OPINION

on

THE CONSTITUTIONALITY OF THE TAX ADMINISTRATION BILL B11 - 2011

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INTRODUCTION

1 Our views have been sought by the South African Revenue Service ("SARS") in relation to the constitutionality of the Tax Administration Bill B11 – 2011 ("the Bill") which is presently being considered by Parliament's Standing Committee on Finance.

2 We have considered the constitutionality of the provisions of the Bill, particularly in light of the comments of a constitutional nature made by various interested role-players prior to the Bill being tabled in Parliament. In light of the existing jurisprudence of our courts, we have concluded that the provisions of the Bill are likely consistent with the Constitution.

3 SARS has asked us to set out the reasons for our conclusions in this regard on four discrete issues:

3.1 The general approach to assessing whether the Bill is consistent with the Constitution;

3.2 The constitutionality of clause 63 of the Bill, dealing with warrantless search and seizure;

3.3 The constitutionality of clause 164 of the Bill, dealing with the "pay now, argue later" principle; and

3.4 The constitutionality of clauses 179 – 184 of the Bill, dealing with the collection of a tax debt from third parties.

4 We deal with each of these issues in turn.

THE GENERAL APPROACH TO ASSESSING WHETHER THE BILL IS CONSISTENT WITH THE CONSTITUTION

5 In assessing the constitutionality of the provisions of the Bill, there are three important principles that must be borne in mind at all times. These principles have frequently been reiterated by the Constitutional Court.

6 The first relates to the effect of section 39(2) of the Constitution.

6.1 Section 39(2) of the Constitution requires that, when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. This duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. This is so even if a litigant has failed to rely on section 39(2).

***Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27**

6.2 The Constitutional Court has repeatedly pronounced on the obligations arising from section 39(2) for the interpretation of legislation. There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

6.3 The first obligation might conveniently be referred to as the "***Hyundai** obligation*".

6.3.1 This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.

6.3.2 Thus, in ***Hyundai*** this Court held that:

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> *… judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*
>
> ***Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*** **NO 2001 (1) SA 545 (CC) at paras 22-23**

6.4 The second obligation might conveniently be referred to as the "***Wary obligation***".

6.4.1 This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another **2009 (1) SA 337 (CC) at paras 46, 84 and 107**

6.4.2 Thus, as the Constitutional Court explained in ***Fraser v Absa Bank***:

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*
>
> ***Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)*** **2007 (3) SA 484 (CC) at para 47**

6.5 Thus, the effect of section 39(2) is that the courts will always seek to interpret the Bill, once enacted, in a manner that is consistent with the Constitution and that best promotes constitutional values.

6.6 This is subject only to the proviso that the relevant provision of the Bill must be "*reasonably capable*" of the interpretation concerned – that is the interpretation must not be "*unduly strained*".

Hyundai **(supra) at para 24**
Wary **(supra) at paras 59-60 and 106-108**

7 Second, all administrators, including SARS, must comply with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") unless the statutes which govern them are inconsistent with PAJA.

7.1 Thus, all statutes relating to administrative action – including the present Bill – must be read together with PAJA unless they are inconsistent with it. As the Constitutional Court has explained:

> *"PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA."*
>
> ***Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC) at para 101 (emphasis added)**

7.2 This is important because it is then not necessary for the Bill itself to spell out all the relevant aspects of administrative justice – for example that conduct by SARS officials should be reasonable.

7.3 On the contrary, if SARS exercises a power which amounts to administrative action, that power would generally have to be exercised in compliance with both the Bill and PAJA. This means that the SARS conduct would have to be reasonable because this is what section 6(2)(h) of PAJA requires.

8 Third, where a party challenges the constitutional validity of a provision of the Bill, it will not enough for the party to demonstrate that the provision is capable of being abused.

8.1 The fact that a power can be abused does not mean that the provision is unconstitutional. All powers are capable of being abused, but if this happens, the Courts have the power and duty to review and set aside the conduct of the officials concerned.

8.2 This has been made clear by the Constitutional Court:

> *"Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."*
>
> ***Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 37**

8.3 Indeed, in determining whether the provisions of the Bill are constitutional, the courts are required to operate on the "*presumption*" that powers will be exercised "*in a manner which is fair in all the circumstances*".

