

## “Clean hands” – Is this or a similar concept used by the courts to determine a taxpayer’s right to just administrative action?<sup>1</sup>

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### A B S T R A C T

Virtually no battles have been won by taxpayers who have challenged fiscal legislation on the grounds that it breaches a fundamental right, as contained in the Bill of Rights in the Constitution (Constitution of the Republic of South Africa, 108 of 1996). On the other hand, taxpayers have won significant victories when challenging administrative decisions by the South African Revenue Service (SARS) (as distinct from challenging the underlying legislation) where one or more fundamental rights of the taxpayer have been violated. The objective of this article is to analyse, document and evaluate whether the South African courts, either impliedly or implicitly, apply the concept of “clean hands” or something similar when adjudicating a taxpayer’s application for relief from the administrative decisions, actions or conduct of SARS (in terms of section 33 of the Constitution) as a result of certain so-called draconian provisions contained in the Tax Administration Act (28 of 2011) being enforced. The conclusion reached is that, although the concept of “clean hands” has not been formally expressed as applying to taxation matters (as has been the case in the law of contract and labour law), the courts impliedly use the “clean hands” concept as a relevant factor to consider in tax matters, where a person’s fundamental rights generally, and the right to just administrative action specifically, have been infringed.

**Key words:** Bill of Rights, Constitution, clean hands, due legal process, Income Tax Act, Promotion of Administrative Justice Act, right to just administrative action, Tax Administration Act, taxpayers’ rights

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## Introduction

There is an old legal adage along the lines that if the facts are on your side, pound the facts into the table and if the law is on your side, pound the law into the table, but where neither the facts nor the law is on your side, pound the table (Quote Investigator 2012). This adage rings true in any legal action, including when taxpayers challenge administrative decisions made by the South African Revenue Service (SARS). SARS has a wide range of powers at its disposal. Amongst these, are search and seizure provisions, as previously contained in section 74D of the Income Tax Act (58 of 1962) (see *Haynes v CIR* (64 SATC 321; 2000 (6) BCLR 596 (Tk)) and the confiscation of property in terms of sections 87 and 88 of the Customs and Excise Act (91 of 1964) (*Deacon v Controller of Customs and Excise* (1999 (6) BCLR 637 (SE))), which are referred to by the courts as draconian in nature. With the power to assess, obtain information and collect taxes, it is not surprising that no other public institution interferes more in the private affairs of individuals than SARS.

Many provisions of the Income Tax Act (58 of 1962) and the Tax Administration Act (28 of 2011) authorise, *prima facie*, interference with an individual's fundamental rights as protected by sections 7 to 39 (the "Bill of Rights") of the Constitution of the Republic of South Africa (108 of 1996) ("the Constitution"). Legislation permitting SARS to gather certain information by way of tax audits, inquiries and search and seizure procedures seems to contradict the right to privacy (section 14 of the Constitution) and the right to human dignity (section 10 of the Constitution). Legislation differentiating or discriminating between taxpayers may be interpreted as infringing on the right to equality (*Harksen v Lane NO and Others* (1997(11) BCLR 1489 (CC); *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) and section 9 of the Constitution). Where the actions, decisions or conduct of SARS officials appear to be unreasonable or irrational, they may be challenged on the basis that they violate the right to just administrative action (section 33 of the Constitution).

Legislation that appears to infringe on a person's fundamental rights may, however, not necessarily be unconstitutional, since fundamental rights may be limited or restricted in terms of section 36 of the Constitution which provides that:

*The rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.*

The section 36 'limitation of rights' clause presents a major obstacle for taxpayers, should they wish to successfully challenge legislation that violates one or more of their fundamental rights as contained in sections 7 to 39 of the Constitution. This is

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because any legislation (including fiscal), even if perceived as draconian in nature, can pass the section 36 ‘limitation of rights’ clause on the basis that it is “reasonable and justifiable in an open and democratic society”. The search and seizure provisions of the now-repealed section 74D of the Income Tax Act (58 of 1962) (these provisions are now contained in sections 59 to 62 of the Tax Administration Act (28 of 2011)), were for example found to pass constitutional muster on this basis (*Investigating Directorate: SEO v Hyundai Motor Distributors* (2001(1) SA 545 (CC))). Even the so-called pay-now-argue-later principle, as previously embodied in sections 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act (Act No. 89 of 1991) (now contained in sections 164 and 169 of the Tax Administration Act (28 of 2011)), was found by the Constitutional Court to be in accord with the underlying values of the Constitution (*Metcash Trading Ltd v C:SARS* (63 SATC 13; 2001 (1) BCLR 1 (CC))). So too were the provisions whereby SARS can appoint a third party (agent) to collect taxes on its behalf (section 99 of the Income Tax Act, 58 of 1962) and now contained in section 156 of the Tax Administration Act (28 of 2011) (*Hindry v Nedcor Bank Ltd and Another* (61 SATC 163; 1999(2) SA 757(W))).

There are, however, two notable exceptions in fiscal litigation where the legislation has been found to be unconstitutional, namely *First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471; 2002 (7) BCLR 702 (CC)) and *Gaertner and Others v Minister of Finance and Others* (76 SATC 69; 2014 (1) BCLR 38 (CC)). In the case of the former, a provision (section 114) of the Customs and Excise Act (91 of 1964) was found to have violated the right of the taxpayer not to be arbitrarily deprived of his or her property. The seizure legislation was found to be neither “reasonable” nor “justifiable in an open and democratic society”, and thus the section 36 ‘limitation of rights’ clause could not save it. In the latter case, the legislation, as it stood on 30 May 2012 when the warrantless search of the taxpayer’s property took place, was found to be unconstitutional as it violated the taxpayer’s right to privacy.

On the other hand, taxpayers have had greater success in litigation against SARS where arguments were brought on the grounds of constitutional rights pertaining to the administrative decision-making process or conduct of SARS in enforcing fiscal legislation. These victories were achieved on the basis that section 36 (the “limitation of rights” clause) applies only to a “law of general application” and not to the conduct or decision-making process of an administrative official. Accordingly, where the decisions, actions or conduct of SARS officials – whilst assessing, obtaining information, calculating taxes payable in terms of an assessment or even collecting taxes – go beyond the threshold of constitutional behaviour, such behaviour is not sanctioned by the “limitation of rights” clause (*Premier Mpumalanga v Executive*

*Committee of the Association of the Governing Bodies of State-Aided Schools, Eastern Transvaal* (1999(2) SA 91 (CC)).

Section 6(2) of the Promotion of Administrative Justice Act (3 of 2000) sets out the circumstances in terms of which any administrative action or conduct of an official (including any official of SARS) may be judicially challenged by an aggrieved person, including a taxpayer. The onus is initially on the taxpayer to prove, *prima facie*, that any decision, action or conduct on the part of SARS is biased, unfair, based on an error of law, made in bad faith, arbitrary, capricious, unreasonable, unconstitutional or unlawful (see section 6(1) of the Promotion of Administrative Justice Act (3 of 2000)). Conduct, actions or decisions that fall within the meaning of any of these words *prima facie* violates the right to just administrative action (section 33 of the Constitution). The onus then shifts to SARS to rebut the *prima facie* proof.

Whenever a taxpayer approaches the court for relief relating to the decisions, actions or conduct of SARS, it is submitted that, based on the research done for this article, he or she should come to court with “clean hands”. This concept is equally applicable to SARS if it is to rebut the taxpayer’s application. The concept of “clean hands” is based on the English decision in *Tinsley v Milligan* ([1994] 1 A.C. 340 at 357) where Lord Goff of Chieveley stated that “the claimant must fail because he has not come to the court with clean hands”.

## Objective, research method followed and overview of the article

Croome (2010) is one of the few South African authors to have written in-depth on taxpayers’ rights in general. Also, not many local authors have attempted to evaluate taxpayers’ rights specifically in relation to the principle of approaching the court with “clean hands” when challenging the actions, decisions and conduct of SARS in terms of section 33 of the Constitution.

The objective of this article is to analyse, document and evaluate whether the South African courts, either impliedly or implicitly, apply the English concept of “clean hands” or a similar concept, when hearing a taxpayer’s application for relief from the administrative decisions, actions or conduct of SARS. However, the research in regard to the “clean hands” concept is limited to the powers of SARS to apply certain so-called draconian provisions contained in the Tax Administration Act (28 of 2011).

