty to collect taxes efficiently creates, it is submitted, an implied right for taxpayers to an efficient service from SARS officials.¹²⁸ Consequently, the present chapter answers the general research question posed above in chapter one by showing that the TAA strikes a seemingly fair balance between efficient and effective tax administration, on the one hand, and the formal recognition of taxpayers' rights and the need to protect such rights against undue interference, on the other. The present chapter also shows that international law does not yet have a universally accepted legal framework for taxpayer rights, their protection, promotion and fulfilment.¹²⁹ Furthermore, SA does not have a separate code, charter, bill or other thematic declaration of taxpayer rights.¹³⁰ Nor does it have a single, dedicated statute codifying all taxpayer rights. In sum, SA does not have a unitary source or 'one-stop shop' of taxpayer rights. The present chapter demonstrates that SA has primary and secondary sources of taxpayer rights that are relevant in tax administration. The former includes the BOR and the TAA; the latter includes the common law. This must, however, be distinguished from taxpayers' primary and secondary legal rights. Adopting Bentley's tiered model of taxpayer rights, the present chapter shows that, under South African law at present, whilst taxpayers' primary legal rights are derived from the BOR and certain international legal instruments, taxpayers' secondary legal rights stem from legislation and the common law.

Taxpayer rights, irrespective of their source, and the rule of law provide an umbrella that protects taxpayers from the coercive exercise of power by SARS and its officials during tax administration processes. However, the conferral of rights and the rule of law are, on their own, insufficient to fully insulate and protect taxpayers, including their legitimate

¹²⁸ The duty of SARS to render an efficient service to taxpayers is expressly included in the norms and standards of good tax administration service in the draft Taxpayer Protection Bill, 2016 proposed as part of the recommendations in chapter eleven below read with the Appendix thereto.

¹²⁹ Brokelind C 'The Role of the EU in International Tax Policy and Human Rights – Does the EU need a policy on taxation and human rights?' in Kofler G, Maduro MP & Pistone P (eds) *Human Rights and Taxation in Europe and the World* (2011) 113 119.

¹³⁰ Bentley D 'Taxpayers' charter: Opportunity or token gesture?' (1995) 12 *Australian Tax Forum* 1 7 describes a taxpayer charter as 'an unusual type of legislation' which is 'broad in scope and is directive, aimed at safeguarding rights, rather than prescriptive as to how that should be done'.

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interests. To this end, in order that taxpayer rights are made meaningful on a practical level, judicial officers and SARS officials must give full force and effect thereto by fulfilling their constitutional duties by, in a sense, acting in partnership with each other in upholding, respecting and protecting taxpayer rights and by displaying a fervent commitment to honouring these pivotal obligations.¹³¹ Thus, Goldswain¹³² is perhaps correct to say that taxpayers' rights of access to courts under s 34 of the BOR and to judicial interpretation of arbitrary or unclear legislation are probably the most valuable of all taxpayer rights. As explained above in chapter two, interpretation must occur in a principled way within the parameters of the accepted interpretive guidelines discussed there.¹³³ The entrenched fundamental rights conferred by the BOR, and to which taxpayers are entitled, are protected by the Constitution against unlawful incursion by SARS and its officials.¹³⁴ This protection is provided by, inter alia, the general limitation clause in s 36(1) of the BOR. Its provisions play a prominent role in constitutional and statutory interpretation when dealing with provisions that encroach on fundamental rights that are guaranteed by the BOR. An analysis of s 36(1) is, thus, particularly important within the context of the constitutional review to be conducted below in chapter ten as well as for purposes of answering the general research question formulated above at para 1.2 in chapter one. Therefore, s 36 of the BOR is analysed forthwith in chapter eight.

¹³¹ The CC, in *Mashongwa v PRASA* 2016 (2) BCLR 204 (CC) para 25, captured the essence of this constitutional duty as follows: 'The State and its organs [and, it is submitted, the judiciary too] exist to give practical expression to the constitutional rights of citizens. They bear the obligation to ensure that the aspirations held out by the Bill of Rights are realised. That is an immense responsibility that must be matched by the seriousness with which endeavours to discharge them are undertaken. To this end, the State, its organs and functionaries cannot be allowed to adopt a lackadaisical attitude, at the expense of the interests of the public, without consequences.'

¹³² Goldswain GK (2012) 27.

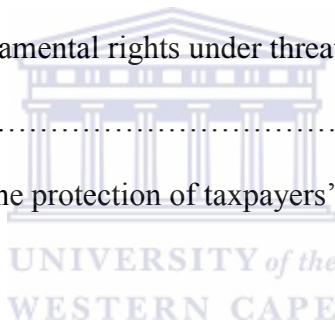
¹³³ The basic approach to interpretation of legal instruments is, first, that words and phrases therein must be properly construed by reading and understanding the whole text in which they appear. Secondly, a meaning assigned must be appropriate in the particular circumstances and must be consistent within the limits of inter alia: (i) the language of the text, (ii) the context and purpose of the text, (iii) the overall objectives of the instrument in which the text appears, (iv) any relevant constitutional values and rights, and (v) any other relevant circumstance. See *Case and Curtis* para 57. Wallis JA, in *NJMPF* para 24, describes an interpretive approach where words and phrases are read in the context of an instrument as a whole and in the light of all relevant circumstances as being 'sensible, more transparent and conduces to greater clarity about the task of interpretation'.

¹³⁴ It bears noting that, unlike the Swedish Constitution in Chapter 2 para 10 (see Hultqvist A (1997) 45), SA's Constitution does not protect taxpayers by prohibiting the passing of tax or other laws with retrospective effect. For further discussion hereof, see Kruger L 'Retrospective legislation: Do taxpayers have any recourse?' (2014) 5(1) *Business Tax & Company Law Quarterly* 15.

CHAPTER EIGHT

LIMITATION OF TAXPAYERS' FUNDAMENTAL RIGHTS

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'The right to swing my fist ends where the other man's nose begins.' (Oliver Wendell Holmes)

8.1 INTRODUCTION

In SA, fundamental rights are not privileges, concessions, favours, benefits or grants conferred by the government. They are entrenched and justiciable constitutional rights. The Constitution is a truly modern instrument containing 'a comprehensible, detailed list of enumerated rights based on generally accepted international human rights norms'.¹ They include the right to privacy that, as explained above in chapter six, applies to natural and juristic taxpayers. This right is indispensable to SA's democratic order because other fundamental rights, such as, human dignity and equality, are closely associated therewith. As stated above, fundamental rights are mutually supportive of each other. To govern SA efficiently and effectively, and to harmonise the aspirations of its people for the common good, the national government will pass laws, some of which will inevitably seek to limit the fundamental rights of its legal subjects. It is a truism that fundamental rights are not absolute but relative.² As will be shown below, this is evinced in the BOR. Section 36(1) thereof permits a justifiable limitation of fundamental rights. To lay the foundation for the constitutional review to be conducted below in chapter ten, the present chapter analyses the contours of the requirements imposed by s 36(1) for a valid limitation of fundamental rights. The discussion outlines the nature, purpose and process of the limitations exercise and identifies the criteria separating legitimate limitations from those that are constitutionally offensive and, hence, impermissible. In keeping with a common thread running through this dissertation, the discussion below is contextualised within the realm of the TAA and seeks to provide a legal framework for balancing efficient and effective tax administration with taxpayers' rights. The discussion is undertaken with an emphasis on the obligation of the State arising from s 7(2) of the BOR, namely, to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

¹ Kende MS (2003) 160.

² *Soobramoney* para 43; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) para 78. See also Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 03-06) 34-1 (and the authorities cited there at fn 2); Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 629.

8.2 FRAMEWORK FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

8.2.1 Historical context for fundamental rights protection in SA

In SA's pre-constitutional era, a legal landscape existed that was fertile for the subsistence of a social, political and legal system that permitted systematic discrimination, domination, persecution and intolerance that led to human rights violations. As stated above, Parliamentary sovereignty, a dominantly executive-minded judiciary that capitulated to the exigencies of political expediency, the absence of a justiciable Bill of Rights, and the lack of a human rights culture, all enabled the apartheid system to enroot itself and flourish in South African society largely unchecked. To break away from SA's unjust past and create a value-oriented, democratic dispensation premised on social justice and a culture of fundamental rights and liberties, the interim and final Constitutions were fashioned to create a transformed social, political and legal order. To this end, the interim Constitution included Constitutional Principle II in Schedule 4. It read: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.' This Principle assisted in steering SA on a new course toward the creation of a human rights identity and a common destiny for its people. In fulfilment of this Principle, the BOR entrenches a suite of fundamental rights outlined above in chapter seven. To avoid a recurrence of the injustices perpetrated during apartheid, the spirit, purport and objects of the BOR, discussed above in chapter six, place a high premium on fundamental rights and their protection against unlawful incursion by persons and institutions imbued with public or private power. As shown above in chapter three, the BOR binds SARS and, concomitantly, all its officials during tax administration processes. Thus, the exercise of their TAA powers, a form of public power, is strictly subject to the control of, and limits imposed by, the BOR that serves as both a 'shield' and a 'sword'.³

³ De Vos P (1997) 78. Likewise, Mureinik E (1994) 48 describes the BOR as a 'potent weapon for bringing about democracy'.

CHAPTER EIGHT: LIMITATION OF TAXPAYERS' FUNDAMENTAL RIGHTS

As discussed above in chapter three, SA is a *Rechtsstaat* premised on the rule of law. It bears repetition that the cardinal principles of the formal, as distinct from the material (or substantive), *Rechtsstaat* are:⁴ (i) the separation of powers; (ii) constitutional supremacy entailing the invalidity of laws and conduct inconsistent with the Constitution (that is, the principle of legality); (iii) the principles of proportionality, legal certainty and foreseeability in State action; (iv) the guarantee of fundamental rights and freedoms; and (v) the protection and enforcement of rights and freedoms by an independent, impartial and fair judiciary.⁵ In SA, the exercise of public power by the State and organs of state is subject to judicial review through the prism of the BOR and the values incorporated therein. This is a key feature of the material *Rechtsstaat* where the centre of gravity lies in the protection and enforcement of fundamental rights and freedoms.⁶ Rights and liberties are interdependent with a written constitution incorporating a Charter of Rights. Such a Charter, enforced by an independent judiciary, is the safety net for rights and freedoms. This applies in SA with a supreme constitution with a justiciable BOR that entrenches hard-won fundamental rights and freedoms for natural and juristic persons.

8.2.2 General constitutional protection of fundamental rights

The Constitution is SA's *lex fundamentalis*. It is both the source of fundamental rights and their guarantor. The protection the Constitution extends to rights of this nature ensures that they are durable and meaningful in the hands of their bearers. This protection avoids such rights being sterile or rendered nugatory, or relegated to mere 'paper' rights. The measures adopted in the Constitution to guarantee and protect fundamental rights are discussed in preceding chapters of this dissertation. For purposes of the present chapter, they are recapitulated here. First, s 2 declares the Constitution to be SA's supreme law. Any law or conduct inconsistent with it is invalid. Thus, the exercise of all forms of power must comply with the Constitution and the principle of legality in the rule of law.

⁴ For the distinction between the rule of law and a *Rechtsstaat*, see Blaauw LC (1990) 88-92.

⁵ Judicial independence, impartiality, dignity, accessibility and efficacy are democratic standards and values expressly catered for in the Constitution (s 165(4)) to ensure the creation of a credible, properly functioning judicial authority in a post-apartheid, democratic constitutional state in SA.

⁶ De Wet E *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa* (1996) 34.

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Secondly, the Constitution incorporates a Bill of Rights containing a cluster of rights that are justiciable.⁷ The protection of fundamental rights is reinforced by the stipulation that the BOR cannot be amended except by satisfaction of the stricter requirements of s 74(2) as opposed to a simple Parliamentary majority vote.⁸ Thirdly, the Constitution elevates all fundamental rights to a position of utmost importance in all areas of law. Their paramountcy is unmistakable from (i) the State's obligations in s 7(2) to 'respect, protect, promote and fulfil the rights in the Bill of Rights', (ii) s 8(1) providing that the BOR 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state',⁹ and (iii) s 8(2) stipulating that the BOR binds natural and juristic persons. Fourthly, the Constitution is a repository of a comprehensive set of express and implied democratic values and principles that bolster SA's human rights ethos and legal culture.¹⁰ Fifthly, s 36(1) imposes rigorous requirements for a lawful limitation of a fundamental right (discussed below in the present chapter). Sixthly, s 38 provides for judicial review of any law or conduct infringing or threatening a right in the BOR. Section 38, discussed below at para 8.2.4, provides an effective enforcement mechanism that curbs the exercise of unbridled State power. This right to access to courts fortifies fundamental rights against incursion by the State or organ of state wielding public power. This underscores the stature of the BOR as a cornerstone of democracy in SA. Seventhly, ss 165(1) and (2) of the Constitution vest the judicial authority of SA in independent courts that must apply the Constitution impartially and without fear, favour or prejudice.¹¹

⁷ Du Plessis LM & de Ville JR (1993) 205 describe the BOR rather usefully as a 'sui generis ... efficacious constitutional instrument designed to truncate the power of government in terms of appropriately defined human rights values'.

⁸ Section 74(2) of the Constitution provides that a Bill amending the BOR requires the supporting vote in the National Assembly of at least two thirds of its members and the supporting vote in the National Council of Provinces of at least six provinces.

⁹ The obligations in s 7(2) continue during a state of emergency as regards the non-derogable fundamental rights listed in s 37(5) of the BOR. The State's constitutional duties under s 7(2) are not relieved because of the reviewability of State action. See *Dawood* paras 48-9 54.

¹⁰ All constitutional values are an integral part of the Constitution's spirit, purport and objects (discussed above in chapter three). Values provide, as discussed above in chapter two, a legal basis for value-coherent (or teleological) interpretation. Cockrell A 'Rainbow Jurisprudence' (1996) 12(1) *SAJHR* 19 points out that the use of values in constitutional adjudication and interpretation 'marks a decisive shift in the fundamental tradition of the South African legal system – a shift from a formal vision of law to a substantive vision of law'.

¹¹ The CC, SA's apex court, has aptly been described as 'the guardian of the Constitution ... the protector of human rights and ... the upholder of democracy' (per Madala J in *Soobramoney* para 45).

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The provisions referred to above reshape South African society in its democratic era. They establish an inclusive, egalitarian society governed by a supreme Constitution suffused with a strong human rights culture, ethos and spirit that ensure SA makes a clean break from the repressive, authoritarian and undemocratic society that pervaded it during the apartheid era. In so doing, the aforementioned provisions are the pillars supporting a just and fair society in SA which not only 'belongs to all who live in it', as proclaimed in the Preamble, but also takes care of the needs of all SA's people (not only some of them). Thus, the Constitution redefines 'public interest' in contrast with that under apartheid where 'public interest' was determined by, and with reference to, a minority (that is, White South Africans).¹² This underscores the Constitution's *leitmotif*, namely, the respect for, and promotion, protection and fulfilment of fundamental human rights for all SA's people. This reflects and gives effect to the advancement of human rights and freedoms, a foundational value in s 1(a) of the Constitution. This is a value of 'an open and democratic society based on human dignity, equality and freedom', the type of normative society referred to in s 36(1) of the BOR whose values, discussed below at para 8.3.6, determine whether a limitation of a fundamental right satisfies the 'reasonable and justifiable' standard imposed by s 36(1) for constitutionality.

The Constitution contains a web of mutually supporting provisions that foster the advancement of human rights and freedoms in SA. For present purposes, the relevant ones are, first, ss 39(1) and (2) (discussed above in chapter two). The former directs that when courts interpret the BOR they 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom', and 'must consider international law'. The latter instructs that when 'interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Secondly, s 234 reinforces the human rights culture, ethos and spirit of the Constitution. It reads: 'In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.'

¹² Nadasen S & Pather S 'The South African reality and the creation of a human rights culture' (1995) 6(2) *Stell LR* 256 261-62.

8.2.3 Taxpayers' fundamental rights under threat by the State and organs of state

Fundamental rights and freedoms¹³ are notoriously in the vanguard (or forefront) of governmental attack in pursuit of protecting competencies of the State (such as, national security, territorial integrity, public order and safety, democracy, and Western values and culture). South Africa is not immune from this danger. As discussed above in chapter one, the global economic recession of 2008/09 contributed to the National Revenue Fund haemorrhaging financial resources. The problem is exacerbated by 'tax minimisation', also discussed above in chapter one. These problems hamper the ability of the national and the various provincial and local governments in SA to fulfil their constitutional mandate of addressing the myriad of social, economic and other challenges facing their respective constituencies. Thus, after attaining political freedom more than two decades ago, the improved quality of life envisaged in the Preamble continues to evade the majority of South Africans. As alluded to in chapter one, this has brought widespread outcries of discontent. Black South Africans are disillusioned with democracy because of the slow pace of transformation. Political freedom has not, as yet, translated into socio-economic freedom. Therefore, mass mobilisation among organs of civil society has led to more frequent, often violent, civilian assemblies, demonstrations and presentations of petitions for, inter alia, free housing and education, improved public service delivery, and the provision of water and social security. A taxpayer revolt seems closer than ever before in democratic SA. This is the national mood simmering in SA at this time (2016).

In view of the foregoing, there is mounting pressure on the government in SA to fulfil the legitimate aspirations and expectations of its citizenry for a qualitative change in the condition of their daily lives.¹⁴ A pressing need exists for the government at all levels to

¹³ In this context, 'fundamental rights and freedoms' refers not only to universal rights and freedoms of individuals in the narrower sense of human and civil rights (such as, security, equality, and human dignity), but also in the wider sense of those basic rights and freedoms that protect legal institutions or a sphere of freedom in general (such as, press freedom, and freedom of the person). For the meaning of fundamental rights and freedoms, see Blaauw-Wolf L & Wolf J (1996) 269.

¹⁴ The Constitution's promise to the people of SA is usefully encapsulated in the following extract per Madala J in *Soobramoney* para 42: 'The Constitution is forward-looking and guarantees to every citizen fundamental rights Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic

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take decisive steps to fast track programmes aimed at achieving social justice, real equality and ensuring that all South Africans live in dignified conditions. This is a seminal moment in the short history of SA's so-called 'rainbow' nation and will be a stern test for the durability of its fledgling democracy. At times of such crisis, fundamental rights and freedoms are vulnerable to attack from within the State (such as by tax authorities). The pursuit of tax justice and the advancement of national economic and fiscal interests led SA's government, in tandem with foreign governments, to combat tax minimisation across international borders. This is discussed above in chapter one. This fight carries the real risk that the State, its institutions and functionaries may erode, even suppress, taxpayers' fundamental rights. The BOR seeks to avoid such an eventuality. Section 36(1) thereof is designed to regulate any attempt at limiting rights.

The TAA grants an arsenal of 'extraordinary and wide-ranging powers'¹⁵ to SARS and its officials aimed at facilitating the efficient and effective detection, assessment and collection of unpaid and undeclared income or tax. They include: (i) power to conduct searches of the taxpayer's premises with and without a warrant,¹⁶ (ii) power to seize taxpayer's communications (including material protected by legal professional privilege),¹⁷ (iii) power to convene an inquiry at which a taxpayer is obliged to testify (including giving self-incriminating evidence),¹⁸ (iv) power to limit a taxpayer's fundamental right to leave and travel outside SA,¹⁹ (v) power to oblige a taxpayer to repatriate assets located in a foreign country,²⁰ (vi) power to compel a taxpayer to cease trading,²¹ (vii) power to conduct a criminal investigation in relation to a 'serious tax offence' (as defined),²² and (viii) the power to institute proceedings for the sequestration,

society aiming to salvage lost dignity, freedom and equality should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.'

¹⁵ Per Seegobin J in *CSARS v Sassin and Others* [2015] 4 All SA 756 (KZD) para 68.

¹⁶ Sections 61 read with 62 and 63, TAA. For a discussion thereof, see chapter nine below.

¹⁷ Section 64, TAA.

¹⁸ Sections 50 read with 52 and 57, TAA (to be read subject to the rights in s 35(3) of the BOR).

¹⁹ Section 186(3)(a), TAA (to be read subject to the right contained in s 21(2) of the BOR).

²⁰ Section 186(1) and (2), TAA.

²¹ Section 186(3)(c), TAA (to be read subject to the right contained in s 22 of the BOR).

²² Sections 43 read with 44, TAA.

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liquidation or winding-up of a taxpayer for an outstanding tax debt.²³ *Prima facie*, some of these powers and the exercise thereof infringe, or threaten to infringe, taxpayers' fundamental rights. Hence, a tension exists between, on the one hand, the exercise by SARS of its TAA powers and, on the other, the exercise by taxpayers of their rights. A fair balance must be struck so that this tension is resolved in a way that advances and defends the culture of rights established by the Constitution whilst, at the same time, not unduly hindering tax administration through the imposition of onerous duties on SARS and its officials that undermine efficient or effective tax administration. The striking of a proper balance will ensure that the scales are not tipped unduly in a taxpayer's favour at the expense of the broader public interest, nor that hard-won fundamental rights are eroded in favour of SA's fiscal well-being. This will indeed be a tricky horse to ride.

The foregoing discussion reveals the pressures being exerted on the government of SA to deliver on the expectations of its people by fulfilling the promises in the Constitution. However, the reduction of financial resources due to, inter alia, wasteful expenditure, corruption and maladministration, as detailed in the Auditor General's Report of 2016, has dealt a severe blow to the public purse and, hence, the government's ability to meet the aspirations of its citizenry. The result hereof is that SARS is under strain to optimise tax collection. The objective hereof is clear: to raise the finances that will fill the gap in the government's available resources, thereby enabling the government to fulfil its constitutional mandate to transform South African society along socio-economic lines. As explained above in chapter five, SARS and its officials administer SA's national tax system for the benefit of the *fiscus* and the public at large. In so doing they perform a key function in public administration and governance in broad terms. Undoubtedly, without the generation of adequate tax revenue, the government will lack the necessary budgetary resources and, concomitantly, the capacity to fulfil its constitutional duties²⁴ and attain its economic objectives.²⁵ None of these financial considerations, on their own, justify limiting taxpayers' fundamental rights. However, when seen in the light of the social,

²³ Section 177(1), TAA. This power applies not only to a 'taxpayer' but in respect of any 'person'.

²⁴ *CSARS v Sassin and Others* [2015] 4 All SA 756 (KZD) para 68.

²⁵ Keulder C & Legwaila T 'The constitutionality of third party appointments – before and after the Tax Administration Act' (2014) 77(1) *THRHR* 53.

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economic, fiscal and other objectives of taxation and tax administration related thereto, as discussed above in chapter one read with chapter five, then there may, in specific instances, be justifiable reasons for limiting taxpayers' fundamental rights in the BOR. As far as the impugned TAA provisions adversely affect taxpayers' fundamental right to privacy (s 14), the foregoing considerations play a role when those provisions are reviewed below in chapter ten for consonance with the Constitution. That review cannot take place without prior discussion of the requirements laid down in s 36(1) for a valid limitation of fundamental rights. Consequently, the ensuing discussion will set the tone for the constitutional review and, furthermore, aims to establish a sound theoretical basis for the principled approach adopted in the review concerned.

8.2.4 Role of s 38 in the protection of taxpayers' fundamental rights

No discussion of the protection of taxpayers' fundamental rights is complete without canvassing their enforcement. The efficacy of all rights lies in the legal enforcement thereof. This is dealt with in s 38 of the BOR. It is the highway to the protection of, and respect for, fundamental rights. Section 38 permits a court to 'grant appropriate relief' for an infringement or threatened infringement of a fundamental right. Whilst the application of such rights is, as discussed above in chapter six, determined with reference to whether a person is natural or juristic, standing is, under s 38, determined by whether a person falls into any listed category of persons. In clear language, s 38 confers standing on 'anyone' with a sufficient interest in the actual or threatened violation of a fundamental right. This includes persons who may not qualify as beneficiaries of such rights under the BOR. The relevant extract in s 38 outlining those persons with standing reads as follows:

'The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest;²⁶ and (e) an association acting in the interest of its members.'

²⁶ Legal standing is permitted if the person concerned acts 'genuinely' in the public interest. For a sample list of relevant factors determining genuineness in this context, see *Lawyers for Human*

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The word 'anyone' is extensive in its breadth and has substantial depth. It enables ss 38(a) to (d) to apply to, inter alia, an association (such as, a sports club and religious group), a movement, a community, an organ of civil society, a registered and unregistered trade union/employer's organisation/federation or other forum of persons, a partnership, an organisation (whether for public or private benefit), an insolvent estate, a deceased estate, and a trust.²⁷ Thus, legal standing in constitutional matters exists for persons who, at common law, lack the status of 'person' (or personhood) and, thus, lack legal personality.

Locus standi in constitutional matters is not a technical or rigidly defined concept, nor do its rules embed a magical formula. When evaluating standing, consideration is given to the broader interests of justice or whether the public interest dictates that standing be recognised so that the merits of a constitutional challenge may be determined.²⁸ Section 38 introduces a 'radical departure from the common law in relation to standing'.²⁹ This section is a judicial enforcement mechanism embodying a non-fundamental right, *ubi ius ibi remedium* ('where there is a right there is a remedy').³⁰ Consequently, when dealing with the BOR, a distinction must be drawn between provisions that confer a fundamental right from those conferring an ordinary, non-fundamental right. As discussed above in chapter two, BOR provisions are to be interpreted generously so that the full measure of

Rights and Another v Minister of Home Affairs and Another 2004 (4) SA125 (CC) paras 16-18 73. For a discussion of *locus standi* in public interest litigation, see Milton J, Cowling M & van der Leeuw G *et al* 'Procedural Rights' in van Wyk D, Dugard J & de Villiers B *et al* *Rights and Constitutionalism: The New South African Legal Order* (1994) 421-23.

²⁷ See, for example, *Christian Education SA v Minister of Education* 1999 (2) SA 83 (CC) para 2; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 2; *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) para 5; *HBR (Hola Bon Renaissance) Foundation v President of the Republic of South Africa and Others* 2011 (10) BCLR 1009 (CC) para 5; *ARMSA v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC); *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC).

²⁸ *Ferreira* paras 40 165. Generally, persons with only a hypothetical or abstract interest will lack proper standing. See *Ferreira* para 164. However, in exceptional cases, and to avoid the disruptive force of legal uncertainty, a court will deal with the substance of a constitutional challenge even if the attack is by a litigant lacking proper legal standing. See *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) para 13.

²⁹ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) para 14.

³⁰ *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) para 21.

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their protection is extended. This permits effect to be given to the Constitution's overall objectives (discussed above in chapter three). Section 38 does not require an applicant to have a 'direct and personal interest' in the relief sought but simply that there be an infringement or threatened infringement of a protected right³¹ and that the applicant falls into a category of persons listed in s 38 with a 'sufficient interest' in obtaining the relief.³² Applicants do not have an unqualified capacity to challenge illegalities.³³ Unlawfulness does not confer standing. A 'sufficient interest' must exist in the validity of the impugned conduct or law. If not, then *locus standi* is absent. This is so even if it leads to the otherwise unlawful conduct or law remaining intact.³⁴

Section 38(a) operates alongside subsecs (b) to (e) which create 'scope for public interest, surrogate, representative and associational challenges to illegality'.³⁵ Thus, a taxpayer who does not have a foothold in the BOR as the bearer of a fundamental right may launch a constitutional challenge in respect thereof despite lacking sufficient own-interest. Such standing is contingent on the taxpayer showing that he/she/it falls into any other category listed in s 38. Thus, a taxpayer who, by law, is precluded from relying on s 38(a) may nevertheless challenge a provision in the TAA limiting a fundamental right of taxpayers generally. In this regard, ss 38(c) and (d) provide some relief. It is submitted that taxpayers are an objectively determinable 'group or class of persons' as contemplated by s 38(c).³⁶ Every taxpayer is a member thereof and clothed with sufficient interest to act in the interests of the group or class concerned. Alternatively, a taxpayer may utilise the 'public interest' provision in s 38(d) to challenge a provision in the TAA that limits a fundamental right enjoyed by taxpayers generally (such as the right to privacy).

³¹ It is unnecessary to show that the right of a particular person is infringed or threatened. See de Vos P, Freedman W (eds) & Brand D *et al* (2014) 327.

³² *Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) paras 21-90.

³³ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 328.

³⁴ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) paras 32-5 41-3. The CC held that an own-interest litigant has standing if he/she/it has actual rights or interests, or potential rights or interests, directly affected by the challenged law or conduct. In other words, as stated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 28, a challenge can be successful only if 'the right remedy is sought by the right person in the right proceedings'.

³⁵ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) para 42.

³⁶ *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) paras 29-34; *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

8.3 GENERAL LIMITATION CLAUSE IN THE BILL OF RIGHTS

8.3.1 General purpose of the limitation clause in s 36(1)

As shown above, the Constitution evinces a pro-fundamental rights orientation. Rights of this nature are not 'popular social values, slogans and clichés [elevated] to holy cows'.³⁷ Rather, they are constituent elements of the legal order in a *Rechtsstaat* ensuring that a fair balance is struck between, on the one hand, the demands on the State by its subjects and, on the other, the rights and liberties of its subjects.³⁸ Fundamental rights curb the predatory appetites of the State and its inclination to place restrictions thereon for reasons that its functionaries consider appropriate in the public interest or for the common good of society. Owing to the history and legacy of rights abuses during apartheid, s 36 anchors the protection of fundamental rights. It safeguards them against encroachment that is not 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The degree of their protection is reflected in the rule that fundamental rights may not be waived.³⁹ In terms of s 36(2),⁴⁰ 'no law' may abridge ('may limit') a fundamental right, except as is permitted by s 36(1) or other provision of the Constitution. Thus, the default legal position is that fundamental rights are not to be limited, except in circumstances satisfying the normative standards of the Constitution.

It is trite law that fundamental rights may not be exercised or enforced with indifference either to the rights of third parties⁴¹ or to broader societal interests. Their upper limits are 'set by the rights of others and by the legitimate needs of society'.⁴² Fundamental rights

³⁷ *Bongopi v Chairman of The Council of State, Ciskei and Others* 1992 (3) SA 250 (Ck) 265G.

³⁸ Blaauw-Wolf L & Wolf J (1996) 270.

³⁹ *S v Shaba and Another* [1998] 2 All SA 48 (T) 51. See also Hopkins K 'Constitutional rights and the question of waiver: How fundamental are fundamental rights?' (2001) 16(1) *SAPL* 122.

⁴⁰ Section 36(2) reads: 'Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

⁴¹ Blaauw Wolf L & Wolf J (1996) 273-74 distinguish between a collision of rights (that is, when fundamental rights with different bearers conflict with each other) and a competition of rights (that is, when two or more fundamental rights come into play in relation to the same bearer of rights).

⁴² Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 639; van der Bank CM 'Media freedom the cornerstone of human rights in South Africa' (2014) 41(2) *Journal of Social Sciences*

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are not altogether inviolable or impenetrable.⁴³ Their non-absolutism is clear from the unambiguous language in the text of s 7(3). It reads: 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'⁴⁴ As will be shown below in chapter ten, the impugned TAA provisions impose or permit limitations of taxpayers' fundamental right to privacy in s 14 of the BOR. However, under s 7(3) read with s 36(1) of the BOR, those limitations are not, *per se*, unconstitutional. This is so because not every infringement of a fundamental right is unlawful. In essence, a limitation of a fundamental right is valid if it is authorised by the Constitution, is contained in a law of general application, and is justified in an open and democratic society based on human dignity, equality and freedom. Section 36(1), thus, serves to ensure that laws are 'drafted within the analytical framework contemplated by that clause and ensures that the legislature considers and debates the legislation within that framework'.⁴⁵ Owing to its general nature, s 36(1) is distinguishable from the rights-specific limitation clauses appearing in various regional and international human rights instruments (for example, the European Convention on Human Rights). However, just as with Germany's *Grundgesetz* (Basic Law) and Canada's Charter of Rights and Freedoms, the BOR contains both a general limitation clause (s 36(1)) and certain specific limitation clauses applying to particular fundamental rights (for example, in s 25, s 26 and s 27).⁴⁶

265 267. See also *Bernstein* para 67; *De Reuck v DPP, WLD and Others* 2003 (3) SA 389 (W) 425G.

⁴³ Friedman J, in *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BG) 563F-G, encapsulates the relative nature of human rights as follows: 'It is accepted and recognised that not all human rights, the so-called "inalienable" rights, could exist as absolutes. They are not fenced in with impregnable palisades and unbreachable walls. They must be counter-balanced against the interests and welfare of the community, represented by the State. In most legal systems, therefore, there is a tension between the demand for clear, determinable, unqualified and explicit rules, and humanitarian and equitable principles that demand a degree of flexibility and pliancy.'

⁴⁴ Section 36 (limitation clause) must be distinguished from s 37 (derogation or suspension clause). Limitations and derogations differ in nature, scope and the circumstances when they apply. In addition, the lawfulness of their application is subject to the operation of different conditions and requirements. Whilst certain fundamental rights may be limited under s 36, they are non-derogable under s 37. It is beyond the purview of this dissertation to discuss s 37 of the BOR. For a discussion of suspensions of fundamental rights generally, see Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 629 650-63.

⁴⁵ Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-3.

⁴⁶ See Rautenbach IM (2012) 302 314-17; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 349 382-87.

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

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including---

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.'

Section 36(1) does not distinguish between any of the guaranteed rights in the BOR. Its opening words, namely, '[t]he rights in the Bill of Rights', are couched in sufficiently broad terms so that it encompasses *all* the rights that are entrenched in the BOR.⁴⁷ In *FNB*, Ackermann J, writing for a unanimous Court, pointed out that '[n]either the text nor purpose of section 36 suggests that any right in the Bill of Rights is excluded from limitation'.⁴⁸ Thus, s 36(1) imposes a common, uniform set of 'primary criteria'⁴⁹ applicable to the limitation of fundamental rights generally, including those rights with their own, internal (or built-in) limitations.⁵⁰ In the light of the foregoing, s 36(1) applies to the fundamental right to privacy in s 14 of the BOR dealt with below in chapter ten as the subject of the constitutional review conducted there in relation to the impugned TAA provisions. As will be shown in that review, the privacy rights of taxpayers are not boundless. In appropriate circumstances, they may be subject to lawful restrictions.

⁴⁷ *Case and Curtis* para 37. Also, in *Dawood* para 37, O' Regan J (writing for a unanimous Court) held: 'Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of section 36(1) of the Constitution.' See also *Nortje and Another v Attorney-General, Cape and Another* 1995 (2) SA 460 (C). A constitutional challenge must be a 'frontal "root and branch"' assault on the constitutional validity of an impugned provision (*Shoprite Checkers* para 30).

⁴⁸ *FNB* para 110. See also Woolman S 'Out of order? Out of balance? The limitation clause of the final Constitution' (1997) 13(1) *SAJHR* 102.

⁴⁹ *Phillips and Another v DPP, WLD and Others* 2003 (3) SA 345 (CC) para 20.

⁵⁰ Currie I & de Waal J (2014) 152 and Iles K 'A fresh look at limitations: Unpacking section 36' (2007) 23(1) *SAJHR* 68 91-2 opine that it is difficult for s 36(1) to apply to BOR provisions that have their own internal limitations (such as ss 26, 27). However, compare de Vos P (1997) 91-2.

8.3.2 Role of s 36(1) in the protection of taxpayers' fundamental rights

The Constitution is a value-centric instrument mainly concerned with substance (not formalism or process).⁵¹ By virtue of s 2 thereof, discussed above in chapter three, SARS does not have free reign (or licence) to administer taxes as it sees fit. When exercising any public power conferred on it by law, SARS must act within the straightjacket of the Constitution, its democratic values and principles. As explained above, SARS is an organ of state. As such, s 8(1) of the Constitution obliges it to respect all taxpayers' fundamental rights entrenched in the BOR. The same legal position applies to tax legislation. Section 8(1) provides further that the 'Bill of Rights applies to all law'. Hence, any money Bill, as defined under the Constitution, and other tax related law that is not a money Bill must respect and uphold taxpayers' rights. This is a prescriptive, mandatory obligation arising from the Constitution. Failure to comply is a breach of s 2 thereof that renders any such 'law' susceptible to a declaration of invalidity under s 172(1).⁵²

In accordance with international human rights law, since fundamental rights do not guarantee unlimited (or unfettered) rights or freedoms for anyone, s 36(1) permits a limitation thereof provided the limitation is justifiable on the basis of the surrounding facts and other relevant considerations, including applicable constitutional values. From a tax law perspective, s 36(1) serves as a protective mechanism that shields taxpayers' fundamental rights from unjustifiable interference or erosion by the State and organs of state in their legitimate pursuit of tax administration for the public benefit. As stated above, the TAA confers on SARS broad-ranging administrative and other powers designed to foster fulfilment of the TAA's stated purposes (discussed above in chapter five). Included among these are the aims outlined in s 2(d) thereof, namely, 'giving effect

⁵¹ Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 633.

⁵² The Constitution (s 172(1)) reads: 'When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.' For a discussion of s 172, see TAC para 101.

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to the objects and purposes of tax administration'. Some of the extensive TAA powers conferred on SARS *prima facie* infringe on taxpayers' fundamental rights. This does not invalidate the provisions or powers concerned.⁵³ Any such invalidity only arises if a competent court issues an order to this effect under s 172(1) which is later confirmed by the CC under s 172(2)(a). Under s 172(1)(a), such invalidity is furthermore restricted 'to the extent of its inconsistency' with the Constitution.⁵⁴ The possibility that an unscrupulous SARS official acting with ulterior (or impure) motives may abuse a TAA power provides no legal basis for mounting a constitutional challenge.⁵⁵ More is required than simply such a possibility. It is in this regard that the safety mechanisms built into the BOR come to the fore. Particularly important in this regard is s 36(1).

Under s 36(1), Parliament may limit taxpayers' fundamental rights when it legislates in relation to tax matters within its spheres of competence (discussed above in chapter four). Such limitation must be by 'law of general application' that satisfies the normative bounds of 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Parliament was, when drafting the TAA, acutely aware of, and indeed sensitive to, taxpayers' fundamental rights. This is clear from s 44(1) thereof. It reads: 'During a criminal investigation, SARS must apply the information gathering powers in terms of this Chapter with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation.' Whilst Parliament's mindfulness of

⁵³ The CC, in *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) para 13, held: 'Whether a law is invalid is determined by an objective enquiry into its conformity with the Constitution. The doctrine of objective constitutional invalidity was laid out in *Ferreira v Levin* where this Court held that finding a law to be in conflict with the Constitution "does not invalidate the law; it merely declares it to be invalid". A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences.'

⁵⁴ Section 172(1)(b)(ii) of the Constitution confers judicial discretion as to whether or not to suspend a declaration of invalidity until the defect in the law is cured by the legislative authority. Thus, a reviewing court 'may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity' (per Ackermann J in *Ferreira* para 28). The conferral of temporary validity avoids potentially chaotic conditions and harmful results arising from a legislative vacuum through the striking down of a law. See *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC) para 19. Such a vacuum in society is inimical to the tenets of the rule of law and its avoidance is constitutionally desirable.

⁵⁵ *Van Rooyen* para 37; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 72.

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taxpayers' fundamental rights provides some assurance that it drafted, debated and considered the TAA within the analytical framework of s 36(1), this is no indicator that the impugned TAA provisions pass constitutional muster 'to the extent that' they impose a 'limitation' on taxpayers' rights to privacy or to property in the BOR. Any incursion on these fundamental rights must be formally subjected to the litmus test of s 36(1). Failure to do so would be an abdication of a constitutional responsibility.

8.3.3 Genesis of s 36(1) traceable to *Makwanyane*

A discussion of the evolution of s 36, and its predecessor in the interim Constitution, as well as their comparable counterparts in foreign jurisdictions (such as, in Canada and Germany) is unnecessary for this dissertation.⁵⁶ However, the CC, in *Malachi v Cape Dance Academy International (Pty) Ltd and Others*,⁵⁷ recognised that s 36(1) is, by and large, a codification of the features identified in the following instructive *dictum per* Chaskalson P in *Makwanyane* para 104 pertaining to s 33(1) of the interim Constitution:

'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ... The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'

⁵⁶ For a discussion of the genealogical history of the limitation clause, see Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-10 – 34-16; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 349-54.

⁵⁷ 2010 (6) SA 1 (CC) para 36. In SA, a rebuttable presumption operates that a legislative body is acquainted with the judicial interpretation of prior enactments. See de Ville JR (2000) 216-17.

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The general limitation clauses in the interim and final Constitutions contain no express reference to proportionality or the notion of balancing referred to in the quoted *dictum*.⁵⁸ Nevertheless, s 36(1) and its predecessor are interpreted as incorporating proportionality and balancing into the limitations analysis. The factors in ss 36(1)(a) - (e) and are not a *numerus clausus* of considerations to be applied mechanically as a sequential checklist.⁵⁹ Nor are freestanding factors to be viewed in isolation. An integrated approach requires each factor to be weighed and balanced in relation to each other.⁶⁰ As part of an overall, global evaluation of a limitation and the assessment of its proportionality, each factor listed in s 36(1) and any other constitutionally relevant consideration must be put onto the scales of 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. A survey of jurisprudence shows that a limitation is valid only if, after considering the nature and importance of an implicated fundamental right⁶¹ and the extent of the limitation thereon, it is justified in relation to the purpose, importance and effect of the provision resulting in the limitation, taking into account other less restrictive constitutional means available to achieve the intended purpose.⁶²

⁵⁸ Unlike s 33(1)(b) of the interim Constitution and Art 19(2) of Germany's Basic Law, s 36 of the final Constitution does not stipulate that a limitation 'shall not negate the essential content of the right in question'. For a discussion of s 33, see de Ville JR 'Interpretation of the general limitation clause in the chapter on fundamental rights' (1994) 9(2) *SAPL* 287; Devenish G 'An examination and critique of the limitation provision of the Bill of Rights contained in the interim Constitution' (1995) 10(1) *SAPL* 131. For a comparison between the limitation clauses in the interim and final Constitutions, see Woolman S (1997) 103-07.

⁵⁹ *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) para 32 (*Manamela*).

⁶⁰ Sachs J, in *Christian Education SA* para 30, describes the approach to implementing s 36(1) as follows: 'Our Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing.' See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 128. Also, see Woolman S (1997) 108-09.

⁶¹ Iles K (2007) 77-9 criticises the CC's limitations jurisprudence taking account of the 'importance' of a fundamental right. Iles points out that 'importance' of a right is distinguishable from its 'nature' and that s 36(1) only refers to the latter (not the former). Whilst this is factually correct, it must be borne in mind that the factors listed in ss 36(1)(a) - (e) are non-exhaustive. Thus, other factors not expressly listed in s 36(1) may be considered to determine whether a limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. See *Manamela* para 32. Iles's most compelling argument is probably that reference in the limitations jurisprudence to the 'importance of the right' suggests that there is an abstract ranking of fundamental rights when indeed none exists in the formal structure of the BOR as confirmed in case law. See *Mamabolo* para 41 as well as the case law cited at fn 121 in chapter one above and at fn 66 of Iles K's article.

⁶² *Christian Education SA* para 31. A limitation of a right must not be used as 'an instrument of oppression, injustice or of needless injury to the individual' (*Bernstein* para 24).

8.3.4 Two-stage approach to a limitations enquiry under s 36(1)

The general limitation clause in s 36(1) of the BOR provides a framework (or matrix) for assessing whether a rational justification exists for a limitation of an entrenched right. A clause of this nature means that 'there will be a more orderly and "open and candid consideration of competing governmental, public, private and constitutional interests"'.⁶³ When confronted with an alleged limitation of a fundamental right, South African courts apply a two-stage approach to the constitutional enquiry.⁶⁴ The first stage is the so-called threshold (or definitional) phase.⁶⁵ It entails an enquiry into whether an offending provision infringes a substantive right guaranteed in the BOR. If not, the enquiry ends. However, if the first phase yields a positive answer, then the second stage is triggered.

The CC has not stated clearly the tasks allocated to each stage of the limitations enquiry. Woolman and Botha⁶⁶ emphasise that the first stage does not involve a balancing of competing interests 'by asking what values underlie the right and then, in turn, what practices serve those values'. Accordingly, they point out that this initial stage does not require an interpreter to delve into a comparison between the relative importance of the values underlying the fundamental right infringed with the values that underlie the policy or right or interest that support its infringement. Such comparison is only undertaken in the second stage of the constitutional enquiry when consideration is given to whether a person's interest in having a challenged law upheld is of sufficient import to justify striking down the infringement of the fundamental right(s) asserted.

⁶³ Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-3.

⁶⁴ *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) para 18. See also Currie I & de Waal J (2014) 152-55; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 354-55. Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-20 criticises the CC's limitation jurisprudence pertaining to the two-stage fundamental rights analysis on the basis that it 'offers little insight or guidance'. Put differently, they consider it 'rainbow jurisprudence', a term coined by Cockrell A (1996) 11-12. The kernel of Woolman & Botha's criticism is: 'The Court has neither described in detail the analytical processes that occur at each step nor has it justified the allocation of certain tasks to particular stages of the analysis.'

⁶⁵ *Prinsloo* para 35; *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) para 28.

⁶⁶ Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-20. See also Iles K (2007) 72-3.

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The threshold phase comprises two enquiries. The first enquiry relates to the scope and content of the fundamental right(s) at issue. The second enquiry pertains to the meaning and effect of the impugned provision with a view to determining whether it has infringed the fundamental right(s).⁶⁷ The first enquiry involves an analysis of a fundamental right's definition (or demarcation): 'a determination of the right's boundary and, then, of whether the law or action complained of crosses that boundary'.⁶⁸ Whereas the enquiry in the first part of the threshold phase is an interpretive exercise, the nature of the enquiry in the second part is dependent on the nature of the infringement. As regards the interpretive exercise in the first part of the constitutional enquiry of the threshold phase, Cheadle⁶⁹ contends that, conceptually, there are at least two possible approaches to conducting that exercise. First, the fundamental right(s) concerned may be given the broadest ambit within the limits of the language of its/their text(s). Secondly, the right(s) may be defined by the constitutionally protected interest(s) or value(s) that it/they advance.

Cheadle concludes that the first interpretive approach identified is inappropriate for the interpretive exercise involved in the threshold phase. This approach applies in the second stage of the constitutional enquiry (discussed below). Cheadle opines, convincingly so, that the second approach referred to is more appropriate.⁷⁰ To this end, Cheadle⁷¹ describes the determination of a constitutionally protected interest or value as entailing a 'hermeneutic exercise based on the text, the context and the foundational values', that is,

⁶⁷ *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) paras 26-7.

⁶⁸ Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-3 – 30-4. Currie I & de Waal J (2014) 153 state the position as follows: 'The court must determine the scope of the rights by a process of interpretation and must ascertain whether the right has been infringed by the challenged law or conduct.' Iles K (2007) 72 describes the threshold phase as involving 'a definitional determination of the scope of the right and a delimitation of the boundaries of constitutionally protected activity'.

⁶⁹ Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-4 – 30-5.

⁷⁰ Similarly, Iles K (2007) 72 states: 'At the first stage a court is asking whether certain activities or interests fall within the scope of the right. This process often requires a court to examine the values that underlie the right and the practices that serve those values. There should be no balancing of competing values.'

⁷¹ Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-5.

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'an analysis of the text in its context, namely the historical background to both the Constitution and the right, the reason for its inclusion as a constitutional right, the concepts enshrined in the right and their legal elaboration under both our law and comparative law, the other provisions of the Constitution, in particular the other constitutional rights, and the foundational values'.⁷² Thus, the interest(s) or value(s) advanced by a fundamental right is/are determined purposively by giving due consideration to relevant constitutional values underlying an open and democratic society, the mischief at which the entrenched right is directed, its inter-relationship with other guaranteed rights in the BOR, and the interpretive directives in s 39. The substantive, value-based approach advocated by Cheadle was applied by the CC in, inter alia, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*⁷³ (*Ferreira*) at para 46 thereof. Thus, in the constitutional review to be undertaken below in chapter ten, a purposive approach will be applied when determining the interest(s) or value(s) advanced by the fundamental right to privacy in the BOR.

The constitutional review below will show that the impugned TAA provisions limit taxpayers' fundamental right to privacy. This triggers the second stage of the constitutional enquiry (that is, the limitations phase).⁷⁴ It entails an analysis of whether the degree of infringement 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' after the balancing considerations listed in ss 36(1)(a) - (e) are put into the scales and weighed in a proportionality evaluation. When dealing with a statutory infringement of a fundamental right, relevant factors to be considered in the limitations phase are the broader context, purpose and

⁷² Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-17 explain the position as follows: 'For each right there are specific values that can be said to have led to its constitutionalisation. The specific values that animate each right, along with FC s 39's more general concerns, determine the right's sphere of protected activity. On this account, if an applicant can show that the exercise of constitutionally protected activity has been impaired, then she has made a *prima facie* showing of a constitutional infringement.' See also *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; 18 DLR (4th) 321 359-60.

⁷³ 1996 (1) SA 984 (CC).

⁷⁴ *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) para 28.

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practical effect of the statutory provision(s) concerned.⁷⁵ The CC, in *South African National Defence Union v Minister of Defence and Another*,⁷⁶ points out a trio of questions to be asked and answered during the limitations phase. First, what is the purpose of the relevant provision? Under the rule of law, discussed above in chapter three, the measure concerned must serve a legitimate governmental (or public) purpose or interest. Secondly, what is the actual effect of the impugned provision on the fundamental right(s) asserted (or affected) thereby? In this regard, the nature of the fundamental right(s), as well as the nature and extent of the limitation are important. Thirdly, is the impugned provision well-tailored to its intended purpose? A rational connection must exist between the measure imposed and the purpose it seeks to achieve. This question embodies the legal principle of proportionality. It requires consideration as to the availability of other suitable, less intrusive (or invasive) constitutional means to achieve the limitation's aim. A legislative measure is bereft of rationality and, thus, validity if it does not use the least onerous means of achieving its intended objectives.⁷⁷

Sections 36(1)(b), (d) and (e) refer to the 'purpose' of a limitation. This recurring theme is an emphatic indication of the cardinal importance of a limitation's 'purpose' in the justification analysis. A limitation is constitutionally justifiable if it serves a good reason or purpose that is 'compellingly important'⁷⁸ or 'exceptionally strong'.⁷⁹ If not, then the limitation fails to pass constitutional muster.⁸⁰ Each case is decided on its own facts. As a general rule, the more serious (that is, severe or egregious) a measure's impact is on a

⁷⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 35. The CC, in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 68, held: 'It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other.'

⁷⁶ 1999 (4) SA 469 (CC) para 18.

⁷⁷ *Prinsloo* para 35.

⁷⁸ Currie I & de Waal J (2014) 151.

⁷⁹ Van der Bank CM (2014) 267.

⁸⁰ The fundamental rights-friendly disposition of s 36 is consistent with international human rights law that is, as stated above, binding on SA under s 233 of the Constitution. For example, the UDHR (Art 29(2)) reads: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

fundamental right, the more persuasive or compelling its justification must be.⁸¹ It is, however, insufficient for a limitation to serve a justifiable purpose. The nature and the extent thereof must also be such that there is good cause to believe that the limitation would achieve its intended aim. Ultimately, the test is one of degree to be evaluated within the context of the 'concrete legislative and social setting of the measure'.⁸² To this end, due regard must be given to the surrounding circumstances. This includes, but is not limited to, a consideration of the values or interests sought to be protected or advanced by the measure in question, and whether there are any other 'realistically available'⁸³ means by which the measure's intended purpose may be attained other than through a limitation of the fundamental right(s) concerned. This is so because s 36 'does not permit a sledgehammer to be used to crack a nut ... [n]or does it allow for means that are legitimate for one purpose to be used for another purpose where their employment would not be legitimate'.⁸⁴ A finding that other suitable, less invasive or intrusive means are available by which the limiting measure's aim could be achieved without damaging a fundamental right(s), is fatal to the limitation. It is excessive (that is, 'substantially disproportionate to its public purpose ... [and] is clearly overbroad in its reach').⁸⁵

8.3.5 Onus of proof under s 36(1)

Once a fundamental right is conferred, 'the state bears the negative duty not to take away or diminish the right without appropriate justification'.⁸⁶ The burden to prove that a measure infringes a fundamental right rests on the party alleging a breach.⁸⁷ In a tax matter concerning the TAA or other tax statute, this burden rests on the taxpayer or

⁸¹ *Manamela* para 32.

⁸² *Manamela* para 32.

⁸³ *Manamela* para 32.

⁸⁴ *Manamela* para 34.

⁸⁵ *Mistry* para 30.

