Rethinking the search and seizure powers of officers in terms of Customs and Excise legislation

A Van Wyk

Orcid.org 0000-0003-0608-6477

Mini-dissertation accepted in partial fulfilment of the requirements for the degree Master of Law in International Trade Law at the North-West University

Supervisor: Prof HJ Kloppers

Graduation ceremony: May 2019
Student number: 23389184
ABSTRACT

This contribution is an analysis of the warrantless search and seizure powers provided for in terms of customs and excise legislation. This research evaluates whether the aforesaid powers infringe on the right to privacy, specifically with regard to the inner sanctum. The scope and purpose of the right to privacy is analysed to determine what could constitute an unlawful search and seizure, specifically considering the warrant requirement. To determine whether there is a limitation or infringement of the right to privacy, the limitation analysis in terms of section 36 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) is applied.

This dissertation is aimed at establishing whether the proposed new customs and excise legislation of South Africa is constitutionally sound. The research also includes a comparative analysis of the search and seizure powers enshrined in various pieces of fiscal legislation and in terms of the customs and excise legislation of neighbouring countries to determine how they provide for search and seizure operations to be conducted.

This research concludes with a finding that the current and the future search and seizure powers are not in line with the Constitution and suggests that a universal model for search and seizure powers should be established in order to protect the right to privacy.

**Keywords:** Search and seizure; warrantless; right to privacy; inner sanctum; customs and excise legislation.
# TABLE OF CONTENTS

ABSTRACT .................................................................................................................. I

LIST OF ABBREVIATIONS .......................................................................................... V

Chapter 1: Introduction .............................................................................................. 1
  1.1 Problem statement .............................................................................................. 1
  1.2 Research questions ........................................................................................... 4
    1.2.1 General research question ............................................................................ 4
    1.2.2 Specific research questions .......................................................................... 5
  1.3 Case study ........................................................................................................... 5
  1.4 Research outline ................................................................................................. 6

Chapter 2: The right to privacy .................................................................................. 8
  2.1 Introduction ....................................................................................................... 8
  2.2 The scope of the right to privacy ....................................................................... 8
  2.3 The purpose of the right to privacy .................................................................. 12
  2.4 Search and seizure ........................................................................................... 13
  2.5 Unlawful search and seizure ............................................................................ 14
  2.6 Limitations ....................................................................................................... 16
  2.7 Conclusion ....................................................................................................... 28

Chapter 3: Customs and excise legislation ................................................................. 30
  3.1 Introduction ...................................................................................................... 30
  3.2 Past position .................................................................................................... 30
3.3 Present .................................................................................................................. 36
3.4 Future .................................................................................................................. 39
3.5 Conclusion .......................................................................................................... 44

Chapter 4: Fiscal legislation in respect of search and seizure......................... 46
4.1 Introduction ...................................................................................................... 46
4.2 Searches and seizures aimed at compliance versus enforcement .... 47
4.3 The Inspection of Financial Institutions Act (“IFIA”) ..................... 48
4.4 The Competition Act .................................................................................. 49
4.5 The Electronic Communications and Transactions Act (“ECTA”) .... 49
4.6 The International Trade Administration Act (“ITAA”) ............... 50
4.7 The National Credit Act (“NCA”) ....................................................... 51
4.8 The Consumer Protection Act (“CPA”) ........................................... 52
4.9 The Companies Act .................................................................................. 53
4.10 Tax related legislation ............................................................................. 54
  4.10.1 The Tax Administration Act (“TALAA”) ........................................ 55
  4.10.2 The Tax Administration Laws Amendment Act ....................... 56
4.11 The Cybercrimes and Cybersecurity Bill (“Cyber Bill”) ........... 57
4.12 The Financial Sector Regulation Act (“FSRA”) ......................... 58
4.13 The Financial Intelligence Centre Act ............................................. 61
4.14 Conclusion .................................................................................................. 65

Chapter 5: Comparison with other jurisdictions.............................................. 67
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AfCFTA</td>
<td>African Continental Free Trade Area</td>
</tr>
<tr>
<td>CCA</td>
<td>Customs Control Act</td>
</tr>
<tr>
<td>CEA</td>
<td>Customs and Excise Act</td>
</tr>
<tr>
<td>CEAA</td>
<td>Customs and Excise Amendment Act</td>
</tr>
<tr>
<td>CDA</td>
<td>Customs Duty Act</td>
</tr>
<tr>
<td>CILSA</td>
<td>Comparative and International Law Journal of South Africa</td>
</tr>
<tr>
<td>CRIMPA</td>
<td>Criminal Procedure Act</td>
</tr>
<tr>
<td>CPA</td>
<td>Consumer Protection Act</td>
</tr>
<tr>
<td>ECTA</td>
<td>Electronic Communications and Transactions Act</td>
</tr>
<tr>
<td>EDA</td>
<td>Excise Duty Act</td>
</tr>
<tr>
<td>FSRA</td>
<td>Financial Sector Regulation Act</td>
</tr>
<tr>
<td>GG</td>
<td>Government Gazette</td>
</tr>
<tr>
<td>HARVARD LR</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>IFIA</td>
<td>Inspection of Financial Institutions Act</td>
</tr>
<tr>
<td>ITA</td>
<td>Income Tax Act</td>
</tr>
<tr>
<td>ITAA</td>
<td>International Trade Administration Act</td>
</tr>
<tr>
<td>JJS</td>
<td>Journal for Judicial Science</td>
</tr>
<tr>
<td>NCA</td>
<td>National Credit Act</td>
</tr>
<tr>
<td>SACU</td>
<td>South African Customs Union</td>
</tr>
<tr>
<td>SALJ</td>
<td>South African Law Journal</td>
</tr>
<tr>
<td>SARS</td>
<td>South African Revenue Service</td>
</tr>
<tr>
<td>TAA</td>
<td>Tax Administration Act</td>
</tr>
<tr>
<td>TALAA</td>
<td>Tax Administration Laws Amendment Act</td>
</tr>
</tbody>
</table>
Chapter 1: Introduction

1.1 Problem statement

It is 23h00 on the 1st of July. Imagine yourself fast asleep on this cold winter’s evening. Suddenly your bedroom wall is demolished and 14 customs officers burst into your home with lights flashing and officers shouting. The officers barge into your home and raid your entire house. The officers search through freezers, the safe, the cellar, the garage and storerooms, breaking open walls and the ceiling and rifling through your personal belongings. This egregious search is conducted in the dead of night, a time of relaxation and intimacy, and when a person would be flimsily dressed. All of this with no information provided such as the reason for the search or a warrant for the search and seizure and with no attorney present to protect you or explain your rights or obligations. Threats of criminal enforcement are made if you obstruct this horrific search or refuse to cooperate. The sense of violation and degradation that you must experience is unquestionable. You are completely vulnerable, suffering indignity. It is with this horrific scene in mind that we must consider the constitutional validity of statutory provisions which authorise warrantless searches and seizures, specifically in the context of the customs and excise industry.¹

South Africa has high regard for the right to privacy. In South Africa the right to privacy may be claimed by any person, including juristic persons.² Despite this high regard for the right to privacy, unlawful infringement of this right regularly occurs.³ One of the contexts in which infringement of the right to privacy occurs is customs and excise. This was noted by the court in Gaertner v Minister of Finance,⁴ in which the court had to

¹ This scenario is based on the events described in Gaertner v Minister of Finance 2013 4 SA 87 (WCC) (hereinafter Gaertner (HC)) and in Gaertner v Minister of Finance 2014 1 SA 442 (CC) (hereinafter Gaertner (CC)). See Gaertner (CC) para 1.
² Davis and Steenkamp "Privacy" 9-2. The applicability of the Bill of Rights to a natural and juristic person is embodied in section 8(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution), which states that the provisions of the Bill of Rights bind a natural and juristic person to the extent that they are applicable, taking into consideration the nature of the right and the nature of any duty imposed by the right. The specific provisions in terms of a juristic person are endorsed by section 8(4) of the Constitution, which provides that 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 the juristic person. This was confirmed in Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 1 SA 545 (CC) (hereinafter Hyundai) para 17.
³ See subheading 2.6 on the limitations of the right to privacy.
⁴ 2014 1 SA 442 (CC) (hereinafter Gaertner (CC)).
consider if certain provisions of the *Customs and Excise Act* (hereinafter referred to as *CEA*)\(^5\) were consistent with the right to privacy enshrined in the *Constitution*. In *Gaertner* the court stated that:

To the extent that a statute authorises warrantless entry into private homes and the rifling through private possessions, the statute breaches the right to privacy.\(^6\)

Section 14 of the *Constitution* provides that everyone has the right to privacy. However, it has recently been argued that the search and seizure powers provided for in various items of legislation, such as the *CEA*, the *Criminal Procedure Act* 51 of 1977 (hereinafter the *CRIMPA*), the *Consumer Protection Act* 68 of 2008 (hereinafter the *CPA*), the *Tax Administration Act* 28 of 2011 (hereinafter the *TAA*), the *Tax Administration Laws Amendment Acts*\(^7\) (hereinafter the *TALAA*) and the like might be inconsistent with the right to privacy enshrined in the *Constitution*.\(^8\)

In the context of customs and excise the leading case with regard to search and seizure provisions is the *Gaertner* matter.\(^9\) The question in the *Gaertner* matter was whether sections 4(4)(a)(i) and (ii), 4(4)(b) and 4(6) of the *CEA* are unconstitutional and thus invalid. Furthermore, whether the aforesaid provisions of the *CEA* unjustifiably limit the right to privacy provided in section 14 of the *Constitution*. Section 4 of the *CEA* provides officers with excessively wide powers to conduct warrantless searches which possibly unduly limit the right to privacy. The Constitutional Court confirmed the Western Cape High Court's declaration of the constitutional invalidity of section 4(4) of the *CEA* and the Court suspended section 4(4) and ordered a reading in of provisions during the period of suspension. In reaction to the *Gaertner* judgement, the legislator has redrafted the *CEA* with specific reference to search and seizure powers in order that it should be constitutionally sound.

---

\(^5\) 91 of 1964.
\(^6\) *Gaertner* (CC) para 86.
\(^7\) 39 of 2013; 44 of 2014; 23 of 2015; 16 of 2016 and 17 of 2017.
\(^8\) See chapter 4 for a more detailed discussion regarding various pieces of legislation in terms of search and seizure; When considering the right to privacy the following case law will be discussed throughout this study: *Bernstein v Bester* 1996 2 SA 751 (CC) (hereinafter *Bernstein*); *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 751 (CC) para 21 (hereinafter *Mistry*); *Hyundai; Magajane v Chairperson, North West Gambling Board* 2006 5 SA 205 (CC) (hereinafter *Magajane*); and *Gaertner* (HC) and (CC).
\(^9\) *Gaertner* (CC).
South Africa is currently in the process of reviewing the current structure of the CEA. The current CEA is to be replaced with the Customs Control Act\textsuperscript{10} the Customs Duty Act\textsuperscript{11} and the Excise Duty Act.\textsuperscript{12} This research will further examine the constitutional validity of the search and seizure powers of officers in terms of the proposed new legislation. Thus, the position before and after the amendment as well as the proposed new legislation will be considered, to determine the extent of the constitutional validity of the search and seizure powers of officers in terms of customs and excise legislation.\textsuperscript{13}

Questions regarding the constitutional validity of search and seizure powers are not unique to customs and excise legislation. The following fiscal statutes will be examined: the Inspection of Financial Institutions Act;\textsuperscript{14} the Competition Act;\textsuperscript{15} the Electronic Communications and Transactions Act;\textsuperscript{16} the International Trade Administration Act;\textsuperscript{17} the National Credit Act;\textsuperscript{18} the Consumer Protection Act;\textsuperscript{19} the Companies Act;\textsuperscript{20} the Tax Administration Act;\textsuperscript{21} the Tax Administration Laws Amendment Act;\textsuperscript{22} the Cybercrimes and Cybersecurity Bill;\textsuperscript{23} the Financial Sector Regulation Act\textsuperscript{24} and the Financial Intelligence Centre Act\textsuperscript{25} and the later Financial Intelligence Centre Amendment Act.\textsuperscript{26} Evidently this is a current problem, as can be seen in the variety of contexts in which it occurs, and not only in the customs and excise industry.\textsuperscript{27}

The provisions for warrantless search and seizure powers are not unique to South Africa. Section 39(1)(b) and (c) of the Constitution advises courts, tribunals or forums to

\begin{footnotesize}
\begin{enumerate}
\item[10] 31 of 2014 (hereinafter the CCA).
\item[11] 30 of 2014 (hereinafter the CDA).
\item[12] 91 of 1964. In other words, the renamed Customs and Excise Act 91 of 1964, as it will read from the effective date provided in section 926 of the CCA (hereinafter the EDA). Section 926 of the CCA states that “effective date” means the date on which the CCA, the CDA and the CEA of 2014 take effect. These Acts will come into effect only on a date yet to be determined by the President.
\item[13] Customs and excise legislation refers to the Customs and Excise Act, the Customs Control Act, the Customs Duty Act and the Excise Duty Act, as mentioned above.
\item[14] 80 of 1998 (section 4) hereinafter the IFIA.
\item[16] 25 of 2002 (section 80, 82 and 83) hereinafter the ECTA.
\item[17] 71 of 2002 (section 43-45) hereinafter the ITAA.
\item[18] 34 of 2005 (section 154) hereinafter the NCA.
\item[19] 68 of 2008 (section 102-106) hereinafter the CPA.
\item[20] 71 of 2008 (section 177 and 178).
\item[21] 28 of 2011 (section 59-64) hereinafter the TAA.
\item[22] 39 of 2013 (section 16) hereinafter the TALAA 39 of 2013.
\item[23] Section 27, as published in the GG 40487 of 9 December 2016; hereinafter the Cyber Bill.
\item[24] 9 of 2017 (section 134-139) hereinafter the FSRA.
\item[25] 38 of 2001 (section 45) hereinafter the FICA.
\item[26] 1 of 2017(section 31) hereinafter the FICAA.
\item[27] See chapter 4 for other effected legislation.
\end{enumerate}
\end{footnotesize}
consider international law and foreign law when interpreting the Bill of Rights. As such, the position in various neighbouring countries (such as Namibia, Botswana, Lesotho and Swaziland) pertaining to the search and seizure powers of officers will be considered, to provide an Southern African perspective.\textsuperscript{28}

This study will explore the search and seizure powers of officers, specifically those embodied in customs and excise legislation. Due to the fact that the right to privacy is one of the fundamental rights furnished by the Constitution, the aim of this study is to establish what the right to privacy entails and how it can be limited. The focus will be placed on the paramountcy of the right to privacy as it provides protection from potential infringement when search and seizure operations are conducted. However, no right is absolute and as such, the right to privacy may be limited and infringed upon. This gives rise to the question; to what extent may the right to privacy be limited and infringed upon, whilst still being constitutionally sound? The study of the right to privacy focusses on both the general nature of the right as well as the specific search and seizure aspects of this right.

Furthermore, this study endeavours to establish whether the provisions of the customs and excise legislation, in terms of the search and seizure powers of officers, are inconsistent with the right to privacy enshrined in the Constitution. Therefore, it is necessary to rethink the search and seizure powers of officers in terms of past, present and future customs and excise legislation.

1.2 Research questions

1.2.1 General research question

To rethink the search and seizure powers of officers in terms of customs and excise legislation, the following general research question should be answered:

- To what extent are the search and seizure powers of customs and excise officers, constitutionally sound?

\textsuperscript{28} See Chapter 5 for the discussion of the various items of customs and excise legislation of the Common Customs Area.
1.2.2 Specific research questions

In order to answer this general research question the following specific research questions are formulated:

- What does the right to privacy entail and to what extent can this right be limited?
- To what extent does the customs and excise legislation, with reference to search and seizure powers, limit the right to privacy?
- How do the search and seizure powers provided for in terms of customs and excise legislation compare with the search and seizure powers in fiscal legislation?
- How do the search and seizure powers of customs officers compare with those in other selected jurisdictions?

1.3 Case study

To envisage the effect of the search and seizure powers of officers, a case study will be utilised to furnish a practical illustration. This case study is a comprehensive study of the facts found in the Gaertner matter. The facts are as follows.⁹

OCS imports and distributes bulk frozen foodstuffs and holds licences for storage warehouses in Muizenberg. To ensure compliance with the CEA, SARS officers perform routine inspections of OCS's storage warehouses. SVD³¹ claimed the return of consignments of skim-milk powder sold to OCS, alternatively payment of the purchase price. SVD served a copy of the application on SARS. A discrepancy in terms of the price on the SVD invoice attached to the application and the invoices submitted to SARS led SARS to suspect that OCS had fraudulently manipulated the invoices so as to pay less customs duty. Thus, SARS decided to search the premises of OCS.

---

²⁹ Gaertner (CC) para 6-13; Mr. Gaertner and Mr. Klemp (the applicants) were the directors of the third applicant, Orion Cold Storage (Pty) Ltd (hereafter OCS). The first respondent was the Minister of Finance, the second was the Commissioner of SARS and the third was the Controller of Customs: Cape Town.

³⁰ Past inspections have never extended to OCS's offices or to the homes of OCS's employees or officers.

³¹ Sloan Valley Dairies (Pty) Ltd (a seller of goods to OCS).
Over a two-day period, a search of the warehouse, bond store, a safe in the strong room, computers and the offices of Mr. Gaertner and Mr. Klemp was conducted. Copies of data on various computers were made and a variety of documents and other objects were seized. Through it all, the officials did not have a search warrant. They argued that they did not require a warrant in terms of section 4 of the CEA.

Thereafter the SARS officers continued to Mr. Gaertner's private home to carry on the warrantless search. Without giving a reason the officers searched the whole house, including freezers, the ceiling space, the safe, the cellar, the garage and the storerooms. The officers went through Mr. Gaertner and his family's personal belongings and demanded access to the home computers, including those of Mr. Gaertner's children. During this search the officials took photographs.

The applicants brought an application before the High Court seeking a declaration that the searches and seizures were unlawful and that section 4 of the CEA is inconsistent with the Constitution and invalid to the extent that it permits targeted, non-routine, enforcement, warrantless searches and seizures. The respondents denied that the searches were unlawful and argued that section 4 of the CEA limited the right to privacy only to the extent that it was justified under section 36 of the Constitution.

1.4 Research outline

Chapter 2 will supply a background for this study to aid in the understanding of what the right to privacy entails. The discussion in this chapter focusses on the general nature and scope of the right to privacy and more specifically on the search and seizure aspects of the right. Furthermore, the extent to which the right can be subject to limitations and infringement will be examined.

In Chapter 3 searches and seizures in the context of customs and excise will be considered with reference to the past, present and future position, the past being section 4(4)-(6) of the CEA prior to the amendment that was made pursuant to the court's decision in Gaertner.\(^{32}\) The present is concerned with the position after the amendment, which is therefore the current position of search and seizures,\(^{33}\) whereas

\(^{32}\) Gaertner (HC); Gaertner (CC); Fritz 2016 JJS 20.

\(^{33}\) As amended by the TALAA 39 of 2013.
the future refers to the proposed new legislation. The effect of the proposed legislation
will be considered against the backdrop of the Gaertner case study.

Chapter 4 will provide insight into the various items of fiscal legislation that are relevant
to search and seizure in similar contexts, whilst keeping in mind the difference between
searches and seizures for the purpose of compliance as against criminal prosecution
(i.e. enforcement).^{34}

Section 1 of the CEA identifies the Common Customs Area. All the countries that are
included in this area are signatories of the South African Customs Union agreements.
The Southern African Customs Union (hereinafter SACU) includes South Africa,
Botswana, Lesotho, Namibia and Swaziland.^{35} Chapter 5 will aim to give a Southern
African perspective with the focus on the Common Customs Area.

The research findings will be drawn together in the final chapter. This conclusion
answers the general research question posed in the introduction. A submission will be
made regarding whether the proposed new legislation is likely to be effective. Lastly, a
recommendation will be made in terms of adequate search and seizure provisions.

^{34} See Chapter 4 for a discussion regarding the difference between searches aimed at compliance and
searches aimed at enforcement.
Chapter 2: The right to privacy

2.1 Introduction

This chapter aims to examine the scope and application of the right to privacy enshrined in the Constitution. In order to determine to what extent the search and seizure powers of customs and excise officers are constitutionally sound, it is crucial to get an understanding of what the right to privacy entails. The problem statement in Chapter 1 suggests that the right to privacy with reference to search and seizure powers poses a challenge in various contexts and not only in the context of customs and excise.

In order to answer the first specific research question, "What does the right to privacy entail and to what extent can this right be limited", the following topics will be addressed in this chapter: the scope of the right to privacy, a brief background to search and seizure, particularly those searches and seizures that are conducted without a warrant, and the limitations to the right to privacy.

2.2 The scope of the right to privacy

The right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life.\textsuperscript{36}

Warren and Brandeis\textsuperscript{37} state that the principle that the individual shall have full protection in person and in property is as old as the common law. They furthermore state that from time to time it is necessary to redefine the exact nature and extent of such protection.\textsuperscript{38} In broad terms, the right to privacy can be defined as the right to be left alone.\textsuperscript{39} The fundamental right to privacy is embodied in the Constitution and includes the right of individuals "not to have their persons, homes or property searched or their possessions seized, or to have the privacy of their communications infringed".\textsuperscript{40}

\textsuperscript{36}Gaertner (CC) para 47; Hyundai para 16. Langa DP states that when people are in their offices, in their cars or on mobile telephones, they still retain the right to be left alone by the State unless certain conditions are satisfied. Woolman et al Constitutional Law of South Africa 38-1.

\textsuperscript{37}Warren and Brandeis 1890 Harvard LR 193.

\textsuperscript{38}Warren and Brandeis 1890 Harvard LR 193.

\textsuperscript{39}Davis and Steenkamp "Privacy" 9-1; Warren and Brandeis 1890 Harvard LR 193. In their article they conclude that the right to be left alone is not to be found in the right to property but rather in the right to personality.

\textsuperscript{40}Section 14 of the Constitution (the final Constitution). It should be noted that the privacy of communications will not be dealt with in this study. Section 13 of the Constitution of the Republic of South Africa, 1993 (the interim Constitution) provided: "Every person shall have the right to his or her
The right to privacy is recognised in various international human rights instruments as well as in the constitutions of many foreign jurisdictions. In order to determine to what extent the right to privacy can be limited or infringed upon, it is necessary to examine its scope and application and focus on the limitations of the right.

Central to the interpretation of section 14 of the Constitution is the meaning of the word "privacy". Steytler pointed out that the legitimate expectations of privacy have crystallised in three spheres of privacy: one relating to the territorial or spatial aspect, a second to the body of a person and the third occurring in the context of communication or the transfer of information. The Constitutional Court confirmed the view that any person, including a juristic person, is entitled to the right to privacy. The provision of section 14 of the Constitution may be interpreted as being two-fold. Firstly, it guarantees a general right to privacy and secondly, protects against specific infringement of privacy, namely searches and seizures. In terms of search and seizure, the right to privacy includes the right: "not to have one's person or home searched, one's property searched or possessions seized".

personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications. See Magajane para 33, in which the court analysed the application of s 14 on searches and seizures operations by assessing the ambit of the right to privacy and whether there was any limitation of the right to privacy. Thereafter, the court determined whether the limitation was reasonable and Justifiable in an open democratic society in terms of the limitation analysis under s 36 of the Constitution. See under subheading 2.6, where this will be discussed.