The research method adopted is a critical textual analysis of the relevant literature contained in provisions of the Income Tax Act (58 of 1962), the Tax Administration Act (28 of 2011), the Constitution and other relevant legislation in conjunction with reported judicial decisions, published articles and textbooks related to the objective.

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Since the title and objective of this article are based on the concept of “clean hands”, the next sub-heading will attempt to explain and discuss this concept generally, along with its possible application in the South African context. The discussion should also dispel the old adage that “there is no equity about a tax” (*Cape Brandy Syndicate v IRC*, (1921(1) KB 64 at 71)).

Thereafter, a practical illustration is given of the difference between a “law of general application” and the “conduct” of a government official. This aspect is important because, as already explained, the section 36 “limitation of rights” clause only applies to the interpretation of legislation. It does not apply to the decisions, actions and conduct of SARS.

Another vital aspect of the right to just administrative action, which is also discussed, is the meaning of the concept of “reasonableness” and the role it plays in determining whether the taxpayer's section 33 right to ‘just administrative action’ has been infringed on.

The conduct of SARS officials in obtaining and carrying out a search and seizure operation, enforcing pay-now-argue-later legislation, appointing agents to collect taxes, freezing bank accounts and applying for preservation orders – powers now contained in the Tax Administration Act (28 of 2011) – are considered, analysed and evaluated against the guiding concept of “clean hands”. The legitimate expectation doctrine is also briefly discussed in the context of the right to just administrative action and the “clean hands” concept.

Finally, possible remedies available to a taxpayer when there has been a violation of the right to just administrative action are considered.

The Tax Administration Act (28 of 2011), effective from 1 October 2012, incorporates and consolidates administrative provisions originally included in the Income Tax Act (58 of 1962) and other fiscal legislation. The administrative provisions contained in the Tax Administration Act (28 of 2011) discussed in this article were lifted, virtually *verbatim*, from the Income Tax Act (58 of 1962) and the Value-Added Tax Act (89 of 1991). Thus, most of the case law decided prior to the introduction of the Tax Administration Act (28 of 2011) and relating to administrative decisions and actions by SARS, is still applicable today when interpreting the relevant provisions of the Tax Administration Act (28 of 2011).

### The concept of “clean hands” and dispelling the notion that there is “no equity about a tax”

When Lord Goff stated in *Tinsley v Milligan* ([1994] 1 A.C. 340 at 357) that “the claimant must fail because he has not come to the court with clean hands”, he was

restating the old English adage that the claimant had “not come to equity with clean hands” (*Groves v. Groves* (82 N.W.2d 124 (1957)) and *Tinker v. Tinker* ([1970] 1 All ER 540)).

South Africa recognises a similar concept. The Supreme Court of Appeal in *Klokoow v Sullivan* ([2005] JOL 15611 (SCA) at 6 of 15611) stated in this regard: “The ‘clean hands doctrine’ derived from English law, is similar in effect to the Roman law maxim *in pari delicto potior est conditio defendentis*.” The court explained that the doctrine originally operated as an absolute bar to the granting of relief to a plaintiff who does not come to court with “clean hands”, yet wishes to extricate him or herself from the consequences of an illegal or immoral contract. Nevertheless, the court held (at 9 of 15611) that while courts should discourage illegal transactions, strict enforcement of the rule may sometimes cause inequitable results, for example, where unjust enrichment is involved. Thus, to prevent inequities, the rule must be relaxed where it is necessary to prevent injustice or promote public policy (also at 9 of 15611).

It is interesting that the court did not refer to the fact that the doctrine may only have applicability when there has been legal wrongdoing. A discussion of the meaning of a legal wrongdoing is beyond the scope of this article, other than to mention that the line between a weak argument and a legal wrongdoing may be fine. The question that may be asked in this regard is: Is it not a legal wrongdoing for SARS to approach a court, for example, for a warrant to search a taxpayer’s house and thus violate his right to privacy knowing that there is no evidence to support the allegation of non-compliance with the Income Tax Act (58 of 1962)? This aspect is further addressed when dealing with search and seizure warrants generally, and discussing the case of *Ferucci and Others v C:SARS and Another* (65 SATC 470; 2002 (6) SA 219 (CPD)) specifically.

Prior to the *Klokoow* (*supra*) decision, in *Numsa & Others v Henred Fruehauf Trailers (Pty) Ltd* ([1995] 2 BLLR 1 (AD)), the employees of a company applied to be reinstated after being fired from their jobs. The Appellate Division found that the employees had embarked on a strike that was not based on a legitimate grievance. Nevertheless, in spite of their “unclean hands”, the court observed that the illegal strike did not mean that the employees were automatically barred from claiming reinstatement. On the other hand, the court found that the employer was not guilty of prior unfair conduct towards the employees, which had to be balanced against the fact that the employees had embarked on an illegal strike. The court relied on the words of Goldstone JA in *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* (1994(2) SA 204(A) at 219 E) who said that “the concept of unclean hands is relevant only to the extent that the conduct of the

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parties must be considered when deciding upon appropriate relief”. The court found that the employees were not entitled to any relief or reinstatement.

In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (2006 (8) BCLR 971 (E)), the court found that the applicant employees had displayed a lack of respect for the Constitution and its democratic processes and institutions, but ironically had relied on the self-same Constitution when their lawless conduct brought about their dismissal. The court specifically referred to the fact that the applicants' hands were not “clean” (at 977) but nevertheless granted the application for reinstatement because the Constitution was supreme and its fundamental rights protect everyone, “even the basest of individuals, from the abuse of governmental power” (also at 977). The court also referred to the fact that the employer had acted with complete disregard for the disciplinary code and procedure that it was bound to apply. The employer displayed a cynical disregard for the Constitution and the law, similar to that displayed by the employees. The court, in spite of holding in favour of the employees, showed its displeasure by denying them the costs that would normally have followed a successful application.

Although all the cases discussed in this sub-heading deal with labour and contract law, a fairly similar concept governs the law of succession, namely the principle of *de bloedige hand neemt geen erfenis* (*Makhanya v Minister of Finance and Others* ([1997] JOL 1222 (D))), where a person who murders the testator (or literally translated has “blood” on his or her hands) is barred from inheriting from the deceased.

None of the cases discussed in this sub-paragraph are tax related, but the principle relating to “clean hands” in its modified South African form – as opposed to the strict manner in which the principle was applied in English law (*Tinsley v Milligan* (*supra*)) – is based on fairness and equity to both parties and, it is submitted, complements the underlying values of the Constitution.

The question that arises, however, is whether the “clean hands” doctrine extends to tax-related matters.

Prior to the adoption of the new constitutional order in South Africa in 1994, there was the oft-quoted mantra that there is “no equity about a tax” (*Cape Brandy Syndicate v IRC* (1921(1) KB 64 at 71)). In *CIR v Simpson* ((16 SATC 268 at 285; 1949 (4) SA 678(A))) and *CIR v Frankel* ((16 SATC 251 at 256; 1949 (3) SA 733(A))) the Appellate Division in both cases approved this notion. Thus, the impression was created that fiscal legislation should be interpreted differently from other legislation – applying the strict and literal rule in the interpretation of statutes as opposed to, for example, attempting to establish the purpose of the legislation (the purposive approach to interpreting statutes). This mantra was only relevant in the interpretation of fiscal legislation. It never applied to the use of the many discretionary powers

available to SARS prior to 1994 and how SARS used such discretionary powers. Provided no *mala fides* was involved, and that SARS had applied its mind to the exercise of its discretion, any such discretion could not be overturned by a court unless it was subject to objection and appeal. This was the case even if SARS exercised its discretion unreasonably (see *KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk* ((58 SATC 273; 1996 (4) SA 58 (A)), discussed later in this article).