⁸⁶ Per Moseneke DCJ in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 52. When interpreting any statute, it is rebuttably presumed that the legislature did not intend to alter or take away a pre-existing right more than is necessary. For a discussion of this common law presumption of interpretation, see de Ville JR (2000) 170-76; du Plessis L (2007) 177-81.

⁸⁷ Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-42. For a discussion of the rules pertaining to onus generally, see *Prinsloo* paras 55-6.

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taxpayer's representative (as the case may be). If a court is satisfied that a challenged provision limits a fundamental right as contemplated by s 36(1), then it will proceed to deliberate on the enquiry in the limitations phase. Proof of an infringement will render the relevant statutory provision *prima facie* unlawful.⁸⁸ A shifting of onus then occurs. The State or other party relying on the limitation bears the burden to prove that constitutional justification exists for the limitation.⁸⁹ In this context, onus does not carry its usual connotation of a burden of proof in a civil or criminal matter involving the resolution of factual disputes respectively on a balance of probability or beyond reasonable doubt. A special onus is at play. It is simply a burden to justify a limitation.⁹⁰

A limitation of a fundamental right is permissible under s 36(1) if it 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The 'reasonable and justifiable' level of scrutiny demanded by the general test imposed in s 36(1) is a constitutional imperative contributing significantly to the emergence of a legal culture of justification.⁹¹ This culture exists in open democratic societies generally. The justificatory culture means that the State and organs of state are accountable to provide reasons that validate an infringement of a right that they seek to enforce. This 'golden thread'⁹² of accountability permeating s 36(1) reinforces the existence of an implied onus on the party seeking to enforce a limitation to show just cause for it. Such accountability dovetails neatly with the principle in s 195(1)(f) of the Constitution (discussed above in chapter five). It reads: 'Public administration [which, as seen above, includes tax administration] must be accountable.'

⁸⁸ McQuoid-Mason D 'Invasion of privacy: Common law v constitutional delict – does it make a difference?' 2000 *Acta Juridica* 227 246.

⁸⁹ *Phillips and Another v DPP, WLD and Others* 2003 (3) SA 345 (CC) para 19. Ngcobo J, in *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 74, held that 'a constitutional right cannot be denied on the basis of mere speculation unsupported by conclusive and convincing evidence'. For analysis of the CC's approach to evidential matters, see Bilchitz D 'How should rights be limited?' (2011) 3 *TSAR* 568 573-74. For a discussion of the meaning of 'conclusive proof' and its distinction from 'prima facie proof', see *TM v NM and Others* 2014 (4) SA 575 (SCA) para 14.

⁹⁰ *Makwanyane* para 102; *Moise v Greater Germiston Transitional Local Council and Another* 2001 (4) SA 491 (CC) paras 18-19; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) paras 34-6.

⁹¹ Mureinik E (1994) 32 points out that a legal culture of justification replaced the culture of authority that existed under apartheid in SA's pre-constitutional era. See also *Ferreira* para 51.

⁹² *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E) 634.

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In a limitations analysis pertaining to the TAA, the 'burden of justification'⁹³ rests on SARS, represented by the CSARS, and the government functionary responsible for the tax law under review, namely, the Minister of Finance. They should place facts and/or policy considerations before a court to show that the limitation is constitutionally justified. However, legislative choices are 'not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data'.⁹⁴ Thus, instances may arise where the concerns or mischief at which a statute is directed are not susceptible to proof by way of objective facts. In such (presumably rare) cases, failure to place relevant information before a court may not necessarily be fatal to a justification claim. Despite the absence of information favouring justification, a court may still find, in those exceptional cases, justification based on common sense, juridical logic and judicial knowledge.⁹⁵ To this end, the CC held: 'If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them.'⁹⁶

8.3.6 Analysis of s 36(1) and the general limitations criteria

8.3.6.1 Approach to the interpretation of s 36(1)

The constitutional review of the impugned TAA provisions in chapter ten necessitates an analysis of the substantive provisions of s 36(1). Thus, the discussion below analyses and determines the meaning of the key requirements imposed by s 36(1) for a valid limitation of a fundamental right. That discussion involves interpreting the provisions of s 36(1). This is a 'constitutional matter' of interpretation as envisaged by s 167(7) of the

⁹³ *Moise v Greater Germiston Transitional Local Council and Another* 2001 (4) SA 491 (CC) para 18. See also Woolman S 'Riding the push-me pull-you: Constructing a test that reconciles the conflicting interests which animate the limitation clause' (1994) 10(1) *SAJHR* 60 83-4.

⁹⁴ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) para 35.

⁹⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) para 36. Whether evidence of justification is necessary 'will depend on the right and the limitation in question' (per Yakoob J in *Phillips and Another v DPP, WLD and Others* 2003 (3) SA 345 (CC) para 21).

⁹⁶ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders and Others* 2005 (3) SA 280 (CC) para 35.

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Constitution. Although reference will be made below to the principles of constitutional interpretation discussed above in chapter two, they will not be restated here. However, it bears repetition that ascertaining the meaning of the text of s 36(1) involves an application of the interpretational directives contained in ss 39(1)(a) - (c), namely, that an interpreter 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom', 'must consider international law', and 'may consider foreign law'. Thus, the approach to interpreting the text of s 36(1) must be purposive, contextual and teleological. As stated above, such interpretation involves having due regard to, inter alia, the transformative potential and proper constitutional context of the provisions under construction. As noted above in chapter two, words in the Constitution are meaningless unless they are interpreted purposively and understood within their broader social, economic, historical, legal and political context.

In the process of drafting the final Constitution, the Constitutional Assembly carefully selected every word, term, clause, phrase, expression and sentence included therein. Its members subjected every aspect of the Constitution's written text to rigorous debate, deliberation and negotiation.⁹⁷ Thus, everything in the certified text of the 1996 Constitution has a meaning and purpose that give effect to the Constitution's objectives and the promotion of its underlying democratic values, norms and principles (discussed above in chapter three). Put differently, nothing in the Constitution's content is superfluous, redundant or insignificant and everything therein is goal oriented. Thus, when interpreting the Constitution, the common law presumption of interpretation that a lawgiver does not intend to enact invalid or purposeless provisions,⁹⁸ applies.

In a *Rechtsstaat*, such as SA, it is contrary to the rule of law for the State to be granted unfettered discretion or unrestrained authority to curtail fundamental and non-fundamental rights. Thus, the limitation clause in s 36(1) is structurally designed in a way that fosters meaningful and optimal enjoyment of fundamental rights. This accords with

⁹⁷ As stated above in chapter one, the approved version of the final Constitution is that certified by the CC in *Certification 1* read with *Certification 2*.

⁹⁸ For a discussion of this presumption, see de Ville JR (2000) 167-69; du Plessis L (2007) 187-91.

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the various measures in the Constitution discussed above that advance human rights and freedoms by emphasising respect therefor, and protection, promotion and fulfilment thereof. This is part of the foundational value in s 1(a) of the Constitution, namely, the advancement of human rights and freedoms. This value is a basic premise of an open society, as in SA, founded on democratic principles and values. Indeed, this is a recognised benchmark of constitutionalism⁹⁹ (discussed above in chapter three). Giving due consideration to the advancement of fundamental rights is a constitutionally relevant consideration when s 36(1) is applied. This is so because s 36(1) only permits limitations that are acceptable 'in an open and democratic society'. The Preamble expressly stipulates that SA's people '[r]ecognise the injustices of our past; [and] [h]onour those who suffered for justice and freedom in our land'. The ultimate objective of the inculcation of a human rights culture, ethos and spirit is to ensure that never again in SA shall there be a repetition of past injustices, suffering and a denial of freedom for anyone.

Whilst an interpretation of s 36(1) must be purposive, contextual and teleological, its provisions ought to be construed restrictively and in favour of the right at stake in any particular case.¹⁰⁰ Such a strict interpretation serves as a legitimate counterweight against governmental onslaughts on fundamental rights. It ensures that effect is given to the aims and interests served by the value in s 1(a), namely, the advancement of human rights and freedoms (such as, enhanced respect for, and increased protection, promotion and fulfilment of, rights). Thus, a restrictive interpretation yields results more compatible with a human rights culture, ethos and spirit. Historical considerations of injustice and rights abuses during apartheid also support the adoption of a restrictive interpretation. This is so because a restrictive approach will reject measures that suppress, revoke or abolish rights. Therefore, a narrow or strict approach is beneficial for an interpretation of s 36(1). This will ensure that limitations are only permitted sparingly as exceptions 'so far as is necessary for preserving the values enumerated in the limitation clause'.¹⁰¹

⁹⁹ Fombad CM (2010) 45.

¹⁰⁰ Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 642-44.

¹⁰¹ Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 642. Bilchitz D (2011) 576

8.3.6.2 Interpreting 'limitation' in s 36(1)

An understanding of the meaning of 'limitation' as used in s 36(1) is a pre-requisite to understanding the mechanics involved in the practical operation of s 36(1). Section 36 does not apply in isolation. An integrated reading shows that it applies together with s 7(3) in terms whereof fundamental rights 'are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'. The term 'limitation' may, depending on its context, bear different meanings. Rautenbach¹⁰² points out that in the BOR generally, a 'limitation' connotes three possible technical meanings. First, 'limitation' may mean that 'all the details contained in the definition of a right concern the limitation of the right'. This meaning of 'limitation' refers to the internal qualifiers that regulate, inter alia, the conduct or interest that a right seeks to protect¹⁰³ (or not protect),¹⁰⁴ the categories of beneficiaries protected by a right,¹⁰⁵ the institutions and persons bound by a right (or a correlative duty arising therefrom),¹⁰⁶ and the geographical area where a right may be exercised.¹⁰⁷ Secondly, 'limitation' may mean the fettered power to limit the reach of rights formulated in the BOR. Such power may be restricted by a general or specific limitation clause indicating 'when, how and by whom the rights in the bill of rights may be limited'.¹⁰⁸ Thirdly, 'limitation' may refer to 'the limitations imposed after the commencement of the constitution in terms of the rules for permissible limitations'.¹⁰⁹

explains, convincingly, the importance of the proper judicial approach to rights' limitations as follows: 'The question of how courts should approach the limitation of rights from a substantive point of view is a central concern for our constitutional order since it affects the very meaning of what it is to have a right. If rights can be limited easily, then possessing a right does not provide one with a particularly strong guarantee.'

¹⁰² Rautenbach IM 'The limitation of rights in terms of provisions of the Bill of Rights other than the general limitation clause: A few examples' (2001) 4 *TSAR* 617-19.

¹⁰³ For example, human dignity (s 10), life (s 11), and freedom and security of the person (s 12). For a discussion of internal restrictions on fundamental rights, see Cachalia A, Cheadle H & Davis D *et al* (1994) 106; Carpenter G 'Internal modifiers and other qualifications in the Bill of Rights – some problems of interpretation' (1995) 10(2) *SAPL* 260; Rautenbach IM (2001) 617.

¹⁰⁴ For example, s 16(2) provides that freedom of expression does not protect propaganda for war, incitement of imminent violence or advocacy of hatred.

¹⁰⁵ For example, citizen (s 19, s 20, ss 21(3), (4), s 22), worker, employer, trade union and employer's organisation (ss 23(2), (3), (4), (5)), child (s 28), arrested, detained and accused persons (s 35).

¹⁰⁶ For example, 'the legislature, the executive, the judiciary and all organs of state' (s 8(1)).

¹⁰⁷ For example, 'the right to enter, to remain in and to reside anywhere in the Republic' (s 21(3)).

¹⁰⁸ Rautenbach IM (2001) 619.

¹⁰⁹ Rautenbach IM (2001) 619.

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Currie and de Waal¹¹⁰ explain 'limitation' to be a word synonymous with 'infringement'. They contend that, in s 36(1), 'limitation' means a 'justifiable infringement'. By parity of reasoning, 'limit' in s 36(2) has a corresponding meaning. De Vos, Freedman and Brand *et al*¹¹¹ proffer a similar ordinary, grammatical meaning. They write: 'When law or conduct infringes on one or more of the rights protected in the Bill of Rights, this is called a limitation of the right. A limitation can be justified in terms of section 36 (and is then constitutionally valid) or is unjustified (and is then unconstitutional).'

Accordingly, 'limitation' in s 36(1) refers to a 'law' that has the effect of curtailing (that is, restricting, impairing or encroaching on) the protected content, space or sphere of a fundamental right. A measure that eviscerates or negates a fundamental right by leaving nothing of its substance (or essence) intact, is not a 'limitation'. Rather, it is a revocation, abolition or suppression of the right. Such a measure cannot pass constitutional muster. It is incongruent with the values of a *Rechtsstaat*. As will be shown below in chapter ten, the impugned TAA provisions impose 'limitations' under s 36(1) because, when the powers conferred thereby are exercised, they infringe a taxpayer's fundamental right to privacy by intruding on, or invading, the constitutionally protected values or interests embedded therein. A provision having such an adverse effect will violate the prescripts of s 36(1) only if it damages the affected right by narrowing or abridging its reach to a degree, or in a manner, that is disproportionate to its intended governmental objective or the public purpose or interest it is designed to advance. In such event, the provision concerned may be susceptible to a declaration of invalidity in terms of s 172(1)(a) 'to the extent of its inconsistency' with the Constitution. This is so because the erosion of the fundamental right would warrant a conclusion that it is not 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

An issue requiring consideration is whether a 'limitation' under s 36(1) encompasses only an actual infringement or both an actual and a threatened infringement. A key indicator of the answer hereto lies, it is submitted, in s 38 (discussed above at para 8.2.4). It entitles

¹¹⁰ Currie I & de Waal J (2014) 151.

¹¹¹ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 785.

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persons with *locus standi* to seek appropriate judicial relief if 'a right in the Bill of Rights has been infringed or threatened'. The clear, unequivocal wording of s 38 indicates that the BOR protects persons against both actual and threatened infringements. Thus, s 36(1) ought to apply to actual and threatened limitations of a fundamental right imposed 'in terms of law of general application'. This would entitle a person with *locus standi* to challenge a 'law' that either infringes a fundamental right of the applicant or threatens, if enforced, to infringe a right held by the applicant or third parties on whose behalf, or for whose benefit, the applicant challenges the 'limitation'.¹¹²

8.3.6.3 Interpreting 'in terms of law of general application' in s 36(1)

In accordance with the rule of law, s 36(1) requires a limitation to be grounded 'only in terms of law of general application'. The use of the word 'only' emphasises that a limitation authorised in a manner other than by legal rules ('law'), is unconstitutional. In the context of s 36(1), the CC has hitherto not crystallised the full spectrum of 'law' as utilised therein, nor articulated the inter-relationship (or interdependence) that must exist between a 'law' and a limitation, nor interpreted 'in terms of' or 'general application'.¹¹³ The CC has dealt episodically (piecemeal) with the phrase 'in terms of law of general application'. The essence of this requirement is that a limitation must be 'contained in'¹¹⁴ (that is, sourced in or stem from) a law applying generally and impersonally to all persons (and not only to a specific individual or group).¹¹⁵ Compliance herewith is determined objectively. The question that begs asking is: Does the TAA qualify as a 'law of general application' under s 36(1) of the BOR? This constitutional issue will now be discussed.

¹¹² See *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 232 (CC) para 11.

¹¹³ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 361-62. For general discussion, see van der Vyver JD 'Limitation provisions of the Bophuthatswanan Bill of Rights' (1994) 57(1) *THRHR* 47.

¹¹⁴ The CC, in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 24, refers to a 'measure complained of ... contained in a law of general application'. (my emphasis) Rautenbach IM (2012) 303 contends that this is an incorrect statement of law and submits the issue is whether 'the person or institution who limits a right has been lawfully authorised to perform the action concerned'.

¹¹⁵ De Vos P, Freedman W (eds) & Brand D *et al* (2014) 360-61. Section 36(1) 'includes law in the general sense of the legal system applicable to all' (such as, the corpus of law known as the 'law of contract'). See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 17. Public policy and practices of an organ of state, such as SARS and the CSARS, are not 'law of general application'. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 41.

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Constitutional supremacy renders all 'law' contemplated by s 36(1) to be subject to direct control by constitutional imperatives.¹¹⁶ The Constitution does not define 'law'. This raises the question whether the definition of 'law' in s 2 of the Interpretation Act applies to s 36(1)? Section 2 defines 'law' as 'any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law'. As discussed above in chapter three, the Constitution is a 'law' within the ambit of this definition. Since this definition expressly refers to an 'enactment having the force of law', it excludes, for example, legal rules developed by the judiciary in the exercise of their powers. Whilst such rules have 'the force of law', they are not 'enactments'. The opening words of s 2 in the Interpretation Act expressly states that the definitions therein apply unless, inter alia, the context of a word or term indicates otherwise. This exception applies to the limitation clause in s 36(1). The definition of 'law' in the Interpretation Act does not encompass the full ambit of 'law' as utilised in the context of s 36(1). In its setting, 'law' is not confined to an 'enactment having the force of law'. Rather, 'law' has a broader meaning in s 36(1) that extends to include both enactments (such as, the Constitution, legislation, municipal by-laws, regulations and other subordinate legislation), as well as non-enactments (such as, the common law, customary law rules, international conventions, executive rule-making, and the rules developed incrementally by South African courts).¹¹⁷ Whilst the definition of 'law' in the Interpretation Act does not determine the outer perimeters of 'law' in s 36(1), that definition is nevertheless useful to give some substance (or content) to 'law' in the realm of s 36 read holistically. For its purposes, to be valid, a 'law' must pass the benchmarks of the rule of law (discussed above in chapter three). Whether a 'law' satisfies the benchmarks is determined objectively with reference to all pertinent facts applicable to the relevant 'law'. If the 'law' fails to comply with the tenets of the rule of law, then it is not a valid 'law' for the purposes of ss 36(1) and (2) of the BOR.¹¹⁸

¹¹⁶ The CC, in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 15, held: 'All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the ... Constitution and the values that underlie our Constitution.'

¹¹⁷ *Midi Television (Pty) Ltd v DPP, WC* [2007] 3 All SA 318 (SCA) para 8. See also Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-51 – 34-53; Iles K (2007) 76; Rautenbach IM (2012) 303-04; Currie I & de Waal J (2014) 155-59; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 361-62.

¹¹⁸ Per O' Regan J (minority judgment) in *Bertie van Zyl* para 100 (and the authorities cited there at fn 17). For legal rules that are not 'of general application', see van der Vyver JD (1994) 55-6.

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The impugned TAA provisions are 'contained in' the TAA. As explained above, the TAA is a national fiscal statute passed by Parliament that, for the most part, acquired the force of law with effect from 1 October 2012. Consequently, viewed objectively, the TAA is original legislation that falls squarely within the concept of 'law' as envisaged by s 36(1). Its provisions have 'general application' in that they do not target or single out a specific taxpayer, or class or group of taxpayers.¹¹⁹ The TAA applies nationally throughout SA to every natural and juristic person qualifying as a 'taxpayer' under a fiscal statute falling within the scope and ambit of a 'tax Act' in relation to a 'tax', each of which term referred to here is defined in the TAA (s 1). Since the TAA applies universally (that is, generally) to all taxpayers affected by tax administration taking place thereunder, it is, like the ITA and VATA,¹²⁰ a 'law of general application' for the purposes of s 36(1) of the BOR. To the extent that the impugned TAA provisions infringe taxpayers' fundamental rights, they satisfy the 'in terms of law of general application' requirement of s 36(1).¹²¹ Administrative action by officers of SARS that are conducted in terms of authority granted by the TAA is not, however, a 'law of general application' within the meaning of this phrase in s 36(1).¹²² Thus, administrative action that has the effect of limiting a taxpayer's fundamental right(s) violate s 36(1) and would be unconstitutional, unless authorised by the TAA with the necessary constitutional safeguards that will ensure its survival in a constitutional review.

¹¹⁹ Section 46(2)(a) of the TAA refers to 'taxpayers in an objectively identifiable class of taxpayers'.
¹²⁰ *Deutschmann NO and Others v CSARS; Shelton v CSARS* 2000 (2) SA 106 (E) para 124A recognises that the ITA and VATA are 'law[s] of general application' under s 36(1) of the BOR.
¹²¹ Botha H 'The legitimacy of legal orders (3): Rethinking the rule of law' (2001) 64(4) *THRHR* 523 524 argues that 'the rule of law requires government action to be based on ... legal rules of general application'. This is so because, as Botha contends, 'the generality of law shields the individual from arbitrary exercises of power, renders government action calculable, and ensures the formal equality of all citizens'. In this way, the impartiality of the exercises of state authority is secured.
¹²² *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 82; *Premier: Mpumalanga and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 42. See also Currie I & de Waal J (2014) 161. Some academics (for example, de Ville JR 'The right to administrative justice: An examination of section 24 of the interim Constitution' (1995) 11(2) *SAJHR* 264 275 and Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-8) contend that 'law of general application' encompasses only laws and not conduct undertaken in terms thereof. However, other academics contend otherwise. For example, Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-53 at fn 3 opine that rules, directives and guidelines issued by administrators in accordance with enabling legislation qualify as 'law of general application' if they satisfy the four rule of law criteria listed by the authors at 34-48.

8.3.6.4 Interpreting 'to the extent' in s 36(1)

Section 36(1) does not prohibit an entire 'law of general application' merely because some part thereof violates its provisions. This is the effect of the phrase 'to the extent' when read within the context of s 36(1) as a whole. Put differently, s 36(1) validates that portion of a limitation that 'is reasonable and justifiable in an open and democratic society' and invalidates only that portion thereof which does not satisfy the norms of 'reasonable and justifiable'. Thus, s 36(1) contemplates some degree of apportionment by excision from a 'law of general application' of that part which is non-compliant with the norms of s 36(1). To this end, s 36(1) must be read in conjunction with s 172(1)(a) of the Constitution. The latter gives practical expression to the excision envisaged by the former. Section 172(1)(a) empowers a court to declare a law invalid 'to the extent of its inconsistency' with the Constitution. The process of excision is known in constitutional law parlance as 'severance'.¹²³ In simple terms, severance is a legal remedy that will 'entail striking down a particular section or subsection of a law or even a phrase or word within a subsection and leaving the rest of the law intact'. A practical problem encountered is that severance cannot always be effected with surgical precision. This is so because one cannot always neatly sever the 'bad' from the 'good' so that what remains in a provision ('law') is both purposeful and effective. If severance is not possible, then the entire provision in which the 'limitation' is contained is declared invalid. The classical statement of the test for severability is that by Kriegler J,¹²⁴ namely:

'[I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?'

¹²³ Currie I & de Waal J (2014) 185. De Vos P, Freedman W (eds) & Brand D *et al* (2014) 788 define 'severance' to be the remedy that, to fix the unconstitutionality of a provision, allows the deletion of those words or phrases from the provision which renders it unconstitutional.

¹²⁴ *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para16. The CC, in *Manamela* paras 33-46, held that the proper enquiry concerning a limitation of a protected right is 'to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose'. This approach will be applied in the constitutionality review in chapter ten.

Accordingly, a court is obliged to consider the issue of severance if it finds that a limitation of a fundamental right is not constitutionally compliant. It cannot simply declare a provision as unconstitutional without first deliberating on the appropriateness of this, or any other available, just and equitable constitutional remedy.¹²⁵ To the extent that an impugned TAA provision may, in the review to be conducted below in chapter ten, be found to be unconstitutional under s 36(1) of the BOR, the question of severance will then be dealt with in chapter eleven as part of this study's recommendations.

8.3.6.5 Interpreting 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' in s 36(1)

Section 36(1) prohibits limitations of fundamental rights that are unreasonable and unjustifiable under democratic rule. In terms thereof, a court may validate a limitation to the extent that it 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The phrase quoted from s 36(1) is complex. It does not permit of easy interpretation. Whilst Rautenbach¹²⁶ states that this 'is not an empty, meaningless phrase', Woolman and Botha¹²⁷ state that it is 'fraught with interpretive difficulties as old as political theory itself'. The seemingly Herculean task of formulating a decisive meaning for the phrase concerned and its individual elements possibly accounts for the absence from the Constitution of a definition for it, as well as for the CC not articulating a comprehensive meaning thereof. Thus, no attempt will be made here to carve out an all-embracing meaning for 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' in its context

¹²⁵ The remedy of 'severance' is distinguishable from 'reading-in'. The latter remedy applies when unconstitutionality arises from an omission in a statutory provision or when words are to be read into a statute in order to narrow the reach of a provision that is unduly invasive or intrusive of a fundamental right. See *Manamela* para 57. The reading-in of words necessary to cure a defect is the inverse of 'severance' that involves excision of words from a statute. The test for reading-in is set out in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) paras 74-6. For a discussion of this remedy, see Currie I & de Waal J (2014) 187-88; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 398-400.

¹²⁶ Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17(6) *PELJ* 2229 2250.

¹²⁷ Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-113.

in s 36(1). However, since this phrase and its elements lack clear demarcation or definition, it is incumbent that, for purposes of the constitutional review below in chapter ten, some insight be given beforehand as to its constitutional contours and practical application under s 36(1). Hence, a discussion thereof will now be undertaken.

8.3.6.5.1 Understanding 'reasonable and justifiable'

Before unravelling the 'reasonable and justifiable' criterion in s 36(1), it is prudent to consider the different normative standards deployed by its predecessor. Section 33(1) of the interim Constitution utilised two different standards for the review of a limitation of a fundamental right. In terms thereof, a limitation of some rights had to be 'reasonable and necessary', whilst other limitations needed only to be 'reasonable'.¹²⁸ This bifurcated approach entitled fundamental rights falling into the former category to the 'greatest judicial solicitude'.¹²⁹ 'Reasonable and necessary', in other words, implies a stricter, more rigorous level of scrutiny than simply 'reasonable'.¹³⁰ The contrasting reviewing standards in the interim Constitution were problematic for a variety of reasons.¹³¹ Chief among them was that it created a misconception in some quarters, including among judges of the CC, that rights to which the 'reasonable and necessary' standard applied were ranked as constitutionally superior, and thus deserving of a greater level of judicial scrutiny, than fundamental rights whose limitation needed only to be 'reasonable'.¹³² However, in a positive move when drafting the final Constitution, the Constitutional Assembly removed the different standards and inserted in s 36(1) a single, common, general standard for use in assessing the constitutionality of limitations of fundamental rights, namely, 'reasonable and justifiable in an open and democratic society based on

¹²⁸ For a discussion of s 33(1), see Cachalia A, Cheadle H & Davis D *et al* (1994) 105-11; Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 648-49; Woolman S 'Coetzee: The limitations of Justice Sachs's concurrence' (1996) 12(1) *SAJHR* 99 103-04.

¹²⁹ Woolman S (1994) 87.

¹³⁰ Woolman S (1994) 67-71; Rautenbach IM (2012) 307-08. See also Alexy R 'The Reasonableness of the Law' in Bongiovanni G, Sartor G & Valentini C (eds) *Reasonableness and Law* (2009) 3-15; Zorzetto S 'Reasonableness' (2015) 1(1) *Italian Law Journal* 107.

¹³¹ For a list of the reasons, see Rautenbach IM (2014) 2241-42.

¹³² As stated above in chapter one, there are some old *dicta* of the CC that refer to a hierarchy of fundamental rights. See, for example, *Makwanyane* paras 144 214.

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human dignity, equality and freedom'.¹³³ This uniform approach underscores the equal value and constitutional status of all protected rights. As stated above in chapter one, constitutional parity exists among all fundamental rights - no hierarchy of rights exists.¹³⁴

In terms of s 36(1), a limitation is valid if it is 'reasonable and justifiable'.¹³⁵ The *Oxford Thesaurus*¹³⁶ explains 'reasonable' to mean 'sensible', 'rational', 'logical', 'fair', 'fair-minded', 'just', 'equitable', 'tenable' and 'plausible'. The same dictionary¹³⁷ explains 'justifiable' as meaning 'valid', 'legitimate', 'warranted', 'well founded', 'justified', 'just', 'defensible' and 'acceptable'. These dictionary meanings suggest that 'reasonable' and 'justifiable' are porous, evaluative concepts whose legal meanings are imprecise or indeterminate. In s 36(1), 'reasonable and justifiable' operate as threshold standards serving as catalysts in the regulation of a limitations analysis.¹³⁸ Understanding their regulatory role enhances an understanding of their practical implementation in every instance. In s 36(1), 'reasonable' and 'justifiable' are generic, normative concepts setting defined parameters for valid State action. In this role, they are safety valves operating as fail-safe mechanisms against unfair, arbitrary, excessive, unjust or irrational infringements that offend the basic tenets or values of justice, reason and fairness.¹³⁹

¹³³ Rautenbach IM (2014) 2247 states: 'Nowhere has a test of this nature been formulated that is capable of providing a single fit-all standard of review for all factual situations.' In *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 128 the majority of the Court observed that 'our Constitution in dealing with the limitation of rights does not call for the use of different levels of scrutiny, but "expressly contemplates the use of a nuanced and context-sensitive form of balancing" in the section 36 proportionality analysis'.

¹³⁴ *Mamabolo* para 41; *Midi Television (Pty) Ltd v DPP, WC* [2007] 3 All SA 318 (SCA) para 9 (and the case law cited at fn 121 in chapter one above). Scott C & Alston P 'Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise' (2000) 16(2) *SAJHR* 206 214 point out, with merit, that a distinctive structural feature of the BOR is that it constitutionalises a non-hierarchical approach to the civil, political, social, economic, administrative, religious, cultural, linguistic, labour and other fundamental rights.

¹³⁵ Other BOR provisions, such as s 26(2), use 'reasonable' as a standard. For the application of 'reasonable' in s 26(2), see *Grootboom* para 44. The CC, in *Khosa* paras 83-4, left open the issue whether the test for reasonableness in s 36(1) differs from that in other BOR provisions.

¹³⁶ Waite M, Hollingworth L & Marshall D (eds) *Oxford Paperback Thesaurus* (2006) 3 ed 681.

¹³⁷ At 467. See also Blaauw-Wolf L & Wolf J (1996) 291-92.

¹³⁸ Alexy R 'The Reasonableness of the Law' in Bongiovanni G, Sartor G & Valentini C (eds) *Reasonableness and Law* (2009) 7 states that 'reasonableness' is, sometimes, a 'regulative idea'. The CC, in *New National Party* para 24, held that, under the separation of powers, courts do not review the reasonableness of legislation, except when it is arbitrary in the sense of being irrational.

¹³⁹ In *COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 265D, 'reasonable' was held to imply 'intelligent care and deliberation'. The Court (266H) enquired into the rationality of an infringement to

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Fairness is a universal standard applied in open and democratic societies.¹⁴⁰ Fairness is a value deeply engrained in the notion of justice under the Constitution.¹⁴¹ Like 'reasonable' and 'justifiable', fairness is an 'elastic and organic'¹⁴² concept with no precise definition. As such, fairness displays a high degree of flexibility. Like the standards 'reasonable and justifiable', fairness requires a value judgment of State action that has the effect of limiting rights. Determining fairness is a factual issue to be decided on a case-by-case basis taking account of, inter alia, policy considerations, social values, legal norms and contextual realities.¹⁴³ Fairness *per se* is not a litmus test or general standard for reasonableness under s 36(1). This is evident from *Christian Education SA v Minister of Education*¹⁴⁴ where the CC held that there is 'no absolute standard for determining reasonableness.' However, a limitation would satisfy the rigours of 'reasonable and justifiable' at its most basic constitutional level in s 36(1) if, after considering all constitutionally relevant factors, it is found to have been imposed for a 'fair' reason or purpose¹⁴⁵ and its implementation is 'fair' in the circumstances of the particular case. A limitation bearing these hallmarks would fit the description of being 'reasonable and justifiable in an open and democratic society'. For s 36(1), the fairness of a limitation would be determined through the lens of the values and norms applicable in 'an open and democratic society based on human dignity, equality and freedom'.

determine if it was reasonably justifiable in a democratic society. It held: 'The test ... is whether the particular classification challenged by the taxpayer rests upon some ground of difference having a fair, equitable and substantial, relation to the achievement of a valid legislative objective, so that all persons similarly circumstanced shall be treated alike. If the classification lacks these attributes the legislative action must be taken to be irrational.'

¹⁴⁰ For example, Art 10 of the UDHR provides for the right to 'a fair and public hearing'.

¹⁴¹ The CC, in *Cool Ideas* para 126, held: 'Fairness "is one of the core values of our constitutional order"'. Various provisions of the BOR refer to fairness. For example, s 23(1) ('fair labour practices'), s 33(1) ('procedurally fair'), s 34 ('fair public hearing') and s 35(3) ('fair trial'). Fairness also features prominently in the concept of 'fair discrimination' contemplated by s 9(5). For a discussion of fairness, see Cockrell A (1996) 9.

¹⁴² *Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) para 127; *Mpande Foodliner CC v CSARS and Others* 2000 (4) SA 1048 (T); *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) paras 53-65.

¹⁴³ *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) paras 12-13. For a general discussion of the test for evaluating 'fairness', see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 63-79.

¹⁴⁴ 2000 (4) SA 757 (CC) para 31. See also *COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 265-66.

¹⁴⁵ Alexy R 'The Reasonableness of the Law' in Bongiovanni G, Sartor G & Valentini C (eds) *Reasonableness and Law* (2009) 8 states that reasonableness requires all relevant reasons to be considered and then a balance struck according to their relative weight or importance in a context-dependent way. Alexy contends that, in this setting, balancing is the 'essence of reasonableness'.

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Based on the foregoing, a limitation would be unconstitutional if it is bereft of a fair reason. A limitation is arbitrary if it is incapable of rational justification.¹⁴⁶ Arbitrariness is, by its nature, dissonant with the rule of law: '[a]rbitrary action, or decision making, is incapable of providing a rational explanation'.¹⁴⁷ In addition, a limitation's aim must not be discordant with the precepts or principles of an open and democratic society. Thus, a limitation lacking a purpose or serving an unlawful, unfair or unjust purpose, or is based on irrelevant considerations, would be unjustifiable under s 36(1). Such limitation would be irrational and violate the principle of legality in the rule of law¹⁴⁸ (discussed above in chapter three). Therefore, in its simplest terms, 'reasonable and justifiable' in s 36(1) refers, first, to the rationality and sensibility of a limitation's reason and, secondly, to the suitability and judiciousness of the limitation's intended purpose when viewed in the light of the means chosen to give effect thereto.¹⁴⁹ This is in accordance with the principle that the exercise of public power is valid provided it is grounded on 'rational justification'.¹⁵⁰ Although 'necessity' is not included in s 36(1) as a requirement for a valid limitation, it is nevertheless a standard that creeps into the application of s 36(1) through the proportionality enquiry conducted under s 36(1)(e) (discussed below in chapter ten).

¹⁴⁶ 'Arbitrary' denotes 'the absence of reason, or at the very least, the absence of a justifiable reason' (*Woolworths (Pty) Ltd v Whitehead* 2000 (3) SA 529 (LAC) para 128). The CC, in *FNB* para 99, refers to the ordinary, dictionary meaning of 'arbitrary' as including 'without sufficient reason'. 'Arbitrariness' connotes 'caprice, or the exercise of the will instead of reason or principle; without a consideration of the merits' (*Johannesburg Liquor License Board v Kuhn* 1963 (4) SA 666 (A) 671). Arbitrary also refers to measures and conduct lacking logic. See de Ville JR (2005) 198.

¹⁴⁷ *Makwanyane* para 156. The CC, in *Lawrence* para 33, held that 'arbitrary restrictions would not pass constitutional scrutiny'. For further discussion hereof, see *New National Party* para 24.

¹⁴⁸ The CC, in *Law Society* para 37, held: 'It is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right.' Thus, rationality and reasonableness are not separate tests. See Rautenbach IM (2014) 2256-57.

¹⁴⁹ Blaauw-Wolf L & Wolf J (1996) 292. See also Currie I & de Waal J (2014) 162-63. Davis J, in *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 (2) SA 817 (C) 831C-D, explains the test as follows: 'There must be a reason which is justifiable in an open democratic society based on human dignity, equality and freedom for the infringement of a constitutional right. Further, the limitation must be shown to serve the justifiable purpose.' Sachs J, in *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para 50, held: 'The requirement that limitation be reasonable presupposes more than the existence of a rational connection between the purpose to be served and the invasion of the right. Thus, a limitation logically connected to its objective could be unreasonable if it undermined a long established and now entrenched right; imposed a penalty that was arbitrary, unfair or irrational; or, as in this case, used means that were unreasonable.' See Woolman S (1996) 105-08.

¹⁵⁰ See *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC) para 37; *ITC 1717* (2002) 64 SATC 32 40.

8.3.6.5.2 Understanding 'an open and democratic society based on human dignity, equality and freedom'

The foregoing discussion shows that the constitutionality or otherwise of every limitation falling within the compass of s 36(1) hinges on whether it passes the general test of 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.¹⁵¹ When applying this test, a limitation must, on the value scales of the kind of society mentioned in s 36(1), be measured and balanced. The 'open and democratic society' that serves as the barometer for measuring reasonableness and justifiability is the antithesis of the type of society that existed in SA during its pre-constitutional era. As explained above, a White minority regime created a closed, undemocratic, apartheid society that was racist, repressive, insular, authoritarian and wholly lacking of a human rights culture, ethos and spirit.¹⁵² In that society, Black people were deprived of freedom in all its manifestations and their dignity 'was routinely and cruelly denied'.¹⁵³ The Constitution changed all this. It ushered in a reborn South African society in which there was a 'radical movement away from the previous state of the law'¹⁵⁴ through the displacement of a culture of apartheid, authority and racism and the inculcation of a culture of democracy, human rights, openness and justification.

South Africa is, under its supreme Constitution, 'an open and democratic society based on human dignity, equality and freedom'. The ethos of this society is 'democratic,

¹⁵¹ Human dignity was excluded from the values mentioned in the general limitation clause in the interim Constitution. Section 33(1)(a) thereof referred only to limitations that are 'reasonable ... and justifiable in an open and democratic society based on *freedom and equality*'. (my emphasis)

¹⁵² The epitome of the rejection of notions of basic fairness, justice and human rights in apartheid SA appears from *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) 379-77. The Court dismissed any argument that recourse could be made to the fundamental, universal principle of a 'fair trial' to justify a finding that an indigent accused lacking finances to afford legal representation was entitled, if necessary at State expense, to be provided with legal representation.

¹⁵³ Per O' Regan J in *Dawood* para 35. In *Ferreira* para 46, Ackermann J held that 'individual freedom is a core right in the panoply of human rights'. At para 49, Ackermann J stated emphatically: 'To deny people their freedom is to deny them their dignity.' See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 49.

¹⁵⁴ *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) para 29.

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universalistic, caring and aspirationally egalitarian'.¹⁵⁵ The precise meaning of 'open and democratic society' is unclear. The terms 'open society' and 'democratic society' are undefined in the Constitution and in South African case law.¹⁵⁶ This is an indicator of the difficulty in composing a comprehensive definition for these terms. The open democracy envisaged by the Constitution is a society based on active solidarity in which the basic needs of all persons living in it are catered for so that the quality of life may be improved for everyone (including the poor, vulnerable and marginalised members of society).¹⁵⁷ An 'open society' may, thus, loosely be explained as an inclusive, diverse, pluralistic society whose members are tolerant, progressive (or liberal) minded, and accommodating of all persons regardless of their ethnic and social origin, sexual orientation, religious persuasion, culture, race, belief, gender, age, nationality or status.¹⁵⁸ As explained above in chapter three, there is no single model for democracy. Therefore, a definitive meaning of 'democratic society' remains elusive. However, a useful guide to its meaning emanates from *Speiser v Randall*,¹⁵⁹ namely, 'a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all'. This meaning resonates with the Preamble in the Constitution that records the following aim: 'to ... [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'.

¹⁵⁵ *Makwanyane* para 262. Mahomed J, at para 262, itemises a list of apartheid practices that are offensive in a democratic society with a supreme Constitution and a BOR. An understanding of what makes those practices constitutionally indefensible enhances an understanding of the types of values that underlie an open and democratic society based on human dignity, equality and freedom.

¹⁵⁶ Sachs J, in *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) para 46, stated: 'The notion of an open and democratic society is ... not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct.' In other words, the reference in the BOR to an open democracy is not inserted therein for its emotional and ideological appeal but rather for its normative benefits. For the distinction between 'values' and 'rules', see Cockrell A (1996) 4-10.

¹⁵⁷ The open and democratic society in SA is inclusive and broad-based. This is clearly expressed by Chaskalson P in *Makwanyane* para 88: 'The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.' See also *Chairperson of the National Council of Provinces v Malema* [2016] 3 All SA 1 (SCA) paras 11-12.

¹⁵⁸ See also Jordaan DW 'The open society' (2001) 64(1) *THRHR* 107 114.

¹⁵⁹ (1958) 357 US 513 537.

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The values stemming from the broad, normative concept of 'an open and democratic society based on human dignity, equality and freedom' suffuse the entire adjudicative process occurring under s 36(1). To regulate the nature and degree to which fundamental rights may lawfully be limited, universal values are used. The values that apply to the limitations analysis are those that are consonant with, or sourced from, human dignity, equality and freedom. This trifecta (triad or trilogy) of values mentioned in s 36(1) are not mutually exclusive of each other. They enhance and reinforce one another.¹⁶⁰ They have been referred to as 'meta-values',¹⁶¹ 'foundational',¹⁶² 'dominant',¹⁶³ and 'conjoined, reciprocal and covalent'.¹⁶⁴ The tag used to label the abovementioned trifecta is irrelevant when considering their respective status in law. As submitted above in chapter one, there should be no abstract ranking of constitutional values in the same way as there is no abstract hierarchy of constitutional rights. All constitutional rights and values are, by their nature, important. It is precisely because of their significance in a South African context that, as discussed above in chapter three, the Constitution accords constitutional rights and values protection through entrenchment therein. Unless the Constitution delineates a formal ranking and weighting of constitutional rights and values, any such ranking and weighting would be susceptible to undue influence by a judicial officer's own personal preferences and ideological bent. The equal status of constitutional rights and values gives each such right and value a comparative equal ranking for purposes of the limitations exercise under the provisions of s 36(1). Thus, no constitutional right or value will be superior over another so that, as a rule, none would have to yield to another.¹⁶⁵ As will be shown below, a delicate weighing and balancing of competing rights, values and interests (both public and private) takes place when the formula in s 36(1) is applied.

¹⁶⁰ *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 63.

¹⁶¹ Scott C & Alston P (2000) 220. Jackson VC (2004) 23 describes human dignity as the 'moral basis for democratic government' that implies the 'essential equality' of all persons before the law. *Grootboom* para 23.

¹⁶² *Grootboom* para 23.

¹⁶³ *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust and Others* 2012 (3) SA 184 (WCC) 191B.

¹⁶⁴ *Mamabolo* para 41. Cheadle H 'Limitation of rights' in Cheadle MH, Davis DM & Haysom NRL *South African Constitutional Law: The Bill of Rights* 2 ed (online version) 30-6 writes: 'If the animating mischief is the starting point of the enquiry, then the values of dignity, equality, freedom and democracy are its Southern Cross.' For a discussion of these values, see Baer S 'Dignity, liberty and equality: A fundamental rights triangle of constitutionalism' (2009) 59(4) *University of Toronto LJ* 417.

¹⁶⁵ Iles K (2007) 78-9.

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Notwithstanding the above, human dignity, equality and freedom play prominent roles under the Constitution. This is evident from, first, their recurring mention across various provisions in the Constitution (for example, ss 1, 7(1) and 39(1)(a)). Secondly, human dignity and equality are independent rights entrenched in s 9 and s 10 respectively. Thirdly, owing to the grave human rights abuses during the apartheid era, the three values concerned reflect the transformation objectives of the Constitution.¹⁶⁶ Fourthly, human dignity, equality and freedom inform every aspect of legal reasoning and decision-making in SA.¹⁶⁷ Therefore, it is unsurprising that s 36(1) renders the reasonableness and justifiability of a limitation dependent on its conformity with human dignity, equality and freedom that form the basis of an open and democratic society.¹⁶⁸

As discussed above in chapter three, the Constitution transformed SA's legal and political landscape by establishing a democratic, unitary State based on values that are universal among open and democratic societies worldwide. The Preamble sets forth the vision and commitment of SA's people to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. In accordance with the aim to break away decisively from a 'past based on conflict, untold suffering and injustice'¹⁶⁹ and create a democratic, rights friendly society infused with justice and human rights, the Constitution contains a justiciable BOR that entrenches a suite of fundamental rights (discussed above in chapter seven). In so doing, the Constitution creates a democratic society subscribing to values, norms and principles placing a high premium on respect for, as well as the protection, promotion and fulfilment of universal human rights. As far as these historical facts are relevant in any specific case involving the limitation of a fundamental right, they ought to be considered when s 36(1) is applied.

¹⁶⁶ *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 148. Moseneke DCJ, in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 47, held that through a 'cluster of warranties' that form part of 'an unconcealed design, the Constitution ardently demands that ... social [and economic] unevenness be addressed by radical transformation of society as a whole'.

¹⁶⁷ *Holomisa v Argus Newspapers Ltd* [1996] 1 All SA 478 (W) 486.

¹⁶⁸ The values that underlie SA's open and democratic society based on human dignity, equality and freedom are the normative sources of the fundamental rights entrenched in the BOR. See Scott C & Alston P (2000) 220.

¹⁶⁹ *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) para 25.

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The Constitution is 'a repository of values'.¹⁷⁰ Whilst its text expressly mentions certain values, other values are extrapolated by implication from the Constitution's text, tone and structure. The democratic State of SA is founded on the values listed in s 1, namely, human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, constitutional supremacy, the rule of law, universal adult suffrage, a national common voters' roll, regular free and fair elections, and a multi-party system of democratic government. In terms of s 195(1), discussed above in chapter five, the democratic values and principles applicable in public administration, of which tax administration forms part, include, inter alia, efficient and effective use of resources, high standards of professional ethics, openness, transparency, responsiveness, accountability, maximising human potential, and rendering services to the public fairly, impartially, equitably and without bias. Other values underpinning SA's open democracy based on human dignity, equality and freedom include, inter alia, pluralism, tolerance, liberalism (or progressiveness), inclusiveness, social justice, fairness (procedural and substantive), equity, impartial decision-making, judicial independence, freedom, equality, privacy, transformation, constitutionalism, co-operative and limited government, unity, diversity, *ubuntu*, and separation of powers. All the foregoing values are broad concepts that include further dimensions reflecting the norms incorporated therein (such as, an open society, peace, public safety and order, national security, social security, public health, environmental protection, control over the exercise of power, effective protection of rights, and access to information).¹⁷¹ These and other norms of an open and democratic society are relevant for the purposes of s 36(1) because legislatures may, *via* legislation, seek to restrict a fundamental right in order, for example, to pursue a public interest.

As far as any of the foregoing values underlying SA's open and democratic society are relevant in a case involving the limitation of a fundamental right, they ought to be taken into account when s 36(1) is applied. Thus, in any given case, it is conceivable that two or more relevant values may compete with each other. This occurs where, as in relation to

¹⁷⁰ Botha H 'The values and principles underlying the 1993 Constitution' (1994) 9(2) *SAPL* 233.

¹⁷¹ Erasmus G 'Limitation and Suspension' in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 634-35. For a sample of the kind of values that would apply in an 'open and democratic society', see Woolman S (1994) 64.

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the impugned TAA provisions, a limitation imposed by 'law of general application' seeks to promote value(s) that differs from the value(s) underlying the fundamental right(s) entrenched in the BOR that is/are infringed by the limitation. In such event, a conflict of competing values arise that must be resolved during the balancing exercise of the limitations analysis conducted under s 36(1) of the BOR.¹⁷²

The values enumerated in the discussion above are not a finite list that underpins 'an open and democratic society based on human dignity, equality and freedom'. Such a complete list is not formulated in the Constitution, nor has the CC articulated an all-encompassing list of values underlying such a society. These are strong indicators of the inherent difficulty in compiling a comprehensive set of its values. Hence, a *numerus clausus* of values underlying a society of such a nature will not be carved out in this study. However, it is important to have a firm grasp of the kind of values that are the hallmarks of an open and democratic society based on human dignity, equality and freedom.¹⁷³ This is so because, first, values form the genesis of the fundamental rights entrenched in the BOR. In other words, values animate every fundamental right, thereby giving them a constitutional shape and form that establish the right's sphere of protected activity.¹⁷⁴ Thus, values are relevant for a s 36(1) analysis. Secondly, values form the substantive basis for evaluating whether a limitation is reasonable and justifiable.¹⁷⁵ Thirdly, as discussed above in chapter two, the provisions of s 39(1)(a) direct that interpretation of the BOR 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Fourthly, values direct how State action must be exercised and the degree to which such action may curtail fundamental rights.¹⁷⁶

¹⁷² For example, a ban on smoking in public areas (such as, restaurants, cinemas and shopping malls), except in specifically demarcated smoking areas, gives rise to conflict between public health, on the one hand, and individual freedom of choice, on the other.

¹⁷³ Sachs J, in *Mhlungu* para 111, aptly describes the importance of values as follows: 'It [the interim Constitution] is a momentous document, intensely value-laden. To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany would have been.'

¹⁷⁴ Woolman S (1996) 115-16.

¹⁷⁵ Scott C & Alston P (2000) 220.

¹⁷⁶ Blaauw-Wolf L & Wolf J (1996) 270.

8.3.6.6 Constitutionally 'relevant factors' in s 36(1)

The discussion above shows that a limitation of a right in the BOR must be grounded in law. To be valid, a limitation must be compatible with what will pass for a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom. Section 36(1) obliges a court to consider 'all relevant factors' when making this determination.¹⁷⁷ To this end, it lists five objective factors. They are: (a) the nature of the fundamental right, (b) the importance of the limitation's purpose, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose, and (e) the availability of less restrictive means to achieve the limitations' intended purpose. Section 36(1) introduces these factors with a word of extension, namely, 'including'. Its effect is that the factors listed are not a *numerus clausus*.¹⁷⁸ Thus, they are no more than a sub-minimum of relevant considerations. This means that other 'relevant' but unlisted factors may also be considered. These circumstances may include, inter alia, whether the legal subject affected by the limitation is a natural or juristic person.¹⁷⁹ Accordingly, it is conceivable that a provision in a statute that limits a fundamental right may pass constitutional muster in relation to a juristic person but may not pass muster in relation to the same right in the hands of a natural person. This shows that the reasonableness and justifiability criterion is a factual issue to be determined on a case-by-case basis. A one-shoe fits all approach is inapplicable. Since s 36(1) obliges courts to consider 'all relevant factors', failure to comply with this duty would contravene s 2 and s 237 of the Constitution. In the light hereof, every judicial officer must apply, in every instance, his mind to the question of whether there are other factors relevant to the limitations enquiry over and above those objective ones mentioned in s 36(1). Failure to consider this question may be an irregularity that renders the limitations analysis objectionable.

¹⁷⁷ Rautenbach IM (2012) 307-08 opines that 'the inclusion of the requirement [in s 36(1)] that the [relevant] factors *must* be considered, clearly implies that within the broad framework of the general test, the Bill of Rights does not envisage a single standard for all limitations'. Rautenbach concludes that 'the precedential effect of decisions will undoubtedly lead to different standards being developed and applied to different rights or aspects of rights, different purposes for the limitation of rights, and different forms of encroachment upon the protected sphere of rights'.

¹⁷⁸ *Manamela* para 32. For the legal effect of 'including', see the authorities cited at fn 186 in chapter three above.

¹⁷⁹ *Hyundai Motors* para 18.

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In its post-apartheid era, South African society is value-driven. As shown in the discussion above, the Constitution is a value-laden instrument. Its values are those that apply in open and democratic societies. Values highlight the normative standards that are relevant when assessing and evaluating the reasonableness and justifiability of a limitation in the type of society in which such values apply. In addition, ss 36(1)(a) - (e) of the BOR identify 'key factors'¹⁸⁰ ordained as 'relevant' for every limitations exercise. However, a shortcoming of s 36(1) is that it does not give any indication of the type or nature of the unlisted factors that may be considered. It only specifies that a factor must be 'relevant'. Naturally, relevance is an issue to be decided by the court applying s 36(1). It is submitted that an unlisted factor would satisfy the 'relevance' criterion if, viewed objectively, it enhances, or relates meaningfully to, the overall adjudication of, and judgment on, the cardinal issue arising from s 36(1), namely, determining whether a limitation 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Factors that are 'relevant' in this sense would include, inter alia, applicable international and foreign law, the historical background or context of a fundamental right from a South African perspective, the relative importance of a fundamental right,¹⁸¹ the nature of the party asserting the right,¹⁸² and any requirement imposed in the BOR for the limitation of the particular fundamental right.¹⁸³

¹⁸⁰ *Manamela* para 32.

