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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Cases No: 12632/12

In the matter between:

Reportable

PATRICK LORENZ MARTIN GAERTNER & 2 OTHERS — **APPLICANTS**

And

MINISTER OF FINANCE — **FIRST RESPONDENT**

COMMISSIONER: SARS & 9 OTHERS — **SECOND TO TENTH RESPONDENTS**

Coram: ROGERS J

Heard: **26 FEBRUARY 2013**

Delivered: **8 APRIL 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The first and second applicants ('Gaertner' and 'Klemp') are directors of the third applicant ('OCS'). OCS conducts business as an importer and distributor of bulk frozen foodstuffs. On 30 and 31 May 2012 officials of the South African Revenue Service ('SARS'), including the fourth to tenth respondents, conducted a search at OCS' premises in Muizenberg. On 1 June 2012 SARS officials conducted a search at Gaertner's home at Silverhurst Estate in Constantia. These actions were taken in terms of s 4(4) of the Customs and Excise Act 91 of 1964 ('the Act'). In terms of that section no warrant was required for the searches. On 2 July 2012 the applicants launched the current proceedings in which they sought orders in summary [a] declaring the relevant part of s 4 to be unconstitutional to the extent that it permitted targeted non-routine searches to be conducted without judicial warrant; [b] in any event declaring the searches to have been unlawful by virtue of the way they were conducted; [c] requiring SARS to return everything taken or copied.

[2] The facts are in brief as follows (in accordance with the *Plascon-Evans* rule I shall, in case of factual disputes, base my summary on SARS' version). On 21 June 2012 Sloan Valley Dairies Ltd of Canada ('SVD') instituted proceedings on motion against OCS in which SVD claimed the return of five consignments of skim milk powder sold to OCS, alternatively payment of the alleged price. Annexed to SVD's founding papers were the five invoices on which SVD based its claim. SVD served a copy of the application on SARS. SARS compared the annexed invoices against the invoices OCS had submitted to SARS in support of the declared value for customs duty purposes. OCS' version of the invoices reflected substantially lower prices. SARS thus suspected that OCS had fraudulently manipulated the invoices so as to pay less duty, thereby committing various offences under the Act. SARS resolved to conduct a search of OCS' premises in order to investigate its suspicions.

[3] On 30 May 2012 a group of about 10 to 15 SARS officials set off for OCS' Muizenberg premises while a similarly sized group headed for premises at Wynberg. The latter group found that OCS no longer conducted business at the Wynberg location. They thus decided to join their colleagues at the Muizenberg premises. On

arrival of the first two SARS vehicles at the Muizenberg premises the officials told the receptionist and then Gaertner that they were there to conduct a bond inspection (ie an inspection of OCS' licensed customs warehouses, which formed part of the premises). To Gaertner's mind this suggested a routine inspection. He allowed them in but asked them to wait until he was finished with a business meeting from which he had excused himself. More SARS officials arrived a short while later, joined not long afterwards by the group that had originally gone to Wynberg, so that there were now about 30 SARS officials in OCS' reception area. SARS sealed the entrance to the premises. When Gaertner asked the purpose of the search, he was now told that SARS was investigating under-declaration of the customs values of certain imported goods. SARS did not provide further detail or mention SVD. (According to SARS their initial untrue statement that SARS wanted to conduct a bond inspection and the vagueness of the later statement were attributable to SARS' concern that with a fuller explanation Gaertner might cause his staff to remove or conceal files.) Gaertner asked whether SARS had a warrant. The officials told him that they did not need a warrant and that they were conducting the search in terms of s 4 of the Act, a copy of which he was shown. Gaertner asked for time to call his attorney. When the attorney did not arrive after 20 to 25 minutes SARS began the search. (According to SARS there was no indication by that stage that Gaertner's attorney was on his way.) SARS told Gaertner that it would be an offence to obstruct SARS and that if necessary SARS would call the police to prevent obstruction or resistance. SARS controlled access to and egress from the premises. Nobody was allowed to leave unless they agreed to be searched and to have their vehicles searched by SARS. OCS staff were required to stand clear of their computers

[4] The search lasted from about 12h30 to 17h30. SARS asked to see a number of files and looked among various papers. These included papers relating to the pending court proceedings between SVD and OCS. There is a factual dispute as to whether privileged material was examined and copied. According to SARS, anything SARS wished to take was shown to Gaertner and copied for SARS by Gaertner's secretary. SARS only took away the copies. (Gaertner says he could not keep track of everything that was going on, did not know exactly what SARS was copying and had no way of

checking whether SARS also removed originals.) OCS was not given an inventory of the copies made. From subsequent events, when the copied material was returned to OCS, it is apparent that the copied documents were not confined to the SVD matter. SARS officials also accessed various computers. There is a dispute as to whether SARS insisted on being given the passwords or whether Gaertner and Klemp entered the passwords so that SARS could explore the data on the computers. SARS inserted a storage device into Gaertner's computer and copied electronic data (according to SARS, what was downloaded was an email relating to the importation of skim milk powder, Gaertner having given permission for the email to be copied). While some SARS officials were busy with Gaertner, other officials were requiring assistance and explanations from other employees including Klemp and OCS' head of shipping and logistics, Ms W Jumat. Before leaving, SARS sealed OCS' computer server room in preparation for a visit the next day by its forensic experts. SARS also removed from OCS' bonded warehouse and took away with them the milk powder which was the subject of the SVD dispute (SARS states that the milk powder was detained in terms of s 88(1)(a) of the Act, pending possible seizure and forfeiture).

[5] SARS returned to OCS' premises the next day with two computer experts to make mirror images of the data on various computers including the OCS file server (containing all emails sent and received by all employees on work computers and all OCS' operational data), Gaertner's personal computer and i-Pad, Klemp's laptop and i-Pad and the laptop of another employee Mr Lötter. This process lasted nine hours. OCS' attorney requested that the search parameters be properly defined but this request was rejected. He also demanded that the data be copied and sealed in Gaertner's presence. SARS said this was not possible but agreed that the data would be sealed and retained by SARS' forensic analysis department pending extraction of all data in the presence of OCS and its attorney.

[6] On I June 2012 SARS, having allegedly not found the SVD import documentation at OCS' premises, decided to search Gaertner's Constantia home in case the documents were there. They arrived shortly before 11h00. They refused to sign the arrival book at the security booth at the entrance to Silverhurst Estate and told the security guards that resistance would result in police intervention. When they got to Gaertner's house the child-minder employed by him would not allow them inside until Gaertner arrived – she summoned him and he got there after 30 to 45 minutes. There were 14 officials waiting to conduct the search. SARS again declined to give Gaertner reasons for the search and would not tell him what they were looking for. Gaertner was told that SARS would wait 15 minutes for his attorney to arrive. After that they would make forcible entry, with SAPS' assistance if necessary. When Gaertner's attorney did not arrive within this time, the search began, lasting about two hours. The officials searched the whole house including bedrooms, freezers, the ceiling space, safe, cellar, garages and storerooms. They rifled through personal belongings. Gaertner was allowed to be present during the search. When his attorney arrived he negotiated a reduction in the number of officials inside the house (according to SARS, from 14 to 8). Among the SARS officials were two computer experts who demanded access to the home computers, including those of Gaertner's children. Apparently no data was copied nor were any relevant documents found.

[7] The applicants' attorneys, Maurice Phillips Wisenberg ('MPW'), wrote to SARS on 13 June 2012 stating the applicants' intention to bring legal proceedings and seeking certain undertakings. A temporary undertaking was given on 19 June 2012. The current application was launched on 2 July 2012. The Minister of Finance ('the Minister'), as the Minister responsible for the administration of the Customs Act, was cited as the first respondent. The Commissioner for SARS was cited as the second respondent, the Controller of Customs in Cape Town was cited as the third respondent, while those officials involved in the searches and whose names the applicants could ascertain were cited as the third to tenth respondents. Save where a distinction is needed I shall refer to the second to tenth respondents collectively as SARS.

[8] Pursuant to an agreed order made on 19 September 2012 the respondents' answering papers were due by 3 October 2012. Instead SARS on that date, through the State Attorney, tendered to return all seized material (including copies) and the computer mirror images and to pay the applicants' costs to date on a party and party scale. SARS did not concede that s 4 was invalid or that the searches had been unlawful. The applicants were requested to identify any 'live issues' which remained. On 8 October 2012, and following interactions at counsel level, SARS improved its tender by offering costs on an attorney and client scale. MPW replied that while the applicants accepted the tender they persisted in the relief claimed in the notice of motion.

[9] On 16 October 2012 SARS through the State Attorney returned most of the copies taken at OCS' premises. MPW identified missing material, following which further documents were returned to the applicants on 24 October 2012. The electronic data was eventually returned on 22 November 2012. This comprised several hard drives and a memory stick. Because the memory stick also contained data concerning unrelated taxpayers, SARS insisted that the stick be destroyed, which was done. The applicants' expert was first afforded the opportunity to check whether the hard drives and memory stick had been accessed contrary to SARS' undertaking. This was found not to have occurred in the case of the hard drives though the memory stick had been accessed several times, most recently on 21 November 2012. According to SARS, this was because data relating to the other taxpayer had to be accessed.

[10] In the meanwhile the Minister and SARS filed their answering affidavits on 17 October 2012 to which the applicants replied on 14 December 2012. The Minister and SARS both asserted that the constitutionality of s 4 and the lawfulness of the searches were moot in the light of the tender which the applicants had accepted. They denied in any event that s 4 was in any respect invalid, asserting that any encroachment on the right to privacy was justifiable under s 36 of the Constitution. SARS also denied that the searches had been conducted in an unlawful manner (the Minister did not deal with that issue). The Minister and SARS averred in the alternative that an order of invalidity should not be retrospective and that the declaration should be suspended to allow parliament to pass remedial legislation.

Section 4 of the Customs Act

[11] Although the notice of motion referred in general terms to s 4, it was common cause in argument that the applicants' attack was directed at ss 4(4) to 4(6) of the Act which read as follows:

'(4)(a) An officer may, for the purposes of this Act-

(i) Without previous notice, at any time enter any premises whatsoever and make such examination and enquiry as he deems necessary;

(ii) While he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;

(iii) At any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and

(iv) Examine and make extracts from and copies of any such book or document and may require from any person an explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act. [Sub-para (iv) substituted by s. 2*(b)* of Act 84 of 1987.]

(b) An officer may take with him on to any premises an assistant or member of the police force.

(5) Any person in connection with whose business any premises are occupied or used, and any person employed by him shall at any time furnish such facilities as may be required by the officer for entering the premises and for the exercise of his powers under this section.

(6)(a) If an officer, after having declared his official capacity and his purpose and having demanded admission into any premises, is not immediately admitted, he and any person assisting him may at any time, but at night only on the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and search;

(b) An officer or any person assisting him may at any time break up any ground or flooring on any premises for the purpose of search and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, may open such room, place, safe, chest, box or package in any manner.'

[12] The applicants, who were represented by Mr A Katz SC, assisted by Ms M Ioannou, contended that these provisions infringed the privacy right guaranteed by s 14 of the Constitution. Section 14 provides:

'Every person has the right to privacy, which includes the right not to have –

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized;

(d) the privacy of their communications infringed.

It is common ground that the right to privacy extends to juristic persons.[1]

[13] At the hearing Mr Mtshaulana SC for the Minister argued that s 4(4) was constitutionally valid because it could be read as permitting a warrantless search only where the person in control of the premises consented to the search. If this argument failed, Mr Mtshaulana associated himself with the submissions of Mr Trengove SC who appeared (together with Messrs E de Villiers-Jansen, S Budlender and J Berger) for SARS.

[14] Although SARS in its answering papers defended the impugned provisions in their entirety, SARS conceded in its heads of argument that ss 4(4) to (6) were constitutionally invalid. The differences between the applicants and SARS concerned [a] the reasons for and thus the extent of the invalidity; [b] whether the declaration of invalidity should be suspended and rendered non-retrospective and whether in the meanwhile words should be read into the impugned provisions to make them constitutionally acceptable.

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[1]See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others* 2001 (1) SA 545 (CC) para 17.

[15] The criterion asserted by the applicants for distinguishing between the justified and unjustifiable parts of the impugned provisions was the distinction between routine searches on the one hand and non-routine (targeted) searches on the other. Mr Katz SC submitted that the impugned provisions were unjustifiable to the extent that they permitted warrantless non-routine searches.

[16] The criterion asserted by SARS for distinguishing between the justified and the unjustifiable parts of the impugned provisions was, by contrast, the distinction between premises which receive special attention in the Act (I shall identify them later – for the moment I refer to them collectively as 'designated premises') and other premises. The impugned provisions were said to be justified to the extent that they authorised warrantless searches, whether routine or targeted, of designated premises; but unjustified to the extent that they permitted warrantless searches, whether routine or targeted, of non-designated premises. SARS thus argued for a position which gave it more intrusive powers in relation to designated premises than the applicants' formulation but which gave it less intrusive powers in relation to non-designated premises than the applicants' formulation. (I may mention that although SARS' primary position in the answering papers was that s 4(4) was valid in its entirety, SARS' answering affidavit put particular emphasis on the justification for warrantless searches of designated premises, and contended that at worst for SARS an order of invalidity should be restricted to premises other than designated premises.)