See subheading 2.6 in terms of the limitations.


See the discussion of the expectation of the right to privacy below; Davis and Steenkamp "Privacy" 9-3; Swanepoel 1977 CILSA 344.

Confirmed in Hyundai para 17; Cheadle et al South African Constitutional Law: The Bill of Rights 184. The applicability of the Bill of Rights to a juristic person is set out in section 8(4) of the Constitution, which confirms that 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.

Currie and de Waal The Bill of Rights Handbook 315.

Section 14 of the Constitution; Currie and de Waal The Bill of Rights Handbook 324. Section 14(a)-(c) of the CRIMPA guarantees people's right not to have their property searched or their possessions seized. Sections 21 and 22 of the Criminal Procedure Act 51 of 1977 confirms that a search warrant is required to search a private home.
The most comprehensive analysis of the interim Constitution's right to privacy by the Constitutional Court can be found in Bernstein.\textsuperscript{48} Ackerman J characterised the right to privacy as being on a continuum, where the more a person interconnects with the public, the more the right to privacy becomes attenuated.\textsuperscript{49} In Bernstein the court formulated the so-called "reasonable expectation of privacy" test to determine the scope of the right to privacy.\textsuperscript{50} This test includes two questions: firstly, whether a person has a subjective expectation of privacy, and secondly, whether this expectation is reasonable in a public context.\textsuperscript{51} The following is an application of the "reasonable expectation of privacy" test:

The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.\textsuperscript{52}

The position of the inner sanctum was confirmed in \textit{NM and Others v Smith and Others (Freedom of Expression Institute as amicus curiae)}.\textsuperscript{53} O'Regan J held that fundamental to our Constitution it is recognised that, as individuals we live in a public sphere and form part of a community, however, we are still entitled to a personal sphere from which we may exclude that public and community.\textsuperscript{54} In this personal sphere, individuals establish intimate human relationships and live their private daily life's, making it

\textsuperscript{48} Bernstein para 76; The essence of the dispute between the parties was whether the respondents are precluded by the Constitution from continuing with the examination of the applicants in terms of the Companies Act, because privacy was clearly invaded. Currie and de Waal The Bill of Rights Handbook 317. Note that the provisions of the interim and final Constitution in terms of the right to privacy are alike.

\textsuperscript{49} Davis and Steenkamp "Privacy" 9-2; Bernstein para 77. See subheading 2.6 for a discussion of the limitations to the right to privacy.

\textsuperscript{50} Bernstein para 76; In Hunter \textit{et al v Southam Inc} 1984 11 DLR 641 (SCC) para 652. Dickson J stated that the guarantee of security from unreasonable search and seizure protects only a reasonable expectation of the right to privacy.

\textsuperscript{51} Bernstein para 75; Currie and de Waal The Bill of Rights Handbook 318. What is reasonable depends on the set of values to which one links the standard of reasonableness.

\textsuperscript{52} Bernstein para 67; Woolman \textit{et al Constitutional Law of South Africa} 38-1. Throughout this study the term inner sanctum is important to remember when considering individual's right to privacy.

\textsuperscript{53} 2007 5 SA 250 (CC)(hereinafter NM v Smith). This case referred to Bernstein frequently.

\textsuperscript{54} NM v Smith para 130.
essential to what makes human life meaningful.\textsuperscript{55} The right to privacy recognises the paramountcy of protecting the personal sphere from the public.\textsuperscript{56} In \textit{Khumao v Holomisa}\textsuperscript{57} O'Regan J also held that the value of privacy, connected as it is to dignity, lies in the recognition that human beings have a right to have their intimate sphere and independence be protected from invasion or intrusions by the public.\textsuperscript{58}

The approach adopted by Ackerman J in \textit{Bernstein} and followed by Langa J in \textit{Hyundai} is consistent with that of the US Supreme Court in \textit{Katz v United States},\textsuperscript{59} which explained the two-part test of the right to privacy.\textsuperscript{60} First the test has to establish that the person claiming a breach of the right indicated an actual, subjective expectation of privacy, and second, the test has to conclude that the expectation is one that society would be prepared to recognise as reasonable.\textsuperscript{61}

It can be extrapolated from the above that it is reasonable to expect privacy in terms of an individual's inner sanctum, the so-called "truly personal realm".\textsuperscript{62} In the case study which challenged the provisions of the \textit{CEA} allowing warrantless searches and seizures, privacy was invaded when SARS officials searched Mr. Gaertner's home and searched his personal belongings. Mr. Gaertner had a subjective and reasonable expectation that his right to the privacy of his inner sanctum would be observed, instead of which it was blatantly violated and invaded.\textsuperscript{63}

\textsuperscript{55} \textit{NM v Smith} para 130.
\textsuperscript{56} \textit{NM v Smith} para 131-132. In doing so the inter-relationship between privacy, liberty and dignity as key constitutional rights are accentuated as the rights which construct the understanding of what it means to be a human being. Therefore, the main reason for asserting the value of privacy lies in the constitutional understanding of what it means to be a human being. The definition of privacy held by Ackerman J in \textit{Bernstein} para 68 was also followed by the High Court in \textit{Deutschmann No and Another; Shelton v Commissioner for the South African Revenue Service} 2000 6 BCLR 571, who described privacy as an individual's condition of life, which is characterised by seclusion from the public and publicity. Davis and Steenkamp "Privacy" 9-2.

\textsuperscript{57} 2002 BCLR 771 (CC).
\textsuperscript{58} \textit{Khumalo v Holomisa} 2002 BCLR 771 (CC) para 27; Davis and Steenkamp "Privacy" 9-3.
\textsuperscript{59} 1967 389 US 347.
\textsuperscript{60} Davis and Steenkamp "Privacy" 9-2.
\textsuperscript{61} \textit{Katz v United Stated} 1967 389 US 347 at 361; Davis and Steenkamp "Privacy" 9-3. Thus, a person's home is a place where a person could reasonably expect the right to privacy.
\textsuperscript{62} Currie and de Waal \textit{The Bill of Rights Handbook} 319; Confirmed in \textit{Gaertner} (CC) para 47. \textit{Gaertner} (CC) para 35 additionally states that the right to privacy extends beyond the inner sanctum of the home. Even though businesses do have the right to privacy, they have a lower expectation of privacy as to the disclosure of relevant information to the authorities as well as the public. In \textit{Bernstein} para 67 Ackerman J held that "privacy concerns only the inner sanctum of a person".
\textsuperscript{63} \textit{Gaertner} (CC) para 47 confirms this by stating that the right to privacy embraces the right to be free from intrusions and interference by the State and others in one's personal life.
2.3 The purpose of the right to privacy

The purpose of the right to privacy is closely tied to the scope of the right. Steytler concludes that the purpose of the right to privacy is to allow every individual sufficient space in which he or she can be himself or herself and relate to other persons. It is the space necessary to enable one to have one's own identity. Another view of the residual right to privacy is that it may be found in the principle of democracy, which dictates that there are limits on the extent of the control and direction that the State may exercise over the day-to-day conduct of individual lives.

In Gaertner, Judge Madlanga amplified the scope of privacy. Judge Madlanga held that the right to privacy is not absolute, and he made a remark similar to Judge Ackerman’s observation in Bernstein by stating that the right to privacy extends beyond the inner sanctum of the home. The extent of a person’s personal sphere shrinks as a person moves into public relations and activities such as business and society. This does not imply that they no longer have a right to privacy. It means only that the right to privacy is attenuated, not obliterated. This attenuation is greater or lesser depending on how far and into what area a person has strayed from the inner sanctum of the private dwelling and home.

Any person may claim the protection of the right to privacy, this claim will become stronger the closer it is in terms of the intimate personal core of a life and weaker as it is in terms of the public sphere. In spite of the fact that businesses have a right to privacy, it should be considered that they have a lower expectation of the right privacy

---

65 Davis and Steenkamp “Privacy” 9-8.
66 Davis and Steenkamp “Privacy” 9-8; Rubenfeld 1989 Harvard LR 804-805. In his article Rubenfeld concludes that the right to privacy is a constitutional right because the Constitution is the document which establishes democracy in a country. Davis and Steenkamp “Privacy” 9-8 note that Habermas, in his book The Inclusion of the Other 1998 argues that private autonomy is inextricably linked with public autonomy, and that privacy is fundamental to a legitimate democratic enterprise.
67 See subheading 2.6 on limitations to the right to privacy.
68 Gaertner (CC) para 35.
69 Gaertner (CC) para 49; thus moving away from the inner sanctum.
70 Gaertner (CC) para 49.
71 Hyundai para 17 and 18; See Bernstein para 77.
with regard to the disclosure of relevant information to the authorities as well as the public.\(^{72}\)

The submission based on the above may be that the right to privacy embodies the right to be free from intrusions and interference. In terms of the case study, Mr. Gaertner's inner sanctum was violated by the search and seizure which was conducted by SARS officers, thus violating his right to be free from intrusion and interference. Therefore, it is necessary to consider what search and seizure entails, considering that search and seizure operations and the law authorising them must comply with the right to privacy enshrined in the Constitution.\(^{73}\)

### 2.4 Search and seizure

Search and seizure operations should be reasonable and justifiable in an open and democratic society.\(^{74}\) The terms "search" and "seizure" are not clearly defined in the South African context.\(^{75}\) Nevertheless, the submission can be made that a search of a person or property requires an element of physical intrusion.\(^{76}\) Persons who have the authority to conduct a search or execute a seizure are identified in exact terms by the law applicable in each context.\(^{77}\)

In the context of search and seizure, a distinction can be drawn between searches aimed at compliance and those aimed at enforcement.\(^{78}\)

\(^{72}\) *Gaertner* (CC) para 35.

\(^{73}\) Okpaluba 2015 *Juta Law* 429. See under subheading 2.4 for what search and seizure with regard to the right to privacy involves. The right to privacy has a residual content as a value which reinforces the concept of democracy in the Constitution.

\(^{74}\) Basdeo 2009 *SACJ* 414.

\(^{75}\) Davis and Steenkamp "Privacy" 9-8: In *Rakas v Illinois* 1978 439 US 128 at 143, the US Supreme Court defined "search" to mean a governmental invasion of a person's privacy". In *Rudolph v Commissioner for Inland Revenue* 1996 7 BCLR 889 (CC) at para 11, the Constitutional Court held that the word "seizure" should be given its grammatical meaning for it is not a technical term.

\(^{76}\) Swanepoel 1997 *CILSA* 343. The most important legislative provisions that prima facie infringe the right to privacy are to be found in the CRIMPA.

\(^{77}\) Swanepoel 1997 *CILSA* 343. For instance, in the customs and excise context an officer is defined in section 1 of the CEA as "a person employed on any duty relating to customs and excise by order or with the concurrence of the Commissioner (of SARS), whether such order has been given or such concurrence has been expressed before or after the performance of the said duty." Even though objects susceptible to search and seizure, and the manner in which a lawful search and seizure should be conducted are specified by law, the law neglects to define the scope and limitations of search and seizure.

\(^{78}\) See Chapter 4 for insight into this distinction.
In certain circumstances searches and seizures may be unlawful. This comes to mind when considering the requirement of a warrant,\textsuperscript{79} whilst keeping in mind that law or conduct inconsistent with the provisions of the Constitution is invalid, and the obligations imposed by it must be fulfilled.\textsuperscript{80}

### 2.5 Unlawful search and seizure

An unlawful search and seizure includes a search of individuals' persons, homes or properties and seizure of their possessions.\textsuperscript{81} Unlawful searches and seizures are generally regarded as invasions of privacy.\textsuperscript{82} However, the terms "search" and "seizure" may be interpreted in any context. To the extent that a statute authorises entry into private homes and rifling through intimate possessions without a warrant, such activities will intrude on the inner sanctum of the persons in question and the statutory authority would accordingly breach the right to personal privacy as protected by the Constitution.\textsuperscript{83} Whether legislation requires a warrant in a particular case will be settled by the court, which will consider whether a warrant requirement would frustrate the regulatory objectives of the legislation and whether the legislation provides adequate regulation to officers as to the limitations to conduct warrantless search and seizure operations.\textsuperscript{84} Evidently, an unlawful search and seizure could be regarded as a search and seizure conducted either with an inadequate or unlawful warrant, or simply without a warrant at the intervention of a Court.

A warrant may be described as a mechanism employed to balance an individual's right to privacy with the public's interest in compliance with and enforcement of regulatory provisions.\textsuperscript{85} In Gaertner Judge Rogers stated that a warrant guarantees that the State has been able to prove that the intrusions upon individuals' right to privacy is

\textsuperscript{79} This will be discussed below under subheading 2.5.
\textsuperscript{80} Section 2 of the Constitution, confirming that any search and seizure must be conducted in terms of the provisions with the Constitution. Therefore, the right to privacy must always be protected.
\textsuperscript{81} Woolman \textit{et al} Constitutional Law of South Africa 38-28.
\textsuperscript{82} Woolman \textit{et al} Constitutional Law of South Africa 38-28. See Fedica Group (Pty) Ltd v Matus 1998 2 SA 617 (C) para 97, in which Brand J stated that the search of the individual's office constituted a violation of her constitutional rights to dignity and privacy.
\textsuperscript{83} Mistry para 23; Section 14 of the Constitution; Bernstein para 67.
\textsuperscript{84} Magajane para 50. See under subheading 2.6 below, where a discussion of the limitation analysis in terms of section 36 of the Constitution follows.
\textsuperscript{85} Swanepoel 1997 CILSA 439; Gaertner (CC) para 69. Throughout this study, the focus will be on warrantless searches and seizures, particularly in the context of the customs and excise industry (see Chapter 3).
reasonable prior to such an intrusion.\textsuperscript{86} Further, a warrant limits the time, place and the ambit of the search and the seizure powers of officers,\textsuperscript{87} thereby moderating the infringement of the right to privacy and guiding the conduct of the officers, whilst informing the individual of the lawfulness and limitations of the search and seizure operation.\textsuperscript{88} Persons conducting the searches and executing the seizures are obliged by the legislation to comply with the requirements of the \textit{Constitution}.\textsuperscript{89} The \textit{Constitution} requires that all conduct of the State accord with the provisions of the \textit{Bill of Rights}.\textsuperscript{90}

It is common knowledge that any legislation authorising warrantless entry into private homes and the rifling through private possessions introduces on the right to privacy.\textsuperscript{91} As such it is necessary that the right to privacy with regard to private homes and possessions of individuals be protected.\textsuperscript{92} Warrantless searches and seizures aimed at obtaining evidence for criminal prosecution possibly create an unjustifiable threat to the right to privacy due to their unwarranted breadth.\textsuperscript{93} Acknowledging the fact that warrantless search and seizure operations will inevitably infringe a person's right to privacy, there is however legislation such as the \textit{CRIMPA} that provides substantial safeguards which guarantee that with regards to the relevant circumstances, the infringement is limited to what is reasonably necessary.\textsuperscript{94} The judicial authorisation requirement with regards to search and seizure operations is only a single aspect of the

\textsuperscript{86} \textit{Gaertner} (CC) para 69.

\textsuperscript{87} \textit{Gaertner} (CC) para 69. It is necessary to strictly adhere to the warrant requirement unless there are clear and justifiable reasons for deviation.

\textsuperscript{88} \textit{Gaertner} (CC) para 69;

\textsuperscript{89} \textit{Hyundai} para 40. \textit{Gaertner} (CC) para 71 states that when legislation authorises warrantless regulatory searches and seizures, provision must be made for a constitutionally adequate substitute to guarantee certainty when a warrantless search and seizure operation is conducted and to limit the discretion of the officers.

\textsuperscript{90} Section 8(1) of the \textit{Constitution} states that "The \textit{Bill of Rights} applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State."; \textit{Hyundai} para 41.

\textsuperscript{91} \textit{Gaertner} (CC) para 86; \textit{Mistry} para 21.

\textsuperscript{92} \textit{Gaertner} (CC) para 86. In the \textit{Mistry} case the court found that at the very least entry and searches conducted there should be authorised by a warrant.

\textsuperscript{93} \textit{Magajane} para 88. \textit{Magajane} brought three important principles in terms of warrantless searches. First determine whether the purpose of the search is for criminal prosecution and enforcement or to verify compliance; second the broader the search powers the greater the limitation on the right to privacy; and third a warrantless search will be constitutional only if the legislation concerned provides adequate guidelines on conducting the search.

\textsuperscript{94} Note that warrantless searches and seizures may be justified in exceptional circumstances (see section 22(b) of the \textit{CRIMPA}); \textit{Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma and Another v National Director of Public Prosecutions} 2009 1 SA 1 (CC) para 78 (hereinafter \textit{Thint}). See under subheading 2.6 for details on the infringement of the right to privacy, and Chapter 4 on other effected legislation in terms of searches and seizures with and without a warrant.
broader scheme which guarantees that the right to privacy is protected. A number of laws authorising searches and seizures have been scrutinised to determine whether they are in fact in line with the Constitution. In previous case law it was determined that to be constitutionally valid, such legislation must comply with the following requirements. Firstly, the law must properly define the power to search and seize, secondly it has to provide for prior authorisation by an independent authority, and lastly it must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search and executing the seizure.

Evidently, the right to privacy and warrantless searches and seizures present significant constitutional problems, and as a result it is necessary to examine the limitations to the right to privacy.

2.6 Limitations

The Constitutional Court pointed out that the Constitution requires a two-stage inquiry to determine whether there has been an unlawful infringement or limitation of the right to privacy. In the case of a constitutional invasion of the right to privacy the following questions need to be answered. Firstly, has the right to privacy provided for in the Constitution been infringed or limited by the invasive law or conduct? Secondly, if so, is such an infringement or limitation justifiable in terms of the requirements of the limitation analysis of the Constitution? Therefore, the Constitutional Court has

95 Thint para 78. It is important to consider the scope of protections for the right to privacy at the various stages of a criminal investigation or trial. See Thint para 79 for further detail, as this study will not focus on search and seizures aimed at enforcement (in the criminal context) but rather at those aimed at compliance (see under subparagraph 2.4 and Chapter 4).
96 Woolman et al Constitutional Law of South Africa 38-28. See below subparagraph 2.6 and Chapter 4 for a discussion on various legislations evaluated.
97 Woolman et al Constitutional Law of South Africa 38-28; De Waal, Currie and Erasmus The Bill of Rights Handbook 278.
98 Mistry para 29.
99 Park-Ross para 148.
100 Hyundai para 6.
102 In this instance the subjective expectation of the right to privacy must be reasonable.
103 This deals with the justification of the limitation in terms of section 36(1) of the Constitution and must be discharged on a balance of probabilities; See case law below; Bernstein para 71; Woolman et al Constitutional Law of South Africa 38-20; Currie and de Waal The Bill of Rights Handbook 317.
cautioned against simply using common law principles to interpret fundamental rights and their limitations.\textsuperscript{104}

To examine the extent to which the right to privacy can be limited it is important to recognise that the right to privacy is not absolute.\textsuperscript{105} Similarly, in \textit{Case v Minister of Safety and Security; Curtis v Minister of Safety and Security}\textsuperscript{106} Judge Madala argued that the protection afforded to the right to privacy is broad but it can also be limited in appropriate circumstances. A very high level of protection is given to the individual's intimate personal sphere - so much so that no limitation to this intimate core of privacy could be considered to be justifiable. However, this intimate core has to be narrowly construed to determine any possible intrusion.\textsuperscript{107} This sacred core is not quite so sacred once a person enters into a relationship with persons outside this closest intimate sphere. The person's activities then obtain a social aspect and in this context the right to privacy becomes subject to limitations.\textsuperscript{108} To determine whether there was a limitation or infringement of the right to privacy the limitation analysis in terms of section 36 of the Constitution should be applied. This limitation analysis involves a proportionality review.\textsuperscript{109} Among other considerations, a court has to consider a person's reasonable expectation of privacy and the extensiveness of the legislation.\textsuperscript{110}

When someone's person, home or property is searched, or someone's possessions seized, section 14 of the Constitution will possibly be infringed.\textsuperscript{111} To ensure compliance with the Constitution, the powers of search and seizure in legislation which \textit{prima facie} violate the right to privacy should be tested against the provisions of section 36 of the

\textsuperscript{104} Woolman \textit{et al} Constitutional Law of South Africa 38-20.
\textsuperscript{105} Gaertner (CC) para 49; Woolman \textit{et al} Constitutional Law of South Africa 38-1.
\textsuperscript{106} 1996 3 SA 617 (CC) para 106 (hereinafter \textit{Curtis}).
\textsuperscript{107} In \textit{Curtis} para 93, Didcott J held that the test to determine whether the intrusion into personal privacy is legitimate is to require the intrusion to be reasonable and justifiable. See under subparagraph 2.6 with regard to the limitation analysis.
\textsuperscript{108} Bernstein para 77.
\textsuperscript{109} Magajane para 50. Also see Magajane para 60-77, where this analysis was applied.
\textsuperscript{110} The reasonable expectation of the right to privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public. Legislation should not be so extensive as to have the real potential to reach into private dwellings and homes.
\textsuperscript{111} Currie and de Waal \textit{The Bill of Rights Handbook} 315; \textit{Director of Public Prosecutions: Cape of Good Hope v Bathgate} 2000 2 SA 535 (C) para 82 stated that having one's home or property searched constitutes a serious inroad into one's right to privacy in terms of section 14 of the Constitution. This is magnified by the seizure of a substantial number of relatively valuable possessions. The seizure of such possessions is not only an infringement of the right to privacy in terms of section 14, but it may also constitute arbitrary deprivation of property in terms of s 25(1) of the Constitution.
Constitution. Section 36 embodies the limitation clause. Accordingly, the right to privacy may be limited in terms of a law of general application only if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Furthermore, section 36 indicates the factors which must be considered when determining whether the limitation is in fact reasonable and justifiable. The first factor in terms of section 36 of the Constitution is the nature of the infringed right. Secondly the importance of the purpose of the limitation is to be considered. The third factor is the nature and extent of the limitation, the fourth factor is the relationship between the limitation of the right to privacy and the purpose of the limitation, and the final factor is the requirement that the availability of less restrictive means to achieve the purpose of the limitation be considered. Subsequently it should be considered whether the provision can achieve its purpose even if it required a warrant prior to the search and seizure operation.

It is evident therefore that the right to privacy is not absolute. However, with regard to search and seizure, several judgements suggests that in certain circumstances a warrantless searches and seizures will not be considered a reasonable and justifiable limitation of a person's right to privacy. To ensure compliance with the provisions of

---


113 Section 36(1) of the Constitution may limit all rights contained in the Bill of Rights, including the right to just administrative action (s 33) and access to courts (s 34) and the like; Gaertner (HC) para 56(d).

114 Gaertner (HC) para 56(e). Regulatory statutes aim at protecting public health, safety and general welfare. The public interest which is served by the inspection provision should therefore be carefully examined by the court.