¹⁸¹ See, for example, *Christian Education SA* para 31. Rautenbach IM (2014) 2254 points out, justifiably, that the 'abstract importance of the affected right relative to other rights must be distinguished from that importance relative to the importance of the purpose of the limitation [as referred to by s 36(1)(b)], which may include the exercise, protection or promotion of another individual right'. Blaauw-Wolf L & Wolf J (1996) 282 argue, with reference to German constitutional law, that the importance of a fundamental right depends, inter alia, on its relative importance to the community which, in turn, is linked to the importance of the freedom at stake in that community. Blaauw-Wolf & Wolf argue further that the 'fundamental principle' applied in Germany determines that the more fundamental a right is for the maintenance of values in a democracy, the higher its position in the pyramid of fundamental rights. This principle does not apply in SA. However, the CC has held that, as a rule, the more serious a limitation's impact is on a fundamental right, the more persuasive or compelling its justification must be for the purposes of s 36(1). See *Manamela* para 32.

¹⁸² Langa DP, in *Hyundai Motors* para 18, held: 'The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. *Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.*' (my emphasis) See also *Gaertner* para 35. For further discussion hereof, see Rautenbach IM (2014) 2254-55.

¹⁸³ For example, stipulations in s 25(2) that an expropriation of property may only occur in terms of 'law of general application' that is 'for a public purpose or in the public interest'.

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A holistic reading of s 36(1) shows that the word 'and' connecting subsecs (d) and (e) has the effect that the factors listed in ss 36(1)(a) - (e) are used conjunctively (not disjunctively in the alternative).¹⁸⁴ Thus, each factor listed is 'relevant' and must be considered. However, a practical problem in the application of s 36(1) arises from a further shortcoming thereof, namely, its failure to spell out the precise role to be played by 'all relevant factors' and the way that they are to be applied. Section 36(1) simply states that they are to be taken into account. No indication is given as to (i) the order in which the listed factors are to be considered, (ii) the inter-relationship between the listed factors, (iii) the ranking and weight of each listed factor,¹⁸⁵ and (iv) how any listed and unlisted factor is to be utilised when determining the reasonableness and justifiability of a limitation. The paucity of detail in the Constitution's substantive text as to the practical implementation of the factors contemplated by s 36(1) ought to have prompted the CC to provide concrete guidelines as to how the general test stipulated therein operates at a practical level. However, it has thus far refrained from doing so. Instead, the CC has employed general, broad descriptions that provide little insight into the adjudicative processes in a limitations analysis.¹⁸⁶ For example, the oft-quoted description of the process is: 'Our Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing.'¹⁸⁷ The reference to 'balancing' that is 'nuanced and context-sensitive' lacks substantive meaning and offers little, if any, guidance.¹⁸⁸

¹⁸⁴ For the legal effect of 'and', see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50. For its distinction with the disjunctive word 'or', see the authorities cited at fn 136 in chapter six above.

¹⁸⁵ For a discussion of a proposed weighting formula to be utilised for the purposes of s 36(1), see Rautenbach IM (2014) 2251-59.

¹⁸⁶ For a detailed critique of the CC's limitations jurisprudence pertaining to the 'balancing' test, see Woolman S & Botha H 'Limitations' in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-93 – 34-104.

¹⁸⁷ Per Sachs J in *Christian Education SA* para 30. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) paras 128 155.

¹⁸⁸ It is submitted that Sachs J's formulation of the adjudicative process involved in s 36(1) is terse and, as such, rather vague. The formulation is purely descriptive of 'what' the process is without providing specifics of its inner workings. For example, no indication is given of what is to be balanced, nor how the balancing is to take place, or what weight is to be placed on each item that is factored onto the balancing scales. Therefore, the entire balancing exercise remains lacking clarity. Hence, its practical operation and implementation is essentially a subjective exercise. All that is certain is that a judicial officer must, as stipulated by s 36(1), consider 'all relevant factors, including' those listed in ss 36(1)(a) - (e). The issue as to how each factor will be considered, what

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All relevant factors are weighed in a balancing exercise to 'arrive at a global judgment on proportionality'.¹⁸⁹ A court places 'the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other'.¹⁹⁰ As stated above, the greater the inroad into a fundamental right, the more persuasive its grounds of justification must be. The factors listed in s 36(1) do not have any abstract ranking or hierarchy. They have equal constitutional status. Since no single factor is superior to another, none is individually decisive for, or conclusive of, a limitations enquiry. The CC does not view the factors listed in ss 36(1)(a) - (e) as a sequential checklist to be applied in a strict, mechanical order in an overall, global assessment of a limitation's validity.¹⁹¹ Thus, it rejects the structured approach applied by the German Federal Constitutional Court and the Canadian Supreme Court.¹⁹² Although the formal approach to the listed factors differ, the factors in s 36(1) are the same as (or substantially similar to) the factors considered by the Courts of Canada and Germany when they deal with a limitations analysis.

The provisions of ss 36(1)(a) - (e) do not prescribe requirements to be met for a limitation to be valid. They simply indicate the type of information that a litigant ought to present to enable a court to apply the general test enunciated in s 36(1). Whilst a litigant on whom the onus rests to justify a limitation must present information of the nature referred to in ss 36(1)(b), (c) and (d), the party challenging a limitation must present information referred to in subsecs (a) and (e). A discussion of the individual listed factors will be undertaken below in chapter ten to the extent that a discussion thereof is required for testing the validity of the impugned TAA provisions in terms of s 36(1) of the BOR.¹⁹³

relative weight will be attached to each, and how the balancing process will work in practice, are all matters left to the sole discretion of each judicial officer seized with an application of s 36(1).
¹⁸⁹ *Christian Education SA* para 30.

¹⁹⁰ *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) para 18.

¹⁹¹ *Manamela* para 32.

¹⁹² The courts in Canada and Germany apply a structured test comprising several distinctive steps, namely, the legitimacy of a limitation's aim, a rational connection between a limitation and its aim, the existence of less restrictive means, and lastly a balancing of competing values. See the celebrated case of *R v Oakes* [1986] 1 SCR 103. For a useful outline of the sequential checklist that continues to be applied in Germany, see Blaauw-Wolf L & Wolf J (1996) 279-80.

¹⁹³ For a discussion of the constitutionality of TAA provisions relating to preservation orders, agent appointments and requests for information from third parties, see van Dijk EC (2014) 17-69.

8.4 CONCLUSION

South Africa is a democracy governed by a supreme Constitution and BOR that confer fundamental rights on taxpayers accessible during tax administration. The entrenchment of these rights and the imposition of strict requirements for a constitutional amendment thereof protect them against incursion. The present chapter shows that s 36(1) reinforces this constitutional guarantee. Whilst s 36(1) provides, on the one hand, a legal framework that regulates inroads into fundamental rights without a formal constitutional amendment, it imposes, on the other, a legal test for a lawful limitation of fundamental rights. To make this protection more meaningful and secure, the present chapter advocates the adoption of a restrictive interpretational approach to s 36(1). As is evident from, inter alia, the Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, international law adopts a similar approach to limitation clauses contained in international human rights instruments. A restrictive interpretational approach has a narrowing effect that is reconcilable with that attained by an application of the principle of proportionality under s 36(1)(e). In terms of that principle, a lawful infringement must take the form of the least restrictive constitutional means available to achieve the limitation's desired objective(s). As shown above, a restrictive interpretive approach is also preferable because it ensures that infringements of fundamental rights occur only as exceptions (not as a general rule or societal norm). Any interpretive approach that permits infringements of fundamental rights as a common (or regular) occurrence puts the open and democratic society of SA on a slippery slope en route to the destruction of the value system entrenched by the Constitution as the basis for the maintenance and defence of freedom and democracy. Such a state of affairs must be averted because it would undermine the spirit, ethos and culture of the Constitution. Moreover, from a tax perspective, it would undermine the rights-based approach to tax administration advocated in this dissertation. Thus, the review below in chapter ten as to the validity of the limitations permitted by the impugned TAA provisions on taxpayers' privacy will be undertaken by an application of the legal principles articulated in the present chapter and those relevant ones outlined above in earlier chapters. To enhance the basis for that review, the impugned TAA provisions are analysed below in chapter nine.

CHAPTER NINE

WARRANTLESS INSPECTIONS AND SEARCHES

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'Knowledge is power. Information is liberating.' (Kofi Annan)

9.1 INTRODUCTION

South African taxpayers enjoy, inter alia, tax exemptions and other fiscal benefits. They are also able to account for certain taxes (such as VAT) on a voluntary self-assessment basis. All these benefits and opportunities 'are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage'.¹ To counteract unscrupulous behaviour by delinquent and/or recalcitrant taxpayers, ss 40, 41, 45, 46, 47, 48, 52, 61, 62, 63 and 64 of the TAA confer powers that enable officers of SARS to gather sufficient, reliable and trustworthy information for purposes of effectively monitoring or policing tax compliance and optimally collecting taxes due to the *fiscus*.² Section 40 read with s 41 confer general information gathering powers in the form of 'audit', 'field audit', 'criminal investigation', 'inspection' and 'verification'. These terms are undefined in the TAA. Section 45 permits warrantless inspections of premises; ss 61 and 62 permit searches of premises with a warrant; s 63 permits warrantless searches of premises; and s 64 permits seizure of documents usually inaccessible because they are shielded by professional privilege.³ Cumulatively, the abovementioned provisions add considerable mass to SARS's already weighty arsenal of powers, thereby ushering in a substantially more powerful tax administration agency with access to information in areas generally considered protected private space.

As explained above in chapter six, the vertical application of the BOR does not involve the conferral of fundamental rights on SARS and the CSARS as 'organs of state' in their relationship with taxpayers as legal subjects of the State. Thus, access to taxpayer information for tax administration purposes is not premised on the right of access to information entrenched in s 32 of the BOR. Since SARS and the CSARS are, as

¹ *Metcash* para 18.

² Croome BJ (2010) 142 states, with merit, that the 'power to search premises and seize documents is a necessary part of the Commissioner's armoury to ensure tax compliance'.

³ If relevant material includes documents protected by legal professional privilege, then the procedural requirements of s 64 of the TAA must be satisfied.

explained above in chapter five, creatures of statute with no inherent powers, a statutory mechanism is required to grant them powers that will enable them to gain access to relevant taxpayer information. In the absence of such mechanism, they would be powerless to execute their statutory functions (such as, to properly assess a taxpayer's liability for tax and evaluate the taxpayer's ability to pay a tax debt due to the *fiscus*). Under such circumstances, SARS would, by and large, be at the mercy of taxpayers. Such a state of affairs would not serve the public interest in a climate where there is apathy or reluctance on the part of persons to pay their fair share of tax voluntarily.

Under the TAA, taxpayers must, as discussed above in chapter five, make a full and frank disclosure of all tax related information that is relevant to determining their tax liability. The corollary hereof is SARS's entitlement to receive such information so that it may fulfil its statutory function. The powers of SARS in ss 45(1) and (2) and 63(1) and (4) of the TAA are mechanisms designed to enforce taxpayer compliance and, thereby, facilitate efficacy in tax administration. Their relevant provisions grant SARS officials access to private and confidential information by way of an inspection of a taxpayer's 'home' and 'property', by searching a taxpayer's 'person', 'home' and 'property', and by seizing a taxpayer's 'possessions' and 'communications' found at any place searched. The ensuing discussion will explain (i) the purpose of a warrantless inspection (s 45) and search (s 63), (ii) the powers of SARS officers at an inspection and search, (iii) the procedures to be followed at an inspection and search, (iv) the requirements for a lawful inspection and search, (v) the requirements for the valid exercise of discretion under ss 45 and 63, and (vi) the meanings of 'premises', 'dwelling-house' and 'domestic premises' in the context of ss 45 and 63. These discussions will locate ss 45 and 63 in the scheme of the TAA so as to enable s 36(1) of the BOR to be applied to their substantive content in the constitutional review undertaken below in chapter ten.

9.2 PURPOSE OF A WARRANTLESS INSPECTION AND SEARCH

As discussed above in chapter two, statutory and constitutional interpretation must be purposive. In addition, as discussed above in chapter eight, the purpose of a limitation of

a right is a relevant, albeit not decisive, factor when the limitation's validity is tested against the provisions of s 36(1) of the BOR. Thus, for purposes of the aforementioned constitutional review, it is important to discuss the purpose of ss 45 and 63 of the TAA.

Sections 45 and 63 have a common subject matter. This probably explains why, structurally, both appear in Chapter 5 of the TAA under the heading 'Information Gathering'. To enhance efficacy and efficiency in tax collection, SARS must have the financial and other relevant personal information of taxpayers. Tax collection will suffer if SARS lacks information of this nature. Reduced tax collection would diminish deposits in the National Revenue Fund that, ultimately, would undermine the government's ability to fulfil its constitutional duties to SA's people. Hence, the advancement of the public interest demands that SARS has effective powers of surveillance. To this end, the TAA empowers SARS to conduct, inter alia, inspections (s 45), as well as warranted (s 61) and warrantless searches (s 63). These powers are aimed, albeit impliedly, at enabling SARS to broaden SA's tax base and to ensure that everyone pays their fair share of tax.⁴ To understand the role of ss 45 and 63 in underscoring the aims of the TAA, it is necessary to outline their provisions and then interpret critical parts thereof. They read as follows:

‘45. Inspection. — (1) A SARS official may, for the purposes of the administration of a tax Act and without prior notice, arrive at a premises where the SARS official has a reasonable belief that a trade or enterprise is being carried on and conduct an inspection to determine only —

- (a) the identity of the person occupying the premises;
- (b) whether the person occupying the premises is registered for tax;⁵ or
- (c) whether the person is complying with sections 29 and 30.⁶

⁴ Klue S, Arendse JA & Williams RC (2015) (online version) para 8.6.2 contend that the powers in s 63 of the TAA 'assist in tax base broadening and addressing the reality that tax evaders who, upon approach by SARS, waste no time in destroying all records and evidence of their fraudulent activities and details of income derived'. Keulder C 'What's good for the goose is good for the gander – warrantless searches in terms of fiscal legislation' (2015) 132(4) *SALJ* 819 820 writes: 'The justification for a warrantless search is that it enables SARS to act straight away, thus preventing tax evaders from destroying or hiding evidence of their evasion. If SARS were required first to obtain a warrant, tax evaders would have the opportunity to destroy relevant documentation.'

⁵ The requirements for tax registration are set out in s 22 of the TAA.

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(2) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for the purposes of trade, under this section without the consent of the occupant. ...

63. Search without warrant. — (1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3) —

- (a) if the owner or person in control of the premises so consents in writing;⁷ or
- (b) if the senior SARS official on reasonable grounds is satisfied that —
 - (i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;
 - (ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and
 - (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

(2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises —

- (a) that the search is being conducted under this section; and
- (b) of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.

(3) Section 61 (4) to (8) applies to a search conducted under this section.

(4) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

(5) If the owner or person in control of the premises is not present, the SARS official must inform such person of the circumstances referred to in subsection (2) as soon as reasonably possible after the execution of the search and seizure.⁷

⁶ Section 29 obliges a 'person' to keep 'records, books of account or documents' that, inter alia, 'enable the person to observe the requirements of a tax Act'. Section 30 prescribes the form in which 'records, books of account or documents' referred to in s 29 are to 'be kept or retained'.

⁷ Neither 'owner' nor 'person in control' is defined in the TAA. They would, however, include both the registered owner and the manager of affected premises.

9.2.1 Inspections conducted under s 45 of the TAA

In terms of s 40 of the TAA, SARS has a discretion to 'select a person for inspection, verification or audit on the basis of any consideration relevant to the proper administration of a tax Act, including on a random or a risk assessment basis'. Once selected, a SARS official is empowered to arrive at the relevant premises unannounced and conduct an inspection with a view to establishing one or more of the specified objective facts listed in s 45(1). By virtue of s 40 authorising inspections on 'a random or a risk assessment basis',⁸ two types of inspections are licensed by s 45. First, random, routine, non-targeted inspections; secondly, risk assessment based, non-routine, targeted inspections. Both forms of inspection are '[o]bvious means of testing compliance'.⁹ Hence, s 45 inspections are administrative (not regulatory) in nature.

Section 45 empowers a SARS official to conduct an inspection of persons reasonably believed to be carrying on a 'trade or enterprise'.¹⁰ A clear differentiation is, thus, drawn between 'trade' and 'enterprise'. In this context, these terms must be understood to bear different meanings. The TAA does not define 'trade' or 'enterprise'. However, s 1 thereof states that, 'unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned' for TAA purposes. Therefore, 'trade' ought to bear its meaning in s 1 of the ITA and 'enterprise' ought to bear its comprehensive meaning in s 1 of the VATA. Although reference is made in s 45(1) to 'a reasonable belief that a trade or enterprise is being carried on', s 45(2) refers only to entry to 'any part ... [of a dwelling-house or domestic premises] used for the purposes of trade'. Section 45(2) does not refer to 'enterprise'. This is a *lacuna* in s 45(2). It is curable only by way of a legislative amendment. In the context of s 45(2), 'trade' does not have a broader or different meaning than that in s 45(1). Therefore, in s 45(2), 'trade' does not encompass 'enterprise'. Such a narrow construction of 'trade' in s 45(2) ought to be

⁸ Clegg D (2012) 86 explains 'risk assessment' as referring 'to the use of an analytic tool which profiles taxpayers according to the likelihood, on a statistical basis, that some or other shortfall exists in their tax affairs'.

⁹ *Gaertner* para 60.

¹⁰ In terms of the Interpretation Act (s 10(1)), a statutory power 'shall be performed from time to time as occasion requires'.

favoured because, first, it preserves and protects the right to privacy of a person carrying on an 'enterprise'. In so doing, the construction contended for here promotes the values that underlie an open and democratic society based on human dignity, equality and freedom as contemplated by s 39(1)(a) of the BOR (discussed above in chapter two). Secondly, an interpretation of 'trade' in s 45(2) so that it excludes an 'enterprise' from its scope and ambit is consistent with the presumption that the same word in a statute bears the same meaning throughout, unless the context indicates otherwise.¹¹ Accordingly, a warrantless entry cannot be made into any part of a dwelling-house or domestic premises used to carry on an 'enterprise', unless entry is consented to by 'the occupant' thereof.

An inspection under s 45 is, in a sense, a preliminary or preparatory fact-finding exercise. This is so because the facts uncovered during an inspection may lead SARS to conduct an audit or criminal investigation (s 48), and/or to initiate inquiry proceedings (s 52), and/or to apply for and execute the terms of a search warrant (ss 59, 60, 61), and/or to lay a criminal charge against the taxpayer (s 234). If non-compliance under s 45(1)(b) or (c) amounts, in any case, to the commission of a criminal offence under ss 234(a) or (e), then a prosecution may ensue. Thus, an inspection under s 45 may lay the groundwork for criminal enforcement through prosecution. Viewed in this light, a warrantless inspection may provide a back door for SARS to uncover evidence of a tax offence without the need to apply for a warrant under s 59(1) to conduct a criminal search referred to in s 60(1)(a). Keulder¹² warns that a warrantless inspection may be used by SARS with improper motives to achieve the goals of s 63 of the TAA without the need to first satisfy the stricter requirements for a warrantless search (discussed below at para 9.4.1(b)).¹³

¹¹ The CC, in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 47, held: 'It is of course most unusual to find one and the same expression used in one and the same statute but not bearing a consistent meaning. In our law, the legislature is presumed to use language consistently, and one would deviate from the presumption with great hesitation and only if driven to do so, for example, because to do otherwise would lead to manifest absurdity, or would clearly frustrate the manifest intention of the lawgiver.'

¹² Keulder C (2015) 845. Croome BJ & Olivier L (2015) 117 argue, convincingly, that s 45 cannot be used to search for documents, or to review a taxpayer's records, or to conduct an audit.

¹³ The risk of SARS abusing its power under s 45 for ulterior purposes does not justify a constitutional challenge. See *Van Rooyen* para 37; *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 72. The courts are responsible to prevent the unfair, unauthorised, oppressive and vexatious use of power.

Section 45 provides for unannounced, warrantless administrative inspections of selected taxpayers, namely, those carrying on a trade or enterprise. Section 45(1) provides for inspections at ‘premises where the SARS official has a reasonable belief that a trade or enterprise is being carried on’. Contextually, inspections are expressly stated to be aimed at enabling a determination to be made of the trio of facts listed in ss 45(1)(a), (b) and (c). An inspection occurs, in terms of s 45(1), ‘for the purposes of the administration of a tax Act’.¹⁴ Despite reference to ‘administration of a tax Act’ as broadly defined in s 3(2), inspections do not serve all the objectives of ss 3(2)(a) - (i) (discussed above in chapter five). Section 45 expressly narrows the aims of an inspection to the ascertainment only of any determination listed in s 45(1). The phrase therein, namely, ‘to determine only’, limits the purpose that an inspection may seek to achieve. This view is consistent with a linguistic interpretation of the text of s 45(1). The disjunctive ‘or’ between sub-secs (b) and (c) indicates that the narrow list of determinations in ss 45(1)(a), (b) and (c) are stated as alternatives.¹⁵ Thus, an inspection need not be aimed at making each of the determinations. It will suffice if an inspection is aimed at making any one of them.

Section 45 inspections are not aimed at finding a breach of a tax Act but rather to gather information that advances SARS’s ability to police compliance with the duties outlined in ss 45(1)(b) and (c).¹⁶ The *fiscus* will suffer significant losses if persons fail to register for tax, or fail to maintain proper, adequate or orderly business records that would hinder the detection of undisclosed income. Therefore, s 45 inspections promote optimal tax assessment and collection for the public benefit. The public’s interest in, and benefit from, ss 45(1)(a) and (b) is that they enable SARS to identify taxpayers more effectively, and this protects, preserves and broadens SA’s tax base. The public’s interest in, and benefit from, s 45(1)(c) is that its provisions enable SARS to ensure the availability of adequate records for audits or investigations aimed at revenue determination or estimation, or aimed at verifying proper disclosure of all information required under a tax Act.

¹⁴ The stipulation that an inspection must be ‘for the purposes of the administration of a tax Act’ is probably not a qualification of the powers in ss 45(1) and (2) of the TAA. See *Gaertner* para 38.

¹⁵ For the legal effect of the word ‘or’, see the authorities cited below at fn 47 in the present chapter.

¹⁶ For a similar objective in another statute permitting inspections, see *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) para 56 (*Magajane*).

9.2.2 Searches conducted under s 63 of the TAA

Warrantless searches aim to avoid potential harm to State fiscal interests that may be caused by undue delay resulting from strict adherence to prescribed formalities and legal niceties in the form of a judicial warrant issued under s 60. The TAA does not confer a general power to conduct any such operation.¹⁷ Sections 63(1)(a), (b) and (4) read with 63(2)(b) provide for unannounced, warrantless searches only in circumstances where the ‘basis’ or cause for the search is reasonable or just, namely, an alleged non-compliance with a duty imposed under a tax Act, or an alleged tax offence. Thus, s 63 licenses targeted, non-routine warrantless searches of premises and seizures of property. The term ‘search’ is undefined in the TAA for its purposes. In broad outline, a search is ‘an examination of a person or property’.¹⁸ Apart from identifying the cause that may give rise to a warrantless search, the TAA does not expressly state its purpose. It may, however, be determined by the rules of interpretation (discussed above in chapter two). The subject matter of s 63 is the gathering of ‘taxpayer information’,¹⁹ including ‘relevant material’, defined as ‘any information, document or thing that in the opinion of SARS is foreseeably²⁰ relevant for the administration of a tax Act as referred to in section 3’.²¹

¹⁷ Croome BJ & Olivier L (2015) 163.

¹⁸ Gupta R ‘Inland Revenue’s powers of search and seizure and taxpayers’ constitutional rights’ (2013) 15(1) *Australian Journal of Taxation* 133 138.

¹⁹ In this context, ‘taxpayer information’ bears the meaning as defined in s 1 read with s 67(1)(b) of the TAA, namely, ‘any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information’. Biometric information, as defined in s 1 of the TAA, encompasses intrusive biological data (such as, facial recognition, fingerprint recognition, voice recognition, and iris or retina recognition). For a discussion of the constitutionality of the public power to obtain intrusive biological data, see, for example, *S v Huma* 1995 (2) SACR 411 (W).

²⁰ Clegg D (2012) 85 warns, with merit, as follows: “Forseeable” relevance is clearly in the eye of the beholder and may open the possibility of “fishing expeditions” being undertaken through requests for information of no direct relevance to a particular line of enquiry.”

²¹ For a discussion of ‘relevant material’, see van der Walt J ‘SARS’ information-gathering powers, the amended definition of “relevant material” (January 2015) available at <https://sait.site-ym.com/news/212759/SARS-Information-gathering-powers-the-amended-definition-of-relevant-material-.htm> (accessed 4 February 2015). See also Vogelmann G & Muller A ‘The extensive powers of SARS in requesting “relevant material”’ (2014) 29(2) *ITJ* 12. The TAA (s 1) defines ‘information’ as including ‘information generated, recorded, sent, received, stored or displayed by any means’; defines ‘thing’ as including ‘a corporeal or incorporeal thing’; and defines ‘document’ to mean ‘anything that contains a written, sound or pictorial record, or other record of information, whether in physical or electronic form’. The latter definition includes ‘electronic communication’ as per the Electronic Communications and Transactions Act 25 of 2002 discussed in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA).

When read with ss 6(1)²² and 63(2)(b) of the TAA, this definition shows that SARS's powers in s 63 are geared to obtaining (reasonably) 'relevant' (not 'necessary')²³ information for the criminal and/or civil enforcement of SA's tax laws. In the light hereof, warrantless searches are conducted in terms of s 63, in situations of alleged non-compliance or the commission of a tax offence, with the object to, inter alia, protect and preserve the integrity, availability and/or accessibility of 'relevant material' as defined in s 1 of the TAA.²⁴ Ultimately, all such operations are aimed at promoting the efficient and effective collection and general administration of tax for the benefit of SA's people by ensuring that the relevant material is, for example, neither lost nor destroyed.

9.3 POWERS AT, AND PROCEDURES FOR, AN INSPECTION AND SEARCH

9.3.1 Powers at, and procedures for, an inspection under s 45 of the TAA

Section 45(1) of the TAA provides that '[a] SARS official may ... arrive at a premises ... and conduct an inspection'. Any officer acting away from SARS premises at an inspection, or at a search conducted under ss 61, 62 or 63 of the TAA, must produce, in terms of s 8(2) thereof, an identity card 'upon request by a member of the public'. Failure to do so would entitle the member of the public 'to assume that the person is not a SARS official' (s 8(3)). Thereupon, such member of the public would be entitled to refuse permission for entry to the premises concerned and may withhold co-operation from such official whose status as a designated SARS official would not have been proven as required by the TAA. If the official concerned persists in attempting to enter the premises despite providing no proof of his SARS credentials, then the member of the public in question would be entitled to seek assistance from the police in order to prevent such entry that may, under the circumstances sketched, constitute the criminal act of trespass.

²² The TAA (s 6(1)) reads: 'The powers and duties of SARS under this Act may be exercised for purposes of the administration of a tax Act.' Section 6(1) refers to the power of 'SARS'; s 63(1) confers powers on a 'senior SARS official'.

²³ To this end, s 63 may be compared and contrasted with, for example, s 59(1) of the TAA that reads: 'A senior SARS official may, *if necessary or relevant to administer a tax Act*, authorise an application for a warrant' (my emphasis)

²⁴ The purpose of a search does not need to relate to the investigation of a crime. See *South African Association of Personal Injury Lawyers v Heath and Others* 2000 (10) BCLR 1131 (T) 1165.

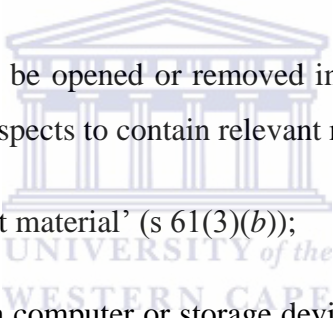
Unlike ss 61(3) - (8) read with ss 63(2), (3) and (5) of the TAA which apply to searches as discussed below at para 9.3.2, s 45 and the TAA read holistically are silent on the scope of the powers that a SARS official may exercise at an inspection. A perusal of the provisions of ss 31 and 45 of the TAA²⁵ reveals that the subjects of an inspection are the 'records, books of account and documents referred to in s 29' and not the premises *per se* at which they are retained or kept. Section 45(1) does not expressly provide that a SARS official may 'enter' premises for inspection purposes. It is submitted that, upon a proper construction of s 45 read holistically, this authority is conferred by necessary implication.²⁶ This interpretation is supported, first, by the reference in s 45(2) to the power of a SARS official to 'enter' such part of a dwelling-house or domestic premises 'used for the purposes of trade'. It is inconceivable that the power of entry would be conferred for the purposes of s 45(2) but not also s 45(1). They serve the same purpose in the TAA. In addition, on a plain reading of s 45, the dominant provision thereof is s 45(1). Its dominance is evident from s 45(1) containing the jurisdictional requirements for conducting an inspection under ss 45(1) and (2). Secondly, in the absence of an implied authority in s 45(1) to 'enter' business premises, an inspection cannot take place thereunder. Such an eventuality would render its provisions ineffective. The result hereof would be that, save for an inspection occurring under the exception catered for in s 45(2), an inspection would not be possible, from a practical point of view, in relation to any other premises. A purposive approach to interpretation, discussed above in chapter two, supports the construction of s 45(1) contended for here. This is so because adopting a purposive interpretation would reinforce a cardinal objective outlined in s 2 of the TAA, discussed above in chapter five, namely, ensuring 'the effective and efficient collection of tax by ... generally giving effect to the objects and purposes of tax administration'.

²⁵ The TAA (s 31) reads: 'The records, books of account and documents referred to in section 29 ... must at all reasonable times during the required periods under section 29, be open for inspection by a SARS official in the Republic for the purpose of — (a) determining compliance with the requirements of sections 29 and 30; or (b) an inspection, audit or investigation under Chapter 5.'

²⁶ Section 63(1) of the TAA also omits expressly stipulating that a senior SARS official may 'enter' premises to conduct a warrantless search. Section 63(1) merely states that 'the powers referred to in section 61(3)' may be exercised without a warrant. Those powers do not expressly include an authority to 'enter' premises. Subject to all necessary contextual changes, it is submitted that, by the use of the same legal reasoning adopted here in relation to s 45(1), the power to 'enter' premises must be regarded as incorporated into s 63(1) by necessary implication.

9.3.2 Powers at, and procedures for, a search under s 63 of the TAA

Whilst ss 63(1) and (4) of the TAA outline the substantive requirements for warrantless searches, ss 63(2), (3) and (5) regulate the procedure for their execution. Cumulatively, these provisions are the due process requirements for a valid warrantless search under the TAA. Sections 63(2)(a) and (b) of the TAA must be read conjunctively because they are joined by the conjunctive word ‘and’.²⁷ By virtue of the provisions of s 63(2)(b), and consistent with SA’s culture of justification, the reason (‘basis’) for a warrantless search must be disclosed before the search commences. This is in addition to divulging, in terms of s 63(2)(a), the section of the TAA under which the warrantless search is conducted.²⁸ In accordance with s 63(1) read with s 61(3) of the TAA, the following powers may be exercised when carrying out a warrantless search:²⁹

- 
- (a) to ‘open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material’ (s 61(3)(a));
 - (b) to ‘seize any relevant material’ (s 61(3)(b));
 - (c) to ‘seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required’ (s 61(3)(c));
 - (d) to ‘make extracts from or copies of relevant material, and require from a person an explanation of relevant material’ (s 61(3)(d));

²⁷ For the legal effect of ‘and’, see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50.

²⁸ Section 63(2) reflects the decision in *Ferucci* 229A-D 231A-C as to the nature of the information to be given prior to a search so that the person against whom a search is executed is ‘adequately informed as to the purpose and ambit of the search’, and is able to ascertain in advance with reasonable accuracy the nature and scope of ‘what is to be seized’ and ‘what it is that he is obliged to surrender’. See also *Goqwana* para 18. Effective communication requires that the information be given in a language understood by the addressee. Thus, an interpreter may be required.

²⁹ Powers of inspection and search ought to be sufficiently circumscribed as regards the timing, place and scope thereof. This is so because overbreadth must be avoided since it creates problems. First, overbreadth causes a failure to inform an occupier of the limits of an inspection or search. Secondly, overbreadth may leave an inspector without sufficient guidelines in accordance with which to conduct the inspection or search within legal limits. Thirdly, overbreadth permits greater privacy intrusions that extend beyond circumstances where the reasonable expectation of privacy is low, to situations where the reasonable expectation of privacy is high. See *Magajane* para 71.

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- (e) if the premises is a vessel, aircraft or vehicle, to ‘stop and board the vessel, aircraft or vehicle, search the vessel, aircraft or vehicle or a person found in the vessel, aircraft or vehicle, and question the person with respect to a matter dealt with in a tax Act’ (s 61(3)(e)); and
- (f) to ‘search a person [found on the premises] if the official [conducting the search] is of the same gender as the person being searched’ (s 61(5)).

The guidelines for the execution of a warrantless search are, in terms of s 63(3), contained in ss 61(4) - (8) of the TAA. They include that an inventory be made of all relevant material seized and that a copy thereof be provided to the person whose premises was searched (s 61(4)), and that every search occurs with strict regard for decency and order (s 61(5)). In terms of s 61(6), a search may occur with the assistance of a police officer who is obliged to acquiesce in, or comply with, a request by SARS (‘must render the assistance’). Under s 61(7), no person may ‘obstruct a SARS official or a police officer’ from executing a search or ‘without reasonable excuse refuse to give such assistance as may be reasonably required’ for its execution. Although ‘assistance’ is not defined for TAA purposes, the nature thereof would, it is submitted, entail performing acts of the nature referred to in s 49(1), namely, ‘making available appropriate facilities,³⁰ to the extent that such facilities are available’, ‘answering questions’ and ‘submitting relevant material as required’. In terms of s 234 of the TAA, it is an offence for any person who ‘wilfully and without just cause’ refuses or neglects to, inter alia, ‘furnish, produce or make available any information, document or thing’ (s 234(h)(i)), or ‘obstructs or hinders a SARS official in the discharge of the official’s duties’ (s 234(k)), or refuses to give assistance as required by s 49(1) (s 234(l)). In relation to s 63, the criminalisation of the conduct referred to is aimed at promoting the efficacy of a search as a tool, inter alia, to combat tax delinquency and maximise tax collection.

³⁰ It is submitted that ‘appropriate facilities’ are ‘facilities’ that are required for the ‘effective, suitable, proper or fitting’ (*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 71) execution of SARS’s statutory duties. Thus construed, ‘appropriate facilities’ may, depending on circumstances, include a toilet, scanner, fax machine, computer, telephone, USB device, internet, email, photocopier, and access to a work station, lighting and electricity.

9.4 LEGAL REQUIREMENTS FOR INSPECTIONS AND SEARCHES

9.4.1 Jurisdictional requirements for lawful inspections and searches

No inspection or search can take place based on conjecture, unsupported averments or uncorroborated speculation. Good cause is a material requirement for a lawful inspection or search. If good cause is absent or cannot be shown to have existed when an inspection or search took place, then ‘there would ... be little content left to the right to privacy’.³¹ Such a state of affairs is untenable in SA where a high premium is placed on fundamental rights. Sections 45 and 63 of the TAA impose good cause criteria for a lawful inspection or search, as the case may be, to occur.³² SARS bears the onus to prove that the jurisdictional facts are met for the lawful exercise of the powers conferred.³³ Non-satisfaction thereof will cause an unreasonable and unjustifiable violation of privacy and of any inter-related or associated right of the affected person (such as, property or dignity).³⁴ Such unlawful action will be a nullity. Moreover, under s 35(5) of the Constitution, information obtained unlawfully will be inadmissible evidence at criminal proceedings.³⁵ As regards its admissibility in civil proceedings, judicial officers have the discretion to exclude unconstitutionally obtained evidence if the circumstances of a case justify its exclusion.³⁶ This determination must be made judiciously after taking into account all relevant facts and circumstances. These include the nature of the evidence, the extent of the rights violation, whether the evidence could be lawfully obtained, and if the evidence would in the ordinary course of events have been obtained lawfully).³⁷

³¹ *Hyundai Motors* para 54.

³² Searches and seizures were, prior to the TAA, regulated mainly by the ITA that did not permit a warrantless search or seizure of taxpayer’s property. See Croome BJ & Olivier L (2015) 139 157.

³³ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) para 45.

³⁴ The CC, in *Grootboom* para 23, held: ‘All the rights in our Bill of Rights are inter-related and mutually supporting.’ See also *Case and Curtis* para 27.

³⁵ The Constitution (s 35(5)) reads: ‘Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.’ For a discussion of the treatment of evidence obtained unconstitutionally in a search, see *Thint* paras 215-24. Also, see de Vos WLR (2011) 270-71 274-79.

³⁶ Zeffertt DT & Paizes AP (2009) 772-75, Schwikkard PJ & van der Merwe SE (2010) 264-66. See also de Vos WLR (2011) 279-81.

³⁷ *Fedics Group (Pty) Ltd and Another v Matus and Others* 1998 (2) SA 617 (C) para 92.

SARS must return material seized in an unlawful search. In terms of s 66(1) of the TAA, SARS can be requested to ‘return some or all of the seized material’ and to ‘pay the costs of physical damage caused during the conduct of a search and seizure’. If it refuses to acquiesce in such request then, under s 66(2), an application may be brought to a High Court for an order obliging ‘the return of the seized material or payment of compensation for physical damage caused’. Despite the unlawfulness of the means by which SARS obtained the material, s 66(4) confers discretion on the High Court to ‘nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice’.³⁸ If so authorised, then the continued possession of the material would be lawful. SARS may then introduce the material as evidence in civil proceedings. If a taxpayer objects to its admissibility, then the judicial officer would have to make a ruling. When deliberating on this issue, the relevant facts would include the order granted under s 66(4).

(a) Inspections under s 45 of the TAA

Section 45(1) contemplates a visit by a SARS official to determinable business premises (‘arrive at a premises’) where an inspection may take place. Section 45(1) confines inspections to occur only at premises where ‘the SARS official has a reasonable belief that a trade or enterprise is being carried on’. Linguistically, the phrase ‘is being carried on’ is cast in the present tense. Thus, it envisages an ongoing operation at the time when the visit occurs. On this basis, it is submitted that an inspection may not occur at premises where the operation of a trade or enterprise is dormant, has ceased, or closed down. If the business operation is simply temporarily closed, such as for lunchtime, then the inspection may still take place there since the trade or enterprise ‘is being carried on’ at the premises concerned at the critical time of the inspection. On the other hand, if the operation of a trade or enterprise has relocated, then an inspection must take place at the ‘new’ premises where the business operation ‘is being carried on’. Consequently, it is a

³⁸ It is submitted that the ‘interests of justice’ is to be determined with reference to all relevant factors, including prejudice to any party, the reasonableness of SARS’s explanation for non-compliance with the law, the competing rights and interests of the parties, and the effect on tax administration and the administration of justice.

factual issue in each case whether ‘a trade or enterprise is being carried on’ at the premises concerned and whether an activity there constitutes a ‘trade or enterprise’.

In terms of s 45(1), an inspection can take place only if ‘the SARS official has a reasonable belief that a trade or enterprise is being carried on’ at the premises concerned. Although not expressly stated in s 45(2), it is submitted that this triggering jurisdictional requirement applies equally to inspections conducted thereunder. It cannot be that this jurisdictional fact applies only to inspections occurring under s 45(1). The rule of law, discussed above in chapter three, demands that the same criteria apply to all inspections. This promotes certainty and uniformity. Compliance with the jurisdictional fact stated in s 45(1) is determined in each case with reference to ‘reasonable belief’, an objective standard. ‘Reasonable belief’, and its known variations ‘reasonable grounds to believe’³⁹ and ‘reasonable grounds is satisfied’,⁴⁰ have hitherto not been judicially interpreted in their TAA contexts. In this regard, the following *dictum* per Plasket J in *NDPP v Stander and Others*⁴¹ is instructive as to their meaning:

‘It is clear from the cases that reason to believe that a state of affairs exists involves an objectively justifiable belief – “a belief based on reason” in which a “factual basis for the reason” exists. There must, in other words, be “grounds, or facts, which give rise to, or form the basis of, the belief” and they must be reasonable grounds. That the belief must be objectively rational (even ... when more subjective language is used in a statute) is now a constitutional imperative, flowing from the founding value of the rule of law.’

³⁹ For the meaning of ‘reason to believe’, see *Bert’s Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* [2012] ZAGPPHC 11 (9 February 2012) para 10. The criterion ‘reasonable grounds to believe’ is used in the TAA in s 60(1) (issuance of a search warrant) and in s 62(1) (search of premises not identified in a warrant). For a discussion thereof, see Bovijn S & van Schalkwyk L ‘Concerns regarding new search and seizure powers granted to SARS in terms of the Tax Administration Act’ (2012) 23(3) *Stell LR* 507 512-13. See also *Huang and Others v CSARS: In re CSARS v Huang and Others* (2015) 77 SATC 283 (GP) paras 45 47.

⁴⁰ For the standard of proof required for ‘satisfaction’, see the authorities cited at fn 74 in chapter five above. For the legal meaning of ‘reasonable’, see para 8.3.6.5.1 in chapter eight above.

⁴¹ 2008 (1) SACR 116 (E) para 13. The Canadian Supreme Court, in *Hunter v Southam Inc* [1984] 11 DLR (4th) 641 (SCC) 658, held that a ‘reasonable belief that relevant evidence may be uncovered’ constitutes ‘a very low standard that would validate intrusion on the basis of suspicion, and authorise fishing expeditions of considerable latitude’. Also, see Cohen S *The Commissioner’s Powers to Access Information: A License to Fish* (unpublished Master of Business thesis, Auckland University of Technology, 2010) 20.

The ‘reasonable belief’ criterion in s 45(1) for the lawful exercise of the discretionary power to conduct an inspection does not encompass a requirement that a SARS official must believe or suspect that the person occupying the premises to be inspected is unregistered for tax or non-compliant with ss 29 and 30 of the TAA. An inspection ought, furthermore, not to be unlawful merely because it transpires that ‘a trade or enterprise’ is not actually ‘being carried on’ at the premises concerned at the time of the inspection. This is so provided that the SARS official who conducted the inspection was privy to a set of facts that led him/her reasonably to believe that a trade or enterprise was ‘being carried on’ at the premises concerned. If this belief is subsequently found to have been misplaced, then this fact alone ought not to justify declaring the inspection to be unlawful.

(b) Searches under s 63 of the TAA

Sections 63(1) and (4) of the TAA are pivotal weapons in SARS’s armoury. They grant sweeping powers to a ‘senior SARS official’,⁴² a creature of the TAA, to exercise a discretion (‘may’) and, without judicial oversight, to conduct a warrantless search.⁴³ The TAA sets no criteria (such as, age, rank, status, qualification, knowledge, expertise or years of experience) for anyone to have the ‘senior SARS official’ designation. In terms of ss 6(3)(a), (b) and (c) of the TAA, the powers and duties of a ‘senior SARS official’ may be exercised by the CSARS and a ‘SARS official’ who either has ‘specific written authority from the Commissioner to do so’ or is ‘occupying a post designated by the Commissioner in writing for this purpose’. The definition of ‘SARS official’ in s 1 includes, inter alia, *any* SARS employee no matter how low-ranking and *any* third party ‘contracted or engaged by SARS’ to administer a tax Act.

Section 63 suffers from an apparent internal contradiction that affects its practical application. Whereas s 63(1) empowers a ‘senior SARS official’ to conduct a warrantless

⁴² The TAA (s 1) defines ‘senior SARS official’ as ‘a SARS official referred to in s 6(3)’.

⁴³ Sopinka J, in *Baron v Canada* [1993] 13 CRR (2nd) 65 (SCC) 84-85, captures the invasiveness of a search concisely as follows: ‘Physical search of private premises (I mean private in the sense of private property, regardless of whether the public is permitted to enter the premises to do business) is the greatest intrusion of privacy short of a violation of bodily integrity.’

search, ss 63(2) and (4) refer to a ‘SARS official’ carrying out a warrantless search. It is clear from the definitions of ‘SARS official’ and ‘senior SARS official’ that these functionaries created by the TAA for its specific purposes are distinguishable from each other. Except for the CSARS who is both a ‘SARS official’ and a ‘senior SARS official’, every other category of ‘SARS official’ is not a ‘senior SARS official’ but may be elevated to that status. Thus, it is submitted that a ‘SARS official’ cannot exercise the powers under s 61(3) for purposes of applying s 63(1), except if this official is a ‘senior SARS official’.⁴⁴ Pursuant to the author’s submission that a legislative amendment be effected to cure the contradiction in s 63,⁴⁵ Parliament amended s 6(4) several times to remedy the deficiencies in, inter alia, s 63.⁴⁶ Presently, s 6(4) permits ‘a SARS official under the control of’ a senior SARS official, as referred to in ss 6(3)(a), (b) or (c), to execute ‘a task ancillary to a power or duty’ to be exercised by a ‘senior SARS official’. This amendment fails to resolve the contradiction in s 63 referred to above. This is so because, in relation to s 63(1), the authority conferred by s 6(4) applies only to the execution of tasks that are ‘ancillary to a power’ exercised by a ‘senior SARS official’ under s 63(1) read with s 61(3). In other words, s 6(4) does not grant a ‘SARS official’ the powers listed in s 61(3) of the TAA for purposes of effecting a warrantless search under the provisions of s 63(1) thereof.

(b)(i) Warrantless search by consent: ss 63(1)(a) and (4) of the TAA

Consensual and non-consensual searches are permitted by ss 63(1) and (4) of the TAA. In terms of s 63(1), a senior SARS official may conduct a warrantless search if ‘the owner or person in control of the premises so consents in writing’ or ‘if the senior SARS official

⁴⁴ Moosa F ‘The power to search and seize without a warrant under the Tax Administration Act’ (2012) 24(3) *SA Merc LJ* 338 344. See also Keulder C (2015) 843; Bovijn S & van Schalkwyk L (2012) 511.

⁴⁵ See Moosa F (2012) 344-45. Until Parliament cures the contradiction in s 63, it is submitted that the reference in ss 63(2) and (4) to ‘SARS official’ ought to be read as a ‘SARS official who qualifies as a senior SARS official’.

⁴⁶ Originally, s 6(4) referred to, inter alia, ‘an official under the control of the Commissioner or a senior SARS official’. Subsequently, s 6(4) was amended by the Tax Administration Laws Amendment Act 21 of 2012 to refer instead to ‘a SARS official under the control of the Commissioner or a senior SARS official’. This provision was not a model of legislative clarity and was, thus, later substituted by s 35 of Tax Administration Laws Amendment Act 23 of 2015.

on reasonable grounds is satisfied' that the trio of requirements in sub-paras (i), (ii) and (iii) thereof as mentioned above are met. These are the good cause criteria for a warrantless search to be conducted under ss 63(1)(a) and (b). If not met, then it is constitutionally impermissible for a senior SARS official to exercise the powers conferred by s 63(1). The disjunctive word 'or' separating ss 63(1)(a) and (b) indicates that they apply as alternatives.⁴⁷ They do *not* operate in a hierarchical fashion in the sense that sub-sec (b) is only available if consent under sub-sec (a) is refused (reasonably or unreasonably). Thus, a senior SARS official may resort to exercising the powers conferred by s 63(1)(b) without first attempting to obtain the written consent referred to in s 63(1)(a). In other words, a senior SARS official has a discretionary power to decide which provision ought to be used for effecting a warrantless search under s 63(1).⁴⁸

Section 63(4) permits a warrantless search of a dwelling-house or domestic premises if consent for any such process is granted by 'the occupant' thereof. A feature that distinguishes s 63(1)(a) from s 63(4) is that, whereas the former requires consent to be in writing, the latter does not. The reason for this difference is unclear from a reading of the TAA. The absence of a requirement that consent be in writing creates fertile ground for disputes and doubts to arise. A written consent is an objective fact reflecting an express authorisation for the performance of an act. In cases of dispute, the document will serve as concrete proof of the consent, particularly if it is signed by the grantor thereof. In cases of doubt, the wording of the relevant document may be construed to ascertain its aim or objective. The absence of a requirement that consent be in writing opens the door for an interpretation that s 63(4) permits an implied or tacit consent, by word or conduct, to be given for a warrantless search to be conducted at a dwelling-house or domestic premises.

⁴⁷ For the legal effect of 'or', see *CIR v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A) 376; *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine* SA 2010 (6) SA 493 (SCA) para 22; *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 6; *Master Currency (Pty) Ltd v CSARS* [2013] 3 All SA 135 (SCA) para 15. For the distinction with 'and', see the authorities at fn 136 in chapter six above.

⁴⁸ For a discussion of the rules regulating the lawful exercise of discretionary powers generally, see below at para 9.5. In a review of administrative action on the basis that an administrative decision was unlawful, irrational, unreasonable or procedurally unfair, an applicant must identify clearly both the facts upon which the cause of action is premised as well as the legal basis thereof. Normally, this would require an applicant to specify the provisions of PAJA upon which reliance is placed. See *CSARS v Prudence Forwarding (Pty) Ltd and Another* (2016) 78 SATC 119 para 32.

Except for the formality that, for the purposes of s 63(1)(a), consent must be in writing,⁴⁹ the TAA sets no other requirement for the granting of a valid consent under ss 63(1) and (4).⁵⁰ In this regard, certain relevant considerations ought to play a role. First, consent must stem from a person competent in law to grant it.⁵¹ Whilst consent under s 63(1)(a) may be given by ‘the owner or person in control of the premises’, consent under s 63(4) must be given by ‘the occupant’. Neither s 63(1)(a) nor s 63(4) refers to the granting of consent by an agent of the designated persons.⁵² Secondly, the written consent stipulated by s 63(1)(a) ought to be valid only if it is signed. Signature is an objective fact serving as proof of consent. It is reliable proof that the signatory bound him/herself to the content of the document. Thus, an unsigned document with words indicating consent for the purposes of s 63(1)(a) ought to be invalid even if handwritten by the owner or person in control of the premises. Owing to the nature and importance of the document, its implications for the fundamental rights of an occupier, the risks of abuse of power by officials acting for SARS, and the need to minimise the potential for litigation, s 63(1)(a) ought to be construed as requiring a signature for a valid consent.⁵³ Thirdly, consent must be given freely and voluntarily and, thus, not induced by duress, fraud, misrepresentation or coercion. Fourthly, an informed consent must be given in the sense explained below.

⁴⁹ The TAA does not specify the content of the document incorporating consent. At a minimum, it ought to state the scope of the premises to which the consent relates and that consent is given under s 63(1)(a). Proof of the objective written consent criterion ‘may be less onerous’ than the subjective ‘reasonable grounds criterion’ in s 63(1)(b) discussed below. See Keulder C (2015) 839.
⁵⁰ Sections 45(2) and 63(4) of the TAA are identical to the extent that they permit warrantless inspections and searches, respectively, of a dwelling-house and domestic premises if ‘the consent of the occupant’ is obtained. Neither provision requires consent to be in writing. Owing to their similarities, the submissions made here regarding the legal requirements for a valid consent under s 63(4) ought to apply with equal force to the granting of consent for an inspection under s 45(2).

⁵¹ For a discussion of the general legal requirements that ought to apply for the granting of a valid consent under ss 63(1) and (4) of the TAA, see Bovijn S & van Schalkwyk L (2012) 511.

⁵² In terms of s 6(b) of the Interpretation Act, statutory words in the singular number include the plural, unless a contrary intention appears. It is submitted that ‘the owner’ in s 63(1)(a) of the TAA means ‘the owners’. Thus, if premises are co-owned then, on a *strict* interpretation of the TAA that makes no provision for consent by an agent, each co-owner would have to consent and do so personally. On a strict construction, consent by an owner would not be binding on another, nor would it constitute consent by ‘the owner’. At best, it is consent by ‘an owner’. A strict interpretation ought to be avoided. Consent ought to be valid if granted by anyone authorised to do so on behalf of a designated person. Logic and common sense dictate the adoption of this approach because it caters for situations where a designated person is unavailable and also ensures that s 63(1)(a) is workable in cases where ‘the owner’ is a juristic person acting through agents.