> ***Doody v Secretary of State for the Home Department and Other Appeals* [1994] 1 AC 531 (HL) at 560**
>
> **Quoted in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 152**

CLAUSE 63 OF THE BILL – WARRANTLESS SEARCH AND SEIZURE

9 Chapter 5, Part D of the Bill deals with search and seizure. It requires that, in the vast majority of situations, a warrant must be obtained by SARS before search and seizure takes place. This is in keeping with the Constitution, including the right to privacy in section 14.

10 An exception to this general approach is created by clause 63. It provides:

> *"(1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3)—*
>
> *(a) if the person who may consent thereto so consents in writing; or*
>
> *(b) if the senior SARS official on reasonable grounds is satisfied that—*
>
> *(i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;*
>
> *(ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and*
>
> *(iii) the delay in obtaining a warrant would defeat the object of the search and seizure.*
>
> *(2) Section 61(3) to (9) applies to a search conducted under this section.*
>
> *(3) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant."*

11 We have given consideration to whether this clause is consistent with the requirements of the Constitution. In our view, it is consistent with the Constitution for five main reasons.

12 First, the clause does not provide a general right for SARS to engage in warrantless searches.

12.1 Rather it provides a narrow exception to the requirement that searches and seizures occur pursuant to a warrant. Warrantless searches and seizures can only be performed when the requirements of clause 63(1) are satisfied.

12.2 Leaving aside the situation where a party consents to a search, a warrantless search is permitted by the clause only when a senior SARS official is satisfied on reasonable grounds that:

12.2.1 there may be an imminent removal or destruction of relevant material likely to be found on the premises; and

12.2.2 if SARS applies for a search warrant under section 59, a search warrant will be issued; and

12.2.3 the delay in obtaining a warrant would defeat the object of the search and seizure.

13 Second, such narrow exceptions permitting warrantless searches occur frequently in our law. They exist, for example, in at least 17 different Acts of Parliament including section 22 of the Criminal Procedure Act 51 of 1977, section 47 of the Competition Act 89 of 1998, and section 29(5) of the Second-Hand Goods Act 6 of 2009.

14 Third, and most critically, our courts have emphasised that such narrow exceptions to the warrant requirement are appropriate and consistent with the Constitution.

14.1 Thus, in ***Magajane*** a unanimous Constitutional Court dealt at length with the nature and purpose of the warrant requirement. It emphasised the importance and merits of requiring a warrant, particularly in the criminal context. However, it held that even in such criminal context:

> *"There may, however, be instances where warrantless searches are justified, such as those provided for in the Criminal Procedure Act."*
>
> ***Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) at para 76**

14.2 In this regard, the Court then quoted section 22 of the Criminal Procedure Act which provides:

> *"'A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in s 20 -*
>
> *. . .(b) if he on reasonable grounds believes -*
>
> *(i) that a search warrant will be issued to him under para (a) of s 21(1) if he applies for such warrant; and*
>
> *(ii) that the delay in obtaining such warrant would defeat the object of the search.'"*

14.3 Similarly, the SCA has, far from criticising this provision of the Criminal Procedure Act, described it as being "*designed to protect rights to privacy against abuse of power by members of the SAPS*".

> ***Raliphaswa v Mugivhi and Others* 2008 (4) SA 154 (SCA) at para 19**

14.4 A similar provision also appears in section 29(10)(b)(ii) of the National Prosecuting Authority Act 32 of 1998. In ***Thint*** both the majority and minority judgments of the Constitutional Court mentioned this provision without any adverse comment at all.

> ***Thint (Pty) Ltd v National Director of Public Prosecutions and Others*** **2009 (1) SA 1 (CC) at paras 35 and 258**

14.5 The provisions of clause 63 are even more protective of privacy than section 22 of the Criminal Procedure Act.

15 Fourth, the clause does not suffer from the same constitutional defects that led the decision in ***Mistry***, where the Constitutional Court struck down a provision of the Medicines and Related Substances Control Act 101 of 1965 which allowed for warrantless searches.

