Critical assessment of the constitutionality of the South African customs legislation

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Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Laws in Import & Export Law* at the North-West University

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Graduation ceremony: December 2020
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ABSTRACT

Before 1994, most if not all pieces of legislation were subject to the sovereignty of Parliament and the law enforcement powers of the executive, which enabled the development of the authoritarian and oppressive system of the apartheid era. The *Customs and Excise Act* 91 of 1964, hereinafter referred to as *CEA,* is a piece of legislation thought to be very critical in the promotion of international trade, but it could be a serious stumbling block if its provisions and application were the subject of constitutional scrutiny and found to be not constitutionally compliant.

The *Constitution of the Republic of South Africa*, 1996, hereinafter referred to as the *Constitution* has created a democratic state based on the supremacy of the Constitution, the rule of law and the Bill of Rights, amongst other values. The Bill of Rights protects the fundamental rights of individuals when they are dealing with organs of the state, which includes members of the police services and to a certain extent Customs officers. For purposes of this dissertation, focus will be more on conduct of the Customs officers when executing their roles at ports of entry and/or exit, and during inspections in what is commonly known as pre-entry facilities like Bonded Warehouses.

Before the advent of the *Constitution*, the *CEA* was silent about the searches to be conducted and goods to be seized without due regard to the right to privacy of the persons being searched. In the instance of the seizure of the goods, without providing such a person the right to state his/her case in terms of the provision of the *Promotion of Administrative Justice Act* 3 of 2000, hereinafter referred to as *PAJA.* Since the enactment of the *Constitution* there have been additional constraints on search and seizure powers. Not only are there now constitutionalised standards against which such legal powers are measured, but there is also the possibility of excluding evidence obtained in the course of a violation of a constitutional right.

In the light thereof, the *CEA* could not withstand the constitutional attacks it has encountered, given that most of the decisions against the Commissioner have also demanded of him to amend the provisions of the Act in question. Although the *Tax*

Administration Act 28 of 2011, hereinafter referred to as *TAA* (also administered by Commissioner of SARS) is considered as progressive, it is arguably also not fully constitutionally compliant. This dissertation will therefore focus on issues that led not to the amendment of the *CEA* but to the total overhaul thereof, even to the extent of giving it new titles, which according to me make it more progressive and business-friendly than the current Act.

Key Words

Customs, Constitutionalism, Right to privacy, Commissioner

LIST OF ABBREVIATIONS

BUSA	Business Unity South Africa
CCA	Customs Control Act
CEA	Customs and Excise Act
CODESA	Convention for a Democratic South Africa
GMLS	Global Maritime Legal Solutions
JCI	Johannesburg Chamber of Industries
JSS	Journal for Juridical Science
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
SA	South Africa Law Reports
SAAFF	South African Association of Freight Forwarders
SAASOA	South African Association of Shipping Operators and Agents
SACU	Southern Africa Customs Union
SAICA	South Africa Institute of Chartered Accountants
SAFACT	South African Federation Against Copyright Theft
SALJ	South African Law Journal
SARS	South African Revenue Services

SCoF	Standing Committee on Finance
SMMEs	Small, Micro and Medium Enterprises
TAA	Tax Administration Act
WCJ	World Customs Journal

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Chapter 1

1.1 Introduction

The practice of collecting taxes has been in existence for a very long time, as also mentioned in the Bible as being executed by the tax collector. The most commonly known taxes are, of course, those relating to what is commonly known as direct taxes, on which government relies to protect its domestic economy. Income tax and Value Added Tax (VAT) are examples. The other type of taxes that focus will be placed on is that on imported and locally manufactured goods, which is called Customs and Excise tax. This tax is commonly enforced by customs officials at ports of entry. They also play a role in ensuring compliance with the country's domestic customs legislation[1].

This field of the economy (customs) commonly referred to as that of imports and exports, and one of the responsibilities of a customs administration is the collection of duties. On the other hand, customs is often considered a department, which frustrates trade and/or travel by means of the application of its numerous administrative processes and procedures, which cause delays because of the numerous interventions arising from the need to collect duties and taxes.[2]

In the International Convention on the Simplification and harmonisation of customs procedures, (Revised Kyoto Convention) "customs" is defined as:

> [t]he Government Service which is responsible for the administration of Customs law and the collection of duties and taxes, and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.[3]

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1 Levendal A case study of the Customs Administrative Penalty Provisions as contained in the Customs and Excise Act No 91 of 1964.

2. Colesky A comparative study on Customs Tariff Classification 1.

3 Chapter 2 of the *Revised Kyoto Convention* (2006).

The *CEA* came into operation on 1 January 1965, and for the first time provided both customs and excise matters in one piece of legislation. Initially there had been the *Customs Act* 55 of 1956 and the *Excise Act* 62 of 1956, until they were consolidated into one piece of legislation. The Act is unique in the sense that most countries favour separate customs and excise legislation.

The *CEA* is amended annually and may be for various reasons, *inter alia* in respect of taxation proposals, to introduce new principles, and importantly to perpetuate amendments. Amendments are effected by notice in the Government gazette.[4]

1.2 The Purpose and scope of the Act

The purpose of the Act is to provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax and an environmental levy; the prohibition and control of the importation, export or manufacture of certain goods; and for matters incidental thereto.

In the unreported case of *Micro and Peripheral Distributors(Pty)Ltd v The Minister of Finance and Commissioner of Customs and Excise,*[5] Hartzenberg J stated the following regarding the scope of the Act:

> The construction of the Act indicates that the legislature created a vehicle to collect revenue in an orderly manner.

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4 Cronje *Customs and Excise Service* 1st ed Int-6.

5 1997 JOL 648 T.

This emphasises the fact that the Act is more about the collection of revenue than enforcement.

In *Tieber v Commissioner for Customs and Excise*[6] Goldstone J stated that if one were to have regard to the scheme of the Act, it would appear clearly that its main purpose is to ensure that customs and excise duties are paid on all goods which are brought into the Republic other than goods in transit. The point in issue then is how Customs enforces compliance on goods imported into the Republic. It is on the basis of this research that the author explores the manner the *CEA* has been enforced and the Commissioner's actions in an attempt to ensure collection of duties on imported goods.

The purpose of this dissertation therefore , after having exposed the provisions of the Act that are non compliant with the provisions of the Constitution of the Republic in certain extent , but to also highlight areas where the New customs legislations had remedied such non compliance.

The scope covered by the Act are matters relating to the general duties and powers of the officials, which forms part of the discussion in this paper, the detention of goods , internal administrative appeal and Dispute Resolution, seizure of the goods , administrative penalties as well duties that constitute a debt to the state (*Lien*).

1.3 Problem statement

The *CEA* was promulgated some fifty years ago, before the enactment of the *Constitution*, and as such, the above statement is applicable thereto. It therefore means that the *CEA* was promulgated before the dawn of democracy in South Africa, and thus it is not aligned with the *Constitution* and the Bill of Rights. Like most of the legislations (if not all)that were promulgated before 1994, they were not consistent with the Bill of Rights in the *Constitution*.

However other writers contend that that the relevance of older decisions taken in interpreting the then provisions of the *CEA* is affected by the subsequent changes and

amendments to customs and excise law, e.g. customs value concepts and the interpretation of tariff classification provisions before and after 1 January 1965 (when the present Act came into operation). The main purpose remains to ensure that customs and excise duties are paid on all goods, which are brought into the Republic other than goods in transit.[7]

The rewriting of the new customs legislation was prompted not only by constitutional imperatives but also apparently by the need to align it with the Revised Kyoto Conventions (hereafter referred to as RKC),[8]. The RCK provides a model framework for Customs control and therefore considered as a blue print for a modern, efficient and cost effective customs system. In view of South Africa having acceded to this convention, it was determined that a fundamental restructuring of our customs and excise legislation was required to amongst others, give effect to Kyoto and other binding international instruments[9]. The focus of the proposed study will be on the constitutional issues as reasons for the rewriting of the new customs legislation.

In support of the above-mentioned statements, Rautenbach[10] outlined the principle that is fundamental when dealing with legislations before 1994 as follows:

> The Constitution applies to all laws that were in force when the Constitution took effect, therefore laws, which were inconsistent when the Constitution took over, were invalid from the moment the provisions of the Constitution came into effect.

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6 1992 4 SA 844 (A).

7 Colesky *A comparative study on Customs Tariff classification* 51.

8 South Africa Acceded to Convention in May 2004

Like other legislation, the *CEA* has been at the centre of constitutional scrutiny by the Constitutional Court, as highlighted below. Some of the sections that were so scrutinised, amongst others, were section 4,[11] section 88,[12] section 91[13] and section 114.[14]

When the Commissioner endeavoured to address the constitutional issues that were raised in various Constitutional Court judgements, the amendment of the Act seemed the only option at first.

The question remained as to whether the perpetual amendment of the Act would be a solution to address all the issues raised and to ensure its alignment with the constitutional imperatives expected of an organ of state such as the South African Revenue Services (SARS).

In its Customs News Bulletin,[15] SARS also admitted that to keep pace with the new challenges the *CEA* has been extensively amended over the past years. However, the basic structure of the Act remained unchanged and it still contains rigidity reminiscent of the era in which it was legislated. The amendments made over the past fifty years have made it impossible for the *CEA* to serve as a vehicle for implementing a modern system of customs control in accordance with international trends, best practice and the constitutional imperatives. It is for these reasons that there had to be a solution to the constitutional attack on the *CEA*, in an endeavour to arrive at possible solutions, which will be discussed in detail in this dissert

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9 Macqueen http://www.polity.org.za.

10 Rautenbach and Malherbe *Constitutional Law* 26.

11 Gaertner and Others v Minister of Finance and Others 2014(1) BCLR 38 CC

12 Wong and Others v Commissioner for SARS 2003 JOL 11010 (T)

13 Commissioner of SARS v Formalito 2005 5 SA 526 (SCA)

14 First National Bank of SA v Commissioner of SARS 2002 4 768 (CC)

There are few cases, which will be discussed in Chapter 3 below, wherein the provisions of *CEA* were declared constitutionally invalid.

The principle held in those cases was that an effective customs legal framework is required to ensure the establishment of transparent, predictable and prompt procedures meeting international standards as required by the stakeholders i.e. importers, exporters and traders in general.

The other contributory factor is that most of the existing customs procedures are generally in accordance with international principles, especially as set out in the original Kyoto Convention that was signed in 1973, and was established under the auspices of the Customs Cooperation Council, which in 1994 underwent a change of name to the Customs World Organization. It is self-evident that these institutions laid a good foundation for national customs regimes throughout the world, including South Africa, but the South African *CEA* was still too stringent to evolve with time.

The other framework, which is a source of customs practices, was developed for the Southern African Customs Union (SACU), which is the oldest customs union in the world, and is comprised of the following members: Botswana, Lesotho, Namibia, South Africa and eSwatini.[16] Again, the question is asked in what way SACU contributed to modernising the *CEA* to address issues in a more progressive way, particularly taking into account the *Constitution*.

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15 South African Revenue Services 2014 http://www.sars.gov.za.

16 Cronje *Customs and Excise Service* issue 21 Int-8.

1.4 Research question

Does the legislative development in South African customs and Excise comply with the constitutional requirements?

This research will show that there are some provisions of the *CEA* that we deemed by the courts to be inconsistent with the provisions of the Constitution as alluded above. The promulgation of the New Acts (namely Customs Control Act [1] and the Customs Duty Act[2]) had addressed the issues that the current act was found foul of addressing. This statement will be elaborated on when dealing with the New Act in details in chapter 5. It is however important to mention that new Act addressed adequately the provisions of the CEA , that were vague , ambiguous and inconsistent with the Constitution .

1.5 Conclusion

It will be demonstrated that the new Customs legislation has addressed this anomaly; however, the fact that these new Acts are not in place yet, it means the only existing Customs legislation is the current CEA. The commissioner will for now have to administer the current Act as it is except for where there are amendments prompted by the courts or initiated by the Commissioner to assist with smooth application of the Act . For purposes of this dissertation, focus will therefore be on those sections that were declared unconstitutional by the courts.

In Chapter 2, this dissertation will first deal with the principles in the Constitution that set out how the Constitution should be addressed. These are the following,

- The limitation clause
- The application of the constitution
- Interpretation

In Chapter 3 the dissertation dwells on the cases where the Commissioner of South African Revenue Services had either to amend or to give effect to the provisions of

[1] No 31 of 2014
[2] No 30 of 2014

the Constitution where the courts had decided against his actions, in some instances as being unconstitutional, and in others or just simply being unlawful conduct by customs officials

Chapter 4 deals with the process of writing the new Acts, and most importantly the views expressed by the interested parties during the consultation processes and the views expressed by the members of both the national legislature and provincial legislature.

Chapter 5 deals with the new Acts themselves and focusses on the provisions that have made an impact in the new era, when the Acts came into effect. Here the dissertation deals with the provisions of the new Acts, to demonstrate that they represent a total departure from the current *CEA*, and discusses the new developments of the new Acts. It is important to mention, however, that since the new Acts are not in force as yet, there could not be any legal authority pertaining to the new legislation, be it in case law or any legal writings.

Chapter 6 of this paper deals with the conclusion remarks from each chapter discussed and how they addressed the issue at hand.

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17 Section 231 of the *Constitution of the Republic of South Africa* 1996.

18 Section 49 and section 51 of the *Customs and Excise Act* 91 0f 1964.

19 Customs Duty *Act* 30 of 2014 and *Customs Control Act* 31 of

Chapter 2

2.1 Purpose of the chapter

This mini-dissertation is based on the fact that some of the provisions of *CEA* were declared unconstitutional as they were inconsistent with the spirit of the *Constitution*. The advent of the *Constitution* on its own was preceded by a journey that was not easy for South Africans at large, and thus one deems it necessary to comment on the process that led to the promulgation of the *Constitution* as well as specific provisions or chapters that have a direct impact on this dissertation. However, before dealing with the above issue, it will also be important to reflect on the situation before the constitutional changes took place, in particular on the behaviour of South African Revenue Services[20] officials in the context of the provisions of the various items of legislation administered by the Commissioner of SARS.

2.2 Background information on searches

Although the frame of reference in this dissertation should have been confined to the *CEA*, prior the enactment of the *Constitution*, it is imperative to also reflect on the situation as it pertained to the *Income Tax Act*[21]. The purpose for tapping into *Income Tax Act* being to demonstrate how the Commissioner dealt with search and seizures, even if, at time such powers were outside the confines of the law, and therefore were considered absolute and unlimited.

It is common cause that prior to 1994 South Africa was a parliamentary state in which parliament was supreme, meaning that the legislative body had absolute sovereignty. The *Constitution*[22] did not specifically provide the state with power to tax its citizens but granted this power by implication by compelling the state to provide certain services.[23]

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20 Hereinafter referred to as SARS.

21 58 of 1962 hereinafter referred to as the *ITA*.

22 *Constitution of the Republic of South Africa Act* 110 of 1983.

23 Khanyile *The constitutionality of search and seizure operations* 14.

Chapter 80 of the *Constitution* provides that –

> …[a]ll revenues of the Republic, from whatever source arising, shall vest in the State President.

The *Constitution of the Republic of South Africa*[24] did not contain a bill of rights and tax payers had no way of challenging the powers of the Revenue Collector. This left taxpayers vulnerable to unjust tax laws. It was only until 1993 when an individual called Rudolph[25] took the Commission of Inland Revenue to court to challenge the search and seizure operations that had been conducted on his business premises under section 74(3) of the *ITA*.[26]

Section 74(3) of the *ITA*[27] provides

> Any officer engaged in carrying out provisions of this Act who has in relation to the affairs of a particular person been authorised thereto by the Commissioner in writing or by telegram, may for the purpose of the administration of this Act,
>
> (a) Without previous notice, at any time during the day enter any premises whatsoever and on such premises search for any moneys, books, records, accounts and documents
> (b) In carrying out any search, open or cause to be opened or removed and opened any article in which he suspects any moneys, books, records or accounts to be seized
> (c) Retain any such documents for as long as they may be required in assisting for any criminal or other proceedings as provided for in the Act.

Because search and seizure warrant operations in this case took place prior to the enactment of the *Constitution*, none of the events, which the applicant challenged, could be said to have constituted a breach of any rights under the interim constitution. However, Rudolph took the matter back to the Supreme Court and unfortunately he was not successful.