In view of the fact that the interpretation of statutes is beyond the scope of this article, no further discussion is considered appropriate, other than to add that in *Du Plessis and Others v De Klerk and Another* (1996(5) BCLR 658(CC) at 722), the Constitutional Court stated that constitutional interpretation is concerned with the recognition and application of constitutional issues, not with the literal meaning of legislation (see also Davis, 1994: 103; Du Plessis & De Ville, 1993: 199 & 356 in this regard). It is submitted that in the light of the *Du Plessis* judgement, the notion that there can be ‘no equity in a tax’ in the interpretation of statutes has been dispelled forever (see also Goldswain (2008) for further discussion on the purposive approach to interpreting fiscal legislation).

In conclusion, it may be said that the quote “there is no equity in a tax” is no longer relevant and, as will be evident from the discussions that follow, is also not applicable when evaluating whether SARS has violated a taxpayer’s ‘right to just administrative action’.

### Difference between “law of general application” and “conduct”

The decision in *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) is an example of how important it is to understand the distinction between a “law of general application” and the “conduct” of a government official. In *Walker*’s case, the City Council was accused of unfairly imposing high levies for municipal services on certain residents in a formerly advantaged (white) suburb of Pretoria. A further complaint was that the municipality not only attempted to collect high levies from this community, but made a conscious decision not to recover levies (albeit at a much lower rate) from residents perceived by the municipality to belong to formerly disadvantaged communities. Thus, two constitutional issues were at stake, namely

- whether the legislation that imposed higher service levies on the so-called formerly advantaged community constituted a violation of their right to equality; and/or
- whether the “conduct” of the Council’s officials, in only collecting levies from the so-called formerly advantaged community, violated their right to equality.



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Since the first question deals entirely with the constitutionality of the perceived unfair discriminatory legislation, and not with the conduct of the Council's officials in enforcing the legislation, a discussion of the reasoning behind the court's decision that the legislation was not unfair or unequal – and thus constitutional – is beyond the scope of this article.

Regarding the second issue raised in the *Walker* case, namely the decision not to collect levies from formerly disadvantaged communities, the court held that the Council's selective enforcement policy (its conduct) for the recovery of debt solely from so-called formerly advantaged communities amounted to unfair discrimination. As the conduct of the Council's officials (as distinct from the charging legislation) was questioned, the section 36 limitation of rights clause could not be invoked as justification. All that needed to be examined was whether the taxpayer's right to equality was violated by the conduct of the Council's officials – which the court held had indeed occurred. The decision, however, was a bittersweet victory for the residents, as the court also found that they had sought the wrong relief and should rather have applied for a *mandamus* (declaration of rights) to ensure that the Council first put its house in order and eliminate unfair discrimination by collecting levies in arrears from disadvantaged communities.

Although the applicant obtained no effective relief from the judgement because the wrong order was sought, it is submitted that the decision alerted the Council to its constitutional obligations. It is presumed, in light of the decision of the court, that the Council remedied the situation as there is no record that the residents made a further court application to enforce their rights to equality or just administrative action.

### **The interaction between the right to just administrative action and the concept of “reasonableness”**

Section 33(1) of the Constitution provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. Section 33(2) provides that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons”. Section 33(3) requires that “National legislation must be enacted to give effect to these rights ...”. The Promotion of Administrative Justice Act (3 of 2000), promulgated to give effect to section 33(3) of the Constitution, sets out the scope and ambit of the right to just administrative action.

It is clear from the Promotion of Administrative Justice Act (3 of 2000) that, generally, most decisions made by SARS in terms of the Income Tax Act (58 of 1962) or other fiscal legislation can be considered “administrative actions”. This

includes the decision to search a taxpayer's premises, apply general anti-tax avoidance regulations as well as the power to disallow a deduction, raise an assessment and even impose penalties on a taxpayer. Most decisions made by SARS may not be immediately challenged in terms of the Promotion of Administrative Justice Act (3 of 2000). Where the Income Tax Act (58 of 1962) or the Tax Administration Act (28 of 2011) provides for an objection and appeal process in respect of a decision made by SARS, such internal procedure must first be exhausted before any application challenging such decision is made under the Promotion of Administrative Justice Act (3 of 2000) (see *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another* ((66 SATC 241; 2004 (3) SA 65 (WLD))). Nevertheless, in any decision, action or conduct by SARS that is challenged by a taxpayer through the objection and appeal procedures of either the Income Tax Act (58 of 1962) or the Tax Administration Act (28 of 2011), a court must take into account the taxpayer's right to just administrative action. Since the Promotion of Administrative Justice Act (3 of 2000) was specifically enacted to give effect to the section 33 right to just administrative action, it is only logical that the courts look to section 6(1) of that Act to determine which decisions, actions and conduct of SARS are unlawful and thus unconstitutional. For example, section 6(1) includes within its ambit of unlawfulness, decisions, actions and conduct that are biased, unfair, made in bad faith, arbitrary, capricious or unreasonable. "Unreasonable", it is submitted, embodies the meaning of all the other words used in section 6(1) to describe unconstitutional conduct and is thus a core element in determining whether the decisions, actions or conduct of SARS violate the right to just administrative action.

A good example of when a decision by SARS is regarded as unreasonable, is *KBI v Geïnsolideerde Sentrale Ondernemingsgroep (Edms) Bpk* (58 SATC 273; 1996 (4) SA 58 (A)). In that case, decided before the coming into force of the Constitution, the taxpayer requested a review of the decision of the Commissioner to disallow the depreciation of its stock value by five per cent for the 1987 year of assessment. Unfortunately, the taxpayer had not specifically informed the Commissioner in its return that it had depreciated its stock value as it was obliged to do in terms of section 22(1)(a) of the Income Tax Act (58 of 1962). Because of the 'non-disclosure', the Commissioner decided to disallow the write-down of the stock and imposed "additional tax" (a 50% penalty) in terms of section 76 of the Income Tax Act (58 of 1962), despite conceding that the taxpayer's failure to disclose the depreciation was not an attempt to evade taxation.

The Commissioner argued that the Tax Court was not competent to consider his decision to disallow the depreciation of the stock value, because section 22(1)(a) did not specifically provide for his decision to be subject to objection and appeal. The

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Commissioner also argued that as he had only imposed additional tax of 50%, it indicated that he had properly exercised his discretion in terms of section 76 and that there were accordingly no grounds on which the Tax Court could interfere with his decision.

The Appellate Division made it clear that two separate discretions were exercised: one in terms of section 22(1)(a) (depreciation of stock value) and the other in terms of section 76 (imposition of additional tax). The former was not subject to objection and appeal but was subject to a formal review process, while the latter was subject to objection and appeal. Where the taxpayer is entitled to object and appeal against a decision of the Commissioner, the Tax Court is empowered to replace the decision by the Commissioner with its “own, original discretion” (see *CIR v Da Costa* (47 SATC 87; 1985 (3) SA 768 (A))).

There was no evidence that the taxpayer intended to evade paying tax, as conceded by the Commissioner. In effect, the taxpayer had “clean hands”. The Tax Court held that the Commissioner had unreasonably exercised his discretion by disallowing the depreciation of the stock value, but noted that unreasonableness, on its own, was not one of the grounds on which the Commissioner’s discretion could be overturned at that time. However, the Tax Court found in favour of the taxpayer regarding the additional tax imposed and remitted it, *in toto*, based on the underlying unreasonableness of the Commissioner’s decision not to permit the depreciation, even with all the facts in his possession. On appeal, the Appellate Division confirmed that the reasoning of the Tax Court was sound.

It is submitted that this decision would now have a happy ending for the taxpayer as unreasonableness on the part of SARS, when exercising discretionary and other similar powers, is now regarded as unconstitutional conduct (section 6(1) of the Promotion of Administration Justice Act (3 of 2000)). However, such a challenge should first follow internal processes, such as objection, appeal and review (see also *Deacon v Controller of Customs and Excise* (61 SATC 275)).

Unreasonable decisions, actions and conduct on the part of SARS not only violate the right to just administrative action but could (for example when conducting a search and seizure) infringe on a taxpayer’s right to privacy (section 14 of the Constitution). Thus, the interaction and scope of these two rights need further discussion in relation to the powers of SARS to institute and conduct search and seizure procedures.