Overview of the Act

[17] Before addressing the parties' contentions it is necessary to say something more about the Act. It is a sprawling piece of legislation, with an enormous amount of detail contained in the schedules and in the rules promulgated by the Commissioner under s 120. Nevertheless, and at the risk of over-simplification, I must do my best to provide a broad summary of the features relevant to this case.

[18] The Act is fiscal in nature. The two main taxes it imposes are customs duty on goods imported into South Africa and excise duty on goods manufactured in South Africa.[2] Customs duty is imposed on a very wide array of imported goods. (The Act also permits export duty to be imposed[3] but this is not commonly done.) Excise duty, by contrast, is imposed on a more limited range of locally manufactured goods – principally alcoholic products, tobacco products and petroleum products. The customs and excise duties imposed by the Act are set out in schedule 1 to the Act.[4] The schedule is so lengthy and is altered so frequently that it is not reproduced in the standard commercial publications of statutes (the same is true of the other schedules). The taxes imposed by the Act are self-evidently an important source of revenue for the fiscus. According to SARS' answering affidavit the State collects customs duty of about R34,2 billion per year. The affidavit does not disclose the amounts collected as excise duty or in the form of other duties imposed by the Act (fuel levy, Road Accident Fund levy and environmental levy). The imposition of customs duty on imported goods is not only a way of raising revenue for the government; it can be, and is sometimes, used to protect the domestic economy – if a particular sector of the local economy is under threat from cheap imports, that sector can be protected by imposing or increasing the duty payable on competing imported goods.

[19] Customs duty and excise duty are payable if the goods are intended for home consumption (ie consumption in South Africa).[5] If imported goods are passing through South African in transit to a foreign country or if excisable goods manufactured in South Africa are exported to a foreign country, duty will not be paid.

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[2]Section 47(1).

[3]Section 48(4).

[4]Part 1 and Part 2 respectively of schedule 1.

[5]Section 47(1).

[20] The Act contains various provisions aimed at controlling the movement of imported and excisable goods until any relevant duty has been paid. The reasons for this are not hard to discern. The duty payable on goods is determined with reference to their value, character and quantity. SARS may thus wish to examine the goods to see that they accord with what it has been told. Furthermore, once goods are beyond SARS' reach it may prove difficult to recover the duty from the liable party. An important feature of SARS' control is that goods may not be moved from a particular controlled environment until 'due entry' has been made of the goods, even though the goods might only be moving from one controlled facility to another. There is a limited number of forms of entry permitted by the Act. The one which gives rise to the payment of customs duty or excise duty (as the case may be) is entry of goods for home consumption. Entry in this context does not refer to the physical passage of goods but to the administrative process in which prescribed forms and documentation are submitted to SARS (together with payment of duty where applicable) before the goods may be moved from the controlled environment.

[21] In the case of imported goods (where customs duty is the applicable duty), the elements of the controlled environment include the following. When imported goods are landed in South Africa by sea or air they are required to be placed in one or other of the following facilities:[6] a transit shed as referred to in s 6(1)(g); a container terminal as referred to in s 6(1)(hA); a container depot as referred to in s 6(1)(hB); or a State warehouse as referred to in s 17. Such placement occurs pending due entry of the goods. In terms of the rules promulgated by the Commissioner in terms of s 120 of the Act, goods may not be moved from one transit shed to another without the Controller's written permission.[7] Air cargo which has been placed in a transit shed may, prior to due entry, be moved to a degrouping depot for the purposes stated in s 6(1)(hA). All these facilities may conveniently be styled pre-entry facilities. While goods which were landed in South Africa by sea or air are in a pre-entry facility they are deemed still to be on the ship or aircraft as the case may be, and the master or pilot is liable for duty as if the goods had not been removed from the ship or aircraft[8] (this liability will typically cease when due entry is made of the goods, at which point liability passes to others[9]). In terms of s 1(5)(iii) of the Act goods in pre-entry facilities fall with the expressions 'goods under customs control', 'goods subject to customs control' and 'goods under control of the Commissioner'.

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[6]See s 11(1). The controls in respect of goods arriving in South Africa overland are contained in s 12. These control measures to do not involve facilities of a kind relevant to this case.

[7]Rule 11.01.

[8]Section 11(2).

[9]See s 44(3).

[22] Before goods may be moved out of a pre-entry facility, due entry of the goods must be made. If the goods are entered for home consumption against payment of duty, the goods will be released from the controlled environment and pass into domestic circulation.

[23] Alternatively, the importer may enter the goods for removal in bond[10]. Goods may only be removed in bond upon the giving of such security for duty as the Commissioner may require.[11] Imported goods may only be removed in bond by a licensed remover in bond, and in order to obtain a license the remover must furnish security.[12] The remover becomes liable for duty on the goods.[13] Unless the removed goods are duly exported (in which case the liability for duty ceases),[14] removal in bond will be an intermediate form of entry, since such goods will be transported to another place of entry where they will either be entered for home consumption (with payment of duty) or (more commonly) for storage in a licensed warehouse.

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[10]Section 18.

[11]Section 18(6).

[12] See s 64D.

[13]Section 18(2).

[14]Section 18(3).

[24] In this latter regard, the Act provides for a further form of due entry (which could be made directly from a pre-entry facility or after removal in bond), namely entry for storage in a licensed customs and excise warehouse[15] with deferment of duty.[16] The licensed warehouse (which I shall for convenience refer to as a storage warehouse or simply a warehouse) is itself a controlled facility. Once goods are in a storage warehouse they may only be removed upon (further) due entry for one of three purposes: home consumption (and payment of the applicable customs duty);[17] rewarehousing in another warehouse or removal in bond;[18] or export.[19] If goods in a storage warehouse are entered for home consumption, they will after due entry and payment of duty leave the controlled environment. If the goods in the warehouse are entered for export, they will be physically removed from the controlled environment but liability for customs duty will remain until the prescribed proof is furnished to SARS that the goods have left the common customs area.[20] SARS' right to be paid customs duty if proof of export is not furnished is safeguarded by the requirements that in general removal for export may be done only by a licensed remover in bond and that security be furnished.[21] If goods in the warehouse are entered for rewarehousing or removal in bond, they will either be moved to another controlled environment or the Commissioner will have the security of the licensed bond remover. Imported goods are thus meant only ever to leave a controlled environment upon due entry for home consumption with payment of duty or (upon provision of security) for removal in bond or export.[22]

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[15]Section 19.

[16]Section 20(1).

[17]Section 20(4)(a).

[18]Section 20(4)(b).

[19]Section 20(4)(d) read with s 18A.

[20]Section 18A(2)(a). If the prescribed proof is not furnished the exporter must pay duty as if the goods had been entered for home consumption (s 18A(2)(iv)).

[21]Sections 18A(4) and (5).

[22] An interesting insight into the historical development of the customs warehousing system is given in *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21 at para 33

[25] In the case of excisable goods, the first element of control is that such goods may be manufactured only in a customs and excise manufacturing warehouse.[23] I shall refer to this type of warehouse as a manufacturing warehouse. This means that a manufacturer of excisable goods needs to have its manufacturing premises duly licensed as a manufacturing warehouse under s 27. The goods will, thus, upon manufacture, automatically be located in a controlled facility. Removal of the excisable goods from the manufacturing warehouse is controlled by the same process of due entry as applies to imported goods in a warehouse – the manufactured goods may leave the warehouse upon due entry for home consumption and payment of applicable excise duty or for export (in both of which cases they leave a controlled environment, in the latter case with safeguards for the potential payment of excise duty if proof of export is not furnished); or they may leave the warehouse upon due entry for removal in bond or for storage with deferment of payment of duty or for rewarehousing (in which case, until further due entry for home consumption or export, they will be in another controlled facility, namely a storage warehouse). Excisable goods (and fuel levy goods) may only be stored in a storage warehouse specifically licensed to store such goods, such warehouses being subject to additional regulation over and above that applicable to ordinary storage warehouses.[24]

[26] The fiscus' interest in goods located in storage or manufacturing warehouses is further protected by a prohibition against transactions involving the transfer of ownership or hypothecation of such goods.[25]

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of the judgment of Smithers J, where the judge quotes a passage from Stephen *the Principles of Commerce and Commercial Law* (1853). In essence, unless customs duty on imported goods could be deferred through a controlled warehousing system, imports into a country would be discouraged, since an importer would then only import goods for which he had an immediate market. See also para 12 of the *Brian Lawlor* judgment.

[23]Section 27.

[24]Section 19A.

[25]Section 26.

[27] A further aspect of control is the creation of 'customs controlled areas' pursuant to s 6A of the Act. Persons entering or leaving such areas, and the vehicles of such persons, may be searched.[26] (These areas, and the search powers pertaining to them, are not in issue in this case.)

[28] In certain circumstances goods entered for home consumption may be admitted under rebate of duty. This is dealt with in some detail in s 75 read with schedules 3 to 6 of the Act. To retain the benefit of the rebate the person so entering the goods must thereafter comply with whatever requirements (whether as to intended use or otherwise) are set out in the relevant rebate item in the applicable schedule. Because SARS has an obvious interest in the payment of the rebated duty if the applicable requirements are not met, s 75 and rule 75 contain detailed provisions applicable to such goods. Security must be furnished, and the person's premises or plant must be registered.[27] The registered premises must include a rebate store which is secure and adequate and which complies with the Controller's requirements.[28]

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[26]Section 6A(3)(a).

[27]Section 75(10) read with rule 75.

[28]Rule 75.08.

[29] Of the pre-entry facilities mentioned earlier, container depots and degrouping depots need to be licensed.[29] Currently that is not the case for transit sheds and container terminals though I was informed that the Act will shortly be amended to bring them within the licensing regime.[30] The places at which transit sheds may be established are listed in rule 200.06 (part of the schedule to the rules).[31] These locations are mainly at various harbours and airports in South Africa. In terms of s 6(5) the owner or occupier of a transit shed must, if so required by SARS, provide accommodation for any officer whom SARS considers it necessary to station at the shed. Apart from s 6(5) and the description of transit sheds in s 6(1)(g) as 'secure premises', I have not been able to locate in the Act or the rules any provisions regulating the operation of transit sheds. The approved container terminals are specifically listed in rule 200.07 (there are four container terminals in Cape Town).

[30] Storage warehouses (used for storage of imported and excisable goods) and manufacturing warehouses (used for manufacturing excisable products) need to be licensed.[32]

[31] Rebate stores are not covered by the licensing regime in Chapter VIII. However, s 75(10) read with rule 75 in essence establishes its own separate licensing regime for such premises.

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[29]Sections 60, 60A and 64G of the Act read with schedule 8 and the rules relating to these sections.

[30]The statutory amendments were passed some years ago: see ss 23 and 28 of the Revenue Laws Second Amendment Act 21 of 2006, inserting ss 64H and 64M into the Customs Act. There is no explanation as to why they have not already been brought into operation.

[31]In paragraph 21.1 of their heads of argument SARS' counsel identified the specific transit sheds established in Cape Town. Although this paragraph was referenced to rule 200.06, the detail contained in the heads is not to be found in the rules (or at least not in the version of the rules published in LexisNexis *Customs and Excise Service*).

[32]Sections 19, 19A and 27 read with sections 60 and 61 and schedule 8 and rules 19, 19A, 60 and 61.

[32] Apart from the control and licensing of the facilities mentioned above, s 59A provides that the Commissioner may require all persons or any class of persons participating in any activities regulated by the Act to register in terms of the Act and the rules. Rule 59A, which contains the Commissioner's rules relating to this section, *inter alia* requires in rule 59A.03 that no person may import goods into, or export goods from, South Africa unless that person is registered as an importer or exporter. A prescribed application must be made. (SARS states in its answering papers that there are 275 000 registered importers and 230 000 registered exporters, though presumably there is some overlap since often a person is both an importer and an exporter.)

[33] The papers do not contain much information as to how pre-entry facilities and warehouses function and are organised from a practical perspective. They are not owned and run by the State. I would expect that the pre-entry facilities are operated by clearing agents and other specialised operators who make facilities available to importers at a fee. Manufacturing warehouses are obviously operated by the manufacturers of the excisable goods. I was told that storage warehouses are mainly operated by clearing agents (a class of activity which is also regulated and requires registration[33]) though some importers (including OCS) operate their own storage warehouses.

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[33] Section 64B.

[34] The Act and rules contain a number of (sometimes overlapping) requirements for the keeping of books and records. The most general provision is s 101(1) which states that any person carrying on any business in South Africa must keep such books, accounts and documents relating to his transactions as may be prescribed. The person must produce those records on demand and render such returns or particulars as the Commissioner may require (s 101(2)). Despite the general language of s 101, it appears from rule 101 that the Commissioner's requirements apply only to importers, exporters, manufacturers of excisable and fuel levy goods, and clearing agents. In terms of rule 101.01 the prescribed records must be kept on the premises where the business is conducted. The records must be retained for five years 'for inspection by an officer'. The prescribed records are 'reasonable and proper books, accounts and documents relating to his transactions' and including at least certain specified documents (in the case of an importer, for example, the records must include bills of entry, bills of lading or other transport documents, supplier invoices, packing lists, bank stamped invoices, payment advices and other documents required in terms of s 39).