24 110 of 1983.

25 *Rudolph and Another v CIR and Others* 1994 3 SA 771 (W).

26 58 of 1962.

The issue of searches by SARS officials was also referred to the Katz Commission[28] for investigation and recommendations. The Katz Commission was established with the mandate to investigate the possibility of tax reform in South Africa in the context of the new constitutional dispensation. The establishment of the Commission was an indication that the government was aware of the need to align the tax laws with the *Constitution.* One of the main recommendations by the Commission was that a person acting judicially must obtain a warrant in terms of section 74 of the *Constitution* in advance of the execution of a search. The Commission stated that the person authorising the issuing of the warrant must be satisfied by information given under oath that an offence had been committed under a fiscal statute. The Commission concluded that the Commissioner's powers to authorise warrants was invalid under the interim constitution and therefore in violation of the right to privacy.[29]

The *CEA* previously allowed search and seizure without a warrant. This included the seizing of documents during the search to prevent suspected persons from hiding or destroying evidence. It was concluded after cases like *Gaetner v Minister of Finance*,[30] however, that a search without a warrant should take place only in limited situations, especially in matters of urgency, with reasonable grounds, the person being searched must be informed in writing of the reasons for a search, and the person must be present at all times during the search. In the instance where the search occurs without a warrant, certain guidelines should be followed to ensure that the taxpayer's rights to dignity and privacy are protected.

The observation by Khanyile[31] is that although certain provisions of the *CEA* were declared unconstitutional and amended by the legislature, the provisions of *TAA* are not consistent with the provisions of the *CEA*. It was further observed that the two pieces of legislation still have different circumstances in which a search and seizure

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28 Katz Commission *Third Interim Report of the commission of inquiry into certain aspects of the tax structure of South Africa* 75

29 Khanyile *The constitutionality of search and seizure operations* 17.

30 2013 4 SA 87 (WCC).

31 Khanyile *The constitutionality of search and seizure operations* 23-24.

without a warrant can be conducted and the recommendation was that the *CEA* should therefore be amended so that the provisions are uniform.

2.3 Constitutional issues

The courts in South Africa in the advent of the constitutional dispensation where mostly confronted with the question on whether law or conduct, which is in breach of bill of Rights, is considered consistent with constitution of the Republic ? The other obvious question was if the or institution which claim his / her rights were infringed has *locus standi* to bring the matter to court[3]. The courts will furthermore determine if infringement is justifiable in terms of provsions of section 36 of the constitution? In the case of *S v Makwanyane and Another* [4], the constitutional court emphasised that rights should be protected against the past injustices in order to heal the past .

Finally, the rights according to Devenish[5] should not be treated as absolute, as all rights should be subjected to limitation a provided in section 36 of the Constitution. The court in enforcing the law may grant appropriate relief including a declaration of right to be unconstitutional.

2.4 Conclusion

This chapter introduced areas where the courts had, as will be demonstrated when dealing with court decision, ruled that all the principles enumerated above are critical and in some instance if one of the principles above are not present , the constitutionality of issues at stake could be dealt a blow.

[3] De Vos , Freedman and Brand ; South African Constitutional law in context 319
[4] 1995 3 391 SA
[5] Devenish : A commentary on South African Bill of Rights 841

Chapter 3

3.1 *Introduction*

In this chapter, the focus will be mainly on decided court cases and constitutional principles where the Commissioner for SARS largely was found to have acted against the spirit of the *Constitution*, in particular the Bill of Rights, and by so doing to have infringed the rights of individuals and corporate entities. Attention will also be paid to some cases beyond the scope of Customs, which are also relevant as they clarify some constitutional legal gaps pertaining to the issue at hand.

Cheadle[61] makes the following remark relating to the issue under discussion:

> Law is the medium through which power is disseminated and exercised, beginning with the Constitution itself. No rule may be made except in accordance with the Constitution – a democratic constitution is a rule making machine - no public body may exercise power except in terms of an authorising rule and no person is above the law.

On the issue of the South African Bill of Rights, he continues and says:

> A bill of rights is a particular feature of a modern democratic constitution. Its function is not only to ensure the perpetuation of democratic governance, but also to articulate the fundamental values that must animate the three branches of government in the realisation of the kind of society contemplated by the government. A bill of rights limits the exercise of power by defining the limits of legislative freedom. It engages in a particular way with the legal system. A bill of rights is no more than a set of rules that governs the content of other rules.

This dissertation focusses on some of the provision of the *CEA* that were ruled to be inconsistent with the spirit of the *Constitution*, in particular the Bill of Rights. The Constitutional Court in particular and other courts as well, ruled against the constitutionality of some aspects of the *CEA*. The dissertation will endeavour to demonstrate the extent at which the Constitutional Court (in particular) and the Supreme Court to a certain extent raised issues that in some instances prompted the amendment of the *CEA*, and also gave rise to the doing away with some practices.

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61 Cheadle and Davis *South African Constitutional Law* 1-2.

3.2 Discussion of the various decided cases

There are specific provisions of the *CEA* that were put under constitutional scrutiny by the Constitutional Court and other courts (the High Court and the Supreme Court of Appeal). The main discussion issues in this chapter will be to establish to what extent those cases influenced not only the changes to the *CEA* but also brought about a total overhaul of the Act. It will become clear when dealing with the specify cases that the *CEA* had indeed trampled on the rights of individuals and/or corporate entities. This will confirm the contention that indeed the *CEA* was not in harmony with the constitutional dispensation in various respects.

3.2.1 First National Bank of SA v Commissioner of SARS[62]

This case deals with the provisions of section 114 of the *CEA.* The section deals with the collection of debts due to the state by a debtor. Prior to the *Revenue Laws Amendment Act* 74 of 2002, this section provided for measures, which allowed the Commissioner to sell goods under *lien* without requiring a court judgement, in order to collect customs and excise debts due to the state. As judicially interpreted, it even allowed the Commissioner to sell goods, which did not belong to the customs debtor but to third parties. The collection procedures in the *CEA* are based on a system of self-accounting and self-assessment. The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.

In this particular matter the importer was indebted to the Commissioner for customs duties because of non-payment of the duties during the time of importation of goods. The Commissioner agreed with the respective parties that the debt be paid off by way of monthly instalments. In order to place security for the debt against those importers, the Commissioner, acting in terms of section 114 of the *CEA* detained vehicles, which were in the possession of those importers. Those vehicles were subject to a credit

62 2002 4 SA 768 (CC).

agreement as set out in the *Credit Agreements Act*[63] with a reservation of ownership until the last instalment had been paid.

Upon the importers' defaulting on the payment of the agreed instalments, the Commissioner decided to sell the vehicles to recover some of the debt.[64]

The two main issues in dispute were firstly whether the administrative collection of customs duty without court intervention is permitted by section 34 of the *Constitution* (which provides for access to courts) and secondly whether, if section 34 does or does not permit such a procedure of collection by means of placing lien without court ruling on the issue. Section 114 of the *CEA* is saved by considerations relating to the reasonableness in an open and democratic society of administrative tax recovery measures, which limit the function of the courts in the recovery process. In as far as, the second issue is concerned; the Constitutional Court[65] had to consider the constitutionality of section 114 of the *CEA* in its original form, and of the mechanism by which the Commissioner enforces the payment of customs duties.

The placement of a *lien* on goods in terms of section 114 of the *CEA* has always been an effective means of safeguarding the interests of the fiscus in the recovery of duty, in the absence of other security.[66]

The provisions of this section did not survive constitutional scrutiny and was drastically amended in 2002.[67] The question is now whether the customs and excise *lien* complies with the Constitutional Court's judgement and if it would survive similar constitutional scrutiny.

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63 75 of 1980.

64 Odendaal *The Recent Development of the Customs and Excise Lien* 20.

65 2002 4 SA 768 (CC).

66 Odendaal *The Recent Development of the Customs and Excise Lien* 3.

67 *Revenue Laws Amendment Act* 74 of 2002.

Odendaal[68] observes that section 114 of the *CEA* enacted in 1964 is a consolidation of the provisions of section 89 of the *Excise Act* of 1956 and section 146 of the *Customs Act 55* of 1955, which is confirmation of the fact that these are pieces of legislation that existed before the new era.[69]

Section 114, as it read at the time of the constitutional attack, provided for the placement of a *lien* over goods in not only the department's control and custody, but also goods in the possession or under the control of the debtor, irrespective of ownership.[70]

Conrade J viewed the credit grantor's property rights as in fact its secured claims for payment against the customs debtor, and therefore his only concern was for the loss of its ranking in the creditor line-up. The court did not see the placement of a *lien* and the subsequent sale of the goods as the expropriation of the goods.[71]

The argument raised by the respondents was that Wesbank's ownership of the vehicles was nothing more than a contractual device which reserved "ownership" of the vehicles, and that they did not seek to protect the reservation of the ownership right by financial institutions in leased goods.

In its judgement the Constitutional Court acknowledged the importance of section 114, but pointed out that section 114 casts the net far too wide:

> The means it uses sanctions the total deprivation of person's property under circumstances where (a) such person has no connection with the transaction giving rise to the customs debt; (b) where such property also has no connection with the customs debt; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to his detriment in relation to the incurring of the customs debt.[72]

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68 Odendaal *The Recent Development of the Customs and Excise Lien* 5.

69 Odendaal *The Recent Development of the Customs and Excise Lien* 5.

70 *Secretary for Customs and Excise v Millman* 1973 5 SA 544 (A) 550A.

71 *First National Bank of SA v Commissioner of SARS* 2002 4 SA 768 (CC).

72 Odendaal *The Recent Development of the Customs and Excise Lien* 27.

The court therefore held that such deprivation was arbitrary for the purpose of section 25(1) of the *Constitution,* and consequently a limitation of such a persons' right. Furthermore, it pointed out that the object to be achieved by section 114 was grossly disproportional to the infringement of the owner's property rights, and therefore the infringement by section 114 of section 25(1) was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[73] The court held that section 114 was constitutionally invalid to the extent that it provided that goods owned by persons other than the person liable to the state for the debts described in the section were subject to a lien, detention or sale.

Croome made reference to Ackerman J (in this FNB case) when glossing the meaning of "property" as follows:[74]

> If the deprivation infringes section 25 and cannot be justified under section 36 that is the end of the matter, the provision is unconstitutional. Based on the FNB case there must be a determination of whether there has been an infringement of the taxpayer's right to property including arbitrary deprivation of a taxpayer's property as well as restrictions on the taxpayer's rights over the property concerned.

The other element with regard to property rights is that of deprivation, which is key to the provision of section 25 of the *Constitution*, as can be seen in the case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*[75] where the law at issue prevented the transfer of property until outstanding rates had been paid.

Although it limited part of the right of ownership, which was the right to sell the property, the action did not constitute an expropriation because ownership remained with the owner.[76]

The court here also considered what amounts to deprivation, and it was defined as the interference of property that is significant enough to have a legally relevant impact on the rights of an affected in order for the action to qualify as deprivation. In this case, the Constitutional Court's view was that:

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73 Section 36 of the *Constitution of the Republic of South Africa* 1996.

74 Croome *Taxpayers' Rights in South Africa* 28.

75 2005 1 SA 530 (CC).

76 Ngcukaitobi & Bishop https://www.wits.ac.za.

> Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation … [A]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.[77]

Croome[78] concluded by issuing a very stern warning statement indicating that the imposition of tax is a justifiable deprivation of taxpayer property. If, however, the state introduces an unreasonable taxing measure or tax with an ulterior purpose or not for public purposes, a court should strike such a measure down as unreasonable in an open and democratic society

According to Fritz,[79] this right protects the interest that a person has in holding property. The fact that the right is formulated in a negative form does not have any significant practical implications. In principle, deprivation of property includes any limitation of the free disposal of property. The qualification that property may be deprived only in terms of law of general application and that the deprivation may not be arbitrary overlaps with the general limitation clause.

The criteria could be distinguished theoretically, but it seems unlikely that the criteria to identify arbitrary action could be different from those provided for in the general limitation clause.[80]

Odendaal[81] in her conclusions stated that since the amendment of section 114 of the *CEA*, liens may now only be placed on goods belonging to the debtor, or goods in respect of which the debtor entered into a credit agreement as contemplated in the *Credit Agreements Act.*[82] With regard to the second category of goods, a *lien* is only placed on the right, title and interest of the Customs debtor on anything subject of a

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77 *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 1 SA 530 (CC) 546.

78 Croome *Taxpayers' Rights in South Africa* 37.

79 Fritz 2016 41(1) *JJS*.

80 Rautenbach and Malherbe *Constitutional Law* 329.

81 *The Recent Development of the Customs and Excise Lien* 65.

82 Now *National Credit Act* 34 of 2005.

credit agreement. The constitutional right to property of the credit grantor will therefore no longer be infringed, and will therefore survive constitutional scrutiny in relation to section 25 of the *Constitution*.

All goods detained subject to a lien, will also no longer be sold after the lapse of the earlier required three-month period. It is clear that a lien is no longer allowed to operate as a collection tool in itself, but merely a discretionary starting block in the collection process now under the watchful eye of the court. Section 114 now provides for judicial intervention before the sale of goods. In this regard the provisions of section 40(2) of the *Value Added Tax Act*[83] was copied and enacted in section 114(1)(a)(ii). In the Constitutional Court judgement, this was in fact suggested to remove any inconsistency with section 34 of the *Constitution*.[84]

It is clear that the section 114 in its form, before the constitutional court decision infringed on the right to property of persons and hence the court declared the section unconstitutional and ordered some amendments therein.

It is incumbent to highlight another tenet of the *Constitution*, which is enunciated in section 25, which deals with the right to access to courts. The relevance thereof lies in the fact that any person deprived of property may freely exercise the right, as enshrined in the *Constitution*, to approach any court freely and without hindrance.

The right to freely access courts is unusual, but its inclusion as a substantive right available to resolve justifiable disputes struck a sympathetic cord amongst the negotiating parties. The reason for this was that previously there were significant legal obstacles in the way of unqualified access to courts of law in South Africa, making it difficult for persons to obtain justice.[85]

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83 89 of 1991.

84 Odendaal *The Recent Development of Customs and Excise Lien* 65.

85 Devenish *A Commentary on the South African Bill of Rights* 485.

This right is fundamental to a viable and dynamic legal system having as its principal feature justifiable human rights, since it would be anomalous if the substantive rights enumerated in the Bill of Rights were to remain inaccessible to the ordinary people of South Africa for whatever reason.

The granting of wide administrative discretion in highly subjective terms, which has often been interpreted in the past to limit severely if not entirely exclude judicial review may now also be impugned by virtue of section 34 of the *Constitution.*

The other issue raised as far as property is concerned is the issue of self-help and access to the courts, as discussed in the case of *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa and Others.*[86]

In a nutshell, these provisions authorised the Land and Agricultural Bank to attach and sell a debtor's property in execution without recourse to court. The Free State court ordered that those sections of the Act be declared inconsistent with the constitution and invalid. The Land Bank conceded the unconstitutionality of the impugned provisions to the extent that they were inconsistent with the right to access the courts, and merely sought a suspension of the order to allow the relevant authorities and parliament time to correct the constitutional defect.

The process of debt recovery common to sections 34 and 55 of the *Land Bank Act* 13 of 1944 allows the Land Bank to attach and sell property in execution on its own authority and without judicial supervision. These sections required the executing bank only to give written notification to the debtor before seizing his or her property and selling it by public auction, and furthermore they could bypass the courts and had sole discretion over the conditions of sale. The process allowed the Bank to take the law into its own hand and serve as a judge in its own right.

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86 *First National Bank of South Africa v Land and Agricultural Bank of South Africa and others* 2000 3 SA 626.

The Land Bank's argument was that these sections served to counter its economic risks, as they granted the Bank a preferred claim to the proceeds stemming from attachments and sales in execution. The Bank conceded the impermissibility of recovering debts in this manner without judicial supervision, but also undertook to affect future attachments and sales in accordance with the rules of civil procedure. The court also commented that the Bank was arguably in a precarious position because it had to balance its high-risk lending practices with its commercial viability, and also reconcile its developmental mandate with its constitutional obligation. The court declared the sections stated above unconstitutional in terms of section 34 of the *Constitution*.