⁵³ Strict formalities in relation to a signature ought not to be required. Thus, pencil signatures, signatures by initials or by means of a stamp, or by a mark, or by a party’s writing below a printed heading, ought to suffice for a valid signature. See *Van Niekerk v Smit* 1952 (3) SA 17 (T) 25.

A holistic reading of s 63 reveals that a warrantless search with the written⁵⁴ consent of ‘the owner or person in control of the premises’ applies to all ‘premises’, except ‘a dwelling-house or domestic premises’, or any part thereof, used for non-trade purposes. The timing of the granting of consent under ss 63(1)(a) and 63(4), as well as s 45(2), is unclear. The TAA fails to indicate whether, procedurally, consent must be given before an operation starts, or if it may be given after the process starts but before its completion, or if it may be given at any time after completion. An inspection and search is lawful if a valid consent exists beforehand. If not, then entry to the premises, and any action there, would be unlawful. The result thereof would be tainted with illegality. However, since only courts are arbiters (or fonts) of legality, any invalid administrative action by SARS will engender legal consequences for an affected taxpayer until it is set aside on judicial review.⁵⁵ Compliance with s 63(1)(a) ought to be regarded as fulfilled if the consent is granted orally before a search commences and it is later, at any time, reduced to writing. That the formality of reducing consent to writing occurred *ex post facto* ought not to invalidate an otherwise valid consent that satisfies all the requirements referred to above. This interpretive approach accords favourably with a purposive interpretation of s 63(1).

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Whilst s 63(1)(a) authorises consent by ‘the owner or person in control’, the TAA does not define or clarify the intended meaning of either term. In this context, ownership is a formal, legal relationship that, at the time of the granting of consent, must exist between the grantor of the consent and the premises in respect of which consent is granted. On the other hand, ‘control’, in this context, refers to the ability of the grantor of consent to exercise a high degree or measure of authority over the relevant premises *and*, as such, exercise sufficient authority over the property, possessions and/or communications found there to be able to consent to SARS officials being granted access thereto. Thus explained, ‘control’ encapsulates different forms of possession that are not commensurate with full

⁵⁴ The Interpretation Act (s 3) reads: ‘In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.’

⁵⁵ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) paras 100-103. The CC held, at para 103, that “[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.”

ownership. In the context of s 63(1)(a), 'control' may take the form of legal control or physical control.⁵⁶ Legal control refers to possessory rights over the premises in respect of which the consent is sought. Thus, it would include, inter alia, a licensee, hirer and lessee. Physical control refers to the actual custody or possession of the premises. Thus, it would include, inter alia, a ship's captain, an employee, an office manager, and property agent. It is submitted that, for the purposes of s 63(1)(a), 'person in control' covers both the aforementioned categories of persons. Whether legal or physical control exists in any instance in the sense as explained here is a factual issue to be decided in the light of the particular circumstances of each case. As stated above, lawful consent requires, inter alia, that the grantor thereof be competent in law to give consent at the time when the search occurs. Therefore, a warrantless search of premises and/or seizure of property in the wide sense would be unlawful if it occurs as a result of consent granted by a person who, in law, lacks the competence to issue a valid and enforceable consent (such as, a person who is in wrongful or unlawful control of the premises to be searched). Where such illegality occurs, any person whose rights are adversely affected by such unlawful consent and concomitant search may apply to a competent High Court for an order prohibiting the unlawful search from continuing and/or obliging SARS officials to surrender any seized material and re-deliver it to the person from whose possession or control it was removed. However, as explained above, notwithstanding the illegality of a search and seizure, SARS may, in terms of s 66(4) of the TAA, apply to a High Court for an order authorising SARS to retain the seized material or a copy of 'relevant material' as defined.

Generally, in terms of ss 45(2), 62(2) and 63(4), a SARS official may not 'enter'⁵⁷ a dwelling-house or domestic premises ... without the consent of the occupant'. The term 'occupant' is undefined in the TAA. Thus, its meaning in the TAA is unclear. 'Occupant' is utilised as a noun in ss 45(2), 62(2) and 63(4). The *Oxford Thesaurus*⁵⁸ defines 'occupant' when used as a noun to mean 'resident, inhabitant, owner, householder, tenant,

⁵⁶ Cohen S (2010) 30-1.

⁵⁷ '[E]nter' is undefined in the TAA. Its ordinary meaning is 'go into a place'. See Cohen S (2010) 23. 'Enter' does not include the use of force or clandestine means. The power to 'enter' does not include the power to search, seize or inspect. Any such power must be conferred separately.

⁵⁸ Waite M, Hollingworth L & Marshall D (eds) (2006) 573.

renter, leaseholder, lessee, addressee'. Based on its dictionary meaning, 'the occupant' may, depending on circumstances, include owners and persons in legal or physical control of a dwelling-house or domestic premises in the sense explained above. Section 63(4) refers to 'the occupant'. Its meaning must be sufficiently distinguishable from 'the owner' and 'person in control of the premises' used in s 63(1)(a) but also wide enough to incorporate such persons in appropriate cases. Therefore, in the contexts of ss 45(2), 62(2) and 63(4), 'the occupant' ought to be construed as referring to 'the occupier' who is authorised, expressly or impliedly, to be on the premises and who, at the time of the inspection or search, as the case may be, habitually resides at the premises. This construction is consistent with reference to 'the occupant' and not 'an' or 'any' occupant'. Thus, 'the occupant' ought to exclude, inter alia, trespassers, land invaders, vagrants, squatters, visitors, contractors, guests, housesitters and babysitters. On the other hand, a live-in worker (such as, a butler, domestic, housekeeper, nurse or child carer) would be encompassed by the term 'the occupant' but then only if such occupier is duly authorised to give lawful consent for a binding inspection or search. Such authority must emanate from the person(s) whose privacy will be adversely affected by the inspection or search. As a safeguard of privacy, 'the occupant' ought also to be construed to cover only persons who occupy the relevant part of a dwelling-house or domestic premises sought to be inspected or searched. This construction would ensure that no occupier may lawfully grant consent that would lead to the invasion of another occupier's privacy, unless the grantor of consent is authorised to do so on behalf of the occupier whose privacy will be invaded. Thus, 'the occupant' must be competent in law to give consent. In the light hereof, consent by a minor, insane or other person with diminished legal capacity would be invalid. '[T]he occupant' must also be lawfully empowered or entitled as of right to give consent that is binding on, and enforceable against, the person(s) whose home or property is inspected or searched and/or whose possessions and/or communications may be seized. Unless each of the abovementioned requirements is met, an inspection, search and/or seizure would be susceptible to attack. The interpretation contended for here is consistent with s 39(2) of the BOR because it fosters protection of privacy and promotes the rule of law. Also, in accordance with s 6(b) of the Interpretation Act, the construction advanced here indicates that 'the occupant' includes its plural, where applicable.

(b)(ii) Warrantless search if senior SARS official is satisfied ‘on reasonable grounds’

If no consent is given under s 63(1)(a) then a warrantless search may take place if it is brought within the confined parameters of s 63(1)(b). Sections 63(1)(b)(i), (ii) and (iii) enumerate the requirements for the lawful exercise of the subjective discretion to conduct a non-consensual, warrantless search. The word ‘and’ joins sub-paras (ii) and (iii). Linguistically, ‘and’ indicates that the three requirements operate conjunctively (not disjunctively).⁵⁹ In terms of s 63(1)(b), a search may be conducted if subjectively, on reasonable grounds, a senior SARS official is satisfied that, first, ‘there may be an imminent removal or destruction of relevant material likely to be found on the premises’; secondly, that a search warrant would be issued if applied for under s 59 of the TAA; and, thirdly, that the object of the search would be defeated by a delay in obtaining a warrant.

Section 22(b) of the CPA,⁶⁰ containing substantially the same or similar requirements for a warrantless search as those in s 63(1)(b) of the TAA, was described in *Raliphaswa v Mugivhi and Others*⁶¹ as ‘designed to protect rights to privacy against abuse of power by members of the SAPS’. By parity of legal reasoning, the trio of requirements in s 63(1)(b) are internal limits aimed at protecting privacy and other inter-related, mutually supporting fundamental rights of affected persons against abuse of power by senior SARS officials. Hence, strict compliance with s 63(1)(b) is required. Any failure to comply therewith ought to render a search invalid. In the context of s 63(1)(b), the requisite standard of proof appears from the phrase ‘reasonable grounds is satisfied’. In civil proceedings, this standard must be shown on a balance of probabilities.⁶² It involves a lesser evidentiary burden than ‘*prima facie*’ proof. In this regard, the following comments by Kubushi J in *Huang and Others v CSARS: In re CSARS v Huang and Others*⁶³ are useful:

⁵⁹ For the legal effect of ‘and’, see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 50.

⁶⁰ The CC, in *Gaertner* para 73, held that ‘there is no cogent reason for not providing for warrants in respect of searches of people’s homes, with exceptions similar to those provided for in section 22 of the Criminal Procedure Act’.

⁶¹ 2008 (4) SA 154 (SCA) 159A.

⁶² *Bovijn S & van Schalkwyk L* (2012) 512.

⁶³ (2015) 77 SATC 283 (GP) para 46.

CHAPTER NINE: WARRANTLESS INSPECTIONS AND SEARCHES

‘That reasonable grounds must be established does not mean prima facie proof. What is of importance is that on the total picture presented by SARS ... reasonable grounds to believe that the applicants had failed to comply with their obligations under the tax Acts or had committed offences under those Acts, were established.’

In terms of s 63(1)(b)(i), a warrantless search may be undertaken if a senior SARS official ‘on reasonable grounds is satisfied that there may be an imminent removal or destruction of relevant material likely to be found on the premises’. When interpreted linguistically and in context, ‘may be’ and ‘likely’ refer to measurements of expectation involving ‘a result that is probable, objectively considered’. When construed against the backdrop of the phrase ‘reasonable grounds is satisfied’, the expectation must be ‘that which *would* reasonably be expected’.⁶⁴ Thus, the cumulative effect of ‘reasonable grounds is satisfied’, ‘may be’ and ‘likely’ is that the circumstances to which they relate need not exist as concrete facts, nor do they later, at a judicial review of the search, need to be shown to have existed at the time of exercising the discretion to conduct a search. In their context, these words simply require a reasonable likelihood or probability, objectively considered with reference to credible or reliable facts, that a removal or destruction of relevant material is impending. Accordingly, a belief based on unfounded claims or unsubstantiated allegations, or on mere speculation or conjecture, would not suffice to trigger the lawful application of the drastic measure catered for by s 63(1)(b).

Section 63(1)(b) permits warrantless, non-consensual searches within narrowly stated jurisdictional limits. They are earmarked for, presumably exceptional or rare, situations where a reasonable fear or apprehension, premised ‘on reasonable grounds’, arises that steps may be afoot to remove or destroy relevant material. The usefulness of s 63(1)(b) lies in it empowering SARS to react with speed and without delay to real (not illusory) situations that give rise to genuine (not fabricated or contrived) concerns about imminent (not far-off) dangers to tax administration caused by probable (not speculative or conjectural) efforts to remove or destroy relevant material. For the sub-sec’s purposes, the intention with which a removal or destruction may, or actually does, occur, is

⁶⁴ *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 All SA 352 para 42.

irrelevant. Of importance is that such acts relate to ‘relevant material’ and that their effect will be of such a nature that, if they materialise, they would undermine tax administration. Accordingly, s 63(1)(b) combats the mischief of relevant material sought to be placed out of SARS’s reach that, in turn, carries the risk of causing prejudice to the *fiscus*. When viewed in this light, s 63(1)(b) is an important weapon in SARS’s arsenal to protect and preserve SA’s tax base and the State’s sources of income. Whilst the possibility exists that this statutory weapon may be abused, that risk is, for reasons already explained above, not a justifiable basis in law for challenging the validity of s 63(1)(b). At worst, a court may declare a particular warrantless search to be void if a person with *locus standi* proves that its execution under s 63(1)(b) read with s 61(3) is an abuse of public power.⁶⁵

Every exercise of a discretion under s 63(1)(b) must be predicated on a reasonable belief that the taxpayer failed to comply with a duty under a tax Act or committed a ‘tax offence’ as defined in s 1 of the TAA. In terms of s 63(2)(b), such alleged non-compliance or tax offence must form the ‘basis for the search’.⁶⁶ Hence, logic dictates that the belief concerned must be part of the factual matrix that triggers a fear or concern of a probable ‘imminent removal or destruction of relevant material’. In the light hereof, a senior SARS official must, in each case, have knowledge of objective facts that establish a reasonable basis to sustain a belief that the relevant jurisdictional facts in ss 63(1)(b)(i), (ii) and (iii) of the TAA are present so that the discretion to conduct a warrantless search may be lawfully exercised. An objective test applies when determining *ex post facto* if the belief (‘satisfaction’) under s 63(1)(b) was reasonably justifiable with reference to the surrounding facts, particularly the set of facts known to the senior SARS official on which he/she relied as the basis for being ‘satisfied’ and exercising the discretion in favour of a particular search.⁶⁷ Each case must, thus, be decided on its own facts.

⁶⁵ The power in s 63(1) is a public power vested in a senior SARS official who exercises it as an agent of SARS, a public functionary, in circumstances where the official acts in the public interest and not in his private interest or on a whim. See *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) para 53. See also the discussion at para 5.2.8 in chapter five above.

⁶⁶ It is compulsory (‘must’) for a judicial warrant issued under s 60(2)(a) read with s 60(1)(a) of the TAA to refer to ‘the alleged failure to comply or offence that is the basis for the application’.

⁶⁷ *Huang and Others v CSARS: In re CSARS v Huang and Others* (2015) 77 SATC 283 (GP) para 45; *CSARS v Saleem* 2008 (3) SA 655 (SCA) para 14.

In the context of s 63(1)(b)(i), ‘imminent’ means ‘impending or threatening’ (not immediate or present).⁶⁸ Thus, to trigger s 63(1)(b) does not require a ‘clear and present danger’ but a ‘probable and impending threat’ of a removal or destruction of relevant material. ‘Imminent’ is distinguishable from ‘immediate’. Naturally, s 63(1)(b) applies if a senior SARS official on reasonable grounds is satisfied that there may be an *immediate* removal or destruction of relevant material likely to be found on premises. However, for its purposes, s 63(1)(b) does not impose the more stringent requirement of an ‘immediate’ threat; it simply requires an ‘imminent’ one. Linguistically, ‘imminent’ provides no specificity or indication as to the length of time that would need to pass in order that a reasonably foreseen danger, in the form of a ‘removal or destruction of relevant material’, would qualify as ‘imminent’. This creates a problem from both interpretational and practical perspectives. Since no definitive time can be laid down for an event to be regarded as ‘imminent’, this issue must be decided on the facts of each individual case.

A warrantless, non-consensual search is not justifiable merely because the requirements of s 63(1)(b)(i) are met. A lawful search under s 63(1)(b) also requires satisfaction with the requirements in ss 63(1)(b)(ii) and (iii) referred to above. If s 63(1)(b) is not complied with then SARS may conduct a consensual warrantless search contemplated by s 63(1)(a). Alternatively, its recourse would be to apply under s 59 for the issuance of a judicial warrant under s 60 for purposes of carrying out a search under s 61. The legal position applicable to a warrantless, non-consensual search conducted under s 63(1)(b) appears to differ from that applicable to a warrantless, non-consensual search under s 63(4). The latter does not refer to any good cause or jurisdictional requirement that must be met for a lawful search of such part of a dwelling-house or domestic premises used for a trade purpose. This apparent *lacuna* in the TAA would be cured if the phrase ‘under this section’ in s 63(4) is interpreted as referring to a warrantless search conducted in terms of s 63 read as a whole. Such a construction would render the requirements in ss 63(1)(b)(i), (ii) and (iii) being applicable to s 63(4). If so, then there would be consistency and parity in the application of ss 63(1)(b) and (4). Such a result ought to be welcomed.

⁶⁸ Bovijn S & van Schalkwyk L (2012) 512.

9.4.2 Key differences between inspections and searches under the TAA

Based on the foregoing, and having regard to the content of ss 45 and 63, the following key differences are evident in the substance and practical operation of their provisions:⁶⁹

- Whereas s 45(1) confers power on a ‘SARS official’ to conduct an inspection, s 63(1) empowers a ‘senior SARS official’ to perform a search;
- Whereas s 63(1)(a) provides for a warrantless search to be conducted with the written consent of the owner or person in control of the premises concerned, no provision is made in s 45 for a warrantless inspection to occur with the written consent of anyone. In terms of s 45(2), entry to such part of a dwelling-house or domestic premises not used for trade purposes may occur with ‘the consent of the occupant’;
- Whereas s 45 permits routine (non-targeted) and non-routine (targeted) inspections, s 63 permits only non-routine (targeted) searches;
- Whereas s 45 does not permit an inspection of any ‘premises’ *per se*, s 63 permits the search of ‘premises’ as defined in s 1 of the TAA;
- Whereas s 45 does not permit the seizure of material inspected, s 63 read with s 61(3) permit the seizure of relevant material searched;
- Whereas an inspection under s 45 occurs at premises where ‘a trade or enterprise’ is reasonably believed to be carried on,⁷⁰ a search under s 63 may occur at any premises (that is, business and non-business premises);

⁶⁹ Sections 45 and 63 of the TAA do not empower SARS officials to (i) intercept communications, (ii) engage in eavesdropping or electronic surveillance, or (iii) ‘tap’ a telephone by planting a bug or other listening device in it. Any such conduct constitutes an actionable invasion of privacy.

⁷⁰ The term ‘premises’ is defined in s 1 of the TAA. Any movable or immovable property qualifying as ‘premises’ is beyond the reach of s 45(1) if it is used exclusively for non-business purposes. ‘Premises’ would fall within the scope and ambit of s 45(1) if good cause exists for a ‘reasonable belief [on the part of a SARS official] that a trade or enterprise is being carried on’ there.

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- Whereas a ‘reasonable belief that a trade ... is being carried on’ is a requirement for entry to a home without consent under ss 45(1) and (2) read together, no such or similar requirement applies under s 63(4);
- Whereas s 45(1) only permits inspections at premises of persons whose tax affairs are to be checked for compliance, s 63 permits searches of a taxpayer’s premises and that of third parties associated with a taxpayer;
- Whereas a warrantless search under s 63 is permitted on the grounds of urgency and expediency in exceptional circumstances only, an inspection under s 45 is warrantless under all circumstances;
- An inspection under s 45 is geared to determine any of the objective facts listed in ss 45(1)(a), (b) and (c). An inspection does not occur because of a suspicion or belief of non-compliance with a tax duty. However, the basis for a search under s 63 is an alleged failure to comply with an obligation under a tax Act or the commission of a tax offence;
- Unlike s 63(2), s 45 does not require a SARS official to inform ‘the person occupying the premises’ that the inspection is conducted under s 45 nor does it require such person to be informed of the reason for the inspection;
- Whereas s 45 sets out no procedural guidelines or directions for conducting an inspection, s 63(3) stipulates that the procedural and other guidelines contained in ss 61(4) - (8) apply to all warrantless searches conducted under s 63; and
- Whereas s 61(3) provides some guidance as to the scope of the search and seizure powers that may be exercised under s 63, no guidance is given in the TAA as to the scope of the powers that may be exercised at an inspection under s 45.

9.5 LAWFUL EXERCISE OF DISCRETION UNDER SECTIONS 45 AND 63

Discretionary power plays an important role in every legal system. Sections 45(1) and 63(1) of the TAA indicates that the SARS officers at whom their provisions are directed ‘may’⁷¹ conduct an inspection or search, as the case may be, if the prescribed jurisdictional facts for the lawful exercise thereof are present. The officers can elect whether or not to exercise the discretionary information gathering powers but are under no obligation to do so, even if the jurisdictional requirements for the exercise of their discretion are met. Since the same general rules govern the exercise of all discretionary powers under the TAA, including an administrative decision to conduct an inspection or search, a single discussion thereof will be undertaken here. This discussion is necessary because the manner in which discretion is exercised may form the basis, or part thereof, for challenging its lawfulness. Thus, consideration ought to be given to the requirements for the lawful exercise of discretionary powers under the TAA.

The scope of discretionary power may vary from provision to provision. The exercise of discretion under tax legislation is reviewable administrative action under the PAJA and is subject to the principles of administrative law.⁷² An administrative decision-maker must apply his mind to the relevant issues in accordance with the ‘behests of the statute and the tenets of natural justice’.⁷³ A presumption operates that powers will be exercised ‘in a manner which is fair in all the circumstances’.⁷⁴ Failure to do so may be shown by proof, inter alia, that the decision was arrived at arbitrarily, capriciously, *mala fide*, due to

⁷¹ For a discussion of the permissive and predictive roles of ‘may’ in a statute, see *CIR v I H B King*; *CIR v A H King* 1947 (2) SA 196 (A) 209; *MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings (Pty) Ltd* 2005 (1) SA 428 (SCA) 439C; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) paras 14-20. For the distinction between directory and peremptory statutory provisions, see *Sutter v Scheepers* 1932 AD 163 173; *Pottie v Kotze* 1954 (3) SA 719 (A) 725-26; *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434E; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 13; *Weenen Transitional Local Council v Van Dyk* 2000 (3) SA 435 (N) 442-45. See also Goldswain GK (2012) 65. For the circumstances when ‘may’ can have the effect of ‘shall’ or ‘must’, see *Stroud Riley & Co Ltd v SIR* (1974) 36 SATC 143 (E) 151; *Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another* 1975 (4) SA 1 (T) 12H-13A; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) paras 14-16.

⁷² Van Dorsten JL part II (2005) 212.

⁷³ *Metcash* para 40. For a discussion of administrative reviews, see de Ville JR (2005) 172-77.

⁷⁴ *New Clicks* para 152.

an unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or motive. Also, it may be shown by proof that the administrator misconceived the nature of the discretion and took account of irrelevant considerations or ignored relevant ones, or that the decision is so grossly unreasonable as to justify an inference that the administrator failed to properly apply his mind to the issue at hand.⁷⁵

The exercise of discretionary power must occur within the limits of an empowering provision read subject to the Constitution.⁷⁶ To be lawful, discretion must be exercised *bona fide* and judiciously by an impartial person acting independently. The State bears the onus to show a rational connection between an inspection or search and the governmental purpose or State interest intended to be served by the exercise of such power. In the absence of rationality, such conduct is arbitrary and inconsistent with the rule of law. The test for rationality is an objective one.⁷⁷ In circumstances where the jurisdictional facts for the lawful exercise of discretion in relation to an inspection or search are present, a taxpayer or other party challenging the lawfulness thereof bears the onus to show that the discretion was exercised unlawfully. This is so irrespective of whether an infringement of a right is at stake. In an *ex post facto* evaluation of whether an administrative decision-maker acted within the bounds of rationality, the human rights context of the decision is important. The more the decision interferes with a fundamental right(s), the greater the force of its justification must be.⁷⁸

The objective to be served by the exercise of discretionary power must be evident from the statute conferring any such power. This is important in the context of ss 45(1), (2), 63(1) and (4) of the TAA because, as will be shown below in chapter ten, the nature of

⁷⁵ *Thint* paras 91-3.

⁷⁶ Unconstrained discretionary powers violate the rule of law. See *Dawood* para 47. Whether limits exist on the exercise of discretion is a matter of construction. See *Affordable Medicines* para 36.

⁷⁷ *Pharmaceutical Manufacturers* paras 85-6. Harms DP, in *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) para 39, held: 'The standard is not breached because an officer exercises the discretion in a manner other than that deemed optimal by the court. A number of choices may be open to him, all of which may fall within the range of rationality. The standard is not perfection, or even the optimum, judged from the vantage of hindsight and so long as the discretion is exercised within this range, the standard is not breached.' For a discussion of proportionality as a requirement for lawful administrative action, see de Ville JR (1994) 366-67.

⁷⁸ *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) paras 37 49-53.

the discretion conferred is such that the fundamental right to privacy is limited when the discretion is exercised. It is unlawful for discretion to be invoked in pursuit of a purpose that is not contemplated by Parliament as legislator. A search that has a just cause cannot be arbitrary. In accordance with s 6(2)(e)(ii) of the PAJA, the pursuit of an improper, ulterior or *ultra vires* purpose would render the exercise of discretion susceptible to judicial review.⁷⁹ The right to seek review of administrative action taken by SARS or the CSARS is a potent weapon in a taxpayer's arsenal of rights (discussed above in chapter seven). Section 6(2)(e)(v) of the PAJA provides for review if 'the action was taken in bad faith'.⁸⁰ Thus, an inspection, search, seizure, audit or criminal investigation will be unlawful if its intention is, for example, to frighten, harass, ridicule or punish the subject thereof, or to coerce the subject to be tax compliant. The same applies if a taxpayer is arrested and the SARS officer laying the criminal charge knows in advance that there is no real intention to pursue the prosecution. Likewise, a warrantless search is impermissible if, prior thereto, SARS had no intention to pursue the taxpayer civilly or criminally for the alleged non-compliance or offence that forms the basis of the search, or the SARS officer executing the search does not believe that there is truth or merit in the allegations levelled against the taxpayer.⁸¹ Such a state of affairs would lead to the ineluctable conclusion that the taxpayer was innocent and, viewed from the taxpayer's perspective, there was no justice in tax administration. This is so because no 'reasonable grounds' would have existed for a belief that the jurisdictional facts for the warrantless search laid down in ss 63(1)(b)(i), (ii) and (iii) of the TAA were met. Despite the foregoing, if the aim, object or purpose of the exercise of a discretionary power is lawful, then the fact that the exercise thereof by SARS or the CSARS may be coupled with an ulterior motive ought not to taint the exercise of the power with nullity.⁸²

⁷⁹ See also *Huang and Others v CSARS: In re CSARS v Huang and Others* (2015) 77 SATC 283 (GP) paras 58-66. For a foreign law perspective, see *Citibank v Deputy Federal Commissioner of Taxation* 89 ATC 4268 4725; *MNR v RBC Life Insurance Co* [2013] FCA 50 (21 February 2013).

⁸⁰ For a discussion of *mala fides* as a ground for review, see de Ville JR (2005) 175-76.

⁸¹ For a discussion of the legal position relating to the improper exercise of discretionary powers, see Neethling J 'The Supreme Court of Appeal pronounces upon arrest without a warrant and the Bill of Rights' (2011) 74(4) *THRHR* 660 665-68. Neethling posits that the unlawfulness of acts tainted by an improper purpose may be explained with reference to the so-called doctrine of abuse of right.

⁸² *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA) para 31. Harms DP held *in casu* that a distinction must be drawn between the 'object' of an act and its 'motive'.

9.6 MEANING OF ‘PREMISES’ IN SECTIONS 45 AND 63 OF THE TAA

Section 45(1) of the TAA authorises warrantless inspections at ‘premises where the SARS official has a reasonable belief that a trade or enterprise is being carried on’. Section 63(1) thereof authorises warrantless searches of ‘premises’ where ‘relevant material [is] likely to be found’. Sections 45(2) and 63(4) prohibit entry to (‘may not enter’) ‘a dwelling-house or domestic premises ... without the consent of the occupant’, ‘except any part thereof used for the purposes of trade’. The meaning of ‘premises’ in the context of these provisions is important for the constitutional review thereof to be conducted below in chapter ten. The scope and ambit of ‘premises’ in ss 45 and 63 bear directly on the issue of the ‘extent of the limitation’ as contemplated by s 36(1)(c) of the BOR, a relevant factor in a limitations analysis under s 36(1). Thus, its meaning will now be determined by utilising the interpretive approach discussed above in chapter two.

9.6.1 Analysis of the definition of ‘premises’ in the TAA

In order to implement ss 45 and 63 of the TAA, it is necessary to consider the nature or type of ‘premises’ affected thereby. Section 1 of the TAA defines ‘premises’ as including ‘a building, aircraft, vehicle, vessel or place’. In the context of this definition, ‘a’ means ‘any’.⁸³ ‘[A] building’ would include the land on which a structure is erected.⁸⁴ Consistent with a reference to ‘any place’, ‘premises’ would include vacant land.⁸⁵ When the inclusion of land as ‘premises’ is contrasted with ‘aircraft, vehicle, vessel’, it becomes clear that, for TAA purposes, ‘premises’ includes both movable and immovable property. ‘Premises’ includes objects on land (‘vehicle’) and things in the air (‘aircraft’) and on water (‘vessel’). The word ‘includes’ indicates that the list of ‘premises’ in the definition is not exhaustive. Since the list is not a *numerus clausus*, it may be expanded by way of a process of ‘reading-in’ through utilising the *ejusdem generis* rule dealt with above in

Whilst the former is legally relevant, the latter is not. For criticism of this distinction, see Neethling J (2011) 665-66.

⁸³ Moosa F (2012) 5.

⁸⁴ In *R v Sithole* (1961) 23 SATC 62 (N) 64-5 it was held that the word ‘premises’ includes ‘land adjoining a building’. See also the definition of ‘premises’ in the Consumer Protection Act, 2008.

⁸⁵ *CIR v Milstein* (1949) 11 SATC 279 (T) 289-90.

chapter four. The *genus* of ‘building, aircraft, vehicle, vessel or place’ includes modes of transport or conveyance on land, or sea or in the air. Thus, they include such things as, inter alia, trains, automobiles, trucks, scooters, motorbikes, buses, vans, aeroplanes, helicopters, micro-lights, drones, ships, submarines, boats, hovercrafts, ferries and yachts.

In ss 45 and 63, ‘premises’ is utilised as a noun. The *Concise Oxford Dictionary*⁸⁶ defines ‘building’, when used as a noun, to mean ‘a structure with a roof and walls such as a house or factory’. Thus, ‘a building’ includes, inter alia, a booth, store, shop, stall, warehouse, outhouse and garage. As shown above, the TAA encompasses structures at any ‘place’ on *terra firma* and on water (such as, a lighthouse and an oil rig). The dictionary meaning of ‘place’ when used as a noun is (i) an area or portion of space that somebody or something can occupy, (ii) a geographical locality, (iii) a public street with residences, and (iv) a dwelling.⁸⁷ Thus, the ordinary, grammatical meaning of ‘place’ includes, inter alia, a street, pavement, estate, land, home, cave, shelter, room, farm, accommodation, quarters, office, basement, smallholding and certain storage areas (such as, a vault, container, trailer, shed, store room, attic, aircraft hangar and shipyard).⁸⁸

The foregoing interpretation outlines a general meaning for ‘premises’. An expansive meaning thereof would enable inspections and searches to occur at any place occupied by street hawkers, vendors, pedlars and any other trader in the formal and informal sectors of SA’s economy, regardless of where the trade is conducted. Thus, affected commercial or business ‘premises’ would include, for example, a mini-bus used as a taxi, a mobile van used for selling commodities, a ferry used for boat tours, a stall at a flea market, and a warehouse used to store or despatch goods. Statutory provisions are to be interpreted contextually. Therefore, whilst ‘premises’ has a general meaning in the TAA, its scope and ambit remain to be determined in relation to each provision in which this term is

⁸⁶ *Oxford Dictionaries Online* at <http://www.oxforddictionaries.com> (accessed 15 March 2016).

⁸⁷ *Encarta Dictionary* meaning (online version) referred to by Moosa F (2012) 6.

⁸⁸ The provisions of ss 45 and 63 of the TAA refer to areas where a person can ‘arrive’ at and ‘enter’. Thus, it is doubtful whether ‘place’ in this context includes, for example, a post office box, private bag address and certain small storage areas (such as, mobile safes and safety deposit boxes). However, it is submitted that any such private area would nevertheless be covered by s 61(3)(a) of the TAA quoted above at para 9.3.2. See also Moosa F (2012) 6-7.

utilised. In certain contexts, 'premises' has a narrower meaning than its general meaning discussed above. For example, 'domestic premises' in ss 45(2), 62(2) and 63(4) is narrower in ambit than 'premises'. As discussed below, the adjective 'domestic' qualifies the meaning of 'premises' to which it is attached.

9.6.2 Scope of a 'dwelling-house' and 'domestic premises' in the TAA

As stated above, ss 45(2) and 63(4) of the TAA permit tax inspections and searches to occur at such part of 'a dwelling-house or domestic premises' used for trade purposes. The burden of proof is regulated by s 102 of the TAA. This provision is, however, silent on the evidentiary burden in relation to whether a place is in fact a 'dwelling-house or domestic premises'. In cases of dispute, the burden ought to be on a taxpayer or other person asserting a breach of the fundamental right to privacy to show that the place concerned is a 'dwelling-house' or 'domestic premises'. However, the burden ought to shift to SARS to prove that any part entered for purposes of an inspection or search is 'used for purposes of trade' so that the prohibitions contained in ss 45(2) and 63(4) are overridden and no consent is required from 'the occupant' to enter the relevant part of the 'premises'.⁸⁹ This latter view is based on the fact that, as explained above in chapter eight, the burden is on a party seeking to limit a fundamental right to prove justification therefor.

The terms 'dwelling-house' and 'domestic premises' are species of 'premises' discussed above. As stated above, for TAA purposes, 'unless the context indicates otherwise, a term which is assigned a meaning in another tax Act has the meaning so assigned'. Although a survey of tax Acts reveals that the term 'dwelling-house' is undefined, the word 'dwelling' is defined in the VATA as

'except where it is used in the supply of commercial accommodation, any building, premises, structure, or any other place, or any part thereof, used predominantly as a place of residence or abode of any natural person or which is intended for use predominantly as a place of residence or abode of any natural person, including fixtures and fittings belonging thereto and enjoyed therewith'.

⁸⁹ Moosa F (2012) 9.

The definition in the VATA is a useful point of reference for determining the meaning of ‘dwelling-house’ in the TAA. It is clear from the definition that the purpose for which a space is used is a key factor in determining if it is a ‘dwelling’.⁹⁰ Based thereon, a ‘dwelling-house’ for TAA purposes would include places or parts thereof that are actually used, or intended for use, as a place of residence or abode, including any fixtures and fittings belonging thereto and enjoyed therewith. However, unlike ‘dwelling’ for VATA purposes, it is submitted that, for TAA purposes, it ought not to be a requirement for a ‘dwelling-house’ that a structure be used or intended to be used ‘predominantly as a place of residence or abode’. First, the TAA does not impose such a requirement. Secondly, a meaning ascribed to ‘dwelling-house’ for TAA purposes must be of a general nature so that it can apply to the full spectrum of tax Acts administered under the TAA. Thirdly, the meaning assigned to ‘dwelling’ under the VATA ought not simply to be transplanted onto the landscape of the TAA. If ‘dwelling-house’ is, for TAA purposes, limited to places or parts thereof used ‘predominantly’ as a residence or abode, then this would unduly restrict the meaning of ‘dwelling-house’ and would exclude places used or intended to be used mainly for trading purposes and to a lesser degree used or intended to be used as a residence or abode. Such a restrictive interpretation would be inconsistent with the provisions of s 39(2) of the BOR. A wide, human rights-oriented meaning of ‘dwelling-house’ ought to be favoured that would foster greater protection for privacy and property and, thus, promote the spirit, purport and objects of the BOR.

In ss 45 and 63 of the TAA, ‘dwelling-house’ and ‘domestic premises’ are used in an ordinary, grammatical sense, namely, ‘a domestic residence, as opposed to a place of business’.⁹¹ Thus, their dictionary meanings play a role when determining their meaning in ss 45 and 63. As explained above in chapter one, SA is an emerging economy plagued by socio-economic challenges. Owing to varied socio-economic conditions and cultural differences among SA’s people, a domestic residence takes a variety of forms. For example, whilst affluent people in SA generally live in brick and mortar structures (such as, houses and apartments), people from disadvantaged communities generally live in, for

⁹⁰ *Respublica (Pty) Ltd v CSARS* (unreported case no. 864/2014) [2016] ZAGPPHC 155 para 14.

⁹¹ *Bovijn S & van Schalkwyk L* (2012) 513.

example, rooms, shacks, ‘hokkies’ or Wendy Houses, many of which are erected on a site from a variety of inexpensive materials. In rural villages of SA, members of tribes and clans in cultural or linguistic communities reside in, for example, huts, tents, kraals, pondocks and rondavels. The social realities applicable in SA must assist to inform an interpreter whether a particular place is a ‘dwelling-house’ or ‘domestic premises’ for TAA purposes. The meaning ascribed to these terms in the context of the TAA must reflect the broader social dimensions prevalent in SA. Thus, when construing these terms, due consideration must be given to the social context in which the TAA operates. This is part of contextualist interpretation. Merely because a place lacks some necessities of life or facilities required for a dignified human or domestic existence (such as, a bed, toilet, bathroom or cooking area), ought not to disqualify it from classification as a ‘dwelling-house or domestic premises’.⁹² Such a narrow construction is inappropriate in a South African setting and would offend the spirit, purport and objects of the BOR that seeks to protect private property rights (s 25)⁹³ and the right to housing (s 26).⁹⁴

As regards the grammatical meaning of ‘dwelling-house’, it must be borne in mind that this is not a term of art with a specialised legal meaning. Rather, it is an ordinary word in the English language used for centuries. It has a wide import and is often used

⁹² Lord Irvine expressed a similar view in *Uratemp Ventures Ltd v Collins* (2002) 1 All ER 46 para 4 as follows: ‘I would not myself, for example, regard a bed, any more than cooking facilities, as an essential pre-requisite of a “dwelling”: every case is for the judge of trial but I would have no difficulty with a conclusion that one could live in a room, which is regarded and treated as home, although taking one’s sleep, without the luxury of a bed, in an armchair, or in blankets on the floor.’

⁹³ For the meaning of ‘property’ in a constitutional sense, see *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 17; *Chevron SA (Pty) Ltd v Wilson t/a Wilson’s Transport and Others* 2015 (10) BCLR 1158 (CC) para 16; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) paras 37-55. Possession is a ‘subset of the right to property’ (*Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 9). Thus, if SARS seizes property in violation of the principle of legality then it commits a form of self-help prohibited under the rule of law. See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) paras 74-5. This would entitle the despoiled person to the remedy, for example, under s 66 of the TAA, alternatively the so-called *mandament van spolie*. The latter is a common law remedy expressed in the maxim *spoliatus ante omnia restituendus est* (‘the despoiled person must be restored to possession before all else’). The CC, in *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 10 held: ‘The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.’

⁹⁴ See *Grootboom; Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

interchangeably with 'lodging'.⁹⁵ 'Dwelling-house' describes 'a place where someone dwells, lives or resides'.⁹⁶ It is a person's home. 'Dwell' and 'dwelling' are synonymous with 'inhabit', 'habitation' and 'abode'. They suggest 'a greater degree of settled occupation than "reside" and "residence", connoting the place where the occupier habitually sleeps'.⁹⁷ Thus, although the concept of 'home' is not easy to define, a place qualifies as such if occupied regularly or habitually with some permanence.⁹⁸ In other words, the ordinary meaning of 'dwelling-house' is a structure or place, or such part thereof, where a person lives, makes a home, and treats or regards it as such.⁹⁹ This is a factual issue in each case. Thus, a holiday house, backpackers' lodge, guesthouse, hotel, hospital, prison and nursing home may not qualify as a 'dwelling-house'. However, examples of a 'dwelling-house' may include a room, homestead, cottage, granny flat, hut, shack, tent, apartment, living quarters, old age home, farmhouse and Wendy House.

As regards 'domestic premises', 'domestic' is an adjective describing the nature of the 'premises' to which it relates. The SCA, in *Daffy v Daffy*,¹⁰⁰ refers to the dictionary meaning of 'domestic' as an adjective to mean 'pertaining to the home, house or household: pertaining to one's home or family affairs'. This meaning is consistent with the context of 'domestic premises' in ss 45(2) and 63(4) of the TAA, namely, a person's home. As stated above, the TAA defines 'premises'. When viewed as a holistic term, 'domestic premises' would refer to a family or household's use of 'a building, aircraft, vehicle, vessel or place', or any part thereof, as a residence or abode. Consequently, 'domestic premises' would encompass, inter alia, a boathouse, motor home and caravan.

⁹⁵ Per Lord Steyn in *Uratemp Ventures Ltd v Collins* (2002) 1 All ER 46 para 15.

⁹⁶ Per Lord Bingham in *Uratemp Ventures Ltd v Collins* (2002) 1 All ER 46 para 10. For example, an attic may be an abode (see *AG Securities v Vaughan*; *Antoniades v Villiers and Bridger* (1988) 3 All ER 1058) and a room may be a dwelling-house (see *Curl v Angelo* (1948) 2 All ER 189).

⁹⁷ Per Lord Millett in *Uratemp Ventures Ltd v Collins* (2002) 1 All ER 46 para 30. At para 31, Lord Millet stated: 'In both ordinary and literary usage, residential accommodation is "a dwelling" if it is the occupier's home (or one of his homes). It is the place where he lives and to which he returns and which forms the centre of his existence.' Thus, intention is relevant to ascertain a 'dwelling'.

⁹⁸ *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) paras 38-40. *In casu*, cottages erected for holiday or recreational purposes were held, on the facts of the specific case, not to qualify as homes because, although the cottages were visited regularly on weekends, these were visits of convenience by persons who had their habitual dwellings elsewhere.

⁹⁹ *Uratemp Ventures Ltd v Collins* (2002) 1 All ER 46 para 3. For a discussion of this case, see Morgan J 'The changing meaning of "dwelling-house"' (2002) 61(2) *Cambridge LJ* 312.

¹⁰⁰ [2012] 4 All SA 607 (SCA) para 8.

CHAPTER NINE: WARRANTLESS INSPECTIONS AND SEARCHES

The critical time for determining whether, as a matter of fact, a place is a ‘dwelling-house’ or ‘domestic premises’ subject to the prohibitions in ss 45(2) and 63(4) of the TAA, is when an inspection or search occurs. If the place is, at that moment, utilised or intended for use as a natural person’s home, then the privacy and other human rights associated therewith apply. All such rights are to be respected and protected. The CC emphasises that a person’s home is not simply ‘a shelter from the elements’ but ‘a zone of personal intimacy and family security’ that is more often ‘the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world’.¹⁰¹ Consequently, the inner sanctum of a person’s home is a haven of safety where the fundamental right to privacy enjoys optimal constitutional protection against undue intrusion from the State and its functionaries. Thus, Sachs J, in *Mistry v Interim Medical and Dental Council of SA and Others (Mistry)*,¹⁰² held that ‘to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the “inner sanctum” of the persons in question and the statutory authority would accordingly breach the right to personal privacy’.

In the factual enquiry to determine whether a place is a person’s home, it is irrelevant by what name or designation the person refers to the ‘premises’. The zoning of the land for residential or other use is also not determinative of whether the land or a structure erected on it is a ‘home’. Also, the duration of occupation is not determinative.¹⁰³ Moreover, a person may have more than one home. For example, the holders of public office (such as, the President of SA, a Premier of a Province, and a Mayor of a City) occupy official State residences for the period that they hold the relevant public office. Any such official residence is, for TAA purposes, no less ‘a dwelling-house or domestic premises’ than the office bearer’s own, (non-State) private home. By parity of reasoning, the same principles apply to person’s occupying, inter alia, hostels at a University or other educational institution. For TAA purposes, the test is whether, viewed objectively, the place or structure inspected or searched, or to be inspected or searched, is used or intended for use

¹⁰¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 17.

¹⁰² 1998 (4) SA 1127 (CC) para 23.

¹⁰³ *Robinson v COT* 1917 TPD 542 548; *Hogsett v Buys* 1913 CPD 200 205.

in such a manner that it may properly be regarded as a 'home' of 'the occupant' at the time of the search or inspection. In addition, 'a dwelling-house or domestic premises' ought not to be limited exclusively to the area or space occupied for living (such as, a bedroom, lounge or dining room). In accordance with s 39(2) of the BOR, discussed above in chapter two, a broad meaning ought to be favoured as it would better protect and ensure respect for constitutional rights. Consequently, 'a dwelling-house or domestic premises' ought to include any garden, yard, garage, outhouse or other appurtenance or annex on the site concerned which is used or intended for everyday domestic usage.

To determine whether a particular 'premises' is a natural person's 'home', relevant factors to be considered include the following: the nature of the premises, an owner or occupant's *ipse dixit* as to its usage or intended usage, the intention with which the premises is occupied or to be occupied, the duration and consistency of the occupation thereof, the factual and legal basis which entitles the occupant to use and possess the premises, the proximity of the premises to an occupant's place of employment or trade, the purpose for which the premises was acquired by the owner, the nature of the building or structure occupied, and the presence of family members or live-in partners at the premises. No single factor will be decisive as to the classification of the premises as 'a dwelling-house or domestic premises'.¹⁰⁴

9.6.3 Entry to 'a dwelling-house or domestic premises' used for trade

In SA, as in other parts of the world, many entrepreneurs ply their trade by operating a business from home. These are mainly small businesses operated as sole proprietorships, partnerships or through close corporations (such as, a house shop, doctor's surgery, an online provider of services and/or goods, and a person offering services in a professional capacity, such as a social worker, lawyer, accountant, bookkeeper, auditor, tax practitioner or estate agent).¹⁰⁵ Areas in 'a dwelling-house or domestic premises' used for

¹⁰⁴ Moosa F (2012) 7-8.

¹⁰⁵ The CC, in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) para 28, acknowledges that 'many estate agents conduct business from home'.

trade purposes may include: (i) a study or library; (ii) a room used as an office; (iii) a bedroom housing a computer on which trade related documents or electronic communication are prepared or the internet surfed for trade purposes; (iv) a dining room or lounge used as a waiting or consulting room; (v) a kitchen used in a confectionary or home-cooking business; (vi) a theatre (cinema) or other area used for entertaining clients or business associates; (vii) a toilet or bathroom facility utilised by clients or staff; and (viii) an attic or basement used for storing business records. Owing to the usage of dwelling-houses and domestic premises for trade purposes, s 23(b) of the ITA provides for the deductibility of expenses incurred in relation thereto. It stipulates that, in the determination of 'taxable income' as defined in s 1 thereof, no deduction is permitted for 'domestic or private expenses' incurred in connection with 'any dwelling-house or domestic premises except in respect of such part as may be occupied for the purposes of trade'. Statutorily, a deduction is permissible only if the relevant part of the home is, inter alia, 'specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes'. Sections 45(2) and 63(4) of the TAA do not distinguish between parts of 'a dwelling-house or domestic premises' that are 'specifically equipped for purposes of the taxpayer's trade and regularly and exclusively used for such purposes', and those which are not. Thus, the TAA permits warrantless entry to any part of a home used for trade purposes regardless of the frequency or duration of use thereof for such purpose, or the duality of the purpose for which the specific part is used. This relevant factor bears directly on the nature and extent of the invasion of privacy permitted by ss 45(2) and 63(4).¹⁰⁶

9.7 CONCLUSION

The present chapter shows that all natural and juristic persons are constituent members of society in SA entitled, within constitutional bounds, to the equal enjoyment of the rights,

¹⁰⁶ Section 45(2) of the TAA does not specify at which part(s) of a dwelling-house or domestic premises an *inspection* may be conducted, and s 63(4) thereof also does not state at which part(s) of any such place a *search and seizure* may occur. Their provisions simply indicate the parts where a designated SARS officer may *enter* without consent.

privileges and benefits of freedom and democracy.¹⁰⁷ In return, they owe a positive duty to contribute to the financial cost of maintaining and building SA's democracy and its institutions. The values of equity and justice in taxation demand that everyone pay their fair share of tax to the *fiscus*. Revenue from taxation is the lifeblood that keeps the machinery of State fully functional for the benefit of SA's people. This is aptly captured by Fabricius J in *CSARS v Sunflower Distributors CC and Others* as follows: '[T]he State is obliged to and entitled to collect taxes, as its very existence is dependent on it.'¹⁰⁸

The TAA imposes a positive duty on taxpayers to be tax compliant. Non-compliance is inconsistent with the rule of law and cannot be left unchecked because it carries the real risk of causing (i) greater laxity in compliance, (ii) an increase in the commission of tax offences, and (iii) placing the financial stability of the South African State at risk of collapse, a situation that must be averted. Hence, logic dictates that SA's tax laws must be strictly enforced for the benefit of its society. To this end, SARS must be adequately equipped to detect tax non-compliance and to enforce compliance by taking appropriate steps that ensure that taxes due to the *fiscus* are declared, assessed and collected. This is essential to any equitable system of taxation. To achieve these goals efficiently and effectively, the present chapter shows that a compelling public need exists for the conferral of broad information gathering powers that will enable SARS to have access to otherwise private and confidential information about taxpayers who may, or may not, be negligent or dishonest about their financial affairs. In this regard, the powers conferred by ss 45 and 63 of the TAA are pivotal. They serve important public purposes and are advantageous to SA's relatively complex tax system entailing a high degree of voluntary self-assessment. The powers in ss 45 and 63 equip SARS to better police tax compliance and detect as well as deter tax minimisation by reluctant or recalcitrant taxpayers.¹⁰⁹

¹⁰⁷ Richardson J, in *R v Jefferies* (1994) 1 NZLR 290 (CA) 302-03, notes correctly: 'But rights are never absolute. Individual freedoms are necessarily limited by membership of society. ... Individual freedom and community responsibility are opposite sides of the same coin, not the antithesis of each other.'

¹⁰⁸ 2015 JDR 2546 (GP) para 4.

¹⁰⁹ McCabe B 'The investigatory powers of the Commissioner under the Income Tax Assessment Act and individual rights' (1993) 3(1) *RLJ* 1 11 writes: 'The ability to detect shirking and enforce compliance is therefore essential to any equitable system of taxation.' Braithwaite V (2009) 30 explains compliance as encompassing 'the willingness or cooperativeness of regulatees'.

Accordingly, the present chapter shows that the TAA creates mechanisms whereby compliance with the positive duties resting on taxpayers can be monitored and enforced by unannounced, warrantless tax inspections and searches of 'property' couched in a rather broad sense. When these powers are exercised, they bring about a drastic invasion of taxpayers' privacy rights. Other modern democracies also recognise the need for a strong tax authority with wide information gathering powers of a similar or identical nature to those in the TAA.¹¹⁰ The present chapter shows further that, for tax administration purposes under ss 45 and 63 of the TAA, SARS officers have greater latitude to enter premises used for trade than they have for those used as a dwelling-house or as domestic premises. The power to carry out an inspection (s 45) and a search (s 63) means that SARS has access to, and is able to gain possession of, large quantities of information that will enable it to determine a taxpayer's liability by way of a tax assessment, and also to collect a tax debt. These powers will assist in ensuring that diligent and honest taxpayers do not unfairly shoulder the burden of taxation.

Under SA's Constitution and its BOR, no organ of state, public official or functionary of the State may exercise full, free and unbridled access to a taxpayer's private premises or to information held by a taxpayer or third party associated with a taxpayer. If unfettered access was permitted, it would create a state of affairs antithetical to a taxpayer's reasonable, legitimate expectation of privacy.¹¹¹ Incursions of this nature and magnitude on a taxpayer's privacy would be unjustifiable in a democratic society with reference solely to the exigencies of a tax system. This raises for discussion research question (iv) formulated above in chapter one (para 1.2), namely, whether the exercise of the powers granted by the impugned TAA provisions measure up to the constitutional standards of 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' (s 36(1)). This issue is now analysed below in chapter ten.

¹¹⁰ See, for example, *R v McKinlay Transport Ltd* 47 CRR 151 (SCC); *Industrial Equity Ltd v Deputy Commissioner of Taxation and Others* (1990) 170 CLR 649; *New Zealand Stock Exchange and National Bank of New Zealand v CIR* (1991) 13 NZTC 8, 147; *United States v BDO Seidman LLP*, No. 02 C 4822, 2005 WL 742642. The CC, in *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 24, held: 'In modern states it has become more and more common to grant far-reaching powers to administrative functionaries.'

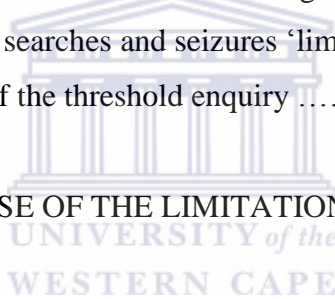
¹¹¹ Gupta R (2013) 141.