[35] The next record-keeping provision is contained in rule 60.08, being one of the requirements imposed on persons who are granted licenses under Chapter VIII of the Act (sections 60 to 64G). These requirements thus apply in general to persons licensed to operate container depots, degrouping depots and warehouses but would not apply (for example) to operators of transit sheds and container terminals nor to importers (except to the extent that the importer was the licensee of a warehouse). The licensee must keep 'proper books, accounts and documents and any data created by means of a computer, of all transactions relating to the activity in respect of which the license is issued'. The records must be retained for five years. The licensee must produce the records and data on demand at any reasonable time and render such returns and particulars in connection with the transactions relating to the licensed activity as the Commissioner may require.

[36] Certain further record-keeping requirements are imposed in respect of specific licensed activities. In the case of degrouping depots, for example, see rule 64G.23, which lists additional documents that must be kept as part of the records. There are no further record-keeping requirements for container depot licensees or warehouse licensees in the rules relating to Chapter VIII of the Act. In the case of warehouses, however, such requirements will be found elsewhere in the rules, as appears below.

[37] Thus, in rule 19, which deals with applications for licenses for storage warehouses, rule 19.05 states that the licensee

‘shall keep at the warehouse, in a safe place accessible to the Controller, a record in a form approved by the Controller of all receipts into and deliveries or removals from the warehouse of goods not exempted from entry in terms of section 20(3), with such particulars as will make it possible for all such receipts and deliveries or removals to be readily identified with the goods warehoused, and with clear references to the relative bills of entry passed in connection therewith.’

[38] In the case of warehouses in which excisable goods and fuel levy goods are to be manufactured or stored, further record-keeping duties are imposed in rules 19A.04 and 19A.05, which records must be produced on demand. In addition, rule 19A.02(a) requires the licensee of such a warehouse to sign a prescribed agreement. In the prescribed agreement[34] the licensee records its understanding that its right to conduct the warehouse business is subject to compliance with the Act; acknowledges the statutory power and right of SARS to inspect, for purposes of the Act, the books, accounts, documents and other records of the business in respect of which the licence is issued; and agrees to and authorises the inspection of such books, documents and business banking accounts as SARS may require. The licensee undertakes to keep on the business premises (that is, at the warehouse) books, accounts, documents and other records relating to the transactions of the business and comprising (where applicable) at least the documents listed in clause 2(e); to keep such material available for inspection by the Commissioner for a period of five years; to answer and to ensure that any employee answers, fully and truthfully, any questions of SARS relating to its business required to be answered for purposes of the Act; and to render such returns and submit such particulars in connection with its transactions and the goods to which the transactions relate as SARS may require.

[39] An identical agreement is prescribed under rule 54F.04. Although this rule and the prescribed agreement[35] are formulated as being of general application to storage and manufacturing warehouses, their location within rule 54F means, I assume, that the prescribed agreement is only intended to be a requirement for warehouses in which the goods dealt with in rule 54F – environmental levy goods – are manufactured or stored. It thus appears, overall, that in terms of rules 19A and 54F the prescribed agreement is required for all manufacturing warehouses and for those storage warehouses where excisable goods or fuel levy goods or environmental levy goods are to be stored but that no such agreement has to be signed by licensees of ordinary storage warehouses. This is consistent with the fact that there is no allegation by SARS that OCS signed any agreement in respect of its

[34] At pp 84-88 of the set of rules submitted to me.

[35] At pp 492-496 of the rules.

licensed storage warehouses. (In terms of rule 64G.03 the Commissioner also requires the licensee of a degrouping depot to sign a similar standard agreement.[36])

[40] In the case of manufacturing warehouses in general, rule 27.10 prescribes the stock record to be kept by the licensee. Such stock record must, when not in use, be kept in a fire-proof safe. Rule 27.11 requires the licensee to furnish the Controller such returns showing such particulars and at such times and under such conditions as he may decide.

[41] Detailed record-keeping requirements are imposed by rules 75.14 to 75.20 in respect of a person whose premises are registered for the use or storage of rebated goods. These records must be available to the Controller on demand (rule 75.20).

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[36]For the standard degrouping depot licensee agreement, see pp 631-636 of the rules.

[42] The Act and the rules contain other provisions regulating the operations at pre-entry facilities, warehouses and rebate stores. In the case of storage warehouses the Controller may, for example, cause the warehouse to be locked with a State lock for such period as he deems fit, and no person may (while the warehouse is so locked) remove or break the lock or enter the warehouse or remove any goods without the Controller's permission (s 19(3)). The Controller may at any time take stock of the goods in the warehouse (s 19(4)). In terms of s 20(2) the licensee must take and record an accurate record in respect of goods transferred into the warehouse for storage. This is further regulated in rule 20. For example, rule 20.06 requires all goods in the warehouse to be arranged and marked in such a manner that they will be easily identifiable and accessible for inspection and that each consignment and the particulars thereof can readily be ascertained and checked. Rule 20.08 states that goods deposited in the warehouse 'may at any time be examined by the Controller and the licensee of such warehouse or his representative shall be present during such examination and assist the Controller in the execution of such examination'. In terms of rule 20.08 goods deposited in the warehouse in closed trade containers may not be examined, nor the packages opened or altered in any way, except with the permission of the Controller and in the presence of an officer if he so requires. If the warehouse is used for the storage of excisable goods or fuel levy goods or environmental levy goods, the additional controls in rules 19A and 54F will apply.

[43] In the case of manufacturing warehouses, s 27(6) states that all operations in the warehouse are ‘subject to the right of supervision by officers’. In terms of s 27(7) the Commissioner can require the licensee to provide suitable office accommodation and board and lodging for a SARS officer stationed at or visiting the warehouse for the purposes of the Act. Section 27(9) provides that no business other than the manufacturing for which the warehouse is licensed may be conducted there without the Controller’s written permission. The Commissioner may prescribe hours of operation of the warehouse (s 27(11)). Further detailed regulation is contained in rule 27. For example, in terms of rule 27.09 no excisable goods manufactured in the warehouse may, without the permission of the Controller, be removed from a receiver, vessel or other container in which they were collected until a count thereof has been taken by the Controller. In terms of rule 27.12 the Controller may give instructions in writing to the licensee specifying in what part of the warehouse any particular manufacturing process is to be carried on and where any material or manufactured goods are to be kept. The requirements contained in rules 19A also apply to a manufacturing warehouse.

[44] In the case of rebate stores, the Controller may at any time take stock and require duty to be paid on any deficiency (s 75(5)(a)(ii)). The Controller may require there to be different stores, vessels etc for different rebate items (rule 75.07). The rebate store must have separate fastenings as will permit a SARS officer to lock the store (rule 75.08). The goods must be arranged and marked to facilitate easy identification and accessibility for inspection (rule 75.09). Except with written permission, only goods entered under rebate may be stored in the rebate store. Rebated goods may only be transferred to another rebate registrant entitled to the same rebate (rule 75.11).

[45] SARS has established an electronic communication system as contemplated in s 101A for the purposes of the electronic processing of documents and procedures under the Act. A person may only communicate with SARS by computer if he is a registered user (s 101A(2)(b)). The Commissioner may by rule require that persons, or persons of a particular class, register as users and communicate with SARS via the electronic communication system. In order to register as a user a person must apply for the status in terms of s 101A(3). If the conditions in s 101A(8) are complied with, retention of electronic data constitutes satisfaction of the Act's requirements in regard to the retention of documentation. In terms of rule 101A.06, s 101 and the rules thereunder regarding books, accounts and documents apply *mutatis mutandis* to data generated on the electronic communication system. In order to register as a user a person must, in terms of s 101A(3)(a), sign a prescribed user agreement. In this agreement[37] the user confirms *inter alia* its awareness of SARS' right to audit and inspect the records of the business in respect of which the user is registered; agrees to and authorises such audit and inspection at any reasonable time without the authorisation of a warrant; and undertakes to keep on the registered business premises the records required by s 101A(2)(a) and s 101A(10)(a) and the electronic data generated pursuant to s 101A, such records to be kept available for audit and inspection for five years.

[46] Sections 79 to 86 create a number of specific offences. Any other contravention of the Act, not separately criminalised, is an offence in terms of s 78(1). Section 91 provides for administrative penalties in lieu of criminal proceedings. If a person has contravened the Act, agrees to abide by the Commissioner's decision and deposits with the Commissioner the sum required by the latter (not exceeding the maximum criminal fine that could be imposed) or secures the payment of such sum to the Commissioner's satisfaction, the Commissioner may, after such enquiry as he deems necessary, determine the matter summarily and may, without legal proceedings, order forfeiture by way of a penalty of the whole or part of the sum deposited. The imposition of such a penalty does not constitute a criminal conviction but no prosecution for the offence is thereafter competent.

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[37] At pp 686-699 of the rules.

[47] Section 87(1) provides that goods dealt with contrary to the provisions of the Act or in respect of which an offence under the Act has been committed shall be liable to forfeiture 'wheresoever and in possession of whomsoever found'. In terms of s 87(2) various other items associated with goods liable to forfeiture may themselves be forfeited. Section 88(1) empowers a SARS officer or a magistrate or a member of the police to detain any goods or other items liable to forfeiture in order to establish whether they are liable to forfeiture. Upon so establishing, the official in question may seize the goods or items. Section 88(2) provides that if goods liable to forfeiture cannot readily be found, the Commissioner may demand from the person who dealt irregularly with the goods payment of an amount equal to the value for duty purposes of such goods.

[48] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another* 2002 (4) SA 768 (CC) Ackermann J, writing for a unanimous court, observed (para 14) that the Act was 'premised on a system of self-accounting and self-assessment'. There was, he said, no viable method by which the Commissioner could keep track of all imported dutiable goods and automatically collect the duty: 'The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion'.

[49] The controlled environment for which the Act makes provision prior to payment of duty is not unique to South African and is of some antiquity internationally. In *R v Lyon* [1906] HCA 17 the following words of O'Connor J concerning the Australian Customs Act of 1901 appear to be true in a general way of our Act:

'[T]he whole policy of the Customs Act, as indicated by a number of sections, is that, from the time of importation until the time of paying duty, the customs shall not lose control of the articles imported. This is indicated directly in sec. 30, which provides that imported goods shall be subject to the control of the customs from the time of importation until delivery for home consumption or exportation. The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them. The only security the customs authorities could have in such a case for the payment of duty would be in most cases the personal security of the importer. Therefore it is, if the Act is to be effective, that all through the dealings with the goods, from the time they are first imported until duty is paid, they must be kept under customs control.'

OCS' status under the Act

[50] OCS is an importer, presumably registered as such with SARS pursuant to s 59A. Although many importers do not have their own licensed warehouses, OCS is the licensee of two storage warehouses at its Muizenberg premises. The one is licensed to store various food products while the other is licensed to store certain kinds of equipment. They are referred to in the papers as the cold store and the dry store respectively.

[51] OCS is a registered user of the electronic communication system referred to in s 101A of the Act. On 17 June 2010 OCS executed the user agreement prescribed under rule 101A.

Mootness of challenge to s 4

[52] The contention in the answering papers that the application is moot was not, insofar as the validity of ss 4(4) to (6) is concerned, seriously pressed in oral argument. The contention is without merit. Section 4 has not been repealed. The present case is quite different from the situation in one of the cases cited to me in argument, *JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC). There the impugned provision had been repealed and the repeal was shortly to be brought into operation. Didcott J observed that nothing that should be stopped was likely to occur under the 'rapidly waning authority' of the repealed legislation (para 16). In the present matter the applicants' *locus standi* to challenge s 4's validity has not been questioned. OCS is an entity which engages in the importation of products which are subject to customs duty. It has in the past been inspected pursuant to s 4 (though the searches of 30-31 May 2012 are the only non-routine searches mentioned in the papers). The respondents do not say, and could not say, that the applicants will not in the future be subjected to search or inspection under the authority of s 4. The respondents themselves assert, in relation to questions of retrospectivity and suspension, that it is of the utmost importance that SARS should have the powers contained in s 4, indicating their intention to keep on using them. An enquiry into the validity of s 4 is thus not an academic matter without practical consequence.

[53] Mr Mtshaulana for the Minister also relied on the so-called principle of avoidance, in terms whereof a court should not decide a constitutional question unless it is necessary to reach that question to dispose of the case.[38] In my view the principle can have no application here – the very point in issue is whether ss 4(4) to (6) are constitutionally valid.

The *Magajane* case

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[38]See, eg, *Zantsi v Council for State, Ciskei, & Others* 1995 (4) SA 615 (CC) paras 4-5.