In conclusion, the issue of the deprivation of property is fluid and sensitive, irrespective of whether such deprivation is against individuals or entities and should always be approached with caution. The judgment is a landmark, and led not only to the amendment of *the CEA*, giving notice that even a powerful institution such as SARS is not beyond reproach. Its' actions in performance of its mandate are limited in terms of the provisions of the *Constitution.*

The case to be discussed below is one of the most remarkable judgement subsequent the advent of constitutional democracy in South Africa and in particular with the Customs environment.

3.2.2 Gaertner and Others v Minister of Finance and Others[87]

As a matter of introduction to the discussion of this case it is deemed appropriate to commence with what Fritz[88] said in his article about section 4 of the CEA. He said that SARS is afforded the power to conduct customs searches in order to verify compliance. He focussed on searches prior to the amendment of section 4(4) to 4(6) of the CEA, the situation at being determined by the current provision after the

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87 2014(1) BCLR 38 CC

88 Fritz 2016 41(1) *JJS* 19.

amendment, and the future situation being related to the provisions of the New Act, namely the *Customs Control Act,*[89] which will be dealt with in the next chapter. For the purposes of this sub topic, focus will be on Fritz with regard to the position before and after the coming into effect of the *Constitution*. The analysis is meant to establish whether the current provision can be considered to provide better protection of a taxpayer's right to privacy, just administrative action and access to courts than the provision prior to the amendment.[90]

Section 2 of the *Constitution* provides for constitutional supremacy and the illegality of any law or conduct contrary to the *Constitution*. Parallel to that, section 39(2) of the *Constitution* imposes a duty on the courts, tribunals and forums that when they interpret any legislation "the spirit, purport and objects of the Bill of Rights must be promoted"

The *Constitution* furthermore prescribes the manner in which legislation must be interpreted, and also imposes duties on SARS (as organ of state), to respect the Bill of Rights contained in Chapter 2 of the *Constitution*, which accords to all persons the right to privacy, the right to just administrative action and the right to access to the courts.[91] These rights are not absolute, though, as they are limited in terms of the limitation clause contained in section 36 of the *Constitution*.

Case law has dealt with what can be considered a reasonable and justifiable limitation of a person's right to privacy, access to the courts and just administrative action. For instance, in the case of *Bernstein v Bester*,[92] which dealt with the right to privacy, it was held as follows:

> A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, concerning this most intimate core of privacy, no justifiable limitation thereof can take place. However, this most intimate core is narrowly construed. This

89 31 of 2014.

90 Fritz 2016 41(1) *JJS* 20-21.

91 Fritz 2016 *JJS* 41(1) 23.

92 1996 2 SA 751 (CC).

> inviolable core is left behind once an individual enters into a relationship with persons outside this closet intimate sphere. The individual's activities then acquire a social dimension and the right to privacy in this context becomes subject to limitation.[93]

Warrantless search and seizure was also declared unconstitutional in *Mistry v Interim National Medical and Dental Council of South Africa*,[94] where the constitutionality of section 28 of the *Medicines and Related Substances Control Act*[95] was challenged. In this case, the court held that while a warrant requirement might be nonsensical if the statute had provided only for periodic regulatory inspection of premises, as the prior warrant could frustrate the objectives behind the search, there was no reason not to require a warrant for searches that could extend to a private home.

Section 4 of the *CEA* therefore also had a serious effect on the provisions enabling warrantless searches. Even though the persons were expressly accorded the right to privacy, the right to access to the courts and the right to just administrative action under the *Constitution*, the *CEA*, unlike the *Income Tax Act*[96] and the *Value Added Tax,*[97] remained unaltered. Section 4(4) provided a broad discretionary power to SARS, without restrictions.[98] A taxpayer affected by a search in terms section 4 (4) would not know whether he/she was entitled to any redress, as it would be uncertain when this power might be exercised, and this was contrary to the rule of law. The search could also be conducted without any judicial intervention, which was identified as problematic. The *CEA* furthermore did not differentiate between a search being conducted at residential premises or at commercial premises. It therefore stands to reason that section 4(4) stood in contrast to the dicta in *Bernstein v Bester*[99] and

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93 *Bernstein v Bester* 1996 2 SA 751 (CC) 794.

94 1998 4 SA 1127 (CC).

95 101 of 1965.

96 58 of 1962.

97 89 of 1991.

98 Fritz 2016 *JJS* 41(1) 28.

99 1996 2 SA 751 (CC).

Mistry v Interim National Medical and Dental Council of South Africa,[100] which provide that safeguards must be in place when a person's residential premises are searched.[101]

In Gaernter case SARS officials numbering about forty searched the Muizenberg premises of the third applicant, Orion Cold Storage (OCS). When they arrived on the first day, they made Mr Gaertner to understand that they were there to conduct a bond inspection and he allowed them in. It was only after they had sealed the premises that they told Mr Gaertner the true reason for their presence. At that point, Mr Gaertner asked for time to get his attorney to the premises. The attorney not having arrived after 30 minutes, an extensive search ensued.

The search took place over a two-day period and included a search of the warehouse, the bond store, a safe in the strong room, computers, and the offices of Mr Gaertner and Mr Klemp who are directors of the Orion Cold Storage. Mirror images of the data on various computers were made and a variety of documents and other objects was seized. As the search was in progress, entry into and exit from the premises was controlled by the SARS officials. People were allowed out only if they agreed to thorough body and vehicle searches. Through it all, the officials did not have a search warrant. The following day fourteen SARS officials proceeded to Mr Gaertner's Constantia home to continue the warrantless search there and were denied entry until Mr Gaertner arrived. The officials refused to provide reason for their presence however continued to search the whole house and in the process went through personal belongings[102].

The applicant approached the High Court and sought a declaratory order that the searches and seizures were unlawful and that section 4 of the *CEA* was inconsistent with the *Constitution*[103] and invalid to the extent that it permitted targeted, non-routine

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100 1998 7 BCLR 880 (CC).

101 Fritz 2016 *JJS* 41(1) 29.

102 Cronje *Customs and Excise Services* issue 36 App 208

enforcement searches to be conducted without a warrant. The applicant further sought the return of what had been seized during the searches of which the minister complied.

In their answering affidavit, the Minister and SARS took the stance that question whether section 4 was inconsistent with *Constitution* and the lawfulness of the searches were moot as they tender return of the goods.

The Minister of Finance and SARS contested the claim that section 4 of the *CEA* was unconstitutional and contended, instead, that to the extent that the section limited the right to privacy, this was justified under section 36 of the *Constitution*. In the alternative, they pleaded that a declaration that section 4 was unconstitutional should not be retrospective and that it should be suspended to afford the Legislature an opportunity to correct the defect. SARS also denied that the searches had been conducted in an unlawful manner.

The Western Cape High Court, Cape Town (High Court) held that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the *CEA* were inconsistent with the *Constitution* and declared them invalid.[104]

In order not to create a *lacuna* in the legislative scheme and in accordance with the purpose served by the affected provisions, the High Court read in certain provisions. In its conclusion the High court held that warrantless non-routine or targeted searches were justifiable in respect of pre-entry facilities, licensed warehouse, and rebates stores to the extent that the searches related to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store. Searches without judicial warrant were not justifiable in other cases, the High Court concluded.

It was furthermore stated that there was no justification for dispensing with the requirement of a warrant in the case of searches of the premises of unregistered and unlicensed persons and non-routine searches of the premises of registered persons

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104 *Gaertner and Others v Minister of Finance and Others* 2013 4 SA 87 (WCC) 116.

except to the extent that the searches related to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store.

The High Court defined a non-routine search as being

> …[a] search where the premises are selected for search because of a suspicion or belief that material will be found there showing or helping to show that there has been a contravention of the Act. The purpose of the search will be to find the material relating specifically to suspected contravention. A routine search is any search other than a targeted search. Pre-entry facilities are where goods are kept prior to their entry into the country and can be described as: a transit shed, a container terminal, a container depot or a state warehouse.[105]

In those cases requiring a warrant the High Court held that it would not be necessary to require the SARS official to apply for one under the *Criminal Procedure Act*[106] or the *National Prosecuting Authority Act*[107] and took the view that the *Customs and Excise Act* could be amended to contain provisions entitling SARS officials to apply for warrants to judicial officers. The High Court then made the declaration of invalidity, suspended the provision, and read in, and the reading in was extensive.[108]

In the Constitutional Court, the applicant argued that section 4 was overbroad for the following reasons[110]:

- It permitted entry into and searches of virtually any premises that had some connection with the persons being inspected or investigated.
- As regarding premises, the official invoking it did not have to hold a belief or apprehension, let alone a reasonable one, of a contravention of the *Customs and Excise Act*[111] to justify the search.
- Section 4 provided no guidance whatsoever on the manner in which a search was to be conducted.

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105 *Gaertner and Others v Minister of Finance and Others* 2013 4 SA 87 (WCC) 116.

106 51 of 1977.

107 32 of 1998.

108 Cronje *Customs and Excise Service* issue 36 app 212-213

109 *Gaertner and Others v Minister of Finance and Others 2014* (1) BCLR 38 (CC)

110 Cronje *Customs and Excise Service* issue 36 App 212

111 91 of 1964.

- A resounding principle of South African law was that the exercise of public power must be within constitutionally permissible limits.

The applicant contended that the High Court had erred in finding that warrantless non-routine searches of designated premises were justifiable in all and any circumstances. Warrantless non-routine searches should remain the exception, and if necessary could be catered for as provided in section 4(4)(ii). Should the court find that warrantless non-routine searches of designated premises were justifiable, the applicants argued that those searches should be confined to the designated premises in question and should not include any of the licensee's other premises or offices. The Minister of Finance supported the confirmation of the declaration of invalidity of section 4(4)(a) and section 4(5)-(6) to the extent that the section permitted entry and searches without a warrant. The Minister of Finance further opposed the confirmation of the declaration of the invalidity of section 4(4)(b). Furthermore, the Minister stated that it could not be unconstitutional for an official requiring protection to require that he/she be assisted by the police where there was a reasonable suspicion that there might be resistance.

The Court held as follows on various aspects of section 4 as presented below:

- On the constitutionality of the impugned, right the Court stated that the right to privacy extended beyond the inner sanctum of the home. Even though the business did have the right to privacy, there was a lower expectation of privacy as to the disclosure of relevant information to the authorities as well as the public[112].
- The provisions were broad as to the manner of conducting searches. Searches might be conducted in private dwellings at any time and officials might not only break in at the dwellings but once inside they might even break up floors. They do not need a warrant to do all of this.
- On the nature of the right, it was stated that privacy like other rights was not absolute. As a person moved into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space did not mean that once people were involved social interaction or business they no longer had a right to privacy. What it meant was that the right was attenuated not obliterated[113].
- On the purpose of limitation, the Court looked at the nature of the *Customs and Excise Act* as well as the rationale for customs and excise controls. Customs and excise controls served an important public purpose. The tight regulation of customs and excise was calculated to reduce practices that were deleterious to the purpose of the customs and excise regime. Despite all of this, the importance and

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112 Cronje *Customs and Excise Services* issue 36 App 215

113 Cronje *Customs and Excise Services* issue 36 App 217

incontestable necessity of control and constant monitoring diminished the invasiveness of searches conducted under the impugned sections[114].

- On the nature and extent of the limitation - the more public the undertaking and the more closely regulated the industry, the more attenuated the right to privacy and the less intense any possible invasion. In modern society, it was generally accepted that many commercial activities in which individuals might engage must to a greater or lesser extent and depending on their nature be regulated by the state to ensure that the individual pursuit was compatible with community interest in the realisation of collective goals and aspirations. The reasonableness of a person's expectations of privacy and thus the strength of that person's privacy interest could vary depending on the regulatory scheme to which that person was subject.[115] The provisions of the *Customs and Excise Act*[116] were overboard. The provision allowed searches that were not only warrantless, but there was no limit to (a) the time when searches might be conducted (b) the types of premises that might be searched and (c) the scope of the search. Instead, SARS officials were given far-reaching powers (including breaking in and breaking floors) that might be exercised anywhere, at whatever time, and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search.[117]
- On the notion of a less restrictive nature, the Court stated that when legislation authorises warrantless regulatory inspections, provisions must be made for a constitutionality adequately substitute to ensure certainty in the conduct of the inspection and to limit the discretion of the inspectors. The legislation must sufficiently inform property owners that searches of property will be undertaken periodically and for a specific regulatory purpose. The legislation must also provide for a manner of conducting searches that accords with common decency and is not more intrusive than necessary[118].
- A balancing of all these factors led the Court to the conclusion that the impugned sections could not be justified in terms of section 36. The legislature, guided by this judgement to the extent that certain pronouncements had been made, should be given the latitude to formulate the inner and outer reaches of search power.

Madlanga J, stated that on the interim remedy issue that during the suspension of invalidity of section 4 , there is a need for a read in and when SARS officials intend to search homes (private residences) pursuant to the powers conferred by section 4 , they must apply for a warrant in terms of similar to those required by section 22 of the *Criminal Procedure Act*[119] or section 29 of the *National*

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114 Cronje *Customs and Excise Services* issue 36 App 218

115 *Gaertner and Others v Minister of Finance and Others* 2014 (1) BCLR 38 (CC) para 60.

116 91 of 1964.

117 HC Cronje *Customs and Excise Services* issue 36 App 220

118 HC Cronje *Customs and Excise Services* issue 36 App 222

119 51 of 1977.

Prosecuting Authority Act[120], the exception provides for in those pieces of legislation also be applicable to read in.

In conclusion it is necessary that the right to privacy with regard to business premises and their business assets are protected and in that context the expectation of privacy is higher and at the very least entry and searches conducted there have to be authorised by warrants.

Keulder's[121] analysis of the impact of the decision of the Constitutional Court includes the observation that SARS' power to search and seize does not exist in isolation. The taxpayer's constitutional right to privacy, amongst others, must be taken into consideration. On the other hand, the taxpayer's right to privacy is not absolute, but could be limited, provided the limitation is reasonable and justifiable as provided for in section 36, and *Promotion of Administration of Justice Act*[122] has been taken into account.[123]

According to Devenish[124] the Constitutional Court in the *Bernstein* case held that

> Privacy is acknowledged in the truly personal realm, but as a person moves into the communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.[125]

The scope of the right to privacy therefore varies and it may be restricted, especially when a person's business activities impact negatively on the public and regulation therefore becomes reasonable and necessary.

In conclusion and in the light of the aforesaid, there are still issues to be resolved although the Constitutional Court has pronounced on the matter and declared the conduct of the officers unconstitutional.

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120 32 of 1998.

121 2015 132 (4) *SALJ* 819.

122 3 of 2000 hereinafter referred to as *PAJA*.

123 Keulder 2015 132 (4) *SALJ* 822.

124 Devenish *The South African constitution* 80.

125 *Benstein v Bester* 1996 4 BCLR449 (CC) para 67.

The courts did not provide guidance on how searches should be conducted. This silence was acknowledged in the case of *Magajane,*[126] where the relevant section that was ruled unconstitutional failed "to guide inspectors as to how to conduct searches within the legal limits."[127]

The two cases discussed above focussed on two specific rights, namely the right to property and the right to privacy. The cases that are discussed hereunder focus more on the application of section 33 of the *Constitution*. Once again the Commissioner's actions in not complying with *PAJA* were met with the strongest criticism, as will be seen below.

3.3 *Cases dealing with the Promotion of Administrative Justice Act*[128]

For ease of understanding before the cases that will be dealt with below, are discussed it is appropriate to highlight some issues pertaining to *PAJA*, although this has been discussed in Chapter 2 of this dissertation. Section 3(1) of *PAJA* provides that an administrative action, which materially and adversely affects the rights and legitimate expectations of any person, must be fair.

However, there are provisions of the *CEA* stating that an officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for establishing whether that ship, vehicle, plant, material or good is liable to forfeiture under the *CEA*.[129]

Furthermore, the *CEA* declares that whatever is seized as being liable to forfeiture under the *CEA* shall forthwith be delivered to the Controller at the customs and excise office nearest to the place where it was seized, or it may be secured by the Controller by sealing, marking, locking, fastening or otherwise securing or impounding it on the premises where it is found, or by removing it to a place of security determined by the

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126 *Magajane v Chairperson, North West Gambling Board and Others* 2006 5 SA 250.