115 Gaertner (HC) para 56(e)(i)-(iii).

116 Gaertner (HC) para 56(f).

117 Section 36(1)(a)-(e) of the Constitution. Subsection (2) prescribes that no law may limit any right entrenched in the Bill of Rights except as provided in subsection (1) or in any other provision of the Constitution; The aforesaid is confirmed in Section 2 of the Constitution, which states that: "the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid". Clearly, any limitation of the right to privacy must be reasonable and justifiable in terms of the provisions entrenched in section 36 of the Constitution; Gaertner (HC) para 56(g).

118 Gaertner (HC) para 56(g); Therefore, where warrantless searches and seizures are justified, the legislation must provide for a constitutionally adequate substitute for a warrant and also properly limit the discretion of officers as to time, place and scope.

119 Gaertner (CC) para 49, states that the right to privacy is not absolute. The right may be attenuated but not obliterated. The attenuation is more or less, depending on how far and into what area one has strayed from the inner sanctum of the home; Fritz 2016 JJS 24.

120 Such as Gaertner; Mistry; Hyundai; Park-Ross; and Magajane mentioned above. Such a search would be unconstitutional. In the above cases, the judgements considered the factors listed in section 36 to determine whether the limitation is reasonable and justifiable. However, section 22(b) of the CRIMPA provides for exceptional circumstances when warrantless searches and seizures may be justified.
the *Constitution*, the powers of search and seizure legislation which *prima facie* violates the right to privacy have to be tested against the provisions of section 36 of the *Constitution*.\textsuperscript{122} The safeguard against an unjustifiable limitation of the right to privacy includes prior judicial authorisation, thus a warrant, and the application of an objective standard which entails that there should be reasonable grounds to believe that an offence has been or is likely to be committed; that the items required or seized may provide evidence in terms of the offence; and that the items are expected to be on the premises to be searched.\textsuperscript{123}

In the *Gaertner* case it was argued by SARS officers that they did not need a warrant to conduct a search or seize property in terms of section 4 of the *CEA*.\textsuperscript{124} Certain provisions of the *CEA* which empowered officers employed on any duty relating to customs and excise to enter any premises whatsoever and search and seize whatever they deem necessary for the purpose of the *CEA* were challenged. Mr. Gaertner claimed that these provisions breached his right to privacy. The court held that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the *CEA* do, in fact, limit the right to privacy.\textsuperscript{125} In addressing the question of justification in *Gaertner*, Judge Madlanga referred to *Magajane*, in which van der Judge Westhuizen held that the inquiry into whether a search infringes or limits the right to privacy is determined with reference to the continuum of privacy.\textsuperscript{126} Hence the case turned on the nature and extent of the limitation.\textsuperscript{127} In this regard the court found that the officers were given far-reaching powers that might be exercised anywhere, at any time whatsoever, and in relation to whomsoever, with no need for the existence of a reasonable suspicion of the nature of the search and seizure.\textsuperscript{128} Accordingly, there were less restrictive means available to achieve the purpose of the *CEA*. No cogent reason had been provided by SARS why warrants were not required in respect of searches of people's homes with exceptions similar to those contained in section 22 of the *CRIMPA*.\textsuperscript{129}

\textsuperscript{122} Davis and Steenkamp "Privacy" 9-9.
\textsuperscript{123} Davis and Steenkamp "Privacy" 9-9.
\textsuperscript{124} *Gaertner* (CC) para 10.
\textsuperscript{125} *Gaertner* (CC) para 43. See Chapter 3 with regards to warrantless search and seizure in terms of the *CEA*.
\textsuperscript{126} *Gaertner* (CC) para 44.
\textsuperscript{127} See *Gaertner* (CC) para 46-75.
\textsuperscript{128} *Gaertner* (CC) para 66.
\textsuperscript{129} Davis and Steenkamp "Privacy" 9-13.
Accordingly, a court has to consider a person's expectation of privacy read with the breadth of the legislation.\textsuperscript{130} When determining whether the legislation could have achieved its purpose through less intrusive means,\textsuperscript{131} the court must determine whether the legislation could have required a warrant, considering whether a warrant requirement would defeat the State's regulatory objectives and whether in the absence of a warrant the legislation provides sufficient guidance to officials.\textsuperscript{132} The factors furnished by section 36(1)(a)-(e) of the \textit{Constitution} are possibly vital when considering whether a limitation of a right enshrined in the Bill of Right is constitutionally sound.

Establishing the limitations to the right to privacy with regard to search and seizure is a general problem and comes to light in various contexts, as is limited in the following cases.

The issue of the right to privacy was dealt with in \textit{Park-Ross v Director: Officer for Serious Economic Offences},\textsuperscript{133} in which the court considered whether the \textit{Investigation of Serious Economic Offences Act}\textsuperscript{134} unreasonably violated a person's right to privacy. Section 6 of the \textit{Investigation of Serious Economic Offences Act}\textsuperscript{135} allowed the Director for Serious Economic Offences to enter and search premises and seize property without a warrant. It was declared that a provision authorising searches to be carried out without the sanction of a judicial officer was unconstitutional.\textsuperscript{136} Thus, the court found the provisions to be in inconsistent with the \textit{Constitution}.\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{130} The expectation of privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public.
  \item \textsuperscript{131} As prescribed by s 36(1)(e) of the \textit{Constitution}.
  \item \textsuperscript{132} \textit{Gaertner} (CC) para 44; \textit{Magajane} para 50. See under subheading 2.5 in terms of the warrant requirement.
  \item \textsuperscript{133} 1995 2 BCLR 198 (C) (hereinafter \textit{Park-Ross}).
  \item \textsuperscript{134} Fritz 2016 JJS 24. Note that the \textit{Investigation of Serious Economic Offences Act} 117 of 1991, which provided directors with the power to search and seize property without a warrant was first amended by the \textit{Amendment Act} 46 of 1995 (See \textit{Park-Ross}); Thereafter it was repealed by the \textit{National Prosecuting Authority Act} 32 of 1998. The regulation remained in force in terms of section 43(7), which was repealed, thus this section is no longer in force.
  \item \textsuperscript{135} 117 of 1991; Fritz 2016 JJS 25.
  \item \textsuperscript{136} \textit{Hyundai} para 38 refers to the judgement in \textit{Park-Ross}.
  \item \textsuperscript{137} \textit{Park-Ross} para 222; Fritz 2016 JJS 25; Note that section 6 of the \textit{Investigation of Serious Economic Offences Act} 117 of 1991 was amended by the \textit{Investigation of Serious Economic Offences Act} 46 of 1995 with reference to warrantless search and seizure to be consistent with the provisions of the \textit{Constitution}.
\end{itemize}
In *Mistry v Interim Medical and Dental Council of South Africa*\(^{138}\) the Constitutional Court considered the right to privacy in the context of regulatory inspections.\(^{139}\) In the *Mistry* case, the issue was in terms of the inspection powers provided by section 28(1) of the *Medicine Act*,\(^{140}\) which were phrased broadly enough to authorise warrantless entry into private homes and the rifling through private possessions. To the extent that the statute authorises intrusion on the inner sanctum, the *Medicine Act* permitted the violation of the right to privacy. Regardless of how the terms search and seizure may be interpreted in a specific case, such activities, as asserted above, will intrude on the inner sanctum of a person, and the statutory authority will accordingly breach the right to privacy as protected by *Constitution*.\(^{141}\) In the *Medicine Act* there were no safeguards (such as a warrant requirement) to limit the extent of the intrusion on the right to privacy.\(^{142}\) The Constitutional Court held that the extent of the invasion of the right to privacy endorsed by the *Medicine Act* was inconsistent with its purpose, overbroad in its reach and, thus, invalid.\(^{143}\)

In *Director of Public Prosecutions: Cape of Good Hope v Bathgate*\(^{144}\) the *Proceeds of Crime Act*\(^{145}\) was challenged.\(^{146}\) In *Bathgate* Judge Van Zyl held that it must be acknowledged that certain provisions of the *Proceeds of Crime Act* limit certain fundamental rights.\(^{147}\) The search of a person's private home or property creates a serious inroad into the right to privacy, which is worsened by the seizure of personal possessions.\(^{148}\) The court had to consider whether the limitation of the right to privacy was justified in terms of section 36 of the *Constitution*.\(^{149}\) In *Bathgate* Van Zyl J held that the infringement or limitation of the right to privacy was nothing more than what was reasonably necessary to achieve the purpose of the *Proceeds of Crime Act*, specifically to recover proceeds of crime and prevent the use of such proceeds, pending the

---

\(^{138}\) *Mistry* para 751.

\(^{139}\) Regulatory inspections are described as: "inspections aimed at ensuring compliance with a regulatory framework set out in a statute". This case relied on the *Bernstein* case.

\(^{140}\) 90 of 1997.

\(^{141}\) *Mistry* para 23.

\(^{142}\) Davis and Steenkamp "Privacy" 9-12.

\(^{143}\) *Mistry* para 30 and para 54.

\(^{144}\) 2000 2 SA 535 (C) (hereinafter *Bathgate*).

\(^{145}\) 76 of 1996, the predecessor or the *Prevention of Organised Crime Act* 121 1998.

\(^{146}\) *Bathgate* para 7. The *Proceeds of Crime Act* provides that when there are reasonable grounds for believing that a confiscation order may be granted against an accused person in terms of the benefits derived from the criminal activities.

\(^{147}\) *Bathgate* para 82; including the right to privacy in terms of section 14 of the *Constitution*.

\(^{148}\) *Bathgate* para 82.

\(^{149}\) *Bathgate* para 84.
predicted proceedings against the alleged criminal.\textsuperscript{150} As such the limitations placed on the right to privacy by the \textit{Proceeds of Crime Act} were found to be justified and proportionate to the purpose of this Act.\textsuperscript{151}

In \textit{South African Association of Personal Injury Lawyers v Heath}\textsuperscript{152} warrantless search and seizure in terms of the \textit{Special Investigating Units and Special Tribunals Act}\textsuperscript{153} was scrutinised. The applicant argued that section 6(1), (3), and (8) infringed the right to privacy and created an unjustifiable limitation.\textsuperscript{154} Section 6 of the Act provides that any member of a Special Investigating Unit or a police officer authorised by a member may enter and search any premises if there is or is suspected to be any connection between the premises and the investigation.\textsuperscript{155} Such inspectors may search or seize anything on such premises which has a bearing on the investigation.\textsuperscript{156} A warrantless search and seizure may be conducted in the event that a competent person gives consent, or if the officer reasonably believes that a warrant will be issued and that the delay in obtaining a warrant would defeat the purpose of the search and seizure.\textsuperscript{157} It provides that any person with the authority to enter and search any premises may, after audibly requesting entry and informing the purpose for the entry and search use such force as is reasonably necessary to overcome any resistance, including the breaking of any door or window of such premises.\textsuperscript{158} The respondent argued that the right to privacy was not violated by section 6(2) of the Act which provides that the entry and search of any premises must be conducted with strict regard to decency and order, including the protection of individuals' right to dignity, security and privacy.\textsuperscript{159} In the High Court Judge A Coetzee held that it is impossible to exercise search and seizure powers without invading a person's privacy when entering and searching a person's premises for the

\begin{flushleft}
\textsuperscript{150} Bathgate para 108.  \\
\textsuperscript{151} Bathgate para 113; Davis and Steenkamp "Privacy" 9-12.  \\
\textsuperscript{152} 2000 JDR 0402 (T) (hereinafter Heath (HC)); Thereafter South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC) (hereinafter Heath (CC)).  \\
\textsuperscript{153} 74 of 1996.  \\
\textsuperscript{154} Heath (HC) para 20; Heath (CC) para 11(c); also see Heath (CC) para 52.  \\
\textsuperscript{155} Section 6(1) of the Special Investigating Units and Special Tribunals Act 74 of 1996.  \\
\textsuperscript{156} Section 6(3) of the Special Investigating Units and Special Tribunals Act 74 of 1996.  \\
\textsuperscript{157} Section 6(6) of the Special Investigating Units and Special Tribunals Act 74 of 1996.  \\
\textsuperscript{158} Section 6(8) of the Special Investigating Units and Special Tribunals Act 74 of 1996. Note that this section is similar to the search and seizure provisions of the \textit{CEA}, which are important for the case study of Gaertner.  \\
\textsuperscript{159} Section 6(2) of the Special Investigating Units and Special Tribunals Act 74 of 1996.
\end{flushleft}
The purpose of the limitation was held to be of great importance and as such the limitation of the right to privacy was justified and constitutional. Coetzee AJ also held that in terms of the *Special Investigating Units and Special Tribunals Act*,

narrowly defined, the circumstances under which a warrantless search may be conducted and therefore it amounted to a reasonable limitation of the right to privacy. In the Constitutional Court Chaskalson P made an order which set aside the order made by the High Court and declared section 3(1) of the *Special Investigating Units and Special Tribunals Act* 74 of 1996 to be unconstitutional and invalid due to the fact that the search and seizure powers vested in the Special Investigating Unit by the Act were not consistent with the right to privacy protected by section 14 of the *Constitution*.

Similarly, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* the constitutionality of specific provisions of the *National Prosecuting Authority Act* (hereinafter the *NPAA*) came under examination. The *NPAA* provides an Investigating Director in the office of the National Director of Public Prosecution, or any person authorised thereto by him or her in writing, with the power to, on the authority of a warrant, search and seize any property in order to conduct the investigation of certain specified offences. The *Hyundai* case was concerned with the constitutionality of the provisions which authorise the issuing of a warrant of search and seize for the

---

160 *Heath* para 63. Coetzee AJ further argued that section 6(2) of the Act does not ensure that the search and seizure powers conferred by section 6 will be exercised in such a manner that the action does not violate the right to privacy of the affected persons. Therefore, to be justified and constitutional the subsections had to be analysed in terms of section 36(1) of the *Constitution*.

161 *Heath* (HC) para 65.

162 74 of 1996.

163 *Heath* (HC) para 68; Section 6(6)(a) and 6(6)(b)(i)-(ii) of the *Special Investigating Units and Special Tribunals Act* 74 of 1996 states that warrantless entry and search are justified if a person, competent to consent, consents to such entering, search, seizure and removal of books, documents of objects concerned, or if a person, on reasonable grounds believes that a warrant will be issued to them if they were to apply for such a warrant and that the delay in obtaining such a warrant would defeat the object of the entry and search.

164 *Heath* (CC) para 5.

165 2001 1 SA 545 (CC) (hereinafter *Hyundai*).

166 32 of 1998.

167 Specifically section 29(5) read with sections 28(13) and 28(14); Davis and Steenkamp "Privacy" 9-10.

168 *Hyundai* para 1; Radyn 2018 *De Rebus* 16.
purpose of a preparative investigation. In the matter of Hyundai Judge Lang held that it is evident that the search and seizure provisions under section 29 constitute a limitation to the right to privacy; as such these provisions must be examined according to the provisions of section 36(1) of the Constitution to determined whether the limitation is constitutionally justifiable. On the correct interpretation of section 29(5) of the NPAA, the court held that, for the judicial officer to issue a search warrant, the Investigating Director is required to place before the judicial officer adequate grounds to justify the infringement of the right to privacy. The court found that for the purpose of a preparative investigation, there must be a reasonable suspicion that an offence had been committed, for a search and seizure operation to be constitutionally justifiable. Properly construed, section 29(5) provides adequate safeguards against a warrantless invasion of the right to privacy. It was further held that in this circumstance the limitation of the right to privacy is reasonable and justifiable.

In Jansen van Rensburg NO v Minister of Trade and Industry the constitutionality of the warrantless search and seizure provisions in the Consumer Affairs (Unfair Business Practices) Act were challenged. In this matter Judge Van Dijkhorst declared that section 7(3), as it then read, constituted a clear infringement and limitation of the right to privacy, in the light of the fact that it sanctioned search and seizure without any judicial authorisation. Furthermore, this section could not be justified in terms of the limitation clause under section 36 of the Constitution and it was found unconstitutional. Van Dijkhorst J held that section 8(5)(a) violates the provisions of the Bill of Rights.

169 See chapter 5 of the NPAA; The two forms of investigatory procedures include an 'inquiry' and a 'preparatory investigation'; Hyundai para 1.
170 Hyundai para 20.
171 Hyundai para 55; There are other circumstances, in the context of other legislation, in which a warrant may be authorised without the requirement of a reasonable suspicion or where a search may be permitted without a warrant; See Mistry para 29 for an example.
172 Hyundai para 28.
173 Section 29(4) of the NPAA provides for circumstances in which warrantless searches and seizures may be dispensed; Radyn 2018 De Rebus 16-17.
174 Hyundai para 55.
175 2001 1 SA 29 (CC) (hereinafter Jansen van Rensburg).
176 71 of 1988. The original name of the Act was the Harmful Business Practices Act. The name was changed by section 13 of the Harmful Business Practices Amendment Act 23 of 1999 (the Amendment Act), as were some of the provisions in the Act, including section 7(3).
177 Jansen van Rensburg para 1. The proceedings concerned the constitutionality of section 7(3), which authorised investigating officers appointed by the Consumer Affairs Committee to conduct searches and seizures for the purpose of ensuring that the terms of the Act are being observed, or to obtain information relevant to an investigation launched by the committee, and section 8(5)(a), which provides the Minister of Trade and Industry with powers.
178 Jansen van Rensburg para 8.
entrenched in the *Constitution*. In the Constitutional Court Goldstone J confirmed the High Court order of Judge Van Dijkhorst J in respect of the constitutional invalidity of section 8(5)(a) of the Act, but the court did not confirm the declaration of invalidity of section 7(3) because the issue became moot as a result of a subsequent amendment of the provision.

The point at issue in *Magajane v Chairperson, North West Gambling Board* was legislation which authorised searches and seizures of unlicensed premises for the aim of obtaining evidence for criminal prosecutions without the requirement of a warrant. The court followed the approach adopted in *Bernstein*, where Ackerman J stated that the scope of privacy was analysed in terms of a series of concentric circles ranging from an innermost core, in which the inner sanctum of a person constitutes the most closely protected aspect of a person, to the outer rings, which yield more readily to the rights of other persons and to the public interest. In dealing with a search of commercial property without the requirement for a warrant, Judge Van der Westhuizen held that the more a business creates potential threats to the public, the more important and less intrusive the search. The case of *Magajane* established the principle that, the broader the inspection or search powers of officers, the greater the possibility of infringement of a person’s right to privacy. It was held that the applicable legislation which served the worthy objective of safeguarding the enforcement of the statutory regulation of the gambling industry was couched in terms that unjustifiably limited the right to privacy.

---

179 Jansen van Rensburg para 17.
180 Jansen van Rensburg para 26; Jansen van Rensburg para 36. Section 7(3) was amended by the *Harmful Business Practices Amendment Act* 23 of 1999; Davis and Steenkamp "Privacy" 9-13.
181 2006 5 SA 205 (CC) (hereinafter *Magajane*). In *Gaertner* (HC) para 54, the *Magajane* matter was referred to as the seminal authority relevant to the enquiry of considering the merits of the constitutional attack on sections 4(4) - (6) of the *CEA*, making it an important case to consider in terms of *Gaertner*.
182 *Magajane* para 1; The *North-West Gambling Act* 2 of 2001 governs the regulations of gambling activities in the North-West Province and establishes and empowers the North-West Gambling Board. Section 65 of this Act lists the powers and functions of the Board’s inspectors.
183 *Magajane* para 42.
184 *Magajane* para 42; *Bernstein* para 70; Davis and Steenkamp "Privacy" 9-12.
185 *Magajane* para 42.
186 *Magajane* para 71; Fritz 2016 JJS 27. *Magajane* para 37 stated that the applicant acknowledges that a limitation of the right to privacy might be justified in terms of the gambling industry, but argued that the extensiveness of the search and seizure provisions makes them unjustifiable under the principles of the *Mistry* case. See *Mistry* para 27-30.
187 *Magajane* para 94; Davis and Steenkamp "Privacy" 9-12.
requiring a warrant, causes these powers to be unjustifiable with regards to the principles stated in *Mistry*.\(^{188}\) In terms of any gambling business or premises there will be a rather low reasonable expectation of the right to privacy, however, the provisions relating to unlicensed premises aim at accumulating evidence for criminal prosecution and as such create substantial intrusions.\(^{189}\) The limitation analysis in terms of section 36 of the *Constitution* involves a proportionality review.\(^{190}\) The court found that there was no proportionality between the purpose and the extent of the limitation of the right to privacy caused by the provisions of section 65(1) of the *North-West Gambling Act*.\(^{191}\) Considering the potential intrusion of the right to privacy permitted by section 65(1) of the *North-West Gambling Act*, along with the extensiveness of the provisions and the availability of a warrant as a less restrictive means to achieve the purposes of the section, this section was held to be unreasonable and unjustifiable in terms of section 36 of the *Constitution* and was therefore found to be unconstitutional.\(^{192}\)

In *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd*\(^{193}\) the Constitutional Court declared section 32A of the *Estate Agency Affairs Act*\(^{194}\) and section 45B of the *Financial Intelligence Centre Act* (hereinafter the *EAAA*)\(^{195}\) to be unconstitutional and invalid. Both provisions ensure regulatory bodies with wide-ranging search and seizure powers.\(^{196}\) In terms of the *Estate Agency Affairs Act* the Estate Agency Affairs Board regulates the estate-agency industry. It must maintain and promote the standard of conduct of estate agents and regulate their activities.\(^{197}\) The Board is also a supervisory body in terms of *FICA*.\(^{198}\) In that role it is required to combat money-laundering, the financing of terrorism and related activities.\(^{199}\) Section 32A of the *EAAA* conferred powers of search and seizure on inspectors authorised by the Board to enter any place

---

\(^{188}\) See *Mistry* para 27-30, which provides that the extensiveness of the provisions is an important factor of the extent of the limitation; *Magajane* para 71; *Magajane* para 37.

\(^{189}\) *Magajane* para 94.

\(^{190}\) *Magajane* para 50.

\(^{191}\) *Magajane* para 95. Given the purpose and effect of the section, the court considered whether there were less restrictive means available to achieve the purpose of the section. It was clear that this section constituted a considerable limitation on the right to privacy.

\(^{192}\) *Magajane* para 95.

\(^{193}\) 2014 3 SA 106 (CC) (hereinafter *Estate Agency*).

\(^{194}\) 112 of 1976.

\(^{195}\) 38 of 2001 (hereinafter *FICA*); Note that *FICA* was amended by the *Financial Intelligence Centre Amendment Act* 1 of 2017. See Chapter 4.

\(^{196}\) *Estate Agency* para 1.

\(^{197}\) Section 7 of the *EAAA*.

\(^{198}\) Schedule 2 of *FICA* lists nine supervisory bodies.