[54] Before considering the parties' arguments on the merits of the constitutional attack in ss 4(4) to (6) it is necessary to refer to the seminal authority relevant to the enquiry, namely *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC). That case concerned the validity of a part of s 65 of the North West Gambling Act 2 of 2001 ('the NWG Act'). Sections 65(1) and (2) of the NWG Act permitted warrantless searches of premises, whether licensed or unlicensed,[39] if it was suspected that a casino or gambling activities were being conducted at the premises or gambling equipment was located there. In addition, s 65(4) authorised inspectors to make 'administrative inspections' to check for compliance with the Act by any 'applicant, licensee, registrant, subsidiary company or holding company'. Sections 65(6) to (12) permitted an inspector to obtain an 'administrative warrant' from a judicial officer in accordance with the Criminal Procedure Act. It is not clear whether these latter provisions were intended to apply to all administrative searches (ie to all s 65(4) searches) or only where the inspector wished to inspect and seize movable property. Although the provisions appear to me to have had the latter meaning (thus allowing warrantless routine searches under s 65(4)), the Constitutional Court seems to have thought that the Act required there to be a warrant under ss 65(6) for all s 65(4) searches (see para 91), and its judgment must be read in the light of this interpretation of the NWG Act.

[55] The attack in *Magajane* was on the warrantless search provisions in ss 65(1) and (2). This was because the proceedings were precipitated by an inspection under ss 65(1) and (2) of unlicensed premises where it was suspected illegal gambling was taking place. The Constitutional Court held that ss 65(1) and (2), in providing for inspections without a warrant, were an unconstitutional violation of the right to privacy.

[56] The essential elements of the legal framework which the court in *Magajane* laid down for analysing the constitutionality of ss 65(1) and (2) were the following:

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[39]The term 'licensed premises' was defined as premises specified in a license authorising gambling activities at such premises.

[a] The right to privacy extends beyond the inner sanctum of the home. However, the legitimate expectation of privacy weakens as one moves away from this inviolable core. In particular, businesses have a lower expectation of privacy in regard to the disclosure of information; and the more regulated a business is, the more attenuated is its right to privacy (paras 42-50).[40]

[b] Nevertheless, and in line with United States and Canadian jurisprudence, all inspections mandated by legislation in this country should be viewed as limiting the right to privacy guaranteed by s 14 of the Constitution, even though the inspected person is a regulated business entity and even though the inspection is a routine inspection concerned with compliance (paras 52-59).

[c] Accordingly, whenever a statutory inspection power is challenged, it is necessary to undertake the limitation analysis in s 36 of the Constitution to determine whether the limitation of the privacy right is reasonable and justifiable in an open and democratic society, having regard to the considerations listed in s 36 (paras 59-61).

[d] The first factor under s 36 is the nature of the infringed right. The right to have one's privacy protected against search and seizure is an important one which 'belongs in the catalog of indispensable freedoms' (paras 62-64).[41]

[e] The second factor under s 36 is the importance of the purpose of the limitation. Regulatory statutes aim at protecting public health, safety and general welfare. The public interests served by the inspection provision must be carefully weighed by the court (para 65).

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[40]The court in *Magajane* referred in this regard to its earlier decisions in *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC) and *Hyundai Motor Distributors supra*.

[41]The italicized words come from Jackson J's dissent in *Brinegar v United States* 338 US 160 (1949) at 180-181, and were quoted in *Mistry* and again in *Magajane*.

[e] The third factor under s 36 is the nature and extent of the limitation. At least three considerations are relevant here (paras 66-71): (i) A commercial property occupier has a lower expectation of privacy; and persons who conduct certain kinds of business know that their businesses are regulated and may be monitored. Searches of such business premises will involve a lesser intrusion on the right to privacy. (ii) Inspections aimed at uncovering evidence for use in criminal prosecutions will involve a greater intrusion; as will inspections aimed at enforcement (often with quasi-penal consequences) rather than compliance, though not all cases will be amenable to such a clear distinction. (iii) The broader and less circumscribed the inspection power, the greater the limitation. An overbroad power fails to inform the inspected person of the limits of the inspection and leaves the inspector with insufficient guidelines as to how to conduct the search in a lawful manner and with due respect for the inspected person's privacy.

[f] The fourth factor under s 36 is the relationship between the limitation of the privacy right and the purpose of the limitation. Legislation providing for regulatory inspections in the public interest have a strong relationship to the limitation of the privacy right, because the inspection aims at protecting the public interest (para 72).

[g] The final factor under s 36 is whether less restrictive means exist to achieve the purpose of the limitation. A highly relevant question is whether the provision could have achieved its purpose even if it required a warrant prior to the search. In general, exceptions to the warrant requirement should not become the rule. It will generally be difficult to justify warrantless regulatory searches aimed at criminal prosecution. Where a warrantless regulatory inspection is justified, the legislation must provide a constitutionally adequate substitute for a warrant. This means that the legislation should properly limit the discretion of inspectors as to time, place and scope, and should in general be sufficiently comprehensive so that inspected entities can be taken to be aware that their property will be subject to periodic inspections undertaken for a specific purpose (paras 73-77).

[57] The above legal analysis was then applied in *Magajane* as follows:

[a] Since all regulatory inspections infringe the right to privacy, the limitation analysis under s 36 of the Constitution had to be applied to ss 65(1) and (2) of the NWG Act (para 79). The five factors listed in s 36 thus had to be considered and weighed.

[b] As to the first factor, the nature of the right (privacy) did not call for further elaboration (para 80).

[c] As to the second factor, the purpose of the limitation in s 65 of the NWG Act was to protect the public interest through the strict regulation of gambling. This was an important public purpose. An effective inspection scheme was crucial (para 81).

[d] As to the third factor, one of the main objections to the impugned provisions concerned the nature and extent of the limitation. Although gambling was heavily regulated (so that licensed operators would have a low expectation of privacy), the NWG Act not only regulated lawful economic activity but sought to prevent illegal gambling. The Act created offences relating to gambling. The fact that unlicensed premises could be inspected under ss 65(1) and (2) indicated that one of the statutory purposes was to collect evidence for prosecution of such offences – this was enforcement rather than compliance, and weighed strongly against the permissibility of warrantless inspection (paras 82-86).

[e] The inspection power was also overbroad: unlicensed premises could be entered on mere suspicion (not only reasonable suspicion); the ‘premises’ that could be searched were very widely defined; the items for which a search could be conducted were very widely framed; and there were no statutory guidelines for inspectors. The impugned provisions did not narrowly target only those premises whose owners possessed a reasonably low expectation of privacy (paras 87-88).

[f] As to the fourth factor, the statutory purpose of regulating gambling was admittedly achieved (para 89).

[g] However, and as to the fifth factor, there were less restrictive (ie less intrusive) means to achieve the statutory purpose. The purpose could have been achieved while retaining the requirement for a warrant. A warrant was, after all, required for routine searches of licensed premises under ss 65(4) to (12). The need for a warrant to inspect unlicensed premises was an *a fortiori* case. Other provinces' gambling legislation, while permitting warrantless inspections of licensed premises, required warrants for inspections of unlicensed premises (paras 90-93).

[h] Overall, ss 65(1) and (2) could not be justified in relation to unlicensed premises. Nor, in the court's view, was it possible by severance to leave these provisions standing in relation to licensed premises (paras 94-99).

[58] The Constitutional Court in *Magajane* left open the following questions:

[a] whether a provision which permitted warrantless searches of licensed premises would have been valid (para 78 and footnote 109);

[b] whether the provisions of ss 65(4) to (12) were constitutionally valid (footnote 109);

[c] whether a more circumscribed power of warrantless searches of unlicensed premises might have been valid, for example a power which could only be exercised where unlicensed commercial gambling activity was being conducted publicly (para 96).

<u>The Minister's argument – consent</u>

[59] Mr Mtshaulana for the Minister submitted that s 4(4) did not state that SARS officers could enter property without the owner's consent. If the owner declined to allow SARS access the officers would need to obtain a warrant to enter and search the premises. Mr Mtshaulana referred to the duty of a court to read legislation to conform as far as reasonably possible with the Constitution.[42] The unstated premise of Mr Mtshaulana's argument was that without the restrictions for which he argued s 4(4) violated s 14 of the Constitution.

[60] I do not think that s 4(4) can be read as Mr Mtshaulana proposes. The section does not state that the owner's consent is needed. It gives a blunt power of entry without prior notice. In terms of s 4(4)(b) the SARS officer may be accompanied by a member of the police. And s 4(6) states that if the officer is not immediately admitted after having declared his official capacity and purpose and having demanded admission, he can force his way in by breaking open doors and windows and breaking through walls. It is difficult to imagine anything less compatible with an implied requirement of consent.

[61] The Act also contains no provisions for the obtaining of a warrant if consent is refused. On Mr Mtshaulana's argument the warrant would have to be obtained under the provisions of the Criminal Procedure Act 51 of 1977 or the National Prosecuting Authority Act 32 of 1998. This would make it impossible for SARS to conduct routine inspections because *ex hypothesi* there would in such cases be no reasonable grounds for believing or suspecting an offence to have been committed.

[62] There is the further consideration that if s 4(4) means that an officer may only enter with the consent of the owner, it is entirely superfluous. Statutory authority is not needed to enter and search premises with the free consent of the owner.

[63] I thus consider that ss 4(4) to 4(6) empowers SARS officers to do all the acts listed in those sections without the owner's consent and without a warrant. As noted earlier, the Minister's counsel was content to associate himself with the submissions of Mr Trengove for SARS if the Minister's contentions failed (as they have).

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[42]There are many cases to this effect. Mr Mtshaulana cited *Saleem v Minister of Finance & Another* [2007] 4 All SA 1040 (T) para 12, being a case specifically concerned with the Customs Act.

Identifying the provisions which infringe privacy

[64] The competing contentions of the applicants and SARS assumed that ss 4(4) to (6) as a whole infringed the constitutional right to privacy guaranteed by s 14 of the Constitution and that the extent of the invalidity of those infringing provisions depended on the extent to which they could be justified under s 36(1) of the Constitution. It is necessary to examine this assumption more closely.

[65] For present purposes the invasion of privacy lies in the power to enter and search premises. Sub-para (i) of s 4(4)(a) clearly falls into that category. Para (b) of s 4(4) as well as ss 4(5) and 4(6) are ancillary to the power to enter and search as conferred by sub-para (i) of s 4(4)(a) and their justification must thus be assessed together with the said sub-paragraph.

[66] I pass over sub-para (ii) for the moment. The power in sub-para (iii) of s 4(4)(a) is not a power of entry and search. It is a power to require a person to produce any book, document or thing which the SARS officer believes relates to any matter dealt with in the Act and which he believes to be in the possession or under the control of that person. The officer may require production 'then and there' (ie at the time of making the demand) or at a time and place fixed by the officer. In *Bernstein*[43] the Constitutional Court expressed the view that the directors, officials, auditors, creditors and debtors of a company had no reasonable expectation of privacy in regard to business records and business information pertaining to the company and that a statutory provision requiring them to produce such business records and to provide business information in response to questions does constitute an invasion of privacy calling for justification (see paras 56-92, particularly at paras 79-89, *per* Ackermann J, and para 129 *per* Kriegler J and para 155 *per* O'Regan J). I consider that the same applies to the production of documents and the answering of questions relating to the goods and business transactions regulated by the Act. In the light of sub-para (ii) of s 4(4)(a), which I shall consider presently, it seems to me that the power in sub-para (iii) is not intended as a power to be exercised during a search under sub-para (i). However, and even if the power in sub-para (iii) could be used by a SARS officer during the course of a search, the power is a free-standing one which could sensibly be used independently of, and thus survive a successful attack on, the search power in sub-para (i).

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[43]See footnote 40 *supra*.

[67] Sub-para (ii) of s 4(4)(a) is also a power to require the production of any book, document or thing. The power can be exercised while the SARS officer is 'on the premises or at any other time'. The sub-paragraph later refers to a book, document or thing 'which is or has been on the premises or in the possession or custody or under the control of' the person at whom the demand is directed or of his employee. Sub-para (ii) thus has in mind, as at least one of the cases in which a demand under that sub-paragraph may be made, the case where the SARS officer is or has been on premises entered in terms of sub-para (i). Although there are slight differences in the formulation of the prerequisites for valid demands under sub-paras (ii) and (iii), I cannot envisage a case in which a demand which could lawfully be made under sub-para (ii) could not also lawfully be made under sub-para (iii). I thus consider that the sub-para (ii) power should be viewed as an adjunct to the search power conferred by sub-para (i) while sub-para (iii) is an independent power. It follows that if the search power in sub-para (i) is invalid, the power in sub-para (ii) would fall with it.

[68] Sub-para (iv) of s 4(4)(a) confers a power to examine, and to make extracts from and copies of, any books or document; a power to call for explanations of entries contained in the book or document; and a power to attach any such book, document or thing if in the officer's opinion it may afford evidence of any matter dealt with in the Act. This power could be used whether the book, document or thing came to the officer's attention pursuant to sub-para (i), (ii) or (iii). Even if sub-paras (i) and (ii) were struck down, sub-para (iv) could survive as an adjunct to sub-para (iii). As an adjunct to sub-para (iii) it does not appear to involve an invasion of the privacy right.

[69] I thus consider that the provisions which infringe the privacy right and which call for justification are sub-paras (i) and (ii) of s 4(4)(a), para (b) of s 4(4) and ss 4(5) and 4(6). By contrast, sub-paras (iii) and (iv) of s 4(4)(a) will be left unscathed by any order I make.