127 *Magajane v Chairperson, Northwest Gambling Board and Others* 2006 5 SA 250 (CC) 282.

128 3 of 2000.

129 Section 88(1)(a) of *CEA*.

Controller.[130] Thus not only goods, but also vessels, vehicles or other property used in connection with the suspected goods may be affected, and this will affect the owner's and importer's trading and other activities. This may lead to large-scale pecuniary losses for a relevant party, often without the party's being afforded the opportunity to state his or her case before the action is taken. Losses occur, especially when the goods in question are perishable, and the *CEA* does not make any provision for the furnishing of reasons for the action taken.[131]

In instances of a dispute between an importer or exporter and a government authority (SARS), the importer or exporter must consider his or her position in the light of *PAJA*, if the authority had taken that into account as well as the provisions of the relevant statutory mechanisms applicable to the dispute. The importer or exporter will also determine if the cause of the dispute falls within the definition of an administrative action in terms of section 1 of *PAJA*.[132]

The issue that comes to the fore regarding the test is determining how the officer of court (namely a policeman, a magistrate or a customs officer) determines what is liable for forfeiture as provided for in section 88(1)(b) of the *Customs and Excise Act*. It is clear from the facts that the test is largely subjective and therefore relies on the view of the officer to detain. Given that section 88 does not list the objective factors to be taken into account for the purposes of detaining goods, it is impossible to determine and justify such detention in terms of the *Customs and Excise Act*. The guiding principles will therefore be those set out in the *Constitution* and *PAJA* regarding procedural fairness. It could also be helpful to consider the principle of public interest in exercising those powers and not for the personal benefit of the official taking the administrative decision.

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130 Section 88(1)(b) of *CEA*.

131 Scholtz *The constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 2.

132 Scholtz *The constitutionality of Sections 88 and 90 of the Customs and Excise Act 91 of 1964* 12.

The cases discussed herein below deal with situations where the Commissioner's actions were considered inconsistent with the provisions of the *Constitution* and were thus ruled unconstitutional, although there were no instances that called for the amendment of the relevant sections in the *CEA*.

3.3.1 Deacon v Controller of Customs and Excise[133]

In this case, the applicant had concluded an agreement with a motor dealer for the purchase of a vehicle, and after delivery, the applicant suspected that the documentation relating to the importation reflected an undeclared value. Although he advised the respondent of his suspicion, the respondent informed the applicant that the invoice used at time of the clearance was false and that the vehicle was liable for forfeiture in terms of section 87, and the vehicle to be seized in terms of section 88 of the *CEA*. The point in issue was that the applicant contended that in seizing the vehicle, the respondent had failed to follow substantively and procedurally fair procedure and failed to comply with the rules of natural justice, as required by the common law and the *Constitution*. He furthermore contended that the discretion had placed a duty on the respondent to consider all surrounding facts and to provide the affected persons with sufficient reasons.[134]

Horn AJ stated as follows:

> In this matter it would not have been difficult for the respondent to afford the applicant the opportunity to be heard. This was clearly not a common situation where, for example, the applicant had knowingly been party to the evasion of payment of customs duty. Here the applicant was an innocent party. His situation called for a proper investigation by the respondent and full ventilation by the parties of all the relevant facts before the respondent took the decision to seize the motor vehicle. I gain the distinct impression that the respondent took the view that once it had been confirmed that duty was payable in terms of the Act, he was entitled to invoke the provision of sections 87 and 88 without the need to have regard to the provision of section 33 of the constitution. The respondent ignored the fact that section 33 had broadened the basis upon which a court will on review interfere with the decision of

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133 *Deacon v Controller of Customs and Excise* 1999 2 SA 905 (SE).

134 Cronje *Customs and Excise Services* issue 3 11-23.

> a functionary who is required to exercise its discretionary powers without regard to the spirit and objectives of this section.[135]

The Court held that the authorities must consider the *Constitution* and cannot apply the *CEA* in a vacuum.

Horn AJ directed the authorities to conduct a full and proper hearing of all relevant facts and consider the principles of fairness, the rules of natural justice, and the taxpayer's right to a hearing. Further, he directed the Customs and Excise officials to apply the provisions of section 93. The court set aside the decision to trade the motor vehicle as forfeited as well as the levying of duties and penalties. The decision of the court in *Deacon* confirms the opinion that a taxpayer may succeed in setting the section aside because the Commissioner has failed to comply with the rules of administrative justice.[136]

According to Croome[137] if the commissioner treats taxpayers unfairly this will negatively affect taxpayer compliance in the future. Therefore, the Commissioner must strike the correct balance between the rights of taxpayers and the degree of enforcement action necessary to ensure compliance with the fiscal laws of the country.

The case herein below shows another level of the Commissioner's disregard for the promotion of administrative justice, which seems to have been very common in practice among the officials under the Commissioner's delegated authority.

3.3.2 Wong and Others v Commissioner for SARS[138]

The applicants have been trading for some time as traders and sell inter alia DVD's, videos and related goods at the Montana Traders Square, Pretoria. There is no suggestion on the court papers that the applicants are not duly entitled to indulge in

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135 *Deacon v Controller of Customs and Excise* 1999 2 SA 905 (SE) 918.

136 Croome *Taxpayers' Rights in South Africa* 177.

137 Croome *Taxpayers' Rights in South Africa* 265.

138 2003 JOL 11010 (T).

such trade and therefore not alleged that their trading is in any way unlawful apart from the allegations to be dealt with below.

As stated above that the applicants trade in goods that are easily reproduced without a licence or payment of royalties and come onto the market as counterfeit goods, they have been regarded with a jaundiced eye by an organisation known as the South African Federation Against Copyright Theft (SAFACT).

The applicants legal representative (Mr Van Der Merwe) alleged that his clients have over the past four to five years been subjected to numerous raids with or without warrants in terms of the *Counterfeit Goods Act* 37 of 1997, the *Trade Marks Act* 17 of 1941, the *Films and Publications Act* 65 of 1966 and under the Customs and Excise Act 91 of 1964, in terms of which the latest raids were executed. Goods have been seized from time to time with or without warrant, allegedly on the basis that they were counterfeit, i.e. reproduced without authority by the copyright holder and distributed by the applicants without proper title to do so.

Van der Merwe annexed to his founding affidavit documents which evidence that, *prima facie*, the goods to which these documents refer (the list is not complete) were lawfully imported. Furthermore, they had their stock confiscated in their absence. Their cubicles were broken open and goods were seized without anybody representing the trader being present.

The commissioner representative who seized the goods points out that section 4(4)(a) of the *CEA*, empowers an officer for purposes of the Act without prior notice to enter any premises at any time and make whatever examination and enquiry he may deem necessary. He may demand the production of books and documents and make extracts from and copies of any such book or document and may be accompanied by assistants, if he does so in pursuance of the purposes of the Act. He also relies upon the powers which are conferred upon him in terms of section 88(1)(a) and (b) of the Act, to remove whatever goods to a place of security for the purposes of establishing whether such goods are liable to forfeiture in terms of the Act.

The applicant's argument was that although it is also clear that extraordinary measures are required to combat the real threat of harm, which may be, and is indeed, suffered, by the authorities and lawful importers because of the importation of counterfeit goods across the borders of our country, which appear to become ever more porous.

This does not mean, according to applicant, that the Act is not subject to the *Constitution,* and that the constitutional principles and fundamental rights relating to fair administrative action, and in particular the right to *audi alteram partem*, do not apply to the actions the officers are authorized to perform. In that regard reference was made to *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa and others.*[139]

There is no explanation on the papers why the stock could not have been attached at the Montana Traders Square for a reasonable period (perhaps for a few hours), until the applicants' attorney was able to produce the required documentation. There is also no explanation why the goods, if indeed they had to be removed, were not properly indexed, itemized and removed to a nearby warehouse or other place of safety, albeit as a temporary measure, to enable the applicants to provide the necessary proof of lawful importation.

The fact that the powers of the respondent are subject to and must be exercised in accordance with the provisions of the *Constitution* has been held authoritatively in the judgment by Horn AJ (as he then was) in *Deacon v Controller of Customs and Excise*[140] on 916H he says, *inter alia*:

> Neither section 87 nor section 88 of the Act expressly or impliedly exclude or limit the right to be heard or the applicability of the rules of natural justice.

In *Henbase 3392 (PTY) Ltd v Commissioner, South African Revenue Survives and Another* Judge Van Der Westhuizen stated the following in concurring with Judge Horn above[141]

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139 2000 2 SA 674 (CC) 696.

140 1999 2 SA 905 (SE) 916B-917E.

141 2002 2 SA 180 (T).

> In this matter it is therefore detention in terms of section 88(1)(a) which is relevant, at least as far as the first respondent's reliance on that clause is concerned. Detention and seizure or forfeiture, for example in terms of section 87 of the Act, are very different steps as far as the conduct of the respondent is concerned. Whereas it can easily be understood that for example the *audi alteram partem* principle may or has to be applicable to seizure and forfeiture, the same is not necessarily true regarding mere detention. In terms of section 87 and section 88, detention is the very first step, which takes place in order to set in motion a process of establishing whether forfeiture should follow. To require a prior hearing before detention can take place would make little sense, also from a practical perspective. In many situations customs officials would be unable to do anything if they could not first detain certain goods without affording a prior hearing. At the stage when they might wish or have to detain the goods, the relevant parties to whom notice and the opportunity of hearing would have to be given might not even be present or available. The only way to notify them of the possibility of seizure or forfeiture would have to be first to detain the goods.[142]
>
> In the case under discussion, Judge Bertelsmann stated that the vast powers which the Act grants to the respondent's officials, must be exercised with discretion and elasticity. The greatest measure of transparency and observance of due administrative process must be allowed as far as possible. This includes *audi alteram partem*. Upon the facts of the present case, the applicants ought to have been given the opportunity to be heard and to produce the documentation upon which they rely for their claims that the goods were lawfully imported and that the necessary duty was paid. Therefore under the circumstances, and in the light of the failure on the part of officials to do so the attachment and removal was unlawful. The court therefore granted the order, which the applicants prayed.

3.3.3 Container Logistics (Pty) Ltd v Commissioner of Customs and Excise[143]

In this case the Commissioner's decisions which formed the subject matter of the appeals were taken under section 99(2)(a) of the *CEA*, which in effect renders agents liable for the obligations of their principals. The respondents were clearing agents and the effect of the Commissioner's decisions was to hold them liable for the unpaid customs duties and other charges in respect of goods, which had been landed in Durban, where they had been cleared for export to Mozambique. Section 99(2) (a) seeks to hold the agent liable for the wrong-doing of his principal, although there are exceptions where the agent can demonstrate to the Commissioner that he/she was

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142 *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2002 2 SA 180 (T) 191C.

143 1999 3 SA 771 (SCA).

not party to the commission of the offence and upon finding out the ill deals of the principal alerted the Commissioner. The legal question in this matter was whether an administrative decision might still be reviewed on common law grounds.

Judge Hefer J A said the following when handing down judgement:

> I cannot imagine that the intention was to do away with this type of review. No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of natural justice is procedurally unfair and therefore equally unconstitutional. But, although it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality, it does not follow that the common law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of section 24 is for the courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common law grounds for review were intended to remain intact.
>
> I cannot accept this contention that there are two systems of law each dealing with the same subject matter, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the constitution, which is the supreme law, all including common law derives its force from the constitution, and is subject to the constitution.[144]

This case endeavoured to give effect to the common law approach to the fact that one cannot endeavour to shy away from applying proper administrative practice because the point in issue is deemed to fall under common law. The Commissioner wanted to raise an exception to apply his mind and provide fair administrative justice to the applicant because according to him the matter involved a common law principle.

The Supreme Court of Appeal was able to set aside the administrative action concerned, by reference to accepted common law principles, without having to consider section 24.

The principle *Rennies* case,[145] which was heard as one case with *Container Logistic* above, dealt with whether the agent had taken all reasonable steps to prevent the non-fulfilment in accordance with section 99(2) (a)(ii) of the *CEA*. The court found that the Commissioner had simply held the respondents to their undertakings to

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144 *Container Logistics (Pty) Ltd v Commissioner of Customs and Excise* 1999 3 SA 771 (SCA) 786.

145 *Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA).

institute administrative measures as stated in the application for a licence. What the Commissioner had had to decide was not whether or not the respondents had complied with their undertakings, but whether they had taken all steps reasonable to prevent the diversion of goods.

It was contended that the Commissioner has wide powers to control export by prescribing whatever he may wish and he is entitled to do so in terms of section 39(1)(c) of *CEA*, but that such powers had never been exercised.[146] The Commissioner relied on the clearing agent to take measures that goods had been exported, and the court found that the Commissioner had not applied his mind properly to the question before him. The court further stated that the Commissioner had wide powers under section 18(7) and 18A (6) of the *CEA* to control exports by prescribing whatever basis he might wish, but these powers was not exercised. In the end, the court concluded that although the section rendered agents generally liable for all principal obligations in terms of the Act, it followed that the question in inquiry must in every case be whether the agent had taken all reasonable steps to prevent the non-fulfilment of particular obligations which the principal had not fulfilled.[147]

The two cases discussed above once again demonstrate the fact that the Commissioner abused his powers in that he did not even want to discharge his obligations in terms of the Act he administers. He expected at all times the clearing agent to discharge its obligation, but not *vice versa* and such lacuna in the law could be viewed as an abuse of the powers entrusted by legislation. (The *CEA*).

3.3.4 Commissioner of SARS v Formalito[148]

This case dealt with provisions of section 44(11)[149] of the *CEA* wherein the respondent, Formalito, a licensed dealer in terms of the *Arms and Ammunitions Act* 75 of 1969,

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146 Cronje *Customs and Excise Services* issue 3 chapter IV 12-8.

147 Cronje *Customs and Excise Services* issue 3 chapter IV 12-9.

148 2005 5 SA 526(SCA).

149 Section 44 (11) of the CEA provides that (a) Notwithstanding the provisions of subsection (10),

had imported firearms and ammunition into the country. The appellant, the Commissioner of SARS, had received information from a former employee of Formalito that the latter had under-declared the value of goods imported by it.

A SARS official who investigated the complaint concluded that certain goods imported by Formalito had been incorrectly cleared and that SARS in consequence had been underpaid customs duties, *ad valorem* duties and VAT to the tune of R696 652.95. Formalito was further advised by SARS that the goods in question were liable to forfeiture in terms of section 87(1) of the *CEA*, alternatively and in the event that those goods could not be found, then in lieu thereof SARS was entitled in terms of s 88(2) (*a*) to an amount equal to the value of those goods, which in this instance amounted to R3 792 912, which amount was demanded in writing. In response to certain representations, SARS advised Formalito that it had been decided "to levy an amount in lieu of forfeiture equivalent to 50% of the value of the goods in issue", which in monetary terms amounted to R1 896 456.

Formalito then sought and obtained, on review, an order in the High Court setting aside the decisions by SARS that it: (i) pay customs duty, *ad valorem* duty and VAT in the sum of R696 652.95; and (ii) forfeit an amount of R1 896 456.00 in terms of section 88(2)(*a*) of the Act. SARS was ordered to pay the costs of that application. The appeal was against those orders, with leave of the judge *a quo*.

The thrust of the argument advanced by Formalito on appeal was that there had been no false declaration by it; and further that the penalty imposed was unreasonable.

In determining the monetary value of the penalty, the court ruled that SARS had ignored the Customs Offences and Penalty Policy of SARS (the penalty guidelines). Those guidelines, the purpose of which was:

> To define the policy and procedure for customs offences and to provide guidelines for the uniform imposition of penalties to declarants that are non-compliant with Customs Law

They stipulated that for a contravention of the kind in question a penalty of "50% of the underpayment with a minimum of R500." The court further considered that had had those guidelines been invoked, the penalty in the case in question would have been less than twenty percent of the value actually declared forfeit by SARS. A deviation to that extent from its own policy by SARS was grossly unreasonable. SARS' decision that Formalito was to forfeit an amount of R1 896 456.00 in terms of s 88(2)(a) of the *CEA* was set aside. The matter was remitted to SARS for reconsideration.