15.1 In ***Mistry***, the provision at issue provided:

> *"An inspector may at all reasonable times ... enter upon any premises ... at or in which there is or is on reasonable grounds suspected to be any medicine or scheduled substance [and] seize any such medicine or scheduled substance, or any books, records or documents found in or upon such premises ... and appearing to afford evidence of a contravention of any provision of this Act".*

15.2 The Constitutional Court struck down this provision on the basis that:

> *"[Where] a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the 'inner sanctum' of the persons in question*

and the statutory authority would accordingly breach the right to personal privacy..."

and

"The section is so wide and unrestricted in its reach as to authorise any inspector to enter <u>any person's home</u> simply on the basis that aspirins or cough mixture are or are reasonably suspected of being there. What is more, the section <u>does not require a warrant to be issued in any circumstances at all.</u>"

***Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) at paras 23 and 28 (emphasis added)**

15.3 The provisions of the present Bill are far more protective of the right to privacy than the provision at issue in ***Mistry.***

15.4 The present provisions generally do require a warrant. They allow warrantless searches only when a warrant would likely have been obtained, but where the delay in obtaining a warrant would defeat the object of the search and seizure.

15.5 Even more critically, clause 63 does not permit any search of a person's <u>home</u> without a warrant (except any part being used for purposes of trade) unless the person consents to the search. In other words, it bars warrantless searches of homes without consent – rather than allowing them, as was the case in ***Mistry.***

15.6 This protection of people's homes is consistent with section 14 of the Constitution because the Constitutional Court has stressed that the right to privacy is strongest in one's home environment and then reduces beyond that:

> *'The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."*
>
> ***Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 67 (emphasis added)**

16 Fifth, section 36 of the Constitution permits all rights to be limited where this is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*". It is highly relevant that a large number of comparable foreign countries allow some warrantless searches by revenue authorities. At least twenty OECD countries allow similar or greater powers for warrantless searches by revenue authorities. This is strongly indicative that any limitation of the right to privacy occasioned by the clause is permissible in terms of section 36 of the Constitution.

17 We are therefore of the view that clause 63 of the Bill is likely consistent with the Constitution.

CLAUSE 164 OF THE BILL - THE "PAY NOW, ARGUE LATER" PRINCIPLE

18 Clause 164 deals with the payment of tax pending objection or appeal.

19 It provides, in essence, that a taxpayer's obligation to make payment of tax will not be suspended pending the objection or appeal process, unless a senior SARS official directs otherwise. In terms of clause 164(7), if the objection or appeal succeeds, the taxpayer is then refunded by SARS, with interest.

20 The constitutionality of the "pay now, argue later" principle was dealt with exhaustively and comprehensively in the Constitutional Court judgment of ***Metcash***. There, the Court unanimously upheld the constitutionality of provisions which set out this principle.

> ***Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another*** **2001 (1) SA 1109 (CC)**

21 The effect of the ***Metcash*** case is to determine conclusively that clause 164 is consistent with the Constitution, unless it can be said that clause 164 is somehow different to the sections at issue in that case.

22 There is only one respect in which it might be contended that clause 164 is more detrimental to the rights of taxpayers than the regime that was upheld in ***Metcash.***

22.1 In ***Metcash***, it was clear that under section 36 of the Value-Added Tax Act 89 of 1991 an *"appeal*" did not suspend the obligation to pay tax.

However, the VAT Act was silent on the question of whether an *"objection"* suspended the obligation to pay tax. SARS's practice and documentation indicated that it did not, though there is a footnote in the ***Metcash*** judgment that suggests the opposite (footnote 62).

22.2 By contrast, the present clause 164 provides expressly that neither an objection nor an appeal suspends the obligation to pay.

23 However, we are of the view that this difference does not render clause 164 unconstitutional, for the reasons that follow.

24 First, what is notable is that, in upholding the constitutionality of the pay now, argue later principle, the Constitutional Court did not rely at all on the fact that an objection suspended payment obligations. It is therefore most unlikely that this would have altered its view.

24.1 On this basis, it appears that the provisions of clause 164 will not be regarded as unconstitutional, unless the Constitutional Court could be persuaded that ***Metcash*** was wrongly decided.