The justification analysis in general

[70] The first, second and fourth factors in the justification analysis are relatively uncontroversial. As to the first justification factor, the nature of the right infringed (privacy) has already been held in *Magajane* and earlier cases to be an important one, belonging among the 'indispensable freedoms'. As to the second justification factor, the purpose of the limitation is to ensure that the Act is complied with so that the taxes imposed by the Act are duly declared and paid. That is a very important purpose in the public interest – non-payment of taxes inhibits the government's ability to fund its manifold programs of action. In *Metcash Trading Ltd v CSARS & Another* 2001 (1) SA 1109 (CC) the court, in the context of an attack on certain provisions of the Value-Added Tax Act 89 of 1991, stressed (para 60) that there was a significant public interest in obtaining full and speedy settlement of tax debts. And in *Mpande Foodliner CC c CSARS & Others* 2000 (4) SA 1048 (T), which also concerned VAT, the court said that 'in a nascent democracy such as ours with a developing economy the fiscus plays a vital role in the public interest of collecting taxes because the economic well-being of the nation is a fundamental imperative in pursuit of developmental goals to improve the quality of life of all citizens and liberate the potential of all' (para 47). These comments apply equally to the taxes imposed under the Customs Act. As to the fourth justification factor, there is, as in *Magajane*, a strong relationship between the limitation of the privacy right and the purpose of the limitation – the purpose of the limitation is to facilitate the collection of information necessary for ensuring that the taxes imposed by the Act are duly declared and paid. The justification factors which will ultimately be decisive in this case are, as in *Magajane,* the third and fifth ones: the nature and extent of the limitation, and whether less restrictive means are available.

[71] Sub-para (i) of s 4(4)(a), which is only valid if it can be justified under s 36 of the Constitution, empowers an officer to exercise the search power without a warrant issued by a judicial officer. There is no limit on the type of premises that may be entered – the phrase ‘any premises whatsoever’ emphasises the lack of limitation and would include a private home. There is no restriction regarding the time at which the premises may be entered – the officer could enter the premises in the middle of the night. No prior notice need be given. The officer is not required to hold a reasonable belief or a reasonable suspicion as to any state of affairs. The draconian nature of the power is underscored by the fact that the officer may be accompanied by a member of the police force (s 4(4)(b)), may use breaking force to enter the premises if he is not immediately admitted (s 4(6)(a)) and may use breaking force to find things once he is inside the premises (s 4(6)(b)).

[72] The only limits on the power are [a] that it may be used only for the purposes of the Act; [b] and that the officer must subjectively consider that any examination or enquiry he makes during the search is necessary (presumably meaning necessary for the purposes of the Act). Given the length and scope of the Act, the phrase ‘for the purposes of this Act’ is extremely broad. The main purpose of the Act is to impose certain taxes and to provide for the collection of those taxes. In support of this main purpose, the Act’s further purposes are to require compliance with a host of operational, administrative and record-keeping procedures. The Act also creates a number of offences (see ss 78 to 86). Those offences have no doubt been created in further support of the main purpose – ie to provide a strong inducement for people to comply with the requirements of the Act so that ultimately the full taxes imposed by the Act are paid.

[73] Although one of the purposes of the Act is to create the offences just mentioned, I do not think the Act's purposes include to provide for the investigation and prosecution of those offences as criminal contraventions. These are matters for the South African Police Service and the National Prosecution Authority pursuant to ss 205(3) and 179(2) respectively of the Constitution read with the national legislation regulating the functions and duties of these agencies. Since searches directed at criminal investigation are viewed as a significant intrusion into the constitutionally guaranteed right of privacy and since an interpretation which would permit searches to be used for that purpose might expose the relevant provision to a finding of invalidity, a court should prefer an interpretation which precludes the use of the search power for this purpose if such an interpretation is reasonably possible. Not only is such an interpretation possible here; it is the most natural interpretation of the phrase 'for the purposes of the Act'. The Act does not contain other provisions indicating that the investigation of crime is a SARS function under the Act. It is true that in terms of s 4A of the Act the Commissioner may determine a category of SARS officers who have the power to carry out an arrest for the purpose of enforcing the Act and that such an officer, in exercising his arrest powers, is deemed to be a peace officer as defined in s 1 of the Criminal Procedure Act and is subject to the provisions of Chapter 5 of the Criminal Procedure Act. In performing his duties under the Customs Act (which, as I have said, do not in my view include the investigation and prosecution of crime) a SARS officer may well conclude that circumstances justifying an arrest under Chapter 5 of the Criminal Procedure Act are present. The power of arrest is not an investigative power. SARS officers are not, for example, given the criminal investigative powers contained in Chapters 2 and 3 of the Criminal Procedure Act.[44]

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[44]In *Magajane* the court, in assessing the constitutionality of the impugned sections, treated one of their purposes as being to facilitate the collection of evidence for criminal prosecution (paras 84-86). This appears to have been taken for granted. Whether the assumption was correct in the light of the specific provisions of the North West Gambling Act 2 of 2001 is not an issue relevant to the present case.

[74] On the other hand, the imposition of administrative penalties in terms of s 91 for contraventions of the Act is a matter for the Commissioner, and the financial penalties he may impose are the same as those which are competent as fines following a criminal conviction (in many instances the maximum fine is a stated sum or treble the value of the relevant goods, whichever is greater). The investigation of contraventions for purposes of s 91 would thus appear to be among the Act's purposes. Although a person will only be at risk of an administrative penalty if he agrees to abide the Commissioner's decision, I am inclined to think that for purposes of s 91 the Commissioner may investigate contraventions of the Act prior to the suspect's agreement to abide the Commissioner's decision. In other words, suspected contraventions may be investigated under s 4 to determine whether the s 91 process should be initiated (which would occur by inviting the suspect to abide the Commissioner's decision on the contravention). Searches may thus be conducted under s 4 to determine that the correct duty is or has been paid, to ensure that there is compliance with the Act and to determine whether there have been contraventions for which administrative penalties may be imposed.

[75] Where there has been a suspected contravention of the Act a SARS officer who wants to conduct a search for the purposes of the Act (eg to ensure that the correct duty is paid, to locate goods liable to forfeiture, even to facilitate the application of the administrative penalty provisions of s 91) may be aware that he is likely simultaneously to find evidence of a criminal contravention. This will not render the search unlawful provided his actual purpose is the permissible one. Section 4(3)(i) of the Act seems to take for granted that SARS may disclose information to the police in regard to offences in terms of the Customs Act and other Acts administered by the Commissioner and in regard to offences in respect of which the Commissioner is a complainant, since judicial permission to disclose information to the police is only required in respect of offences which do not fall into this category. One might thus say that the purpose of obtaining evidence of a criminal contravention is a legitimate incidental consequence of a s 4 search. However, the search power may not be used for the very purpose of obtaining evidence for use in a possible criminal prosecution.[45]

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[45] The impermissibility of using administrative search powers for the predominant purpose of collecting evidence for a criminal prosecution is well established in the Canadian cases (see *Jarvis v R* [2002] 3 SCR). In *Jarvis*, which concerned powers of inspection and entry under income tax legislation, the court seems to have based its conclusion, as do I, on a proper interpretation of the stated purposes for which the powers could be exercised. In *Jarvis* the powers could be exercised 'for any purpose related to the administration or enforcement of the Act'. This was held not to include the prosecution and investigation of the offences created by the Act (see paras 77-81).

[76] In the answering affidavit filed on behalf of the Minister the deponent referred to the important role played by customs officials in combatting illicit trade in counterfeit goods. He stated that in the past financial year SARS had confiscated over 750 000 pieces of under-declared and illegal clothing worth R483 million. However, this is not a matter dealt with in the Customs Act.[46] The powers of SARS customs officials in respect of counterfeit goods are to be found in the Counterfeit Goods Act 37 of 1997 which contains its own provisions for inspection and search.[47] The purpose of preventing trade in counterfeit goods is thus not a purpose of the Customs Act and is not relevant to ss 4(4) to (6) of the Act.

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[46]This will change if and when Chapter XB (ss 77Q to 77Y), introduced into the Act by s 17(1) of Act 36 of 2007, is brought into force.

[47]See sections 4 to 6. It is of interest to note that in general a judicial warrant is required for the searches mandated by the Counterfeit Goods Act.

[77] The respondents correctly did not contend that the impugned provisions of s 4 could be justified to their full extent. At very least, for example, a warrantless targeted search of someone's home would not pass muster, having regard to the *Magajane* judgment.[48] Both sides' arguments accept, however, that the invalidity goes beyond this. The applicants use the nature of the search as the criterion for identifying those searches which can validly be conducted without a warrant, contending that s 4 is invalid to the extent that it permits warrantless non-routine (targeted) searches. SARS by contrast uses the nature of the searched premises as the criterion. The premises which I earlier referred to for convenience as 'designated premises' may, SARS contends, validly be the subject of any type of search (routine or targeted) while for all other premises a warrant would be required. Section 4 would, thus, on SARS' argument be invalid in respect of all premises other than designated premises. The designated premises identified by SARS are the pre-entry facilities mentioned in my overview of the Act (transit sheds, container terminals, container depots and degrouping depots) and the various types of licensed warehouses. SARS did not include rebate stores in the designated premises though it seems to me that they are subject to a degree of control not dissimilar to that applicable to storage warehouses, and for similar reasons (ie to ensure that duty is paid where applicable).

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[48]It is of interest to note that in s 6 the Customs Management Act 9 of 1903, passed 100 years ago, a distinction was drawn between stores, shops and other structures for the reception of goods on the one hand, and other premises. For entry into the latter class of premises a judicial warrant was required. In *Katz v Commissioner of Customs & Another* 1934 NPD 108 Landsdown J remarked on this distinction (at p 113): 'The reason for this is apparent; it was clearly the intention of the Legislature that any breach by the customs authorities of the privacy of dwelling houses or other places not ordinarily used for the reception of goods should not be permitted save under the safeguard of judicial authority.'

[78] In its heads of argument SARS' counsel cited authority for the view that the privacy of a corporation is much attenuated when compared with that of human beings.[49] I do not think that this consideration has a role in the present matter. The persons whose premises may be searched in terms of s 4(4) are not confined to corporations. The persons who conduct business to which the Act applies may include natural persons, partnerships, trusts and corporations. Section 4(4) does not distinguish between corporations and other persons nor would it sensible, given the purposes of the Act, to draw such a distinction. Neither side sought a remedy which distinguished between corporations and other persons.

[79] If the appropriate remedy in this case were a bare declaration of invalidity it might not be necessary to determine all the issues raised by the parties' competing contentions – it might be sufficient to say that ss 4(4) to (6) are invalid at least because they permit targeted searches of private homes. This was essentially what occurred in *Magajane*. However, and as will become apparent, a simple remedy of that kind is not appropriate in the present case. It will thus be necessary, for purposes of fashioning a suitable remedy, to decide the precise grounds for and extent of the invalidity. It is in any event desirable to do so in order that the lawmaker may know what needs to be addressed in remedial legislation. If the court were only to identify the most obvious objection to the impugned provisions, an amended provision might face another challenge on grounds left undecided in the first case. This process could repeat itself several times.

Justification: routine and targeted searches

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[49] *Thint (Pty) Ltd v National Director of Public Prosecutions & Others* 2009 (1) SA 1 (CC) para 77; *Hyundai supra* para 18.

[80] I shall first consider the applicants' distinction between routine and non-routine searches. The word 'search' is not actually used in s 4(4)(a). Linguistically it might be more apt to confine the word 'search' to targeted searches and to refer to routine searches as 'inspections'. However, for convenience I shall refer simply to routine and non-routine searches. *Magajane* recognises that routine searches and targeted searches may stand on a different footing. The distinction was there described as one between compliance and enforcement (para 70), between [a] 'random, overarching supervision' where particular participants are chosen for inspection 'without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general'; and [b] 'focused investigation of a particular actor…, often with a view to quasi-penal consequences'. When Sachs J in paras 27 and 28 of *Mistry* referred to the 'administrative inspections that are an inseparable part of an effective regime of regulation' and to the relative ease with which 'periodic inspections of the business premises' could be justified in the case of a regulated activity, he was again referring in my view to routine inspections as distinct from targeted ones. Mr Trengove for SARS submitted that the distinction is not clear-cut, making this an unsatisfactory basis for determining constitutional validity. In my view, however, the distinction can be formulated in a way which should enable officials to determine whether a particular search they wish to undertake falls on one side of the line or the other. If in borderline cases they err on the side of caution and seek a warrant, that will be no bad thing and is unlikely materially to hamper the attainment of the Act's objects.

[81] It is best, I think, to define a routine search by reference to its counter-part. I would regard a non-routine search as being a search where the premises are selected (targeted) for search because of a suspicion or belief that material will be found there showing or helping to show that there has been a contravention of the Act. The purpose of the search will be to find material relating specifically to the suspected contravention. A routine search is any search other than a targeted search. There are various ways in which premises could be selected for routine search. SARS might have a program of periodically inspecting the premises of all persons who conduct business of a kind to which the Act applies or of persons who conduct a particular class of business to which the Act applies. If SARS cannot feasibly inspect all such premises, it might randomly select certain premises for search. The knowledge that premises can be randomly searched is an inducement for all persons who conduct the relevant business to comply with the Act. The important feature of a routine inspection is that the officer does not select the premises on the basis of suspected non-compliance, does not enter the premises with a specific suspicion of non-compliance, and is thus not looking for anything in particular. This does not mean, of course, that the officer will not be aware, when he enters the premises on a routine inspection, that he may find evidence of a contravention. In every routine inspection that possibility exists. However, in a routine inspection the officer would not be entering premises which have been selected for search because of a specific suspicion or belief that there has been a contravention.