According to Levendal[150] regarding the whole issues of penalties, there are no clear guidelines available to the transgressor to indicate the possible penalty amount due for the specific breach required in Standard 9 of the Revised Kyoto Convention. This therefore means that only the Commissioner knows the amount to be paid, but the person who should pay will not even know how the amount is calculated. Although this case did not deal with constitutional issues, it dealt with a *lacuna* that the *CEA* created by not stipulating the penalty amount equivalent to the offence committed. In this regard, the *CEA* (unlike other pieces of legislation administered by the Commissioner) did not make it easier for the Commissioner to enforce some of the provisions contained therein. The sections dealing with penalties in particular sections 874, 875 and 876 of the *Customs Control Act*[151] and sections 199 to 201 of the *Customs*

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150 *A case of Customs administration penalty provisions as contained in Customs and Excise Act 91 of 1964* 17.

151 31 of 2014.

Duty Act[152] have clearly provided for specific penalties for specific offence, unlike in the *CEA*.

The developments in the new Act are positive, and there will not be any guesswork in deciding the penalty amounts payable, as they are reflected in the Act, not in internal policy, which is not accessible to SARS-registered clients.

3.3.5 Fazenda v Commissioner of Customs and Excise[153]

In this case the applicant's driver crossed the border at the Lebombo border post in the applicant's vehicle (a horse, trailer and container) with contraband cigarettes hidden in the compartment in the trailer. Upon finding those goods, customs officials detained them in terms of section 88(1)(a), and the Controller subsequently seized the goods purportedly in terms of section 88(1)(d) of the Act. The reasons given by the respondent was that because the cigarettes were hidden in a compartment he was of the view that not only should the cigarettes be attached and seized, but that the vehicle involved in the smuggling by the driver should also be attached and seized. The applicant therefore applied to get the attachment set aside and for the return of the vehicles to the rightful owner.

The argument by the applicant was that the seizure in terms of section 88(1)(d) does not apply as the item were not "other vehicle" and therefore section 87(2)(a) of the Act does not shed light on the circumstances under which other vehicles can be seized. If the owner had arranged for loading of cigarette in the container of the goods to be smuggled into the country the vehicles would not be returned to the owner. If the Commissioner returned the vehicles to owner, where he was aware that the goods were smuggled on their vehicle the Commissioner would be in dereliction of duty. The section protects rights of innocent owners of vehicle or ship used on the carriage of goods liable to forfeiture. The other person lawfully in possession of the

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152 31 of 2014.

153 1999 3 SA 452.

vehicle, who is not the owner and did that outside his own criminal liability of smuggling, should therefore be liable to his deeds.

Judge Stafford further stated that this section certainly does not require that the owner must satisfy the Commissioner that both he or she and the person lawfully in charge of the vehicle did not consent to or had no knowledge of the use of the vehicle for smuggling purposes, before it can be released. The Commissioner is guilty of a gross irregularity in his interpretation of section 87(2)(a) of the Act.

Whatever suspicions he might have entertained about the adaptation of the container cannot rectify this clear illegality in the performance of his duty in interpreting the onus in section 87(2)(a) of the Act. In any event, the Commissioner exercised his discretion improperly. He did not apply his mind to the issue in accordance with the behests of the statute.

The judge in conclusion stated that applying the common-law test, the review must succeed as the decision of the Commissioner to seize and to declare the vehicles and container forfeited is administrative action within the purview of section 33(1) and (2) of the *Constitution.*

Given that the above case (Fazenda) was decided on the principles of common law, although making reference to the *Constitution*, the author also agrees with De Waal's[154] sentiments. He holds the view that:

> The right to just administrative action entrenches fundamental principles of administrative law developed by courts in the exercise of their common law review powers. Whilst the entrenchment of constitutional rights to just administrative action expands the field of the judicial control of administrative power it does not replace or supersede the common law of the judicial review of administrative action. It would be unfortunate if the complex and intricate conceptual framework of judicial review which has evolved under common law was simply to be abandoned in favour of an attempt to develop an entirely new jurisprudence under section 33. This means that the courts will continue to develop the common law principles of review, especially as they relate to private bodies.

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154 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 476.

In light of De Waal's views and the judgment in the *Fazenda*[155] case, there is no doubt that the Commissioner always thought that if an action is allowed in terms of the *CEA*, it is thus justifiable and therefore constitutional to act in disregard for other people's constitutional rights. The Commissioner should henceforth go beyond consideration of the *CEA* and consider also the common law principle (*audi alterem partem* rule) and others when executing its powers in terms of the Act.

3.4 *Conclusion*

The cases discussed above demonstrate how the Customs regime in the South African environment did not give due regard to the rights of taxpayers. In a constitutional state such disregard of human rights is a matter of concern and thus unacceptable.

It was demonstrated with regard to the protection of property in the *FNB* case that the Commissioner had trampled on the bank's right to property, which it held against goods it had financed.

In the case of *Wong*,[156] the court again (even though it was not the Constitutional Court) chastised the Commissioner for disregarding one of the important tenets of our Constitution, which is the right to administrative justice. It will be demonstrated when dealing with the provisions of the New Acts that *PAJA* is at their heart.

Although the *CEA* is still in operation and in force, despite the fact that it has its own shortcomings as alluded to in this chapter. It therefore means that SARS and other entities feeling that this legislation is not enforceable, they can approach the legislature to propose the amendments to that effect. Although the new Acts have been promulgated, it is unclear when will they take effect. Some of the cases, like *Rennies* and *Container Logistics,*[157] exemplify the excuses the Commissioner may give about adopting the common law approach or evading constitutional issues

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155 *Fazenda v Commissioner of Customs and Excise* 1999 3 SA 452.

156 2003 JOL 11010 (T).

157 1999 3 SA 771 (SCA).

The cases discussed above show how the provisions of the *Customs and Excise Act* have denied the constitutional rights of individuals and entities by invoking what one can call the "draconian provision" of the Act. It is therefore incumbent upon the legislature (as lawmakers) to ensure the total overhaul of the Act. The following chapter will focus on that issue.

Finally, the views propounded in Van Niekerk and Schulze,[158] that it may be possible in appropriate circumstances to institute a delictual claim for damages based on the *action injuriandi* against the Commissioner of Customs and Excise for the unlawful seizure and detention of goods, can also act as catalyst for SARS officials to act unconstitutionally .

158 Van Niekerk and Schulze *The South African Law of International trade: Selected Topics* 13.

Chapter 4

4.1 Introduction

In this chapter, the focus will be more on the issues that prompted the change to the South African Customs dispensation. As the issues raised by our courts on how they viewed the current *CEA* have already been raised in the previous chapters, it is imperative at this stage to consider other catalysts that contributed to the need for change. As we approach the new dawn (the promulgation of a new Customs Acts), it also vital to discuss the process of passing the legislation in the course of this chapter, and to consider the consultative process that preceded it, as also provided in the *Constitution*.

4.2 Catalyst for change

It is a well-known fact that border control is the critical responsibility of customs officers as well as other law enforcement agencies, who have the mandate of ensuring that the relevant taxes applicable during the importation of goods are collected and of combating cross-border crime. Globalisation is also a factor to be considered as catalyst for international trade and tourism, and thus there is a need for the authorities to balance compliance with the facilitation of international trade and tourism. The above initiatives can be achieved by optimising the use of technology, which is why SARS had embarked on the modernisation of its systems.[159]

According to Macqueen,[160] the *CEA* may understandably be said to be outdated and no longer adequate for the proper monitoring and control of the import and export of certain goods in South Africa, simply because of the massive technological advancements, which have taken place in the last 20 years.

It is acknowledged and will be demonstrated further as shown in the previous chapter that the constitutionality of the *CEA* has largely been the catalyst for the framing of the new Customs Control and Duty Act. The same sentiment was expressed in the

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159 SARS 2018 https://www.sars.gov.za.

160 2016 http//www.polity.org.za

SARS question and answer communication with clients (taxpayers). The clients questioned the benefits of the new Acts, amongst other matters, and the SARS response was

> They are aligned with the Constitution of the country and were benchmarked against the other customs administrations and international conventions.[161]

The other catalyst that ultimately prompted and enhanced the process of reconsidering the rewriting of the Act was the Customs Modernisation Program, which was officially launched in 2009 in order to address a number of critical issues that were becoming obviously in need of attention. Trade volumes had doubled over the previous ten years, while staff numbers had, in fact, decreased. Systems and processes in Customs were still largely paper-based and labour-intensive, leading to large numbers of validation errors and the waste of staff resources on low value-adding activities. The lack of adequate customs presence at ports of entry, lengthy inspection turnaround times, and poor trader awareness and management were also identified as other areas of concern. The main area of focus was to be on systems, policies, processes and people.[162]

In 2011 and 2012, the modernisation of customs picked up pace, with every area of customs and trade impacted by several key changes. One of these was an automated workflow-driven system called Service Manager, which allowed customs officers to complete all clearance processes end-to-end without having to perform manual functions. The specific focus in this regard was on the Botswana, Lesotho, Namibia and Swaziland (BLNS) land border posts.[163]

The modernisation program was to help SARS (Customs) to align its operations with international standards and benchmarks, and to provide stakeholders with an improved service.

Some key modernisation program are the following:

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161 SARS 2019 http://www.sars.gov.za.

162 SARS 2018 http://www.sars.gov.za.

163 SARS 2018 http://www.sars.gov.za.

- Electronic supporting documents. This will be extension of e-filing, to enable traders to file and submit any supporting documents required by customs for the finalisation of a transaction or case.

- Enforcing mandatory electronic communication with traders, customs brokers, carriers and release agents. Since the introduction of EDI (Electronic Data Exchange), the uptake had grown remarkably. Customs has now introduced electronic release messaging to obviate the need for paper-based customs release notification.

- The implementation of risk-based customs assessment, which will improve the integrity of the customs process and will ensure that any opportunity for gain by either an internal user or collusion between internal and external parties is negated.

- Single registration. Taxpayers, traders and practitioners will have a single interface with SARS for all their clients' needs.

- The Customs Modernisation program (release One). This has been introduced because Customs had thirty-seven diverse systems. A new integrated customs solution is being introduced to standardise the processing and validation of customs declarations across all modes.[164]

In South Africa there has been a marked change with regard to the primary focus of customs. Instead of focussing purely on revenue collection, the SARS approach shifted towards increasing compliance in the field of tax and customs. These changes were described by the then Commissioner Gordhan[165] as follows:

- In an increasingly globalised world in which both legal and illegal trade is expanding, Customs administrations need to identify and understand the key international, regional and national strategic drivers in order to respond appropriately. These drivers are universal, and while most customs

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164 SARS 2018 http://www.sars.gov.za.

165 Gordhan 2007 *WCJ* 1(1) 49.

> administrations recognise that their role has fundamentally changed and their mandate expanded, the international customs response has been uncoordinated. This has engendered an active response by the World Customs Organization (WCO), which as part of its commitment to a new vision and action plan for customs has adopted the Framework of Standards to Secure and Facilitate Global Trade in order to provide a global response to supply-chain security and facilitation. In amplification Gordhan stated that there is an emphasis on shifting to automation, risk management and intelligence to facilitate the movement of legitimate goods and focus resources on high-risk areas. Most customs administrations are introducing measures to obtain as much information as possible in advance and prior to the arrival of goods, to make timely and effective risk-based decisions. This has involved the introduction of modern information technology that enables the secure, real time exchange and receipt of information, risk profiling and the processing of declarations.[166]

Lastly the current Act was viewed as being not structurally suitable to serve as a vehicle for the implementation of a modern system of customs control, in accordance with current international trends and best practices. What was required was a fundamental restructuring of the customs and excise legislation not only to give effect to the Kyoto Convention but also to other binding international instruments. This also meant establishing a sound, clear and logical legislative framework that would enhance and speak to the many other legislative instruments that rely for their implementation on customs control.[167] It was indeed in the light of the foregoing that SARS realised the need for rewriting of the New Customs Acts as known as NCAP.

4.3 Consultation Process

Although this heading flags the raising of issues by various stakeholders during the consultation process, one also deems it important to highlight the entire process

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166 Gordhan 2007 *WCJ* 1(1) 51.

167 SARS http://www.sars.gov.za/NCAP.

leading up to the ultimate product, which is the new Act, to emphasise the importance of consultation in advance of taking decisions.

At the outset the government department intending to pass the new law or amend the existing legislation is responsible for drafting the bills. In the case of Customs and Excise law, the Department of Finance leads the process. The Department solicits inputs, which are in the form of a draft bill and an explanatory memorandum. The draft bill will then go to Cabinet for approval, where after it is introduced in the National Assembly through the Secretary of Parliament. The Secretary of Parliament can still invite comments from interested parties, which comments will once again be consolidated in the form of a draft bill and an explanatory memorandum.[168] The bill will then be presented before the relevant portfolio committee responsible for finance, and once again if needs be comments will be solicited and if necessary a public hearing can also take place. The reports of the parliamentary monitoring group (PMG) confirm that there were inputs and public participation from various stakeholders.

In this particular instance, the Bills/Acts in question are Money Bills, for which special provision is made in terms of section 77 of the *Constitution*. Money Bills must be introduced in the National Assembly by the Minister of Finance, and special considerations laid down by the *Constitution*. Section 77 provides thus, amongst other provisions:

Money Bills.

(1) A Bill is a money Bill if it—

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges;

(2) A money Bill may not deal with any other matter except—

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168 SARS http://www.sars.gov.za/NCAP.

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or
(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

Reverting to the issue of the consultative process, it may be of interest to note that SARS started to draft the new Customs legislations in 2003.

In its various meetings with stakeholders, in the first instance Customs conceded that an abrupt transition from the old Act to the new was not feasible, and for that reason a decision was taken to introduce the Act in modules.[169] This meant that the two new Customs Act (the Customs Duty and Control Acts) would commence first and the Excise Act would commence later.

The main issues raised during the public hearings were those of inland terminals, penalties and the rules. Under current legislation, containers can move inland purely based on the ship's manifest, but SARS wanted a customs clearance declaration to be given so as to have better information in order to make a more informed decision in the exercising of its control duties. There had been much debate with Business Unity SA (BUSA) and the Johannesburg Chamber of Industries (JCI), who were not in agreement with SARS, while the South African Association of Freight Forwarders (SAAFF), Transnet and the South African Association of Shipping Operators and Agents (SAASOA) were satisfied that the new system would work.

A fall-back clause was inserted to accommodate the fears of the JCI and BUSA, and there would be a 12-month grace period to introduce the legislation. SARS did not intend to close the inland terminals.

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169 DSV http://www.samed.org.za.

SAAFF had been concerned about the administrative penalties for *bona fide* errors, and the discretion of customs officers. SARS had proposed that no fixed amount penalties would be imposed for *bona fide* errors, and the value of the penalties in clause 876 would be reduced by fifty percent. Officers would not have any discretion in the amount of the penalty levied.

The South African Institute of Chartered Accountants (SAICA) expressed concerns that the rules had not been made available for scrutiny and comment. SARS said it was normal for the primary legislation to be passed and the rules to follow that, and it was not possible to include all technical aspects in the primary legislation. The rules would be published for comment before being implemented, and SARS would be conducting workshops to explain them.

The JCC said losing inland port terminals were a critical issue because of the extensive unintended consequences. The SA Customs Union (SACU) was still an unresolved matter and the Bill made no mention of landlocked countries, with the SACU secretariat unaware of the possible change of status of inland ports. A big point of disagreement was where the border of South Africa was. Both options SARS had presented required a customs declaration, which in effect would place the border at the coast. Most of the goods to inland ports currently went by rail and Transnet was in the process of spending R14b on upgrading its rail infrastructure, yet if inland ports were terminated, a large portion of this rail traffic would switch to the roads. The World Customs Organization (WCO) at its meeting in December 2013 in Bali addressed the high logistics transaction costs and called for the further easing of border controls. South Africa would be in contravention of the WCO Bali agreement regarding the ease of transit and reducing logistical costs[170].

Over and above the consultation process that SARS had undertaken as referred to above, SARS also developed what is called a question and answers portal on its website regarding the intended Acts, and some of the issues raised were the following.