#### ***Search and seizure procedures – violation of the right to privacy and just administrative action***

There is a 17<sup>th</sup>-century saying that “an Englishman’s home is his castle”. A cynic may add that that is what he believes when he pays taxes on it, or that it is no

longer his castle if it can be invaded with impunity by the State. South Africa has a very similar common law precept, which is now embodied in section 14 of the Constitution. It guarantees a person the right to privacy and specifically includes the right not to have his or her person or property searched, his or her possessions seized, or the privacy of his or her communications infringed on. Nevertheless, the search and seizure provisions as previously contained in the Income Tax Act (58 of 1962) (section 74D) (until 30 September 2012) and now embodied in sections 59–66 of the Tax Administration Act (28 of 2011) (effective from 1 October 2012) have been found to be a reasonable and justifiable limitation (as envisaged in section 36 of the Constitution) of a person's right to privacy (*Investigating Directorate: SEO v Hyundai Motor Distributors* (2001(1) SA 545 (CC)) except where a search without a warrant was conducted under section 74D of the Income Tax Act (58 of 1962) (*Gaertner and Others v Minister of Finance and Others* (76 SATC 69; 2014 (1) BCLR 38 (CC))).

The search and seizure provisions (both in terms of section 74D of the Income Tax Act (58 of 1962) and sections 59–66 of the Tax Administration Act (28 of 2011)) contain specific safeguards to protect the taxpayer against the invasion of privacy, but in *Deutschmann NO and Others v C:SARS; Shelton v C:SARS* (62 SATC 191; 2000 JTLR 49), an Eastern Cape Division decision, these safeguards appear to have been very liberally interpreted by the court in favour of SARS. Since the allegations and facts in both cases were almost identical, the court dealt with both taxpayers' applications in the same judgement.

Both applicant taxpayers attacked the granting of warrants for the search and seizure of their business premises and even their private homes on the basis that SARS used material inaccuracies and hearsay allegations to obtain the warrant. Thus, they contended that their constitutional right to privacy as well as their right to property had been violated as a result of the search and seizure warrant being granted. The court held that the right to privacy has been defined by the Constitutional Court in *Bernstein and Others v Bester and Others* NO (1996 (2) SA 751 (CC) at 789B) and that the concept of privacy does not extend to include the premises where business activities are carried out. As regards the right to property, the court held that the warrant did not permit arbitrary deprivation. The individual remains free to establish his entitlement and claim delivery of his property. Accordingly, relying on the Constitution was misplaced.

The search and seizure warrant, in *Deutschmann's* case, was only carried out after a period of three months had elapsed. The court held that the lengthy delay in executing the warrant did not impact on the validity of the warrant as no prejudice to the taxpayers had been shown by SARS. Although agreeing with the taxpayers'

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contention that the seizure of the documents and information inevitably impacted on the proper running of their businesses, the court held that that did not mean that the prejudice suffered as a result of the search and seizure made the warrant defective.

The court set out the requirements of section 74D(4) of the Income Tax Act (58 of 1962), as follows: that the warrant should refer to the alleged non-compliance or offence in relation to which it is issued; should identify the premises to be searched; should identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and to be reasonably specific as to any information, documents or things to be searched for and seized.

In the affidavit seeking the warrant, SARS alleged that Deutschmann, who had by then passed away, had not submitted returns in respect of the tax years 1994 and 1995. The taxpayer's representative disputed the allegation and alleged that SARS had lost the returns submitted. When they were re-submitted by the taxpayer, SARS contended that they were incomplete, arguing that the asset to income (capital) reconciliation calculation performed in respect of the available capital and income figures revealed an unexplained shortfall in income of R241 583 for the tax year 1994 and unexplained capital erosion in the sum of R1 487 061 for 1995. This, according to SARS, confirmed a failure to disclose income for the year 1994 and capital erosion in 1995. The court held that the affidavit by SARS setting out the alleged non-compliance – non disclosure of income in this case– as required by section 74D(4) (a), had been met.

In regard to the Shelton matter, the court found that the figures supplied by the applicant in his income tax returns strongly suggested an under-disclosure of net asset worth. When questioned, the applicant's response was extremely “coy” and he failed to address the issue. The court held that there were sufficient averments by SARS as to the allegation of non-compliance as required by section 74D(4)(a) for the warrant to be valid in this respect.

Both taxpayers alleged that the warrant issued did not comply with the terms of s 74D(4)(d), being couched in general terms and not specific about the nature of the information or documents to be searched for and seized. The court held, in both cases, that the requirement that the information and documents to be searched for and seized had to be “reasonably specific”, had been met. The court further held that section 74D contains no provision which requires or suggests that documentation to be searched for and seized should be limited to documentation belonging exclusively to the taxpayer or liable person. The basis for the decision was that the legislature contemplated that documents belonging to or relating to entities or persons other than the taxpayer could be searched for and seized within the ambit of a warrant issued in terms of section 74D of the Income Tax Act (58 of 1962) (at 202). In effect,

it is submitted that this ruling meant that the search and seizure warrant could be interpreted as permitting SARS to search and seize, for example, the computers of the taxpayer's wife and even his children.

The court specifically found that there was no bad faith and improper conduct on the part of SARS, but in so stating it is submitted that the court implied that the taxpayers had "unclean hands". After all, the court did make a finding that there was an unexplained increase in both taxpayers' capital reconciliation accounts, which indicated the non-disclosure of income. Accordingly, the court held that the taxpayers had failed to establish that the warrant was improperly sought and obtained.

It is submitted that owing to the perceived "unclean hands" of the taxpayers, the court liberally and widely interpreted the requirements for a valid search warrant issued in terms of section 74D of the Income Tax Act (58 of 1962). This submission seems to be supported by three related cases that followed on the *Deutschmann* decision, which held that the requirements to obtain a valid search and seizure warrant in terms of section 74D of the Income Tax Act (58 of 1962) (now sections 59–66 of the Tax Administration Act (28 of 2011)) by SARS should be strictly adhered to when an application is made (see *Haynes v CIR* (64 SATC 321; 2000 (6) BCLR 596 (Tk)); *Ferucci and Others v C:SARS and Another* (65 SATC 47; 2002 (6) SA 219 (CPD)) and *Minister for Safety and Security v Van der Merwe and Others* ([2011] ZACC 19 (CC))).

Perhaps the distinguishing feature in the three cases is the perception that the taxpayers all had "clean hands". In *Ferucci's* case, following a virtually identical decision to that in the *Haynes'* case, the court held that not only must the requirements of the search and seizure provisions be strictly adhered to, but that from a constitutional point of view, SARS had to make out a cogent case why it required a search to be conducted at the relevant premises. The judge issuing the warrant should have considered whether one of the less drastic mechanisms contained in the Income Tax Act (58 of 1962) could have been utilised instead. SARS, for example, could have requested information, documents or things to be supplied to it in terms of section 74A of the Income Tax Act (58 of 1962). Failing that, its officials could have visited the taxpayer's premises and requested his consent to examine any documents or things in terms of section 74B or even called for a board of inquiry to be established in terms of section 74C, and for the taxpayer to attend the inquiry and answer any questions put to him or her. Only after exploring such avenues should SARS have brought an application for a search and seizure warrant. As these alternative procedures had not even been canvassed, and because the warrant was flawed in other respects (the offences were not stipulated and no proper parameters/guidance as to the documents to be seized were given), the court held that the warrants of search and seizure had to

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be set aside and that all information, documents or objects seized by SARS pursuant to the warrant were to be returned to the taxpayer.

A further interesting aspect of the decision in the *Ferucci* matter was the lack of facts on which SARS attempted to build its case and muddy the waters to support its application for the warrant. In the affidavit SARS filed it made speculative averments – because the taxpayer was in arrears with its regional services levies, it was the experience of SARS that such taxpayers were often associated with income tax fraud – to motivate the application for the search and seizure warrant. Speculative averments are not facts. SARS presented a very weak case that the court recognised, and it was inevitable that it would suffer the consequences. Its application, in effect, amounted to a “fishing expedition” and SARS should have been aware that the court would disapprove (*Welz and Another v Hall and Others* (59 SATC 49; 1996 (4) SA 1073(C))).

It is submitted that the weak case presented by SARS was akin to a legal wrongdoing. After all, SARS was trying to infringe on the taxpayer's fundamental right to privacy, knowing full well it had no evidence that the taxpayer had not complied with the provisions of the Income Tax Act (58 of 1962).