[82] In criticising the use of the distinction between routine and non-routine searches, SARS' counsel referred to the judgment of the Supreme Court of Canada in *R v Jarvis* [2002] 3 SCR 757, where the court said that there was 'no clear formula' that can answer the question whether the predominant purpose of a search is the determination of penal liability – one has to look at all the factors that bear upon the nature of the search (para 88). The fact that an official has reasonable grounds to suspect the commission of an offence does not mean that the predominant purpose of a search is the determination of penal liability (para 89). However, the distinction I have in mind, and which the applicants propose, is not the one developed by the Canadian courts in regulated industries between searches for the predominant purpose of investigating criminal liability (which require a warrant) and other searches but between searches prompted by suspected non-compliance with (ie contraventions of) the Act and other searches. The fact that a search has been prompted by a suspicion of non-compliance is not a difficult criterion with which to work. I should also make clear that a non-routine search in the sense I am using the term does not signify a search conducted for the purpose of determining criminal (penal) liability. I have already said that I do not regard the investigation of crime as being one of the purposes of the Act; a search for that purpose would simply be unlawful, having regard to the introductory language of s 4(4)(a).

[83] In a regulated field the justification for distinguishing between routine and non-routine searches and permitting warrantless routine searches is, I consider, this. By participating in a regulated field the participant can reasonably be assumed to accept that he must tolerate routine random intrusions aimed at ensuring that all participants comply with their statutory duties. By contrast, the participant does not, by engaging in the regulated activity, expect to become the target of violations of his privacy on the grounds of what might be baseless suspicion of non-compliance. In common with all other subjects, he is entitled to say that if State officials wish to enter his premises because of a suspected contravention of the law they must not do so without satisfying a judicial officer, by some criterion such as reasonable suspicion or a belief on reasonable grounds, that there is justification to invade the target's premises.

[84] The persons whose premises could notionally be the subject of routine searches under the Act would, I think, be those who are required by s 59A to be registered with SARS, those required by Chapter VIII to hold a license in order to conduct an operation of a particular kind, and those registered under s 75 to obtain goods under rebate of duty. Such persons, by applying for registration or for a license, acknowledge that they conduct operations to which the Act applies and can reasonably be expected to accept the intrusion of routine searches. This would cover (among others) registered importers and exporters, licensed clearing agents and removers in bond, the licensees of container depots, degrouping depots and warehouses and registered rebate users. On pragmatic grounds the operators of transit sheds and container terminals would stand on the same footing, even though at this stage those facilities are not part of the licensing regime. A routine search of the premises of such persons would be a search relating to the business for which the person is registered or licensed.

[85] The search of an unregistered or unlicensed person would by its very nature be non-routine. SARS would only have occasion to search such a person's premises because of a suspected contravention. For example, SARS might suspect that a person is conducting business as an importer or exporter without having registered. This would be a contravention of s 59A read with the rules and would also be an offence in terms of s 78(1). A search of the person's premises to establish that he should be registered would be a targeted non-routine search. Of course, a search might not be needed. SARS might be able to deal with the matter non-coercively if the person has omitted to register due to ignorance or oversight (a phone call or informal visit might suffice); or SARS could call for information under other provisions of the Act. But if a search were regarded as necessary, there is no reason why a warrant should not then be obtained. As another example, SARS might, in the course of investigating a person (A) to whom the Act applies, wish to search the premises of a person (B) who does not conduct business to which the Act applies but who has had business dealings with A (for example, where B is a local buyer of goods imported by A). Such a search would again by its very nature be non-routine – there would only be a need to obtain information from B's premises because of a suspicion that A had not complied with the Act. Depending on the circumstances, SARS might be able to get the information it needs from B without a search; but if a search were thought necessary (for example, because B's *bona fides* were doubted), the Act's objects would not be thwarted by requiring SARS to obtain a warrant.

[86] I consider that warrantless routine searches of registered persons and licensees are justifiable. The applicants, without specifically conceding that routine searches may validly take place without a warrant, contend for a striking-down only insofar as non-routine searches are concerned. In relation to designated premises, the various features of the Act and the rules I have summarised earlier show that the operators and licensees of such premises have only a minimal expectation of privacy. The legislative regime governing the licensing and functioning of those premises is aimed at ensuring a high degree of governmental regulation and oversight. However, and even in respect of non-designated premises, a person registered under s 59A operates in a highly regulated field. The prescribed registration form[50] obliges the person to provide details as to where the business is conducted, contact details, particulars of the individuals in charge of the business and so forth. In terms of rule 59A.08 the registered person is obliged to advise SARS of any changes in the particulars provided in the registration application. In terms of s 101 he is required to maintain prescribed records at the premises where he conducts the registered activity. The registered person knows he is obliged by rule 101.01 to have those records available for inspection by an officer. Compliance by registered persons will be enhanced if they know that they can be subjected to random routine searches to determine that they are keeping the prescribed records and keeping SARS informed of changes in the particulars of their businesses.

[87] In short, in regard to the third justification factor (the nature and extent of the limitation), warrantless routine searches of registered and licensed persons do not constitute a significant inroad into the privacy of those persons because their reasonable expectation of privacy in relation to such searches is low and because such searches do not resemble criminal investigations. As to the fifth justification factor (less restrictive means), there is no compelling reason to impose a warrant requirement for routine searches since *ex hypothesi* there are no particular facts which SARS would need to establish to the satisfaction of a judicial officer in order to justify the warrant (beyond perhaps the mere fact that the person is registered or licensed and that the proposed inspection is a random non-targeted one) and since it would not be consistent with a routine inspection to confine the inspection to

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[50]Form DA185.

specific documents or matters. A warrant appears to me to be a somewhat pointless requirement for random routine inspections.[51]

[88] Curiously enough, SARS' approach in the present case would have the result that not only targeted but even routine inspections of non-designated premises could not take place without a warrant, even though the person whose premises are to be searched is registered as (for example) an importer. This would mean, from a practical perspective, that if the warrant could only be obtained upon sworn evidence of a reasonably suspected contravention (which is the usual sort or standard for a judicial warrant and is the standard for which SARS argued), there could never be a routine inspection at a registered person's non-designated premises because *ex hypothesi* there would be no suspicion or belief to justify the issuing of a warrant. The only alternative would be to require an officer to obtain a warrant for a routine inspection by adducing proof to a judicial officer that SARS wishes to conduct a random inspection for compliance purposes. While it would not be impossible to enact such regime, the inconvenience, cost, delay and diversion of judicial resources would not in my opinion be justified by the very attenuated expectation of privacy which registered and licensed persons have in respect of routine searches.

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[51]Cf *Mistry* para 29 and footnote 52 where Sachs J refers to conflicting opinions on this question in the United States. Later United States cases are discussed in footnote 58 of the *Magajane* case. See also *McKinley Transport Ltd & Another v R* [1990] 1 SCR 627 para 36 *per* Wilson J: 'The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed… [T[here is no need for an impartial arbiter capable of acting judicially since his central role under *Hunter* is to ensure that the person seeking authorization has reasonable and probable grounds to believe that a *particular* offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to the *particular* offence, and that the authorization only goes so far as to allow the seizure of documents relevant to the *particular* offence' (emphasis in the original). In the same case L'Heureux-dubé J said, with reference to the United States cases, that the administrative warrant was now 'in almost complete disfavour'(paras 82-87).

[89] Conversely, and leaving aside designated premises for the moment, I do not consider that there is justification for the warrantless non-routine searching of the premises of registered persons. As I have said, the act of registering as a participant in an activity regulated by the Act does not carry with it the reasonable expectation that the person will become the subject of targeted searches based on what may be groundless suspicion. The registered person, in common with other participants in the economy at large, is reasonably entitled to have his privacy safeguarded against targeted intrusions which are not authorised by judicial warrant. A targeted intrusion of this kind resembles a criminal investigation, since suspected non-compliance with the Act will almost invariably equate to a suspected offence under the Act. Although I consider that a SARS officer may not undertake a search for the purpose of investigating crime, the administrative penalties of s 91 do resemble criminal penalties. Furthermore, SARS is probably entitled to disclose the information it obtains in a s 4 search to the police (see my earlier remarks concerning s 4(3)(i)). Searches of this character were held in *Magajane* to constitute a more extensive intrusion into the privacy of the searched person. The respondents have not advanced facts to show that the Act's objects would be thwarted if targeted searches of non-designated premises could only be undertaken after obtaining a judicial warrant. Indeed, SARS' approach would not allow warrantless searches of any kind insofar as non-designated premises are concerned.

[90] I am aware that my conclusions thus far would require a warrant in a wider range of circumstances than would the Canadian jurisprudence. In respect of highly regulated industries, the Canadian courts generally accept as constitutionally acceptable a warrantless search not only where the search is a routine (ie random) one but even where it has been prompted by a complaint or information of non-compliance.[52] A judicial warrant is only required where the search is investigative in the sense that an 'adversarial relationship' has 'crystalised', which is equated with the point where the predominant purpose of the search is to determine penal liability.[53] However, the relevant provisions of the Canadian Charter are not identical to those of our Constitution. For this and other reasons one should not expect our law to develop along identical lines. I also consider it unwise to lay down a general rule applicable to all cases in regulated industries. Under our Constitution the justification analysis must be applied separately to each statute and in accordance with the guidance afforded by cases such as *Mistry* and *Magajane.*

Justification: designated premises

[91] I turn now to the question whether warrantless non-routine searches are constitutionally permissible in respect of designated premises. I shall start with ordinary storage warehouses (ie storage warehouses other than those licensed for storing excisable goods, fuel levy goods or environmental levy goods). The question whether warrantless targeted searches are permissible in respect of ordinary storage warehouses is of importance to the applicants because OCS is the licensee of two such warehouses located at its Muizenberg premises. The searches on 30 and 31 May 2012 were conducted over the whole of the premises, including but not limited to the licensed warehouses.

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[52]See *le Comité Paritaire de L'industrie de la Chemise & Another v Potash* [1994] 2 SCR 406 para 13 (*per* La Forest J) and paras 91-93 (*per* L'Heureux-dubé J).

[53]I have found useful the summary of the Canadian case law in para 157 of *R v Canada Bricks Ltd* [2005] CanLII 24925 (ONSC), which refers to the leading decisions of the Canadian Supreme Court.

[92] The fact that the licensee of a storage warehouse must keep prescribed records at the warehouse and have them available for inspection by SARS on demand, while relevant to the permissibility of routine searches, does not in my view constitute such an attenuation of the right to privacy as to justify warrantless targeted searches. After all, even an importer who does not have a licensed warehouse must in terms of s 101 read with rule 101 maintain prescribed records at its business premises and have them available for inspection. SARS does not argue that warrantless targeted searches of such importers are permissible – indeed, SARS' approach in this case would not even permit the warrantless routine searching of such premises.

[93] The same applies in my view to the obligation imposed on a registered user of the electronic communication system in terms of s 101A of the Act. The requirement to register as a user is not an incident of being the licensee of a warehouse or of other controlled premises. For example, in terms of rule 101A.01A, all importers accredited in terms of s 64E and all unaccredited importers whose declarations exceed a certain number or length must register as users and sign the prescribed agreement. OCS is thus a registered user by virtue of being an active importer, not by virtue of being a warehouse licensee. The lawmaker cannot, by making it a legal obligation for persons to register as users and to sign a prescribed agreement, abridge the constitutional rights of users. If a warrantless targeted search is an unconstitutional violation of privacy, it cannot be legitimised by requiring a person to register and sign an agreement in which he purports to agree to such searches. The provisions of the prescribed agreement must be read as relating only to those searches which SARS may under the Act conduct without a warrant.

[94] If the dispensing of the usual requirement of a warrant for targeted searches is to be justified in relation to ordinary storage warehouses, it would thus have to be because of the nature of the business conducted in such warehouses and the other intrusions which the Act envisages in regard to such premises. The storage warehouse is a controlled environment. Duty will not yet have been paid in respect of goods stored there. SARS thus has a legitimate interest in knowing at all times what is contained on the premises, because if goods taken into the warehouse are no longer there and duty has not been paid on them, there will have been a contravention of the Act. Apart from the fact that the licensee (and others) would become liable for duty, SARS would have the right under ss 87 and 88 to detain and seize the goods as forfeited to the State. Prompt action may be necessary because goods which should be, but no longer are, at the warehouse would become more difficult to track down with the passing of time.

[95] The Act and the rules contain provisions reflecting SARS' legitimate interest in the goods and records contained in the warehouse. Section 19(4) states that SARS may take stock of the goods in a warehouse at any time. The licensee must store the goods in a particular way so as to facilitate easy inspection. SARS is given the right to examine goods at the warehouse at any time. SARS may even cause the warehouse to be secured with a State lock, in which case nobody would be entitled to enter and remove goods without SARS' permission.