CHAPTER TEN

CONSTITUTIONALITY OF SECTIONS 45(1), (2), 63(1) AND (4) OF THE TAA

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'The right to be let alone is indeed the beginning of all freedom.' (Justice William O. Douglas)¹

10.1 INTRODUCTION

As discussed above in chapter three, s 7(2) of the BOR obliges the State to 'respect, protect, promote and fulfil' fundamental rights. Section 8(1) thereof renders the BOR applicable to all laws and binding on all organs of state. Thus, unless appropriate justification exists, the State has a duty not to unduly interfere with the fundamental rights of taxpayers, whether by withdrawing it altogether, or by abridging it, or by diminishing the scope and ambit of any such right.² At the same time, taxpayers' rights, discussed above in chapter seven, may not unduly hinder the fulfilment of SARS's primary duty to administer taxes efficiently and effectively. As discussed above in chapter eight, fundamental rights entrenched in the BOR are not absolute. As relative rights, they may be subjected to limitations that satisfy the norms and standards laid down in s 36(1) of the BOR. In terms of s 36(2) thereof, a limitation is valid if it is imposed either by the Constitution or in terms of 'law of general application'. The TAA is, as shown above in chapter eight, a 'law of general application' within the meaning and contemplation of s 36(1). Chapter nine above shows that ss 45 and 63 of the TAA provide for warrantless entry to taxpayers' 'premises' as defined in s 1 thereof, including 'a dwelling-house or domestic premises'. Whereas entry is, under s 45, aimed at conducting an inspection of business records, an entry is, under s 63, aimed at searching a person, home and/or property and/or to seize possessions and/or communications. When exercised, these administrative powers adversely impact on taxpayers' rights to, inter alia, privacy as entrenched in s 14 of the BOR.

It is in the above context that research question (iv) formulated above in chapter one (para 1.2) is relevant. This question raises the issue as to whether the powers conferred by ss 45(1), (2), 63(1) and (4) of the TAA are constitutional, an issue hitherto untested in a South African court. In keeping with the overall subject matter of this dissertation, the

¹ *Public Utilities Commission v Pollak* (1952) 343 US 451 467.

² *Mazibuko* para 47. See also *Bilchitz D* (2016) 56 60 64-6.

constitutional review will be undertaken in the present chapter as far as the powers concerned adversely affects a ‘taxpayer’ as defined in s 151 of the TAA as discussed above in chapter five. Reference will, however, be made in passing to the adverse impact that the powers in ss 45(1), (2), 63(1) and (4) have on the privacy of third parties. They ought to be in the same legal position as that sketched below in relation to taxpayers.

In accordance with research question (iv), the constitutionality review will be conducted through the prism of the cluster of privacy rights in ss 14(a) - (d) of the BOR. Since the validity of the impugned TAA provisions will be tested against a common fundamental right, some overlapping in the discussion is inevitable. This is more so because ss 45 and 63 of the TAA are located within Chapter 5 thereof under the heading ‘Information Gathering’ and share a common legislative purpose. These considerations have also influenced the structure of the discussion below. The two-stage approach adopted by the CC to the limitation of rights, discussed above in chapter eight, will be followed. In terms thereof, the threshold enquiry will essentially centre on whether the impugned TAA provisions limit the right to privacy. If it does, then the next question is whether the infringement is justified. In the threshold enquiry, the demarcation of the right to privacy in s 14 of the BOR will first be discussed. Thereafter, inspections under s 45 of the TAA and searches and seizures under s 63 thereof will be discussed with a view to arguing that they impose or permit ‘limitations’ of the right to privacy as contemplated by s 36(1) of the BOR. Consequently, the justification stage of the limitations enquiry is triggered. In that stage, ss 45 and 63 of the TAA will be analysed through the lens of the factors listed in ss 36(1)(a) - (e) of the BOR. Since ss 45 and 63 of the TAA serve, by and large, common objectives, the considerations in ss 36(1)(b) and (d) of the BOR overlap. Thus, it is sensible to undertake a single discussion thereof as regards ss 45 and 63. Similarly, since ss 45(2) and 63(4) are virtually identical in wording, their limitations on privacy overlap. Thus, to avoid unnecessary repetition, a single discussion will be undertaken in relation to their provisions, taking account of the factors listed in ss 36(1)(c) and (e) of the BOR. Finally, the features of ss 45(1) and 63(1) of the TAA that are not shared between them will be discussed through the prism of ss 36(1)(c) and (e) of the BOR.

10.2 SUMMARY OF APPLICABLE INTERPRETATIONAL PRINCIPLES

Determining the validity of ss 45 and 63 of the TAA entails an interpretation of their respective provisions. In SA's human rights dispensation, the BOR contains 'the system of values and norms against which all (other) legislation is weighed'.³ An interpretation of the impugned TAA provisions must accord with, and be in furtherance of, constitutional values and fundamental rights.⁴ This is evinced in s 39(2) of the BOR that requires 'the spirit, purport and objects of the Bill of Rights' to be promoted whenever legislation is interpreted. Therefore, the ethos, culture, philosophy, values and underlying aims of the BOR will be the legal barometers or yardsticks by which the validity of the impugned TAA provisions are assessed in the review conducted below. For this purpose, reliance will be placed on the principles of interpretation discussed above in chapter two and the constitutional framework outlined above in chapter three.

As shown above in chapter two, a textualist *cum* purposive *cum* contextualist *cum* teleological approach to interpretation must be applied in any constitutional review.⁵ In the absence of a well-grounded, countervailing constitutional objection, effect will be given to the TAA's objectives (discussed above in chapter five). In accordance with the tenets of a purposive interpretive approach, the constitutional review undertaken here will take into account various internal and external *indicia*. These include: (i) the relevant texts of the TAA with all the linguistic complexities of the rules of grammar, syntax and spelling; (ii) the context of the TAA's provisions by understanding their interplay with the grid of related provisions in the statute read holistically and in relation to any relevant constitutional values, the common law and/or other extra-textual *indicia*; (iii) the TAA's overall purpose or scheme, including the mischief at which the TAA or relevant provisions thereof are directed; (iv) the social, economic and historical context (reasons or material) surrounding the TAA coming into being; and (v) to the extent relevant, a comparative dimension will be considered, namely, foreign and international law.

³ Du Plessis LM & de Ville JR (1993) 202.

⁴ *Media 24 Ltd and Others v National Prosecuting Authority and Others: In re S v Mahlangu and Another* 2011 (2) SACR 321 (GNP) 327-34.

⁵ Botha CJ (2010) 50 refers to the 'text-in-context' method of interpretation.

Determining the constitutionality of any legislation involves resolving an inherent tension between the duty of an interpreter to read legislation in conformity with the Constitution, and the duty of a legislature to legislate with clarity and precision. The CC's approach to dealing with the constitutional challenges of legislation may be summarised as follows:⁶

- The Constitution requires interpreters to read statutes, where possible, in a way that gives effect to fundamental values.
- Interpreters must examine the objects and purport of a statute and read its provisions, as far as is reasonably possible, in conformity with the Constitution.
- Preference must be given to an interpretation that falls within constitutional bounds over one that does not, provided the interpretation sought to be given can reasonably be ascribed to the provision that is the subject of the constitutional challenge.⁷
- Words that are susceptible to an unconstitutional meaning but are reasonably capable of being read 'in conformity with the Constitution' ought to be read as such, provided that the interpretation to be given to the impugned words is not 'unduly strained'.
- A distinction exists between interpreting legislation in a way that 'promote[s] the spirit, purport and objects of the Bill of Rights' (s 39(2))⁸ and the process of reading words into or severing them from a provision under s 172(1)(b) of the Constitution, following a declaration of constitutional invalidity under s 172(1)(a) thereof.

⁶ *Hyundai Motors* paras 21-6. See also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) para 11; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 59-60 106-08.

⁷ If a provision is reasonably capable of sustaining two or more interpretations then, even if none of the plausible interpretations renders the provision concerned unconstitutional, an interpreter ought to adopt the interpretation that 'better' promotes the spirit, purport and objects of the BOR. See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46-84.

⁸ The CC, in *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) para 47, held that s 39(2) 'requires more from a court than to avoid an interpretation which conflicts with the Bill of Rights'. The Court held that it 'demands' the promotion of the 'spirit, purport and objects' of the BOR which are 'to be found in the matrix and totality of rights and values embodied in the Bill of Rights' and also, in appropriate cases, 'in the protection of specific rights' entrenched in the BOR.

- The first process referred to is an interpretative one. It is limited to what a statutory text is reasonably capable of meaning. The second process referred to can only take place after the statutory provision is, despite the application of all legitimate interpretative aids, found to be invalid. Thus, when a statutory provision is reasonably capable of a meaning that places it within constitutional bounds, its constitutionality ought to be preserved. It is only if this is not possible that the remedy of reading-in or notional severance may be considered and applied.

10.3 THRESHOLD PHASE OF THE LIMITATIONS ENQUIRY

10.3.1 Scope and content of the fundamental right to privacy

In accordance with international human rights law,⁹ the protection and preservation of a person's privacy is explicitly guaranteed by s 14 of the BOR. It reads: 'Everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications¹⁰ infringed.' The entrenchment of a right to privacy strengthens the claim for the protection of all dimensions of a person's privacy against arbitrary or 'unreasonable invasion and search'¹¹ by the State or organs of state. As is evident from the wording of s 14, it contains certain internal modifiers that either restrict or enumerate the scope and content of privacy. These internal modifiers are relevant at the threshold stage of a limitations enquiry.¹² Section 14 protects persons, not places or property.¹³ This is clear from the constitutional subject of the right being '[e]veryone'.¹⁴ This word has a

⁹ The right to privacy is recognised in several international legal instruments, including the UDHR (Art 12), the International Covenant on Civil and Political Rights (Art 17), the European Convention on Human Rights (Art 8), and the American Convention on Human Rights (Art 11).

¹⁰ Mokgoro J, in *Case and Curtis* para 30, pointed out that the concept of 'communication' embraces both the transmission and the reception of information.

¹¹ *Park-Ross* 166.

¹² De Vos P, Freedman W (eds) & Brand D *et al* (2014) 358-59.

¹³ Currie I & de Waal J (2014) 304. The CC, in *Gaertner* para 86, describes privacy as 'a fundamental personality right deserving of protection as part of human dignity'.

¹⁴ McCreath J held, in *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) 1118H, that 'the terms "every person" and "everyone", as used in the Constitution . . . are synonymous'. The word 'every' renders unlimited the reach of its

neutral sense. Thus, the rights in s 14 may apply to, and benefit, natural and juristic persons.¹⁵ ‘Everyone’ casts the net of the applicable constitutional subject very widely. Textually and contextually in s 14, ‘[e]veryone’ is all-embracing and encompassing in its extent: it includes everyone and excludes no one. This widens considerably the horizon of the application of s 14. The blanket application of s 14 to a wide range of persons is an integral part of a truly ‘democratic, universalistic, caring and aspirationally egalitarian ethos’¹⁶ that is ‘vital to a conscience-honouring social order’¹⁷ in a *Rechtsstaat*, such as SA, that subscribes to the values expressly or impliedly included in the Constitution.

Ackermann J, who penned the majority judgment in *Bernstein and Others v Bester and Others NNO*¹⁸ (*Bernstein*), held *obiter* that there is no indication that s 14 of the BOR ‘may be extended to include the carrying on of business activities’. A Full Bench in *Deutschmann NO and Others v CSARS; Shelton v CSARS*¹⁹ construed this to mean that business entities fall beyond the scope of s 14. The correctness of this interpretation was, rightly so, questioned and not followed in *Haynes v CIR*.²⁰ It is evident from the following *dictum* that s 14 of the BOR applies to juristic persons, including businesses:²¹

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

subject. See *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 (1) SA 254 (A) 261; *Southern Life Association Ltd v CIR* (1984) 47 SATC 15 (C) 18-19.

¹⁵ *Hyundai Motors* para 17.

¹⁶ Per Mahomed J in *Makwanyane* para 262.

¹⁷ *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA) para 31.

¹⁸ 1996 (2) SA 751 (CC) para 69.

¹⁹ 2000 (2) SA 106 (E) 123I-J.

²⁰ 2000 (6) BCLR 596 (Tk) 613. See also *Bovijn S* (2011) 103.

²¹ Per Langa DP in *Hyundai Motors* para 18. See also *FNB* para 42. The European Court of Human Rights adopted a similar position in relation to rights in the European Convention on Human Rights. See Emberland M *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006) 113-36.

It is evident from the extract quoted above that the CC has not limited s 14 to certain juristic persons only. The fundamental right to privacy therein applies to all types, classes and forms of juristic persons, subject only to satisfaction of the twin requirements in s 8(4) of the BOR. As contended above in chapter six, all juristic taxpayers, including trading and non-trading trusts, insolvent and deceased estates, ought to be juristic persons for the purposes of s 8(4). Taxpayers, both natural and juristic persons, have property, possessions, communications and/or information deserving of constitutional protection. In as much as ‘property rights of natural persons can only be fully and properly realised if such rights are afforded to companies’,²² so too can the privacy rights of natural persons only be effectively realised if they apply to juristic persons. Thus, s 14 of the BOR ought to apply to *all* persons (natural and juristic) who are taxpayers under the TAA. In the light hereof, every such taxpayer ought to have *locus standi* under s 38(a) of the BOR when a right in the cluster of privacy rights guaranteed by s 14 is infringed by the TAA.

10.3.2 Are inspections, searches and seizures ‘limitations’ of privacy?

Since taxpayers’ fundamental rights are relative and not absolute, they may be subject to ‘limitations’, discussed above in chapter eight, that are imposed by the State for the benefit of society. As explained above, an infringement of a protected sphere of privacy by the State is a violation of the right to privacy in s 14 of the BOR. Any such violation would be unlawful, unless it is justified by the party responsible for the infraction. For purposes of the constitutional review undertaken here, an ‘inspection’ and ‘search’ under ss 45 and 63 of the TAA respectively will be a ‘limitation’ under s 36(1) of the BOR if it either amounts to a ‘search’ as referred to in ss 14(a) and (b) of the BOR or involves an ‘infringement’ of the privacy of communications as referred to in s 14(d) thereof. On the other hand, a ‘seizure’ occurring under s 63 read with s 61(3) of the TAA will be a ‘limitation’ if it is a ‘seizure’ contemplated by s 14(c) of the BOR. For purposes of the review undertaken here, it is important to determine whether an ‘inspection’, ‘search’ or ‘seizure’ is a ‘limitation’ for the purposes of s 36(1) of the BOR. If this issue is

²² FNB para 45. See also *Certification 1* paras 57-8.

determined in the affirmative, then the validity and enforceability of the inspection, search and seizure, as the case may be, would depend on whether it passes constitutional muster in the sense that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. As discussed above in chapter eight, a person challenging the validity of a tax inspection, search or seizure on the basis that the impugned TAA provision authorising such act is unconstitutional will bear the burden to establish that the provision in question imposes a 'limitation' on a right as contemplated by s 36(1) of the BOR. If this onus is not discharged, then the challenge is doomed.

(a) Searches and seizures as limitations of fundamental rights

The terms 'searched' and 'seized' as used in the BOR are undefined. South African case law has also not defined these terms in their constitutional setting. The question of what is a 'search' and a 'seizure' is a factual issue to be answered by a common sense approach, taking into account their ordinary, natural, dictionary meanings.²³ 'Search' is characterised as 'any act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on or upon such person, container or premises'.²⁴ This description is consonant with s 14 of the BOR that refers to the search of a physical being ('person'), territory ('home') and 'property'. In accordance with ss 60(2)(a) and 63(2)(b) of the TAA, discussed above in chapter nine, a 'search' is aimed at ascertaining facts that would prove SARS's allegation that a taxpayer failed to comply with a duty or committed an offence. Thus, when determining if an act is a 'search', a focal point is its aim or purpose.²⁵ 'Seizure' is not a term of art.²⁶ Rather, it

²³ Since the BOR applies both vertically and horizontally, as discussed above in chapter six, searches and seizures are, for constitutional purposes, not limited in their scope to governmental invasions of fundamental rights, as is the case in, for example, the USA. See *McQuoid-Mason D* (2000) 251.

²⁴ *Basdeo V* 'The constitutional validity of search and seizure powers in South African criminal procedure' (2009) 12(4) *PELJ* 307 309. See also *R v Jefferies* (1994) 1 NZLR 290 (CA) 300.

²⁵ When determining if a legislated power of intrusion is a 'search', relevant factors ought to include the aim or purpose of the legislation, the degree of intrusion permitted, whether entry, observation and removal is permitted, and an affected person's degree of privacy expectation. See Gupta R 'Rights against unreasonable search and seizure in tax: Canadian and New Zealand approaches compared' (2013) 19(3) *New Zealand Journal of Taxation Law and Policy* 222 226-35.

²⁶ *Rudolph and Another v CIR and Others* 1996 (4) SA 552 (CC) para 11.

implies 'a forcible deprivation of possession'.²⁷ A 'seizure' entails the act of taking possession of an article discovered and its detention.²⁸ Thus, the essential feature of a 'seizure' is the 'effective deprivation of the owner's control'.²⁹ Whether such deprivation occurs is a factual issue. A 'seizure' must, under s 61(8) of the TAA, be for investigative purposes regarding non-compliance with a tax Act or the commission of an offence, or be justified by an intention to use the seized property in civil or criminal proceedings.

Searches and seizures are, by their nature, drastic invasions of privacy.³⁰ As shown above in chapter nine, in terms of s 61(3), SARS officials are, during a search, empowered to open 'anything' and to scour through personal possessions and private or confidential communications of whatsoever nature found at the premises. They are also empowered to conduct a body search in order to find material in, for example, a jacket or pants pocket, and they may also copy material as well as remove and retain possession of computers and storage devices (such as, iPhones, smart phones and cellphones). The exercise of search and seizure powers under the TAA can cause severe hardship since they 'frequently result in criminal or civil proceedings'³¹ and infringe the rights of affected persons to dignity, privacy, freedom, bodily security and/or property. Parliament's recognition that searches and seizures encroach on privacy is clear from the prohibition in s 63(4) against a SARS officer, generally, entering a dwelling-house or domestic premises without the occupant's consent. Thus, warranted and warrantless searches and seizures under the TAA are searches and seizures envisaged by s 14 of the BOR. It also involves an infringement of the privacy of communications. The exercise of any such power is a 'limitation' under s 36(1) of the BOR. This view is reinforced by ss 63 read with 61(3) of the TAA using the same terminology in s 14, namely, 'search' and 'seize'.

²⁷ *Green v Commissioner of Customs and Excise* 1941 WLD 128 133; *Naidoo and Another v CIR* 58 SATC 251 260. The Canadian Supreme Court, in *R v Dyment* [1988] 2 SCR 417 431, defines the essence of a 'seizure' as the 'taking of a thing from a person by a public authority without that person's consent'.

²⁸ *Basdeo V* (2009) 312 (and the authorities cited there).

²⁹ *Rudolph and Another v CIR and Others* 1996 (4) SA 552 (CC) para 11.

³⁰ *Mistry* para 25; *Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others* 2006 (4) SA 73 (W) para 127 (and the various local and foreign authorities cited there).

³¹ *Ferucci* 227D-E. See also Mosupa F 'Constitutional validity of search and seizure provisions: A perspective on section 74 of the Income Tax Act 58 of 1962' (2001) 12(2) *Stell LR* 317.

(b) Inspections as limitations of fundamental rights

On the question of whether an ‘inspection’ under s 45 of the TAA is a ‘search’ for the purposes of s 14 of the BOR, a useful starting point is to note that the term ‘inspection’ is undefined in the TAA. Thus, for purposes of the constitutional review undertaken here, it is a matter of interpretation whether an ‘inspection’ under s 45 is a ‘search’ that limits the right to privacy in the BOR. Not every ‘inspection’ is a ‘search’ for BOR purposes. In *Mistry*,³² the CC refrained from a definitive determination as to when an ‘inspection’ would be a ‘search’ for constitutional purposes. The difficulty to determine whether an ‘inspection’ under s 45 of the TAA is a ‘search’ contemplated by s 14 of the BOR is heightened by the fact that, unlike the detailed powers outlined in s 61(3) of the TAA exercisable at a search, the TAA does not expressly particularise the powers exercisable at an inspection. Thus, for purposes of ascertaining whether a s 45 tax ‘inspection’ is a constitutional ‘search’, the nature and potential scope of the powers of inspection in terms of s 45 of the TAA require an objective process of interpretation by having regard to, inter alia, other relevant TAA provisions and the dictionary meaning of ‘inspection’.

In accordance with s 31(b) of the TAA, s 45 applies in conjunction with s 31 of the TAA whose subject matter, apparent from its heading, is ‘inspection of records’.³³ A holistic reading of these TAA provisions reveals that an inspection under s 45 pertains to ‘records, books of account or documents’³⁴ referred to in s 29(1) of the TAA. Accordingly, an inspection under s 45 excludes the power to conduct a body search in respect of any person. As regards the meaning of ‘inspection’, a linguistic interpretation of s 45 shows that ‘inspection’ is not utilised there in a technical, legal sense but in its ordinary, grammatical sense. Linguistically, s 45 uses ‘inspection’ as a noun. The *Oxford Thesaurus*³⁵ defines ‘inspection’, when used as a noun, to mean ‘examination, check-up, survey, scrutiny, probe, exploration, observation, investigation, assessment, appraisal,

³² At para 23.

³³ For the text of s 31, see fn 25 in chapter nine above.

³⁴ For the definitions of ‘document’, ‘information’ and ‘thing’ in s 1 of the TAA, see fn 21 in chapter nine above.

³⁵ Waite M, Hollingworth L & Marshall D (eds) (2006) 443.

review, evaluation'. Based on its dictionary meanings, 'inspection' under s 45 would not encompass a seizure of material as contemplated by s 14(c) of the BOR. When interpreted contextually in s 45, an 'inspection' involves an examination of records to determine objectively if the tax duties listed in ss 45(1)(b) and (c) have been satisfied.

In *Magajane v Chairperson, North West Gambling Board and Others (Magajane)*,³⁶ the CC held that the USA and Canadian treatment of all regulatory inspections as 'searches' for purposes of the threshold question of whether the inspection falls within the scope of the privacy interest, is constitutionally sound in a South African context. Consequently, that approach was adopted by the CC. This view is premised on the following rationale:³⁷

'It recognises that "[d]espite its less invasive nature, inspection is unquestionably an 'intrusion'." The notion that an inspection constitutes an intrusion, albeit a less invasive one, invoking the right to privacy is consistent with our constitutional notion of concentric circles of the privacy right. Additionally, it would be undesirable to impose at the threshold inquiry an arbitrary demarcation line between degrees of intrusion that would invoke the constitutional right to privacy. Such line drawing would have the negative effect of placing certain administrative inspections beyond the reach of judicial review.'

Accordingly, an 'inspection' conducted under s 45 of the TAA is an intrusion on 'concentric circles of the privacy right' or a 'continuum of privacy',³⁸ albeit a lower level of invasion than a search and seizure occurring under ss 61, 62 and 63 of the TAA. The intrusion on privacy permitted by s 45 is evident from a tax inspection involving SARS officials having rights of access and entry to business premises without a warrant, including entry to any part of a dwelling-house or domestic premises used for trade purposes. The intrusion is further evident from SARS officials having rights of access to, for examination purposes, confidential records, books of account or documents, including

³⁶ 2006 (5) SA 250 (CC). Currie I & de Waal J (2014) 304 contend, justifiably so, that it is undesirable to formulate a general definition of 'search' so that the issue as to whether a regulatory inspection of premises is a 'search' is a matter to be decided on a case-by-case basis with reference to established legal principles.

³⁷ *Magajane* para 59.

³⁸ *Magajane* para 50. See also Croome BJ & Olivier L (2015) 117.

communications, containing ‘information’ as defined in s 1 of the TAA. In view of all the foregoing, an inspection under s 45 of the TAA is a ‘search’ contemplated by s 14 of the BOR that surpasses the threshold enquiry of a ‘limitation’ under s 36(1) of the BOR. Thus, as explained above in chapter eight, the State bears the onus to justify the intrusion on privacy by having regard to all the factors listed in s 36(1) of the BOR.

10.3.3 Recapitulation of the threshold enquiry

The foregoing discussion shows that s 14 of the BOR includes internal modifiers that enumerate certain aspects of the fundamental right to privacy, namely, the right not to have one’s person, home or property searched, possessions seized or the privacy of communications infringed. The discussion above argues that the information gathering powers granted to SARS in relation to inspections, searches and seizures under ss 45(1), (2), 63(1) and (4) of the TAA, as the case may be, limit taxpayers’ fundamental rights to privacy as contemplated by s 36(1) of the BOR. Every exercise of such power must, to be lawful in a democracy, take place in an orderly fashion, with decency, respect and due regard for a taxpayer and his rights to, inter alia, dignity, privacy, bodily security, freedom and property. This is so because, in SA’s constitutional democracy, ‘the substantive enjoyment of rights has a high premium’.³⁹ Although the administrative powers of SARS referred to above ‘potentially invades the privacy and dignity of the subject of the process, the process itself is permissible and, indeed, essential in a constitutional state such as ours if conducted strictly in accordance with law’.⁴⁰ Therefore, it is submitted that the inspection, as well as search and seizure processes permitted by the impugned TAA provisions are not unconstitutional.⁴¹ The question remaining for consideration is whether the limitations on privacy permitted by ss 45 and 63 are justified in the sense that they are ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’ taking into account all legally relevant

³⁹ *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) para 44.

⁴⁰ *Huang and Others v CSARS and Another: In re CSARS v Huang and Others* 2015 (1) SA 602 (GP) para 16.

⁴¹ *Huang and Others v CSARS and Another: In re CSARS v Huang and Others* 2015 (1) SA 602 (GP) para 13.

factors. The ensuing discussion will answer this question with reference to the factors listed in s 36(1) of the BOR, namely, ‘the nature of the right’ (s 36(1)(a)), ‘the importance of the purpose of the limitation’ (s 36(1)(b)), ‘the nature and extent of the limitation’ (s 36(1)(c)), ‘the relation between the limitation and its purpose’ (s 36(1)(d)), and the availability of ‘less restrictive means to achieve the purpose’ (s 36(1)(e)).

10.4 JUSTIFICATION PHASE OF THE LIMITATIONS ENQUIRY

10.4.1 Is the notion of a warrantless inspection and search consistent with the values of an open and democratic society?

A warrant ‘is not a mere formality’⁴² or simply ‘some kind of mere “interdepartmental correspondence” or “note”’.⁴³ It is a substantive weapon in the State’s armoury and embodies ‘awesome powers as well as formidable consequences’.⁴⁴ The enforcement of a warrant involves encroaching on the fundamental rights of affected persons to, inter alia, dignity, privacy, freedom, bodily security, trade and/or property.⁴⁵ This holds equally true for warrantless inspections and searches. A warrant is a tried and tested method used in open democratic societies across the world to ensure that fundamental rights are breached only if the appropriate legal standard is met and the relevant public interest is ‘demonstrably superior’.⁴⁶ A warrant is advantageous because it (i) guarantees that the State justifies an intrusion beforehand, (ii) governs the time, place and scope of an intrusion, (iii) limits the intrusion on privacy, (iv) guides officials in the execution of an inspection or search, and (v) informs the subject of the legality and limits of an inspection or search.⁴⁷ Thus, the European Court of Human Rights held the power of governmental agencies to search and seize should *always* be subject to judicial supervision because a

⁴² *Magajane* para 74.

⁴³ *Goqwana* para 30.

⁴⁴ *Goqwana* para 30.

⁴⁵ For the requirements to be met for a search warrant to be issued in SA, see *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) paras 24-30 55-6. For a discussion of the process regulating the issuance of search warrants under the TAA, see *Huang and Others v CSARS: In re CSARS v Huang and Others* (2015) 77 SATC 283 (GP).

⁴⁶ *Hunter v Southam Inc* [1984] 2 SCR 145 161-62.

⁴⁷ *Magajane* para 74.

warrant is a safeguard ensuring that a search and seizure occurs in accordance with the prevailing law and is not disproportionate to the interests of affected persons.⁴⁸ However, as explained below, warrantless inspections and searches are, *per se*, not incompatible or incongruent with the values of an open and democratic society.

Section 233 of the Constitution, discussed above in chapter two, is relevant when the validity of ss 45 and 63 of the TAA is considered. In terms of s 233, preference must be given to any reasonable interpretation of legislation that is consistent with international law above any that is inconsistent therewith. As stated above, international law accords protection to privacy as a relative human right. Therefore, taxpayers' privacy rights may be limited within the confines of the law applicable in a particular tax jurisdiction. There is no rule of international law regulating the legality or otherwise of a warrantless inspection or search. The territorial sovereignty of States, a fundamental principle of international law that is discussed above in chapter six, entitles every government to enact laws for the territory under its control, including provisions permitting its tax authority to conduct warrantless inspections and searches in order to, inter alia, combat crime in the form of, for example, tax evasion. Any such public power conferred by legislation is, however, subject to the proviso that encroachment of a taxpayer's fundamental right(s) must conform to internationally recognised democratic principles. A warrantless inspection or search is not *per se* offensive to a norm of international law. Legislation in various democracies with Bills of Rights (such as, Australia,⁴⁹ Canada,⁵⁰ New Zealand,⁵¹ SA and USA)⁵² cater for such warrantless acts. A key difference is that, whilst a warrant is required in, for example, Canada and New Zealand for an inspection or search of a dwelling, this is not always so elsewhere (such as, in Australia and SA).

⁴⁸ Baker P & Groenhagen A-M *The Protection of Taxpayer's Rights – An International Codification* (2001) 48.

⁴⁹ See s 263 of Australia's Income Tax Assessment Act 1936. For a discussion hereof, see McCabe B 'The investigatory powers of the Commissioner under the Income Tax Assessment Act and individual rights' (1993) 3(1) *RLJ* 1.

⁵⁰ See s 231 of Canada's Income Tax Act 1985.

⁵¹ See s 16 of New Zealand's Tax Administration Act 166 of 1994. For a comparative analysis, see Gupta R 'Rights against unreasonable search and seizure in tax: Canadian and New Zealand approaches compared' (2013) 19(3) *New Zealand Journal of Taxation Law and Policy* 222.

⁵² *Donovan v Dewey* (1981) 452 US 594; *New York v Burger* (1987) 482 US 691.

Both the TAA (s 63) and Australia's Income Tax Assessment Act (s 263) permit warrantless searches of business premises and dwellings. However, an important distinction is that, whilst s 263(1) of the latter Act permits warrantless, non-consensual searches of all commercial and residential 'buildings, places', s 63 of the TAA permits warrantless, non-consensual searches of all commercial premises and only such part(s) of a 'dwelling-house or domestic premises ... used for purposes of trade'. The inherent dangers in SARS's power to conduct warrantless inspections or searches lies in the fact that, first, such acts occur without prior oversight by an 'impartial arbiter'⁵³ and without post-judicial supervision by way of an *ex post facto* validation. Secondly, a SARS officer exercises the power in circumstances where he/she is essentially the judge, jury and executioner acting in SARS's own cause.⁵⁴ SARS is the taxpayer's creditor for an unpaid tax and is a potential creditor for a tax debt that may arise from information uncovered in a search or inspection.⁵⁵ Thus, the powers in ss 45 and 63 of the TAA are not exercised for the benefit of a disinterested third party but for a party with a direct financial interest in the outcome of an inspection or search.⁵⁶ This shows that a conflict of interests exists. It creates tension between SARS and any taxpayer subjected to a warrantless act.⁵⁷ The validity of ss 45 and 63 is unaffected by the possibility that the powers therein may be abused⁵⁸ or exercised in a manner that causes a gross violation of rights.⁵⁹ All public power must be exercised subject to constitutional control. If abused, then the legal remedy lies in the Constitution and not in the invalidation of an empowering provision.

⁵³ *Park-Ross* 172. For further discussion, see Oosthuizen AC 'The search, seizure and forfeiture provisions of the Customs Act: A cause for concern' 2002 *Acta Juridica* 220-221-25.

⁵⁴ Keulder C & Legwaila T (2014) concludes similarly that, arising from s 179 of the TAA, 'SARS remains the Legislature, the judge and the police, all in one'.

⁵⁵ The TAA (s 169(3)) reads: 'SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt.'

⁵⁶ Bovijn S (2011) 114 contends that the warrantless search and seizure provisions of the TAB 11B, 2011 (now s 63 of the TAA) lack 'sufficient checks and balances' since SARS, 'when contemplating a warrantless search and seizure, makes its own determination of whether the reasonable grounds criterion is satisfied'. Bovijn contends that 'SARS is required to objectively determine the reasonableness of its own view of the matter, which can give rise to difficulties'.

⁵⁷ Section 7 of the TAA deals with conflicts of interest arising in relation to the CSARS or a SARS official. However, it does not apply to conflicts of interest arising from the implementation of s 63. For example, SARS may wish to use its powers for a 'fishing' expedition. This is impermissible conduct in tax administration. See *Ferucci* 235B-H.

⁵⁹ For example, a taxpayer's premises may be raided and belongings there 'ransacked'. This is impermissible conduct. See *Goqwana* para 19; *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) para 71.

As discussed above, by virtue of s 33 of the BOR read with the PAJA, every taxpayer has the right to lawful administrative action. Accordingly, inspections, searches and seizures under the TAA must occur in accordance with the Constitution and the law. In SA, the general rule is that invasive inspections, searches and seizures infringe fundamental rights and ought to occur by consent or be authorised in a warrant issued before the intrusion occurs. However, the CC, in *Magajane*,⁶⁰ recognises that ‘limited circumstances’ exist that would justify a warrantless, non-consensual entry to premises, including a home, for purposes of an inspection, search or seizure. Although such operation is *per se* not inimical to the spirit, purport and objects of the BOR, discussed above in chapter six, the CC warns that ‘[e]xceptions to the warrant requirement should not become the rule’.⁶¹ Whether circumstances justify a warrantless, non-consensual tax inspection, search or seizure is a factual issue to be decided on a case-by-case basis. No hard and fast rules may be laid down in advance. In the light of the foregoing, an application for a search warrant under s 59 of the TAA is the general norm that must be met in order that lawful entry may be gained to premises for the administration of a tax Act as envisaged by s 3 of the TAA (discussed above in chapter five). Therefore, the non-consensual, warrantless entry, search and seizure catered for in ss 63(1)(b) and (4) are exceptions to be applied sparingly and only in rare circumstances. In this way, the integrity and privacy of a person’s home and business, described per Lord Wilberforce⁶² as an important human right, are protected and neither may be unnecessarily trampled upon or compromised. In sum: a warrantless, non-consensual inspection, search or seizure as provided for in the TAA is not in and of itself offensive to the Constitution or democratic principles recognised at international law. As stated above, the validity of any provision permitting such acts ought to be determined through the prism of s 36(1) of the BOR.

⁶⁰ At para 74.

⁶¹ *Magajane* paras 74-5. Apart from the TAA (s 63) and CPA (s 22), warrantless searches and/or seizures exist in, inter alia, the Anti-Personnel Mines Prohibition Act 36 of 2003 (s 19), Civil Aviation Act 13 of 2009 (s 34(1)), Competition Act 89 of 1998 (s 47), Counterfeit Goods Act 37 of 1997 (s 5(2)), Explosives Act 15 of 2003 (s 6(6)), Firearms Control Act 60 of 2000 (s 115(4)), Health Professions Act 56 of 1974 (s 41A 6(h)), Immigration Act 13 of 2002 (s 33(9)), Inspection of Financial Institutions Act 80 of 1998 (s 4), International Trade Administration Act 71 of 2002 (ss 44, 45), National Forest Act 84 of 1998 (ss 67, 68), National Prosecuting Authority Act 32 of 1998 (s 29(10)), National Veld and Forest Fire Act 101 of 1998 (s 27), Nuclear Energy Act 46 of 1999 (s 38), and the South African Police Service Act 68 of 1995 (s 13(6)).

⁶² *R v Inland Revenue Commissioners - ex parte Rossminster Ltd and Others* (1980) AC 952 997-98.

10.4.2 Section 36(1)(a) of the BOR applied to ss 45(1), (2) and 63(1), (4) of the TAA

In terms of s 36(1)(a) of the BOR, when evaluating the reasonableness and justifiability of a limitation on a fundamental right imposed or permitted by ss 45 and 63 of the TAA, a relevant factor to be considered is ‘the nature of the right’. This involves taking account of the scope and ambit of the right that the State seeks to limit, its purpose and relative importance, the relevant historical facts that contributed to the right being enshrined in the BOR, and the seriousness of limiting the right.⁶³ For present purposes, these factors will be considered in relation to the right to privacy in s 14 of the BOR. Although no hierarchical ranking of fundamental rights applies in SA, ‘constitutional rights have especial significance’⁶⁴ that is magnified in view of SA’s peculiar history under apartheid. During that era, an authoritarian regime de-personalised and de-privatised confidential information and communications through discriminatory laws and security legislation that conferred extraordinarily wide powers of search and seizure without a court order.⁶⁵ To the apartheid State, the oppressed Black majority had no privacy to be protected and no dignity to be respected.⁶⁶ Privacy and other human rights oriented values played no role in delicately balancing the interests of the State against an individual’s civil rights (or liberties). A succinct overview of the history of systemic violations of privacy during the apartheid era is contained in the following *dictum* per Sachs J in *Mistry*:⁶⁷

⁶³ *Magajane* para 62. The CC, per Kentridge AJ in *Zuma* para 15, approved the following *dictum* in *R v Big M Drug Mart Ltd* (1985)18 DLR (4th) 321 395-96: ‘The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.’ For a discussion of the meaning of ‘freedom’, see Woolman S & Davis D (1996) 382-83; Hill JL (2004) 499; Wayburne PA (2014) 77-95.

⁶⁴ *Goqwana* para 13.

⁶⁵ For discussion hereof, see du Plessis LM & de Ville JR ‘Personal Rights: Life, Freedom and Security of the Person, Privacy, and Freedom of Movement’ in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 242.

⁶⁶ *Gaertner* para 1.

⁶⁷ At para 25.

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

Consequently, s 14 of the BOR unsurprisingly forbids encroachments on ‘private facts’⁶⁸ or ‘personal matters’⁶⁹ falling within the personal domain of ‘everyone’. This prohibition aims to ensure a repudiation of, and a clean break from, past practices that are repugnant to the protection of privacy, dignity, freedom, social justice and other democratic values of a society with a liberal culture.⁷⁰ This is part of the Constitution’s transformative spirit (discussed above in chapter three). Privacy is a universal right of paramount importance to natural and juristic persons. The history of indiscriminate privacy violations under apartheid contributed to privacy rights being entrenched in the BOR. The aforementioned historical facts, taken with the affirmation in s 7(1) that the BOR is ‘a cornerstone of democracy in South Africa’, reflect the importance of the role that privacy plays in a transformed South African society based on fundamental rights. The history of privacy in SA underscores that, apart from a particular person’s privacy that is at stake when the State seeks to invade a private sphere, privacy also has a social interest dimension that is affected (that is, society’s interest in protecting and preserving privacy against unwarranted State intrusion or erosion that would harm social values of a democracy).

⁶⁸ Madala J, in *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) para 34, defines ‘private facts’ as ‘those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private’. This *dictum* pertains to information privacy. However, other privacy interests include personal privacy to bodily integrity and territorial privacy to property.

⁶⁹ Rautenbach IM (2012) 360 defines ‘personal matters’ as ‘matters concerning the free and unimpeded exercising of rights’.

⁷⁰ *Gaertner* para 48. O’ Regan J, in *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) para 131, held: ‘The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In so doing, it highlights the inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these rights are therefore inter-dependent and mutually reinforcing.’

The parameters of all rights entrenched in the BOR is determined objectively with reference to their structure and internal content.⁷¹ Section 14 of the BOR is structured in two distinctive parts.⁷² Whilst the first part recognises a positive, general right to privacy ('[e]veryone has the right to privacy'), the second part recognises a negative right to privacy ('the right not to have ...'). The latter protects 'everyone' against specific forms of infringements listed in s 14. The rights in s 14 are formulated in general and abstract terms. Section 14 does not comprehensively define the substantive right to privacy for constitutional purposes. Thus, some uncertainty exists as to its precise scope and ambit.⁷³ This prompted Ackermann J to describe the concept of privacy as 'an amorphous and elusive one'⁷⁴ whose scope is closely related to a person's own, autonomous identity. The provisions of s 14 are couched open-endedly, thereby permitting the inclusion of other facets of privacy that are not expressly mentioned in its make-up or composition. The word 'includes' indicates that sub-paras (a) - (d) thereof are not a *numerus clausus*. Thus, other (unlisted) protectable privacy interests may, through the process of constitutional interpretation, be regarded as protected under the umbrella of s 14. This may occur if, as required by s 39(1) of the BOR, discussed above in chapter two, the protection of the unlisted privacy interests is consonant with the values of an open and democratic society based on human dignity, equality and freedom.⁷⁵

⁷¹ *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (SCA) 271D.

⁷² Currie I & de Waal J (2014) 294.

⁷³ Harms JA, in *National Media Ltd and Another v Jooste* 1996 (3) SA 262 (SCA) 271, accepted the following definition of 'privacy' proposed by Neethling: 'Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.' (translated from Afrikaans) Ackermann J, in *Bernstein* para 68, also referred to this definition. Madala J held, in *NM and Others v Smith and Others* 2007 (5) SA 250 (CC) paras 32-3, 'that the nature and the scope of the right [to privacy] envisage a concept of the right to be left alone. Privacy encompasses the right of a person to live his or her life as he or she pleases.' In *Hyundai Motors* para 16, Langa DP held: 'Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.'

⁷⁴ *Bernstein* para 65. Privacy is a fundamental personality right deserving of protection as part of human dignity, if not subsumed under the rubric of dignity. See *Gaertner* para 86.

⁷⁵ The common law also recognises a right to privacy. However, the independent, self-standing right to privacy in the BOR is distinguishable from the common law right to privacy. Under s 14 of the BOR, privacy is wider than at common law. See Currie I & de Waal J (2014) 295. Also, see Rautenbach IM 'The conduct and interests protected by the right to privacy in section 14 of the Constitution' (2001) 1 *TSAR* 115; Dendy M 'Protection of privacy' (August 2009) *DR* 46-7.

In *Bernstein*, Ackermann J stated further that ‘it seems to be a sensible approach to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured’.⁷⁶ A ‘legitimate expectation’ entails a subjective expectation of privacy that society must recognise as objectively reasonable.⁷⁷ Thus, ‘an individual’s expectation of privacy must be weighed against “the conflicting rights of the community”’.⁷⁸ In *Bernstein*, Ackermann J also held that it would be reasonable for a person to expect privacy in the ‘truly personal realm’ or ‘inner sanctum of a person’ (such as in his home). However, ‘as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly’.⁷⁹ This approach to the fundamental right to privacy was elaborated on in *Hyundai Motors* in the following *dictum* penned per Langa DP:⁸⁰

‘As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows ... from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings.’

⁷⁶ *Bernstein* para 75. Expectations of privacy are normative rather than descriptive standards. See *R v Tessling* [2004] 3 SCR 432 (SCC) para 42. The rights delineated in s 14 of the BOR are underpinned by the constitutional values of human dignity, equality and freedom. See *Minister of Safety and Security and Others v Mohamed and Another* [2010] 4 All SA 521 (WCC) para 25.

⁷⁷ *Bernstein* para 75. Currie I & de Waal J (2014) 298 contend that, for purposes of applying the legitimate expectation test, ‘[w]hat is reasonable ... depends on the set of values to which one ties the (empty) standard of reasonableness’. Rautenbach IM (2012) 358 writes: ‘To determine the reasonableness of a subjective expectation the Constitutional Court uses the German idea to arrange forms of privacy in concentric circles ranging from inner sanctum privacy which is protected without any qualification, to periphery privacy which is so attenuated by societal interests that a subjective privacy expectation is unreasonable.’

⁷⁸ McQuoid-Mason D (2000) 247.

⁷⁹ *Bernstein* para 67. Sachs J held, in *Mistry* para 27, that ‘Ackermann J [in *Bernstein*] posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated’. Madlanga J, in *Gaertner* para 49, held: ‘This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home.’

⁸⁰ *Hyundai Motors* para 18. For further discussion of privacy, see Okpaluba C ‘Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure’ 2015 *Acta Juridica* 407. The Canadian Supreme Court, in *R v Dymont* [1988] 2 SCR 417 436, refers to the ‘spheres’ or ‘zones’ of privacy as being ‘spatial, physical and informational’.

Accordingly, privacy has an inviolable, narrowly construed ‘intimate core’⁸¹ that is ‘lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated’.⁸² This does not mean that privacy is non-existent or abolished in a business or social setting: ‘when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied’.⁸³ Privacy cannot be ‘construed absolutely or individualistically in ways which [deny] that all individuals are members of a broader community and are defined in significant ways by that membership’.⁸⁴ Thus, in a constitutional democracy, inspections, searches and seizures are permissible despite their adverse impact on privacy rights. Against this backdrop, the CC has arranged privacy expectations on a sliding scale from high to low.⁸⁵ A person’s privacy expectation relating to business premises, plant, equipment, machinery, materials, records and other assets is attenuated by the duty to comply, inter alia, with reasonable regulatory schemes involving inspections, searches and seizures linked to ‘an effective regime of regulation’.⁸⁶ Thus, although the cluster of privacy rights in s 14 of the BOR are hallowed human rights deserving of the utmost respect and protection, they are not absolute and remain susceptible to lawful limitations.

10.4.3 Section 36(1)(b) and (d) of the BOR applied to ss 45(1), (2) and 63(1), (4) of the TAA

When evaluating the validity of the limitations imposed or permitted by ss 45 and 63 of the TAA in relation to taxpayers’ fundamental privacy rights, the importance of the limitations’ purpose (s 36(1)(b)) and the correlation between the limitations and their purpose (s 36(1)(d)) are relevant considerations. These factors are closely related and, thus, are discussed together. Since the overall purpose of the limitations in ss 45(1) and

⁸¹ *Bernstein* para 77.

⁸² *Hyundai Motors* para 15.

⁸³ *Hyundai Motors* para 16.

⁸⁴ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 31. Ackermann J (para 32) held: ‘Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.’ Privacy includes the ‘right to be let alone, to be free from unwanted and unwarranted intrusions upon one’s time, peace of mind and sleep’ (*Makhanya v Vodacom Service Provider Co (Pty) Ltd* 2010 (3) SA 79 (GNP) para 12).

⁸⁵ Rautenbach IM (2012) 358.

⁸⁶ *Mistry* para 27. See also *McQuoid-Mason D* (2000) 249.

(2) is the same as that of ss 63(1) and (4) of the TAA, it is deemed prudent to undertake a single discussion thereof as regards the application of ss 36(1)(b) and (d) of the BOR.

A limitation is not, in relation to s 36(1)(b), regarded as reasonable and justifiable unless a substantial State interest or legitimate public purpose justifies it.⁸⁷ Assessing the importance of its purpose involves a normative evaluation of the abstract weight to be attached to the interests and rights protected or promoted by a limitation. In this context, ‘purpose’ includes ‘the benefit that can be achieved by limiting the right and the importance of achieving that benefit in an “open and democratic society based on human dignity, equality and freedom”’.⁸⁸ The ‘mere existence of a legitimate power or legal competence is not the purpose that must be noted for balancing purposes; the importance of the purposes for which such powers and competences are exercised must be determined’.⁸⁹ The extent of a limitation must be weighed against its purpose, importance and effect: if, to an extent that meets the standard set by s 36 of the BOR, the benefit flowing from allowing an intrusion on a right outweighs the loss that the intrusion will entail, then the law will recognise the validity of the intrusion.⁹⁰ The privacy limitations imposed or permitted by ss 45 and 63 of the TAA will not, for the purposes of s 36(1)(d), be regarded as reasonable and justifiable unless a strong causal link exists between the purpose of the law and the limitations imposed by it.⁹¹ The greater the extent of a limitation, discussed below with reference to s 36(1)(c) of the BOR, the more compelling its purpose must be and the closer the relationship must be between the means chosen and the ends to be attained.⁹² A limitation would be invalid if its purpose is incongruous with the Constitution.⁹³ This is part of the principle of legality in the rule of law requiring a limitation to be rationally related to achieving or furthering a legitimate governmental purpose or State interest that serves a broader public interest for the public benefit.⁹⁴

⁸⁷ *Magajane* para 65.

⁸⁸ Rautenbach IM (2014) 2255.

⁸⁹ Rautenbach IM (2014) 2255.

⁹⁰ *Midi Television (Pty) Ltd v DPP (Western Cape)* [2007] 3 All SA 318 (SCA) para 11.

⁹¹ *Magajane* para 72.

⁹² *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 35.

⁹³ *De Klerk* para 123.

⁹⁴ *Matatiele Municipality* para 100. See also *Minister of Home Affairs and Others v Scalabrini and Others* 2013 (6) SA 421 (SCA) para 69.

The validity of a limitation may be successfully challenged if an objector shows the lack of a legitimate purpose or State interest, or the lack of a rational connection between the scheme adopted and the advancement of a governmental purpose or State interest.⁹⁵ A rationality review is an objective enquiry⁹⁶ that does not need to show that the provision under consideration is reasonable or appropriate.⁹⁷ A finding of rationality must be reasonably supported by concrete evidence.⁹⁸ In relation to ss 45 and 63 of the TAA, the State bears the onus to show that a sufficient causal nexus exists between an inspection, search or seizure, as the case may be, and the advancement of a legitimate purpose or State interest in the ‘administration of a tax Act’ defined in s 3 of the TAA. Without such nexus, the limitations permitted by ss 45 and 63 would not pass constitutional muster.⁹⁹

As discussed above in chapter nine, administrative action occurring under ss 45 and 63 of the TAA respectively advance the public purpose and benefits of taxation. Revenue yielded from taxation enables the State to fulfil the rights in the BOR. Thus, a compelling public need exists to grant SARS broad information gathering powers that would enable it to manage tax collection efficiently and effectively for the benefit of the National Revenue Fund. The information gathering powers contained in ss 45 and 63 are rationally linked to the attainment of these aims. The powers therein are key weapons in SARS’s arsenal to, on the one hand, combat tax minimisation that impedes the government’s ability to fulfil its mandate and, on the other, to ensure tax compliance so as thereby to raise a constant stream of State revenue. These aims are congruent with the values of a democracy and are of such importance and incontestable necessity that they diminish the invasiveness of an inspection and search or seizure under ss 45 and 63 respectively.¹⁰⁰

⁹⁵ *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 51. See also *Glenister* para 55; *Matatiele Municipality* para 100. For further discussion, see Rautenbach IM (2014) 2256-57.

⁹⁶ *Pharmaceutical Manufacturers* paras 85-6; *ARMSA* para 50.

⁹⁷ *New National Party* para 24; *Pharmaceutical Manufacturers* paras 86 89-90.

⁹⁸ Erasmus DN (2013) 55 (and the authorities cited there at fn 143 and fn 144).

⁹⁹ Currie I & de Waal J (2014) 304 contend: ‘In general, searches and seizures that invade privacy must be conducted in terms of legislation clearly defining the power to search and seize. They are only permissible to achieve compelling public objectives.’ Bovijn S (2011) 114 submits that ‘the purpose of section 63 of the TAB [now the TAA] to curb tax evasion could outweigh the right to privacy in certain circumstances’.

¹⁰⁰ See *Gaertner* para 56. For a useful outline of the general purpose of tax, see *Gaertner* paras 50-5. *Gaertner* para 55 reads: ‘The impugned provisions ensure effective monitoring and prevent – as

10.4.4 Sections 36(1)(c) and (e) of the BOR applied to ss 45(2) and 63(4) of the TAA

As explained above, SARS's legal duty to administer and collect taxes efficiently and effectively does not exist in a vacuum but operates parallel to taxpayers' fundamental rights in the BOR, all of which are relative (not absolute) and, thus, subject to justifiable limitations under s 36 of the BOR. When evaluating the validity of a limitation of privacy imposed or permitted by the TAA, a healthy balance or medium must be struck between, on the one hand, SARS's aforementioned legal duty and, on the other, the protection of taxpayers' rights. Taxpayers have low reasonable privacy expectations at businesses and high privacy expectations in their homes. The degree of privacy that may reasonably be expected varies, depending on the activity that brings a person into contact with the State,¹⁰¹ the particular context of the statutory provision under review, the information obtained, and the premises and objects inspected or searched.¹⁰² A regulated business has a more attenuated privacy, particularly if 'the business is public, closely regulated and potentially hazardous'.¹⁰³ The TAA does not regulate any particular type of business or industry. It provides for strict monitoring of SA's tax base across a myriad of industries in relation to various taxes. In so doing, the TAA discourages practices that are deleterious to the efficient and effective administration of SA's tax system. To advance tax compliance, traders and enterprises must expect and tolerate periodic, surprise inspections under s 45 of the TAA.¹⁰⁴ This is a predictable part of doing business. Any 'expectation of a wholesome right to privacy ... would be unreasonable: the right is simply attenuated, and greatly so'.¹⁰⁵ However, in relation to private dwellings or homes, generally speaking, 'the right remains as strong as one can imagine'.¹⁰⁶

far as possible – evasion of payment of what is due in terms of the Customs and Excise Act. SARS tells us that despite the industry regulation that is in place, the country still loses billions of rand. Thus there is a need for regular inspections. This is especially so in our country, which is a developmental state that can ill-afford loss of revenue ... through evasion.'