The Constitutional Court decision in the *Van der Merwe* (*supra*) case confirmed that in any future application for a search and seizure warrant, all requirements of legislation safeguarding the taxpayer's privacy must be strictly interpreted and adhered to. This decision created a binding precedent for all lower courts, including the Supreme Court of Appeal.

An interesting aspect of search and seizure warrant applications is where SARS conducts a search of a taxpayer's premises without a warrant. In *Gaertner and Others v Minister of Finance and Others* (76 SATC 69; 2014 (1) SA 442 (CC)), the Constitutional Court confirmed the High Court ruling that held that such searches without a warrant unjustifiably infringed on the right to privacy and were thus unconstitutional.

In spite of the *Gaertner* decision, section 63 of the Tax Administration Act (28 of 2011) still specifically provides for searches of taxpayers' premises by SARS without a warrant. Built-in limitations and safeguards may save the provision constitutionally, on the basis that the warrantless search and seizure provision meets the criterion that it is reasonable and justifiable in an open and democratic society. However, it is inevitable that, in future, the constitutionality of the provisions relating to searches without a warrant will be challenged by an affected taxpayer. Any further discussion is beyond the scope of this section, as it deals with the constitutionality of the legislation rather than the conduct of an administrative official in applying the legislation.

If legislation is enacted that *prima facie* infringes on one or more of a person's fundamental rights, then for such legislation to be constitutional and enforceable, safeguards must be built in to limit infringements and protect the individual. In terms of section 36 of the Constitution, any limitation of fundamental rights, to be constitutional, must meet the criteria of being "reasonable and justifiable in an open and democratic society". Legislation granting SARS the power to obtain a warrant to search and seize documents and information specifically provides safeguards to protect the taxpayer from any abuse by SARS officials in obtaining such a warrant (now contained in sections 59–66 of the Tax Administration Act (28 of 2011)). The Constitutional Court in *Minister for Safety and Security v Van der Merwe and Others* [2011] ZACC 19 (CC) was very clear that any safeguards built into legislation to protect a taxpayer must be strictly interpreted and adhered to. It is submitted that there is thus no room for a wide and liberal interpretation of such protection mechanisms, as appeared to be the case in *Deutschmann NO and Others v C:SARS; Shelton v C:SARS* (62 SATC 191; 2000 JTLR 49).

The question that arises, is what protection the taxpayer has if no safeguards are built into legislation relating to SARS's conduct when carrying out a search and seizure operation or confiscating property. The case of *Deacon v Controller of Customs and Excise* (61 SATC 275; 1999 (2) SA 905 (SE)) is it is submitted, instructive in this regard.

In *Deacon's* case, the taxpayer informed the Controller of Customs and Excise of possible irregularities for which he was not responsible in the importation of a vehicle in his possession. The Controller agreed that the taxpayer could retain possession of the vehicle pending an investigation, but later – without further investigation or discussion – changed his mind and notified the taxpayer that the vehicle was liable for forfeiture in terms of section 87 of the Customs and Excise Act (91 of 1964). In response, the taxpayer offered to pay the Controller the amount due in respect of duties and penalties owing, which the Controller refused to accept.

In applying for an interim order to retain possession of the vehicle, the taxpayer argued, *inter alia*, that the Controller had not given adequate reasons for the decision to seize the vehicle, that he had based his decision on an incorrect assessment of the true facts, had followed a defective procedure and had failed to follow the rules of natural justice. The Controller, in response, argued that he had complied strictly with all the provisions of the legislation which compelled him to confiscate the vehicle, thus there was no need to apply the rules of natural justice.

The court indicated that the conduct of an official is not, in every instance, subject to the rules of natural justice. Public policy and public interest, in certain circumstances, hold sway over the rights of individuals in order to ensure effective



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governance (at 281). Nevertheless, once a functionary exercises a discretionary power in terms of an Act, he cannot do so without having regard to the spirit and objects contemplated by section 33 of the Constitution – the right to just administrative justice – and the principles underlying the provisions of section 33 should constantly be uppermost in his mind (at 282).

The court held that neither section 87 nor section 88 of the Customs and Excise Act (91 of 1964) “expressly or impliedly excludes or limits the right to be heard or the applicability of the rules of natural justice” (at 283). Accordingly, the rules of natural justice had to be taken into account, otherwise the steps taken by the Controller in terms of sections 87 or 88 “would never entitle an individual whose rights had been infringed thereby to the protection of the Constitution” (at 283). The judge found this to “be repugnant to the concept of justifiable administration envisaged by section 33 of the Constitution and would negate the fundamental principles of fairness upon which it had been structured” (at 284). The court could not understand why the Controller had not used his discretion to apply section 93 of the Customs and Excise Act (91 of 1964), which provided for the Controller to accept the payment of the duties proffered by the applicant. If the Controller had accepted the payment there would have been no need for the matter to come before the court. The court made a factual finding that the applicant was “innocent” (at 284) and commented that if the Controller had heard the applicant's side of the story (applying the *audi alteram partem* rule), he “may very well have acted differently” (at 289). In fact, the court viewed the Controller as acting “in a manner reminiscent of the old order prior to the coming into operation of the Constitution” and found that his conduct was “particularly officious” (also at 290).

The court decided to send the matter back to the Controller “to be dealt with in accordance with the principles outlined in this judgment” (at 290).

The “innocence” of the applicant (which equates to the court acknowledging the “clean hands” of the applicant) in the circumstances of this case on the one hand, and the unreasonable stance of the Commissioner on the other (the court found the conduct of the Controller “precipitate, cavalier and regimented” (at 290)) resulted in a resounding victory for the applicant. It is submitted that the judgement, although not a Constitutional Court decision, is well founded and that SARS should always consider the rules of natural justice before applying legislation that affects the fundamental rights of taxpayers or prejudices a taxpayer, even if the legislation appears to demand that its provisions be strictly adhered to, as is the case with section 87 of the Customs and Excise Act (91 of 1964).

Further potentially controversial powers available to SARS involve the so-called pay-now-argue-later provisions that were contained in sections 88 and 91 of the

Income Tax Act (58 of 1962), but are now embodied in sections 164 and 172 of the Tax Administration Act. The constitutionality of the pay-now-argue-later provisions and the part that the “clean hands” concept plays in enforcing the provisions, will be discussed next.

*Pay-now-argue-later provisions – the right not to be arbitrarily deprived of property, the right of access to courts and just administrative action*

In terms of section 172 of the Tax Administration Act (28 of 2011) (previously section 91 of the Income Tax Act), any amount of tax payable (as assessed or determined by SARS) by a taxpayer can be collected by SARS enforcing a civil judgement granted against the taxpayer. However, the judgement obtained is unique in that it is not an order issued by a judge or a judicial officer. All SARS has to do to obtain such a judgement against the taxpayer is to file with the clerk or registrar of any competent court, a statement certified by SARS as being correct and setting out the amount of tax, interest or penalty due or payable by the taxpayer. The certified statement has all the effects of a civil judgement lawfully given in favour of the Commissioner for a liquid debt to the amount specified in the statement. However, the taxpayer may apply for its rescission once he or she is informed of the judgement order against him or her (*Traco Marketing (Pty) Ltd and Another v Minister of Finance and Another* (60 SATC 526; 1998 (6) BCLR 710 (SE))). See also *Singh v C:SARS* (65 SATC 203; 2003 (4) SA 520 (SCA)).

SARS used section 91 of the Income Tax Act (58 of 1962) to great effect to enforce the provisions of section 88 of the Act, which provides for the immediate payment of assessed taxes even where the taxpayer may have objected to or appealed against such assessment. These two provisions embody what is generally referred to as the ‘pay-now-argue-later’ principle. Although appearing to interfere with a taxpayer’s right of access to the courts (section 34 of the Constitution) and the right not to be arbitrarily deprived of one’s property (section 25 of the Constitution), the ‘pay-now-argue-later’ provisions as contained in the Value-Added Tax Act (89 of 1991) (same wording as sections 88 and 91 of the Income Tax Act) were nonetheless found by the Constitutional Court to be constitutional in *Metcash Trading Ltd v C:SARS* (63 SATC 13; 2001 (1) BCLR 1 (CC)).