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[170] Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16809 28/01/2014

In a response to a question about what benefits could be derived from these two pieces of legislation, SARS gave a response which is more relevant to the topic under discussion than the alignment with constitution referred to above. It was that the Acts are written in plain language and the material covered is arranged in a logical and systematic way with topic-specific chapters. The rules would also follow the arrangement of the Acts, and each rule would be linked to a specific enabling provision in the relevant Act. This would enable people to whom the Acts apply to find provisions applicable to specific subject matters, such as a specific customs procedure, in an easier manner[171].

There was also a question about what the impact of the new legislation would be on customs stakeholders. The response thereto was that when the Acts were implemented, there would be an impact on all customs clients, particularly in relation to system, process and policy changes. There would also be new compliance measures for traders and changes to the penalties regime.

The chapter on warehousing can illustrate an example of the type of impact that the new legislative regime might have on trade. Various stakeholders, including warehouse licensees, licensed carriers, importers and exporters, customs brokers and owners of goods and agents representing foreign clients would be impacted by the changes in the warehousing regime. These changes include the following:

- Application for new licences
- New receipt and delivery notification requirements by public and private warehouse licensees and licensed carriers
- Storage of free circulation goods with goods not in free circulation
- Electronic inventory management system
- Periodic goods accounting reporting
- Permissible operations in a warehouse.

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171 Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16809.

On the issue of why the period for the submission of import clearance declarations was reduced from seven days to three days after arrival, the SARS indicated that the decision to reduce the period for the submission of clearance declarations in the *CCA* had been informed by the technological advances made since 1964, when the current Act had been drafted. Trade and the way business was conducted had dramatically changed since then, and in the current digital era the information required for clearing goods is available instantly. A change had been made also to mitigate the effect of the reduced timeframe; provision was made for the clearance and release of goods on the submission of incomplete or provisional clearance information.

On the issue of processing of applications, which is the critical part of Customs authority to its clients, it was asked if SARS would be compliant and be able to process all applications timeously. The response from SARS was that it anticipated opening up a new electronic channel for the submission of new registration/licensing applications via e-filing (e-filling is the SARS process of submitting the documents on line) at some time before the new Acts went live. An existing registration or licence would continue to be effective in terms of section 932 or 933 of the *CCA* until the new application was finalised. Provided clients submitted their new applications within 30 days after the effective date, they could continue to operate under their existing registration or licence[172].

Global Maritime Legal Solutions (GMLS), representing other interested parties as well, raised the contentious issue that was dealt with even in parliament (which will be dealt with in detail in the section pertaining to the parliamentary process). The point in issue related to what stakeholders understood to be the discontinuation of the "land terminals" and the impact the discontinuation would have on "Incoterms."[173]

Lastly, there was the issue of fixed penalties and the clarity sought was if current fixed penalties will be reduced under the new Act? The SARS response was in the negative, stating that a lenient approach will be applied for a limited period but the amounts as

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172 Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16809.

173 Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16809.

contained in the penalty table would not be reduced. It is to be noted that the fixed amount penalty tables for the *Customs Duty Act*, the Customs Control Rules, and the Customs Duty Rules must still be finalised and published for public comment.

It must be indicated, though, that there were many submissions made by various structures and bodies, and that although some did overlap with others, this chapter is unable to deal with all of them. Given that, the law has already been passed, and therefore dwelling on the process of passing it will not elucidate the details therein.

4.4 Parliamentary Process

In this particular case, the Minister of Finance represented the Treasury, and SARS fell under the brief of the Standing Committee on Finance (SCoF) on the Customs Duty Bill, the Customs Control Bill and the Customs and Excise Amendment Bill. It gave a brief background on the reasons for the Bill and the benefits arising from it. It detailed the consultation processes the Bills had undergone. The presentation then detailed how the Bills would facilitate trade and the control of goods entering and leaving the country, followed by a summary of the three Bills and the main issues, which had arisen from the public hearings process.[174]

Members said that there appeared to be confusion about the role of parliamentarians. They were concerned that rules were being dragged into legislation, whereas legislation should be a reflection of policies. They were worried about safety and security being relaxed with regard to the ease of access into the country. On benchmarking, they asked why countries like Australia, Canada and the United Kingdom were being referenced, when South Africa had associated itself with the BRICS countries. Regarding the collection of customs duties, members asked when SARS officials would do the necessary spot tests. Did SARS plan to educate business to do tax evaluations? Would SARS' refunds cover the extraordinary losses of small enterprises if they were wrongly penalised? What penalties would SARS pay? What

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174 Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16809/

was the intention, when someone was penalised? Was the one-stop shop at border posts included in and aligned with this legislation?

Members asked whether a penalty would be imposed if a claim was put in and a document was not submitted. They wanted a further explanation of the prosecution avoidance penalty. What process would be followed for offences and the penalties that would be applied? Could people justify themselves, or was it the application of a penalty by an official to be arbitrary? Members wanted further explanation of the single duty-free warehouse. Were there no licensing provisions in the current legislation and did everyone have to apply? Why did SARS differentiate on the size of the business when giving small, medium and micro enterprises (SMMEs) allowances? Surely it should be promoting economic activity rather than promoting SMMEs? Were the revised proposals part of the Bill or not? Members asked if payments could also be done online.

Regarding fixed penalties, the members concerns were the introduction of new penalties approach would impact on SARS' income, and whether the penalties were in line with the contraventions. The reason for asking such clarity is that the traders/clients views are that SARS makes its revenue through imposition of penalties, which is not a fact though.

They further commented that there appeared to be no interventions the entry points like Johannesburg International airport[175] when it comes to imposition of penalties. The members appeal for lesser or standardised penalties irrespective of the nature of the offence, if not there would be deliberate avoidance and falsification of information to avoid customs taxes.

Members said SARS had not taken strong punitive measures on counterfeit goods. Was BUSA comfortable regarding the revised proposals on the issue of City Deep? SARS was asked to explain the perceived risk in allowing goods to move to inland

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175 Now referred to as O R Tambo International Airport.

ports. SARS reiterated the issue of a fall-back clause that had been inserted to accommodate the fears of the JCI and BUSA, and that there would be a twelve-month grace period to introduce the legislation. SARS did not intend to close the inland terminal - it only wanted better information so that it could make a risk assessment.[176]
During the parliamentary process there were several papers specifically presented regarding the issue of the inland port, as raised by the company, Global Maritime Legal Solutions, where the main issues were SARS consultation, the ICC incoterms, and Ports v Terminals.[177]

The reply in the form of an opinion by Advocate Eiselen (1 November 2013)[178] reflected that he disagrees with the JCC's views that the policy change would have the effect that traders would change the terms of their contracts of sale. He also disagreed that the policy change would result in a change in the contract of carriage, and suggested that the GMLS interpretation of the CC incoterms 2010 rules was incorrect and thus that the argument was not appropriate. He disagreed that carriers would as a result of the policy change no longer issue a through bill of lading that will allow the goods to move from Durban to City Deep, for example.

He further strongly criticised the report that BUSA's basis of contention had based "its conclusion on generalities and misleading statements."
Advocate C J Pammenter SC also echoed the above issues raised by Advocate Eiselen in his legal opinion (20 December 2013)[179] on the question of how the change of policy would affect multi-modal contracts. In his response, it was alluded that there was no reason to suspect that there would be extraordinary customs delays, provided the operator timeously submitted the transit clearance declarations.
He further stated that in any event, virtually every bill of lading, which I have seen, including house bills issued by an operator contains a *vis majeure* clause protecting the carrier against delays resulting from seizures by state authorities

176 Parliamentary Monitoring Group https://pmg.org.za/committee-meeting/16809/

177 GMLS http://pmg-assets.s3-website-eu-west-1.amazonaws.com/140128gmls.pdf.

178 Parliamentary Monitoring Group https://pmg.org.za/committee-meeting/16845.

179 Parliamentary Monitoring Group https://pmg.org.za/committee-meeting/16845

> , strikes and the like. The operator does not, and has never assumed responsibility in these circumstances nor will it have under the change policy.[180]

In his opinion Advocate Joubert A P (3 February 2014)[181], once again concurring with the views expressed by Eiselen, said the following:

> In deciding whether proposed amendments are appropriate and necessary, it should be at the forefront of all considerations that it is the Commissioner for SARS' duty to administer the Act. To this end he should be empowered with statutory provisions enabling him to do his duty properly and efficiently. Business sectors that have raised concerns are aware of the Commissioner's concerns regarding proper administration and control.

Yet after all was said and done, the thrust of parliament concern regarding proper administration and control had not been met. In contrast, all the fears expressed regarding INCOTERMS and the like had been allayed by the Commissioner, and therefore the Committee adopted the Customs Duty Bill, the Customs and Excise Amendment Bill and the Customs Control Bill.

Finally, on 18 October 2013 the final versions of these pieces of legislations were published in the Government Gazette, together with explanatory memoranda. Although the Bills have now been promulgated, they take effect and commence only on an unknown future date to be determined by Presidential Proclamation in the Gazette.[182]

The Customs Duty Act[183] was published in the Government Gazette No 37821 of 10 July 2014 whereas the *CCA* was published in the GG 37862 of 23 July 2014.

180 Parliamentary Monitoring Group 2013 https://pmg.org.za/committee-meeting/16676.

181 Parliamentary Monitoring Group https://pmg.org.za/committee-meeting/16845/

182 Van der Berg 2013(43) *TAXtalk* 39

183 30 of 2014.

184 Coleskey *A comparative study on Customs Tariff classification* 51.

4.5 Conclusion

Coleskey[184] has said (and the author concurs with this) that even if the relevance of older decisions in interpreting the present provisions of the Act is affected by subsequent changes and amendments of customs and excise law, for example Customs value concepts and the interpretation of tariff classification provisions before and after 1 January 1965 (when the present Act came into operation), the main purpose remains to ensure that customs and excise duties are paid on all goods which are brought into the Republic other than goods in transit.

Whilst one is in agreement with the statement that the *Customs Control Act*[185] focusses on processes which most of the above submissions related to, the *Customs Duty Act*,[186] mostly deal with the payment of duties when transacting with SARS. This is a form of acknowledgement of the fact that, regardless of how democratic, advanced and simplified the processes can be made to be, the taxman still has to collect taxes as its mandate in terms of the *South African Revenue Service Act*[187] and in doing so legitimate process not trampling on rights of taxpayers should be complied with by him and his employees.

185 31 of 2014.

186 30 of 2014.

187 34 of 1997.

Chapter 5

5.1 Introduction

The purpose of this chapter is to provide the author's understanding on the new provisions contained in the New Acts and the implication thereof to SARS and its customers. It is also important, however, to note that the New Customs Acts are not operational as yet. There are no authorities or court decisions or precedents attached thereto other than a few articles written thus far. Reliance will therefore be placed chiefly on a comparison of the provisions of the new legislation with that of the old, and the interpretation of the new provisions.

Katze[188] says the following in relation to the commencement of the new legislation:

> It is no secret that the Customs and Excise Act (91 of 1964) (Customs Act) is in its twilight years. It is due to be replaced by a pair of laws assented to in July 2014, the Customs Duty Act (30 of 2014) and the Customs Control Act (31 of 2014) – their commencement dates are yet to be proclaimed. Until then, the Customs Act persists.
>
> One enduring (if not endearing) feature of the Customs Act is its reputation as a complex and cryptic creature. Its provisions are not always clear, it is less than user-friendly, and SARS seems to agree.

As demonstrated in the previous chapters, in particular chapter four, the purpose of the New Acts is to do the contrary of what Katze above has stated. It will not be in the interest of the legislature to say the least to promulgate any piece of legislation in the democratic error that could be viewed unconstitutional and ambiguous.

The discussion in this chapter will focus on scholarly views with regard to these Acts. Some of the views are negative, and some are positive.

188 Keyser and Katzke 2017 17(8) *Without Prejudice* 7.

5.2 Purpose of the new Acts

The objective/purpose for the *Customs Duty Act*[189] is

> To provide for the imposition, assessment, payment and recovery of customs duties on goods imported or exported from the Republic; and for matters incidental thereto.

The objective/purpose of the *CCA* is

> To provide for customs control of all vessels, aircraft, trains, vehicles, goods and persons entering or leaving the Republic; to facilitate the implementation of certain laws levying taxes on goods and of other legislation applicable to such goods and persons; and for matters incidental thereto

The New Acts, unlike the current act, have a preamble outlining the principles upon which they have been enacted, some of which are the following:

> The fact that the current customs legislation has not kept pace with technological advances and does not fully reflect the modern standards of the Revised Kyoto Convention and other related international instruments to which the Republic assented to;
> Whereas there is a need for establishing a new legislative framework for the further development and reform of customs legislation in an open and democratic society and;
> Whereas the mere amendment of current legislation will not achieve the desired result of the modernisation and transformation of customs legislation and the simplification of customs procedures and formalities and;
> Whereas customs procedures and formalities should be efficient, transparent and predictable for carriers, importers, exporters, traders, travellers and other persons involved in or affected by customs procedures and formalities and should not impede legitimate international trade, economic competitiveness and movement of people and goods across national boundaries…[190]

The above statements describe the purposes of the drafting of the New Customs Acts, and already are evident of the new legislation.

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189 30 of 2014.

190 Preamble to *the Customs Control Act* 31 of 2014.

5.3 Issues introduced by the new Acts

5.3.1 Duties of an officer

In terms of the 1964 Act, the duties of the officer as well as the enforcement functions are listed under one section, section 4, whereas the *CCA* separates those functions and powers. Section 11 provides thus:

> A customs officer may exercise powers and must perform duties assigned to customs officer generally by this Act and perform duties delegated or sub delegated in terms of section 19 to customs officers generally or to that customs officer specifically.

The significance of the above issues is that customs officers have powers delegated to them by the *CCA* and the delegation is provided for in terms of section 19.

The issue of the delegation of powers was addressed in detail by the *CCA* than in the *CEA*, where there is a section that specifically outlines what delegation is all about and who are the parties to whom those powers will be delegated. The author is bound to believe that the section 19 delegation is in line with the *Constitution* on delegation of power. This opinion will be justified below with specific reference to what Van Niekerk has argued in his article.[191]

According to him, for an effective, fair, just and equitable tax system to be established, it must be informed by certain fundamental principles if it is to achieve a balance between government interests and taxpayer interests. The power to tax is conferred on the government by the *Constitution.* However, the *Constitution* confers numerous rights on the taxpayer, which serve as substantive limitations of government power to tax. One of those fundamental taxpayer rights is the right to just administrative action. A right without a remedy to enforce it is of no consequence. The executive authority to tax rests in SARS, which is headed by Commissioner of SARS, and empowering legislation confers on SARS, the Commissioner for SARS and other delegated SARS officials the power to take decisions and exercise discretion.[192]

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191 Van Niekerk *Reviewing Administrative action by SARS* 4.

192 Van Niekerk *Reviewing Administrative action by SARS* 62.

The powers conferred by empowering provisions include taking decisions and exercising discretion in their capacity as executive tax authorities. SARS and its delegated officials do not have the authority to create legislation, but government may delegate certain legislative authority to SARS and its delegated officials, and thus SARS may draft regulations for the smooth implementation of the provisions of the Act.

In the current fiscal legislation (although no specific mention is made of the *CEA* or the New Customs Acts), SARS, Commissioner for SARS, senior officials of SARS and other delegated officials of SARS are all directly given certain powers and duties, but Commissioner for SARS still has the authority to confer powers and duties conferred upon it to other specific authorised SARS officials in certain circumstances. The powers of the executive authority must be wide enough to ensure that it can perform its functions and duties, but taxpayers must be protected from an excessive use of the executive authority, which would infringe on taxpayers' fundamental rights. A balance must thus be obtained. The executive authority has wide powers to tax, and taxpayers are then given remedies to protect themselves from an excessive use of the executive authority's power, which would infringe on their fundamental rights. The most well-known taxpayer remedies are objection and appeal, which are automatically available to the taxpayer, as seen in the empowering provisions.[193] The taxpayer's appeal process will be discussed herein below.

In conclusion, with regard to the duties of a customs officer, one would want to draw inferences from the decisions made by various courts as discussed in the chapter above, where precedents were set that triggered the changes introduced in the New Acts, including in the enforcement functions of customs officers.

In the case of *Raymond Wong*[194] the court adopted the following principle:

> The vast power, which the Customs and Excise Act grants to the respondent's officials must be exercised with discretion and liability. The greatest measure of transparency and observance of due administrative process must be allowed as far as possible, and this includes *audi alteram partem*. Upon the facts presented, the applicants should have been given an opportunity to be

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193 Van Niekerk *Reviewing Administrative action by SARS* 63.