\(^{199}\) *Estate Agency* para 4.
in respect of which there is reason to believe *inter alia* that any person there is performing an act as an estate agent and there are books, records or documents to which the provisions of the *EAAA* are applicable.\(^{200}\) \(^{200}\) *FICA* confers powers of search and seizure on inspectors in respect of premises which are reasonably believed to be places where the business of an accountable institution, reporting institution or other person to whom the provision of *FICA* apply, is conducted.\(^{201}\) \(^{201}\) These search and seizure operations may be executed without obtaining a warrant.\(^{202}\) \(^{202}\) Cameron J found that as all these searches required no warrant, they afforded no differentiation as to the nature of the search or the nature of the premises searched, consequently authorising warrantless searches in circumstances where no justification can exist for not requiring the Board to obtain a warrant.\(^{203}\) \(^{203}\) The Constitutional Court confirmed the High Court’s declaration of the constitutional invalidity of both provisions.\(^{204}\) \(^{204}\)

The case of *Minister of Police v Kunjana*\(^{205}\) involved a search of a person’s properties and the seizure of items by members of the South African Police Service (SAPS), relating to sections 11(1)(a) and (g) of the *Drug and Drug Trafficking Act*.\(^{206}\) \(^{206}\) The court held that the power of the police officers to search and seize a person’s property is a violation of the right to privacy as protected by section 14 of the *Constitution*.\(^{207}\) \(^{207}\) The Constitutional Court referred to *Mistry*, in which this court had emphasised the paramountcy of the right to privacy and held that the existence of safeguards to regulate the way in which State officials may enter the private domains of ordinary citizens was one of the features that distinguish a constitutional democracy from a police state.\(^{208}\) \(^{208}\) In *Gaertner* the Constitutional Court said that the right to privacy embraces the right to be free from intrusions and interference by the State and others in one’s personal life.\(^{209}\) \(^{209}\) Section 11(1)(a) of the *Drugs and Drug Trafficking Act*\(^{210}\) provides that warrantless searches of private homes may be conducted. Consequently, the more a search intrudes into the inner sanctum of persons, the more the search infringes their right to

---

\(^{200}\) Section 32A of the *EAAA*.

\(^{201}\) Section 45B of *FICA*.

\(^{202}\) Davis and Steenkamp “Privacy” 9-13.

\(^{203}\) *Estate Agency* para 40.

\(^{204}\) *Estate Agency* para 73.

\(^{205}\) 2016 2 SACR 473 (CC) (hereinafter *Kunjana*).


\(^{207}\) *Kunjana* para 14.

\(^{208}\) *Kunjana* para 18; *Mistry* para 25.

\(^{209}\) *Kunjana* para 18; *Gaertner* (CC) para 47.

\(^{210}\) 140 of 1992.
privacy.\textsuperscript{211} These provisions are also problematic as they raise the limitation question, namely whether there are less restrictive means available to achieve the purpose of the \textit{Drug Act}, as the provisions place a greater limitation on the right to privacy than is necessitated by the circumstances.\textsuperscript{212} Less restrictive measures to achieve the purpose of the \textit{Drug Act} do exist and there is no readily discernible reason for sections 11(1)(a) and (g) not to contemplate such less restrictive means, which would prevent the possibility of a too great limitation of the right to privacy.\textsuperscript{213} Accordingly, the Constitutional Court confirmed the High Court's declaration of the constitutional invalidity of sections 11(1)(a) and (g) of the \textit{Drug Act}.\textsuperscript{214}

### 2.7 Conclusion

In this chapter the specific research question "What does the right to privacy entail and to what extent this right can be infringed" was answered. The right to privacy embodied in the \textit{Constitution} confirms a person's right not to have one's person, home or property searched or possessions seized. This chapter has further made it clear that in certain circumstances privacy is in fact limited and that this limitation might be unconstitutional and invalid. As indicated in the case law discussed above, the test to determine whether a limitation of the right to privacy is constitutional and valid is that it must be reasonable and justifiable according to the provisions of the limitation clause, section 36 of the \textit{Constitution}. As stated above, the right to privacy may be infringed only if the party seeking to uphold an infringement can satisfy the test set out in the limitation clause furnished by the \textit{Constitution}.\textsuperscript{215} The limitation clause includes considering the nature of the infringed right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive means available to achieve the purpose of the limitation which the legislation imposes.

It may be distilled from the foregoing case law that whenever a search and seizure has been conducted and a person has to establish whether there has been an infringement

\textsuperscript{211} Kunjana para 27; see Bernstein para 67 and Magajane para 82.
\textsuperscript{212} Kunjana para 27.
\textsuperscript{213} Kunjana para 32.
\textsuperscript{214} Kunjana para 48.
\textsuperscript{215} Woolman \textit{et al} \textit{Constitutional Law of South Africa} 38-22. Therefore, every infringement of the right has to be tested against section 36 of the \textit{Constitution}. If it is not in line with those provisions it is unconstitutional and invalid.
of the *Constitutional* right to privacy, such a person will have to show that they had a subjective reasonable expectation to privacy which was infringed upon.\footnote{Woolman et al *Constitutional Law of South Africa* 38-21. Except in regard to privacy rights pertaining to the inner sanctum of a person, an individual’s expectation of privacy has to be compared to the conflicting rights of the public.} The following chapter sets out to explore warrantless searches and seizures specifically in the context of customs and excise legislation.
Chapter 3: Customs and excise legislation

3.1 Introduction

The previous chapter categorically shows that the right to privacy is in high regard in South Africa. The right to privacy protects one from having one's person, home or property searched and one's possessions seized. This chapter seeks to evaluate the position specifically in terms of the customs and excise context. This interest gave rise to the specific research question: "To what extent does the customs and excise legislation, with reference to search and seizure powers, limit the right to privacy?"

To answer the question, this Chapter will compare the provisions of the CEA before and after the amendment, to establish whether the current provisions of the CEA can be considered to provide a better safeguard of the right to privacy than the provisions prior to the amendment. Furthermore, the chapter seeks to establish whether the provisions of the proposed new legislation (CCA, CDA, EDA) can be considered a step toward protecting the said right.

3.2 Past position

The past position with regard to customs and excise legislation may be found in the provisions of the CEA prior to the amendment that was pursuant to the court's decision in Gaertner.217 Under consideration in the Gaertner matter was section 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the CEA.218 Section 4 of the CEA prescribed the general duties and powers of officers.219 It provided that an officer may, without any prior notice, at any time enter any premises and conducts such examinations and make such enquiries as he deems necessary.220 Additionally, an officer had the power to require from any person any documentation which was kept in terms of the CEA or which related to a matter dealt with in the CEA, including which has been on the premises or in the

---

217 In terms of Gaertner (HC) and Gaertner (CC); Fritz 2016 JJS 20.
218 Gaertner (CC) para 34. These provision were to be considered inconsistent with the Constitution and declared invalid.
219 See section 88 of the CEA in terms of seizure as well as section 90 of the CEA, which provides for the disposal of seized goods.
220 Section 4(4)(a)(i) of the CEA; Thus, section 4 provides a power to search that required no authorisation. Therefore no warrant is required.
possession of such persons or their employees.\textsuperscript{221} Moreover, it provided that an officer may be assisted by an assistant or a member of the police force.\textsuperscript{222} Section 4(5) of the \textit{CEA} stated that whenever an officer required entry to a premises and exercised its search powers, any person whose business was conducted on that premises, or an employee of the business, had to provide the necessary facilities.\textsuperscript{223} If the officer was refused admission after declaring his or her official capacity, the purpose for requiring admission and demanding such admission, such an officer and any person assisting him or her might break open any door or window or break through any wall on the premises to gain entry and search the premises.\textsuperscript{224} In addition, the officer or any person assisting him or her might "break up any ground or flooring on any premises for the purposes of search".\textsuperscript{225} In the event that a "room, place, safe, chest, box or package was locked and the keys thereof were not produced on demand," the officer or person assisting him or her might open it in any manner.\textsuperscript{226} In light of the above the submission can be made that subsections (4)-(6) conferred on officers wide powers of investigation for the purpose of the \textit{CEA}.\textsuperscript{227}

In determining the constitutionality of section 4(4) of the \textit{CEA}, this essay performs a case study of \textit{Gaertner}. The applicant in \textit{Gaertner} argued that the search and seizure operation was unlawful and that section 4 of the \textit{CEA} is inconsistent with the \textit{Constitution} and invalid to the extent that it permits targeted, non-routine, enforcement, warrantless searches.\textsuperscript{228} The respondents denied that the search was unlawful and argued that section 4 of the \textit{CEA} limits the right to privacy only to an extent that it is justified under section 36 of the \textit{Constitution}.

Accordingly, the High Court concluded that the \textit{CEA} may justify warrantless routine searches in respect of a business premises or pre-entry facilities of a registered or

\begin{footnotesize}
\begin{enumerate}
\item Section 4(4)(a)(ii) of the \textit{CEA}.
\item Section 4(4)(b) of the \textit{CEA}.
\item Section 4(5) of the \textit{CEA}.
\item Section 4(6)(a) of the \textit{CEA}. In the event that an officer has to gain entry by force during the night, the presence of a member of the police force is required.
\item Section 4(6)(b) of the \textit{CEA}.
\item Section 4(6)(b) of the \textit{CEA}.
\item Cronje \textit{Customs and Excise Service} 2-8(4).
\item A non-routine search is one where SARS officers searches a specific premises based on a notion that material will be found on the premises that would indicate a breach of the \textit{CEA}, whereas a routine search is any search other than a targeted search (\textit{Gaertner} (HC) para 81).
\end{enumerate}
\end{footnotesize}
licensed persons.\(^{229}\) Additionally, the \textit{CEA} may justify warrantless non-routine searches regarding pre-entry facilities, licensed warehouses and rebate stores only to the extent that the search relates to the business of the aforesaid premises.\(^{230}\) The High Court provided the following guidelines in respect of warrantless searches:

Unless an officer reasonably believes, on grounds of urgency, that entry at another time is necessary, the entry of any premises must occur during ordinary business hours only. The person in charge of the premises should be informed whether the search is routine or non-routine. In the event that it is non-routine and no warrant is required. The officer should furnish the person in charge with a written statement specifying the purpose of the search. If the matter is urgent, the purpose of the search should be communicated orally to the person in charge.\(^{231}\) The person in charge or his/her representative is entitled to be present and observe the search. An inventory of everything seized from the premises should be provided to the person in charge. In the event that SARS copy documents, they should provide a list of copied material to the person in charge. During the search decency and order should be strictly observed.\(^{232}\)

The Constitutional Court is the highest court of the Republic and makes the final decision whether an Act is constitutional or not, and must affirm or renounce any order of invalidity made by the High Court.\(^{233}\) Accordingly, the matter of \textit{Gaertner} was referred to the Constitutional Court to determine whether the provision of section 4 of the \textit{CEA}, which limits the right to privacy, is reasonable and justifiable under section 36 of the \textit{Constitution}.\(^{234}\) Section 36 distinctly provides factors which should be taken into consideration when determining the above.\(^{235}\)

Firstly, considering the nature of the right to privacy, \textit{Gaertner} stated that the right to privacy embraces the right to be free from intrusions and interference by the state and others in a person's personal sphere.\(^{236}\) Nevertheless, the right to privacy is attenuated

\(^{229}\) \textit{Gaertner} (HC) para 103.

\(^{230}\) \textit{Gaertner} (HC) para 103; Searches without a judicial warrant are not justifiable in other cases.

\(^{231}\) An officer may only enter the premises if their presence is reasonably necessary to conduct the search.

\(^{232}\) \textit{Gaertner} (HC) para 105; Fritz 2016 \textit{JJS} 30.

\(^{233}\) Section 167(3)(a) of the \textit{Constitution}; Section 167(5) of the \textit{Constitution}.

\(^{234}\) \textit{Gaertner} (CC) para 21.

\(^{235}\) Section 36(1)(a)-(e) of the \textit{Constitution}.

\(^{236}\) Section 36(1)(a) of the \textit{Constitution}; \textit{Gaertner} (CC) para 47.

when a person moves into the public sphere, although not obliterated.\textsuperscript{237} By considering the nature and purpose of customs and excise duty, the importance of the purpose of the limitation will become clear.\textsuperscript{238} The court held that customs duty is levied primarily to raise revenue, to regulate imports of foreign goods into South Africa, to conserve foreign exchange and to protect domestic industries against unequal foreign competition.\textsuperscript{239} Consequently, regular inspections by SARS officials are necessary. Customs and excise controls serve an important public purpose.\textsuperscript{240} The court found the search provisions entrenched in the \textit{CEA} to be reasonably linked to this purpose.\textsuperscript{241} In terms of the nature and extent of the limitation in the context of a regulatory inspection of commercial private property the court pointed out three principles to consider.\textsuperscript{242}

The first principle relates to the level of reasonable expectation of privacy. The level of a person's reasonable expectation of privacy may notably vary depending on the commercial activity which fosters state regulation, including the regulatory scheme to which that person is subject.\textsuperscript{243} The more public and closely regulated the industry, the more attenuated the right to privacy.\textsuperscript{244} The scope of a person's personal sphere shrinks the closer a person moves to the public sphere. The State regulates commercial activities to ensure that individuals' activities are compatible with the public interest.\textsuperscript{245} In the customs and excise industry, regular inspections are necessary. For this reason, the court pointed out that the right to privacy in terms of business premises is greatly attenuated, yet not in respect of private homes.\textsuperscript{246} However, the search provisions in the \textit{CEA} do not discriminate between searches at a business premises and private dwellings.\textsuperscript{247} In respect of private homes, participants in the customs and excise industry are clearly entitled to reasonably expect that their right to privacy will be protected by the law.\textsuperscript{248}

\textsuperscript{237} \textit{Gaertner} (CC) para 49.
\textsuperscript{238} Section 36(1)(b) of the \textit{Constitution}; \textit{Gaertner} (CC) para 50.
\textsuperscript{239} \textit{Gaertner} (CC) para 53; Fritz 2016 \textit{JJS} 31.
\textsuperscript{240} \textit{Gaertner} (CC) para 55.
\textsuperscript{241} \textit{Gaertner} (CC) para 55; Fritz 2016 \textit{JJS} 31. It provides SARS with the powers to monitor and prevent tax evasion.
\textsuperscript{242} Section 36(1)(c) of the \textit{Constitution}; \textit{Gaertner} (CC) para 57-66; Fritz 2016 \textit{JJS} 31.
\textsuperscript{243} The nature of the industry determines the level of control by the state; \textit{Gaertner} (CC) para 59 and 60.
\textsuperscript{244} \textit{Gaertner} (CC) para 58.
\textsuperscript{245} \textit{Gaertner} (CC) para 60.
\textsuperscript{246} \textit{Gaertner} (CC) para 63.
\textsuperscript{247} \textit{Gaertner} (CC) para 64; Fritz 2016 \textit{JJS} 31.
\textsuperscript{248} \textit{Gaertner} (CC) para 64.
The second principle to consider is the extent to which the statutory provisions resemble criminal law. The court pointed out the importance of determining whether a search is aimed at enforcement or compliance.\textsuperscript{249} Searches aimed at enforcement, which are akin to criminal searches, are generally more intrusive and involve a greater limitation to the right to privacy than searches aimed at compliance.\textsuperscript{250} The last principle which is crucial to consider in terms of the extent of the limitation is the breadth of the relevant provisions. The court concluded that the provisions were overly broad in that they allowed warrantless searches with no limit as to the time, the type of premises or the scope of the said searches.\textsuperscript{251} Therefore, SARS officials were given far-reaching powers to conduct searches whenever, wherever and in relation to whomever, without their having a reasonable suspicion to investigate.\textsuperscript{252}

When considering section 36(1)(d) of the \textit{Constitution}, the court found that there is, in fact a link between the limitation of a person's right to privacy and the purpose of the limiting provision. The purpose of this limiting provision is to ensure compliance with the provisions of the \textit{CEA}.\textsuperscript{253} The tight regulations of the customs and excise industry are enforced through inspections which possibly limit the right to privacy.

Lastly, the court had to consider whether there are less restrictive means to achieve the purpose of the provision.\textsuperscript{254} The court held that to achieve the basic purpose of the \textit{CEA} private home searches are not necessary.\textsuperscript{255} The court referred to the \textit{Magajane} case, in which it was concluded that warrantless searches should not become the norm.\textsuperscript{256} Furthermore, the court stated that a warrant is a safeguard which ensured that the right to privacy is protected.\textsuperscript{257} Obtaining a warrant restricts the infringement of the right to privacy as it specifies the manner in which the search should be conducted.\textsuperscript{258} Only in exceptional circumstances should warrantless searches be conducted.\textsuperscript{259} In the event of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{249} \textit{Gaertner} (CC) para 50. Refer to chapter 4 with regard to the difference between enforcement and compliance.
\item \textsuperscript{250} \textit{Gaertner} (CC) para 65; Fritz 2016 \textit{JJS} 32. The distinction between searches aimed at enforcement and compliance will be dealt with in Chapter 4.
\item \textsuperscript{251} \textit{Gaertner} (CC) para 66.
\item \textsuperscript{252} \textit{Gaertner} (CC) para 66; Fritz 2016 \textit{JJS} 32.
\item \textsuperscript{253} \textit{Gaertner} (CC) para 67.
\item \textsuperscript{254} Section 36(1)(e) of the \textit{Constitution}.
\item \textsuperscript{255} \textit{Gaertner} (CC) para 68.
\item \textsuperscript{256} \textit{Magajane} para 78.
\item \textsuperscript{257} \textit{Thint} para 78.
\item \textsuperscript{258} Fritz 2016 \textit{JJS} 32; \textit{Gaertner} (CC) para 69.
\item \textsuperscript{259} \textit{Gaertner} (CC) para 70.
\end{itemize}
\end{footnotesize}
these exceptional circumstances of warrantless searches eventuating, legislation must provide for the manner in which these searches should be conducted. Consequently, there were less restrictive means to achieve the purpose of the CEA. These means include the warrant requirement and conducting private home searches at a certain time, place and within a restricted scope. The court concluded that the impugned sections could not be justified in terms of section 36 of the Constitution.

The declaration of the constitutional invalidity of section 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the CEA made by the Western Cape High Court, Cape Town was confirmed by the Constitutional Court. During the period of suspension of section 4(4) of the CEA, the court provided an interim reading-in provision. The reading-in stated that only on the authority of a warrant may an officer enter and search a private dwelling. The warrant could be issued by a magistrate or judge if it is clear from the information on oath or affirmation given by the officer that:

(i) there are reasonable grounds for suspecting an infringement of the CEA has occurred; (ii) a search of the premises will yield information relating to the infringement; and (iii) the search is reasonably necessary for the purpose of the CEA.

An officer may enter and conduct a search at a private residence without a warrant only if the officer reasonably believes that: (a) a warrant would have been issued if the officer had applied for it; (b) the delay in obtaining the warrant is likely to defeat the object of the search.

The reading-in provisions recognise that a person's expectation of privacy will be far greater at his/her private home or so-called inner sanctum. Accordingly, the reading-in provided that a warrant is required for these searches to be conducted. Even though these provisions did not provide for any detailed requirements in terms of the content of the warrant, if the warrant is too vague the taxpayer would be able to have the warrant set aside. Pursuant to the Gaertner judgement made by the Constitutional

---

260 Gaertner (CC) para 71-71.
261 Gaertner (CC) para 73.
262 Gaertner (CC) para 73; Fritz 2016 JJS 32.
263 Gaertner (CC) para 74.
264 In the High Court, Rogers J held that the abovementioned sections, which authorised warrantless searches of any premises, unjustifiably infringed the plaintiff's right to privacy (Gaertner (HC) para 69). The declaration of invalidity is not retrospective; Cronje Customs and Excise Service 2-9.
265 Gaertner (CC) para 88.
266 Gaertner (CC) para 88.
267 Gaertner (CC) para 88.
268 Fritz 2016 JJS 33.
Court, section 4(4) and 4(6) were amended by section 16 of the TALAA 39 of 2013, which also inserted a new section 4D. 269

3.3 Present

The present is concerned with the position after the amendment, therefore the position of search and seizures before the enactment of the new customs and excise legislation. Subsequently, section 4 of the CEA was amended by way of the TALAA 39 of 2013, which came into operation on 16 January 2014, 270 as follows: paragraph (a) replaces subsection (4) and paragraph (b) replaces subsection (6). 271 Furthermore, section 17 inserts section 4D into the CEA. 272

As a point of departure, the amendment provides that an officer may enter premises only under the authority of a warrant. 272 A magistrate or judge will issue a warrant to conduct a search of premises only if it is satisfied that: (i) there are reasonable grounds to suspect that an offence in terms of the CEA has been committed; (ii) a search is likely to yield documents that can be used as evidence; and (iii) the search is reasonably necessary for the purpose of the CEA. 274

In terms of the amendments, subsection (4)(aA) and (4)(aB) provide for circumstances in which an officer may enter premises without a warrant. Consequently, only in the event that an officer reasonably believes that:

A warrant will be issued by a magistrate or judge if a warrant is applied for; and that the delay in obtaining the warrant is likely to defeat the purpose for which the officer seeks to enter the premises, may an officer enter a premises, including private dwellings, without a warrant. 275

Whilst subsection (4)(aC)(i) states that an officer may, for the purposes of the CEA, after having gained entry to any premises in terms of the subsection, conduct an inspection, examination, enquiry or a search. 276

---

269 Section 17 of the TALAA 39 of 2013; Cronje Customs and Excise Service 2-9. See under subheading 3.3 below for a discussion on the amendments.
271 Section 16 of the TALAA 39 of 2013.
272 Section 17 of the TALAA 39 of 2013.
273 Fritz 2016 JJS 33; Section 4(4)(aA) of the CEA.
274 Section 4(4)(e)(i)-(iii) of the CEA; See reading-in under Gaertner (CC) para 88.
275 Section 4(4)(aB)(i)-(ii) of the CEA; See reading-in under Gaertner (CC) para 88.
276 Section 4(4)(aC)(i) of the CEA; Cronje Customs and Excise Service 2-10.
Due to the fact that this study focusses on the provision of warrantless searches, the requirements regarding warrantless searches are considered. When entering *any premises* in terms of paragraph (aB), therefore, without a warrant, subsection 4(c) requires an officer to comply with the requirements specified in sub-paragraphs (i)-(iii).\(^ {277}\)

The officer should enter the premises only during ordinary business hours, unless the officer is of the reasonable opinion that entry at any other time is necessary for the purpose of the *CEA*.\(^ {278}\) Upon seeking entry to the premises, the officer must inform the person in charge of the premises of the purpose of the entry.\(^ {279}\) In the event that the purpose of entry is based on the suspicion that in terms of the *CEA* an offence has been committed, or if after gaining entry to the premises the officer decides to conduct a search of goods or documentation, the following is applicable:

- Only if the officer is of the reasonable belief that the matter is urgent and should not be delayed, the preparation of the written statement, stating that the officer will be conducting a search of the premises, to the person in charge, is not required.\(^ {280}\) Before or after complying with the aforesaid, the officer may prevent persons present on the premises from interference with any documents or goods found on the premises.\(^ {281}\)

- For the purpose of the search, the officer's powers will be limited to only what is reasonably necessary to conduct same.\(^ {282}\)

- During the search, the person in charge or an appointed representative may observe the search.\(^ {283}\)

- The officer must compile an inventory of all documents seized from the premises and a schedule of all copies and extracts made during the search.\(^ {284}\)

---

\(^ {277}\) Cronje *Customs and Excise Service* 2-10; Section 4(4)(c) of the *CEA*; Section 4(4)(d) and (e) relate to the issue of the warrant by a judge or a magistrate.

\(^ {278}\) Section 4(4)(c)(i) of the *CEA*.

\(^ {279}\) Section 4(4)(c)(ii) of the *CEA*.