In the *Metcash Trading* case, SARS delivered a letter to the taxpayer giving formal notice that SARS was not satisfied with its Vat returns. Accordingly, SARS issued assessments reflecting the true state of affairs, alleging that certain transactions entered into by the taxpayer were fictitious, as no goods were sold and delivered, therefore no input tax could be claimed. In effect, the taxpayer was being accused of fraud. SARS demanded the amount owing in accordance with the assessments

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made, and warned the taxpayer that failure to pay would result in SARS taking steps to recover the amounts owing without further notice.

The taxpayer lodged an objection to the assessments. After disallowing the objection, SARS demanded that the taxpayer pay the amounts assessed within 48 hours or the summary procedure as contemplated by section 40(2)(a) of the Value-Added Tax Act (89 of 1991) would be implemented: SARS would file a statement at court which had the effect of an exigible civil judgement for a liquid debt and section 40(5) put the correctness of the assessment beyond challenge in such execution.

The court held that the ‘pay-now-argue-later’ provisions of the Value-Added Tax Act (89 of 1991) did not prevent the taxpayer from following the appeal procedure or preclude him from resorting to a court of law for whatever other relief might be appropriate. Thus, the ‘pay-now-argue-later’ provisions did not violate the taxpayer’s right of access to a court. The court was not asked to deal with whether SARS should have used its discretion to suspend payment of the assessed taxes but, it is submitted, that in view of the taxpayer’s alleged fraud (which was not denied), the court would probably have found there was no merit in suspending payment until the appeal against the assessments was concluded.

In *Singh v C:SARS* (65 SATC 203; 2003 (4) SA 520 (SCA)) the taxpayer appealed to the Supreme Court of Appeal to set aside or alternatively rescind the civil judgement for a liquid debt obtained by SARS against the taxpayer in terms of section 40(2)(a) of the Value-Added Tax Act (89 of 1991). The judgement order was obtained before SARS had served the Vat assessment notices on the taxpayer. The taxpayer contended that the judgement should be set aside, as notice of the assessments had not been given to him before the statement contemplated by section 40(2)(a) had been filed. Thus, the proceedings under the section were consequently void. Alternatively, the taxpayer argued that the failure to give notice of the assessments before invoking the section 40(2)(a) procedure had breached his right to fair administrative action which received statutory expression in section 3 of the Promotion of Administrative Justice Act (3 of 2000).

The question before the court was whether the statutory judgement SARS obtained in the High Court by virtue of the provisions of section 40(2) of the Value-Added Tax Act (89 of 1991) could be set aside because the taxpayer had not, prior to such judgement being obtained, been given notice of the assessment envisaged by section 31 of that Act.

The court held that SARS, in the context of section 40(1), had to inform the taxpayer of the assessment made and how it arrived at the amount owing. Until that was done, the tax could not be regarded as having become recoverable through judicial intervention. The primary objective of giving notice of the assessment is not

objection and appeal but payment by the taxpayer, and even a dishonest taxpayer cannot be kept ignorant of the fact of an assessment and its content. Deemed knowledge on the part of the taxpayer is not sufficient, as the “pay-now-argue-later” provisions are a substantial departure from the common law and could have serious potential consequences for the taxpayer. Thus, there was sufficient reason to regard the notification of the assessment to the taxpayer as a necessity contemplated by the legislature.

Although there is still some debate amongst legal scholars as to whether the underlying principles of the *Metcash* decision also applied to the “pay-now-argue-later” provisions of the Income Tax Act (the *Metcash* and *Singh* cases only dealt with the Value-Added Tax Act provisions), the arguments for and against its applicability are beyond the scope of this article. The arguments only deal with the constitutionality of the legislation, rather than with the constitutionality of the conduct of SARS in enforcing the provisions.

Section 164 of the Tax Administration Act (28 of 2011) sets out the criteria SARS must consider when deciding whether to suspend any payment subject to the “pay-now-argue-later” provisions. Although the criteria are not discussed here, it is interesting that several contemplate the “clean hands” of the taxpayer. SARS, for example, must consider the compliance history of the taxpayer, whether potential fraud is involved, or whether the taxpayer failed to furnish any information requested by the Commissioner in order for him to make a decision. Furthermore, SARS may, in terms of section 164, deny the request to suspend payment if it is satisfied that the objection or appeal is frivolous or vexatious, is being employed as a dilatory tactic or because there have been material changes in the taxpayer’s circumstances since the suspension was granted.

The taxpayer may not object and appeal against a decision by SARS not to suspend payment. However, any such decision is administrative in nature. Thus, if the decision to deny suspension is regarded as unreasonable on review by a court, it will be overturned. Where the request is denied, SARS must inform the taxpayer. Only ten business days after issuing the denial notice may SARS institute recovery proceedings, unless it has a reasonable opinion that there is a risk of dissipation of assets by the taxpayer (section 164(6)).

If a taxpayer acknowledges a debt in terms of an agreement but the payment agreed on is not forthcoming, then SARS may institute and obtain a civil judgement without a further ten business days’ notification to the taxpayer. In *Lifman and Others v C:SARS and Others* ((2015) 77 SATC 383 (WC)), the taxpayers failed to make payment of an undisputed tax debt agreed on, even after SARS had revealed its intention to seek a civil judgement against them for failure to comply. When

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SARS obtained the civil judgement, the taxpayers approached the High Court for an interdict to prevent SARS from executing it. It was alleged that SARS had not given the taxpayers the requisite notice of ten business days before filing the certified statement setting out the amount of tax payable. The court held that the previous correspondence in connection with the debt due and the agreed-on date of payment had given the taxpayers more than enough notice to do what was necessary to structure their affairs to be able to pay the debt as agreed upon. No further notice was required. It was clear that the taxpayer was attempting to delay the payment of the taxes or even renege on the agreement. The taxpayers had relied on a weak procedural point to prevent the enforcement of the debt, hoping the court would see fit to interpret the ten-day notice provision in a strict manner. It is submitted that the court dealt correctly with the defaulting taxpayers by looking at their behaviour and finding that the extra ten days' notice period was not necessary in the circumstances.

The courts, in dealing with the application of SARS's “pay-now-argue-later” provisions did not specifically mention the concept of “clean hands” in its decisions, neither in relation to the taxpayer nor to SARS. The actions and conduct – both good and bad – of both SARS and the taxpayers were, however, specifically mentioned. It is thus submitted that the actions and conduct of the taxpayers and SARS were impliedly taken into consideration (see *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* (1994(2) SA 204(A))) when the various courts handed down their decisions. For example, in *Singh's (supra)* case, SARS did not issue an assessment, as it was required to do in terms of section 31 of the Value-Added Tax Act (89 of 1991), before obtaining the civil judgement against the taxpayer. As a result the taxpayer successfully applied to have the civil judgement set aside. In *Lifman's (supra)* case, the court took into account the taxpayer's behaviour (reneging on an agreement) when deciding that the ten-day notice period before instituting the civil claim need not be strictly adhered to, as the taxpayers had had sufficient time to structure their affairs and make the agreed-to payment.

Where the taxpayer is in default of the payment of his or her taxes, SARS may, instead of attempting to collect taxes directly from the taxpayer, appoint a third party to do so. These provisions are discussed next.

#### ***Appointment of a third party – right not to be arbitrarily deprived of property and right to just administrative action***

In terms of section 179 of the Tax Administration Act (28 of 2011) (previously section 99 of the Income Tax Act (58 of 1962)), a senior SARS official

*may by notice to a person who holds or owes or will hold or owe any money, including a*

*pension, salary, wage or other remuneration, for or to a taxpayer, require the person to pay the money to SARS in satisfaction of the taxpayer's tax debt.*

In effect, SARS is appointing the third party as its agent, in terms of section 179 of the Tax Administration Act (28 of 2011), to collect the alleged tax debt on its behalf without approaching a court for permission to do so. The section is, however, silent on whether prior notice must be given to the taxpayer before a third party is appointed.