194 2003 JOL 11010 (T).

heard and to produce the documentation upon which they rely for their claims that goods were lawfully imported and that necessary duty was paid.

In the *First National Bank*[195] case the principle adopted by the courts was thus;

The two main issues in dispute were firstly whether the administrative collection of customs duty, without court intervention, is permitted by section 34 of the *Constitution*. The other issue that is whether non-compliance with provision of section 34 when applying section 114 of the *CEA* would not encroach on the right to property against individuals and thus encroaching on section 25 of the *Constitution*.

The court therefore held that such deprivation was arbitrary for the purpose of section 25(1) of the *Constitution* and consequently a limitation of the applicant's rights. Furthermore, the object achieved by section 114 was grossly disproportional to the infringement of the owner's property rights, and therefore the implementation of section 114 of *CEA* was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[196]

The court held that section 114 was constitutionally invalid, to the extent that it provided that goods owned by persons other than the person liable to the state for the debts described in the section are subject to a *lien*, detention or sale.

In *Gaertner*[197] the following positions were adopted as a matter of principle. The court ruled that warrantless non-routine or targeted searches are justifiable in respect of pre-entry facilities, licensed warehouses and rebate stores. On the other hand, searches without judicial warrant were not justifiable. The court ruled that there was no justification for dispensing with the requirement of a warrant in cases of the search of unregistered premises in this instance if the premises are not licensed with

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195 2002 4 SA 768 (CC).

196 Section 36 of the *Constitution*.

197 2013 ZACC 38.

SARS, to an extent they may be operating illegally there will not be a need for search warrant.

The court further stated that the relief it intended to grant in respect of the invalidity of sections 4(4) to (6) should be such as to ensure that there was appropriate prospective legislative regulation of SARS' search powers.

In conclusion, the court ruled that the impugned provisions do not draw the distinctions considered necessary between routine and non-routine searches and between designated and non-designated premises; nor do they provide appropriate guidance as to how permissible warrantless searches should be conducted. The impugned provisions could not be brought into satisfactory form by actual or notional severance or by a modest reading-in. The court therefore held that sub-paras (i) and (ii) of section 4(4) and section 4(4)(b), 4(5) and 4(6) must be declared invalid.

5.3.2 *Chapter 33 of the Customs Control Act.*[198]

The issue of searches, which was discussed in the previous chapter in the light of the constitutional court case of *Gaertner*,[199] which led to the amendment of section 4,[200] has resonated in the Customs Control Act. Although some scholars hold the view that view that the provision in the new Act are worse than the current provisions, even after their being amended subsequent the *Gaertner*[201] case.

The South African Revenue Service has the power to conduct searches in order to enforce compliance in premises licensed to keep customs-related goods, as in bonded

198 31 of 2014.

199 2013 3 All SA 159 (WC).

200 *Customs and Excise Act* 91 of 1964.

201 2013 3 All SA 159 (WC).

or manufacturing warehouses.[202] There is an obligation on the Commissioner to take into consideration a taxpayer's constitutional rights. The deliberations will therefore consider customs search prior to the *Tax Administration Law Amendment Act*[203] and after it, as well as the customs search provisions in the *Customs Control Act*.[204]

In the first instance attention should be paid to the provisions of section 195(2)(b) of the *Constitution,* which provides that SARS, which is an entity of public administration, must adhere to the basic values and principles enshrined in the *Constitution.* The values enshrined therein are, amongst others, promoting and maintaining a high standard of professional ethics, and acting in an impartial, fair and unbiased manner. Furthermore, the entity must provide the public with timely, accessible and accurate information.

Sections 709 and 714 make provision for circumstances that compel an officer to obtain a warrant before s/he can again access to premises and conduct a search. The warrant can be issued only by a judge or magistrate, upon application by the Customs Officer. The grounds for such an application should be provided as to why access to the premises is required, and such grounds or circumstances could be given in terms of objective or subjective criteria.[205] The former applies when relating to customs control areas like terminals, container depots or warehouses.

However, section 709(3) provides for an exception where the premises are not those mentioned above, but the owner of the premises consents to the search. The act further provides for instances where the premises are used for business to which the Act applies, and if the public has access to the premises.

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202 Fritz 2016 41(1) *JJS* 19.

203 39 of 2013.

204 31 of 2014.

205 Fritz 2016 41(1) *JJS* 19

According to Basedo[6] the safeguards against an unjustified interference with the right to privacy and other fundamental rights include prior judicial authorisation and an objective standard used is whether there are reasonable grounds to believe based on information obtained under oath that an offence has been or is likely to be committed. He further stated that the articles sought or seized may provide evidence of the commission of the offence; and that the articles are likely to be on the premises to be searched.

In the constitutional court matter of The Investigating Directorate: Serious Economic Offence v Hyundai Motor Distributors (Pty) Ltd[7] The question arising is what criteria should be employed to determine the basis of such grounds. One may infer that for seizure of property on reasonable grounds to be justifiable there should exist an objective set of facts which causes the officer to have the required belief. In the absence of such facts, the reliance on reasonable grounds will be vague.

According to Fritz, whilst it is commendable that judicial intervention is preserved, section 709 of the *CCA* fails to provide the full protection that is envisaged by obtaining a warrant. Section 709 lacks the specific requirements contained in the Customs and Excise Act. Unlike the *CEA*, section 709 does not stipulate that:

(i) the customs officer must on reasonable grounds believe that an offence has been committed;

(ii) a search must likely produce documents that can be used as evidence; and

(iii) the search must be reasonably necessary for the purposes of the Act.

The vagueness of the grounds on which a warrant will be authorised leads to broader powers on the part of SARS. Conversely, taxpayers' rights are more limited owing to this vagueness. It is submitted that this is also contrary to one of the founding principles of the *Constitution*, namely the rule of law.

Fritz[207] has summarised the issues stated above as follows:

> The difference between the provisions of these two pieces of legislation is that CEA deals with a suspicion of an offence being committed and not a breach of CCA or a tax levying act which indicates that a breach relates to more than an offence. This may lead to an extension of what customs officer may reasonably suspect before

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[6] Basdeo 2009 12(4) *PELJ* 314/ 360

[7] 2000(10) BCLR 1079 (CC) 539

> conducting the search and seizure, as it would be not as difficult to reasonably suspect a breach, as it would be to reasonably suspect an offence. Thus, this act expanded the instances when an official can conduct a search without a warrant.

Fritz's contention seem to criticize the *CCA* as being vague only because that section did not specifically list reasons for applying for a warrant. However, his criticism has been remedied in section 715(2), which provides the following:

> A magistrate or judge may issue a warrant referred to in subsection (1) only on written application by the customs authority setting out under oath or affirmation the grounds why it is necessary for a customs officer
> *(a)* To gain access to the relevant area or facility.

The *Customs Control Act*[210] has simplified the cumbersome requirements for obtaining a warrant by not listing them and allowing the applicant to provide them upon application for a warrant to a magistrate or a judge. There is no dispute that the reasonable grounds that are compelling for the issuance of the warrant are still required as the test of whether the Commissioner is acting within the ambit of the Constitution.

In South African jurisprudence, a few other cases elaborate on the search and seizure provisions. Even if they do not specifically relate to the customs environment, they are of great assistance in laying down the guiding principles of what constitutes a lawful act of search and seizure.

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206 Basdeo 2009 12(4) *PELJ* 314.

207 Fritz *An appraisal of selected tax enforcement powers* 105.

The example of one such case is the Constitutional Court case of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd,*[211] where the National Prosecuting Authority was placed under the magnifying glass and court had to consider and pronounce on the constitutionality of the provisions contained in section 29(5) of the *National Prosecuting Authority Act,*[212] which authorises the issuing of warrants of search and seizure for the purposes of a "preparatory investigation."

In this regard Langa DP held that section 29(5) of the *NPA Act* explicitly requires of the judicial officer issuing a warrant to be satisfied that the same object connected to the investigations is on the premises to be searched is indeed on that premises, meaning the officer should have made sure the object is there.

What is critical is that for the right to privacy to be protected, the information on which the reasonable grounds are based, thus authorising a constitutional search, may not itself have been obtained in violation of section 14 of the NPA Act.

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208 91 of 1964.

209 31 of 2014.

210 31 of 2014.

211 2001 1 SA 545.

The other case that laid a precedent on the unconstitutionality of search under certain circumstances in protection of the right to privacy is that of *Magajane v Chairperson, North West Gambling Board*.[213] In this case the point in issue was to challenge the validity of a part of s 65 of the *North West Gambling Act* 2 of 2001 (the NWG Act).

Sections 65(1) and (2) of the NWG Act permitted warrantless searches of premises, whether licensed or unlicensed, if it was suspected that a casino or gambling activities were being conducted at the premises or gambling equipment was located there. In addition, section 65(4) authorised inspectors to make "administrative inspection" to check for compliance with the Act by any applicant, licensee, registrant, subsidiary company or holding company. Section 65(6) to (12) permitted an inspector to obtain an "administrative warrant" from a judicial officer in accordance with the *Criminal Procedure Act*.[214] The Constitutional Court held that section 65 (1) and (2), in providing for inspection without warrant, was an unconstitutional violation of the right to privacy.

The author also reflects on the Competition Commission case of *Portland Cement Company Limited v The Competition Commission*,[215] which also dealt with the validity of search and seizure operations conducted in terms of a warrant issued under section 46 of the *Competition Act*.[216]

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212 32 of 1998 hereinafter referred to as the *NPA Act*.

213 2006 5 SA 250 CC.

214 51 of 1977.

215 2002 ZASCA 63.

In this case, Competition Commission officials in the premises of the first appellant, Pretoria Portland Cement Co Ltd (PPC), and the second appellant, Slagment (Pty) Ltd (Slagment), conducted the search. The warrants were "wrongly issued", as Daniels J applied the wrong criteria, and also because there were in any event no reasonable grounds for believing that prohibited practices had taken place, were taking place, or would take place.

The court held that the search warrants were unlawful because they were overbroad, or because they had conferred a subjective discretion on the inspectors or because their issuance had been based on reasons and grounds for which the Act makes no provision. The search warrants had thus been executed unlawfully because, *inter alia,* (a) the inspectors were complicit in the entry of a SABC television crew onto PPC's premises, where the proceedings were filmed, such entry being unauthorised and contrary to Spoelstra J's order and the terms of s49 (1) of the Act. There was similar complicity in the entry of e-TV at Slagment, (b) the inspectors failed to hand over a copy of the application for the warrant, despite request.

The judge was very vocal and stated the following:

> I take a serious view of the Commission's conduct and am of the view that we must make it clear that we will not allow persons or businesses to be subjected to an abuse of power and must also make it clear to the Commission that it also is subject to the Constitution and the law and must accordingly mend its ways in certain respects. I must emphasise that the facts which I have set out, even the undisputed facts, involve a gross violation to the appellants' rights to privacy under the Constitution and s49 (1) of the Act, and also of the appellants' rights of resort to a court. These are fundamental matters.

Although the above cases do not strictly deal with customs-related cases, they support the argument that there has been consistent disapproval by the courts for searches that infringe on the privacy of people or corporate bodies, in particular where proper process was not followed.

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216 Act 89 of 1998.

The *Customs Control Act*[217] had described the enforcement functions in a whole as against just one section in the Act. This is a developmental step towards the recognition of the Right to Privacy as guaranteed in the Bill of Rights.

5.3.3 Administrative penalties

In Chapter 3, this dissertation discussed issues relating to the imposition of penalties (whether deposits in terms of section 91 or forfeits in terms of section 88(2)(a) of the *Customs and Excise Act*). The issue in question had regard to the Court's decision in the case of *Commissioner for SARS v Formalito,*[218] where Judge Hefer ruled against the Commissioner on the basis that the SARS official deviated from the Customs Offences Penalty Policy of SARS, also called the "Penalty guideline", which provides for penalties to be imposed for the contravention of specific provisions of the *Customs and Excise Act.*[219] The *Customs Control Act*[220] and *Customs Duty Act*[221] have now provided for specific fixed amounts in respect of certain contraventions of the two Acts. Although the Commissioner still has discretion in imposing some legislated penalties, this is no longer an internal policy but the law.

Levendaal's[222] comment regarding the current penalty regime is that it's rather complex and might therefore not improve compliance with customs legislation. According to him and upon examination of foreign customs penalty regimes, their systems appear to be very practical, especially from the perspective of enforcement by the customs officers themselves, as against those regimes (like SA Customs) that are legalistic and make the work of customs officers complicated. According to him, the customs penalty regime has not received the attention it deserves. However, the

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217 31 of 2014.

218 2005 5 SA 526 (SCA).

219 91 of 1964.

220 31 of 2014.

221 30 of 2014.

222 Levendal *A case of customs administrative penalty provision as continued in the Customs and Excise Act 91 of 1964* 17.

promulgation of the *Customs Control Act*,[223] which is more constitutionally complaint, will simplify issues, in particular the application of section 91 of the *Customs and Excise Act.*[224]

A notable development of the New Acts is that the punishment for contravention is more severe than in the past. The punishment has been aligned with that specified in other legislation – in this case, the *Adjustment of Fines Act* 101 of 1991. One thus cannot say that the punishment is too severe or unfair.[225]

It is a feature of South Africa's new customs legislation that it is aligned to international instruments as well as to other South African legislation. The *Customs Control Act* serves as a platform for many other South African acts dealing with imports and exports and the collection of taxes. Chapter 37 of the *Customs Control Act*[226] was recently amended by aligning it with the *Tax Administration Act*.[227]

5.3.4 Voluntary disclosure relief

This is a new provision introduced by the *Customs Control Act*[228] in chapter 13, and the applicable provisions are from section 863 to section 873. The *Customs and Excise Act* does not have this provision at all, despite the fact that it is a very important provision in the tax fraternity.

In the SARS environment, the Voluntary Disclosure Programme (VDP) was introduced in terms of sections 225-233 of the *Tax Administration Act*.[229] The provisions regarding the VDP under the TAA largely curtail SARS's discretion, making the VDP process fairly predictable for a prospective applicant which allows for the applicant to follow the

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223 31 of 2014.

224 91 of 1964.

225 2015 https://www.customstariff.co.za.

226 31 of 2014.

227 2015 https://www.customstariff.co.za.

228 31 of 2014.

229 28 of 2011.

procedure in terms of section 227(f) and meets the requirements in section 227 for a valid voluntary disclosure, and the applicant should be home and dry. The statutorily defined VDP relief cannot be denied because, "despite the provisions of the Tax Act, SARS must" grant the applicable relief (s229).[230]

SARS (Customs) has been talking about the modernisation of its systems for quite some time, and arguing that modernisation refers not only to the manner of processing entries, but also to how it approaches enforcement and the servicing of traders according to their level of compliance. The idea is to achieve a scenario in the long run where traders, who have elected to make application to SARS to follow a voluntary process of assessing their compliance, will ultimately attain some form of superior status, will enjoy a better relationship with and service from customs authorities, and will thereby reduce costs and become more efficient.[231]

The author's conclusion on the above is that there are reciprocal functions between the taxpayer and the customs authority. The former should be wary of abusing the voluntary relief programme, and the same has been seen in many cases from the process Administered by the *Tax Administration Act*[232] where taxpayers provide incorrect information during application to qualify for the relief. On the other hand, the Customs authority should not just grant the relief for statistical purposes even to the point of defrauding taxpayers, without probing deeply into their affairs, as this would render the programme ineffective.

5.3.5 Internal Administrative Appeals

The challenges encountered currently in terms of the *Customs and Excise Act* 91 of 1964 are insurmountable. They include the frustration of the aggrieved person lodging appeals

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230 Sections 225 -233 of the *TAA.*

231 Wood 2012 32 *TAXtalk.*

in terms of Part A of Chapter XA (section 77A-77H), particularly if the internal appeal has been dismissed. The aggrieved party has to lodge an alternative dispute resolution process (Arbitration) although the Commissioner may refuse to participate into such processes. In other words, the available mechanism to do so is an application to the High Court for judicial review under the *PAJA*. Another important consideration in this context pertains to section 96 of the *CEA.* This section states that no legal proceedings may be instituted by a litigant for anything done in pursuance of the Act unless notice is given to the state or to SARS at least one month in advance.[233]

Section 842(1) of the *CCA* in turn specifies the period within which SARS must decide the administrative appeal. The new timeframe is sixty calendar days from the date of the electronic submission or the receipt by the SARS office in question of the appeal; or, if the appeal was initially incomplete, within sixty calendar days from the date on which the complete appeal was electronically submitted or received by the SARS office. SARS may extend the sixty-day period by no more than thirty calendar days, under section 842 (2) of the *CCA*.