\(^ {280}\) Section 4(4)(c)(iii)(aa) of the *CEA*.

\(^ {281}\) Section 4(4)(c)(iii)(cc) of the *CEA*.

\(^ {282}\) Section 4(4)(c)(iii)(bb) of the *CEA*.

\(^ {283}\) Section 4(4)(c)(iii)(dd) of the *CEA*.

\(^ {284}\) Section 4(4)(c)(iii)(ee) of the *CEA*; Section 4(4)(c)(iii)(ff) of the *CEA*. 37
The officer must sign and provide the person in charge with a copy of the inventory and schedule before leaving the premises.\textsuperscript{285}

The officer is required to conduct the search in a decent and orderly manner.\textsuperscript{286}

With regard to the amendments to subsection (6)(a), for the purpose of entry and search of a premises an officer must comply with any applicable requirements of subsection (4) before breaking open any door or window or breaking through any wall on the premises.\textsuperscript{287} In terms of subsection (6)(b) the officer may at any time break up ground or flooring on any premises for the purpose of a search, if the officer is of the reasonable opinion that such a breaking up is necessary for the purpose of the \textit{CEA}.\textsuperscript{288}

In terms of the additional section 4D an officer may investigate for the purposes of criminal prosecution whether an offence in terms of the \textit{CEA} has been committed, lay criminal charges for the prosecution of such offences, and provide such assistance as may be required by the prosecuting authority for the prosecution of such an offence.\textsuperscript{289} However, section 4D is repealed by section 22(1) of the \textit{TALAA 23} of 2015.

South Africa’s history presents evidence of the need to adhere strictly to the warrant requirement unless there are clear and justifiable reasons for deviation.\textsuperscript{290} The warrant requirement softens the infringement on the right to privacy and guides the officers when conducting search and seizure operations.\textsuperscript{291} Furthermore, it is clear that warrantless searches and seizures are allowed in limited instances only.\textsuperscript{292} In terms of private residential premises, it is still possible for a customs official to conduct a warrantless search at such premises if that officer is of a reasonable opinion that a warrant would have been obtained if applied for.\textsuperscript{293} However, there are guidelines which restrict these warrantless search powers of officers, which are not as broad as they were in the past.\textsuperscript{294} In the event that an officer suspects that an offence has been

\textsuperscript{285} Section 4(4)(c)(iii)(ee) of the \textit{CEA}; Section 4(4)(c)(iii)(ff) of the \textit{CEA}.
\textsuperscript{286} Section 4(4)(c)(iii)(gg) of the \textit{CEA}.
\textsuperscript{287} Section 4(6)(a) of the \textit{CEA}; Cronje \textit{Customs and Excise Service} 2-10.
\textsuperscript{288} Section 4(6)(b) of the \textit{CEA}; Cronje \textit{Customs and Excise Service} 2-10.
\textsuperscript{289} Section 4D of the \textit{CEA}; Cronje \textit{Customs and Excise Service} 2-10.
\textsuperscript{290} \textit{Gaertner (CC)} para 69; \textit{Magajane} para 48; \textit{Mistry} para 29.
\textsuperscript{291} \textit{Okpaluba 2015 Juta Law} 429.
\textsuperscript{292} Fritz 2016 \textit{JJS} 35, which is in line with the constitutional search framework.
\textsuperscript{293} Fritz 2016 \textit{JJS} 36.
\textsuperscript{294} Fritz 2016 \textit{JJS} 36. Accordingly, the infringement of a person’s right to privacy will not be as invasive as prior to the amendment.
committed, the amended provision acknowledges that a search aimed at enforcement will be more invasive than a search aimed at compliance. Even though the amended provisions are more conformable to the provisions of the Constitution in terms of search and seizure and to what constitutes a reasonable and justifiable infringement of the right to privacy, the current provisions still invite constitutional scrutiny.296

3.4 Future

Previously customs and excise legislation was provided for by the CEA only. In essence the CEA provided for the levying of customs and excise duty as well as certain other taxes.297 To authorise the administration and collection of these taxes, the CEA furnished an extensive system of customs controls focussed on the import, export manufacture and use of goods.298 In addition, these control mechanisms enforced legislative restrictions on imports and exports into and out of the Republic. The CEA was written to cater for the needs of the time, when the focus was on control and even though it has been extensively amended, the basic structure remains unchanged. Consequently, the provisions of the CEA are no longer structurally suitable to serve as a vehicle for implementing a modern system with regard to customs and excise.299 As a consequence South Africa decided to undertake a fundamental restructuring of the customs and excise legislation to establish a sound, clear and logical legislative framework consistent with various international instruments and the Constitution.300

The process of reviewing the structure of the CEA consists of the following. The current CEA is to be split into three separate pieces of legislation to eventually replace the CEA. The new legislative framework will consist of the Customs Control Act (hereinafter the CCA);301 the Customs Duty Act (hereinafter the CDA)302 and the Excise Duty Act
Accordingly the CCA will establish a system for the customs control of all goods imported into or exported from the Republic and for all means of transport such as vessels, aircrafts, trains and persons entering or leaving the Republic.\textsuperscript{304} The CDA will provide for the importation assessment payment and recovery of customs duties on goods imported or exported from South Africa and for matters incidental thereto.\textsuperscript{305} The EDA the will provide for the assessment and collection of excise duties, fuel levies, Road Accident Fund levies and environmental levies on goods imported into or manufactured in the Republic, as well as the collection of air passenger tax.\textsuperscript{306} The \textit{Customs and Excise Amendment Act}\textsuperscript{307} provided that the \textit{CEA} shall be renamed the \textit{Excise Duty Act}, 1964 as from the date that the \textit{CEAA} takes effect.\textsuperscript{308} In return the \textit{CEAA} takes effect on the date on which the \textit{CCA} takes effect.\textsuperscript{309}

Accordingly, the \textit{CEAA} came into operation in 2014 to amend the \textit{CEA}. The purpose of the \textit{CEAA} is mainly to delete all provisions superseded by the general provisions of the \textit{CCA} and the \textit{CDA}, and most importantly to change the name of the \textit{CEA} to the \textit{EDA}, 1964 and provide for matters connected therewith.\textsuperscript{310}

The \textit{CCA} was approved on 21 July 2014. However, section 944(2) of the \textit{CCA} states that the date of commencement may be determined only when the \textit{CDA}, which was approved on 9 July 2014, is amended by adding a customs tariff annexure to the \textit{CCA}, and when the \textit{EDA}, is amended by adding an excise tariff annexure to the \textit{CCA}.\textsuperscript{311} The \textit{CCA} and the \textit{CDA}, along with the \textit{EDA}, will come into operation only on a date yet to be determined by the President.\textsuperscript{312} The \textit{CCA} and the \textit{CDA} provide platforms for customs modernisation aimed at simplifying customs administration. Amendments to the \textit{CCA}

\begin{itemize}
\item \textsuperscript{303} Previously the \textit{CEA} 91 of 1964; 91 of 1964. In other words, the renamed \textit{Customs and Excise Act} 91 of 1964.
\item \textsuperscript{304} Paragraph 1.3 (a) of the \textit{Memorandum on objects of Customs and Excise Amendment Bill}, 2013; Fritz 2016 JJS 36.
\item \textsuperscript{305} Paragraph 1.3 (b) of the \textit{Memorandum on objects of Customs and Excise Amendment Bill}, 2013; Fritz 2016 JJS 36.
\item \textsuperscript{306} Paragraph 1.3 (c) of the \textit{Memorandum on objects of Customs and Excise Amendment Bill}, 2013.
\item \textsuperscript{307} 32 of 2014 (hereinafter the \textit{CEAA}).
\item \textsuperscript{308} Section 87 of the \textit{CEAA}, amending section 122 of the \textit{CEA}.
\item \textsuperscript{309} Section 88 of the \textit{CEAA}.
\item \textsuperscript{310} Preamble of the \textit{CEAA}. For ease of reference and as the President has not yet determined a date, this study will still refer to the \textit{CEA} and not the \textit{EDA}.
\item \textsuperscript{311} Fritz 2016 JJS 20; SARS 2017 \url{http://www.sars.gov.za}; Mavropoulos 2016 \textit{TAXtalk} 56 37.
\item \textsuperscript{312} SARS 2017 \url{http://www.sars.gov.za}; The \textit{EDA} will become effective at a later date than the \textit{CCA} and the \textit{CDA}; Mavropoulos 2016 \textit{TAXtalk} 56 38.
\end{itemize}
are contained in the *Tax Administration Laws Amendment Act* and in the *Tax Administration Laws Amendment Bill, 2017*.  

Considering the fact that once the *CCA* comes into operation section 4 of the *CEA*, which deals with search and seizure, will be revoked in its entirety, the focus will be on the provisions of only the *CCA*.  

Sections 709 and 714 of the *CCA* will furnish the new search provisions relating to customs. A customs officer’s power to access areas, premises and facilities is entrenched in section 709 of the *CCA*. Before an officer may enter a premises and conduct a search, a warrant must be obtained. The said warrant may be issued by a magistrate or judge once the customs authority has made an application specifying under oath or by way of affirmation the grounds on which access is required. Section 1 provides that the customs authority referred to implies the following: (a) the Commissioner, or (b) a customs officer, but only if and to the extent that a power or duty allocated to the customs authority in terms of the *CCA* has been given to that officer in terms of section 19, which indicates that the designation must be done in writing and it is subject to limitations as provided for by the Commissioner. Accordingly, an ordinary customs officer cannot apply for a warrant, but only the Commissioner or a duly delegated customs officer.  

The *CCA* does, however, provide for warrantless searches of premises in certain circumstances. For the purpose of implementing or enforcing the *CCA* an officer, at any time, has unrestricted access to any area, premises or facility which is within the customs controlled area. The aforesaid customs controlled areas would include areas such as: "container terminals, container depots, storage warehouses and excise warehouses". Section 709(3) of the *CCA* provides for warrantless searches of premises that are not in a customs controlled area. A warrantless search will be allowed  

---

313 16 of 2016.  
315 Fritz 2016 JJS 36; Section 4 of the *Customs and Excise Amendment Act* 32 of 2014.  
316 Section 709(2)(a) of the *CCA*.  
317 Section 715 of the *CCA*.  
318 Section 1 of the *CCA*; Section 19 of the *CCA*.  
319 Fritz 2016 JJS 37.  
320 Furnished by subsections 709(3) and (4) of the *CCA*.  
321 Section 709(1)(a) and (b) of the *CCA*.  
322 Fritz 2016 JJS 37. See section 43(1)(i)-(xxiv) of the *CCA*.  
41
if the owner or the person in physical control of the premises consents to such access.\textsuperscript{323} A warrantless search will also be permitted if the premises is occupied by a person who is a registered person or licensee who uses the premises for purposes of the business or activity for which that person is registered or licensed.\textsuperscript{324} If the public has access to the premises, a customs officer may enter the premises without a warrant at a time whilst the public has access to the premises.\textsuperscript{325}

Another exception to the warrant requirement is where a customs officer has reasonable grounds for his/her suspicion.\textsuperscript{326} The first ground for suspicion is that there are goods subject to customs control which are being or have been used as part of the activities that constitute a breach of the \textit{CCA} or a tax levying Act.\textsuperscript{327} The second ground relates to circumstances where the customs officer suspects that there are goods which are prohibited, restricted, sectorally controlled or counterfeit goods.\textsuperscript{328} A customs officer may gain warrantless access to any premises outside a customs controlled area if the customs officer has reasonable grounds to suspect that these goods,\textsuperscript{329} any documents concerning the goods or activity,\textsuperscript{330} or information relating to the goods, documents of activities that will be found at the premises.\textsuperscript{331} A customs officer may gain warrantless access to premises outside the customs controlled area only if he/she has reasonable grounds to believe that a warrant authorising such access would have been issued on application in terms of section 715 of the \textit{CCA} and that a delay in obtaining such a warrant would defeat the object of the access.\textsuperscript{332} Furthermore, the \textit{CCA} provides for the

\textsuperscript{323} Fritz 2016 JJS 37; Section 709(3)(a) of the \textit{CCA}.
\textsuperscript{324} Section 709(3)(b) of the \textit{CCA}. Section 1 states that a "registered" person means: "someone who is registered in terms of chapter 28 of the \textit{CCA}". Chapter 28 deals among other things with the registration of exporters, importers and persons obtaining the ownership of goods when goods are still in the customs procedure; Furthermore that a "licensee" means the holder of a licence which is issued by the customs authority in terms of chapter 29.
\textsuperscript{325} Section 709(3)(c) of the \textit{CCA}.
\textsuperscript{326} Section 709(3)(d)-(f) of the \textit{CCA}.
\textsuperscript{327} Section 709(3)(d)(i)-(iii) of the \textit{CCA}. Section 1 states that a "tax levying Act" means: "any legislation, other that the \textit{CCA}, imposing and regulating the administration of a specific tax on goods". In addition, it states that a tax levying Act includes any rules, regulations or subordinate legislation issued in terms of the \textit{CDA} and the \textit{EDA}, among other Acts.
\textsuperscript{328} Section 709(3)(d)(iv) of the \textit{CCA}; Fritz 2016 JJS 38.
\textsuperscript{329} Section 709(3)(d) of the \textit{CCA}. These goods include goods that are subject to customs control, goods in respect of which a breach of the \textit{CCA} or a tax levying Act is being/has been committed, or goods which are prohibited, restricted or sectorally controlled, or counterfeit goods.
\textsuperscript{330} Section 709(3)(e) of the \textit{CCA}. "Activity" refers to activities which constitute a breach of the \textit{CCA} or a tax levying Act.
\textsuperscript{331} Section 709(3)(f) of the \textit{CCA}.
\textsuperscript{332} Section 709(4) of the \textit{CCA}.
seizure of goods.\textsuperscript{333} It authorises the seizure of any goods to which chapter 34 of the 
CCA applies, including goods detained in terms of section 734(1) or (2).\textsuperscript{334}

To comprehensively understand and evaluate the implications of the proposed new legislation, it should be applied to the facts of the case study: The SARS officers conducted a warrantless search of Mr. Gaertner's home. The officers gave no reasonable grounds or reason for the search. They went through personal belongings and demanded access to the home computers, including those of Mr. Gaertner's children. When applying the CCA to the facts of the case study, it becomes clear that the CCA fails to specifically protect a person's private dwelling and does not consider the purpose of the search.\textsuperscript{335} Even though the CCA requires a warrant before a search may be conducted, it does not specify what is required to obtain the said warrant. It refers only to "grounds" without clarifying what would establish such grounds demanding a search.\textsuperscript{336} Note that in the case under study the officers had no warrant and had no grounds necessitating a search to be conducted at Mr. Gaertner's residential premises.\textsuperscript{337}

SARS states that search and seizure operations must be conducted in a transparent way and in accordance with strict legislation and procedure.\textsuperscript{338} However, the ambiguity of the grounds on which a warrant will be granted gives rise to uncertainty, making it difficult for individuals to challenge the grounds on which the warrant is granted.\textsuperscript{339} Unintentionally, this leads to broader search and seizure powers for officers. Additionally, it fails in terms of the founding principle of the Constitution, namely the rule of law. Individuals would be able to take the matter on review on the principle of vagueness. With regards to searches relating to residential premises, no additional protection is provided for. Customs officers still holds the power to conduct warrantless searches of a person's residential premises and possibly the power to infringe the right to privacy, leaving one's inner sanctum unprotected. No specific guidelines are provided

\textsuperscript{333} Section 762 of the CCA.
\textsuperscript{334} Section 762(1) of the CCA. See section 762(2)-(4) of the CCA for details regarding the seizure of goods.
\textsuperscript{335} Fritz 2016 JJS 41.
\textsuperscript{336} Fritz 2016 JJS 39.
\textsuperscript{337} The submission can be made that the new provisions of the EDA will require officers to conduct the searches with strict regard for decency and order and as such not in the manner of the Gaertner matter (Section 4(c)(iii)(gg) of CEA 91 of 1964 as soon as renamed as the EDA.
\textsuperscript{338} SARS 2018 http://www.sars.gov.za.
\textsuperscript{339} Fritz 2016 JJS 39.
in terms of warrantless searches. Such guidelines would restrict the extent of the infringement of a person's right to privacy. The absence of such guidelines could entail that a person's right to privacy are not reasonably and justifiably defined limited in terms of section 36 of the *Constitution*.

### 3.5 Conclusion

For any law to be constitutionally valid, same must comply with the following requirements. Firstly, the law must properly define the power to search and seize, secondly it has to provide for prior authorisation by an independent authority, and lastly it must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search and executing the seizure. The provisions of the aforesaid Acts are possibly more consistent with the principles of the *Constitution* than the previous provisions herein. A recommendation hereto will be made in Chapter 6 of this paper.

This chapter aimed at answering the question, to what extent does the customs and excise legislation with reference to search and seizure powers limit the right to privacy? It can be submitted that the past provisions of the *CEA* did not protect a person's residential premises against a warrantless search, this not protecting a person's right to a reasonable degree of privacy. The current customs search provisions mostly successfully protect a person's constitutional rights, including the right to privacy. Nonetheless, whether the future provisions will be constitutionally valid remain unclear. In light of the above the submission can be made that, although an improvement is made by way of the new legislation, there is still room for improvement to ensure that the right to privacy is not infringed by search and seizure operation conducted by customs and excise officials. Consequently, the new provisions are still not in line with the provisions of the *Constitution*.

---

340 Fritz 2016 JJS 41.
341 Woolman et al *Constitutional Law of South Africa* 38-28; De Waal, Currie and Erasmus *The Bill of Rights Handbook* 278.
342 Mistry para 29.
343 Park-Ross para 148.
344 *Hyundai* para 6.
The following chapter will consider the fiscal legislation which provides for search and seizure powers in other contexts, in order to determine whether these provisions possibly limit the right to privacy, giving rise to the question: how do the search and seizure powers provided for in terms of customs and excise legislation compare with the search and seizure powers in other legislation?
Chapter 4: Fiscal legislation in respect of search and seizure

4.1 Introduction

It was disconcerting to see in the previous chapter that the wide-ranging search and seizure powers of officers are generally applicable in various contexts and legislation. This leads to the question: how do the search and seizure powers provided for in terms of customs and excise legislation compare with the search and seizure powers in fiscal legislation, specifically legislation related to trade?

The powers with regard to the entering and searching of premises and the seizure and forfeiture of property are dealt with mainly in the CRIMPA. However, to answer the aforesaid question, Chapter 4 seeks to provide insight into various items of fiscal legislation that are relevant to search and seizure, whilst keeping in mind the difference between searches and seizures for the purpose of compliance as against enforcement.

The following pieces of financial legislation will be examined below: the Inspection of Financial Institutions Act; the Competition Act; the Electronic Communications and Transactions Act; the International Trade Administration Act; the National Credit Act; the Consumer Protection Act; the Companies Act; the Tax Administration Act; the Tax Administration Laws Amendment Act; the Cybercrimes and Cybersecurity Bill; the Financial Sector Regulation Act; the Financial Intelligence Centre Act and the Financial Intelligence Centre Amendment Act.

---

346 Section 21 of the CRIMPA; Radyn 2018 De Rebus 16.
347 80 of 1998 (section 4) hereinafter the IFIA.
348 89 of 1998 (section 46-49).
349 25 of 2002 (section 80, 82 and 83) hereinafter the ECTA.
350 71 of 2002 (section 43-45) hereinafter the ITAA.
351 34 of 2005 (section 154) hereinafter the NCA.
352 68 of 2008 (section 102-106) hereinafter the CPA.
353 71 of 2008 (section 177 and 178).
354 28 of 2011 (section 59-64) hereinafter the TAA.
355 39 of 2013 (section 16) hereinafter the TALAA 39 of 2013.
356 Section 27, hereinafter the Cyber Bill.
357 9 of 2017 (section 134-139) hereinafter the FSRA.
358 38 of 2001 (section 45) hereinafter the FICA.
359 1 of 2017(section 31) hereinafter the FICAA.
As stated above, for such legislation to be constitutionally valid it has to satisfy the following requirements;\footnote{Woolman et al Constitutional Law of South Africa 38-28; De Waal, Currie and Erasmus The Bill of Rights Handbook 278.} firstly, it must properly define the power of search and seizure;\footnote{Mistry para 29.} secondly it has to provide for prior authorisation by an independent authority;\footnote{Park-Ross para 148. In other words it must require a warrant.} and lastly it must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search and executing the seizure.\footnote{Hyundai para 6; The above warrant should be granted on reasonable and justifiable grounds only.} The most important factor to consider is whether the legislation provides for certain premises to be excluded from warrantless searches and seizures, with particular reference to the inner sanctum.

4.2 \textbf{Searches and seizures aimed at compliance versus enforcement}

The distinction between searches and seizures aimed at compliance as against enforcement is paramount when considering whether they infringe the right to privacy or not. Various statutes deal with search and seizure powers, some well-defined and others open-ended.\footnote{Swanepoel 1977 CILSA 341.} In terms of customs and excise legislation, SARS officers are afforded powers to conduct search and seizure operations in order to verify compliance in terms of the \textit{CEA}.\footnote{Fritz 2016 JJS 19.} Searches aimed at compliance are unlike criminal searches and are likely to infringe the right to privacy to a lesser extent. Searches or seizures aimed at compliance are purposed mainly to supervise an industry to guarantee the integrity of the scheme of regulation in general.\footnote{Gaertner para 65; Magajane para 70. It should be pointed out that the right to privacy discussed above in Chapter 2 is crucial when considering search and seizure powers and other legislation as the \textit{Constitution} is the supreme legislative body of South Africa. This will become evident below.} On the other hand, searches aimed at enforcement are akin to criminal searches and are generally more intrusive and involve a greater infringement on the right to privacy.\footnote{Searches or seizures aimed at enforcement closely resemble traditional criminal policing. Criminal law provides for extensive search and seizure powers; see sections 19-36 of the \textit{CRIMPA}. Search and seizure in respect of criminal enforcement involves a focussed investigation under a regulatory scheme, often with a view to corrective consequences.} Searches and seizures become less rigorous the further they move away from traditional criminal law.\footnote{Magajane para 57. The court applies a standard of reasonableness, requiring a warrant. It deviates from this standard only when administrative statutes authorise powers for compliance, not enforcement.} Therefore, search
and seizure operations of a person’s inner sanctum will become less invasive and not as strict if aimed at compliance with a specific Act.

4.3 The Inspection of Financial Institutions Act (“IFIA”)

The goal of the IFIA is to provide for the inspection of the affairs of financial institutions, unregistered entities conducting business of a financial nature, and matters connected therewith. If the Registrar believes that a person, partnership, company or trust which is not registered or approved as a financial institution is carrying out the business of a financial institution, the Registrar may at any time appoint an inspector to conduct an inspection of the affairs of such a person, partnership, company or trust. Section 4 of the IFIA furnishes the search and seizure powers of inspectors relating to financial institutions. It provides inspectors with the power to enter and search at any time and without prior notice any premises occupied by the institution and require the production of any documents relating to the business of that institution. Inspectors may open any strong room, safe or other container in which they reasonably suspect any documents of the institution to be kept, and against the issue of a receipt, seize any of such documents if the inspector believes that the documents contain information relevant to the inspection. To ensure that constitutional values are protected, section 6A of the IFIA requires that any entry or search of any premises must be conducted with strict regard to a person’s rights to dignity, freedom and, above all, privacy. In terms of the above test, the IFIA could be considered constitutional, as it properly defines the powers to search and seize and it requires reasonable grounds to motivate the performance of warrantless searches and seizures. Nonetheless, it does not consider the right to privacy and still unlawfully limits the right to privacy as it does not exclude the search and seizure of the inner sanctum.