¹⁰¹ *Gaertner* paras 58-60.

¹⁰² *Magajane* paras 66-8.

¹⁰³ *Mistry* para 27; *Gaertner* para 36. See also *S v Coetzee and Others* 1997 (3) SA 527 (CC) 570-73.

¹⁰⁴ The CC, in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) para 39, recognises that the element of 'surprise [is] often crucial' for a successful inspection.

¹⁰⁵ *Gaertner* para 62. As stated above, the attenuation of a right does not mean that it is obliterated.

¹⁰⁶ *Gaertner* para 63. The Court, in *R v Silveira* [1995] 2 SCR 297 paras 140-41, refers to the 'age-old principle of the inviolability of the dwelling-house' that 'must be the final refuge and safe haven

Conducting a trade at a ‘dwelling-house or domestic premises’ ought not to attenuate the reasonable privacy expectations of a homeowner or occupier thereof to such a degree that a very low privacy expectation exists for any part of his home. The mere carrying on of a trade from premises used as a private residence does not change the basic principle exemplified in the notion that ‘every man’s house is his castle’.¹⁰⁷ The high degree of protection afforded to the privacy rights enjoyed in a home environment was emphasised by the CC as follows: ‘Once the investigation extends to private homes, however, there would seem to be no reason why the time-honoured requirement of prior independent authorisation should not be respected.’¹⁰⁸ This notwithstanding, a home is not a fortress with impregnable walls. Its walls may be breached in appropriate circumstances when justifiable under s 36 of the BOR.¹⁰⁹ Also, it cannot be overlooked that, as emphasised by the CC, ‘as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly’.¹¹⁰ In the light hereof, when a tax inspection or search and seizure occurs under the TAA at a business operating from a dwelling-house or domestic premises, a delicate balance must be struck between, on the one hand, the high expectation of privacy existing at a person’s home and, on the other, the lower privacy expectation of a business. No hard and fast rules can be laid down in advance as to when the privacy expectation at a residence may be validly pierced to advance a public interest. Each limitation would have to be decided on its merits.

A person’s home is a personal space reserved for the most private of activities and is deserving of a high level of protection against intrusion by the State and its agents.¹¹¹ This position ought not to alter merely because a trade is conducted from domestic

for all’. It held further: ‘There is no place on earth where persons can have a greater expectation of privacy than within their “dwelling-house”.’ As regards the extent of the privacy rights of a business operating from someone’s dwelling-house or domestic premises, the CC, in *Gaertner* para 64, held: ‘Needless to say, in respect of private dwellings, participants in the customs and excise industry are still entitled to expect – and reasonably so – that the law will respect and protect their right to privacy.’ See also *Baron v Canada* [1993] 13 CRR (2nd) 65 (SCC) 84-5.

¹⁰⁷ *Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others* 2006 (4) SA 73 (W) para 1.

¹⁰⁸ *Mistry* para 29. See also *Gaertner* para 73.

¹⁰⁹ *Case and Curtis* paras 65 99 106.

¹¹⁰ *Bernstein* para 67.

¹¹¹ *Mistry* para 28.

premises. The essential character of any place as a home does not change merely because a trade operates there. The site or structure used as a home remains a residence. Everyone living there, including a trader, continues to be entitled to a high level of protection of privacy at his home. However, since privacy rights are not absolute, ss 45(2) and 63(4) of the TAA dilutes its protection by imposing limitations thereon. These provisions are worded similarly. Thus, they are discussed together. Sections 45(2) and 63(4) promote respect for privacy in a home by imposing a general prohibition against non-consensual, warrantless entry of a residence. However, both provisions cater for an exception to this prohibition. Sections 45(2) and 63(4) empower a designated SARS officer to enter, without consent or warrant, ‘any part’ of a dwelling-house or domestic premises that is ‘used for purposes of trade’.¹¹² These exceptions appear to be grounded in the legal principle recognised in *Bernstein* that ‘the scope of personal space shrinks’ at places where a person engages in business activities with the public. Since these exceptions limit the privacy rights guaranteed by s 14 of the BOR, they trigger the justification stage of the limitations enquiry. When evaluating their validity, relevant factors include those listed in ss 36(1)(c) and (e) of the BOR. The factors mentioned in ss 36(1)(a), (b) and (d) have been canvassed above at paras 10.4.2 and 10.4.3. Thus, they are not repeated here.

(a) Section 36(1)(c) of the BOR: ‘the nature and extent of the limitation’

The ‘nature and extent of the limitation’ in s 36(1)(c) refers to ‘information on how intrusive the limitation was in respect of the conduct and interests that are protected by the [affected fundamental] right – the intensity of the limitation’ and also ‘relates to the

¹¹² For the meaning of ‘for purposes of trade’, see *De Beers Holdings (Pty) Ltd v CIR* 1986 (1) SA 8 (A) 35-7; *Solaglass Finance Co (Pty) Ltd v CIR* 1991 (2) SA 257 (A) 271-72; *Burgess v CIR* 1993 (4) SA 161 (A) 179-82. It is submitted that, linguistically in ss 45(2), 62(2) and 63(4), ‘any part thereof used for purposes of trade’ means ‘any part thereof *currently being* used for purposes of trade’ (that is, at the time of the search or inspection, as the case may be). This interpretation accords with s 45(1) referring to ‘a trade or enterprise is being carried on’. Thus, ss 45(2), 62(2) and 63(4) ought only to permit entry to premises when a trade is ongoing at the time of the inspection or search. Such entry ought to be impermissible when a trade is dormant, closed or otherwise non-operational, although it may have been carried on in the past. In such circumstances, an alternative, less invasive information gathering method provided in the TAA (such as, in ss 46, 47, 48 and 52) would, it is submitted, be more appropriate and proportionate when the competing privacy rights of natural persons in their homes are balanced against applicable societal interests.

methods and instruments used to limit the right'.¹¹³ The nature of the limitations permitted by the exceptions in ss 45(2) and 63(4) are self-evident from the nature of the powers they confer (discussed above in chapter nine). The breadth of these provisions is a key determinant of the extent of the limitations that they impose or permit.¹¹⁴ The 'extent of the limitation' on privacy is influenced by the ambit of SARS's discretionary power to enter a home without consent or a warrant. However, the exceptions embodied in ss 45(2) and 63(4) have limited application. They do not operate in relation to dwelling-houses or domestic premises generally but only to any such place used for trade purposes and then, also, only in relation to 'any part thereof used for' such purposes. The word 'any' is of wide import and unqualified generality.¹¹⁵ 'Any' casts extremely widely the net of the relevant 'part'. The expansive effect of 'any' appears tempered by the phrase 'used for purposes of trade'. On the face of it, this phrase confines 'any part' to such part(s) used or, in the case of s 45(2), reasonably believed to be used for trade purposes. However, closer scrutiny of ss 45(2) and 63(4) reveals that, as shown below, their provisions are capable of a broader interpretation that would, if applied, involve a deeper invasion of privacy. Such a construction ought to be avoided by interpreting their provisions restrictively.

(b) Section 36(1)(e) of the BOR: 'less restrictive means to achieve the purpose'

Viewed objectively, the exceptions in ss 45(2) and 63(4) do not confine warrantless, non-consensual entry to such part(s) of a dwelling-house or domestic premises as is used *exclusively* or *mainly* for trade purposes. Nor is access limited to such part thereof as is specially set up or equipped for conducting a trade or is *reasonably suspected or believed to be* used for purposes of trade. Nor is access limited to only areas to which the public have access in their dealings with a trader operating from a dwelling-house or domestic premises. Nor is there an exclusion from the operation of the exceptions in respect of those parts of a home where the expectation of privacy is at its apex (such as, a bedroom, bathroom and toilet). Thus, the exceptions in ss 45(2) and 63(4) permit access to areas of

¹¹³ Rautenbach IM (2014) 2255-56.

¹¹⁴ *Mistry* paras 28-30; *Magajane* para 71.

¹¹⁵ For the legal effect of the word 'any', see the authorities cited at fn 32 in chapter two above.

a home that is used partly for trade purposes (no matter if such use is minimal) and partly for domestic purposes (such as, a lounge, dining room, bedroom, attic and home study). It is conceivable that, to gain access to a part of a dwelling-house or domestic premises used for trade purposes, a tax official may first have to enter at, and/or pass through, a part used exclusively for domestic purposes. The general prohibition in ss 45(2) and 63(4) referred to above may be interpreted as prohibiting access to a trade area by entry, without consent, *via* a non-trade area. However, a purposive approach to interpreting their provisions supports a result that permits SARS officials entering a dwelling-house or domestic premises at a non-trading area without the occupant's consent. It is submitted that this would be reasonable and justifiable in circumstances where doing so is necessary for using an exclusively domestic area as a point of entry and/or thoroughfare to gain access to a trading area contemplated by the exceptions in ss 45(2) and 63(4).

Accordingly, the exceptions in ss 45(2) and 63(4) appear, *prima facie*, to involve an unduly high degree of invasiveness of the privacy of affected persons in their homes and their immediate precincts or surrounds. This raises the issue whether they are overbroad in a manner offensive to the spirit, purport or objects of the BOR. This issue also arises because neither ss 45 nor 63 read holistically differentiates between the rights of innocent occupants at an affected residence and the tax duties of the trader operating there. Thus, the privacy of innocent third party occupiers are implicated when the powers conferred by ss 45 and 63 are exercised.¹¹⁶ When determining if a law is impermissibly overbroad in its reach, consideration is given to the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying aims. If the impact of the law is not sufficiently proportionate with such aims, then the law may be deemed overbroad.¹¹⁷ It is to this issue that attention will now be turned.

¹¹⁶ The innocent occupants contemplated here are those residents in a home where an inspection or search occurs who are not involved in or connected with, and/or have no legal interest in, the trade carried on there. These persons may include the child(ren) and spouse of the trader, a live-in child carer, nurse, butler and domestic worker, and a tenant who habitually resides in part of the dwelling-house or domestic premises (such as, in a room or granny flat). Persons excluded from the 'innocent occupants' referred to here would include the employee(s) of the trader, and the proprietor, partner, director, office bearer and member of the business inspected or searched.

¹¹⁷ *Case and Curtis* para 49. See also *Magajane* para 50.

(b)(i) Legal principles applicable to determining the proportionality of means used

The principles of proportionality apply when determining if a law is overbroad in a way inconsistent with the Constitution. The ‘less restrictive means’ rubric of s 36(1)(e) of the BOR requires consideration of whether other less restrictive constitutional means were available than that catered for in the law under review. This ‘requires an empirical prognosis of the effectiveness of potential alternative measures’.¹¹⁸ For example, whether warranted (not warrantless) inspections and/or searches were preferable. This involves a proportionality review.¹¹⁹ In its widest sense, proportionality is a device serving to ensure ‘reasonableness, fairness and good administration’ by obliging State action that infringes fundamental rights to be based on rational or fair (not arbitrary) grounds.¹²⁰ Fundamental rights may not be impaired more than is reasonably necessary for purposes of advancing a public benefit. Any impairment thereof may be ‘reasonable and justifiable’ under s 36 if the harm caused thereby is proportional to the State’s gain from furthering its particular goal.¹²¹ This is proportionality in the narrow or strict sense. In this context, ‘reasonable and justifiable’ entails that a limitation be ‘sensible’ and ‘judicious’ in the sense of being appropriate to achieve a specific objective. Moreover, it requires that any such ‘object must not be discordant with the principles integral to a free and democratic society’.¹²²

¹¹⁸ Petersen N ‘Proportionality and the incommensurability challenge in the jurisprudence of the South African Constitutional Court’ (2014) 30(3) *SAJHR* 405.

¹¹⁹ Proportionality under s 36(1) must be distinguished from proportionality in administrative action for the purposes of s 33(1) of the BOR. See de Ville JR (1994) 366-67. The CC, in *Thint* para 126, held, in relation to the issuance of a search warrant, that a judicial officer ought to consider ‘whether there is an appreciable risk ... that the State will not be able to obtain the evidence by following a less invasive route’. The CC’s application of the proportionality principle is the subject of criticism by some academics. See, for example, de Vos P, Freedman W (eds) & Brand D *et al* (2014) 363-69. Also, see Petersen N (2014) 407 (and the authorities referred to there at fn 12). A review of the criticism levelled by academics falls beyond the purview of this dissertation. It suffices to say that Petersen N (2014) 409 concludes that the ‘core of the critique is thus that balancing allows courts to make political decisions behind the veil of legal reasoning’.

¹²⁰ Blaauw-Wolf L & Wolf J (1996) 289-91.

¹²¹ Rautenbach IM (2014) 2234. Bilchitz D (2011) 573 refers to a ‘suitability’ and ‘necessity’ requirement in the limitations analysis of s 36(1). The former ‘involves there being a close connection between the limitation of a right and the purpose it seeks to achieve’. The latter ‘involves the idea that, if there are a number of possible measures that limit a right and would equally give effect to a particular purpose, then it is of importance to choose the measures that are least restrictive of the right in question’.

¹²² Blaauw-Wolf L & Wolf J (1996) 292.

The *locus classicus* statement regarding proportionality is that by Chaskalson P in *Makwanyane* at para 104 (quoted above in chapter eight).¹²³ The CC has, in subsequent judgments referred to earlier in this dissertation, expounded and developed that statement. In essence, proportionality entails testing the validity of an infringement of a fundamental right through the lens of competing rights, values and interests. A delicate and careful balancing (or weighing) must occur on a principled basis between, on the one hand, competing values and interests that underlie an open, democratic society and, on the other, the fundamental rights of an affected person. The aim of the exercise is to ‘determine who should win’¹²⁴ (that is, public purpose or private right). This balancing is the centrepiece or core of the limitations analysis: it lies ‘at the heart of the inquiry into the limitation of rights’.¹²⁵ In any such exercise, extreme positions cannot be taken ‘which end up setting the irresistible force of democracy and general law enforcement against the immovable object of constitutionalism and [the] protection of fundamental rights’.¹²⁶ The weighing up of contrasting considerations aims to ensure maximum harmonisation between competing rights, values and interests so as to determine if a limitation is, in a particular instance, ‘reasonable and justifiable’ within the meaning of these words in the context of s 36(1) of the BOR (discussed above in chapter eight). Petersen aptly describes the ‘balancing’ process under s 36(1) as follows:¹²⁷

‘Balancing is essentially a cost-benefit analysis: The limitation of an individual right passes constitutional muster if the marginal benefit of the state measure for a public purpose outweighs the marginal restriction of the constitutional right. However, a cost-benefit analysis usually requires that the compared goods be measured in one common normative currency, i.e., that they be commensurable.’

¹²³ Although *Makwanyane* was decided with reference to the interim (1993) Constitution, it remains a seminal judgment that provides the foundation for the operation of s 36(1) in the final (1996) Constitution. As correctly pointed out by Petersen N (2014) 406 and Rautenbach IM (2014) 2240, the approach adopted in *Makwanyane* (para 104) paved the way for the context in which the general limitations clause in s 36(1) is formulated as part of the proportionality test. For a detailed discussion of proportionality, see Steiner W *Justifying Limitations on Privacy: The Influence of the Proportionality Test in South African and German Law* (unpublished LLM thesis, UCT, 2013). Rautenbach IM (2014) 2231-32.

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¹²⁵ *Hyundai Motors* para 54.

¹²⁶ Per Sachs J in *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 155.

¹²⁷ Petersen N (2014) 408.

All relevant factors are to be weighed in the balancing exercise to ‘arrive at a global judgment on proportionality’.¹²⁸ O’ Regan J, in *S v Bhulwana, S v Gwadiso*, usefully summed up the judicial process involved in the balancing exercise as follows:¹²⁹

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

(b)(ii) Proportionality applied to the exceptions in ss 45(2) and 63(4) of the TAA

Based on the foregoing, the question arises whether other less restrictive, but equally effective, constitutional means were available to achieve the same, or substantially similar, outcomes sought by the exceptions in ss 45(2) and 63(4) of the TAA in relation to the advancement of the aims sought to be attained by ss 45 and 63 thereof read holistically. These objectives are discussed above in chapter nine. An affirmative answer to the question posed here would be a strong indicator of incompatibility between the TAA provisions concerned and the Constitution. Although SARS’s entry, inspection or search of a dwelling-house or domestic premises is a substantial inroad into the privacy of its occupants, the exceptions in ss 45(2) and 63(4) have confined operation to certain dwellings or domestic premises so that their intrusion on privacy guaranteed by s 14 of the BOR is curtailed within determinable limits. As regards searches and seizures occurring under the aegis of s 63(4) read with s 61(3) of the TAA, various provisions of the TAA soften their invasiveness of the fundamental privacy rights of affected persons. The relevant TAA provisions contemplated here are the following:

¹²⁸ *Christian Education SA* para 30. For a useful comparative study of proportionality, see Slade BV ‘The less invasive means argument in expropriation law’ (2013) 2 *TSAR* 199 210-14.

¹²⁹ 1996 (1) SA 388 (CC) para 18. The majority judgment of the CC, in *Phillips and Another v DPP, WLD and Others* 2003 (3) SA 345 (CC) para 22, referred with approval to the following description of the assessment of proportionality by O’ Regan J and Cameron AJ in *Manamela* para 66: ‘The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose.’

- the obligation imposed by s 63(2) that a SARS official must, before commencing with a search, inform the owner or person in control of the premises to be searched of both the factual basis giving rise to the need for conducting the search as well as the fact that the search is to be conducted under s 63 of the TAA;¹³⁰
- the obligation imposed by s 63(5) that a SARS official must comply with s 63(2) ‘as soon as reasonably possible after the execution of the search and seizure’ in such circumstances where the owner or person in control of the premises searched was not present when the search and seizure took place;
- the obligation imposed by s 63(3) read with s 61(4) that, pursuant to a seizure of relevant material, SARS must provide an affected person with a copy of SARS’s inventory of all relevant material seized during a search;
- the obligation imposed by s 63(3) read with s 61(8) that SARS must preserve and retain ‘the relevant material seized ... until it is no longer required’ for the specific purposes enumerated in ss 61(8)(a) or (b) of the TAA; and
- the obligation imposed by s 63(3) read with s 61(5) that SARS must conduct a search ‘with strict regard’¹³¹ for decency and order, as well as that a person may be searched only by an official who is of the same gender as the person searched.

Unlike in the case of the exception in s 63(4), the invasiveness of inspections under both ss 45(1) and (2) is not relieved by the imposition in the TAA, with the necessary contextual changes, of an obligation comparable to that imposed by s 61(5) relating to searches. The omission of a provision requiring entry to premises and inspections there to take place ‘with strict regard for decency and order’ raises the question whether a SARS

¹³⁰ Information imparted to an owner or person in control of the premises ought to be done in a language that is comprehensible to such person. Accordingly, in practice, an interpreter ought to accompany a SARS official at searches and inspections. The use of an interpreter would ensure that there is effective communication by SARS with an owner or person in control of the premises.

¹³¹ Generally, ‘with due regard’ means ‘with proper consideration’. See *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 15. Hence, it is submitted that generally, and in the context of s 61(5) of the TAA, ‘with strict regard’ means ‘with strict consideration’.

official is, for the purposes of ss 45(1) and (2), exempt from the duty to act with decency and order. If so, it would have the undesirable result that s 45 permits a high degree of invasiveness of the privacy (and other fundamental) rights of affected persons. A SARS official is, by virtue of the rule of law, not above the law and is constitutionally obliged to execute all functions under the TAA in a dignified manner with the utmost respect for, inter alia, the dignity, freedom, security and privacy of all persons affected thereby. This obligation stems from s 8(1) of the BOR stipulating that '[t]he Bill of Rights applies to all law, and binds ... all organs of state'. As discussed above in chapter three, this means that the BOR applies to the TAA and is binding on SARS and the CSARS as 'organs of state' within the meaning of this term in s 239 of the Constitution. By extension, the BOR binds all employees and officials acting for SARS and the CSARS in the administration of the TAA or any other tax law of SA. Therefore, an inspection under s 45 of the TAA must take place with due regard by SARS officials for decency and order. This interpretation of s 45 through the prism of the BOR promotes its 'spirit, purport and objects' as required by s 39(2) of the Constitution (discussed above in chapter two). This interpretation also accords favourably with the democratic values and principles outlined in s 195(1) of the Constitution (discussed above in chapter five). As stated there, tax administration is part of public administration. Hence, SARS and the CSARS, including all their employees and officials, are obliged, under s 195(1)(a), to promote and maintain 'high standards of professional ethics' when executing their statutory functions and duties.

The context and purpose of inspections and searches are also important considerations to be factored into the equation when evaluating if the exceptions in ss 45(2) and 63(4) are impermissibly overbroad. Every person carrying on a 'trade' as defined in s 1 of the ITA is a potential taxpayer. Thus, for the advancement of legitimate fiscal interests that are beneficial to the public, SARS requires access to all premises, including a home, whence a 'trade' is conducted. Such access must be accompanied by powers that would enable SARS officials to collect valuable financial information that would assist SARS in the execution of its tax administration duties. As discussed above in chapter nine, and as is evident from the heading to Chapter 5 of the TAA where ss 45 and 63 are located, their provisions capacitate SARS officials with powers to gather relevant tax information. The

invasiveness of these powers is tempered by the exceptions in ss 45(2) and 63(4) being confined in their application to those parts of a residence 'used for the purposes of trade'.

A further consideration pointing to the exceptions in ss 45(2) and 63(4) not being impermissibly overbroad in their effect is the absence of power in the hands of SARS officials to use force, whether reasonable or otherwise, to gain entry to premises in circumstances where resistance is encountered. For example, no provision is made for the breaking of a door or window. As stated above, SARS officials are, as creatures of statute, imbued with only such powers as are conferred by law. In addition to the foregoing, s 45 does not empower a SARS official to summon a police officer to assist in gaining entry to any premises. This does not apply to searches. By virtue of s 63(3) read with s 61(6) of the TAA, discussed above in chapter nine, a SARS official may request the reasonable assistance of a police officer. This would include obtaining assistance to gain entry to premises. However, the TAA does not authorise a police officer to use force.

It is submitted above that a purposive interpretation of the exceptions in ss 45(2) and 63(4) of the TAA permits SARS officials entry to a dwelling-house or domestic premises without the occupant's consent in order to use an exclusively domestic area as a point of entry and/or thoroughfare to gain access to a trading area therein. Although this interpretation permits the relevant exceptions to have broad application, they are not, for the ensuing practical, common sense reasons, impermissibly overly broad in their effect. An owner or someone in control of immovable property (not SARS) determines the physical layout of a dwelling-house or domestic premises in relation to a trading area therein. Thus, if a trading area is designed in such a way that access thereto is dependent on entry first being gained to a non-trading area then, in such event, a purposive interpretation of ss 45(2) and 63(4) favours granting SARS officials rights of access to such non-trading area 'without the consent of the occupant'. This construction advances the attainment of the TAA's objectives in ss 45 and 63 thereof discussed above. Put differently, a contrary interpretation would undermine the achievement thereof. The interpretation contended for here has the desirable effect of promoting the efficient and effective administration of tax by way of inspections and searches of business premises

conducted from a person's home. Moreover, the purposive interpretation advanced here, as opposed to a strict literal interpretation of the general prohibition in ss 45(2) and 63(4) referred to above, ought also to be embraced because it averts the creation of an unpalatable loophole that would undermine achieving the objectives of ss 45 and 63. The loophole contemplated here is the following: taxpayers would readily, and legally, be able to circumvent the exceptions in ss 45(2) and 63(4) by simply (re-) configuring or (re-) structuring the layout of their business premises in such a way that access thereto is dependent on access first being gained to a non-trading area at the home. In so doing, the exceptions catered for in ss 45(2) and 63(4) of the TAA would be rendered ineffectual.

Mindful of the imperative to interpret statutes, where reasonably possible, in conformity with the Constitution rather than contrary to it, unless doing so would unduly strain their provisions, it is submitted that the exceptions in ss 45(2) and 63(4) are not impermissibly overbroad in their reach. They are consistent with the BOR and not inimical to the values of an open and democratic society based on human dignity, equality and freedom. As stated above, the values of a democracy include respect for, and the promotion of, privacy in a home. The high level of privacy expectation in a home is exemplified by the negative right entrenched in s 14(a) of the BOR, namely, a person's right not to have his home searched. Thus, in SA, the privacy of an innocent occupant ought not to be unduly limited in pursuit of a fiscal goal or public interest in relation to the tax affairs of another who trades from part of the place that the innocent occupant calls 'home'. In keeping with democratic values and principles, their person, property, possessions and communications ought to be protected during a tax inspection or search and seizure occurring in, or at, their homes. The ideals of efficient and effective tax administration are not realised by limiting their fundamental privacy during any such process. If their rights are adversely affected in this way, then all that would be achieved is that the 'secrets of private friendship, relationship, trade and politics, communicated under the seal of privacy and confidence would become public, and the greatest trouble, unpleasantness and injury caused to private persons'.¹³² Such a situation must be avoided.

¹³² *Ex parte Hull* (1891-1892) 4 SAR TS 134 141 (quoted with approval in *Goqwana* para 19).

In the light of the foregoing, a fair balance must be struck between, on the one hand, the high level of privacy in a person's home and, on the other, interpreting ss 45(2) and 63(4) in a manner that would secure the public's interest in financial information stored at business premises located in a dwelling-house or domestic premises. To this end, ss 45(2) and 63(4) ought to be construed restrictively by reading down their provisions. Adopting such a mode of construction would ensure that SARS officials may only access a trading area from a non-trading area in a dwelling-house or domestic premises in circumstances where this is unavoidable (that is, absolutely necessary). This would be so due to, for example, the absence of, or inaccessibility to, any other area from which access to a trading area may be gained without unduly infringing the privacy of persons in their homes. In other words, a restrictive interpretation would permit SARS, 'without the consent of the occupant', to access a non-trading area in a home with the aim to gain access to such part of a home used for a trade purpose but only in such circumstances where doing so is a measure of last resort (not the port of first call). The interpretation of ss 45(2) and 63(4) contended for here would not unduly strain their provisions. Moreover, the interpretation is advantageous because it would ensure that an infringement of privacy in a home satisfies the test for proportionality as required by s 36(1)(e) of the BOR.¹³³

10.4.5 Sections 36(1)(c) and (e) of the BOR applied to ss 45(1) and 63(1) of the TAA

Sections 36(1)(c) and (e) of the BOR were not applied to ss 45(1) and 63(1) of the TAA in the discussion above at para 10.4.3. Since special considerations apply in a justification analysis for the limitation of fundamental rights at residential premises, a focussed discussion was undertaken of ss 45(2) and 63(4) through the prism of ss 36(1)(c) and (e). The application thereof to ss 45(1) and 63(1) will now be undertaken. However, since the requirements for *all* warrantless inspections and searches are, as discussed above in chapter nine, outlined in ss 45(1) and 63(1) respectively, the ensuing discussion applies to *all* inspections and searches conducted under ss 45(2) and 63(4) of the TAA respectively.

¹³³ Section 36(1)(e) of the BOR is applied below at para 10.4.5 to ss 45(1) and 63(1) of the TAA. The discussion and submissions made here at para 10.4.4(b) in relation to ss 45(2) and 63(4) of the TAA apply equally, *mutatis mutandis*, in relation to ss 45(1) and 63(1) thereof.

10.4.5.1 Sections 36(1)(c) and (e) of the BOR applied to s 45(1) of the TAA

(a) Section 36(1)(c) of the BOR: ‘the nature and extent of the limitation’

Section 45(1) grants a right of entry to premises without a warrant ‘where the SARS official has a reasonable belief that a trade or enterprise is being carried on’. As explained above, such inspection is a ‘search’ within the meaning and contemplation of ss 14(a) and (b) of the BOR. It may also involve infringement of the right to privacy of communications contemplated by s 14(d) thereof. Consequently, as shown above, an inspection under s 45 of the TAA read holistically is a ‘limitation’ of the fundamental right to privacy entrenched in s 14 of the BOR. For purposes of determining the reasonableness and justifiability thereof with reference to s 36(1)(c) of the BOR, attention will be focussed below on three aspects. First, the uncertainty concerning the exact powers exercisable by SARS officials at an inspection. Secondly, the omission of procedural guidelines that would regulate the lawful execution of an inspection. Thirdly, the degree to which s 45 applies in the criminal law sphere. In sum, these considerations suggest that s 45 may be inconsistent with certain fundamental (constitutional) values.¹³⁴

(a)(i) Lack of clarity concerning the extent of the powers exercisable at an inspection

Just as ‘searches and seizures that invade privacy must be conducted in terms of legislation clearly defining the power to search and seize’,¹³⁵ so too must inspections that invade privacy. The TAA lacks express provisions that, first, specify the powers of a tax inspector and that, secondly, indicate the scope and ambit of the records, books of account and documents susceptible to an inspection. Specificity of statutory powers at inspections or searches and seizures, as the case may be, is important because persons

¹³⁴ In the present chapter, a discussion will be undertaken in relation to whether a declaration of unconstitutionality under s 172(1) of the Constitution may be averted by interpreting s 45 in such a way that would render its provisions constitutionally compliant.

¹³⁵ Currie I & de Waal J (2014) 304. Also, see *Magajane* para 71. The importance of boundaries for search and seizure powers vested in the hands of public officials is aptly expressed per Jackson J in *Brinegar v United States* (1949) 338 US 160 180 as follows: ‘Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.’

affected thereby must know, or be able to determine, the upper limits or scope of the available powers. As discussed above in chapter three, certainty and precision in legislation are basic tenets of the rule of law applicable in the tax arena. Every person is entitled to know what the law demands of him/her/it to enable a person to act in conformity with the law.¹³⁶ To the extent that uncertainty emanates from s 45 regarding the extent of an inspector's powers or the true extent of an affected person's rights and duties at an inspection, s 45 would be in breach of the rule of law. Moreover, uncertainty surrounding the extent of an inspector's powers would mean that affected persons would not be able to appreciate the risks to which they are exposed at an inspection.¹³⁷ A finding that s 45 offends the rule of law would render it incompatible with the Constitution. As explained above, such a finding ought not to be reached lightly. It may be made only if it is unavoidable after all relevant considerations are taken into account. In preference to a declaration of invalidity, an interpretation of s 45 that preserves its validity should be favoured, provided such construction does not unduly strain its provisions.

In addition to the TAA not expressly regulating the parameters of an inspector's powers, it also does not qualify an inspector's power to enter premises for any purpose indicated in s 45(1). For example, the TAA does not require that a SARS official must suspect, whether reasonably or otherwise, a person occupying the relevant premises to be someone who (i) is contemplated by s 29(2), (ii) failed to register for tax, or (iii) failed to comply with the provisions of ss 29(1) and 30(1) of the TAA. Whilst the absence of qualifications of this nature broadens considerably the extent of an inspector's discretion under s 45(1), this does not render its provisions to be inconsistent with constitutional

¹³⁶ *Hyundai Motors* para 24; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 102. The requirement that a 'law' must be drafted in a manner creating legal certainty was a keystone of the CC's decision in *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) para 58. In setting aside a prohibition in clause 2(a) of the Code of Conduct for Broadcasting Services in Schedule 1 of the Independent Broadcasting Authority Act 153 of 1993, Langa DCJ (para 44) held: 'The prohibition is so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition.'

¹³⁷ Van Dijkhorst J, in *Janse van Rensburg NO en 'n Ander v Minister van Handel en Nywerheid NO en 'n Ander* [1998] JOL 4129 (T) 27, held that anyone who may be subjected to an inspection by an official is entitled to know precisely what dangers threaten him/her/it at an inspection.

values. As shown above, s 45(1) couches the objectives of an inspection narrowly. An inspection may be conducted ‘to determine only’ an objective fact listed in ss 45(1)(a), (b) or (c) (discussed above in chapter nine). An inspection for a purpose unrelated to that stipulated in these sub-sections would be *ultra vires*. The TAA’s failure to expressly specify the extent of an inspector’s powers means that s 45 confers undefined and potentially unbounded power that would permit SARS officials to exercise unfettered discretion and to access the full spectrum of records in order to make a determination pursuant to ss 45(1)(a), (b) or (c). Such untrammelled powers would, if permitted, entail a high degree of invasiveness of privacy that is prejudicial to persons whose property, possessions or communications are inspected. Furthermore, the power to inspect *all* business or trade records without a warrant would be an unreasonable encroachment on privacy when consideration is given to the fact that a warrantless search of the same records can only occur in the exceptional circumstances listed in s 63(1) read with s 63(4).

The potentially wide berth of s 45(1) would create an unhealthy legal position. However, its reach may be cut back by adopting a strict interpretation of the powers exercisable at an inspection. Such an interpretive approach would ensure that the scope and ambit of an inspection are limited to only those records, books of account and documents that are reasonably necessary for SARS to make the determinations identified in ss 45(1)(a), (b) or (c).¹³⁸ Thus, it would be a factual question in each case whether an inspection is valid in the sense that it occurs within the narrow limits mentioned here. The interpretive approach contended for here carries the added benefit of averting s 45 being used for ulterior investigative purposes, namely, that SARS officials would conduct a warrantless search *via* s 45 and, in so doing, bypass the onerous requirements of s 63. The reading down interpretive approach contended for here is also advantageous because it minimises to a considerable degree any potential ill-effects that may arise owing to an inspection under s 45 occurring without prior judicial supervision or post-judicial sanction.¹³⁹

¹³⁸ For purposes of s 45(1)(a), relevant documents that would enable SARS to ascertain the identity of an occupier would be, for example, a lease, delivery note, utility bill or other like document.

¹³⁹ Instant (that is, on the spot) or warrantless inspections amounting to a ‘search’ ought to be the exception rather than the norm. See *Magajane* para 74. Whilst judicial oversight, whether it occurs before or after an inspection, would be a useful protective mechanism against unwarranted

(a)(ii) Lack of procedural guidelines for the lawful execution of an inspection

Access by SARS to a home or other premises must occur within the framework of ‘constitutionally valid criteria and procedures’.¹⁴⁰ To qualify as a valid ‘law of general application’, s 45 ought to provide constitutionally valid procedural guidelines that would ensure the lawful exercise of the discretionary power conferred by s 45. As regards inspections to determine compliance with ss 29 and 30 of the TAA, s 31 thereof minimises the adverse impact of such an inspection by regulating its timing and location. In terms of s 31, records, books of account and documents may only be inspected within SA and ‘at all reasonable times during the required periods under section 29’.¹⁴¹ Apart from these provisions, the TAA lacks express provisions that direct how an inspection is to be conducted (that is, its mode or method) and the rules applicable to inspections. For example, unlike s 63(2) applicable to warrantless searches, the TAA omits a stipulation that requires there to be prior notice or disclosure of (i) the reason for the inspection, and (ii) the section of the TAA in terms whereof the inspection takes place. Furthermore, the TAA does not require a SARS official to inform a person affected by an inspection as to its scope in terms of s 45(1) nor to explain the rights of such person at an inspection (such as whether the person whose records are inspected is entitled to be present at an inspection). Failure to provide guidelines of the nature referred to here within which to conduct an inspection within acceptable constitutional limits brings into question whether the principle of legality in the rule of law has been violated. As stated above, this principle requires that all laws be couched in clear terms so that persons affected thereby are readily able to determine their rights and duties.

intrusions on fundamental rights, it is submitted that the absence of provision for warranted inspections does not in and of itself render s 45 of the TAA unconstitutional. For further discussion hereof, see below at para 10.4.5.1(b).

¹⁴⁰ *Mistry* para 29. See also *Gaertner* para 73.

¹⁴¹ The stipulation in s 31 that inspections may only take place ‘in the Republic [of SA]’ exemplifies the territoriality of the TAA discussed above in chapter six. Sections 31(a) and 45(1)(c) of the TAA overlap with each other. Both provisions cater for inspections to determine if there has been compliance with ss 29 and 30 of the TAA. As a result of this overlapping, s 31(a) may be rendered superfluous by s 45(1)(c) read with s 31(b) of the TAA. If so, then a determination as to whether there has been compliance with ss 29 and 30 of the TAA ought to take place under s 45(1). In addition, s 31(a) appears *prima facie* to be unconstitutional by reason that it provides for warrantless inspections that fail the test laid down in *Magajane* as applied in *Gaertner*. A constitutional review of s 31(a) is beyond the scope of this study.

As explained above in chapter three, the rule of law requires laws conferring public power to be drafted intelligibly and in a way that limits the risk of a coercive exercise of power without due regard for the fundamental rights of affected persons.¹⁴² Compliance with this foundational value entrenched in the Constitution ensures ‘that the Constitution takes root in the daily practice of governance’.¹⁴³ To pass muster, warrantless inspections (and searches) must be reasonable both at inception with reference to their reasons or justification and later in relation to the manner of execution.¹⁴⁴ Since s 45 inspections involve the exercise of public power that interferes with a constitutional right, procedural guidelines are necessary to ameliorate the effect of this interference.¹⁴⁵ Safeguards of this nature are reasonable bulwarks that would temper the extent to which a right is impaired.¹⁴⁶ This view is echoed in the following *dictum* emanating from the CC:¹⁴⁷

‘Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the State they bear a constitutional obligation to seek to promote the Bill of Rights as well. But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government, which is different from that played by judicial officers.’

¹⁴² *Dawood* para 48.

¹⁴³ *Dawood* para 54.

¹⁴⁴ *Magajane* paras 54-8 68. See also *Hunter v Southam Inc* [1984] 11 DLR (4th) 641 (SCC); *New York v Burger* (1987) 482 US 691 702-13; *R v Jefferies* (1994) 1 NZLR 290 304-05.

¹⁴⁵ *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) paras 35-6. The CC, in *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 25, held: ‘Every conferment by the legislature of an administrative discretion need not mirror the provisions of the Constitution or the common law regarding the proper exercise of such powers. However, ... the constitutional obligation on the legislature to promote, protect and fulfil the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised.’

¹⁴⁶ The importance of safeguards is exemplified in *Mistry* para 25 as follows: ‘The existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens is one of the features that distinguish a constitutional democracy from a police State’.

¹⁴⁷ *Dawood* para 46. The CC, in *Mistry* para 29, held: ‘Inspectors, like any other persons exercising power on behalf of the state, are as entitled as the public to know the precise framework within which they can lawfully and effectively carry out their functions. The statute gives hardly any guidance. All is left to the discretion of the inspectors and their superiors. ... Lord Acton’s famous statement about all power tending to corrupt and absolute power corrupting absolutely was made in the context of power being exercised by the most worthy people, not the least.’

The CSARS and officials within SARS's organisational structure, discussed above in chapter five, are State functionaries on whom the TAA confers wide-ranging powers. Section 45 inspections are 'administrative action'. As stated above, whether conduct is administrative depends mainly on the nature of the power concerned rather than upon the identity of the person exercising it.¹⁴⁸ Thus, s 45 implicates the right to just administrative action guaranteed by s 33 of the BOR read with the PAJA, discussed above in chapter seven, which entitles a taxpayer to lawful, reasonable and procedurally fair administrative action. This right is undermined by the absence from the TAA of procedural guidelines for inspections occurring under s 45. The significance of rules of procedural fairness for the execution of administrative functions was emphasised by the CC¹⁴⁹ as follows:

'Observance of the rules of procedural fairness ensures that an administrative functionary has an open-mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.'

Procedural guidelines promote certainty and regularity in the application of inspections sufficient to inform an affected person of its legality. The absence thereof under s 45 means that affected persons are unable to determine beforehand their procedural rights at an inspection. Also, inspectors are unable to know in advance the legal framework within which they can execute a lawful inspection. After all, SARS inspectors are unskilled in law and, unlike police officers, are untrained and inexperienced in the execution of lawful inspections and searches.¹⁵⁰ In a manner consistent with ss 61(3) and (5) of the TAA

¹⁴⁸ In general terms, 'administrative action' refers to 'conduct of the bureaucracy (whoever the bureaucrats functionally might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals' (per Jajbhay J in *Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others* 2006 (4) SA 73 (W) para 48). The CC, in *SARFU* para 141, held: 'What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.' For the legal requirements to be met for conduct to be 'administrative action' in terms of the PAJA, see *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) para 181. See also the authorities cited at fn 180 and fn 188 in chapter three above.

¹⁴⁹ *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC) para 24.

¹⁵⁰ *Gaertner* para 42.

relating to searches, the TAA ought to have included procedural guidelines that regulate, within the confines of the law, the execution of an inspection under s 45. Parliament also failed to create a mechanism whereby guidelines may be issued through, for instance, delegated legislation by a competent authority.¹⁵¹ Importantly, the procedure in s 64 for dealing with ‘relevant material’ claimed to be protected by legal privilege is inapplicable to s 45 inspections.¹⁵² Section 64 only applies to searches and seizures under ss 61, 62 and 63. This *lacuna* may be cured by reading into the TAA certain generally accepted procedures. In this regard, see the recommendations discussed below in chapter eleven.

(a)(iii) Degree to which s 45 of the TAA may give rise to a criminal sanction

As stated above, inspections under s 45 are aimed at monitoring compliance with certain tax obligations. Generally, compliance inspections ‘are unlike criminal searches and are likely to limit the right to privacy to a lesser extent’.¹⁵³ However, s 45 inspections are quasi-criminal in nature with potential consequences in criminal law. This is so because there is a possibility of a criminal charge arising and prosecution ensuing if an adverse determination is made under ss 45(1)(b) or (c) based on information uncovered at an inspection. Section 234(a) of the TAA declares it an offence if any person wilfully and without just cause ‘fails or neglects to register’ for tax; s 234(e) declares it an offence if any person wilfully and without just cause ‘fails or neglects to retain records as required under this Act’. Upon conviction of an offence under s 234, an accused ‘is subject to a fine or imprisonment for a period not exceeding two years’. An inspection under s 45

¹⁵¹ At the time of finalising this dissertation, no operational procedural guidelines had been issued for use by SARS officials in relation to inspections conducted under s 45 of the TAA. Although such guidelines, if issued, would not have a formal legal status under the TAA, they would be useful for SARS’s operational purposes. Such guidelines would also assist judicial officers when evaluating and/or assessing the lawfulness of a procedure followed at an inspection.

¹⁵² For a discussion of the nature and ambit of material protected by legal professional privilege, see *Heiman, Maasdorp and Barker v Receiver of Revenue* 1968 (4) SA 160 (W); *Bogoshi v Van Vuuren NO and Others*; *Bogoshi and Another v Director, Officer for Serious Economic Offences and Others* 1996 (1) SA 785 (A); *Thint (Pty) Ltd v NDPP and Others*; *Zuma and Another v NDPP and Others* 2009 (1) SA 1 (CC); *A Company and Others v CSARS* 2014 (4) SA 549 (WCC); *South African Airways SOC v BDFM Publishers (Pty) Ltd and Others* [2016] JOL 35097 (GJ). Also, see Croome BJ & Olivier L (2015) 168-85. See also Tiley J ‘Professional privilege and the Tax Man’ (2002) 61 *Cambridge LJ* 540.

¹⁵³ *Gaertner* para 65.

may also result in the discovery of a ‘document’ (as defined) that incriminates a person in the commission of a criminal offence under s 234. Any such document is admissible in criminal proceedings, unless a competent court directs otherwise.¹⁵⁴

In view of the foregoing, although s 45 is not *per se* aimed at criminal prosecution or enforcement, it has criminal law implications encompassing some characteristics of a criminal investigation that, ultimately, may lead to a criminal sanction. Therefore, s 45 ought to trigger the operation of the fundamental right against self-incrimination.¹⁵⁵ The potential danger of a criminal sanction indicates that s 45 entails a potentially high degree of invasiveness of the low privacy expectations of businesses generally. Hence, s 45 involves a substantially greater limitation of privacy than would appear at first blush from a reading of its provisions. This demands a high standard of reasonableness as well as built-in safeguards.¹⁵⁶ Apart from s 45(2) providing that entry to a dwelling-house or domestic premises ought, in general, to occur with ‘the consent of the occupant’ thereof, no other safety measures are expressly built into the structure of s 45 read as a whole that are aimed at cushioning the blow to the privacy rights of affected businesses or other persons. The absence of built-in safety valves may be the Achilles heel of s 45 because it may add weight to an argument that, in its current form, the limitation of privacy rights permitted thereby is, *prima facie*, offensive to the values of the Constitution. However, it is submitted that the adoption of a restrictive interpretation of s 45, as suggested above, ought to overcome the problems identified here. In so doing, its provisions would be interpreted in a manner that is in conformity with, rather than against, the Constitution.

¹⁵⁴ The TAA (s 72(1)) provides that ‘an admission by the taxpayer contained in a return, application or other document submitted to SARS by a taxpayer is admissible in criminal proceedings against the taxpayer for a tax offence, unless a competent court directs otherwise’. (my emphasis) The italicised words are sufficiently broad in ambit to include any document received from a taxpayer at an inspection under s 45 of the TAA. For the definition of ‘tax offence’, see below at fn 166 in the present chapter. That definition covers any offence contemplated by s 234 of the TAA.

¹⁵⁵ Section 35, Constitution. The TAA (s 72(2)) reads: ‘An admission by the taxpayer of the commission of a tax offence obtained from a taxpayer under Chapter 5 is not admissible in criminal proceedings against the taxpayer, unless a competent court directs otherwise.’ Whereas this provision applies to verbal admissions, s 72(1) applies to admissions in writing. For case law dealing with the right against self-incrimination, see *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 (2) SA 636 (W); *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); *ITC 1818* (2007) 69 SATC 98.

¹⁵⁶ *Magajane* paras 56-9; *Gaertner* para 65.

(b) Section 36(1)(e) of the BOR: ‘less restrictive means to achieve the purpose’

The principles pertaining to proportionality are discussed above. To evaluate whether the provisions of s 45(1) of the TAA are, for the purposes of s 36(1)(e) of the BOR, proportional, consideration must be given to the aims of an inspection, discussed above in chapter nine, and whether the means chosen to give effect thereto are commensurate with the attainment thereof. As stated above, s 45 inspections are fact-finding mechanisms that are not aimed at monitoring tax compliance in general but rather more narrowly to monitor only, and make determinations on, ‘whether the person occupying the premises is registered for tax’ (s 45(1)(b)) and ‘whether the person is complying with sections 29 and 30’ (s 45(1)(c)). To foster SARS’s ability to make these factual findings, s 45(1)(a) empowers its officials to conduct an inspection to determine only ‘the identity of the person occupying the premises’. Therefore, a determination made under s 45(1)(a) is an integral part of the process that enables a determination to be made under sub-secs (b) and (c). In the light hereof, it is unsurprising that s 45(1) includes a determination of the occupier’s identity as part of the information that an inspection is designed to uncover.

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In determining whether, for the purposes of s 36(1)(e) of the BOR, the means chosen by Parliament in s 45(1) to give effect to the aims of an inspection are proportional, separate consideration will be given to ss 45(1)(a), (b) and (c). This is so because a finding of proportionality, or the lack thereof, in relation to any particular sub-section would not mean that such finding would necessarily apply to any other. For present purposes, consideration will first be given to s 45(1)(c). In this regard, it is difficult to conceive how a SARS official can make the determination contemplated therein without first inspecting relevant records, books of account and documents. However, as explained above, s 45 ought to be construed restrictively. This would limit inspections to records, books of account and documents reasonably related to the specific periods contemplated by s 29(3) and to material that would illustrate the nature and form of the records, books of account and documents. In this way, a determination may be made of whether there is compliance with the stipulations in ss 29(1) and 30(1) of the TAA. On the other hand, the adoption of a liberal or wide interpretation of s 45(1) would result in its provisions being construed as

permitting, without limitation, access to, and inspection of, *all* records, books of account and documents, including those that are unnecessary for the purposes of s 45(1)(c). Such a result would be disproportionate to the aims sought to be achieved by s 45(1)(c) and ought, thus, to be avoided by way of a narrow interpretation of the provisions in s 45(1).

Attention is now turned to the issue of proportionality in relation to ss 45(1)(a) and (b). Except in instances of a failure or refusal by persons to co-operate with SARS officials at an inspection occurring under s 45(1), it is difficult to conceive of instances where a formal examination of records, books of account or documents would be necessary to determine the facts envisaged by ss 45(1)(a) or (b). The information from which the factual determinations referred to therein may be made are readily obtainable by way of other, less intrusive and equally effective constitutional means. Information as to the identity of the occupier and his tax registration status may be elicited orally by asking appropriate questions of the owner, occupant or person in control or in charge of the premises concerned. A formal examination of records as a matter of course in every instance is unnecessary and probably overkill. As regards s 45(1)(b) in particular, SARS maintains a database of all registered taxpayers for taxes in respect of which registration is required (such as, for income tax, Pay As You Earn, VAT, unemployment insurance contributions, and skills development levies).¹⁵⁷ Accordingly, once a determination is made of the fact referred to in s 45(1)(a), the tax registration status of the occupier concerned may readily be ascertained by a SARS official accessing SARS's national tax registration database. No inspection at the taxpayer's premises would be necessary. If no record of the occupier's tax registration is found in SARS's database, then it may be presumed that the occupier is not registered for any tax. The onus ought then to shift onto the occupier to provide documentary proof to the contrary.

The crucial point for present purposes is that, as regards proportionality under s 36(1)(e) of the BOR, a warrantless inspection of records, books of account and documents is

¹⁵⁷ As discussed above in chapter five, formal registration as a taxpayer is not a legal pre-requisite for a liability to pay certain taxes applicable in SA. In addition, certain persons are in law exempt from the duty to register as taxpayers.

considerably more restrictive or intrusive than the other suitable, less intrusive, available constitutional means referred to above. Those alternatives would achieve the stated aims of ss 45(1)(a) and (b) without the need for a formal, somewhat invasive inspection. Bearing in mind the narrow objectives sought to be achieved by inspections conducted under s 45(1), the foregoing discussion suggests that the wording of s 45(1) is overbroad in its effect as regards sub-secs (a) and (b) thereof. This implicates the constitutionality of s 45(1) to the extent that its provisions permit inspections for purposes of making the determinations contemplated by sub-secs (a) and (b). However, the validity of s 45(1) ought to be affirmed by adopting a narrow or restrictive interpretation of its provisions. Such an interpretive approach would have the effect that warrantless inspections of records, books of account and documents would be permissible only if there is a failure or refusal to co-operate with a SARS official. In other words, a strict interpretation would result in a formal inspection being a measure of last resort. Consequently, for purposes of ss 45(1)(a) and (b), an inspection ought only to be permitted after a failed attempt by a SARS official to ascertain the identity and/or tax registration status of the occupier of the premises through an oral enquiry directed at the occupier or their agent. It is submitted that an inspection ought also to be permitted if a SARS official has reasonable grounds to believe that the information furnished may be untrue so that a proper determination cannot be made under ss 45(1)(a) and/or (b). The interpretation contended for here strikes a fair balance between, on the one hand, respect for the fundamental right to privacy and, on the other, the power of SARS to access relevant personal information pertaining to persons carrying on a trade or enterprise in order that SARS may efficiently and effectively administer SA's tax laws. In so doing, the proposed interpretation promotes the spirit, purport and objects of the BOR as required by s 39(2) of the Constitution.

As stated above, s 45 authorise inspections without requiring a warrant under any circumstance. This raises the issue whether s 45 goes too far by not providing for a warrant at all. If so, then s 45 would fail the 'less restrictive means' component of the limitations analysis. An unannounced inspection contains the element of surprise that enhances its efficacy. Admittedly, the need for surprise is preserved by a warrant

obtained *ex parte*.¹⁵⁸ As explained above in chapter nine, s 45 confers powers of inspection aimed at supervising compliance, not enforcement. The dichotomy between administrative compliance and enforcement inspections is recognised and applied by the CC.¹⁵⁹ Provision for a warrant is necessary for enforcement but not for compliance provisions. Thus, the absence of a warrant requirement for s 45 inspections, and the omission of a substitute requirement, is reasonable and justifiable under s 36(1) of the BOR. In other words, s 45 warrantless inspections are not disproportionate to the legitimate public interests that such inspections protect, preserve and promote.