In *Hindry v Nedcor Bank Ltd and Another* (61 SATC 163; 1999(2) SA 757(W)), the taxpayer had received an erroneous refund of taxes from SARS. When the taxpayer failed to respond to the request for repayment, SARS appointed a third party – a bank in this case – without informing the taxpayer, to recover the amount. The taxpayer asked the court to declare section 99 of the Income Tax Act (58 of 1962) unconstitutional on the basis that it violated his right not to be arbitrarily deprived of his property. In addition, the taxpayer questioned the constitutionality of the actions and conduct of SARS in appointing a third party to collect the monies.

On the question of whether section 99 of the Income Tax Act (58 of 1962) violated the right of the taxpayer not to be arbitrarily deprived of his property, the court acknowledged that the provision was extra-judicial and summary in nature, but the provision did not violate the right not to be arbitrarily deprived of property. Thus, this decision supports the appointment of a third party to collect a tax debt on behalf of SARS as constitutional.

In regard to the fact that no prior notification was given to the taxpayer before SARS appointed the bank to collect the monies – thus alleging that SARS had not followed the rules of natural justice – the court held that SARS had frequently corresponded with the taxpayer in regard to the erroneously paid refund, but the taxpayer chose to ignore such correspondence. Accordingly, there was no need for a prior hearing to appoint the bank as its agent, as the taxpayer knew from the correspondence that SARS wanted the money repaid. Thus, neither the taxpayer's right to just administrative action nor the right not to be arbitrarily deprived of his property had been violated by SARS's conduct or actions. The finding of the court that the taxpayer knew that SARS wanted the monies repaid, but chose to ignore such demand, implied that the taxpayer was approaching the court with "unclean hands" in attempting to set aside the appointment of the agent.

The court in *Contract Support Services (Pty) Ltd And Others v C:SARS and Others* (61 SATC 338; 1999 (3) SA 1133 (WLD)) went even further and held that not all administrative acts require the application of the *audi alteram partem* rule to be effective. Section 47 of the Value-Added Tax Act (89 of 1991) – appointing a third party to collect taxes – itself required no prior hearing, as that would defeat the very

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purpose of the notice by alerting the defaulting Vat payer of the intention to require payment. Prior notice would enable the defaulting taxpayer to spirit the funds away before they could be paid over to SARS. Thus, the court held further that where a prior notice and a hearing would render the proposed appointment of an agent nugatory, no such prior notice or hearing is required. By necessary implication, the provisions of section 47 therefore excluded the *audi alteram partem* principle. It is submitted that the court gave a very inadequate reason for excluding the *audi alteram partem* principle, namely that the forewarned taxpayer could avoid paying. The court made no attempt to establish whether this observation was true in the case of the taxpayer applying to the court for interim relief.

In *Mpande Foodliner CC v C:SARS and Others* (63 SATC 46; 2000 (4) SA 1048 (T)), however, the taxpayer went to court with evidence and facts to rebut the impression by SARS that it had been guilty of wrongdoing. The Transvaal Provincial Division decision, contrary to the Witwatersrand Local Division decision in *Contract Support Services (supra)*, held generally that the denial of the *audi alteram partem* rule before issuing the agency notices, infringed on the taxpayer's section 33 right to just administrative action. The agency notice was set aside as the notice was issued based on SARS' impression – of which there was no evidence whatsoever – that money was being diverted to the taxpayer from a liquidated company to avoid tax. The action taken by the Commissioner had thus been unlawful, and null and void. Thus, there were conflicting decisions within the same division as to whether a taxpayer should be given prior notice of the appointment of a SARS agent.

Inevitably, years later the same issue came before the Witwatersrand Local Division for decision in *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another* (66 SATC 241; 2004 (3) SA 65 (WLD)). The single judge sitting preferred not to follow the *Mpande (supra)* decision, instead referring to the decision as a “lone voice”. SARS, which led evidence that it had uncovered a fraudulent scheme involving some R19 million, obtained a civil judgement for some R70 million, which included penalties and interest, pursuant to the provisions of section 40(2)(a) of the Value-Added Tax Act (89 of 1991) and wished to collect such amount. It appointed a bank in terms of section 47 of the Value-Added Tax Act (89 of 1991) to act as collection agent on its behalf. The court held that SARS had not acted *mala fide* or with ulterior motives or failed to apply its mind in respect of the decision to appoint the agent. As there was no prejudice to the taxpayer as a result of SARS not having given prior notice of its intent, the application to declare the appointment of the agent unlawful failed. Thus the payment the bank made to SARS could not be reversed. The court held further that the taxpayer had failed to review or set aside various administrative decisions taken by the Commissioner preceding the appointment of the agent, and had not exercised its rights of objection and appeal or pursued other legal remedies open to

it before attempting to obtain relief from the agency notice. It is submitted that the alleged fraudulent activities of the taxpayer influenced the court in holding that no prior notice needed to be given to the taxpayer of the appointment of the bank as an agent of SARS.

The fact that the taxpayer in *Smartphone (supra)* had not pursued any other legal remedy (such as the objection and appeal route, or contested the amount owing) but rather contested the lawfulness of the appointment of the agent, appears to have weighed heavily against his application. Why would the taxpayer not contest the basis of the actual debt owing, but instead attack the method of debt collection? Perhaps, if the taxpayer had not been suspected of fraud and had followed the objection and appeal route, the court may have found that SARS should first consider a less drastic collection mechanism, until the objection and appeal process had been completed (*Ferucci and Others v C:SARS and Another* (65 SATC 470; 2002 (6) SA 219 (CPD)) and *Haynes v CIR* (64 SATC 321; 2000 (6) BCLR 596 (Tk))). If a person holds any money on behalf of a taxpayer (for example, a bank), SARS could consider freezing the taxpayer's bank accounts in terms of 163(4) of the Tax Administration Act, by applying for a preservation order. This could, to some extent, mitigate the fact that no prior notice has been given of the appointment of an agent and might allow the taxpayer – if he has “clean hands” to support his application – to apply for an urgent interdict to set aside the preservation order and unfreeze his bank account. Applying for a recovery or return of taxes already paid over to SARS by the agent would mean a lengthy and time-consuming exercise that could adversely affect the taxpayer's cash flow.

A good example of this alternative procedure is *C:SARS v Tradex (Pty) Ltd and Others* (77 SATC 121; 2015 (3) SA 596 (WC)), where SARS obtained a provisional preservation order against the taxpayer's assets in terms of section 163 of the Tax Administration Act (28 of 2011), for not submitting returns timeously. Thereafter the taxpayer completed the outstanding annual financial statements and submitted them. However, SARS was sceptical about the authenticity of the returns. The court held that no facts had been alleged by SARS to establish a *prima facie* case that there was an appreciable risk of the assets being diminished. Furthermore, SARS did not seek to make the case that the taxpayer's business was being run into the ground or becoming less valuable. Thus the provisional preservation order was rescinded. It is submitted that this is an example of the judiciary taking into account the fact that a previously defaulting taxpayer had put his tax affairs in order, and was entitled to administrative justice as a result. SARS's stance on the matter appeared to be unreasonable.

Also vital in evaluating the applicability of the concept of “clean hands” in relation to the right to just administrative action, is the doctrine of legitimate expectation. As



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the application of this doctrine is crucial in upholding the principle of natural justice, and is specifically catered for in the Promotion of Administrative Justice Act (54 of 2002), a brief discussion is appropriate.

#### *Legitimate expectation doctrine – right to just administrative action*

Section 3 of the Promotion of Administrative Justice Act (54 of 2002) recognises the doctrine of legitimate expectation by providing that: “Any administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.” Thus, the doctrine may be used against state officials who abuse their powers, for example, by reneging on agreements (*Deacon v Controller of Customs and Excise* ((61 SATC 275; 1999 (2) SA 905 (SE)) or by treating taxpayers inconsistently in similar circumstances (*ITC 1682* ((2000) 62 SATC 380)).