24.2 This is extremely unlikely. The Constitutional Court has at no stage cast doubt on the correctness of its decision in ***Metcash.*** On the contrary, it has repeatedly cited it with approval, most recently in the ***Armbruster*** decision.

> ***Armbruster and Another v Minister of Finance and Others*** **2007 (6) SA 550 (CC) at para 61**

25 Second, there are further features of clause 164 which enhance the rights of taxpayers and prevent prejudice to them pending the determination of an objection or appeal. These features were not part of the regime upheld in ***Metcash***. These include:

25.1 Clause 164(3), which specifies the factors to be taken into account by SARS in determining whether to suspend the obligation to pay.

25.2 Clause 164(6), which provides that where a request for suspension of payment is made by a taxpayer pending objection and appeal, no collection proceedings may be taken by SARS until 10 days after its decision on the request for suspension, unless SARS has a reasonable belief that there is a risk of dissipation of assets by the taxpayer concerned. This ensures that a taxpayer has a proper opportunity to request suspension and, if refused, approach a court on an urgent basis to prevent collection.

25.3 Clause 164(7), which provides that if an assessment is ultimately altered, whether on objection or appeal, amounts paid by the taxpayer in excess of the assessed amount shall be refunded with interest at the prescribed rate of interest. This ensures that a taxpayer is not financially disadvantaged in the long-run by the requirement that tax be paid pending objection and appeal.

26 Third, it appears that at least 20 OECD countries permit revenue authorities to collect tax pending the determination of their equivalent of the objection

process. This is strongly indicative that any limitation of rights created by clause 164 is permissible in terms of section 36 of the Constitution.

27 We are therefore of the view that clause 164 of the Bill is likely consistent with the Constitution.

CLAUSES 180 – 184 OF THE BILL – PERSONAL LIABILITY OF THIRD PARTIES

28 Clauses 180 - 184 of the Bill deal with the circumstances in which a third party may be held liable for the tax debt of a taxpayer.

29 They renders third parties liable in a number of situations, including where

29.1 The third party's negligence or fraud results in the failure to pay a tax debt, if the third party controls or is regularly involved in the management of the overall financial affairs of the taxpayer; and

29.2 The third party knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of a tax debt and reduces the assets available to pay the taxpayer's debt.

30 In determining the constitutionality of these clauses, the focus must be on section 25(1) of the Constitution. It provides:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

31 The relevant clauses of the Bill plainly produce a deprivation of property for the third parties concerned. However, the Constitution does not prohibit all deprivations of property – only deprivations that are "*arbitrary*". It is accordingly the question of "*arbitrariness"* that must be considered.

32 The Constitutional Court has held that a deprivation is arbitrary when it takes place "*without sufficient reason*" or in a manner that is procedurally unfair.

> ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another* 2002 (4) SA 768 (CC) at para 100**

33 In the present case no question of procedural unfairness arises when the clauses are read together with the procedures in the remainder of the Bill and, to the extent applicable, the provisions of PAJA.

34 With regard to whether the deprivation is "*without sufficient reason*", the Constitutional Court has explained that arbitrary deprivations are not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. Rather, the test is a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time, the concept is narrower and less intrusive than that of the proportionality evaluation required by the limitation provisions of section 36.

> ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another* 2002 (4) SA 768 (CC) at para 65**

35 The Court has therefore concluded that "*sufficient reason*" is to be determined with regard to the following considerations:

> *"(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.*
>
> *(b) A complexity of relationships has to be considered.*

> *(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
>
> *(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
>
> *(e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property in something different, and the property right something less extensive…*
>
> *(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*
>
> *(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in other words this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.*
>
> *(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."*
>
> ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another* 2002 (4) SA 768 (CC) at para 100**

36 The ***First National Bank*** case concerned provisions of the Customs & Excise Act 91 of 1964 which related to the establishment of liens over certain property. In that case the bank owned certain cars which it had leased to the taxpayer. The provision then entitled SARS to establish a lien over those cars because of an entirely separate debt owed by the taxpayer to SARS. The Court held

unanimously in that case that the deprivation in that case occurred "*without sufficient reason*" because the person deprived of property had "*no connection"* at all with the customs debt concerned. The sections were therefore held to be unconstitutional.