In addition to the above, there are other objective indicators of proportionality in relation to s 45. First, s 45(1) does not confer a blanket authority on SARS officials to enter and conduct inspections at all premises. Inspections may only take place at premises where a ‘SARS official has a reasonable belief that a trade or enterprise is being carried on’. Secondly, unlike other statutes authorising inspections,¹⁶⁰ the TAA does not confer on an inspector the power to use force to enter any premises. The TAA also does not impose an expressly stated positive duty on anyone at the premises to co-operate with SARS officials, nor does it expressly prohibit anyone from refusing access to the premises, nor does it empower a SARS official to summon a police officer to provide assistance to gain entry to any premises. The TAA also does not expressly prohibit any person from obstructing a SARS official in the execution of his duties, nor does it empower a SARS official to conduct a body inspection of any person at the premises, nor does it empower such official to remove anything found there, or to copy any records, books of account or documents. The absence of provisions of the type referred to here is a strong indicator that the power of inspection conferred by s 45(1) is couched proportionally within limits. These limits are acceptable because they, on the one hand, enable SARS officials to attain the narrow objectives of an inspection and, on the other, ensure that the fundamental privacy rights of affected persons are not unduly restricted.

¹⁵⁸ *Magajane* para 76.

¹⁵⁹ *Magajane* paras 57-8 70 86. See also *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC) para 64.

¹⁶⁰ See, for example, the National Regulator for Compulsory Specifications Act 5 of 2008 (ss 17, 18 and 19).

10.4.5.2 Sections 36(1)(c) and (e) of the BOR applied to s 63(1) of the TAA

Warrantless searches and seizures are carried out under ss 63(1)(a) and (b) of the TAA. As discussed above in chapter nine, their provisions impose different requirements for the execution of any such operation. As stated there, the disjunctive ‘or’ appearing between sub-secs (a) and (b) indicates that they operate as alternatives to each other. Thus, for the purposes of s 63, a senior SARS official can elect to rely on either s 63(1)(a) or (b). The TAA imposes no obligation that an attempt first be made to secure the written consent contemplated by sub-sec (a) before resorting to utilising sub-sec (b). In other words, an unreasonable refusal of consent under (a) is not a pre-requisite for the application of (b). Owing to the fact that ss 63(1)(a) and (b) operate independently of each other, they will, to the extent possible, be discussed separately below as regards their respective constitutionality when viewed through the lens of ss 36(1)(c) and (e) of the BOR.

(a) Section 36(1)(c) of the BOR applied to ss 63(1)(a) and (b) of the TAA

The opening words of s 63(1) of the TAA stipulate that a senior SARS official may without a warrant exercise the powers enumerated in s 61(3). Since these are common powers applicable to both ss 63(1)(a) and (b), a single discussion will, for purposes of applying s 36(1)(c) of the BOR, be undertaken as regards the nature and extent of the limitation imposed on privacy when the powers in s 61(3) are exercised during a warrantless search and seizure operation. To this end, consideration will be given to the timing, place, procedure and scope of such operations, as well as to whether the powers in s 61(3) are ‘sufficiently circumscribed’¹⁶¹ within permissible constitutional bounds.

Unlike with inspection of records, the TAA does not regulate the timing of a warrantless search and seizure (such as, during business hours or at reasonable times).¹⁶² Thus, such

¹⁶¹ *Magajane* para 71.

¹⁶² As shown above, s 31 of the TAA provides that ‘records, books of account and documents ... must at all reasonable times ... be open for inspection by a SARS official’. For provisions in other statutes that regulate the timing of a search, see Bovijn S & van Schalkwyk L (2012) 514. See also *Gaertner* para 41.

operations may occur, in the exercise of an unfettered discretion in the hands of designated SARS officials, at any time of the day or night, irrespective of the reasonableness of the time and of the necessity to conduct a search at night. This places taxpayers at the mercy of SARS whose officials may unilaterally decide to act in the dead of night, or at such other inopportune time, without any justifiable reason for doing so, save that it is within the sole preserve of their power to determine the timing of conducting a warrantless search. The absence of statutory guidelines on the timing of such a search has the undesirable effect that the process permitted by the TAA entails a measure of arbitrariness. This suggests that privacy is limited by s 63(1) in a manner that is inconsistent with the rule of law. However, this, on its own, ought not to justify s 63(1) being declared unconstitutional. This would, however, be a basis for the setting aside of a particular warrantless search carried out at an unreasonable time determined arbitrarily.¹⁶³

‘[F]rom time to time as occasion requires’,¹⁶⁴ a warrantless search under s 63 may take place at any ‘premises’ as defined in s 1 of the TAA. Unlike inspections under s 45 read with s 31 discussed above, the TAA does not stipulate that s 63 applies only to premises ‘in the Republic’. However, it also does not state that s 63 applies extraterritorially. In the light of the presumption of the territoriality of SA’s tax and other laws, discussed above in chapter six, it is submitted that warrantless searches may only occur at premises within SA’s geographical borders, territorial waters and airspace. Section 63(1)(b)(i) restricts ‘premises’ to places where a senior SARS official is, on reasonable grounds, satisfied that ‘relevant material [is] likely to be found’. In this context, as shown above in chapter nine, ‘premises’ is not confined to a place occupied, controlled or owned by the taxpayer or in which the taxpayer has an interest. Rather, ‘premises’ includes any place owned, occupied, or controlled by a third party at which ‘relevant material [is] likely to be found’. A search with written consent under s 63(1)(a) is not subject to a just or good cause requirement of the nature contained in s 63(1)(b)(i) referred to above. Thus, a consensual search may occur at any premises in SA, irrespective of whether or not a senior SARS official believes that relevant material may be found there. The absence of a provision

¹⁶³ *R v Inland Revenue Commissioners- ex parte Rossminster Ltd and Others* (1980) AC 952 1001.

¹⁶⁴ Section 10(1), Interpretation Act.

akin to that in s 63(1)(b)(i) does not result in s 63(1)(a) imposing a greater limitation of the right to privacy than that under s 63(1)(b). Subject to what is stated below at para 10.4.5.2(b)(i), the invasiveness of s 63(1)(a) is tempered by the consent granted by a person designated in law to do so. Derogation from a fundamental right that is duly and properly authorised would, generally speaking, be constitutionally defensible.

The nature and extent of the powers exercisable at all warranted and warrantless searches conducted under the TAA are broad-ranging and cast in wide terms. As discussed above in chapter nine, the powers are in ss 61(3)(a) - (e) and in s 61(5). They are: (i) to ‘open or cause to be opened or removed in conducting a search, anything which the official suspects to contain relevant material’, (ii) to ‘seize any relevant material’, (iii) to ‘seize and retain a computer or storage device in which relevant material is stored’, (iv) to ‘make extracts from or copies of relevant material, and require from a person an explanation of relevant material’, (v) to search a vessel, aircraft or vehicle or a person found therein, and to question any person regarding a matter dealt with in a tax Act, and (vi) to conduct a body search. These powers license the search and seizure of a broad array of persons and/or property. They also appear to entail a high degree of invasiveness of taxpayers’ privacy. To this end, the following objective considerations are noteworthy:

- Section 61(3)(a) confers the powers to open, remove and seize that may be exercised in relation to ‘anything which the official suspects to contain relevant material’. Grammatically, ‘anything’ casts its subject very widely so that, contextually, ‘relevant material’ would cover ‘everything’ including private papers and personal possessions. Similarly, s 61(3)(b) refers to the seizure of ‘any relevant material’. Contextually, ‘any’ has an effect similar to ‘anything’ used in s 61(3)(a). Furthermore, the suspicion referred to in s 61(3)(a) is not qualified by reference, for example, to a ‘reasonable suspicion’ standard.¹⁶⁵ Thus, any suspicion, regardless of its reasonableness, would appear to suffice.

¹⁶⁵ *Magajane* para 87. Reasonableness is a norm adopted in s 8 of the Canadian Charter of Rights and Freedoms. It reads: ‘Everyone has the right to be secure against unreasonable search or seizure.’

- The power conferred by s 61(3)(d) for a designated SARS official to seek ‘an explanation of relevant material’ from ‘a person’ at the premises is cast sufficiently broadly so that it may sustain an interpretation that ‘any person’ there may be questioned and is duty bound to provide an explanation. This power is not expressly qualified by, for example, a requirement that the person questioned be someone reasonably suspected or believed to possess, or likely to possess, information about ‘relevant material’ related to or connected with the actual reason or basis for the warrantless search, namely, an ‘alleged failure to comply with an obligation imposed under a tax Act or tax offence’.¹⁶⁶
- In terms of s 61(5), a body search may be conducted of ‘a person’. Linguistically, ‘a person’ means ‘any person’. Thus, s 61(5) is cast sufficiently broadly so as to sustain a construction that ‘any’ person at the premises may be searched. Affected persons would include the taxpayer under investigation, the taxpayer’s employees and family members, and anyone directly or indirectly associated with the taxpayer (such as, a tax practitioner, accountant, lawyer, client, business partner, friend, visitor, guest and service provider).

The foregoing considerations suggest that, for purposes of s 36(1)(c) of the BOR, the nature and extent of the powers exercisable at a warrantless search and seizure conducted under s 63 of the TAA involves a high degree of invasiveness in relation to the privacy of persons whose ‘premises’ are searched and property, possessions and/or communications seized. In some respects, as shown above, the powers concerned appear to be overly broad with the potential to cause problems of the nature referred to above as identified in *Magajane*.¹⁶⁷ Generally, overbreadth in search and seizure powers would impermissibly

¹⁶⁶ For an example of a restrictive provision of the nature referred to, see *Park-Ross* 159H. The TAA (s 1) defines ‘tax offence’ to mean ‘an offence in terms of a tax Act or any other offence involving – (a) fraud on SARS or on a SARS official relating to the administration of a tax Act; or (b) theft of monies due or paid to SARS for the benefit of the National Revenue Fund’. Clegg D (2012) 107 points out that ‘fraud on SARS’ is unexplained in the TAA and contends that, whilst an intentional non-disclosure of income is fraud, it is doubtful if it is ‘fraud on SARS’ as an organisation.

¹⁶⁷ At para 71. *Magajane* is useful in the context of the present discussion. On the basis that they violated his rights, inter alia, to privacy, the applicant challenged the validity of s 65 of the North West Gambling Act 2 of 2001 that empowered inspectors to enter premises without a warrant and conduct inspections, searches and seizures. For comparative purposes, it is useful to outline its

result in a greater intrusion on privacy that would extend beyond those circumstances in which the reasonable expectation of privacy is low (such as at property used for commercial purposes) and would include situations where a privacy expectation is at its apex (such as in a dwelling). The ensuing discussion aims to show that when other legally relevant factors are considered, they sufficiently circumscribe, within constitutional limits, the powers conferred by ss 61(3) and (5) of the TAA. In so doing, an appropriate balance would be shown as being struck between, on the one hand, taxpayers' rights during tax administration and, on the other, the legitimate public interest in the efficient and effective collection and general administration of tax by SARS and its officials.

provisions *in toto*. Section 65 of Act 2 of 2001, entitled 'Powers and functions of inspectors', read as follows: '(1) An inspector shall for the purpose of this Act — (a) enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected — (i) that a casino or any other gambling activity is being conducted without the authority of a licence, (ii) that persons are being allowed to play or participate in any gambling game or other gambling activities or to play any gambling machine, or (iii) that any gambling machine or any equipment, device, object, book, record, note, recording or other document used or capable of being used in connection with the conducting of gambling games or any other gambling activity may be found, and may, after having informed the person who is deemed or appears to be in charge of the premises of the purpose of his or her visit, make such investigation or enquiry as he or she may think necessary; (b) with regard to any premises referred to in paragraph (a) — (i) require the production of any licence or written permission or authorisation to conduct gambling activities from the person who is in control of such premises, (ii) question any person who is on or in such premises, and inspect any activities in connection with the conduct of any gambling activity, (iii) examine or inspect any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) found on those premises and make a copy thereof or an extract therefrom, (iv) inspect and examine all premises referred to in paragraph (a) or any premises where gambling devices or equipment are manufactured, sold, distributed, or serviced, wherein any records of such activities are prepared or maintained, (v) inspect all equipment and supplies, in, about, upon or around such premises, (vi) seize summarily and remove from such premises and impound any such equipment or supplies for the purposes of examination and inspection, (vii) examine, inspect and audit all books, records and documents pertaining to licensed gambling operations, (viii) seize, impound or assume physical control of any book, record, ledger, game device, cash box and its contents, conducting room or its equipment, or gambling operations, and (ix) inspect the person, and personal effects present in any gambling facility licensed under this Act, of any holder of a licence or registration issued pursuant to this Act while that person is present in the licensed gambling facility; (c) require any person who is deemed or appears to be in charge of any premises referred to in paragraph (a)— (i) to point out any equipment, device or object referred to in that paragraph which is in his or her possession or custody or under his or her control, (ii) to produce for the purpose of examination or of making copies or extracts, all books, records, note[s] or other documents referred to in paragraph (a) which are in his or her possession or custody or under his or her control, (iii) to provide any information in connection with anything which has been pointed out or produced in terms of subparagraph (i) or (ii), and (d) seize and remove any gambling machine, equipment, device, object, book, record, note or other document referred to in paragraph (a) which in his or her opinion may furnish proof of a contravention of any provision of this Act or mark it for the purposes of identification.'

The first consideration is s 63(3) of the TAA. It is instructive. In terms thereof, the procedural guidelines in ss 61(4) - (8), discussed above in chapter nine, apply to all warrantless search and seizure operations conducted under s 63. For present purposes, there are several relevant ones. First, SARS must prepare an inventory of all 'relevant material' seized and then provide a copy thereof to the owner or person in control of the premises whence the relevant material was seized.¹⁶⁸ Secondly, SARS must conduct a search 'with strict regard for decency and order', and no person may be searched except by someone of the same gender. Thirdly, SARS may, at any time, request such assistance from a police officer as may be reasonably necessary in the circumstances of a particular search. Fourthly, SARS must preserve any relevant material seized and may retain such material until it is no longer required for purposes of its investigation or for legal proceedings instituted against the relevant taxpayer. The guidelines mentioned here serve to ensure that the powers conferred by s 61(3) are not abused and that every search and seizure operation occurs in an orderly, dignified, respectful, responsible, rights sensitive way that conforms with constitutional values. The application of the aforementioned guidelines would have the desirable effect of mitigating, to some considerable degree, the adverse impact that a search and seizure would have on the privacy and other fundamental rights of taxpayers and third parties. In addition, s 63(3) read with ss 61(4) - (8) serve to inform all affected persons whomsoever of justiciable rights to which they are entitled during a search and seizure operation. This exemplifies compliance with a basic tenet of the rule of law affecting legislation, namely, that the TAA ought to be drafted with sufficient clarity so that taxpayers are able to know beforehand their rights during and after a warrantless search and seizure, and SARS officials are able to determine beforehand their concomitant duties in respect of any such operation.

¹⁶⁸ Section 61(4) provides that an inventory must be made 'at the time that is reasonable under the circumstances'. The practical effect of s 61(4) is that there is no obligation on SARS to make an inventory at the same time as when it seizes property. Thus, SARS may seize property without immediately issuing a receipt or other documentary proof of the property taken into its possession. This puts affected taxpayers and third parties at a disadvantage because their property may be removed without SARS officials disclosing the nature and extent of the things taken or providing written proof thereof. This creates room for disputes as to the property seized. This is a real concern, particularly because taxpayers and other affected persons would not be present when SARS makes a belated inventory. If any such inventory is not received within a 'reasonable' period after the seizure, then any person with *locus standi* may apply to a competent court for an order compelling compliance within such period as may be determined by the court.

The second consideration is the definition of ‘relevant material’ read with s 63(2)(b). It is a further indicator that the wide powers conferred by ss 61(3)(a), (b), (c) and (d) are appreciably circumscribed for the purposes of s 63(1). As stated above, s 61(3) empowers SARS officials to ‘seize any relevant material’ and to open, remove, retain and copy, as the case may be, anything containing ‘relevant material’ as defined in s 1 of the TAA. The scope and ambit of ‘material’ (that is, information, documents and things) envisaged by this definition is expressly confined to that which ‘in the opinion of SARS is foreseeably relevant for the administration of a tax Act as referred to in section 3’. Thus, s 63(1) read with s 61(3) do not authorise the search and seizure of all ‘information’, nor of every ‘document’ and ‘thing’ relating to the ‘administration of a tax Act’ as particularised more fully in ss 3(2)(a) - (i) (discussed above in chapter five). In other words, SARS officials exercising the powers conferred by s 63(1) read with s 61(3) do not have *carte blanche* to search and seize anything and everything that they, in the exercise of an unfettered discretion, deem fit. The exercise of the powers under ss 61(3)(a) - (d) is fettered by the notion of ‘relevance’ in relation to the ‘administration of a tax Act’ as statutorily defined. However, contextually for purposes of s 63(1), ‘relevance’ is narrowed further by s 63(2)(b). In terms thereof, as stated above, the factual matrix forming the rationale (‘basis’) for a search must be disclosed to ‘the owner or person in control of the premises’. Therefore, when the definition of ‘relevant material’ is understood and applied purposively in the light of s 63(2)(b), it becomes clear that s 63(1) read with s 61(3) only permits the search and seizure of material connected or related to the actual reason or cause (‘basis’) which precipitates the search.¹⁶⁹ The ‘basis’ or reasonable cause would be an ‘alleged failure to comply with an obligation imposed under a tax Act or tax offence’ (s 63(2)(b)). Consequently, the powers in s 61(3) may not be used for ‘fishing’ expeditions ‘in the hope of finding something ... that might in the sole judgment of those searching have evidentiary value’.¹⁷⁰ In the result, a search is impermissible if it is premised on a mere hope of possibly uncovering facts indicative of non-compliance with a tax Act in circumstances where, at the time of a search, SARS officials have no facts giving rise to a suspicion of any non-compliance with a legal duty.

¹⁶⁹ ‘Reasonable specificity’ of relevant material is a narrowing standard used in s 47(3) of the TAA.

¹⁷⁰ *Ferucci* 231A. Also, see *Ferucci* 233C-D.

The third consideration is the scope of ‘a person’ in s 61(5). This provision empowers SARS officials to ‘search a person’. However, it contains no express limits of the persons or categories of persons who may be searched. A linguistic interpretation of ‘a person’ would result in s 61(5) encompassing ‘any person’ found at the premises when a search takes place. Such a broad interpretation would expose anyone there to the risk of a search not because of any connection to a tax offence or an alleged non-compliance with a tax Act but simply because he/she has the misfortune of being present at the relevant time. A restrictive interpretation of ‘a person’ ought to be adopted so that its reach is adequately circumscribed within constitutional limits. It is an imperative of purposive interpretation that any meaning ascribed to ‘a person’ may not undermine the objectives of s 63. Indeed, a meaning ought to be ascribed which best advances the ‘administration of a tax Act’ as defined. It is submitted that the remit of ‘a person’ may be appropriately narrowed by requiring a body search of any particular person to be relevant in relation to the ‘basis’ for the search operation as contemplated by s 63(2)(b) discussed above.¹⁷¹ Accordingly, in the context of s 61(5), ‘a person’ ought to mean, for the purposes of s 63(1), anyone reasonably suspected or believed to possess, or likely to possess, ‘relevant material’ related to the alleged failure to comply with an obligation under a tax Act or tax offence and who, on reasonable grounds, is suspected or believed to be involved in the ‘imminent removal or destruction’ thereof (s 63(1)(b)(i)).¹⁷² The interpretation contended for here ought also to be favoured because it promotes the spirit, purport and objects of the BOR. This is so since it averts the invasion of the privacy of innocent bystanders and others who are fortuitously at the premises when a search thereof takes place under s 63.

The fourth consideration is ss 66(1)(b) and (2). In terms thereof, SARS may be held liable in law for the costs of physical damage caused to property during a search and seizure operation. This underscores the existence of an implied legal duty on SARS officials to execute a search and seizure with reasonable care and the utmost regard for taxpayers’ property rights and proprietary interests. The imposition of these duties circumscribes, within acceptable legal limits, the exercise of the powers conferred by s 63.

¹⁷¹ Section 60(2)(a) relating to warranted searches is substantively similar to s 63(2)(b).

¹⁷² For a similar view, see *Ferucci* 232D-E where comparable provisions in a statute were considered.

(b) Section 36(1)(e) of the BOR applied to ss 63(1)(a) and (b) of the TAA

Although ss 63(1)(a) and (b) of the TAA deal with the same subject matter, they are sufficiently distinguishable to merit separate discussion on the issue of proportionality.

(b)(i) Section 63(1)(a): a warrantless search with written consent

Section 63(1)(a) of the TAA provides that a senior SARS official may, without a warrant, exercise the powers provided for in s 61(3) ‘if the owner or person in control of the premises so consents in writing’. The granting of consent does not relieve SARS of its duty under s 63(2) to disclose the factual ‘basis’ for the search. Generally, consent would significantly ease, if not relieve altogether, the State’s onus to justify a limitation for the purposes of s 36(1) of the BOR. This is so because any derogation from a fundamental right authorised by its holder would be constitutionally defensible. In the light hereof, a binding consent is a key requirement for a valid warrantless search under s 63(1)(a) and for the admissibility into evidence of facts uncovered during any such search. Since a search and seizure authorised by a valid and legally binding consent would be sound in law, any such operation ought, as a general rule, to pass constitutional muster. However, this does not mean that the validity of a consensual, warrantless search under s 63(1)(a) is immune from judicial review. Section 63(1)(a) suffers from an internal shortcoming that creates fertile ground for a possible constitutional challenge.

The shortcoming referred to above is the provision that consent may be given by either ‘the owner’ or ‘person in control of the premises’. A senior SARS official can elect from whom consent will be sought. A reasonable refusal of consent by the one is of no consequence if consent is granted by the other. A constitutional problem would arise if the grantor of consent is not the occupier whose property, possessions and/or communications are at risk in a search and seizure. This would be so where, for example, a landlord of commercial premises consents to a warrantless search of premises leased to a commercial tenant. Although such a search and seizure of the leased premises would,

on a literal interpretation, accord with the provisions of s 63(1)(a), it is submitted that, for the reasons advanced below, such a search and seizure ought to be declared invalid.

The TAA does not define ‘owner’ nor does any other tax Act surveyed. Thus, it is unclear whether ‘owner’ in the TAA refers to ‘beneficial’ or ‘legal’ owner, or to both.¹⁷³ It is submitted that, for TAA purposes, ‘owner’ means a person who stands in a formal legal relationship with premises as the lawful holder of ownership rights in the wider sense. Based on this meaning, ‘owner’ would include, inter alia, trustees who are, in law, the bare or legal owners of the trust property under their administration or control for the benefit of the trust beneficiaries who are its beneficial owners. In law, ownership confers on an owner a bundle of justiciable rights, benefits and entitlements over the property owned. The natural incidence of ownership over ‘premises’ as defined in s 1 of the TAA does not include rights over the property of another found in or on the owner’s ‘premises’. Generally, if an owner is an independent legal person different from that occupying the owners’ ‘premises’, then the former would lack legal authority to act on behalf of the latter. Thus, ownership of the ‘premises’ would *per se* not entitle, authorise or empower an owner to lawfully consent, for tax purposes, to any act that would infringe the privacy of the occupant in occupation of the owner’s ‘premises’. In other words, consent by an owner to a warrantless search and seizure of an occupant’s property, possessions or communications would, without s 63(1)(a), be unauthorised and unenforceable against the occupant to the extent that the owner and the occupant are not the same person in law. Based on the foregoing, the validity of s 63(1)(a) may, to a limited degree, be susceptible to a constitutional challenge. Such a challenge would be limited to the extent that a blanket authority is conferred on all owners of ‘premises’ to consent to warrantless searches in circumstances where the owner surrendered possession of the ‘premises’, or part thereof, to a third party whose property, possessions and/or communications form the object, or part of the object, of the warrantless search. It is submitted that s 63(1)(a) ought to be construed in the manner consistent with that suggested in the ensuing paragraph in order that its constitutionality may be preserved.

¹⁷³ For a discussion of the distinction between beneficial and legal ownership, see *Yarram Trading CC t/a Tijuana Spur v Absa Bank* 2007 (2) SA 570 (SCA) para 10.

Accordingly, for the purposes of s 63(1)(a), a person would qualify as ‘owner ... of the premises’ if such person is the legal owner of the ‘premises’ who occupies the ‘premises’ to be searched and whose property, possessions and communications would form the subject of the search and seizure. Furthermore, ‘owner’ in this context ought also to encompass a legal owner who does not occupy the relevant ‘premises’ but is duly authorised by the occupant thereof to act as its agent and grant consent for a search and seizure of the occupant’s property, possessions and/or communications. The legal position contended for here ought to be supported because it has the advantage of promoting parity with the position applicable to searches occurring under s 63(4) of the TAA discussed above. In terms thereof, only ‘the occupant’ may consent to SARS officials entering a dwelling-house or domestic premises. No justifiable legal basis exists for occupants of all other types of ‘premises’ to be treated differently by being overlooked or bypassed for purposes of consent in relation to a warrantless search of the ‘premises’ and the potential seizure of property found there. Put differently, the legal position contended for here averts s 63 extending special treatment (benefit) and/or protection in law to an occupant of residential premises that is not extended to an occupant of any other type of ‘premises’. Any such special dispensation afforded to the occupants of residential premises is differential treatment of the kind that is offensive to the spirit, purport and objects of the BOR because it creates a state of affairs that is inconsistent with the equality clause in s 9 thereof (discussed above in chapter six). Section 9 entrenches the right of ‘everyone’ to ‘equal protection and benefit of the law’. Thus, it is submitted that s 63(1)(a) of the TAA ought to be interpreted restrictively in a manner consistent with that outlined here. The suggested interpretation does not undermine the attainment of the aims of s 63, nor does it involve unduly straining the language of s 63(1)(a). The interpretation suggested here ought also to be favoured because it, on the one hand, avoids s 63(1)(a) being declared unconstitutional to the extent that its provisions are overly broad in their effect, and, on the other, ensures that the means utilised by s 63(1)(a) do not violate the rights of affected persons in a manner that is disproportionate to the aims of s 63 (discussed above in chapter nine).¹⁷⁴

¹⁷⁴ For proposed guidelines *re* the granting of a valid consent under s 63(1)(a), see para 11.3.5 below.

(b)(ii) Section 63(1)(b): a warrantless search on reasonable grounds

In terms of s 63(1)(b) of the TAA, the powers in s 61(3) may be exercised at a warrantless search if a senior SARS official ‘on reasonable grounds is satisfied’ that the jurisdictional facts in ss 63(1)(b)(i), (ii) and (iii) are present.¹⁷⁵ For purposes of s 36(1)(e) of the BOR, a relevant consideration is whether the full spectrum of powers exercisable under s 61(3) is proportional to the factual basis indicated by s 63(1)(b)(i) as the sole justification for the search. Although this provision only permits a search when ‘there may be an imminent removal or destruction of relevant material’, the TAA does not, for purposes of s 63(1)(b), expressly limit the exercise of the powers in s 61(3) to those which would protect and preserve such material, thereby ensuring their availability and accessibility for tax administration purposes. The nature and extent of the powers exercisable at a search conducted under s 63(1)(b) must bear a direct correlation to the narrow circumstances that give rise to the need for, or cause of, the search in the first instance. Unless the wide powers conferred by s 61(3) are sufficiently circumscribed in the context and for purposes of s 63(1)(b), the exercise of all the available powers therein may aptly be described as ‘breath-taking in their scope’.¹⁷⁶ Put differently, they would be significantly overbroad. The result hereof would be disproportionate in the sense that a greater invasion of privacy would be permitted than is reasonably necessary to overcome the narrowly stated mischief at which s 63(1)(b) is directed. Such a state of affairs would lead to a finding of unconstitutionality in relation to warrantless searches under s 63(1)(b). It is submitted that the TAA is susceptible to an interpretation that would, if applied, uphold the validity of the provisions in s 63(1)(b). To this end, for purposes of s 63(1)(b),

¹⁷⁵ As discussed above in chapter nine, the test for ‘on reasonable grounds is satisfied’ is objective. In determining whether this requirement is met, consideration must be given to whether a reasonable person in the position of the senior SARS official who made the disputed decision to conduct a warrantless search, and possessed of the same information at such official’s disposal at the relevant time, would have been satisfied that good and sufficient (‘reasonable’) grounds exist to justify a belief that the jurisdictional facts listed in s 63(1)(b) are met. See *Bert’s Bricks (Pty) Ltd and Another v Inspector of Mines, North West Region and Others* (unreported case no.15347/2011) [2012] ZAGPPHC 11 (9 February 2012) paras [10] - [11]. Whether a search is conducted for good reasons will depend on the surrounding circumstances and the subject matter of the search. Relevant factors include the nature and seriousness of the alleged non-compliance, the taxpayer’s history of non-compliance, the nature of the ‘relevant material’ and ease with which it may be removed or destroyed, and the existence of additional, accessible copies of the material in question.

¹⁷⁶ *Powell NO and Others v Van der Merwe and Others* 2005 (5) SA 62 (SCA) para 45.

the powers conferred by s 61(3) ought to be construed with reasonable strictness. The only powers conferred thereby that ought to be exercisable for the specific purpose and context of s 63(1)(b) are those powers that would enable the relevant material contemplated by the provisions of s 63(1)(b)(i) to be found, seized and/or copied so that they may be protected and preserved. An interpretation of the TAA in a manner consonant with the submissions made here is intelligible and ought to be favoured because, first, it ensures that effect is given to the end sought by s 63(1)(b). Secondly, the interpretation contended for here guards the privacy rights of the subject of a warrantless search in that it protects them against excessive, unwarranted intrusion by keeping the limitation thereof by s 63(1)(b) read with s 61(3) within acceptable constitutional bounds.

(b)(iii) Availability of less restrictive means than warrantless searches

The discussion above shows that warrantless searches under the TAA involve a high degree of invasiveness of the privacy of those persons whose ‘premises’ are searched and property, possessions or communications seized. The strong emphasis placed on the protection of fundamental rights is an integral part of SA’s democratic hygiene. Public interest in the carrying out of a warrantless search to enhance the efficient and effective collection of tax to ensure continued access to adequate financial resources for funding, inter alia, SA’s national transformation projects cannot justify the abandonment of the protection of taxpayers’ privacy. In a democracy, the ends or results achieved do not justify the means utilised to attain them. Proportionality under s 36(1)(e) of the BOR in relation to warrantless searches conducted under s 63(1) of the TAA requires that consideration be given to whether other suitable, less intrusive or restrictive constitutional means were available to achieve the goals of s 63. This issue will now be canvassed.

The TAA caters for different mechanisms by which SARS may access ‘relevant material’ (as defined) in the hands of a taxpayer or third party connected with a taxpayer. The mechanisms are: an inspection (s 45), a request for information (s 46), an interview (s 47), a field audit or criminal investigation (s 48), an inquiry proceeding (s 52), and warranted as well as warrantless search operations (ss 61, 62, 63). These information gathering

mechanisms do not have a ranking or hierarchy in the TAA. Also, no particular mechanism may be labelled the single, most efficient or effective information gathering tool preferable above all others. Each mechanism applies in a specific context to achieve a particular statutory objective. On the tax administration landscape as a whole, the various mechanisms referred to here complement each other. Thus, they ought to apply alongside one another. The different mechanisms have varying criteria for their respective operation. Also, the extent of the powers related to each also differ. When evaluated in relation to their respective degree of intrusion of privacy, the least restrictive, it is submitted, would probably be a request for information and the most restrictive would be a search. Naturally, a warrantless, non-consensual search under ss 63(1)(b) and (4) is more drastic than a judicially sanctioned warranted search conducted under s 61 and a warrantless, consensual search occurring under s 63(1)(a).¹⁷⁷

Although the TAA does not create a formal hierarchy of mechanisms by which tax related information may be obtained, Croome¹⁷⁸ contends, with merit, that SARS ‘must first exhaust other less intrusive remedies to secure the requisite information’ than by way of the more drastic warrantless search method. The approach that s 63 ought to be a measure of last resort in exceptional circumstances accords favourably with that endorsed in *Thint (Pty) Ltd v NDPP and Others; Zuma and Another v NDPP and Others*¹⁷⁹ where Ngcobo J held:

‘The legislature contemplated that the state would use the less drastic measure consistently with the legislature’s concern for the right to privacy and other constitutional rights. It contemplated that when the state resorts to the more drastic mechanism in section 29(5), the state will provide an explanation or justification as to why the more drastic measure is used when there are less drastic measures available.’

¹⁷⁷ An encroachment on privacy by the State harms social values integral to a democratic society. See Cockfield AJ ‘Protecting the social value of privacy in the context of State investigations using new technologies’ (2007) 40(1) *University of British Columbia Law Review* 41 43-9. When assessing the validity of an encroachment, a fine balance must be struck between personal rights and the State’s right to self-preservation. Udombana NJ (2005) 55 writes: ‘Being a predator, the state must be contained if the individual is not to be placed in an extremely vulnerable position.’

¹⁷⁸ Croome BJ (2010) 307.

¹⁷⁹ 2009 (1) SA 1 (CC) para 377. Also, see *Ferucci* 235B-C.

The principle articulated in the quoted extract is not an inflexible rule of invariable application. Hence, the viability or appropriateness of less invasive constitutional means by which SARS may gather tax related information for specific TAA purposes would need to be adjudicated on a provision-by-provision basis in every case. No hard and fast rules can be given in advance. The presence in the TAA of less intrusive information gathering means than that actually catered for in s 63(1) by which the availability and accessibility of relevant material may be secured, does not mean that the mechanism actually chosen fails the proportionality test. For present purposes, the fact that less intrusive constitutional alternatives are available is not the end of the enquiry. The test for proportionality also demands consideration of whether the available alternatives would have been equally effective to combat the mischief at which s 63(1) is directed. This issue will now be discussed only in relation to s 63(1)(b) since s 63(1)(a) provides for consent.

The information gathering mechanisms in ss 45, 46, 47, 48 and 52 of the TAA are all, for present purposes, presumed to be constitutional.¹⁸⁰ As stated above, they are each also less restrictive of privacy than a warrantless, non-consensual search under s 63(1)(b) whose provisions, as shown above in chapter nine, apply in situations where time is of the essence. In other words, s 63(1)(b) caters for circumstances involving a high degree of urgency that necessitate prompt, immediate action by SARS to prevent probable harm to the 'administration of a tax Act' as defined by s 3(2) of the TAA, discussed above in chapter five, arising from an identified, reasonably foreseen, 'imminent' threat. To avert harm of the nature contemplated by s 63(1)(b)(i) materialising, requires that SARS be equipped with powers that would enable its officials to act swiftly and, without prior notice, to seize the relevant material reasonably believed to be at risk of removal or destruction. The statutory framework created in the TAA for inspections (s 45), requests for information (s 46), interviews (s 47), field audits and criminal investigations (s 48), and inquiries (s 52) is such that these mechanisms are, for the reasons outlined below, each ill-suited to effectively deal with the tax administration challenges which s 63(1)(b) is designed to address.

¹⁸⁰ A discussion of the constitutionality of the various alternative means referred to here is beyond the purview of this study. Hence, a discussion thereof will not be undertaken.

None of the alternative mechanisms mentioned above authorise SARS officials to seize relevant material or to deal with it in any other manner that would ensure its retention or preservation for tax administration purposes. Moreover, except for inspections, all other alternative mechanisms referred to require that advance notification be given to a taxpayer or other associated person against whom steps are intended to be taken.¹⁸¹ To effectively combat the mischief at which s 63(1)(b) is aimed demands that speedy action is taken on an unannounced basis. The elements of surprise and urgency are critical ingredients to successfully thwart any effort to remove or destroy relevant material likely to be found on premises. Prior notice would alert a would-be wrongdoer of SARS's intended action or plan, thereby significantly increasing the risk of the relevant material being successfully removed or destroyed before SARS's pre-announced arrival. In so doing, prior notice would severely hamper the achievement of the aims of s 63(1)(b). In the light of the foregoing, the other less restrictive constitutional means catered for in the TAA under ss 45, 46, 47, 48 and 52 are not equally or better suited than a warrantless, non-consensual search conducted under s 63(1)(b). Accordingly, warrantless searches under s 63(1)(b) of the TAA are reasonable and justifiable limitations for purposes of the proportionality requirement under s 36 of the BOR. Compliance with these constitutional standards is further evident from the following considerations: first, the absence of a warrant requirement is rationally related to the achievement of tax administration aims identified in the TAA; secondly, in terms of s 63(1)(b)(ii) of the TAA, a senior SARS official must, on reasonable grounds, be satisfied that the legal requirements for the issuance of a warrant under s 59 are met so that a warrant would have been issued by a competent court of law if an application for a warrant had been launched.

¹⁸¹ For example, the TAA (s 46(1)) reads: 'SARS may, for the purposes of the administration of a tax Act in relation to a taxpayer, whether identified by name or otherwise objectively identifiable, require the taxpayer or another person to, *within a reasonable period*, submit relevant material (whether orally or in writing) that SARS requires.' The provisions of s 46 are peremptory so that compliance therewith is mandatory. See *CSARS v Brown* (unreported case no. 561/2016) [2016] ZAECPEHC 17 (5 May 2016) para 39. The relevant portion of the TAA (s 47(1)) reads: 'A senior SARS official may, by notice, require a person, whether or not chargeable to tax, ... to attend in person at the time and place designated in the notice for the purpose of being interviewed by a SARS official concerning the tax affairs of the person ...'. The relevant portion of s 48(1) reads: 'A SARS official ... may require a person, with prior notice of at least 10 business days, to make available at the person's premises specified in the notice relevant material that the official may require to audit or criminally investigate in connection with the administration of a tax Act in relation to the person or another person.' As regards inquiries, the notice provision is in s 53(1).

10.5 CONCLUSION

The present chapter shows that taxpayers' privacy rights include personal, informational and territorial privacy interests. It shows further that, whilst s 45 warrantless inspections and s 63 warrantless searches, including seizures, entail the exercise of administrative powers that limit taxpayers' fundamental privacy,¹⁸² these impugned TAA provisions, both individually and collectively, serve important public purposes from which South African society derives significant benefit. Consequently, the present chapter balances the powers under ss 45 and 63 respectively in the light of the formula in s 36(1) of the BOR and with reference to relevant norms of international and foreign law concerning warrantless searches and inspections in an open and democratic society with a Bill or Charter of Rights. The public interest in tax administration was, on the scales of reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, delicately weighed against the competing privacy rights, and concomitant expectations, of taxpayers. The present chapter also shows that a causal link exists between, on the one hand, the privacy limitations under ss 45 and 63 of the TAA and, on the other, the attainment of the legitimate governmental aim to promote efficient and effective tax administration. Thus, a rational connection is shown to exist between the limitations of privacy rights and the State's efforts to ensure efficacy in tax collection and general tax administration that will enable the government of SA to fulfil its obligations under s 7(2) of the BOR (discussed above in chapter three). The present chapter shows further that, although the inspection and search (including seizure) powers are intrusive of taxpayers' privacy interests, they are protected. This is so because, first, the TAA curtails these powers to varying degrees. Secondly, s 8(1) of the BOR read with s 195(1) of the Constitution also provides some respite for taxpayers. In terms of s 8(1), SARS and the CSARS are bound by the BOR. Thus, SARS officials cannot act with impunity but in a manner that is in conformity with the BOR. In accordance with s 195(1), tax administration must occur with due regard for democratic values and principles.

¹⁸² For a useful discussion of the right to privacy and its protection in general, see Burchell J 'The protection of privacy in South Africa: A transpalatable hybrid' (March 2009) 13(1) *Electronic Journal of Comparative Law* 3 available at <http://www.ejcl.org/131/art131-2.pdf> (accessed 23 November 2014).

In accordance with the principle stated in *Hyundai Motors*¹⁸³ that an impugned statute ought, as far as is reasonably possible, to be construed in a manner that is constitutionally compliant, it is submitted that the scales ought to tilt in favour of a finding that s 63 of the TAA meets constitutional standards. The TAA's failure (i) to regulate the timing of a warrantless search, (ii) to define 'owner', 'person in control of the premises' and 'the occupant' for purposes of s 63, and (iii) to clarify the requirements for a valid consent to searches under s 63(1)(a), does not render the provisions of s 63 too vague for constitutional purposes. As was held in *Affordable Medicines*,¹⁸⁴ although the rule of law requires that laws are to be written in clear and accessible language, what is required is reasonable certainty and not absolute (or perfect) lucidity. Section 63 of the TAA read with s 61 thereof indicates with reasonable certainty what is required of persons bound by their provisions so that they may regulate their conduct accordingly. Thus, ss 63(1) and (4) ought to survive a constitutional challenge on the grounds of vagueness. The discussion in the present chapter also reveals that, when all legally relevant factors are duly considered for purposes of s 36 of the BOR, the limitations on taxpayers' privacy caused by searches and seizures¹⁸⁵ under ss 63(1) and (4), are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

As regards tax inspections, the present chapter shows that unannounced, warrantless inspections for tax administration purposes are reasonable and justifiable in an open and democratic society. They serve useful public purposes for the public's benefit.¹⁸⁶ Accordingly, tax inspections are, as a general rule, constitutional mechanisms for verifying tax compliance. For the reasons articulated above, it is submitted that the absence of a warrant requirement for an inspection does not mean that s 45 of the TAA goes too far by not providing less restrictive means to obtain information for the purposes

¹⁸³ At para 22.

¹⁸⁴ At paras 108-09.

¹⁸⁵ For judicial consideration of conduct amounting to deprivations of property, see *Cool Ideas* paras 38-41; *Mazibuko and Another v NDPP* 2009 (6) SA 479 (SCA) paras 22-4; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others* 2015 (10) BCLR 1158 (CC) paras 17-19.

¹⁸⁶ The CC, in *Sarrahwitz v Martiz NO and Another* 2015 (4) SA 491 (CC) para 51, held: 'State action must always be designed to advance a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism.'

of s 45(1). The burning issue that remains to be considered is whether ss 45(1) and (2) are couched in a manner that is constitutionally compliant. To this end, consideration must be given to the effect of the shortcomings identified in relation to s 45. First, unlike ss 61(3), (5) and (6) that list the powers exercisable at searches, the TAA omits specifying the powers that are available at inspections.¹⁸⁷ Secondly, unlike ss 61(4) and (8) and s 63(2) applying to searches, no procedural guidelines are provided for inspections, save that a SARS official is, under s 8(2), obliged to produce an identity card upon request by a member of the public when such official exercises, outside SARS's premises, a power or duty of tax administration. Thirdly, the TAA fails to provide clarity as to the scope of the objects (that is, the documents, books of account and records) that may be inspected under s 45. Fourthly, unlike s 64 that regulates the position when legal professional privilege issues arise during a search, the TAA contains no comparable provision that would apply when such issues arise at an inspection. The materiality of these shortcomings and their cumulative effect are such that s 45 may not, in its current form, be read in conformity with the Constitution: its provisions are not couched with reasonable certainty. Put differently, persons who are bound by s 45 are unable to ascertain from the TAA with any degree of clarity what is demanded of them so that they may conform their conduct in accordance with the law. The result hereof is that ss 45(1) and (2) of the TAA are susceptible to a declaration of invalidity for want of compliance with constitutional standards in the rule of law (discussed above in chapter three). It is submitted that the problems identified here in relation to ss 45(1) and (2) ought to be remedied by way of legislative amendments to s 45, the precise nature and terms whereof are matters discussed more fully in the ensuing final chapter of this dissertation.

¹⁸⁷ Until s 45 is amended to cure the *lacuna* by providing specific powers at an inspection, a SARS official would be powerless to, inter alia, direct any person to point out, furnish, produce or make available relevant records, books of account or documents sought to be inspected, and/or to direct appropriate enquiries to a person present at an inspection. Thus, the current legal position is that a SARS official requires the voluntary co-operation of a taxpayer or other person at an inspection. As the law presently stands, it is difficult to conceive how, arising from an inspection conducted under s 45, any person may be charged with, or found guilty of, an offence in ss 234(h)(i) and (ii), s 234(i) and s 234(k) of the TAA. The relevant portions of s 234 reads: 'A person who wilfully and without just cause — ... (h) refuses or neglects to — (i) furnish, produce or make available any information, document or thing, excluding information under s 46(8); (ii) reply to or answer truly and fully any questions put to the person by a SARS official; ... (i) fails to comply with a directive or instruction issued by SARS to the person under a tax Act; ... (k) obstructs or hinders a SARS official in the discharge of the official's duties; ... is guilty of an offence ...'

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'Finality is a good thing, but justice is better.' (Lord Atkin)¹

11.1 INTRODUCTION

Taxation is, as demonstrated above in chapter one, a necessary 'evil' for social, economic, and political reasons. Adequate revenue derived from taxation is crucial for ensuring sustainable governance in SA and the attainment of the broader human rights aspirations of SA's people exemplified in the Constitution. To this end, efficient and effective tax administration is a key determinant for capacitating the government of SA with the requisite financial resources that would enable it to achieve its socio-economic targets, provide security for its subjects, and ensure that SA's people have access to the necessities for a quality life. Accordingly, without adequate tax revenue, the ideals of real equality, infrastructural development, socio-economic growth and transformation would remain elusive because the government of SA would not be fiscally stable and, thus, financially able to implement its key development strategies, programmes and initiatives (such as the National Development Plan). In the light hereof, there is significant public interest in ensuring that there is efficient and effective tax collection and administration.² Although the structure of the Constitution does not contain a provision that expressly imposes a duty to pay tax, such a legal duty ought to be construed as incorporated by implication as part and parcel of the 'duties and responsibilities of citizenship' expressly dealt with in s 3(2)(b) thereof. As shown above in chapter three, *ubuntu* engenders a spirit that encourages and obliges every member of society, both natural and juristic, to pay their fair share of tax for communal or public benefit. Fulfilment of this critical constitutional *cum legal cum* civic duty facilitates the maintenance of a functioning, African-style democracy in an open society within SA that has a liberal culture and where human rights are guaranteed, and social justice, national unity, freedom and security for all persons are key social values that guide statutory and constitutional interpretation.

¹ *Ras Behari Lal and Others v The King Emperor* [1933] All ER Rep 723 [PC].

² To protect the public's interest in tax collection, s 94(1) of the TAA introduces a novel concept into South African tax law, namely, jeopardy assessments. Section 94(1) reads: 'SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.'

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As explained above in chapter three, SA is, under its Constitution, a rights-based society in which ‘the substantive enjoyment of rights has a high premium’.³ This rights culture and ethos is crystallised by the BOR proclaiming itself to be ‘a cornerstone of democracy in South Africa’ (s 7(1)). The protection of rights applies irrespective of whether they originate from a primary or secondary source, and regardless of whether they are, as discussed above in chapter seven, subsumed under the rubric of a primary or secondary right. Section 39(3) of the BOR confirms the existence of rights and freedoms that are ‘recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill’. Thus, South African taxpayers have access to a broad range of binding and enforceable rights stemming from the common law, tax legislation, judicial precedent, the Constitution and customary international law.⁴ Since tax administration takes place subject to constitutional control and the rule of law, SARS, the CSARS and their subordinates or agents are obliged to fulfil their administrative functions with utmost respect for taxpayers and taxpayer rights under South African law. A breach of this legal duty would entitle a taxpayer to have the offending conduct, or the law permitting such conduct, reviewed and set aside by courts of justice⁵ if the conduct or law is found to be constitutionally wanting. It is against this backdrop, and the emphasis in SA and internationally on taxpayers’ rights in tax administration, that chapters four, six and ten above answered the specific research questions formulated above in chapter one at paras 1.2 (i), (ii), (iii) and (iv) thereof. The key findings made in relation to each question will be recapitulated below in order that the motivation for the recommendations made hereunder in respect thereof is contextualised and may be properly understood.

³ *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) para 44.

⁴ Universally accepted rules or principles of customary international law apply in SA, subject to the operation of the proviso in s 232 of the Constitution. Their application in SA is not dependent on the government of SA ratifying the international human rights instrument or convention from which the rule or principle is derived. Section 233 of the Constitution, discussed above in chapter two, provides a legal basis for the applicability of international law human rights norms and standards in SA. International human rights law is applicable in SA ‘through two constitutional devices – as an instrument of *interpretation* and by virtue of the incorporation of the *substance* of public international law into municipal law’ (Erasmus G ‘Limitation and Suspension’ in van Wyk D, Dugard J & de Villiers B *et al Rights and Constitutionalism: The New South African Legal Order* (1994) 637). For a discussion of the application and enforcement in SA of international tax treaties and agreements generally, see *CSARS v Van Kets* (2012) 74 SATC 9.

⁵ Beukes M (1997) 452 states that, unlike in the apartheid era, in SA’s post-constitutional dispensation, courts are to be described as ‘courts of justice’ and not simply as ‘courts of law’.

11.2 PROBLEM STATEMENTS: RECAPITULATION OF KEY FINDINGS

Apart from the general research question emanating from the title of this dissertation, chapter one above identified four constitutional issues affecting the ‘administration of a tax Act’ under the TAA, a term discussed above in chapter five, that require focussed research with reference to the values and principles in the Constitution. These issues are:

- (a) Whether, when Parliament passed the TAA, it complied with the prescribed procedural requirements under the Constitution. This question, answered in the affirmative above in chapter four, centred on whether the TAB 11B, 2011 was a ‘money Bill’ contemplated by s 77 of the Constitution and therefore subject, in the course of the formal process of its enactment as the TAA, to satisfying the procedural requirements of the Constitution relating to Bills of such a legal nature;
- (b) Whether natural persons located beyond SA’s borders are entitled, as taxpayers, to the protection and benefit of those fundamental rights in the BOR, discussed above in chapter seven, that apply in tax administration. This question, answered in the affirmative above in chapter six, concerned the extraterritoriality of the BOR in the light of principles of international law and relevant provisions in the Constitution;
- (c) Whether trusts, insolvent estates and estates of deceased persons are entitled, as taxpayers, to the protection and benefit of those fundamental rights entrenched in the BOR that apply in tax administration. This question, answered in the affirmative above in chapter six, centred on whether these juristic taxpayers may be construed as ‘juristic persons’ within the meaning thereof in s 8(4) of the BOR; and
- (d) Whether SARS’s powers in ss 45 and 63(1) and (4) of the TAA, discussed above in chapter nine, pass muster under s 36(1) of the BOR, discussed above in chapter eight. This question, answered in the affirmative in chapter ten subject to qualifications as regards s 45, centred on whether the powers limit taxpayers’ fundamental privacy and, if so, whether they are reasonable and justifiable in an open and democratic society.

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For reasons already stated, the key findings made in relation to the research questions in (b), (c) and (d) above, and the essential legal basis therefor, will be outlined in summary form below. In addition, proposals will be made, where applicable, in order to resolve the concerns raised or shortcomings identified in respect thereof. It is unnecessary to do so in relation to the research question referred to in (a) because of the view expressed above in chapter four, namely, that the TAB 11B, 2011 was not a ‘money Bill’ for national legislative purposes and that the legal process followed for its enactment as the TAA was in accordance with the Constitution. Hence, for purposes of this chapter, nothing further needs to be said thereon since no recommendations are necessary in relation thereto.

11.2.1 Are taxpayers who are natural persons and located beyond SA’s borders entitled to the rights in the BOR during tax administration?

South African taxpayers include persons onshore in SA or offshore in foreign jurisdictions. This is so because the panoply of tax laws applicable in SA, like those in other countries, affects taxpayers located within and beyond SA’s geographical borders and territorial waters. Consequently, tax administration by SARS officials may affect taxpayers located anywhere in the world, including their pecuniary, legal or other rights, title and/or interests. The Constitution and the rule of law bind SARS and its officials to execute their statutory administrative functions in a manner that is consistent with the letter of SA’s laws and the spirit and ethos of its BOR. While this constitutional duty, entrenched in s 8(1) of the BOR, provides protection for taxpayers’ rights, it is, on its own, inadequate. To be effective, all taxpayers’ rights, irrespective of their legal source, must be justiciable (that is, enforceable in courts of justice). The absence of justiciable rights exposes taxpayers, inter alia, to the risk of abuse by tax administrators. During the apartheid era, the absence of a justiciable BOR, and non-adherence to the principles encapsulated in the rule of law, enabled SA’s tax authority to operate without a democratic consciousness and, at times, with impunity. This led to injustices in tax administration. A recurrence of such a state of affairs would be inimical to SA’s democratic ethos. To avert such recurrence requires *all* taxpayers, both onshore and offshore, to be entitled to the protection afforded by the fundamental rights in the BOR.