The decision in *Plasma View Technologies (Pty) Ltd v C: SARS* (72 SATC 44; [2011] 2 All SA 235 (SCA)) gives greater clarity to the doctrine on fiscal matters. The SARS Commissioner had determined that certain plasma screens were video monitors and qualified for a full rebate of duty when imported. He later made a further contradictory and retrospective determination, demanding retrospective payment of duties under the new ruling. The taxpayer suffered financial prejudice as a result of the Commissioner's *volte-face* and requested a review and setting aside of the administrative action. The court held that the Commissioner was bound by the provisions of section 3 of the Promotion of Administrative Justice Act (3 of 2000) to take administrative action that is procedurally fair. As this had not been done, the taxpayer had made a proper case for the decision to be reviewed and set aside. The Commissioner was not permitted to demand payment of any retrospective duties as a result of the new determination. In effect, the Commissioner went to court with dirty hands and suffered the consequences.

Where SARS violates the right to just administrative action or any other fundamental right, section 172 of the Constitution provides for the appropriate remedy. The next section touches on some of the constitutional remedies available to a taxpayer when a decision, action or conduct of SARS does not live up to the founding principles of the Constitution.

#### **Constitutional remedies for taxpayers affected by the decisions, actions and conduct of SARS**

Section 172(1) of the Constitution provides that a court “when deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is

inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including ...”.

Section 172(2)(a) provides that only the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, but an order of constitutional invalidity has no force unless confirmed by the Constitutional Court. Thus, a Tax Court, being inferior to the High Court, may not make an order concerning the constitutional validity of an Act of Parliament – with no inherent jurisdiction it can claim no authority which is not laid down in the Income Tax Act (58 of 1962) (*ITC 1687* ((1998) 62 SATC 474)). The Income Tax Act (58 of 1962) does not provide, for example, for declaratory orders or interdicts to be issued or granted by a Tax Court, but it can review any decision of SARS made in terms of the Income Tax Act (58 of 1962), the Value-Added Tax Act (89 of 1991) or the Tax Administration Act (28 of 2011). Thus, declaratory orders and interdicts are the domain of the High Court.

Section 8 of the Promotion of Administrative Justice Act (3 of 2000) provides for remedial action by a court, in granting a taxpayer a remedy against any unjust administrative action on the part of SARS. Remedies include a declaratory order (*University of South Africa v C:SARS* (63 SATC 197; [2001] 2 All SA 335 (T))), an interdict to prevent SARS from following a certain course of action (*Mpande Foodliner CC v C:SARS and Others* (63 SATC 46; 2000 (4) SA 1048 (T))), or halting the continuation of a search and seizure warrant (*Ferucci and Others v C:SARS and Another* (65 SATC 470; 2002 (6) SA 219 (CPD))) or even a rescission order (*Traco Marketing (Pty) Ltd and Another v Minister of Finance and Another* (60 SATC 526; 1998 (6) BCLR 710 (SE))). See also *Singh v C:SARS* (65 SATC 203; 2003 (4) SA 520 (SCA)).

## Conclusion

The objective of this article has been to analyse, document and evaluate whether the South African courts, either impliedly or implicitly, apply the English concept of “clean hands” or a similar concept when hearing a taxpayer’s application for relief from the administrative decisions, actions or conduct of SARS (in terms of section 33 of the Constitution) as a result of the enforcement of certain draconian provisions contained in the Tax Administration Act (28 of 2011).

The scope of the objective was restricted to constitutional challenges to the decision-making process and the general conduct of SARS, which precluded any detailed discussion on challenges related to the unconstitutionality of the actual fiscal legislation being applied.

“Clean hands” – Is this or a similar concept used by the courts to determine a taxpayer's right

The “clean hands” (or conversely the “unclean hands”) concept, as applied in South African contract and labour law, is a modification of an old English law where the “unclean hands” of an applicant usually meant an absolute bar to any relief claimed by him or her. In its modified form in South Africa, the “unclean hands” of both the applicant and the respondent are taken into consideration by a court, but are not an absolute bar to being granted relief (*Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (2006 (8) BCLR 971 (E))).

The concept of “clean hands” has not been specifically mentioned as a criterion in tax cases dealing with the right to just administrative action. Nevertheless, it is submitted that the modified South African concept is impliedly used when the courts are tasked with determining whether SARS has violated a taxpayer's right to just administrative action through its decisions, actions or conduct. Where fraud or even the suspicion of fraud is involved (*Metcash Trading Ltd v C:SARS* (63 SATC 13; 2001 (1) BCLR 1 (CC)); *Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another* (66 SATC 241; 2004 (3) SA 65 (WLD))) or where the taxpayer reneges on an agreement with SARS (*Lifman and Others v C:SARS and Others* ((2015) 77 SATC 383 (WC))) the courts appear to find against the taxpayer. On the other hand, where SARS is at fault, for example, not by applying the rules of natural justice (*Deacon v Controller of Customs and Excise* (61 SATC 275; 1999 (6) BCLR 637 (SE))) or is unreasonable (*KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk* (58 SATC 273; 1996 (4) SA 58 (A))), or tries to muddy the waters by making unfounded allegations to support its unreasonable contentions (*Ferucci and Others v C:SARS and Another* (65 SATC 47; 2002 (6) SA 219 (CPD))), the courts usually come to the rescue of the taxpayer and grant the relief requested.

The decision in *Ferucci's* case, it is submitted, should guide SARS when applying so-called draconian legislation. The court held that before applying for a search and seizure order, SARS should evaluate whether a less invasive procedure can achieve the same objective. If the objective cannot be achieved because the taxpayer appears to have committed fraud or is about to remove documents and records from the reach of SARS, then SARS should proceed and apply for the warrant.

The route recommended in the *Ferucci* case it is further submitted, is totally in line with the underlying principles of the Constitution, namely the protection of fundamental rights, and should be used as a criterion when SARS appoints an agent to collect taxes on its behalf, with the possible harsh consequences that could flow from such action. Perhaps a preservation order against the taxpayer's assets would be sufficient until the matter is finally settled by objection and appeal (*C:SARS v Tradex (Pty) Ltd and Others* (77 SATC 121; 2015 (3) SA 596 (WC))).

The “pay-now-argue-later” provisions, after a rocky beginning when there were no guidelines in either the Income Tax Act (58 of 1962) or the Value-Added Tax Act (89 of 1991) as to when the provisions should be applied or the circumstances under which payment should be suspended, have evolved constitutionally, taking into account fairness and equity to both the taxpayer and SARS. It is, however, interesting to note that the “clean hands” of the taxpayer appear to be a major consideration in the guidelines (section 164(3) of the Tax Administration Act (28 of 2011)) that SARS must take into account in determining whether to grant any application for the suspension of taxes payable in terms of an assessment.

Nevertheless, it does appear possible for dishonest taxpayers to rely on the strict application of legislation (*Minister for Safety and Security v Van der Merwe and Others* ([2011] ZACC 19 (CC))) to obtain relief from, for example, an investigation by SARS that calls for an audit, the supply of information, or even a search and seizure warrant. However, it is submitted that the relief is normally only temporary and the victory short-lived. SARS will then be able to pursue other strategies that could have devastating financial implications at a later stage, and may tie up the taxpayer in court proceedings for years to come.

Although the concept of “clean hands” has not been formally expressed as applying to taxation matters, as has been the case in the law of contract and labour law, the courts impliedly use the modified concept, as stated in *Kloko v Sullivan* ([2005] JOL 15611 (SCA)), also in tax matters where a person’s fundamental rights generally and the right to just administrative action specifically have been infringed. Where the taxpayer has, by presenting evidence, been able to rebut the adverse inferences of SARS (*Mpande Foodliner CC v C:SARS and Others* (63 SATC 46; 2000 (4) SA 1048 (T)), the demonstration of “clean hands” has resulted in significant victories for the taxpayer. This has been the case even where the strict reading of the legislation (*Minister for Safety and Security v Van der Merwe and Others* ([2011] ZACC 19 (CC))) may indicate that the court should have reached a different decision (*Deacon v Controller of Customs and Excise* (61 SATC 275; 1999 (6) BCLR 637 (SE))). Without facts to pound, taxpayers should not proceed to court unless they merely want to pound the table – an expensive and usually futile exercise.

## Note

1. Portions of this article were presented in an unpublished thesis in fulfilment of the requirements for the degree of Doctor of Accounting Sciences by the author of this article. Goldswain, G.K. 2012. *Winds of Change – An Analysis and Appraisal of Selected Constitutional Issues Affecting the Rights of Taxpayers*. Unpublished doctoral thesis. Pretoria: University of South Africa.

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