---

369 "Financial institutions" can be any institutions referred to in section 1 of the Financial Services Board Act 97 of 1990; they can be medical schemes registered in terms of the Medical Schemes Act 72 of 1967; or they can be any persons referred to in terms of section 3A of the IFIA for the purpose of the implementation of any agreement or memorandum of understanding; Section 1 of the IFIA.

370 Section 3(1) and (2) of the IFIA. "Registrar" refers to the executive officer defined in section 1 of the Financial Services Board Act 97 of 1990, but in relation to medical schemes registered in terms of the Medical Scheme Act 131 of 1998, "Registrar" means the Registrar of medical schemes appointed under section 18 of the Medical Scheme Act.

371 Section 4(1)(b) of the IFIA.

372 Section 4(1)(c) and (e) of the IFIA. The purpose herewith is evidently to verify compliance in terms of the relevant Act. In terms of section 4(1)(f) inspectors may retain the seized documents for any criminal proceedings the aim of which would be enforcement.

373 Section 6A(1)(a)-(c) of the IFIA.
4.4 The Competition Act

This Act gives effect to international law obligations in terms of trade, and creates an environment for South Africans to compete effectively in international markets. The Act provides inspectors with the power to enter and search any premises under a warrant. In terms of entry and search without a warrant it is important to note that the Act does not grant inspectors the power to enter and search a private dwelling without a warrant. Furthermore, warrantless entry and inspection may be conducted only with the reasonable belief that a warrant would be issued if applied for and that the delay in first obtaining a warrant would defeat the object of the entry and search. The search and seizure powers of inspectors are also provided for in section 48, which stipulates that if an inspector is authorised under sections 46 and 47 mentioned above, they may enter the premises and conduct such a search and seizure. It is important that inspectors who enter and search premises in terms of section 48 conduct such entry and search with strict regard for decency and order whilst respecting each person’s right to dignity, freedom, security and privacy. Consequently, this Act could be considered constitutional as it properly defines the powers to search and seize, protects the right to privacy, and excludes search and seizure of the inner sanctum.

4.5 The Electronic Communications and Transactions Act (“ECTA”)

The ECTA facilitates and regulates electronic communications and transactions. According to the ECTA a cyber inspector has the power to enter any premises or access an information system that has bearing on an investigation, at any time without

---

374 Section 2 of the Competition Act. Extrapolating from the Preamble of the Competition Act, the submission can be made that the entries and searches conducted are aimed at compliance rather than enforcement.
375 Section 46 of the Competition Act 89 of 1998. It provides that the authority who issues the warrant has to have reasonable grounds for authorising the entry and search, and that such searches may be executed only during the day.
376 Section 47(1) of the Competition Act. In 1.2 above the point was made that the CEA did in fact authorise warrantless entry and search in private dwellings.
377 Section 47(2)(b) of the Competition Act. Section 47(3) confirms that entry without a warrant may also be carried out only during the day.
378 Section 48(1) of the Competition Act.
379 Section 49(1) of the Competition Act.
380 Section 80(1) of the ECTA provides that the Director-General may appoint any employee of the Department as a cyber inspector empowered to perform the functions provided for in the Act.
prior notice. However the aforesaid may only be done on the authority of a warrant issued in terms of section 83(1) of the ECTA. This Act states that in the event that a person refuse to co-operate or hinder the inspector to conduct a lawful search and seizure, that person is guilty of an offence. The CRIMPA applies with the necessary changes to searches and seizures in terms of the ECTA. In terms of the above test, the Act could be considered constitutional as it requires a warrant to conduct the search and seizure operation.

4.6 The International Trade Administration Act (“ITAA”)

The ITAA provides for the establishment of the International Trade Administration Commission, which provides for the implementation of certain aspects of the SACU Agreement in the Republic. In addition the Act provides for the continued control of the import and export of goods and amendments of customs duties and matters connected therewith.

Section 43 of the ITAA confers a judge or magistrate with the power to issue a warrant to enter and search any premises if there are reasonable grounds to believe that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises. However, the Act clearly states that without a warrant an investigating officer may not enter and search a private dwelling. Section 45 of the ITAA furnishes the exact powers in terms of entry and search given to inspecting officers. Section 45 provides that a person acting in terms of section 43 or 44 may enter those premises provided for; search those premises

---

381 Section 82(1) of the ECTA. Also see section 82(1)(a)-(i) of the ECTA for the specific search and seizure powers conferred on cyber inspectors.
382 Section 82(1) of the ECTA. See section 83(1)-(5) of the ECTA for detail on the warrant requirement.
383 Section 82(2) of the ECTA.
384 Section 82(3) of the ECTA. Therefore, searches and seizures conducted in terms of the ECTA are aimed at enforcement, which involves a greater infringement on the right to privacy than searches and seizures aimed at compliance with an Act.
385 See Chapter 5 for a discussion of the SACU Agreement.
386 Preamble of the ITAA.
387 Section 43(1) of the ITAA. See section 43(2)-(5) for additional detail in terms of the warrant requirement.
388 Section 44(1) of the ITAA. This protects the right to privacy with regard to individuals’ personal sphere, as mentioned in Chapter 2 above. Section 44(2) further confirms that warrantless entry and search may be conducted only if the officer believes on reasonable grounds that a warrant would be issued if applied for, and that the delay in obtaining a warrant would defeat the object of the entry and search. In addition section 44(3) states that such a warrantless entry and search may be carried out only during the day.
or any person, document, computer or articles which might be relevant to the investigation; and seize anything that has a bearing on the investigation. This Act could be deemed to be constitutionally valid as it protects the right to privacy by excluding searches of private dwellings, i.e. the inner sanctum.

4.7 The National Credit Act (“NCA”)

The NCA promotes access to consumer credit (and therefore the general regulation of consumer credit) and improved standards of consumer information. The entry and search powers provided for in terms of the NCA may be implemented only if a warrant has been issued in response to a reasonable belief that prohibited conduct has taken place or is taking place. Section 154 of the NCA provides the specific powers to enter and search premises as well as any person present on those premises, and to examine any article or document. It includes the power to search and seize output from computer systems on the premises. The NCA may be regarded as one of the Acts that make better provision for the protection of the right to privacy due to the fact that it includes a warrant requirement and additional provisions with regard to inspectors when conducting search and seizure operations. This is evident from section 154.

Inspectors are empowered to conduct searches and execute seizures in order to verify compliance. The NCA stipulates that entry and searches must be conducted with strict regard for decency and order and with regard for each person’s right to dignity, freedom, security and privacy. However, a police officer authorised to enter and search under section 154 of the NCA, or a police officer assisting an inspector authorised to conduct such entry and searches may overcome resistance to the entry

---

389 Section 45(2)(a)-(h) of the ITAA. These searches and seizures are most likely aimed at compliance.
390 Preamble of the NCA.
391 Section 153(1) of the NCA. See section 153(2)-(6) of the NCA for more detail on the warrant requirement. It should be noted that entry and search may be executed only during the day.
392 Section 154(1)-(3) of the NCA.
393 Section 179(3)(a) provides that the inspector, before questioning anyone, must advise that person of his or her right to be assisted by an advocate or attorney; Furthermore, section 179(4)(a) and (b) provides that inspectors who remove anything from the premises being searched must issue a receipt for it to the owner of the premises and return the items as soon as possible after achieving the purpose for which it was seized.
394 Section 154(2) of the NCA states that only a female inspector or police officer may search a female person and only a male inspector or police officer may search a male person; Section 154(3)(a)-(b) of the NCA requires a person who enters and searches premises under the Act to advise the person in question of his or her right to be assisted by an advocate or attorney and allow that person to exercise that right. See section 154(3)-(6) on the rights awarded to persons subject to entry and searches under the NCA.
395 Section 155(1) of the NCA.
and search by using as much force as is reasonably required, including breaking a door or window of the premises.\textsuperscript{396} The \textit{NCA} provides for a warrant requirement, but it does not consider the right to privacy and it does not exclude the search and seizure of the inner sanctum.

\textbf{4.8 The \textit{Consumer Protection Act ("CPA")}}

The \textit{CPA} provides for certain powers in support of investigations in the context of consumer transactions and agreements.\textsuperscript{397} In terms of the \textit{CPA} any premises may be entered and searched if a judge of the High Court or a magistrate has issued a warrant authorising such entry and search.\textsuperscript{398} A person authorised by the aforesaid warrant may enter and search premises or any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation.\textsuperscript{399} Empowered by a warrant, such authorised person may search and seize any documents or any output from a computer for examination and copying.\textsuperscript{400} As seen in several other pieces of legislation, the \textit{CPA} prescribes that entries and searches must be conducted with strict regard for decency and order, and with regard for each person’s right to dignity, freedom, security and privacy.\textsuperscript{401} Like the provisions in the \textit{NCA}, the \textit{CPA} provides that during a search only a female inspector or police officer may search a female person and only a male inspector or police officer may search a male person. Also, that the inspector has to advise the

\textsuperscript{396} Section 154(7) of the \textit{NCA}. As previously stated, the focus of this study is the customs and excise legislation, which also allows for the breaking open of any doors or windows. However, the \textit{NCA} does not specify whether entry and searches and the aforesaid breaking open are authorised in terms of private dwellings as provided for under the customs and excise legislation. Section 154(8) of the \textit{NCA} stipulates that: “before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to dispose of the document that is the object of the search”. In the event that anyone suffers damages caused by forced entry during a search when no-one responsible for the premises was present, the National Credit Regulator may compensate such a person (section 154(9) of the \textit{NCA}).

\textsuperscript{397} Section 102-106 of the \textit{Consumer Protection Act 68 of 2008} (hereinafter the \textit{CPA}). The search and seizure powers in terms of the \textit{NCA} and the \textit{CPA} are similar.

\textsuperscript{398} Section 103(1) of the \textit{CPA}. In addition, for a warrant to be issued there have to be reasonable grounds to believe that a contravention of the Act has taken place or is taking place. The warrant may be issued at any time. The specifications of the warrant requirement can be found in section 103(2)-(6) of the \textit{CPA}.

\textsuperscript{399} Section 104(1)(a)-(c) of the \textit{CPA}.

\textsuperscript{400} Section 104(1)(g)-(h) of the \textit{CPA}.

\textsuperscript{401} Section 105(1) of the \textit{CPA}.
person in question of his or her right to be assisted by an advocate or attorney and allow that person to exercise this right.\textsuperscript{402}

4.9 The Companies Act

The Companies Act provides for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies and the registration of offices of foreign companies carrying on business within the Republic.\textsuperscript{403} With regard to this Act entries and searches must be conducted under the authority of a warrant issued by a judge of the High Court or a magistrate.\textsuperscript{404} This warrant empowers inspectors to enter and search any premises if there are reasonable grounds to believe that a contravention of the Act has taken place or that anything connected with an investigation is in the possession of or under the control of a person who is on or in those premises.\textsuperscript{405} The specific power to enter and search is provided for in section 178 of the Companies Act. These powers do not specify whether private dwellings may be searched or not. It is clear, however, that these searches are aimed at verifying compliance with the provisions of the Act. Furthermore, strict regard is to be given to decency and order, and regard is to be paid to each person’s right to dignity, freedom, security and privacy whilst conducting an entry and search.\textsuperscript{406} Again similar to the provisions in the NCA and the CPA, the Companies Act provides that during a search only a female inspector or police officer may search a female person and only a male inspector or police officer may search a male person. Also, that the inspector has to advise the person in question of his/her right to be assisted by an advocate or attorney and allow that person to exercise this right.\textsuperscript{407}

\textsuperscript{402} Section 105(2)-(3) of the CPA. See section 105(4)-(9) on the rights awarded to persons subject to entry and searches under the CPA, which is similar to section 179(3)(a) of the NCA.

\textsuperscript{403} Preamble of the Companies Act. This provides powers to support investigations and inspections under sections 176-179.

\textsuperscript{404} Section 177(1) of the Companies Act.

\textsuperscript{405} Section 177(1)(a)-(b) of the Companies Act. This warrant to enter and search may be executed only during the day (section 177(4)).

\textsuperscript{406} Section 179(1) of the Companies Act.

\textsuperscript{407} Section 179(2)-(3) of the Companies Act. See section 179(4)-(9) on the rights awarded under the Companies Act to persons who are subjected to entry and searches.
4.10 Tax related legislation

Section 74D of the *Income Tax Act* (hereinafter the *ITA*)\(^{408}\) granted the powers of search and seizure to SARS officials. The underlying principal was that the officials were required to first obtain a warrant from a judge prior to a search and seizure operation. However, section 74(3) of the *ITA* granted the Commissioner the power to authorise and conduct a search without the requirement of a warrant. The *Tax Administration Bill*\(^{409}\) subsequently re-evaluated the provisions of the search and seizure powers of SARS officers and replaced section 74D of the *ITA*. Thereafter the *Tax Administration Act* (hereinafter the *TAA*)\(^{410}\) came into operation.

The *TAA* is central to tax-related legislation providing for search and seizure powers. The purpose of this Act is to ensure the effective and efficient collection of tax.\(^{411}\) Evidently the *TAA* was aimed at consolidating all the provisions on tax administration, including those provisions which provide for searches and seizures, administered by the South African Revenue Services (SARS),\(^{412}\) which were to be found in different tax Acts such as the *ITA*,\(^{413}\) the *Value Added Tax Act*,\(^{414}\) the *Transfer Duty Act*\(^{415}\) and the *Estate Duty Act*.\(^{416}\) The promulgation of the *TAA* had the purpose of allowing a single piece of legislation to regulate tax administration and more specifically search and seizure operations.\(^{417}\)

Before the introduction of the *TAA* the *ITA* provided that SARS officials might, at any time during the day, without previous notice, enter any premises whatsoever and on such premises search for any moneys, books, records, accounts or documents.\(^{418}\) Furthermore, in carrying out any such search, they might open or cause to be opened or

\(^{408}\) 58 of 1962.
\(^{409}\) 11 of 2011 (hereinafter the *TAB*).
\(^{410}\) 28 of 2011.
\(^{411}\) Section 2 of the *TAA* 28 of 2011. This Act prescribes the powers and duties of persons engaged in the administration of the tax Act.
\(^{412}\) The major function of SARS is to collect tax revenue. As such, in terms of all legislation pertaining hereto, searches and seizure are aimed at compliance or enforcement.
\(^{413}\) In terms of section 74D of the *ITA* the Commissioner was granted powers to conduct a search and seizure on the taxpayers’ premises without judicial authorisation. These powers were evidently intrusive and archaic, and as time went on, change was inevitable.
\(^{414}\) 89 of 1991.
\(^{415}\) 40 of 1949.
\(^{416}\) 45 of 1955.
\(^{417}\) Khanyile *Constitutionality of search and seizure operations conducted before and after the Tax Administration Act 28 of 2011* 17.
\(^{418}\) Section 74(4)(a) of the *ITA*.
removed any article in which the officers suspect any moneys, books, records, accounts or documents are kept. SARS officials were also empowered to seize any such books, records, accounts or documents as in their opinion might afford evidence which might be material in assessing the liability of persons for any tax. However, the promulgation of the TAA brought about an overhaul to the provisions in terms of the search and seizure powers of SARS in the recovery of tax. There have been numerous amendments to the TAA, the discussion of which follows.

4.10.1 The Tax Administration Act (“TALAA”)

To give effect to the powers of SARS officials the Act provides that a magistrate or a judge may issue a search and seizure warrant authorising such officials to unannounced enter premises, conduct a search and seize relevant material. The TAA confers authority on SARS to conduct a search and seizure under a warrant, and extends this power to allow them to search premises that are not identified in a warrant, and to conduct a search and seizure without a warrant in limited circumstances. The most important safeguard which the TAA provides is that it does not authorise SARS officials to enter a dwelling-house or domestic premises without the consent of the occupant, thus protecting individuals’ rights to privacy in their personal sphere.

In terms of sections 59 to 64 of the TAA, SARS has broad powers to search premises for and seize relevant material. Such searches and seizures can take place only under the authority of a warrant issued by a judge. An ex parte application for a

---

419 Section 74(4)(b) of the ITA.
420 Section 74(4)(c) of the ITA; These search and seizure provisions were assessed by the courts in Rudolph v Commissioner for Inland Revenue 1997 4 SA 391 (SCA), but because the search and seizure operations in this case took place before the 1996 Constitution came into force, none of the events which the applicant challenged could be said to have constituted a breach of any of his constitutional rights.
425 In Huang v The Commissioner for the South African Revenue Services 2015 1 SA 602 the court was asked to reconsider the granting of a search and seizure warrant in favour of SARS. In this matter the warrant had been issued on the strength of the allegations that there were reasonable grounds to believe that the Applicants had failed to comply with their duties in terms of the TAA 2011. When considering whether a warrant should be granted a court must determine whether objective jurisdictional facts are present and whether the discretion to grant the application for the warrant would be exercised judicially (Louw 2014 Tax Alert CDH 3).
426 Section 60 of the TAA 2011.
Search and seizure warrant is a judicial proceeding which must be supported by information supplied under oath establishing the facts upon which the application is based.\textsuperscript{427} Taxpayers were affected negatively by the earlier TAA, which allowed SARS to knock on their door and conduct a search and seizure without a court order.\textsuperscript{428} It provided that SARS officials may conduct the search and seizure where a senior SARS official has reasonable grounds to believe that there may be imminent removal or destruction of documents likely to be found on the premises, and the delay to apply for a search warrant would defeat the object of the search and seizure.\textsuperscript{429} Section 63 of the TAA authorises search and seizure without a warrant. However, it seems that a very limited number of persons are allowed to conduct warrantless searches and seizures due to the fact that either the person in control of the premises should have given consent in writing or a senior SARS official must have given consent on reasonable grounds,\textsuperscript{430} making this Act constitutionally valid. However, it lacks provisions regarding the search and seizure of private dwellings.

\textbf{4.10.2 The Tax Administration Laws Amendment Act}

Criticism against the powers introduced under the TAA to conduct warrantless searches and seizures stems from fears that a warrantless search could infringe on certain constitutional rights of taxpayers, such as the taxpayers' rights to privacy or to fair administrative action.\textsuperscript{431}

As pointed out in Chapter 3 above, the CEA was amended by way of the TALAA 39 of 2013, which came into operation on 16 January 2014.\textsuperscript{432} As mentioned in chapter 3 of this research, section 16 of the TALAA 39 of 2013 amended section 4 of the CEA as follows: paragraph (a) replaces subsection 4, paragraph (b) replaces subsection (6); and section 17 inserts section 4D into the CEA.\textsuperscript{433}

\textsuperscript{427} The CEA is not subject to the TAA. The TAA is merely another example in which warrantless search and seizure powers are provided.
\textsuperscript{428} Vanek 2011 Tax Breaks Newsletter 7.
\textsuperscript{429} Vanek 2011 Tax Breaks Newsletter 7; Section 60 of the TAA 2011.
\textsuperscript{430} This is an exemplary example of what search and seizure provisions should include; Section 63(1)(a) and (b) of the TAA 2011; Khanyile \textit{Constitutionality of search and seizure operations conducted before and after the Tax Administration Act 28 of 2011} 19.
\textsuperscript{431} Lamprecht 2013 Tax Breaks Newsletter 1.
\textsuperscript{432} Fritz 2016 JJS 33; GG 37236 of 16 January 2014.
\textsuperscript{433} Section 17 prescribes the officers’ powers relating to criminal prosecutions. See Chapter 3 for the amendments to the CEA.
Section 16(a), which replaces section 4 of the *CEA*, advises that an officer may enter a premises only on authority of a warrant and provides only a few exceptional circumstances in which a warrant is in fact not required.\(^{434}\) Section 16(b), which replaces subsection (6) of the *CEA*, makes a few small changes to the previous subsection, but the most important addition to the subsection is that it now provides that an officer may: "break open any door or window or break through any wall on the premises for the purpose of entry and search" (as provided for in subsection (6)(a)) only if the officer in his or her reasonable opinion considers such breaking to be necessary for the purpose of the *CEA*.\(^{435}\)

The submission can be made that the tax-related legislation contains certain unclear provisions in terms of search and seizure operations, as there are different rules applicable on which officials may rely. They may rely on any tax legislation to conduct search and seizure operation. Due to the fact that most tax legislation provides for search and seizure to be conducted, it would consequently be easier to rely on the legislation which does not require a warrant or limits the officials in some way.\(^{436}\) This may be prevented by amending the tax legislation by making a universal provision in terms of search and seizure operations.\(^{437}\)

**4.11 The Cybercrimes and Cybersecurity Bill ("Cyber Bill")**

The main purpose of the *Cyber Bill* was to create offences and impose penalties which will have a bearing on cybercrimes. Relevant for this study is the purpose of the Bill, which is to regulate the powers to investigate cybercrimes. This is provided for in chapter 5 of the *Cyber Bill*. Central to this chapter, section 27 of the *Cyber Bill* states that subject to the provisions of sections 29, 30 and 31 of the *Cyber Bill*; section 4(3) of

\(^{434}\) Section 16(a) of the *TALAA* 39 of 2013. The circumstances include (s 16(aB)) when an officer has reasonable grounds to believe that a warrant would be issued and that the delay in obtaining the warrant is likely to defeat the purpose for which the officer seeks to enter the premises., an officer may enter any premises without a warrant.

\(^{435}\) Section 16(b) of the *TALAA* 39 of 2013; It should be noted that the *TALAA* 44 of 2014; 23 of 2015 along with 16 of 2016 had the function of amending the *CDA* and the *CCA*; The *TALAA* 17 of 2017 amended certain provisions of the *CEA*. However, none of the aforesaid amendments will be discussed in this study as these amendments are not relevant in terms of search and seizure provisions.

\(^{436}\) Khanyile *Constitutionality of search and seizure operations conducted before and after the Tax Administration Act 28 of 2011* 24.

\(^{437}\) Khanyile *Constitutionality of search and seizure operations conducted before and after the Tax Administration Act 28 of 2011* 24; Such a universal provision might resemble the proposed provision under subparagraph 3.5.
the CEA;\textsuperscript{438} sections 69(2)(b) and 71 of the TAA\textsuperscript{439} and section 21 (e) and (f) of the CCA;\textsuperscript{440} an article may be searched for or seized exclusively by virtue of the possession of a search warrant. The aforesaid search warrant has to be issued by a magistrate or judge of the High Court in response to a written application by a police official, only in the event that there are reasonable grounds for believing that the article is within the officer's area of jurisdiction and that the said article is being used in the commission of an offence or is required in evidence at a criminal proceeding.\textsuperscript{441} The aforementioned warrant therefore authorises police officials to enter and search any container, premises, vehicle, facility, ship or aircraft identified in the warrant.\textsuperscript{442} Additionally, the search warrant may be executed at any time and may be issued on any day.\textsuperscript{443} However, if the police have reasonable grounds to believe that a search warrant will be issued to them in terms of section 27(1)(a) if they were to apply for such warrant, and or that the delay in obtaining such a warrant would defeat the object of the search and seizure, a police official may search any person or container or premises for the purpose of performing the powers referred to in subparagraphs (a) and (b), without a search warrant referred to in section 27 (1)(a). Therefore, warrantless search and seizure operations will be conducted only on reasonable grounds. This would justify the infringement of the right to privacy.