[96] That these various elements of control should exist prior to payment of duty or the exportation of the goods is obviously in the public interest. A person is not obliged to operate a customs warehouse but if he seeks a license to do so he can have very little expectation of privacy (insofar as SARS is concerned) in regard to the business conducted there. If SARS were obliged to obtain a warrant to enter the warehouse other than for routine inspection, the objects of the Act could be jeopardised. Firstly, speed of action may be necessary if goods which have irregularly left the warehouse are to be traced. Second, in order to obtain a warrant the empowering provision would have to lay down a standard of suspicion or belief to be established to the judicial officer's satisfaction. This inevitably means that certain non-routine searches could not take place at all, because SARS' suspicions would not necessarily meet the threshold prescribed for a warrant. This strikes me as inconsistent with the important objects of the Act in regard to a controlled environment where the reasonable expectation of privacy is so low. SARS should, I consider, be free to enter and inspect even on the slightest suspicion that something may be amiss.

[97] Although the non-routine search may resemble a criminal investigation (particularly if SARS has in mind to initiate the administrative penalty provisions of s 91), the very low expectation of privacy in relation to storage warehouses means that the nature and extent of the limitation (the third justification factor) is still modest. The use of less restrictive means (the fifth limitation factor), and in particular a requirement for a warrant, could well on occasions thwart the objects of the Act. When one adds to these considerations the important purposes of the limitation and the close relationship between the limitation and its purpose (the second and fourth justification factors), the existence of a right to search storage warehouses without a warrant is in my view justified under s 36 of the Constitution.

[98] The warrantless non-routine searching of a storage warehouse is, however, justified only insofar as it concerns the licensed business of the warehouse. It is quite possible that the licensee of a storage warehouse might have other records and goods at the same premises. In the case of a manufacturing warehouse the licensee may not, without the Controller's written permission, conduct at the warehouse any business other than the licensed manufacturing business. There is no like restriction in the case of storage warehouses. If SARS wishes to conduct a targeted search at a licensed storage warehouse in respect of some other business conducted by the licensee, a warrantless search would not be justifiable.

[99] What I have said in regard to ordinary storage warehouses applies *a fortiori* to manufacturing warehouses and to storage warehouses for the storage of excisable goods, fuel levy goods and environmental levy goods (though since OCS is not a licensee in respect of any such warehouses the applicants can have little interest in this question). The provisions of the Act and the rules relating to manufacturing warehouses and to warehouses for the storage of excisable goods, fuel levy goods and environmental levy goods give SARS extensive rights of control and supervision over the activities conducted at such warehouses. The expectation of privacy, particularly in respect of manufacturing warehouses, is virtually non-existent. SARS officers are entitled to supervise all operations at the warehouse. A SARS officer can even be stationed there, and the licensee must provide him with accommodation. The particular attention which these warehouses receive in the Act is probably attributable to a concern that irregularities which may result in a diminution of duty can occur at any stage in the manufacturing process. The degree of State interference which the licensee voluntarily accepts by seeking the license and signing the prescribed agreement is such that he can in my view reasonably be expected to tolerate all forms of search and inspection of the premises and its records. The Act's purposes might well be frustrated if SARS officers were not able, promptly and without having to justify any particular quality of belief or suspicion, to enter such warehouses to examine the manufacturing process, the goods stored there and the relevant records.

[100] Although SARS' contentions regarding designated premises did not include rebate stores, I suspect that this was due to an oversight. The degree of control in respect of such stores is much the same as that which applies to storage warehouses. The reason for this control is also similar. A rebate of duty will have been granted but this rebate is provisional in the sense that it will be forfeited if the relevant requirements for the rebate are not thereafter observed. SARS thus has an ongoing interest in the goods until the requirements have been discharged. Although I did not hear any argument directed to rebate stores, my reasoning on the other facilities dictates that rebates stores should form part of the category of designated premises which can be subjected to warrantless non-routine searches.

[101] The pre-entry facilities are regulated to differing extents. Surprisingly there is very little legislative regulation of transit sheds, though it seems that this may change in the near future when they (together with container terminals) are brought within the licensing regime. SARS' answering papers contain virtually no information as to the functions and operations of pre-entry facilities. On the other hand, the applicants can have no particular interest in the question whether warrantless targeted searches of pre-entry facilities are constitutionally permissible because OCS is not an operator of any such facilities.

[102] Pre-entry facilities provide temporary storage for goods before they are duly entered for the first time following their landing in South Africa. Nobody is entitled to deal with these goods until they have been duly entered. To use a colloquial expression, the places where these facilities are located (harbours and airports) are typically ‘crawling with officialdom’. They are just the sort of environment where one would expect a SARS officer to be free to enter, inspect and ask questions, whether randomly or because something has caught his attention. These areas are akin to the areas at ports of entry after a person has disembarked from an aircraft or ship but before he has passed through passport and customs control. It may well be justified and necessary that SARS officers should have the right, without the need for a warrant, to inspect such premises, even if the search is not a routine matter but is made because their suspicions have been aroused. Even if the suspicion has not risen to a level justifying the issue of a warrant, it is probably in the public interest that the right of SARS officers to examine goods in these areas and to inspect the related documentation should be unfettered.

[103] In summary, these are my conclusions thus far:

[a] Warrantless routine searches are justifiable under the Act in respect of the business premises of persons registered in terms of s 59A, of persons licensed under Chapter VIII, of person registered under s 75(10) and of persons who operate pre-entry facilities, to the extent that the search relates to the business for which such person is registered or to the business for which such premises are licensed or registered or to the business of operating the pre-entry facility.

[b] Warrantless non-routine searches are justifiable under the Act in respect of pre-entry facilities, licensed warehouses and rebate stores, to the extent that the search relates to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store.

[c] Searches without judicial warrant are not justifiable in other cases. In particular, there is no justification for dispensing with the requirement of a warrant in the case of [i] searches of the premises of unregistered and unlicensed persons; [ii] non-routine searches of the premises of registered persons (except to the extent, if applicable, permitted by para (b) above).

Justification: the need for guidelines

[104] This does not conclude the justification analysis. Even if the distinctions discussed above were expressly drawn in s 4, the section would leave SARS officers with insufficient guidance as to how to conduct those searches for which no warrant is needed (cf *Magajane* para 71). This is a component of the third justification factor (the nature and extent of the limitation). The facts of the present case, while not directly relevant to the assessment of the constitutional validity of s 4, are a striking example of why guidelines are needed. The searches at OCS' premises and at Gaertner's house were on any reckoning heavy-handed. On the applicants' version, the searches may well warrant the same description that Schutz JA gave to the Competition Commission's raid *in Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others* 2003 (2) SA 385 (SCA) – a display of 'rampant triumphalism' (para 66).

[105] I consider that in order properly to balance the searched person's privacy with SARS' legitimate interest in infringing such privacy for the Act's purposes, the following guidelines would need to be incorporated in the empowering provision in respect of warrantless searches:

[a] Entry should take place only during ordinary business hours unless the officer reasonably considers that entry at another time is necessary on grounds of urgency.

[b] The officer should inform the person in charge at the premises whether the search is routine or non-routine. If the search is non-routine (and a warrant is not needed), the officer should be required to furnish to the person in charge a written statement of the purpose of the search unless the officer reasonably considers that there are circumstances of urgency making it not feasible to furnish a written statement, in which case the purpose of the search should be orally communicated to the person in charge.

[c] Only those officers whose presence is reasonably necessary to conduct the search should enter the premises.

[d] The person in charge or his delegate should be entitled to be present and observe all aspects of the search. (I have considered whether it is necessary that the person in charge should be informed of a right to contact his legal representative and whether the officer should be required to delay the commencement of the search if the person wishes his lawyer to be present. While I think this would be a healthy practice and should be carefully considered when remedial amendments of s 4 are considered, I cannot say that such a rule is necessary to render a search constitutionally acceptable. The search provisions of the Criminal Procedure Act and the National Prosecuting Authority Act do not contain such a requirement.)

[e] If anything is removed by an officer from the premises, the officer should provide an inventory of removed items to the person in charge. If SARS copies documents, SARS should provide the person in charge with a list of the material copied.

[f] Decency and order should be strictly observed during the search. (A general requirement of this kind appears in several statutes, including in s 61(5) of the recently enacted Tax Administration Act 28 of 2011.)

[106] I should make clear that in those cases where a warrant is constitutionally required, I do not mean a warrant obtained by the investigating authorities under the Criminal Procedure Act or the National Prosecuting Authority Act. I think the Customs Act could permissibly contain provisions entitling SARS officers to apply to a judicial officer for a warrant. The non-routine searches for which warrants would be needed would relate to the purposes of the Customs Act, not criminal investigation. SARS should not have to depend on the police in order to obtain warrants for these searches. SARS' answering papers claim that because of the high volume of customs investigations and their specialised nature, dependence on the police would 'effectively stymie' searches for the Act's purposes.

Applicants' attack on the searches themselves

[107] The applicants contend that whether or not s 4 in its current form is constitutionally valid, the searches were conducted in a way which rendered them unlawful. The respondents, while denying this, argue that the question has become academic in the light of the settlement reached between the applicants and SARS.

[108] I agree that the question is moot and that it would not be in the interests of justice to decide it.[54] Even if an order declaring s 4 constitutionally invalid is not made retrospective, the terms of the settlement are such that no consequential advantage can flow to the applicants from an order declaring the searches to have been unlawful. SARS undertook in the settlement to return, and claims that it has returned or destroyed, all the material (hardcopies and electronic) copied during the searches, and tendered to pay the applicants' costs on the scale between attorney and client. Although there is a residual dispute as to whether the tender has been fully complied with, a declaration that the searches were unlawful would not make the applicant's case for the return of any outstanding material any stronger. If there is copied material which has not been returned, the applicants may compel compliance pursuant to the settlement agreement.

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[54] For the test in this regard, see *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 29; see also *MEC for Local Government, Housing and Traditional Affairs, KwaZulu-Natal v Yengwa & Others* 2010 (5) SA 494 (CC) para 11.

[109] Furthermore, it is by no means clear that a decision on the legal issues relating to the lawfulness of the searches would be useful in preventing any repetition of the alleged abuses by SARS. The relief I intend to grant in respect of the invalidity of ss 4(4) to (6) should be such as to ensure that there is appropriate prospective legislative regulation of SARS' search powers. This distinguishes the present case from *Pheko & Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), which Mr Katz cited in argument. That case concerned the lawfulness of conduct (eviction without a court order), having regard to the proper interpretation of the relevant legislation. There was no attack on the legislation itself. The questions raised in that case were of a kind which could arise again in the future. And as it happens the declaratory order which the appellants obtained from the Constitutional Court was coupled with consequential relief (see paras 6 to 9 of the order).

[110] Mr Katz referred me to para 21 of *S v Jordan & Others (Sex Workers, Education and Advocacy Task Force & Others as Amicus Curiae* 2002 (6) SA 642 (CC) and para 167 of *City of Cape Town v Premier, Western Cape & Others* 2008 (6) SA 345 (C) in support of his submission that I should decide the challenge to the lawfulness of the searches. Those cases are distinguishable. What the Constitutional Court said in *Jordaan* was that where the constitutional validity of a statutory provision is challenged on several grounds it is desirable that a court of first instance should determine all the grounds, even though a finding on one of the grounds might in the court's view be sufficient for a declaration of invalidity. This ensures that if, in the confirmation proceedings, the Constitutional Court disagrees with the lower court on a particular ground, it has the benefit of the lower court's findings on the other grounds. In *City of Cape Town* the court applied the same reasoning to a case where the lawfulness of conduct was challenged on several grounds. In the present case there are two discrete challenges, one directed at ss 4(4) to (6) of the Act, the other directed at the conduct of the searches. The matter I am declining to decide is not an additional ground for challenging the validity of ss 4(4) to (6) but a separate challenge to the lawfulness of conduct. I have found the latter challenge to be moot and that it would not be in the interests of justice to decide it.

[111] I thus merely note that the applicants' argument that the searches were themselves unlawful created an uneasy tension with the argument regarding the invalidity of s 4. Ultimately a search under a valid statutory provision can be unlawful only if the search is not conducted in accordance with the express and implied terms of the empowering provision. The applicants' submissions on the unlawfulness of the searches amounted in substance to a contention that s 4 as it stands is subject to various implied requirements such as a duty on the SARS officer to inform the searched person of the purpose of the search, a duty to afford adequate opportunity to obtain legal representation and so forth. I have already found that the absence of guidelines in s 4(4) on these matters is one of the features rendering the section unconstitutional. I do not think that such guidelines should be matters of mere implication.

Conclusion and relief

[112] The impugned provisions do not draw the distinctions I consider necessary between routine and non-routine searches and between designated and non-designated premises nor do they provide appropriate guidance as to how permissible warrantless searches should be conducted. The impugned provisions cannot be brought into satisfactory form by actual or notional severance[55] or by a modest reading-in. I thus consider that sub-paras (i) and (ii) of s 4(4) and ss 4(4)(b), 4(5) and 4(6) must be declared invalid.