However, Part 3 of Chapter 37 of the *CCA* contains a new provision that departs dramatically from the current internal administrative appeal provisions in Chapter XA of the Act. That provision is found in section 842(3), and it reads:

> An appeal must be regarded as having been upheld if the appeal is not decided within the period mentioned in subsection (1) or as extended in terms of subsection (2).

The new provision will, we submit, have a positive, two-fold effect. First, it will put SARS under significant pressure to finalise administrative appeals within the timeframes stipulated by legislation. Currently, the absence of any similar provision in Chapter XA of the *CEA* or the Rules means that SARS is under no such pressure. The only existing option for an aggrieved person in such a situation is to resort to costly High Court litigation under *PAJA* to compel SARS to take the decision, as already noted. Unless a material amount of

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233 Keyser and Katze 2017 17 (8) *Without Prejudice 7.*

duty is involved or SARS' delay has other serious consequences, many appellants will simply accept SARS' delays, without even receiving an explanation.[234]

The other shift from the status quo is that if SARS fails to decide the administrative appeal within the stipulated timeframes, section 842(3) states that the administrative appeal will be regarded as having been upheld. This means that an automatic remedy is built into the provision itself (unlike in the current regime), namely a deemed decision in favour of the appellant. Section 842(3) will thus address the issue identified, in terms of which SARS could effectively ignore the timeframes to decide an internal administrative appeal under Chapter XA without a mechanism under the Act to force it to comply. From that perspective at least, it is to be hoped that the *Customs Control Act* will become effective without much further delay, and that section 842(3) will be retained in its current form.

Lastly and importantly, the *Customs Control Act*[235] introduces section 862, which provides for the competency of the Ombudsman to review and address complaints relating to customs matters. The office of the Ombudsman plays a vital role in the tax administration era, and it was a lacuna in the *Customs and Excise Act* not to include it, despite the fact that the *Tax Administration Act* makes provision for it.

5.4 Conclusion

Although the new Customs Acts are not in effect yet, all the stakeholders are positive that it will be effective in ensuring that trade is facilitated. The other encouraging issue is the extent at which the SARS has taken time to engage with all stakeholders and to address the many concerns raised accordingly. SARS is concurrently engaged in the implementation of some of projects like Licencing and Registration.

The then Commissioner of SARS, Mr Moyane, spelled out a timetable for the implementation of the New Acts.[236] He stated that:

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234 Keyser and Katze 2017 17 (8) *Without Prejudice* 7.

235 31 of 2014.

236 http://www.sars.gov.za /NCAP Document

With amendments to the rules and regulations guiding the new customs acts currently under way, there appears to be growing acceptance of the new legislation, which has been the source of significant industry concern.

He also stated that while compliance with the legislation would be mandatory upon its commencement, SARS would be lenient in enforcing the legislation fully during the initial transitional phase. Now two projects have already gone live, namely the Customs Sufficient Knowledge process (CSK) and the Reporting of Conveyances and Goods project (RCG).[237]

Chapter 6

6.1 Introduction

The birth of a new *Constitution*[238] in Republic the of South Africa with an entrenched Bill of Rights can be viewed as the most important development in South African legal history. In the Constitution basic principles such as its supremacy, democracy and social justice receive the strongest emphasis and recognition.

In order for agents of the state to protect constitutionalism, attention should be paid to ensuring that the state protects its citizens from the unjustified invasion of their right to privacy, dignity and property ownership.[239.] Whilst conceding the fact that constitutionalism is still a fresh and new value to the South African post-apartheid fraternity, one holds the view that it would be futile if the state to act arbitrarily, as this would severely hamper and prejudice the individual personal freedoms in its entirety.

As an organ of the state, SARS therefore has an obligation to ensure that the rights of taxpayers/importers/exporters are protected.

6.2 The issues

The *Customs and Excise Act* 91 of 1964, like most other pieces of legislation, had some of its provisions being the subject of attack, as SARS applied them in a manner inconsistent with the spirit of the *Constitution*. In that regard, after due consideration and reflection the legislature deemed it necessary to consider not only amending the *CEA* in its current form but actually rewriting the *CEA* in its entirety.

It is conceded that the drafters of the *CEA* in its current form could not have envisaged that South Africa would ever become a democratic state. Hence, the most of the provisions disregard the individual rights espoused in the *Constitution*. As discussed in

238 *Constitution of the Republic of South Africa* 1996.

239 Basdeo 2009 12(4) *PELJ* 322.

the previous chapters, in particular in Chapter 3, some provisions were ruled to be unconstitutional by the relevant courts, a fact that triggered the rewriting of the *CEA* instead of further continuous amendment or review.

It is important to mention, however, that the trigger for the rewriting of the new Acts (the *Customs Control Act*[241] and the *Customs Duty Act*[242]) was not only the deficiency of the Custo*ms and Excise Act* to address constitutional issues. The rewrite was also motivated by the desire to align it with the Revised Kyoto Convention (RKC). This protocol aims to simplify and harmonise customs procedures, including modern customs techniques (modernisation). In the light thereof, SARS introduced the modernisation programme meant redress the complex, partially labour-intensive environment with a simplified, automated and cost-effective one. This program was developed in tandem with the draft *Customs Control and Duty* Acts, one aim of which is to bring customs in line with international norms and standards.[243]

However, focus of this dissertation is chiefly on the constitutionality of some sections of the *Customs and Excise Act*[244] in its current form and how the new Customs Acts have addressed those challenges, being those raised mainly by the courts. It is in this light that Devenish[245] contends that the courts have a seminal role to play in the process of transformation occurring in South Africa, particularly regarding the interpretation and application of the justifiable rights encapsulated in chapter 2 of the *Constitution*.

6.3 The impact on the new Acts (Control Act and Duty Act)

In the case of *Wesbank*,[246] which was dealt with in detail in Chapter 4, a *lien* was placed on goods belonging to a third-party credit grantor in terms of section 114 of

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241 31 of 2014.

242 30 of 2014.

243 SARS 2018 https://www.sars.gov.za.

244 91 of 1964

245 Devenish *A Commentary on the South African Bill of Rights* 640.

246 *First National Bank t/a Wesbank v The Commissioner of SARS & the Minister of Finance* 2002 4 SA 768 (CC).

CEA as an effective means of safeguarding the interests of the fiscus in the recovery of duty, in the absence of other security.[247] However, the Commissioner disregarded the fact that property they placed a *lien* on did not belong to the person indebted to SARS, but to an independent entity.

The court adopted the principle that:

> Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. [A]t the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

The issue of placing a lien is dealt with in section 704 of the *Customs Control Act*[248] and in Chapter 3 (Part 4) of the *Customs Duty Act*.[249]

The constitutional attack by the courts in the *Wesbank* case was addressed in this chapter. Under a credit agreement in terms of the *National Credit Act*,[250] the salient issue regarding the placing of a lien on goods belonging to credit grantor is that when the credit provider becomes aware of the attachment, the credit provider can immediately notify the customs authority of the credit agreement and submit to the customs authority the information required. The *Customs and Excise Act,*[251] on the other hand, provides for 14 days to produce proof that the goods are subject to a credit agreement. The provision of the *Customs Duty Act*[252] makes it easier for a credit grantor to recover its goods sooner than after the 14-day period. It is for such reason, amongst others, that the Court held this provision to be unconstitutional. It prejudices the credit grantor.

The other issue in the *Customs and Excise Act*[253] that the *Customs Duty Act*[254] corrected is that it is the credit grantor who is required to show good cause to the Commissioner why he should release the goods belonging to him, which accordingly is unfair to the

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247 Odendaal *The Recent Development of the Customs and Excise Lien* 3.

248 31 of 2014.

249 30 of 2014.

250 34 of 2005.

251 91 of 1964.

252 31 of 2014.

253 91 of 1964.

credit grantor. In terms of the *Customs Duty Act*[255] all that is required from the credit grantor is the production of the agreement, which of course outlines the terms as well as the amount still owing. The *Customs and Excise Act*[256] placed many burdens on the credit grantor as if it were his problem that the Commissioner subjected the goods to a lien.

In the *Gaertner*[257] case the High Court of the Western Cape and subsequently the Constitutional Court were very explicit on the conduct of SARS officials in that they are given far-reaching powers that may include breaking into properties and breaking floors, that may be exercised anywhere at whatever time and in relation to whomsoever with no need for the existence of a reasonable suspicion, irrespective of the type of search.

Pursuant to this judgement, section 4(4) and 4(6) was amended by section 16 of the *Tax Administration Act*[258] to give effect to the issues raised by the courts.

Keulder's[259] analysis of the impact of the decision of the Constitutional court is that SARS's power to search and seize does not exist in isolation. The taxpayer's constitutional rights to privacy, for instance, must be taken into consideration. On the other hand, the taxpayer's right to privacy is not absolute either, but could be limited, provided the limitation is reasonable and justifiable as provided for in section 36, and provided PAJA has been taken into account.[260]

Croome's comments regarding searches were:

> If the commissioner does not treat taxpayers fairly and effective remedies are not available, this will negatively affect taxpayer compliance in the future. Therefore, the Commissioner must strike the correct balance between the rights of taxpayers and

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255 91 of 1964.

256 91 of 1964.

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

258 39 of 2013.

259 Keulder 2015 132(4) *SALJ*819

260 Keulder 2015 132(4) *SALJ822*

> the degree of enforcement action necessary to ensure compliance with the fiscal laws of the country.[261]

The *Customs Control Act*[262] had adequately addressed the concern of the courts in the *Gaetner* case. In the first instance, the *Customs Control Act*[263] makes provision in chapter 33 to deal with enforcement issues, and the search issue is addressed extensively to avoid any further inconsistencies and violations of human rights like those referred to above. The *Customs Control Act*[264] has deviated distinctly from the CEA. This is evident in section 710 (2)(b), where it clearly states that the breaking through of any fence, wall, roof or ceiling, or the breaking open of any door or window should be a last resort when customs officer want to gain access to areas, premises or facilities. There is no doubt that the wording of this section is completely different from the wording in the *Customs and Excise Act*.[265] That in the *Customs Control Act*[266] clearly states that breaking down components of premises should be a last resort.

In regard to the issue of a search without a warrant, that the amendment (reading in) of the sections that were declared unconstitutional rendered the job of writing the New Act easier, as the courts (the High Court and the Constitutional Court) had already aligned the same with the spirit of the *Constitution*.

In *Raymond Cheng*[267] the Commissioner was founds to have not complied with the principles of fairness and the rules of natural justice by not according the importer/exporter the right to present its case and be heard in terms of PAJA when its goods were detained by the Commissioner. The *Customs Control Act* has however adequately addressed the issues relating to detention in terms of section 88 of the *Customs and Excise Act*, as provided for section 760 and 761 of the *Customs Control Act*. Section 760 of the *Customs Control Act* has stipulated the period of detention,

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261 Croome *Taxpayers' Rights in South Africa* 265.

262 31 of 2014.

263 31 of 2014.

264 31 of 2014.

265 91 of 1964.

266 31 of 2014.

267 2003 JOL 11010(T).

whereas section 761 provides for the termination thereof. The main issue the courts considered unconstitutional was the conduct of the customs officer in not granting the owner of the goods any reasons for the detention.

In the case of *Deacon*[268] Horn AJ directed SARS to conduct a full and proper hearing of all the relevant facts and consider the principles of fairness, the rules of natural justice, and taxpayer's right to a hearing. The court set aside the decision to trade the motor vehicle as forfeited, as well as the levying of duties and penalties. The decision of the court in *Deacon* confirms the view that a taxpayer may succeed in setting a decision aside because the Commissioner has failed to comply with the rules of administrative justice.[269]

Section 757 of the *Control Act* introduces the issuing of a notice by a customs authority/officer when detaining goods, which notice will specify the purpose of the detention and identify the goods detained, as well as give the date of such detention. The *Customs and Excise Act* does not provide for such, although SARS has made provision for detention notices in terms of SARS policy.

In *Formalito,*[270] where the Commissioner arbitrarily charged amounts in respect of penalties for the contravention of the Act, the courts again were unsympathetic towards the Commissioner. The courts in this particular case made it clear that as the Commissioner had developed what he termed internal policy on penalties to be imposed against contravention of the Act (a Penalty Guideline), he cannot deviate from its provisions arbitrarily.

Levendal[271] also notes that there are no clear guidelines available in terms of the *Customs and Excise Act*[272] to the transgressor to indicate the possible penalty amount due for a specific breach. This means that only the Commissioner knows the amount.

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268 1999 2 SA 905 (SE).

269 Croome *Taxpayers' Rights in South Africa* 177.

270 2005 5 SA 526 (SCA).

271 Levendal *A case of customs administrative penalty provision as contained in the Customs and Excise Act 91 of 1964* 17.

272 91 of 1964.

The person who will have to pay will not even know how the amount is calculated. The new Acts make sure that such arbitrary action of the Commissioner is curtailed; by ensuring that the amounts of penalties are legislated, and therefore that, the penalties are not arbitrarily imposed. In Chapter 5 the discussion on administrative penalties highlighted the fact that, in the spirit of transparency, the penalties imposed for the contravention of the new customs Acts will be known to everyone as they are part of the legislation. This accord with the principle of transparency.

In Chapter 5, mention was made of the internal administrative process, which is provided for in section 842(3) of the *Customs Control Act.*[273] This section provides that if the Commissioner does not conclude the appeal within the prescribed time (60 calendar days), such an appeal will be considered to have been upheld in favour of the client. The *Customs and Excise Act,*[274] however, is silent on what was to happen if the Commissioner defaulted in taking a decision in respect of an appeal lodged by a client.

Chapter 5 highlights one of the positive developments brought about by the *Customs Control Act*[275] in chapter 38. A Voluntary Disclosure Relief Programme is provided for with the aim to invite clients to apply for relief after having disclosed all their activities contrary to the provisions of the Act. This is another milestone in the customs and excise environment. Although this programme has been introduced by the *Tax Administration Act,*[276] the customs environment also requires such a programme. The main aim of the inclusion thereof in the *Customs Control Act*[277] was the need to be transparent in dealing with clients. This programme has been used by tax authorities internationally and even on this continent, and has brought about harmony in effectively dealing with tax matters in this regard.

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273 31 of 2014.

274 91 of 1964.

275 31 of 2014.

276 28 of 2011.

277 31 of 2014.

The *Customs Control Act*[278] also introduces the office of the Tax Ombudsman, whose main role is to independently address the complaints of taxpayers who have exhausted the redress available through the normal SARS complaints mechanism. The Tax Ombudsman office exists to ensure the provision of administrative justice by being a check on the exercise of authority by SARS. Once again, this provision is not included in the *CEA.* The office facilitates access to justice in South Africa and contributes to a culture of respect for the tax system and for taxpayer rights. The annual Report of the Tax Ombudsman recorded that only six cases that were reported to his office on customs-related issues.[279] It is my view that the cause for the low number of cases reported is that the office was not legislated in the then customs legislation. The *Customs Control Act* has since made provisions for such.

6.4 Conclusion

As stated above, this work has focussed on only those sections of the legislation that were declared to be inconsistent with the constitution, but one should be upfront and state that the new Acts, upon their implementation, will change the customs practice and introduce high standards.

The situation as it is , is that the new Acts are not in force as yet, and the important issue that is facing the Commissioner is to administer the CEA at its current state, particularly where there some provisions that could not pass constitutional scrutiny. Given that not all sections that were declared to be inconsistent with the spirit of the Constitution have not been amended, it will incumbent upon the him to approach the legislature to expedite the effective date of operation of the new Acts. In the alternative, the Commissioner should then approach the constitutional court directive (write in) of some sections as guidance in the meantime.

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278 31 of 2014.

279 Office of the Tax Ombuds *Annual Report* 2017/2018.

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