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With reference to *Kaunda*, the extraterritorial application of the BOR to natural persons who are taxpayers located outside SA is discussed above in chapter six. *In casu*, the majority judgment adopted a rather strict interpretation of the phrase '[i]t [the BOR] enshrines the rights of all people in our country' (s 7(1)) and concluded that the BOR does not apply extraterritorially. If this decision, without more, applies rigidly and dogmatically in tax administration by SARS under the TAA, then the operation of the BOR and the fundamental rights therein will not benefit taxpayers who are natural persons physically located beyond SA's geographical borders and territorial waters.⁶ A proper reading of the majority judgment in *Kaunda* reveals that such a narrow interpretation of the scope of the BOR's application is not intended to operate as an inflexible rule. Every case would still need to be judged on its own peculiar facts in order that justice may be done and be seen to be done, a fundamental principle of natural justice. As discussed above in chapter six, the majority judgment in *Kaunda* leaves room for manoeuvre so that the BOR may apply extraterritorially in an appropriate tax, commercial, maritime or other context outside the narrow remit of the factual matrix before the Court in *Kaunda*. Thus, it is submitted that the majority and minority judgments in *Kaunda* recognise that SA's constitutional and human rights law must come to terms with the economic, social, political and other realities prevailing in SA.⁷ To this end, an interpretation of the BOR ought to be adopted that fosters protection of all natural persons who are taxpayers under any of SA's myriad of sprawling tax laws. Unless such an interpretive approach is adopted, the BOR will lose some of its shine as a beacon of justice for all persons in a democratic SA governed by the rule of law.⁸ If the interpretive approach contended for here is found to be constitutionally wanting, then the issue arises as to which alternative legal remedies would be available to those natural persons whose taxpayer rights and/or interests may be adversely affected. Such alternatives are proposed below at para 11.3.3.

⁶ The current state of South African law imposes two requirements for natural persons to be eligible to hold a fundamental right and incur a constitutional duty: first, any requirement specified in the text of a right in the BOR; secondly, the rules enunciated in the majority judgment in *Kaunda*.

⁷ This is also emphasised in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 64; *ABSA Bank Ltd v Trustees for the Time Being of the Coe Family Trust and Others* 2012 (3) SA 184 (WCC) 191B-D.

⁸ Botha H (2001) 539 observes, probably correctly, that 'the rule of law is vital in ensuring democratic accountability and in fighting social injustice'.

11.2.2 Are juristic taxpayers in the form of trusts and the estates of deceased and insolvent persons entitled to the rights in the BOR during tax administration?

Section 8(4) of the BOR is the gateway for access to fundamental rights by juristic persons. It does not confer any specific right on a particular type or category of juristic person. Rather, s 8(4) is a general application provision recognising the right of juristic persons generally to claim an entitlement to appropriate fundamental rights. Chapter six above showed that the term ‘person’ is used in the BOR in different contexts: first, as an object of a right;⁹ secondly, as the legal subject on whom a right is conferred;¹⁰ and thirdly, as part of a composite term, namely, ‘natural person’ and ‘juristic person’ (ss 8(2) and (3)). In s 8(4), ‘person’ is not utilised in isolation but in the ‘abstract’¹¹ term ‘juristic person’. The notion of a juristic person is a ‘social invention’:¹² it is the ‘antithesis of a “natural person”’.¹³ ‘Juristic person’ denotes an artificial entity through which a natural person, acting individually or in a group, may conduct commercial or other affairs for public or private benefit. A juristic person lacks a physical form or existence: it is an ‘artificial person with no body to kick and no soul to damn’.¹⁴ For this reason, natural persons represent juristic persons as their agents. The law confers legal status on juristic persons so that, by virtue of their legal personality, they may possess rights and incur duties.¹⁵

⁹ For example, ‘the right to freedom and security of the person’ (s 12(1)); ‘the right not to have – (a) their person ... searched’ (s 14); ‘measures designed to protect or advance persons, or categories of persons’ (s 9(4)); ‘re-detaining that person’ (s 37(7)); and ‘the detention of ... persons’ (s 37(8)).

¹⁰ For example, ‘[a] juristic person is entitled to the rights in the Bill of Rights’ (s 8(4)); ‘[n]o person may unfairly discriminate’ (s 9(4)); ‘[a] person ... whose tenure of land is legally insecure as a result of ...’ (s 25(6)); ‘[p]ersons belonging to a cultural, religious or linguistic community may not be denied ...’ (s 31(1)); ‘that person may not be detained again’ (s 37(7)); and ‘[t]he persons who may approach a court are ...’ (s 38).

¹¹ Rautenbach IM (2012) 75.

¹² Ramirez MK (2005) 934.

¹³ Feenstra R ‘The development of the concept foundation in Continental law’ 1971 *Acta Juridica* 123.

¹⁴ Per Centlivres CJ in *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) 606G (quoted with approval in *CIR v Pick ‘n Pay Wholesalers (Pty) Ltd* 1987 (3) SA 453 (A) 473). See also *Barclays Zimbabwe Nominees (Pvt) Limited v Black* 1990 (4) SA 720 (A) 726F.

¹⁵ Fitzgerald PJ (ed) *Salmond on Jurisprudence* 12 ed (1966) 299; Pienaar G ‘Regspersone: Fiksie of feit?’ (1994) 57(1) *THRHR* 92 93-6; Paranjape NV *Studies in Jurisprudence and Legal Theory* 4 ed (2004) 315. The rights and powers of a juristic person, and of natural persons in their capacities as its members, administrators or agents, are contained in the juristic entity’s constitutive charter,

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Qualifying as a 'juristic person' is the gateway requirement for application of s 8(4). Unless this requirement is satisfied, s 8(4) does not come into play. The text of s 8(4) impliedly confirms that, first, juristic persons are not entitled to all fundamental rights. Secondly, the specific fundamental rights conferred by the BOR on particular types of named or listed juristic persons are not the only fundamental rights to which those entities are entitled. Nor do those entities constitute a *numerus clausus* of juristic persons with a claim to fundamental rights. In other words, other unlisted or un-named juristic persons may also qualify as beneficiaries of the BOR. Such juristic persons or entities ought, it is submitted, to include trusts and the estates of deceased and insolvent persons.

'Juristic' describes the type of constitutional person to which s 8(4) of the BOR applies. It would be unwise, perhaps even futile, to attempt to formulate comprehensive, finite definitions of 'person' or 'juristic person' for the purposes of s 8(4). Hence, this dissertation does not attempt to do so. Suffice it to say that 'person' and 'juristic person' ought, in their constitutional context, to be flexible in their meanings so that s 8(4) may apply to a wide range of entities.¹⁶ It is imperative that the umbrella of protection afforded by the BOR extends broadly. A transformative approach to interpreting 'juristic person' in the context of s 8(4) supports a result that embraces within its reach trusts, deceased estates and insolvent estates that are, at common law, *personae non iuris* but are, for tax purposes under the laws of SA, statutory juristic persons with legal personality. An interpretation that denies constitutional personhood and constitutional personality to any such juristic entity utilised by a natural person would, it is submitted, be incongruous with the spirit, purport and objects of the BOR (discussed above in chapter six). Any such denial of constitutional personhood and personality would be overly formalistic, reflect an unacceptably high degree of rigidity that runs counter to the flexible approach adopted in fundamental rights jurisprudence, and would overlook the transformative spirit and ethos of the Constitution. Hence, the interpretive approach contended for here in relation to 'juristic person' ought to resonate with the courts in SA.

deed, agreement, memorandum or other legally binding and enforceable document regulating its affairs.

¹⁶ For further discussion of 'juristic person' in the BOR context, see du Bois F (ed), Bradfield G & Himonga C *et al* (2014) 395; de Vos P, Freedman W (eds) & Brand D *et al* (2014) 785.

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Juristic persons are vehicles through which natural persons exercise certain of their rights. Thus, these types of persons exist ‘on the periphery of life, personhood and humanity’.¹⁷ Through critical analysis and interpretation of the concepts ‘person’ and ‘juristic person’, this dissertation advances the hypothesis that the compass of s 8(4) extends to all juristic taxpayers, including trusts, insolvent estates and the estates of deceased persons, so that, during tax administration conducted by SARS, all such taxpayers are entitled to the benefit and protection of fundamental rights. This conclusion, at least as regards trusts, accords favourably with the judicial precedent that recognises, albeit by assumption and implication only, that trusts are, in their own right, bearers of fundamental rights.¹⁸ The legal recognition of constitutional personhood and personality under s 8(4) for trusts and the estates of deceased and insolvent persons would exemplify the infusion of the spirit of *ubuntu* into the interpretation of ‘juristic person’. The value-laden, democratic system of SA with its rights oriented culture manifests itself when the spirit of *ubuntu* embodying the values of respect and tolerance extends to all juristic entities utilised by natural persons. The extension of fundamental rights to trusts and the estates of deceased and insolvent persons ensures that an imbalance is not created through respect being shown for, and protection afforded to, the fundamental rights of some taxpayers and not others. The equal protection under the BOR for *all* juristic taxpayers also averts elevating the interests of some taxpayers above those of others. This, in turn, avoids the creation of a hierarchy of taxpayers with unequal status in constitutional law. Accordingly, it is submitted that, even in the absence of a formal constitutional amendment, a purposive approach to the interpretation of the term ‘juristic person’ would enable s 8(4) of the BOR to be construed transformatively and in a manner that leads to an affirmative answer for research question (iii) formulated above at para 1.2 of chapter one.

¹⁷ Van Coller A (2011) 311.

¹⁸ See *Municipality of the City of Port Elizabeth v Prut NO and Another* 1996 (4) SA 318 (E); *Minister of Education and Another v Syfrets Trust Ltd NO and Another* 2006 (4) SA 205 (C) para 28; *Haffejee NO and Others v eThekweni Municipality and Others* 2011 (6) SA 134 (CC) para 27; *Governing Body of the Juma Masjid School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) paras 56-7 62; *Trustees of the Simcha Trust v De Jong and Others* 2015 (4) SA 229 (SCA). It bears noting that in these cases the Courts did not delve into the substantive provisions of the Constitution to make a definitive determination that trusts are beneficiaries of fundamental rights. The Courts proceeded largely on the assumption that trusts are entitled to rights under s 8(4) of the BOR. The discussion in this dissertation provides a concrete constitutional basis for the assumed legal position taken by the Courts in the cases mentioned here.

11.2.3 Do ss 45(1) and (2) and 63(1) and (4) of the TAA limit taxpayers' privacy in a manner that passes muster under s 36(1) of the BOR?

By virtue thereof that SA's constitutional order 'hinges also on the rule of law', no public power may be exercised by an organ of state or public official 'unless it is sanctioned by law'.¹⁹ For tax purposes, SARS and its officials may only exercise power granted to them by legislation. All power vested in them, and all State resources at their disposal, belong to the public.²⁰ Hence, as repositories thereof, SARS and its officials must use public power and State resources on behalf, and for the benefit, of the public whom they serve. The impugned TAA provisions confer administrative powers that permit SARS officials to exercise discretion whether to carry out a warrantless inspection (s 45) and warrantless search and seizure (s 63). SARS officials are empowered, inter alia, to enter a taxpayer's residential and business premises and then, without prior or subsequent judicial sanction or supervision, inspect or search and seize, as the case may be, 'relevant material' as defined in the TAA (s 1). These are formidable powers whose exact nature and extent are discussed above in chapter nine.²¹ The exercise of the discretionary powers referred to here is 'administrative action' that must conform to the norms and standards crafted in skeletal form in s 33 of the BOR and expounded in detail under the PAJA.²² Section 33 and the PAJA are significant counterweights to SARS's powers in the TAA. In terms thereof, administrative conduct is valid if it is lawful, reasonable and procedurally fair. If not, then administrative justice permits the impugned conduct to be set aside on review.²³

¹⁹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) paras 74-5.

²⁰ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 53.

²¹ Bovijn S & van Schalkwyk L (2012) 525 write in relation to s 63: 'The SARS has indicated that it intends to execute the provisions in limited circumstances, being only to target serious tax evaders. However, the TAA still grants the wide powers and the comments of the SARS that they will only target serious tax evaders and that it would only be applied to a very limited number of taxpayers are not binding.'

²² *Metcash* paras 32 40-2. The Court, in *CSARS v Saleem* 2008 (3) SA 655 (SCA) para 14, held: 'The facts and circumstances of each detention and seizure are different. As stated herein before the[se] powers, like any other administrative powers, must be exercised fairly and reasonably in accordance with the purpose and spirit of the Constitution and with due regard to the rights of the individual.' Also, see van Niekerk A (2013) 73-6; Erasmus DN (2013) 35-42.

²³ In a review, some deference is shown to administrative conduct. See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC)

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Mayat J, in *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa, In Re : Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others*,²⁴ summarised the grounds for judicial review under the PAJA. Mayat J held administrative action to be reviewable if an administrator was not authorised by the empowering legislation to take the relevant action or acted under a delegation of power that was not authorised by the enabling statute. Furthermore, Mayat J held administrative action reviewable if it was procedurally unfair, or materially influenced by an error of law, or the action was taken (i) arbitrarily or capriciously, (ii) for a reason not authorised by the empowering legislation, or (iii) on the basis of irrelevant considerations or because relevant considerations were not considered. Mayat J also held administrative action to be reviewable if the action itself (i) contravenes legislation or is not authorised by the empowering provision, or (ii) is not rationally connected to the purpose for which the action was taken, or the purpose of the empowering provision, or the information before the administrator at the time the action was taken, or the reasons given for the action.

When exercised, the powers in ss 45 and 63 of the TAA erode a taxpayer's fundamental privacy to such a degree that, as shown above in chapter ten, the encroachment is a limitation under s 36(1) of the BOR. Thus, the onus rests on the State, represented by SARS and the relevant Cabinet Minister, to prove on a preponderance of probabilities that the limitations meet the test of 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' (s 36(1)). If this onus is not discharged, then the impugned TAA provisions, or any among them, are susceptible to a declaration of invalidity under the Constitution. The analysis undertaken above in chapter ten led to the hypothesis expressed there that, in their current form in the TAA, s 63 is likely to survive a constitutional challenge but s 45 not. For this reason, proposals are made below for amendments to be effected to the content of s 45.

paras 42-9; *Brown v Health Professionals Council of SA and Others* [2016] 2 All SA 62 (WCC) paras 14-18. Review as a remedy against unlawful administrative action is distinct from a 'defensive' or 'collateral' challenge to the validity of an administrative act. See *3M South Africa (Pty) Ltd v CSARS and Another* [2010] 3 All SA 361 (SCA) para 32; *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 85.

²⁴ [2014] 3 All SA 171 (GJ) para 40.

11.3 RECOMMENDATIONS

As shown above in chapter five, tax administration is part of public administration. Thus, tax collection and general tax administration must occur in a principled way consistent with the Constitution's spirit and ethos. By virtue of s 195(2) of the Constitution read with s 239 thereof, SARS and the CSARS are, as organs of state, required to apply the democratic values and principles laid down in s 195(1) that would, if strictly adhered to, promote a deeper culture of democracy in tax administration. However, constitutional values and principles, including those enumerated in s 195(1), do not create justiciable rights for taxpayers nor impose enforceable obligations on SARS.²⁵ Thus, presently, the taxpayers of SA do not have a legal remedy merely because tax administration occurs in a manner inconsistent with the Constitution's normative values and principles. A remedy exists only to the extent that conduct either infringes or threatens to infringe a recognised right in law. It is shown above in chapter ten that where this occurs, the norms and standards of a democratic society enshrined in the Constitution will guide the process of balancing taxpayers' legitimate expectations with the public interest ostensibly served by the intrusion or threatened intrusion on taxpayers' rights.

This dissertation highlights certain shortcomings in the relationship between taxpayers and SARS arising from the latter's role as SA's internal revenue administration agency. These include: (i) the absence of a national charter of taxpayers' rights and a uniform code of conduct for SARS; (ii) the existence of a Tax Ombud that is neither structurally nor sufficiently fiscally independent, nor empowered to make binding recommendations or rulings; (iii) the uncertainty in law as to whether trusts, insolvent estates and the estates of deceased persons are, as juristic taxpayers, entitled to the fundamental rights in the BOR; (iv) the lack of guidelines that regulate the execution of inspections conducted under s 45 of the TAA; and (v) the paucity of procedural guidelines in the TAA as regards warrantless searches and seizures conducted under s 63 thereof. The ensuing recommendations are each aimed at resolving these shortcomings in the tax arena.

²⁵ See *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) paras 74-6.

11.3.1 Legislating a Taxpayer Protection Act with a Bill of Taxpayers' Rights

Tax administration is a service rendered for the public benefit in which a taxpayer is a client of SARS, although not a 'consumer' under the Consumer Protection Act, 2008. Thus, taxpayers are not entitled to the consumer rights conferred thereby.²⁶ Taxpayers ought to be entitled to treatment that is considerate, decent, dignified, ethical, fair, humane, lawful, respectful and unbiased. They ought also to be entitled to a quality service that is accurate, courteous, efficient, honest, helpful, polite, punctual, prompt and professional. SARS officials ought also to be accessible, accountable, competent, equitable, fair-minded, impartial, non-arbitrary, open, rights and service orientated, transparent and responsive to taxpayers and their needs. These qualities are hallmarks consistent with the Constitution's ethos. They promote efficiency and effectiveness in tax administration with service excellence as a key aim. Qualities antithetical thereto and that undermine the credibility of, and the public's faith and trust in, SARS as a reputable organisation include abusiveness or hostility towards taxpayers, arrogance, bias, bullying, close-mindedness, disrespect, defensiveness, deafness to criticism, engagement in corrupt or coercive or deceitful or clandestine activities, harassment, incivility, ignorance of the law, maladministration, unresponsiveness, and unethical conduct. In SA, taxpayers do not have rights to treatment and service as advocated here, except to the limited extent as may be implied in the rights to human dignity and/or to just administrative action, and by statutory provisions obliging SARS to act with decency and order. To create binding and enforceable minimum service standards for tax administration by SARS, and to confer taxpayer rights of the nature referred to here, a Taxpayer Protection Act that incorporates a BOTR ought to be legislated. The rights in a BOTR would exist in addition to, and not in lieu of, those entrenched in the BOR. Since taxpayers are generally not *au fait* with the text of the BOR, a Taxpayer Protection Act that is readily accessible to all taxpayers and drafted in language that is clear and simple for taxpayers to understand will advance education among taxpayers of their core legal rights and key duties and responsibilities.

²⁶ For the application of the Consumer Protection Act 68 of 2008 generally, see *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government and Others* [2016] 3 All SA 794 (FB).

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In 1997, a draft SARS 'Client Charter' was disseminated to enhance taxpayer education. It highlighted some taxpayer rights and duties without creating new ones.²⁷ In 2005, SARS published a Service Charter containing measurable, minimum performance standards aimed at improving tax compliance.²⁸ Neither the Client Charter nor the SARS Service Charter are presently in use. The implementation of a charter of taxpayers' rights would be a positive step that brings SA into line with Western democracies, such as Australia, Canada, New Zealand, the USA, and various States of the European Union. For the purposes of this dissertation, it is unnecessary to conduct a comparative analysis of available Charters of Taxpayers' Rights. In any event, a literature survey shows that this is ground already covered.²⁹ A BOTR will deepen SA's culture of rights and has the potential to weaken tensions between SARS and taxpayers. Therefore, in the Appendix hereto, a model BOTR, tailored to the South African context and based on the triadic pillars of rights, freedom and responsibility, is proposed as part of a Taxpayer Protection Bill, 2016 that may be used as a blueprint for future legislation to be passed in SA.³⁰ The draft Bill also promotes the achievement of equality between taxpayers as consumers of SARS's service, and 'consumers' as defined in the Consumer Protection Act, 2008.

²⁷ Croome BJ (2010) 304-05; Croome BJ & Olivier L (2015) 641 920-24. See also Williams RC 'The South African Revenue Service "Client Charter"' (1998) 115(3) *SALJ* 527-35.

²⁸ A taxpayer charter plays a useful role in promoting enhanced tax compliance. See Bentley D 'The significance of declarations of taxpayers' rights and global standards for the delivery of tax services by revenue authorities' (2002) available at http://epublications.bond.edu.au/law_pubs/35 (accessed 9 October 2014); Unger K 'Ethics codes and taxpayer charters: Increasing tax morale to increase tax compliance' (2014) 12(2) *eJournal of Tax Research* 483.

²⁹ See, for example, Croome BJ (2010) 266-303. Also, see Greenbaum A 'Taxpayers' Bills of Rights 1 and 2: A charter to be followed by the rest of the world or just another attack on the tax authority?' (1997) 7(1) *RLJ* 138; Sawyer AJ 'A comparison of New Zealand taxpayers' rights with selected Civil Law and Common Law countries – have New Zealand taxpayers been "short-changed"?' (1999) 32(5) *Vanderbilt Journal of Transnational Law* 1345-1400. For a general discussion of taxpayer charters, see Tucker J 'Taxpayers' Bill of Rights' (1993) 28(1) *Taxation in Australia* 50; Bentley D 'Taxpayers' charter: Opportunity or token gesture?' (1995) 12 *Australian Tax Forum* 1; Petersen S 'The rights of third-party taxpayers under the taxpayers' Bill of Rights' (1997) 1 *Journal of Small & Emerging Business Law* 325; James S, Murphy K & Reinhart M 'The taxpayers' charter: A case study in tax administration' (2004) 7(2) *Journal of Australian Taxation* 336; Cockfield AJ 'Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: Toward a multilateral taxpayer Bill of Rights' (2010) 42(2) *University of British Columbia Law Review* 419; Dogan A & Gokbunar R 'Taxpayers' rights and an evaluation for Utah taxpayer Bill of Rights' (2012) 38 *Turkish Public Administration Annual* 37.

³⁰ The Bill is not modelled on any foreign statute. When drafting it, reference was made to the draft Taxpayer Protection Act of 2016 (USA), Bentley D 'Formulating a taxpayers' charter: Setting the ground rules' (1996) 25 *Australian Tax Review* 97, OECD (2003) 8-11, and Cadesky M, Hayes IE & Russell D *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (2016) ch 2.

11.3.2 Defining ‘juristic person’ in s 8(4) by constitutional amendment

The discussion above in chapter six shows that the adoption of the common law meaning of ‘person’ for constitutional purposes arising from s 8(4) of the BOR would deprive trusts, and estates of deceased and insolvent persons of access to fundamental rights. In so doing, they would be denied the equal benefit and protection of the law guaranteed by s 9 of the BOR. A broad, liberal, transformative approach to the interpretation of ‘juristic person’ in s 8(4) is, in chapter six above, advocated that would, if applied, result in the reach of s 8(4) extending to *all* juristic taxpayers because they are ‘persons’ for tax law purposes. However, if this interpretation is, for any reason, found to be constitutionally wanting, then it is recommended that, in accordance with s 74 of the Constitution, the definitions clause in s 239 thereof ought to be amended by the insertion therein of the following definition: “‘juristic person’ includes any trust, the estate of a deceased person, and an insolvent estate’. This proposed definition in the Constitution’s text would be advantageous for various reasons. First, it can be applied universally to all areas of law (not only tax law). Secondly, the definition is not rigid but is sufficiently flexible so that it may include within its ambit other types of non-human entities. Thirdly, the use of the proposed definition would avoid the injurious results referred to above that would ensue if trusts, and the estates of deceased and insolvent persons are ineligible to benefit from the fundamental rights in the BOR. It bears noting that the need for a constitutional amendment of the nature referred to here would, for tax purposes, be diminished, if not negated altogether, if Parliament passes a law in the mould of the Taxpayer Protection Bill, 2016 proposed in the Appendix to this dissertation.³¹ This is so because the BOTR formulated therein incorporates the essence of those fundamental rights in the BOR that are, as discussed above in chapter seven, relevant in the sphere of tax administration.

³¹ It is submitted that a BOTR ought to be legislated into the fabric of South African law and ought not to be left in the hands of SARS to unilaterally adopt on such terms as it deems appropriate. SARS ought not to be in a position that empowers it to unilaterally amend or withdraw a BOTR if it deems doing so expedient for any reason. Like the BOR in the Constitution, a BOTR is a *sui generis* instrument of crucial legal *cum* practical significance for taxpayers in their public law relationship with SARS. This is the more so if, as recommended herein, a BOTR is wrapped into a single document with a SARS Service Charter. Consequently, a BOTR ought to be passed by Parliament as national legislation. This would be preceded by a process of public consultation in accordance with SA’s mode of participatory democracy discussed above in chapter five.

If the interpretation of ‘juristic person’ advocated above does not find favour with the courts in SA, and neither the proposed constitutional amendment nor the proposed BOTR materialises,³² then a trust and the estates of a deceased person or an insolvent person would not be remediless as regards challenging the validity of the impugned TAA provisions. Every taxpayer adversely affected by inspections or searches occurring under ss 45 and 63 of the TAA respectively may challenge their constitutionality. A juristic taxpayer in the form of a trust and the estate of a deceased or an insolvent person could mount such a challenge as a member of, or in the interest of, taxpayers generally since ‘taxpayers’ constitute an identifiable group or class of persons contemplated by s 38(c) of the BOR (discussed above in chapter eight). Alternatively, they could launch any such challenge in the public interest under s 38(d) of the BOR discussed above.³³

11.3.3 Interpretation of the BOR permitting its extraterritorial operation

The majority decision in *Kaunda* was discussed above in chapter six. There it was shown that a strict interpretation of that judgment would limit, as regards natural persons, the application of the fundamental rights in the BOR to persons who are physically present in the territory of SA. If the broad, transformative approach to the interpretation of the application provisions in the BOR advocated above in chapter six is applied, it would extend the operation of the fundamental rights therein to taxpayers who are physically outside SA’s borders when tax administration by SARS occurs. Thus, it is recommended that a liberal interpretation of the BOR be adopted that would result in the extraterritorial application of the fundamental rights therein for the benefit of taxpayers who are adversely affected by tax administration. The need for such a construction would remain even if Parliament, as recommended above, passes a law that enacts a SARS Service Charter incorporating a BOTR. This would be so because, as explained above in chapter six, Parliamentary legislation lacks extraterritorial application and enforcement.

³² If a BOTR is legislated then the principle of subsidiarity, discussed above in chapter seven, would impel taxpayers to first rely on their rights in the BOTR before asserting any right in the BOR.

³³ Any disentitlement of a juristic taxpayer to fundamental rights in the BOR would not permit SARS and its officials to engage in tax administration in a manner that is inconsistent with the values of the Constitution. This is so because constitutional values apply for the benefit of everyone, including persons who may not qualify as beneficiaries of the BOR.

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If the liberal construction of the BOR contended for above does not find favour with the courts in SA, then a natural person taxpayer who is not a beneficiary of the fundamental rights in the BOR is not remediless as regards challenging, on human rights grounds, the validity of conduct undertaken pursuant to ss 45 and 63 of the TAA. First, on the same basis as in the case of trusts and the estates of deceased and insolvent persons postulated above at para 11.3.2, the natural person would have *locus standi* under ss 38(c) and/or (d) of the BOR to launch any such attack. Secondly, the natural person can challenge the validity of administrative conduct undertaken in terms of ss 45 and 63 of the TAA on the basis that it violates a human right to which he/she is entitled under customary international law. As explained above in chapter three, customary international law is, by virtue of the Constitution (s 232), grafted onto the legal fabric of SA except to the extent that any such law is inconsistent with the Constitution or an Act of Parliament. Furthermore, as explained above in chapter seven, the Constitution (s 39(3)) confirms the existence in SA of rights and freedoms recognised or conferred by other sources of law. Accordingly, the right to privacy embodied in, for example, Art 12 of the UDHR³⁴ is, subject to the constitutionally imposed limits, binding and enforceable in SA. The UDHR is part of customary international law.³⁵ Apart from s 232 of the Constitution, this human rights instrument is binding on SA by virtue of it being a member of the UN. The provisions of Art 12 are neither inconsistent with the BOR nor violate an Act of Parliament in SA. Although the UDHR does not confer rights on taxpayers *per se*, it is submitted that, just as with the BOR, its provisions may, to the extent permitted by the language of the UDHR and the nature of a particular human right, be applied in a tax administration context. The UDHR is aimed at conferring rights on all members of the 'human family'. Thus, a natural person who is a 'taxpayer' under the TAA but ineligible for the right in s 14 of the BOR ought to be entitled to challenge an impugned TAA provision on the grounds that it violates the taxpayer's human rights arising from Art 12 of the UDHR. In the light hereof, ineligibility for qualification as a beneficiary under the BOR does not mean that a natural person has no fundamental rights protected in law.

³⁴ The UDHR (Art 12) reads: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

³⁵ Sohn LB 'The human rights law of the charter' (1977) 12(2) *Texas International LJ* 129 133.

11.3.4 Legislating the scope of, and procedures for, inspections under s 45

The discussion above in chapter ten reveals several shortcomings in s 45 of the TAA. First, uncertainty exists as to the powers available at an inspection. A SARS official is a creature of the TAA and, thus, imbued with only those powers conferred by legislation. Secondly, save that a SARS official is, under s 45(2), required to obtain the occupant's consent to enter any part of a dwelling-house or domestic premises not used for a trade purpose, s 45 does not outline any other procedural guidelines for an inspection. This *lacuna* creates uncertainty as to the procedural rights of a taxpayer at an inspection. Thirdly, uncertainty exists as to the records, books of account and documents that may be inspected. Fourthly, s 45 does not deal with the issue of legal professional privilege. The recommendations made below are aimed at resolving the above shortcomings of s 45.

In the TAA, the terms 'inspection' and 'search' are not used synonymously. Neither term is defined therein. Thus, no bright lights (dividing lines) are evident *ex facie* the TAA that indicate when conduct crosses the Rubicon from being a mere inspection under s 45 of the TAA to a more invasive search under s 61, s 62 or s 63 thereof. As shown above in chapter ten, inspections and searches intrude on taxpayers' privacy and are limitations under s 36(1) of the BOR. The discussion there also shows that some overlapping exists between the meanings of these terms. Hence, it is difficult to formulate a sufficiently distinctive legal meaning for either term. This partly accounts for the inability of SA's courts to define 'inspection' and 'search' comprehensively. In the light hereof, no recommendation will be made here for a concrete definition for either term in their TAA context. It is a question of fact and degree in each instance whether conduct constitutes an inspection or search. To clarify the divide between inspections and searches and, thus, avoid a warrantless search being masked as a warrantless inspection, and to fill the gap identified in s 45 of the TAA, it is recommended that s 45 be amended so that it expressly outlines the powers that are exercisable and the procedures to be followed at an inspection. It is further recommended that, pending the enactment of the remedial legislation, the proposed amendments below are to be read-in as part of s 45. The following are the proposed provisions that are to be incorporated into the text of s 45:

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- (3) When carrying out an inspection, a SARS official may –
- (a) examine the records, books of account and documents, including information, which will reasonably assist in the determination of only those facts listed in subsections (1) (a), (b) or (c);
 - (b) make such enquiries from any person present at an inspection who the official reasonably believes is involved in the carrying on of the trade or enterprise referred to in subsection (1), which enquiries are directed solely at determining any of the facts listed in subsections (1)(a), (b) or (c); and
 - (c) instruct the person in charge of the premises at the time of an inspection to then and there, or at a time and place fixed by the official, produce for examination as contemplated in subsection (3)(a), any relevant records, books of account and documents, including information, requested by the official which would enable a determination to be made of any fact listed in subsections (1)(a), (b) or (c);
- (4) No person may obstruct or hinder a SARS official in carrying out an inspection, or refuse, without reasonable cause, to give access to the records, books of account and documents as may be required under subsection (3)(a), or to answer any question directed under subsection (3)(b), or to carry out an instruction under subsection (3)(c).
- (5) A SARS official must in writing, before commencing an inspection, disclose its purpose under this section to the person in charge of the premises and inform such person that he has the right to be present or to appoint a delegate to be present during an inspection and to observe the inspection.
- (6) An inspection shall be conducted with strict regard for decency and order, and with due regard for each person's right to dignity, freedom, security and privacy.
- (7) Section 64 shall apply *mutatis mutandis* to any inspection where SARS foresees the need to examine relevant material that may be alleged to be subject to legal professional privilege.'

11.3.5 Guidelines for a valid consent under ss 63(1)(a) and (4)

The discussion above in chapter ten shows that the granting of consent under ss 63(1)(a) and (4) of the TAA entitles a SARS official to conduct a warrantless search and exercise a reservoir of wide powers reserved under, inter alia, ss 61(3), (5) and (6). These provisions, read cumulatively, contain formidable powers that authorise SARS officials to, inter alia, search individuals, property and premises, and to seize property. The exercise of these powers constitutes a drastic inroad on the fundamental rights entrenched in the BOR. Hence, the granting of consent for the purposes of s 63 ought to be regulated by guidelines that would ensure that, at a minimum, an informed consent is given freely and voluntarily. Apart from s 63(1) requiring written consent, no further requirements are stipulated. The absence thereof does not, it is submitted, vitiate consent. However, it does create fertile ground for potential abuse by unscrupulous or over-zealous administrators. Therefore, it is submitted that appropriate guidelines that are not too onerous on SARS ought to apply for the granting of consent. To this end, it is recommended that, for a valid consent to exist for a lawful warrantless search to be conducted in terms of s 63 of the TAA, the following information ought, as a bare minimum, to be required for disclosure to the grantor of consent prior to any consent being obtained by a SARS official:

- (i) the purpose of the search;
- (ii) that there is no compulsion to grant consent in the absence of a warrant;³⁶
- (iii) the nature and extent of the search powers that will be triggered by the granting of consent;
- (v) that, once consent is given, no person may, on pain of a criminal sanction, obstruct a SARS official from executing the warrantless search, or without reasonable excuse refuse to give such assistance as may be reasonably required for the execution of the search;³⁷
- (vi) that consent, once granted, may not be revoked; and

³⁶ This requirement accords with that read into the Customs and Excise Act 91 of 1964 per Rogers J in *Gaertner and Others v Minister of Finance and Others* 2013 (4) SA 87 (WCC) para 119.

³⁷ This requirement has its origins in s 61(7) of the TAA read with ss 234(k) and (l) of the TAA.

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- (vii) that the information gathered during a search may be used against the relevant taxpayer during an audit and/or a criminal investigation.³⁸

As stated above in chapter ten, warrantless searches are not unconstitutional if they are coupled with necessary, predetermined constitutional safeguards that adequately minimise the extent of an intrusion on a fundamental right. Thus, s 63 of the TAA ought to incorporate appropriate guidelines that provide sufficient controls and restrictions for protecting fundamental rights against being eviscerated or negated, or unduly whittled away in a search. The disclosure requirements enumerated above are an expression of procedurally fair administrative action to which taxpayers are entitled in terms of s 33(1) of the BOR. Although it is preferable, as recommended here, that the aforementioned requirements be written into the structure of the TAA by way of an amendment to s 63 thereof, it bears mentioning that their absence from the TAA does not render ss 63(1)(a) or (4) invalid. Other domestic legislation (for example, s 22 of the CPA and s 47(2)(a) of the Competition Act, 1998) that provide for consensual warrantless searches or inspections, as the case may be, also do not include guidelines or requirements for the granting of a valid consent. Despite the absence thereof in the indicated legislation, the courts in SA have not struck down the relevant statutory provisions on the strength of this omission. If a formal amendment to s 63 of the nature recommended here is not effected, then a court in SA is not precluded from, and indeed ought to, apply the requirements listed above as implied, ‘unwritten’ rules that serve to underscore or advance procedural fairness in tax administration. After all, the heartland of the judicial function is to dispense justice in a ‘stewardly manner’.³⁹ The judiciary in SA fulfils this cardinal role by ensuring, inter alia, that ‘when statutory powers ... are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner’.⁴⁰

³⁸ Subject to all necessary contextual changes, the guidelines proposed here may also be applied to ‘the consent of the occupant’ of a private residence in relation to an inspection in terms of s 45(2).

³⁹ *Eke v Parsons* 2016 (3) SA 37 (CC) paras 34-39.

⁴⁰ *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) para 56.

11.4 FINAL THOUGHTS AND CLOSING REMARKS

South Africa's constitutional democracy can only be strengthened when, first, there is zero-tolerance of a culture of impunity; secondly, the prospects of good governance are duly enhanced by enforced accountability; thirdly, there is observance of the rule of law; and, fourthly, the respect for every aspect of the Constitution is real.⁴¹ The Constitution revolutionised tax administration. SARS is an organ of state forming part of SA's broader governance structure. By upholding and enforcing its tax laws, SARS plays a crucial role in enabling SA's national government to fulfil its mandate. SARS's efforts in this regard ought not to be unduly interfered with or inhibited. SARS is subject to constitutional control. Failure to hold SARS bound to the Constitution may encourage its officials to be a law unto themselves. This must be discouraged, particularly because it would be at odds with constitutionalism. In accordance with the Constitution's normative code, SARS and its officials must administer taxes in a manner that accords with the Constitution's foundational values and its related or associated democratic principles. This is part of sound governance in a constitutional State founded on the rule of law. Fulfilment hereof is beneficial for effective tax administration. This is so because it promotes a culture of co-operation and compliance on the part of taxpayers in their public law relationship with SARS.⁴² To achieve optimal efficiency in tax administration requires a mind-shift by SARS officials from that which suffused their predecessors during apartheid. This, in turn, requires an attitudinal change towards taxpayers, a sincere commitment to upholding the Constitution, and enforcing tax laws in a manner that is consistent with the Constitution's spirit, purport and objects. Doing so will advance and protect SARS's integrity and reputation as an organisation. The TAA promotes the attainment of the kind of change referred to here. However, the TAA is still largely in its infancy. Thus, the jury remains out as to the degree of its success in bringing about the kind of changes envisaged here.

⁴¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) para 54.

⁴² Braithwaite V 'Tax System Integrity and Compliance: The Democratic Management of the Tax System' in Braithwaite V (ed) *Taxing Democracy: Understanding Tax Avoidance and Evasion* (2003) 274-80 explains the multiple conceptions of taxpayer compliance and argues (281-85) that unity in a tax office, responsiveness to taxpayers, and soundness of purpose in tax administration are key features bridging the gap between the integrity of tax officials and taxpayer compliance.

APPENDIX: DRAFT TAXPAYER PROTECTION BILL, 2016

To comply with SARS's duties arising from s 8(1) of the Bill of Rights insofar as any taxpayer is entitled to fundamental rights during tax administration conducted by SARS; to promote respect for taxpayers and their rights; to establish a Bill of Taxpayers' Rights that, as required by s 39(3) of the Constitution, is consistent with the Bill of Rights; to impose basic taxpayer duties and responsibilities on taxpayers; to advance justice in tax administration; to promote in tax administration, as required by s 195(2)(b) of the Constitution, adherence to democratic values and principles; to establish a set of basic norms and standards of good service for SARS that (i) will foster with taxpayers good relations premised on mutual trust, respect and co-operation, (ii) will promote taxpayers' faith and confidence in SARS as a credible, reliable and trustworthy administrative agency, and (iii) will create a climate in the tax arena that is conducive to cultivating a voluntary tax compliance culture; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:-

CHAPTER 1: DEFINITIONS (s 1)

- 1. Interpretation.** – (1) Unless otherwise stated or a contrary indication appears from the context, the following terms bear the meanings assigned thereto below –
- ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996;
 - ‘**Bill of Rights**’ means the Bill of Rights in Chapter 2 of the Constitution;
 - ‘**SARS**’ means the South African Revenue Service established under the South African Revenue Service Act 34 of 1997, its successors in title, and its agents, assigns, contractors, employees, functionaries and officials;
 - ‘**tax**’ includes a tax, levy, duty, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax law;
 - ‘**tax law**’ means any fiscal legislation administered by SARS, including a fiscal law of a foreign State on whose behalf SARS acts as agent in terms of either a bilateral or multilateral agreement or tax treaty;
 - ‘**Tax Ombud**’ means the person appointed under section 14 of the Tax Administration Act 28 of 2011; and
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-

'taxpayer' means any person of whatsoever nature and kind who is chargeable to tax under any tax law, whether personally or as a representative.

(2) Unless the context indicates otherwise, words importing the masculine gender include the feminine and neuter.

CHAPTER 2: GENERAL ADMINISTRATION PROVISIONS (ss 2-6)

- 2. Application.** - This Act applies to tax administration occurring under any tax law and binds SARS and every taxpayer.
- 3. Non-retrospectivity.** - This Act shall not operate retrospectively.
- 4. Purpose of the Act.** - This Act aims to ensure equitable tax administration by -
 - (a) realising the ideal of a just, fair and accessible tax administration in which democratic values and principles are applied for the benefit of taxpayers;
 - (b) identifying basic norms and standards for the cultivation of a good service culture by SARS and the promotion of service excellence to taxpayers;
 - (c) giving substance and effect to the right of taxpayers to administrative action by SARS that is lawful, reasonable and procedurally fair; and
 - (d) balancing a set of core rights of taxpayers with key duties.
- 5. Protection of taxpayers' rights.** – If a taxpayer exercises, asserts or seeks to uphold any right conferred by this Act, then SARS must not in response thereto (i) penalise the taxpayer; and/or (ii) discriminate directly or indirectly against the taxpayer when compared to SARS's treatment of a taxpayer who has not exercised, asserted or sought to uphold a right conferred by this Act; and/or (iii) take any action to accelerate, enforce, suspend or terminate an agreement reached with the taxpayer.

- 6. Enforcement.** – A taxpayer may enforce a right conferred by this Act by referring the matter to the Tax Ombud or approaching a court with jurisdiction if all other remedies available in terms of national legislation have been exhausted.

CHAPTER 3: NORMS AND STANDARDS FOR ADMINISTRATION (ss 7-8)

- 7. Democratic values and principles in tax administration.** - Tax administration by SARS shall occur in accordance with the values of an open and democratic society based on human dignity, equality and freedom. These include, but are not limited to, adherence to the following core democratic values and principles:

- (a) Supremacy of the Constitution and the rule of law;
- (b) Lawful, reasonable and procedurally fair administrative action;
- (c) Justification of all decisions by providing written reasons;
- (d) Fulfilment of legal obligations diligently and without undue delay;
- (e) Respecting the dignity, privacy, property and other rights of taxpayers;
- (f) Accountability and responsiveness to taxpayers and their needs;
- (g) Openness and transparency;
- (h) Promotion of the efficient, economic and effective use of public resources;
- (i) Promotion and maintenance of high standards of professional ethics; and
- (j) Provision of services impartially, fairly, equitably, with dignity and integrity, and without fear, favour or prejudice.

- 8. Basic norms and standards of good service.** – In the promotion of efficiency and effectiveness in tax administration, SARS shall, to the extent reasonably possible, comply with the following basic norms and standards of good service:

- (a) Treat taxpayers politely, courteously, ethically and professionally;
- (b) Render services competently, equitably, with dignity and with integrity;
- (c) Assist taxpayers impartially, with consistency, and based on relevant facts;
- (d) Strive to find thoughtful and creative ways to solve taxpayers' complaints;
- (e) Deal with taxpayers' funds honestly, transparently and accountably;

- (f) Exercise discretion in a non-arbitrary, fair and unbiased manner;
- (g) Complete all functions within a reasonable time and without delay;
- (h) Honour the privacy and confidentiality of all taxpayer information;
- (i) Provide taxpayers with timely, accessible and accurate information;
- (j) Use taxpayer information only for purposes specified in a tax law;
- (k) Use clear and simple language in all official correspondence, forms and documents;
- (l) If necessary, use an interpreter when communicating with taxpayers;
- (m) Provide taxpayers with periodic progress reports of an ongoing audit or investigation, and provide taxpayers with progress reports on request;
- (n) Operate a national call centre and branch offices throughout South Africa that are accessible to taxpayers during reasonable business hours;
- (o) Maintain a SARS website that is accessible to taxpayers and regularly monitored and updated with relevant information and documentation;
- (p) Use modernised tax and computer systems, as well as modernised audit and investigative programmes;
- (q) Achieve SARS's objectives cost effectively and cost efficiently without compromising on quality and taxpayers' legitimate expectations;
- (r) Refrain from conduct that is abusive or hostile to taxpayers, or that constitutes coercion or harassment of taxpayers, or that involves a conflict of interest, or that would bring SARS or the *fiscus* into disrepute;
- (s) Refrain from enforcing a tax law by physical force, undue influence, duress, unfair tactics or other similar unconscionable conduct;
- (t) Refrain from advertising taxpayers' responsibilities in a manner that is misleading or deceptive in any material respect;
- (u) Promptly report to any relevant authority an act of fraud, corruption, nepotism, maladministration, or any other act that is a criminal offence;
- (v) Co-operate fully with the Tax Ombud and the Office of the Tax Ombud in all taxpayer matters;
- (w) Employ staff who are fit and proper persons and committed to abiding by the Constitution and respecting taxpayers and their rights;

- (x) Expeditiously investigate all taxpayer complaints and, where necessary, institute disciplinary proceedings against offending SARS employees;
- (y) Ensure that all SARS auditors, inspectors, investigators and any person responsible for effecting a search and/or seizure, successfully complete a formal training programme that equips them with the skills, knowledge, competence and expertise required to fulfil their duties lawfully and/or in accordance with any applicable industry norms and/or standards;
- (z) Conduct inspections, searches and seizures with strict regard for decency and order, and with regard for taxpayers' rights and freedoms;
- (aa) Conduct audits, investigations, inspections, searches and seizures in accordance with the law and SARS's internal policies and procedures;
- (bb) Disclose SARS's internal policies and procedures, save where doing so would undermine effectiveness in tax administration;
- (cc) Monitor on a continuous basis, for quality assurance purposes, compliance with all SARS's internal operating policies and procedures;
- (dd) Periodically review and, if required, update all SARS's internal policies and procedures, as well as the Code of Conduct for employees;
- (ee) Exercise a power proportionally, having regard to the purpose for which the power is granted and the means used to exercise it;
- (ff) Avoid unnecessary infringement of taxpayers' fundamental rights by using, if appropriate, suitable alternative less intrusive means;
- (gg) Confirm receipt of a written communication from a taxpayer or a taxpayer's representative within seventy-two hours calculated from the date of receipt thereof and then formally reply thereto in writing within twenty-one calendar days from the date of receipt of the communication;
- (hh) Interpret a tax law in a manner that, where necessary, balances fairly, on the one hand, the general public's interest in advancing the aims of the law being interpreted with, on the other, taxpayers' rights and the spirit, purport and objects of the Bill of Rights; and
- (ii) Apply, where appropriate, international law norms and standards in tax administration to the extent that they are consistent with the Constitution.

CHAPTER 4: BILL OF TAXPAYERS' BASIC RIGHTS AND DUTIES (ss 9-10)

9. Taxpayers' Rights. - In addition to any other right conferred by law, and subject to any reasonable and justifiable limitation imposed by any law, every taxpayer shall, for tax administration purposes, be entitled to the following basic rights:

- (a) **Equality** - Every taxpayer is equal before the law and has the right to equal protection and enjoyment of all rights, privileges, benefits and freedoms conferred by the law. No taxpayer may be subjected to unfair discrimination on any ground recognised in section 9(3) of the Constitution. Fair discrimination against taxpayers is permitted;
- (b) **Dignity** - A taxpayer has dignity and a right to have that dignity respected;
- (c) **Freedom and security of the person** - A taxpayer has the right to freedom and security of the person. This includes (i) the right not to be deprived of freedom arbitrarily or without just cause, (ii) the right to be free from all forms of violence, intimidation and harassment, and (iii) the right not to be treated in a cruel, inhumane, degrading, undignified or insulting manner;
- (d) **Privacy** - A taxpayer has the right to the privacy of his home, of his property, of his communication, and of his person. A taxpayer's right to bodily integrity includes the right not to be searched by anyone other than a person of the same gender. A taxpayer's privacy includes the secrecy and confidentiality of information disclosed to SARS or which comes into SARS's possession through any means other than through a taxpayer;
- (e) **Freedom of association** - A taxpayer has freedom (i) to form and join a taxpayer association or any other organisation whose objects include promoting the interests of taxpayers, and (ii) to participate in the activities of, and to recruit members for, a taxpayer association or such other organisation that advances taxpayer interests;

- (f) **Freedom of movement** - A taxpayer may freely move to any place and when doing so may, if needs be, change his tax residency status;
- (g) **Property** - No taxpayer may be arbitrarily deprived of any property, including any interest therein. Property seized by, or surrendered to, SARS for tax administration purposes shall be preserved and protected by SARS against loss or damage. Property seized or surrendered shall be returned to a taxpayer in the same condition as it was when the property was seized or surrendered, fair wear and tear excepted;
- (h) **Children** - In any civil or other proceedings affecting the interests of any person under the age of 18 years as a taxpayer, the State must at its expense assign a legal practitioner to the taxpayer if substantial injustice would otherwise result. Save with the leave of a High Court having jurisdiction over the child, SARS may not engage directly with any child as a taxpayer but may do so via his legal guardian as his representative;
- (i) **Language** - A taxpayer may use any official language recognised in section 6(1) of the Constitution. Any communication, form, notice or document issued by SARS must be in plain and understandable language. This requirement will be deemed to be met if it is reasonable to conclude that an ordinary taxpayer of the class of persons for whom the communication, form, notice or document is intended, with average literacy skills and minimal experience as a taxpayer, could be expected to understand its content, significance and import without undue effort having regard to, inter alia, its vocabulary and sentence structure, its context, comprehensiveness, form, style, organisation and consistency, as well as the use of any headings or other aids to reading and understanding;
- (j) **Access to information** - A taxpayer is entitled to receive timely and accurate information held by SARS relating to, inter alia, the taxpayer's affairs, and SARS's rulings, interpretation notes and operating guides;

- (k) **Just administrative action** - A taxpayer has the right to administrative action that is lawful, reasonable and procedurally fair. This includes the right to receive adequate written reasons for any tax assessment or other administrative decision that adversely affects the taxpayer or his interests;
- (l) **Access to courts** - A taxpayer has the right to object to, or appeal against, the imposition of a tax or other decision that is, under a tax law, subject to objection or appeal. A taxpayer may institute judicial review proceedings against a law or conduct. Objections, appeals and judicial reviews must be decided in a fair hearing before a competent court, Tax Board, Tax Court or other independent and impartial tribunal or forum authorised by law;
- (m) **Arrested, detained and accused taxpayers** - A taxpayer who is arrested, detained or accused for allegedly committing a criminal offence, and every taxpayer who is a suspect in, or the subject of, a criminal investigation, shall be entitled to the rights in section 35 of the Constitution but only to the extent that any such right finds application;
- (n) **Right to quality service** - Every taxpayer is entitled to service in tax administration that is efficient, punctual, fair and respectful of taxpayers and their rights. A taxpayer is entitled to timely written notice of an unavoidable delay in the completion of any service by SARS;
- (o) **Freedom to plan affairs** - A taxpayer has the freedom to plan his financial affairs tax efficiently;
- (p) **Right against excessive imposition and collection of tax** - No taxpayer shall pay more tax than is required by a tax law, or be required to pay a tax before its due date, or be subjected to the imposition of excessive penalties, or be required to pay interest in contravention of the *in duplum rule*, or be taxed more than once on the same income received or accrued by the taxpayer;

- (q) **Payment of refunds** - A taxpayer is entitled to receive payment of a tax refund within a reasonable time calculated from the date when the refund first became due under a tax law;
- (r) **Legal representation** - A taxpayer may deal with SARS personally or through a duly authorised and registered tax practitioner appointed in writing by the taxpayer. In legal proceedings, a taxpayer has the right to competent legal representation; and
- (s) **Reasonable timing of searches and inspections** – Notwithstanding anything stated in any tax law, unless exceptional circumstances exist, no search or inspection may occur outside of ordinary business hours.

10. Basic duties and responsibilities of taxpayers. - Every taxpayer shall comply with the following basic duties and responsibilities:

- (a) To pay his fair share of tax to the *fiscus* and to do so timeously;
- (b) To promptly register for tax when required to do so by a tax law;
- (c) To timeously submit a tax return for assessment;
- (d) To be transparent in fiscal affairs by making a full, frank and honest disclosure of financial information relevant to determining a tax debt;
- (e) To keep and maintain proper financial records, books of account and documentation, and to do so for such periods as is required by a tax law;
- (f) To co-operate with SARS in the execution of all its functions;
- (g) To refrain from frivolous and vexatious objections and appeals; and
- (h) To prove an entitlement to a tax deduction, exemption or exclusion.

CHAPTER 5: GENERAL (s 11)

11. Short title and commencement. – This Act is called the Taxpayer Protection Act, 2016 and comes into operation on a date to be determined by the President of the Republic of South Africa by proclamation in the *Gazette*.

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S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC)

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