[113] SARS submits that the declaration should not be retrospective and that its effect should be suspended for a period of 24 months, or at least 18 months, to allow the legislature to pass remedial legislation. SARS proposes that in order to protect the privacy rights of persons who may be subjected to searches during the period of suspension there should be a temporary reading-in. The applicants resist these submissions.

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[55]For the concept of notional severance, see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 63-64.

[114] In view of the settlement, a retrospective order will not achieve any particular benefit for the applicants themselves. On the other hand, a retrospective order could well prejudice SARS and the public interest. Section 4(4) has been the only search provision available to SARS. Although I do not have evidence of the number and nature of searches conducted by SARS since the Constitution came into force on 4 February 1997, one can safely assume that many searches have been conducted on the authority of s 4. SARS' answering papers refer in a different context to the 'high volume of customs investigations' conducted by SARS. A retrospective order would have the effect of rendering all past searches unlawful (even routine searches). This could jeopardise taxes collected and still to be collected. In terms of s 172(1)(b) of the Constitution it would not be just and equitable to make the declaration retrospective.[56] Whether, in addition, SARS and its officers could, as Mr Trengove argued, face claims for damages for wrongful invasion of property and taking of documents and things in respect of past searches if the order were made retrospective would seem to me to depend on whether knowledge of unlawfulness or negligence in that regard is an element of delictual liability in such cases (since if fault was required SARS and its officers could almost certainly contend that they genuinely and reasonably believed they had statutory authority to conduct the searches). Since I was not addressed on that question and since I think non-retrospectivity is in any event indicated, I express no view on that question.[57]

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[56]The Constitutional Court reached a similar conclusion in *Mistry* paras 41-44.

[57] Cf *Minister of Trade & Others V EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) which suggests with reference to authority that knowledge of unlawfulness may not be required in cases involving wrongful imprisonment and wrongful detention of goods. The possibility of delictual claims was mentioned in *Mistry* para 41 without any specific finding on the point.

[115] Similar considerations favour a suspension of the declaration to allow the lawmaker to make remedial changes. Those changes cannot be effected immediately. In the meanwhile, the public interest which is served by allowing SARS officers to conduct searches would be thwarted if SARS did not have any search powers. The Constitutional Court has frequently suspended orders of invalidity where there would otherwise be a lacuna in the legislative scheme (see, eg, *Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature & Others* 2012 (4) SA 58 (CC) paras 38-42). The search provisions in the Criminal Procedure Act and National Prosecuting Authority Act are not sufficient. Those provisions apply to criminal investigations and are thus not suitable for searches aimed at compliance with and enforcement of the non-criminal provisions of the Customs Act. They are in any event unsuitable for routine searches and make SARS dependent on police officials.[58] However, I do not think the suspension need be as long as 24 months. Indeed, I am doubtful whether even 18 months are needed. The lawmaker, assisted by the National Treasury, is remarkably nimble when it comes to amending fiscal legislation. Our taxing statutes, including the Customs Act, are in practice amended at least once a year, sometimes twice or more. The required amendments are procedural in nature – they do not go to broad questions of substance and policy. Nevertheless, in view of the interim protection I propose to afford to the privacy rights of affected persons, it should do no harm, and may be safer, to allow a period of 18 months.

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[58] In *Mistry* the order of invalidity was not suspended (paras 36-39). However, that aspect was decided with reference to s 98(5) of the interim Constitution, which differs materially from s 172(1)(b) of the final Constitution. Also, the main infringing provision had already been amended though the amendment had not yet been brought into effect (para 39). In *Magajane* there was likewise no suspension (para 99) but the reasons given by the court indicate a view that the immediate striking down of ss 65(2) and (2) of the North West Gambling Act would not leave a lacuna since ss 65(4) to (12) would still be available for searches (routine or targeted) of licensed premises while the provisions of the Criminal Procedure Act sufficed to deal with unlicensed operators.

[116] As SARS submitted, the privacy rights of parties who may be searched during the period of suspension can be safeguarded by a reading-in of terms which will render ss 4(4) to (6) constitutionally acceptable. Ultimately it will be for the legislature to determine precisely how the shortcomings in section 4 should be remedied.[59] However, a temporary reading-in during the period of suspension would in my view strike the proper balance between the public interest and the privacy rights of the individual. In *Johncom Media Investments Ltd v M & Others* 2009 (4) SA 7 (CC) the Constitutional Court held that such a temporary reading-in is permissible (para 40). It is so that the reading-in will need to be quite elaborate. Mr Trengove pointed out that in *C v Department of Health and Social Development, Gauteng, & Others* 2012 (2) SA 208 (CC) the court, in granting a final and not merely a temporary remedy, engaged in quite an extensive re-writing (see paras 4 to 6 of the order in that case). The alternatives to a temporary reading-in in the present case are either to order invalidity without suspension (which I would regard as plainly prejudicial to the fiscus and the public interest) or to suspend the order of invalidity with no interim protection for the privacy rights of affected persons (which would mean that SARS can continue to employ a power which is admittedly unconstitutional, which I find equally unacceptable). As in *C v Department of Health*, I consider that the only feasible way forward is a reading-in (see para 89). Even where there is a final reading-in, the court's remedy is not cast in stone because Parliament can always amend the statute. The remedy thus does not intrude unduly into the lawmaker's sphere. In the case of an interim reading-in, this recognition of Parliament's ultimate responsibility for amending the law is explicit; the reading-in is temporary precisely because the court recognises that there may be other legislative solutions. There is the further consideration that SARS itself has argued that a reading-in is required in order to protect the privacy rights of affected persons during the period of suspension, and the Minister through counsel has associated himself with this position. The respondents thus accept that a fairly elaborate reading-in is appropriate.

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[59] *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) paras 64-65.

[117] Because my judgement accepts each of the parties' submissions only in part, and because I also consider that the empowering provision should contain adequate guidelines as to the conduct of searches, the temporary reading-in I intend to order differs substantially from the one proposed by SARS. The reading-in proposed by SARS also errs, in my view, in linking the obtaining of a warrant to suspected offences under the Act and to the collection of evidence of such offences. I repeat my view that the criminal investigation of offences is not one of the purposes of the Act. In SARS' formulation of the reading-in for cases where a warrant would as a general rule be required there was a proposed exception *inter alia* for case where the public has access to the premises to be searched and the premises are entered while the public has access to the premises. I do not think this exception is needed. A SARS officer does not need the authority of law to enter a place which is open to the public and to do no more than the public may do (look around, observe). If the SARS officer wants to do more than any member of the public could do (eg if he wants to go behind a counter, enter back offices and so forth) he should obtain a warrant.

[118] The applicants are entitled to their costs, including the costs of two counsel. They have succeeded in their application to have the impugned provisions declared unconstitutional though I have not accepted their submissions in full. In the answering papers the respondents sought to defend ss 4(4) to (6) in their entirety, and this remained the Ministers position at the hearing. Only in argument did SARS concede that these provisions were constitutionally objectionable.

[119] I make the following order:

(a) Sub-paras (i) and (ii) of s 4(4)(a) of the Customs and Excise Act 91 of 1964 ('the Act') and ss 4(4)(b), 4(5) and 4(6) are declared to be inconsistent with the Constitution and invalid.

(b) The declaration in para (a) shall not be retrospective and its effect shall be suspended for 18 months to afford the legislature an opportunity to amend the offending provisions so as to make them constitutionally valid.

(c) During the period of suspension or until such sooner date as any amendments as contemplated in para (b) come into force, ss 4(4) to 4(6) (inclusive of sub-paras (iii) and (iv) of s 4(4)(a), which remain constitutionally valid) will be deemed to read as follows (the words inserted into the existing text by this order are underlined for convenience):

'(4)(a) An officer may, for purposes of this Act –

(i) enter premises and make such examination and enquiry as he deems necessary, subject to the provisions of paragraphs (c) to (h) of this sub-section;

(ii) while he is on the premises or at any other time require from any person the production then and there, or at a time and place fixed by the officer, of any book, document or thing which by this Act is required to be kept or exhibited or which relates to or which he has reasonable cause to suspect of relating to matters dealt with in this Act and which is or has been on the premises or in the possession or custody or under the control of any such person or his employee;

(iii) at any time and at any place require from any person who has or is believed to have the possession or custody or control of any book, document or thing relating to any matter dealt with in this Act, the production thereof then and there, or at a time and place fixed by the officer; and

(iv) examine and make extracts from and copies of any such book or document and may require from any person an explanation of any entry therein and may attach any such book, document or thing as in his opinion may afford evidence of any matter dealt with in this Act.

(b) An officer may take with him on to any premises an assistant or a member of the police force, provided that only those assistants and members of the police force whose presence, in the officer's reasonable opinion, is strictly necessary for purposes of conducting the inspection, search or examination on the premises may enter the premises.

(c) The power of entry in terms of sub-paragraph (i) of paragraph (a) of this sub-section shall be subject to the further provisions of paragraphs (d) to (g), in regard to which the definitions in paragraph (h) shall apply.

(d) Subject to paragraph (e), if an officer wishes to enter premises to conduct a non-routine search, the officer shall not do so except on the authority of a warrant issued in terms of paragraph (g) of this sub-section; provided that this paragraph shall not apply to the non-routine search of designated premises to the extent that the search pertains to the business of operating the designated premises or to the business in respect of which the designated premises have been licensed or registered.

(e) An officer may enter and search premises without the warrant contemplated in paragraph (d) if:

(i) the person in charge of the premises consents to the entry and search after being informed that he is not obliged to admit the officer in the absence of a warrant; or

(ii) the officer on reasonable grounds believes-

(aa) that a warrant would be issued in terms of paragraph (g) if the officer applied for a warrant;

(bb) that the delay in obtaining the warrant is likely to defeat the object of the search.

(f) If the officer wishes to enter premises in circumstances where a warrant is not required in terms of this sub-section, he shall comply with the following requirements:

(i) The officer may enter the premises only during ordinary business hours unless in his reasonable opinion he considers that entry at any other time is necessary for purposes of the Act.

(ii) The officer shall, upon seeking admission to the premises, inform the person in charge of the premises whether the purpose of entry is to conduct a routine inspection or to conduct a non-routine search.

(iii) If the purpose of entry is to conduct a non-routine search, the officer shall hand to the person in charge a written statement signed by him stating the purpose of the search; provided that if, in the officer's reasonable opinion, there are circumstances of urgency which may result in the purpose of the search being frustrated if its commencement is delayed until such a statement can be prepared, the officer shall orally inform the person in charge of the purpose of the search; provided further that the search shall be confined to such searching, inspection and examination as are reasonable necessary for the stated purpose; and provided further that if in the officer's reasonable opinion there are grounds for believing that the object of the search may be frustrated if the person in charge is informed of the purpose of the search, the officer may, before complying with this sub-paragraph (iii), take such steps as he considers necessary to prevent persons present on the premises from concealing, destroying or tampering with any document, data or thing located at the premises

(iv) The person in charge shall have the right to be present, or to appoint a delegate to be present, during and to observe the search.

(v) If the officer removes anything from the premises pursuant to the search, he shall compile an inventory of such items and shall, prior to leaving the premises, sign the inventory and hand a copy thereof to the person in charge.

(vi) If the officer makes any copies or extracts during the course of the search, he shall compile a schedule of such material and shall, prior to leaving the premises, sign and hand a copy thereof to the person in charge.

(vii) The officer must conduct the search with strict regard for decency and order.

(g) An officer may apply to a magistrate or judge in chambers for the issue of a warrant contemplated in paragraph (d) of this sub-section, and the magistrate or judge may issue such warrant if it appears from information on oath:

(i) that there are reasonable grounds for suspecting that a contravention of the Act has occurred; and

(ii) that a search of the premises is likely to yield information pertaining to such contravention; and

(iii) that the search is reasonably necessary for the purposes of the Act.

(h) For purposes of this sub-section the following expressions have the meaning indicated:

(i) 'designated premises' means any transit shed or container terminal as contemplated in s 6(1) of the Act, any premises in respect of which a license has been issued in terms of Chapter VIII of the Act, and any rebate store as contemplated in rule 75.08 of the rules promulgated in terms of s 120;

(ii) 'non-routine search' means a search which an officer has decided to conduct because a suspicion exists that a contravention of the Act has occurred and because the officer suspects that information pertaining to such contravention may be discovered if the premises in question are searched;

(iii) 'routine search' means any search, inspection or examination other than a non-routine search.

(5) Any person in connection with whose business any premises are occupied or used, and any person employed by him shall at any time furnish such facilities as may be required by the officer for entering the premises and for the exercise of his powers under this section.

(6)(a) If an officer, after having declared his official capacity and his purpose and having demanded admission into any premises and having complied with any applicable requirements of sub-section (4), is not immediately admitted, he and any person assisting him may at any time, but at night only on the presence of a member of the police force, break open any door or window or break through any wall on the premises for the purpose of entry and search;

(b) An officer or any person assisting him may at any time break up any ground or flooring on any premises for the purpose of search if the officer in his reasonable opinion considers such breaking up to be necessary for the purposes of the Act; and if any room, place, safe, chest, box or package is locked and the keys thereof are not produced on demand, the officer may open such room, place, safe, chest, box or package in any manner.'

(d) The respondents shall jointly and severally be liable to pay the applicants' costs, such costs to include the costs of two counsel.

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ROGERS J

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