\subsection*{4.12 The Financial Sector Regulation Act ("FSRA")}

The initial Financial Sector Regulation Bill of 2013 was the first effort at introducing the Twin Peaks model of financial sector regulation in South Africa. The Bill dealt with the creation of two regulators and the framework within which they would operate.\textsuperscript{444} The inspiration for change arose from the recognition that as financial products and financial institutions become increasingly complex, it becomes more important to move away from the sector-based or institutional approach.\textsuperscript{445} The FSRA was published in the GG \end{document}
The Twin Peaks model divides the regulations into two broad functions, namely prudential regulation and market conduct regulation.

Previously there were numerous regulatory authorities with responsibility for financial regulation, each with substantially different powers and functions. The difficulty of regulating a large financial combination of industries, the increasing complexity of financial products, and the desire for holistic system-wide regulation are all reasons as to why jurisdictions choose to move toward the Twin Peaks model.

The incentive of the FSRA was to achieve a stable financial system that works in the interest of financial customers and supports balanced and sustainable economic growth. The FSRA will achieve this by establishing the specific financial sector laws and a regulatory and supervisory framework that promotes certain principles and objectives. Some of these principles and objectives are, for example, financial stability, the safety and soundness of financial institutions, and the fair treatment and protection of financial customers.

Regarding search and seizure, sections 135-139 of the FSRA provides for investigations. Firstly, investigators are provided with the power to conduct investigations under section 135 of the FSRA. It provides that a financial sector regulator may instruct its investigator to conduct an investigation of any person, if the

---

446 Nagal 2017 https://eb.momentum.co.za; Sections 134-139 of the FSRA provide regulations regarding investigations. See the discussion below.

447 Godwin et al 2017 3 SALJ 665; This is done by creating dedicated authorities responsible for each of these objectives. Thus, the model sees entities regulated according to the sector in which they operate or their legal form. The market conduct regulator is the Financial Sector Conduct Authority (FSCA) and the prudential regulator is the Prudential Authority (PA). The National Treasury has recognised that the FSCA will be a stand-alone market conduct authority, whilst the PA will be an authority established within the Reserve Bank.

448 Godwin et al 2017 3 SALJ 668. See the description of the powers and functions below.

449 Godwin et al 2017 3 SALJ 669; Godwin et al 2017 3 SALJ 702. South Africa’s decision to move towards a Twin Peaks model was a timely development. South Africa had the advantage of observing how other jurisdictions implemented the model. However, the true test of its effectiveness will be in its implementation.

450 Godwin et al 2017 3 SALJ 669; Regulation of various industries, with different standards and requirements applying to different industries.


452 See section 134 of the FSRA in respect of individuals who may qualify as inspectors in terms of the FSRA.

453 See section 1 of the FSRA, which defines a financial sector regulator as the Prudential Authority or the Financial Sector Conduct Authority.
financial sector regulator reasonably believes that a person may have contravened a financial sector law for which the financial sector regulator is the responsible authority; or if the financial sector regulator reasonably believes that an investigation is necessary to achieve the objects referred to in section 251(3)(e) of the FSRA. Section 136 of the FSRA confers on investigators the power to question people and require the production of documents or other items, thus implying seizure. Investigators are given specific powers to enter and search premises in terms of section 137 of the FSRA. The aforesaid provides that an officer may enter a private residence with the prior consent of the person in control of the business reasonably believed to be conducted at the private residence and the consent of the occupant of the private residence or the part of the private residence to be entered. In the case of any other premises, the officer may enter with prior consent of the person in control of such premises. Furthermore, it provides that the aforesaid persons are under no obligation to allow the officer when the officer is not in the possession of a warrant.

Section 137(3)(a)(iii) provides that an investigator exercising powers in terms of this section must do so with strict regard to an effected person's right to privacy. Furthermore, the entry or search of the premises must be conducted at a reasonable time within ordinary business hours. The warrant requirement is set out in section 138 of the FSRA. As such, the right to privacy is borne in mind but still infringed upon when search and seizure operations are conducted without a warrant or reasonable grounds.

---

454 Section 135(1)(a) and (b) of the FSRA; See section 251 of the FSRA, which provides a financial sector regulator and/or the Reserve Bank with obligations and duties.
455 Note that section 137(1)(BB) states that no person is under any obligation to admit the investigator in the absence of a warrant; See Chapter 2 on the right to privacy. Section 137(3)(b)(i)-(iv) provides the requirements of decency and good order in terms of which entry and searches must be conducted.
456 Section 137(1)(a)(i)(aa) of the FSRA.
457 Section 137(1)(a)(i)(bb) of the FSRA.
458 Section 137(1)(a)(i)(bb)(BB) of the FSRA. This provision protects the person whose property is being searched by imposing the requisite of prior consent or a warrant.
459 Section 137(4) of the FSRA.
460 Note that section 137(1)(a)(ii)(bb)(BB)-(CC) of the FSRA provides that: "if the head of a financial sector regulator or senior staff member on reasonable grounds believes that a delay in obtaining the warrant is likely to defeat the purpose for which entry of the premises is sought, and it is necessary to enter the premises to conduct an investigation and search the premises", an investigator may enter any premises without prior consent or notice.
4.13 The Financial Intelligence Centre Act

The FICA provided for inspection under section 45(B). This section provides that an inspector appointed to determine compliance may, on the authority of a warrant issued in terms of section 45B(1B), enter and search a private residence or any premises other than premises contemplated in subsection (1)(b) or paragraph (a), if there is a reasonable belief that the residence or premises are used for a business to which the provisions of FICA applies. Section 45B(1C) contains the clause on warrantless search and seizure powers. Accordingly, an inspector has the power to enter and search a private residence (as provided for in 1(A)) without a warrant, with the consent of the person in control of the private residence, the person in control of the business reasonably believed to be conducted at the private residence, and/or the occupant of the part of the private residence to be entered and searched. Subsection 45B(1D)(c) prescribes that throughout the search operations strict regard must be had to an affected person's right to dignity and right to privacy. It goes further to provide that in terms of the strict regard to decency and good order, areas should be entered and inspected only if this is reasonably required for the purposes of section 45B(2). It is specifically stated that such entry and search should be performed whilst causing as little disturbance as possible, discreetly, and with due decorum.

The FICAA amended section 45 of the FICA by replacing subsection (1D). Section 32 of the FICAA also amended section 45B of the FICA as follows: by replacing paragraph (a) with subsection (1); paragraph (b) inserts subsections (1A)-(1E); paragraph (c)

461 Section 45B (1A) makes it evident that the purpose of this Act is to determine compliance.
462 See chapter 2 specifically Estate Agency Affairs Board v Auction Alliance (Pty) Ltd 2014 3 SA 106 (CC).
463 Section 45B (1C)
464 See chapter 2 on the right to privacy; Subsection 45B (1D)(c) of FICA.
465 Subsection 45B (1D)(d)(ii) of FICA.
466 Subsection 45B (1D)(d)(ii)-(iii) of FICA.
467 Section 31 of FICAA 1 of 2017.
468 Subsection (1)(a) provides that "compliance" means compliance with a provision of the Act or any order, determination or directive made in terms of the Act. Subsection (1)(b) states that: "an inspector appointed in terms of section 45A may enter the premises, excluding a private residence, of an accountable institution or reporting institution which is registered in terms of s 43B or otherwise licensed or authorised by a supervisory body, and inspect affairs for the purpose of determining compliance." An inspector may at any reasonable time enter and inspect any premises if the inspector reasonably believes that business in terms of the Act is being conducted.
469 Subsection (1A) furnishes inspectors with the power to enter and inspect, for the purpose of determining compliance and on the authority of a warrant, a private residence, or any premises if the inspector reasonably believes that the residence or premises are used for business to which the
inserts subsection (2A)-(2C); paragraph (d) replaces subsection (4); paragraph (e) replaces subsection (5)(b)(iv); paragraph (f) deletes subsection (6)(b) and paragraph (g) deletes subsection (7).

With regard to the most recent amendment of the *FICA*, namely the *FICAA* 9 of 2017, there were quite a few formidable impediments to overcome. Parliament had passed the Bill in May 2016 and sent it to former president Zuma for assent. The presidency confirmed that the proposed Bill had been returned to parliament due to concerns that certain of its provisions did not pass constitutional muster. These concerns related to warrantless searches. The former president was of the opinion that these provisions fell short of the constitutional standard required for the provisions not to unjustifiably limit the right to privacy. For this reason parliament had to deliberate, during which deliberations the clause which the president held to be unconstitutional, was reconsidered. Thereafter, amendments were introduced making it clear that warrantless inspection in terms of the proposed section 45B(1C) is not permitted in respect of criminal offences. Furthermore, a clear distinction was introduced between a private residence and an unlicensed residence. An additional paragraph (d) outlined how an inspection is required to be conducted with strict regard to decency and good order. After many deliberations the Act was published in GG 40821 of 2 May 2017 and came into effect.

Section 134 to section 138 of the *FICAA* 9 of 2017 furnish provisions with regard to investigations. Section 137 is particularly relevant as it empowers investigators to enter and search premises. It provides that an investigator may, for investigating purposes, enter any premises with prior consent or without a warrant.

---

provisions of the Act apply. Subsection (1B) issues the warrant requirement, whereas subsection (1C) provides for the circumstances where an inspector may enter and inspect a residence or premises without a warrant. Subsection (1D) provides for the manner in which an inspector is required to enter and inspect a residence or premises, specifically with strict regard to an affected person’s right to dignity, freedom and security, and most importantly privacy. These subsections provide inspectors with the right to demand the delivery of a report or the furnishing of facts and information related to the report from an accountable institution under inspection.

"(4) The Centre or a supervisory body may recover all expenses necessarily incurred in conducting an inspection from an accountable institution or reporting institution inspected."

"...(iv) except information contemplated in subsections (2A) and (2C), if the Director or supervisory body is satisfied that it is in the public interest."

Section 32 of the *FICAA* 1 of 2017.

Published in the GG 38748 of 29 April 2015.

In the case of a private residence an investigator may enter any premises with the consent of the person apparently in control of the business, which business is reasonably believed to be conducted at the private residence and the occupant of the private residence or the part of the private residence to be entered.\(^\text{476}\) In terms of any other premises, an investigator may enter any premises with the consent of the person apparently in control of the premises.\(^\text{477}\) The aforesaid is lawful only after informing that person that granting consent will enable the investigator to enter and search the premises and to do anything contemplated in subsection (6) of the Act and that such a person is under no obligation to admit the investigator in the absence of a warrant.\(^\text{478}\)

On the other hand an investigator may enter any premises without prior consent and without giving prior notice to any person if the entry is authorised by a warrant, or alternatively with the prior authority of the head or senior staff member of a financial sector regulator, only if such a person reasonably believes that a warrant will be issued if applied for, the delay in obtaining the warrant is likely to defeat the purpose of which entry of the premises is sought, or that it is necessary to enter the premises to conduct the investigation and search the premises.\(^\text{479}\)

Most important is the requirement that an investigator has to exercise his or her power with strict regard to the affected person’s right to dignity; freedom and security; privacy and other constitutional rights.\(^\text{480}\) Regard must be given to decency and good order to the extent which is required in the relevant circumstances, specifically by entering and searching only such areas or objects as are reasonably required for the purpose of the investigation; conducting the search discreetly and with due decorum; causing as little disturbance as possible; and concluding the search as soon as possible.\(^\text{481}\) Unless a warrant authorises it expressly, an entry or search of premises must be conducted at a reasonable time within ordinary business hours.\(^\text{482}\) Section 6 provides for the manner in which such a search may be conducted. Investigators have the right of access to any

---

\(^{476}\) Section 137 (1)(a)(i)(aa) of the FICAA 1 of 2017.

\(^{477}\) Section 137 (1)(a)(i)(bb) of the FICAA 1 of 2017.

\(^{478}\) Section 137 (1)(a)(i)(AA) and (BB) of the FICAA 1 of 2017.

\(^{479}\) Section 137 (1)(a)(ii) of the FICAA 1 of 2017.

\(^{480}\) Section 137 (3)(a)(i)-(iv) of the FICAA 1 of 2017.

\(^{481}\) Section 137 (3)(b)(i)-(iv) of the FICAA 1 of 2017. This provision is not contained in any of the other Acts discussed.

\(^{482}\) Section 137 (4) of the FICAA 1 of 2017.
part of the premises and any documents or items on the premises and may open or cause to be opened any strong-room, safe, cabinet or other container in which the investigator reasonably suspects there is a document or item that may afford evidence of the contravention concerned or which is relevant to the request.\textsuperscript{483} Investigators may examine, make extracts and copies from any documents as well as question any person on the premises.\textsuperscript{484} The investigator may require any person on the premises to operate any computer or similar system on or available through the premises to search any information and produce records of that information.\textsuperscript{485} The investigator has the power to seize from the premises a document or item that may provide evidence of the contravention concerned or be relevant to the request.\textsuperscript{486} Furthermore, an investigator and any person assisting an investigator may use reasonable force to exercise any power in terms of the Act.\textsuperscript{487} The warrant requirement is furnished by section 138 of the \textit{FICAA} 1 of 2017 and as is the case with most other legislation requires reasonable grounds for it to be issued.\textsuperscript{488} The promulgation of this \textit{FICAA} brought about an overhaul of the provisions relating to the search and seizure conducted by officials for the purpose of compliance.

If one were to apply the most recent search and seizure provisions provided in the \textit{FICAA} 1 of 2017 to the case of \textit{Gaertner}, the conclusion that may be drawn, is that there may be a lesser infringement on the right to privacy as Section 137 (3)(b)(i)-(iv) of the \textit{FICAA} 1 of 2017 provides specifically that strict regard must be given to a person’s constitutional rights and that decency and good order must be regarded when conducting the search. In the matter of \textit{Gaertner}, had the officials entered and searched Mr. Gaertner’s private residence more discreetly and with due decorum, they might not have infringed Mr. Gaertner’s right to privacy, as they would not have been able to enter the private residence without reasonable grounds and a warrant. Mr. Gaertner in return would have been able either to refuse their entry or to co-operate and provide the officials with the required information without the officials having to break into or disrupt his personal sphere. Considering the fact that the \textit{FICAA} 1 of 2017 was measured against the provisions of the \textit{Constitution} and thereafter was approved by Parliament as

\textsuperscript{483} Section 137 (6)(a)(i) of the \textit{FICAA} 1 of 2017.
\textsuperscript{484} Section 137 (6)(a)(ii) and (iii) of the \textit{FICAA} 1 of 2017.
\textsuperscript{485} Section 137 (6)(a)(v) of the \textit{FICAA} 1 of 2017.
\textsuperscript{486} Section 137 (6)(a)(vii) of the \textit{FICAA} 1 of 2017.
\textsuperscript{487} Section 137 (7) of the \textit{FICAA} 1 of 2017.
\textsuperscript{488} See section 138 of the \textit{FICAA} 1 of 2017 for more detail.
well as by the President, should this not be used as a model for all search and seizure provisions? Comparing the search and seizure powers provided for in the FICAA 1 of 2017 with the provisions contained the in CEA, one can see that the latter are clearly not harmonious with the constitutional right to privacy furnished by the Constitution.

4.14 Conclusion

The focus of the above discussed fiscal legislation was placed on those provisions providing for entry, searches, seizures and a warrant requirement or lack thereof. The most important of these provisions is the requirement that an investigator has to exercise his or her power with strict regard to the effected person’s right to dignity; freedom and security; privacy and other constitutional rights. Section 39 of the Constitution states that when interpreting the Bill of Rights (furnishing the right to privacy) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and must consider international law.\textsuperscript{489} In terms of the Constitution, the duties and obligations which an act enforces/authorises do not exist in isolation. The taxpayers’ constitutional right has to be taken into consideration. These rights include the right to just administrative action,\textsuperscript{490} the right to access to the courts,\textsuperscript{491} and the right to privacy.\textsuperscript{492}

In light the of the above, the goal should be to promulgate a single law to provide guidance in relation to all search and seizure operations and as such provide a universal statute which is in line with the provisions of the Constitution, taking into account the caveat that legislation should not be so widespread as to have the real potential to reach into private dwellings.

This chapter has endeavoured to compare the search and seizure powers in various other pieces of legislation with the provisions of the customs and excise legislation. The provisions in most of the Acts discussed above are similar to the provisions of the customs and excise legislation, as they similarly seem to authorise possible infringements on the right to privacy. A universal model of all search and seizure

\textsuperscript{489} Section 39(1)(a) and (b) of the Constitution; The international context will be dealt with in the next chapter.

\textsuperscript{490} Section 33 of the Constitution.

\textsuperscript{491} Section 34 of the Constitution.

\textsuperscript{492} Section 14 of the Constitution.
operations should be drafted to establish legal certainty, irrespective of the context in which such operations take place.\textsuperscript{493}

The following chapter will compare the search and seizure powers of customs officials in various selected jurisdictions. The relevant customs and excise legislation as well as any provisions furnishing the right to privacy will be considered.

\textsuperscript{493} See Chapter 6 for a recommendation herein.
Chapter 5: Comparison with other jurisdictions

5.1 Introduction

In the previous chapter it became evident that there are many different statutes dealing with search and seizure powers, and that they are not limited to customs and excise legislation. Chapter 4 considered how search and seizure powers in terms of customs and excise legislation compare with search and seizure powers under various fiscal statutes and considered the constitutionality of such legislation.

Section 233 of the Constitution requires a court to prefer any reasonable interpretation of legislation consistent with international law over any alternative interpretation inconsistent with such law. Additionally, section 39 of the Constitution states that when interpreting the Bill of Rights (which includes the right to privacy) a court, tribunal or forum must consider international law. The right to privacy is recognised in various international human rights instruments as well as in the constitutions of many foreign jurisdictions. The fact that Gaertner referred to legislation in terms of Canadian and Australia law, suggests that it is essential to compare the search and seizure powers of customs officials with different jurisdictions. In terms of international perspective the court considered Canadian jurisprudence which is consistent with the South African view that inspections authorised by legislation can be deemed as limiting the right to privacy guaranteed by the Constitution. In Gaertner, Judge Rogers considered that in his view a warrant is required in a wider range of circumstances than required in Canadian jurisprudence. Judge Rogers points out that the relevant provisions of the

---

494 Du Plessis Interpretation of Statutes and the Constitution 2C22.
495 Section 39(1)(a) and (b) of the Constitution.
496 Woolman et al Constitutional Law of South Africa 38-19; International Human Rights Instruments such as article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights; article 11 of the American Convention on Human Rights; article 8 of the European Convention of Human Rights and Fundamental Freedoms.
497 See para 49 of Gaertner, (HC) which refers to the provisions of the Australian Customs Act of 1901 regarding the controlled environment prior to the payment of duty as parallel to the South African CEA. Gaertner (HC) para 90.
498 Despite the fact that the inspected person is a regulated business entity and even though the inspection is a routine inspection concerned with compliance, it limits the right to privacy. In terms of South African law the right to privacy is provided for by section 14 of the Constitution (refer to chapter 2 of this study) and in terms of Canada’s Constitution Act, 1982 it limits the provisions included in section 8 which states that: “everyone has the right to be secure against unreasonable search and seizure”.
499 Gaertner (HC) para 90.
Canadian Charter are not identical to the provisions of the South African Constitution. Therefore, it cannot be expected that South African law develops along identical lines. Rogers J is of the opinion that under the South African Constitution the limitation analysis furnished by section 36 of the Constitution has to be applied separately to each statute and in accordance with the guidance afforded by cases such as Mistry and Magajane. Evidently, it is important to consult international jurisprudence, whilst keeping in mind that the international provisions might not be in line with the South African Constitution.

To explore foreign jurisprudence is of value due to the fact that it gives insight into how courts in other jurisdictions have dealt with issues confronting South African courts. It should be useful, then to ask how the search and seizure powers of customs officials in other jurisdictions compare with those in South Africa. This chapter will examine customs and excise legislation from such jurisdictions with search and seizure powers as the focal point of the examination, and the implications of such legislation for the right to privacy will be reviewed.

In terms of section 1 of the CEA, the Common Customs Area is defined. All of the countries in this area have subscribed to the South African Customs Area (SACU) agreements. The Southern African Customs Union includes South Africa, Botswana, Lesotho, Namibia and Swaziland. This chapter will aim to give a comparative perspective with the focus on the Common Customs Area.