37 Clauses 180 – 184 of the present Bill are fundamentally different to the sections at issue in ***First National Bank.*** These clauses only permit the third party to be held liable when the third party has a direct connection to the tax debt or taxpayer. Thus:

37.1 In clause 180, it is the third party's negligence or fraud that resulted in the failure to pay the tax debt and the third party controls or is regularly involved of the financial affairs of the taxpayer;

37.2 In clause 181, the third party is a shareholder of the taxpayer of company wound up without having satisfied its tax debt and must also have received assets from the taxpayer less than a year prior to winding-up;

37.3 In clause 182, the third party is a "*connected person*" to the taxpayer and has received an asset below fair market value from the taxpayer; and

37.4 In clause 183, the third party has knowingly assisted in dissipating a taxpayer's assets to obstruct a tax debt.

38 In our view, therefore, there is a sufficiently close connection between the third party and the taxpayer and/or the tax debt to mean that the sections do not produce a deprivation "*without sufficient reason*". This is especially so given that exacting payment of a tax debt is a "*legitimate and important legislative purpose, essential for the financial wellbeing of the country and in the interests of all its inhabitants"*.

> ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another* 2002 (4) SA 768 (CC) at para 108**

39 Our conclusion in this regard is bolstered by the fact that we understand that other comparable countries have similar provisions for the recovery of tax debts.

40 We are therefore of the view that clauses 180 – 184 of the Bill are likely consistent with the Constitution.

CONCLUSION

41 We have set out above the principles applicable in determining whether the Bill is consistent with the Constitution. These include that:

41.1 The courts will always seek to interpret the Bill, once enacted, in a manner that is consistent with the Constitution and that best promotes constitutional values.

41.2 All administrators, including SARS, must comply with PAJA unless the statutes which govern them are inconsistent with PAJA.

41.3 The fact that a statutory power can be abused does not mean that the provision is unconstitutional. All powers are capable of being abused, but if this happens, the Courts have the power and duty to review and set aside the conduct of the officials concerned.

42 We have considered the provisions of the Bill in line with these principles, particularly in light of the comments of a constitutional nature made by various interested role-players prior to the Bill being tabled in Parliament.

43 In light of the existing jurisprudence of our courts, we have concluded that the provisions of the Bill are likely consistent with the Constitution. This includes clauses 63, 164 and 180 – 184, which are dealt with above.

44 There is one further issue which we consider it appropriate to address. In some of the comments we have seen from interested role-players prior to the Bill

being tabled in Parliament, the suggestion has been made that powers conferred on SARS by the Bill are "*absolute*", "*unfettered*" or "*draconic*".

45 We are of the respectful opinion that these views are simply unfounded. The Bill does not afford SARS absolute, unfettered or draconic powers. In this regard there are three points worth emphasizing.

45.1 First, the very notion of unfettered or absolute powers is a contradiction in terms. The exercise of all powers is subject to consistency with the Constitution and the control of the Courts. This was recognised by our courts as long ago as 1973:

> *"The Courts are stringent in requiring that discretion should be exercised in conformity with the general tenor and policy of the statute and for proper purposes, and that it should not be exercised unreasonably. In other words, every discretion is capable of unlawful abuse and to prevent this is a fundamental function of the Courts. 'Unfettered discretion' is a contradiction in terms."*
>
> ***Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 372**

That approach has since been reiterated and reinforced by the Constitutional Court in a passage already quoted in full:

> *"The exercise of [any] power is subject to constitutional control and should the power be abused the remedy lies there..."*
>
> ***Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 37**

45.2 Second, far from undermining the powers of the judiciary, the Bill preserves and entrenches the role of the judiciary as a check and balance in respect of SARS powers. For example, in respect of some

its more far-reaching sections – search and seizure operations and inquiries – the Bill requires that in the vast majority of cases, these powers may only be exercised after approval has been obtained from the judiciary. Similarly, in respect of any final decision by SARS against a taxpayer, the taxpayer is able to make use of the judiciary to appeal against or review that decision.

45.3 Third, the powers conferred by the Bill are in no way unprecedented. Similar powers are conferred on various bodies by multiple pieces of legislation in South Africa and similar powers are conferred on revenue authorities in other comparable foreign countries.

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