5.2 Namibia

5.2.1 Customs and excise legislation

Section 4 of the Namibian Customs and Excise Act 20 of 1998 provides for the general duties and powers of officers in Namibia. Section 4(9)(a) empowers officers to enter
any premises and conduct an examination or enquiry in relation to the Act as they deem necessary, at any reasonable time and without prior notice.\footnote{Section 4(9)(a)(i) of the \textit{Customs and Excise Act} 20 of 1998 (Namibia); Therefore, no warrant is required. Subsection (iv) empowers officers to seize or examine and make extracts of any books, documents or other goods referred to in the Act. This is similar to section 4(4)(b) of the \textit{CEA} of South Africa.} In the event that the officer has identified himself and demanded entry into or onto any premises and declared his official capacity and purpose for demanding entry, and is not immediately admitted to such premises, the officer may break open any door or window, or break through any wall on or in the premises for the purpose of entry and search.\footnote{Section 4(11)(a)(i)-(iii) of the \textit{Customs and Excise Act} (Namibia). Any premises would therefore include private dwellings. See section 4(6)(a) of the \textit{CEA} of South Africa.} Further to this, the officer may at any time break up any ground or floor on or in any premises for the purpose of searching the premises, and in the event that a room, place, safe, chest, container or package in or on the premises is locked and the keys thereof are not produced on demand, the officer may in any manner open such a room, place, safe, chest, container or package.\footnote{Section 4(11)(b) of the \textit{Customs and Excise Act} (Namibia); confirmed in Section 4(14)(b) of the \textit{Customs and Excise Act} (Namibia). See section 98 of the \textit{Customs and Excise Act} (Namibia) regarding the seizure powers of officers, magistrates or members of the Namibian Police, including the warrant requirement. This is cognate to section 4(6)(a) of the \textit{CEA} of South Africa.}

5.2.2 The right to privacy

The right to privacy is furnished by Article 13 of the \textit{Constitution of the Republic of Namibia}, 1990. Article 13 states that no person shall be subject to interference with the privacy of their homes, correspondence or communications. Nonetheless, this right may be limited in accordance with law and as is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.\footnote{Article 13(1) of the \textit{Constitution of the Republic of Namibia}, 1990.} The \textit{Constitution of the Republic of Namibia}, 1990 specifically provides that warrantless searches of a person or the homes of individuals shall be justified only in the following two circumstances, namely (a) where these are authorised by a competent judicial officer or (b) in cases where a delay in obtaining judicial authority carries with it the danger of prejudicing the objects of the
search or the public interest, and such procedures as are prescribed by the Act of Parliament to preclude abuse are properly satisfied.\textsuperscript{508}

5.3 Botswana

5.3.1 Customs and Excise legislation

The \textit{Customs and Excise Duty Act}\textsuperscript{509} of the Republic of Botswana provides for the general duties and powers of officers.\textsuperscript{510} Like the South African customs and excise legislation, it provides that officers may, for the purpose of the \textit{Customs and Excise Duty Act}, without previous notice and at any time enter any premises whatsoever to do an examination and enquiry as they deem necessary.\textsuperscript{511} It furthermore provides that in the event that an officer has already declared his official capacity and his purpose, and has demanded admission into any premises, and such an officer is not immediately admitted, the officer can: "break open any door or window, or break through any wall on the premises for the purpose of entry and search".\textsuperscript{512} In addition the Act states that an officer or any person assisting him may at any time break up ground or flooring on any premises to enable an officer to search the premises, and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, the officer may open such a room, place, safe, chest, box or package in any manner.\textsuperscript{513} If there are reasonable grounds for believing that it is necessary to do so for the prevention, investigation or detection of an offence in terms of the Act, an officer may at all times enter and search any premises and may seize any goods or documents relating thereto.\textsuperscript{514}

---

\textsuperscript{508} Article 13(2)(a)-(b) of the \textit{Constitution of the Republic of Namibia}, 1990.
\textsuperscript{509} 22 of 1970 (Botswana).
\textsuperscript{510} An "officer" is any person employed on any duty relating to customs and excise; Section 6 of the \textit{Customs and Excise Duty Act} (Botswana).
\textsuperscript{511} Section 6(5)(a) of the \textit{Customs and Excise Duty Act} (Botswana).
\textsuperscript{512} Section 6(8) of the \textit{Customs and Excise Duty Act} (Botswana), which is parallel to section 4(6)(a) of the \textit{CEA} of South Africa.
\textsuperscript{513} Section 6(9) of the \textit{Customs and Excise Duty Act} (Botswana), which is similar to section 4(6)(b) of the \textit{CEA} of South Africa.
\textsuperscript{514} Section 147(1) of the \textit{Customs and Excise Duty Act} (Botswana). "Premises" include premises licensed in terms of section 128 or the premises of any person who sells goods liable to excise duty or surtax or who is reasonably suspected of manufacturing or selling such goods in contravention of the Act.
5.3.2 The right to privacy

The Constitution of Botswana, 1966 includes the right to the protection of the privacy of the home and other property.\(^{515}\) It clearly states that no persons shall be subject to the search of their persons or of their property or the entry by others on their premises, except with their own consent.\(^{516}\) Nonetheless, the exception provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the aforesaid, to the extent that the law in question makes provision for such actions.\(^{517}\)

5.4 Lesotho

5.4.1 Customs and excise legislation

In terms of section 5 of the Customs and Excise Act 10 of 1982 (Lesotho) an officer is provided with certain powers.\(^{518}\) Without previous notice, an officer may at any time enter any premises whatsoever and make such examination and enquiry as he deems necessary.\(^{519}\) After an officer has declared his official capacity and his purpose, demanded entry into any premises, and is not immediately admitted, that officer and the person assisting him may at any time, but at night only in the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and search.\(^{520}\) Furthermore for the purpose of search the officer may: break up any ground of flooring on any premises, and in the event that any "room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand", may open the aforesaid in any manner.\(^{521}\)

\(^{515}\) Section 9 of the Constitution of Botswana, 1966.
\(^{516}\) Section 9(1) of the Constitution of Botswana, 1966.
\(^{517}\) Section 9(2)(a)-(d) of the Constitution of Botswana, 1966. Therefore, providing that a reasonable entry and search is performed in terms of the Customs and Excise Duty Act (Botswana), it will not be inconsistent with the right to privacy in terms of the Constitution of Botswana.
\(^{518}\) "Officer" means a person employed on any duty relating to customs and excise and sales duty and surcharge by order or with the concurrence of the Director. Section 2(1) Customs and Excise Act (Lesotho).
\(^{519}\) Section 5(4)(a)(i) Customs and Excise Act 10 of 1982 (Lesotho), which resembles section 4(4)(b) of the CEA of South Africa.
\(^{520}\) Section 5(6)(a) Customs and Excise Act (Lesotho). Also see Section 5(8) Customs and Excise Act (Lesotho), which resembles section 4(6)(a) of the CEA of South Africa.
\(^{521}\) Section 5(6)(b) Customs and Excise Act (Lesotho); confirmed in Section 5(9)(b) Customs and Excise Act (Lesotho), which resembles section 4 (6)(b) of the CEA of South Africa.
5.4.2 The right to privacy

The Constitution of Lesotho, 1993 provides for the right to privacy in various manners. On the one hand it provides for the right of freedom from arbitrary search or entry. More so it states that every person shall be entitled to freedom from arbitrary search or entry. Therefore, a person shall not be subjected to the search of his person or property or the entry by others onto his premises except with his own consent.

It also furnishes the right to respect for private and family life. It provides all persons with the entitlement to respect for their private and family lives and homes. Nonetheless, it states that nothing in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 11 (2) to the extent that the law in question makes provision for same, in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedoms of other persons.

5.5 Eswatini (previously known as Swaziland)

5.5.1 Customs and excise legislation

Section 4 of the Customs and Excise Act, 1971 (Swaziland) lays out the general duties and powers of officers. For the purposes of the Customs and Excise Act (Swaziland) any officer may without previous notice at any time enter any premises whatsoever and conduct a search and seizure operation. After an officer has declared his official capacity and purpose and has demanded entry into any premises, and is not immediately admitted, the officer and any person assisting the officer may at any time, but at night only in the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and

---

523 Section 10(1) of the Constitution of Lesotho, 1993. See Section 10(2) of the Constitution of Lesotho, 1993 for the exceptions.
525 Section 11(1) of the Constitution of Lesotho, 1993. Consequently, entry and searches without a warrant or any reasonable grounds will be inconsistent with this provision.
526 Section 11(2) of the Constitution of Lesotho, 1993, which clearly limits the right to privacy.
527 "Officer" meaning: "a person employed on any duty relating to customs, fiscal excise or sales duty by order or with the concurrence of the Commissioner". Section 2(1) of the Customs and Excise Act, 1971 (Swaziland).
528 Section 4(4)(a) of the Customs and Excise Act, 1971 (Swaziland), which is similar to section 4 (4)(b) of the CEA of South Africa.
search. An officer or any supporting person may at any time break up any ground or flooring on any premises for the purpose of search and if any "room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand", may open the aforesaid in any manner.

5.5.2 The right to privacy

The Constitution of the Kingdom of Swaziland affords the right to privacy. Section 14 yields the fundamental human rights and freedoms of individuals and grants the right to the protection of the privacy of the home, and other property rights of individuals. Furthermore, a person shall not be subjected to a search of his person or his property or to the entry by another onto his premises. Nothing contained in or done under the authority of any other law shall be held to be inconsistent with or in contravention of the Constitution of the Kingdom of Swaziland, to the extent that the law in question makes provision that it is reasonably required. Therefore, the submission can be drawn that the limitation imposed by the Customs and Excise Act, 1971 (Swaziland) will be considered in line with the provisions of the Constitution of the Kingdom of Swaziland if entries and searches are reasonably conducted.

5.6 Conclusion

From the above it is evident that the various items of customs and excise legislation relating to search and seizure in the Common Customs Area are interconnected. The customs and excise legislation above resembles the provisions contained in section 4 of the CEA of South Africa. These provisions, which provide officers with widespread powers to conduct entry, search and seizure operations in a person’s private home, place limitations on the right to privacy. Accordingly, whenever a statutory inspection power is challenged and the South African court considers international law, it is

### Footnotes

529 Section 4(7) of the Customs and Excise Act, 1971 (Swaziland). See section 4(6)(a) of the CEA of South Africa.
530 Section 4(8) of the Customs and Excise Act, 1971 (Swaziland); Confirmed in section 4(15) of the Customs and Excise Act, 1971 (Swaziland). See section 4(6)(b) of the CEA of South Africa.
531 The Constitution of the Kingdom of Swaziland Act, 2005.
532 Section 14(1)(c) the Constitution of the Kingdom of Swaziland Act, 2005.
533 Section 22(1)(a)-(b) the Constitution of the Kingdom of Swaziland Act, 2005.
534 Section 22(2)(a)-(c) the Constitution of the Kingdom of Swaziland Act, 2005.
535 Specifically sections 4(4)(b); 4(6)(a) and 4(6)(b) of the CEA of South Africa.
536 Even more so due to the fact that warrantless searches and seizures are warranted by the provisions of the various customs and excise Acts.
necessary to undertake the limitation analysis furnished by section 36 of the Constitution to determine whether the limitation of the right to privacy is reasonable and justifiable in an open, democratic society.\(^{537}\) Additionally, the test described in subparagraph 2.5 can also be applied. For any legislation to be constitutionally valid it has to satisfy the following requirements.\(^{538}\) Firstly, it must properly define the power to search and seize,\(^{539}\) secondly it has to provide for prior authorisation by an independent authority,\(^{540}\) and lastly it must require the independent authority to be provided with evidence on oath that there are reasonable grounds for conducting the search and executing the seizure.\(^{541}\)

This chapter aimed to answer the question, how do the search and seizure powers of South African customs officials compare with those of customs officials in others jurisdictions? The conclusion drawn is that the search and seizure powers of customs officials in the SACU are derived from the same source and they furnish officials with similar far-reaching powers to break open any door or window or break through any wall for the purpose of entry and search, as well as to break open any: “room, place, safe, chest, box or package in any manner”.

It is doubtful whether any of the statutes considered herein would be considered to be constitutional within the context of this study, due to the fact that they provide for such widespread powers.

An important event to keep in mind is the signing of the Agreement Establishing the African Continental Free Trade Area (AfCFTA). South Africa became a part of the AfCFTA on 2 July 2018.\(^{542}\) This Agreement will increase intra-regional trade and also more complex levels of production on the African continent.\(^{543}\) The AfCFTA will have an effect on the SACU customs and excise industry.

\(^{537}\) Gaertner (HC) para 56(c).
\(^{538}\) Woolman et al Constitutional Law of South Africa 38-28; De Waal, Currie and Erasmus The Bill of Rights Handbook 278.
\(^{539}\) Mistry para 29.
\(^{540}\) Park-Ross para 148.
\(^{541}\) Hyundai para 6.
\(^{543}\) Frykberg 2018 https://www.iol.co.za.
The subsequent chapter will include a comprehensive conclusion of the entire study with regards to rethinking the search and seizure powers of officers in terms of customs and excise legislation.
Chapter 6: Conclusion

6.1 Findings

This dissertation aimed to establish to what extent the search and seizure powers of customs and excise officers are constitutionally sound. This research focussed on the right to privacy provided for by the Constitution and its possible infringement. Throughout this study the case study of Gaertner was borne in mind. Gaertner stated that provisions which authorise warrantless entry into a private home breach the right to privacy. In Gaertner there was a reasonable expectation of privacy, yet the inner sanctum of the home was blatantly violated by the warrantless search and seizure operation.

When someone's person, home or property is searched, or someone's possessions seized, section 14 of the Constitution will possibly be infringed. Chapter 2 described what the right to privacy entails and made the point that the right to privacy enshrined in the Constitution is not absolute. The infringement of the right to privacy may be justified in terms of section 36 of the Constitution. Section 36 indicates the factors to be considered when determining whether the limitation is, in fact, reasonable and justifiable. These factors include the nature of the right; how vital the purpose of the limitation is; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether there are less restrictive means available to achieve the purpose of the limitation.

The goal in Chapter 3 was to determine to what extent the search and seizure powers provided for in the customs and excise legislation limit the right to privacy. It also analysed the past, present and future position in terms of the aforegoing, to establish whether the future provisions would be more in line with the Constitution. It was concluded, however, that the proposed new legislation still provides officers with excessively wide powers to conduct warrantless searches which unduly limit the right to privacy.

Chapter 4 was devoted to an illustration of the search and seizure powers in various pieces of fiscal legislation and an analysis of how the aforesaid compare to the provisions of the customs and excise legislation. It was found that there are in fact
similarities among the numerous statutes and that a universal model for search and seizure provisions would establish harmony and legal certainty in this area of regulation.

Lastly, in Chapter 5 this research compared the search and seizure powers of South African customs officer to the powers of their colleagues in other countries forming part of the SACU. The submission was made that the customs and excise legislation of the selected jurisdictions furnishes officers with similar far-reaching powers, and if these provision were subject to the provisions of the South African Constitution, these powers would not be constitutionally valid.

For any search and seizure provisions to be constitutionally valid they have to properly define the power to search and seize; they have to require a warrant to conduct the search and execute the seizure; and such a warrant may be granted only in the event that there are reasonable and justifiable grounds to do so.

6.2 Recommendation

Any search and seizure will be justifiable only if conducted in a reasonable and fairly regulated manner. To ensure legal certainty the recommendation is that a universal model should be established to regulate and provide for all search and seizure operations, irrespective of the context in which they take place, whilst protecting the right to privacy.

It is possible to propose a constitutionally sound, universal model for conducting search and seizure operations, following the guidelines provided in Gaertner, as follows. Firstly, search and seizure operations should be conducted during ordinary business hours, unless there are reasonable grounds to argue that the matter is urgent. Secondly, the persons in charge of the premises should be informed of whether this operation is a routine or non-routine search. In the event that it is a non-routine search, for which no warrant is required, the official should inform the person in charge in writing of the purpose of the search and seizure operation. When a warrantless search and seizure operation is to be performed, the person in control of the premises should give written consent to the search and seizure to be conducted.

Where the matter is reasonably judged to be urgent and the person in charge of the premises cannot be informed in writing, this must be done orally. Only those officials
whose presence is reasonably necessary to conduct the search and seizure operation should be present and partake in the search and seizure operation being conducted. The person in charge of the premises should be entitled to be present and to observe all aspects of the search and seizure being conducted. If anything is removed from the premises by an officer, the person in charge is entitled to an inventory of the items so removed and if anything is copied the person is entitled to a list of all such materials copied. The search and seizure operation should be conducted with strict regard for decency and order whilst respecting each person’s right to dignity, freedom, security and privacy. Lastly, whenever an individual’s inner sanctum is to be entered, a warrant is required to authorise such entry.\footnote{The recommendation has been culled from various sources: Khanyile \textit{Constitutionality of search and seizure operations conducted before and after the Tax Administration Act 28 of 2011} 42; Gaertner (CC) para 19 and para 105; Fritz 2016 JJS 30.}

The above would provide individuals with legal certainty and protect the right to privacy from unreasonable, unjustifiable infringement whilst rethinking the search and seizure powers of officers in terms of customs and excise legislation.
BIBLIOGRAPHY

Literature

Cheadle et al South African Constitutional Law: The Bill of Rights


Cronje Customs and Excise Services

Cronje H.C. Customs and Excise Services (LexisNexis Butterworths South Africa 2017)

Currie and de Waal The Bill of Rights Handbook

Currie I and de Waal J The Bill of Rights Handbook 5th ed (Juta Cape Town 2005)

Davis and Steenkamp "Privacy"


Dennis and Steenkamp Chapter 9 in Cheadle et al South African Constitutional Law: The Bill of Rights


De Waal, Currie and Erasmus The Bill of Rights Handbook


Du Plessis Interpretation of Statutes and the Constitution
Du Plessis L *Interpretation of Statutes and the Constitution* (LexisNexis Butterworths South Africa Last updated June 2012 – SI30)

Fritz 2016 *JJS*


Godwin *et al* 2017 *3 SALJ*

Godwin A *et al* "Twin Peak: South Africa’s Financial Sector Regulatory Framework" 2017 *3 SALJ* 665-702

Khanyile *Constitutionality of search and seizure operations conducted before and after the Tax Administration Act* 28 of 2011

Khanyile Constitutionality of search and seizure operations conducted before and after the *Tax Administration Act* 28 of 2011 (LLM-dissertation University of Pretoria 2016)

Lamprecht 2013 *Tax Breaks Newsletter*

Lamprecht I "Does SARS invade your privacy?:enforcement" 2013 *Tax Breaks Newsletter* 1-2

Louw 2014 *Tax Alert CDH*


Mavropoulos 2016 *TAXtalk* 56

Mavropoulos G "Customs and excise legislation gets much needed overhaul" 2016 *TAXtalk* 56 36-39

Radyn 2018 *De Rebus*

Radyn L "Search warrants: What do the courts require?" May 2018 *De Rebus* 16 17

SARS *Short Guide to the Tax Administration Act, 2011*


Swanepoel 1997 CILSA

Swanepoel JP "Warrantless search and seizure in criminal procedure: Constitutional challenge" 1997 CILSA 339-363

Rubenfeld 1989 Harvard LR

Rubenfeld J "The Right to Privacy" 1989 Harvard LR 737-807

Vanek 2011 Tax Break Newsletter

Vanek M "SARS’ new search and seizure powers" Tax Break Newsletter Volume 2011 Issue 208

Warren and Brandeis 1890 Harvard LR

Warren SD and Brandeis LD "The Right to Privacy" 1890 Harvard LR 193-220

Woolman et al Constitutional Law of South Africa

Woolman S et al Constitutional Law of South Africa 2nd ed Volume 3 (Juta Cape Town 2014)

Case law

Bernstein v Bester 1996 2 SA 751 (CC)

Case v Minister of Safety and Security; Curtis v Minister of Saftery and Security 1996 3 SA 617 (CC)
Deutschmann No and Another; Shelton v Commissioner for the South African Revenue Service 2000 6 BCLR 571 (E)

Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 2 SA 535 (C)

Fedica Group (Pty) Ltd v Matus 1998 2 SA 617 (C)

Gaertner v Minister of Finance 2013 4 SA 87 (WCC)

Gaertner v Minister of Finance 2014 1 SA 442 (CC)

Huang v The Commissioner for the South African Revenue Services 2015 1 SA 602 (GP)

Hunter et al v Southam Inc 1984 11 DLR 641 (SCC)

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 1 SA 545 (CC)

Jansen van Rensburg NO v Minister of Trade and Industry 2001 1 SA 29 (CC)

Katz v United Stated 1967 389 US 347

Khumalo v Holomisa 2002 8 BCLR 771 (CC)

Magajane v Chairperson, North West Gambling Board 2006 5 SA 205 (CC)

Minister of Police v Kunjana 2016 2 SACR 473 (CC)

Mistry v Interim Medical and Dental Council of South Africa 1998 4 SA 751 (CC)

NM and Other v Smith and Others (Freedom of Expression Institute as amicus curiae) 2007 5 SA 250 (CC)

Park-Ross v Director: officer for Serious Economic Offences 1995 2 BCLR 198 (C)

Rakas v Illinois 1978 439 US 128

Rudolph v Commissioner for Inland Revenue 1996 7 BCLR 889 (CC)

Rudolph v Commissioner for Inland Revenue 1997 4 SA 391 (SCA)
South African Association of Personal Injury Lawyers v Heath 2000 JDR 0402 (T)

South African Association of Personal Injury Lawyers v Heath 2001 1 SA 883 (CC)

Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma and Another v National Director of Public Prosecutions 2009 1 SA 1 (CC)

**Legislation**

Constitution Act, 1982 (Canada)

Companies Act 71 of 2008

Competition Act 89 of 1998

Constitution of Botswana, 1966

Constitution of Lesotho, 1993

Constitution of the Republic of Namibia, 1990

Constitution of the Republic of South Africa, 1993


Constitution of the Kingdom of Swaziland Act, 2005


Consumer Protection Act 68 of 2008

Criminal Procedure Act 51 of 1977

Customs Control Act 31 of 2014

Customs Duty Act 30 of 2014

Customs and Excise Act 91 of 1964

Customs and Excise Act 20 of 1998 [Namibia]

Customs and Excise Duty Act 22 of 1970 [Botswana]
Customs and Excise Act 10 of 1982 [Lesotho]

Customs and Excise Act, 1971 [Swaziland]

Customs and Excise Amendment Act 32 of 2014

Cyber and Cybersecurity Bill (GG No 40487 of 9 December 2016)

Drug and Drug Trafficking Act 140 of 1992

Electronic Communications and Transactions Act 25 of 2002

Estate Agency Affairs Act 112 of 1976

Estate Duty Act 45 of 1955

Excise Duty Act 91 of 1964 (the renamed Customs and Excise Act 91 of 1964)

Financial Advisory and Intermediary Service Act 37 of 2002

Financial Intelligence Centre Act 38 of 2001

Financial Intelligence Centre Amendment Act 1 of 2017

Financial Sector Regulation Act 9 of 2017

Financial Sector Regulation Bill of 2013

Financial Services Board Act 97 of 1990

Harmful Business Practices Amendment Act 23 of 1999

Income Tax Act 58 of 1962

Inspection of Financial Institutions Act 80 of 1998

International Trade Administration Act 71 of 2002

Investigation of Serious Economic Offences Act 117 of 1991

Land Bank Act 13 of 1944
Medical Schemes Act 72 of 1967

Medical Schemes Act 131 of 1998

Memorandum on objects of Customs and Excise Amendment Bill 2013

National Credit Act 34 of 2005

National Prosecuting Authority Act 32 of 1998

North West Gambling Act 2 of 2001

Pension Funds Act 24 of 1956


Proceeds of Crime Act 76 of 1996

Promotion of Administrative Justice Act 3 of 2000

Special Investigating Units and Special Tribunals Act 74 of 1996

Tax Administration Act 28 of 2011

Tax Administration Bill 11 of 2011

Tax Administration Laws Amendment Act 39 of 2013

Tax Administration Laws Amendment Act 44 of 2014

Tax Administration Laws Amendment Act 23 of 2015

Tax Administration Laws Amendment Act 16 of 2016

Tax Administration Laws Amendment Act 17 of 2017

Transfer Duty Act 40 of 1049

Value Added Tax Act 89 of 1991
**International instruments**


*European Convention of Human Rights and Fundamental Freedoms* (1953)

*International Covenant on Civil and Political Rights* (1966)

*Universal Declaration of Human Rights* (1948)

**Government publication**

GG 37236 of 16 January 2014

GG 37862 of 23 July 2014

GG 38748 of 29 April 2015

GG 40821 of 2 May 2017

GG 40487 of 9 December 2016

GG 4160 of 22 August 2017

**Internet sources**

Frykberg M 2018 *SA signs free trade agreement with AU*  
accessed 19 October 2018

Nagal D 2017 *Momentum Legal Updates*  

Omarjee L 2018 *SA to sign African free trade agreement - Davies*  
accessed 19 October 2018
Petr Erasmus 2017  
**Customs and Excise Highlights**

https://www.cliffedekkerhofmeyr.com accessed 7 November 2017

Sabinet 2017  
**Financial Centre Amendment Act Signed**


SACU 2018  
**The South African Customs Unions**  
http://www.sacu.int/ accessed 10 April 2018

SARS 2017  
**New Customs Legislation Update**


SARS 2017  
**New Customs Legislation**


SARS 2018  
**SARS Search and Seizure Operations are Strictly Governed**