

Can Sars search and seize your property without a warrant?



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30 Aug 2022

The case of *Bechan and Another v Sars Customs Investigations Unit and Others [2022]* (*Bechan* case) hinges on fundamental aspects of Constitutional democracy. Section 62 of the Tax Administration Act 28 of 2011 (TAA), which permits the search of premises not identified in a warrant, has been under scrutiny for many years due to its potential to infringe the right to privacy as enshrined in South Africa's Constitution. The South African Revenue Service (Sars) and the TAA play an essential role in ensuring that taxes are collected in an efficient and effective manner. Therefore, in order to do so and ensure fiscal security, section 62 of the TAA permits Sars to conduct warrantless searches and seizures of taxpayers' property.



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This power granted to Sars collides with the taxpayer's Constitutional rights to privacy as entrenched in section 14 of the Bill of Rights, contained in chapter two of the Constitution. A question remains as to whether such an infringement on one's Constitutional rights may be justifiable under a limitation clause covered in section 36 of the Constitution.

Facts of the case

In the *Bechan* case, Sars was issued with a warrant in terms of sections 59 and 60 of the TAA, which authorised them to seize information and documentation concerning the case at the premises of a particular taxpayer. Upon arrival at the taxpayer's premises to execute the warrant, Sars was delayed access to the office park in which the premises of the taxpayer were located. While waiting and attempting to gain access to the office park, Sars noticed several people carrying items from the taxpayer's office and placing them in the vehicles around the parking lot.

Some hours later, Sars was granted access to the premises. Besides finding the directors of the taxpayer, they also encountered Bechan (Applicant) on the premises, who was at the premises to do business with a different entity. The main issue began when Sars started investigating the cars in the parking lot when executing its warrant. It noticed that the

vehicles contained several items and documents relating to the taxpayer. This proved to be a critical factor further on in the case.

The Applicant's car was among the cars parked in the parking lot and, according to Sars, when asked to open his vehicle, he stated he did not have the keys. Considering the Applicant's resistance, Sars sought assistance from the SAPS and the Hawks to assist, as well as the services of a locksmith to open the vehicle in question. Once opened, Sars took possession of several items belonging to the Applicant.

According to the Applicant's version, he handed the keys over to Sars and denied being present when Sars took possession of the items in question.

Issues considered

The critical issue in this matter came about upon the institution of a *mandament van spolie* application by the Applicant, who sought an order for Sars to return certain items in its possession. For this application to succeed, two legal questions had to be answered:

1. Was there a disturbed dispossession of the Applicant's property?
2. Was the search and seizure of the Applicant's vehicle by Sars, which fell outside of the scope of the granted warrant, unlawful?

In dealing with this issue, the court relied on the principles of the Constitutional Court in *Anale Ngqukumba v The Minister of Safety and Security*, in which the Constitutional Court held that the "essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession of the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before or else)."

Essentially the spoliation order is meant to prevent taking possession unless it is in accordance with the law.

Court finding

On the first issue, it was undisputed that Sars had taken possession of the Applicant's property. However, the two different versions between the parties ought to have two different outcomes for the second issue. The court found, on balance, the probability that the Applicant did not relinquish possession voluntarily, therefore, there was a disturbed dispossession.

Searching unidentified property in a warrant lawful

Section 62 of the TAA empowers a Sars official to enter and search premises not identified in a warrant, subject to the following requirements:

- The property included in a warrant is at premises not identified in the warrant and may be removed or destroyed.

- The warrant cannot be obtained in time to prevent the removal or destruction of the relevant material.
- The delay in obtaining a warrant would defeat the object of the search and seizure.

The court found that Sars was entitled, in the execution of the warrant, to ascertain whether Bechan had in his possession or under his control any of the taxpayer's materials specified in the warrant. This view by the court was most likely motivated by the fact that Sars had earlier observed materials being carried to motor vehicles in the parking lot of the premises.

With respect to the Applicant's argument that the warrant had to be confined only to the actual premises of the taxpayer, which excluded the parking lot, the court dismissed this view by stating that the warrant referred to the address of the taxpayer's premises, which would also include the parking, and the interpretation argued by the taxpayer would undermine the warrant's efficacy. To conclude the case, the court dismissed the application and ordered the Applicant to pay the costs jointly and severally.

Comments

The importance of this finding is entrenched in the fact that, although a warrantless search may be executed by Sars, this search is subject to much more stringent requirements, even though the rights to privacy might be infringed at times. Such rights are subject to limitations and in the court's view, section 62 of the TAA would be sufficient to meet the scrutiny of the limitation clause in section 36 of the Constitution.

Further, there are unanswered questions with respect to the true scope of the ability of Sars to investigate and seize, particularly without a warrant, and if such collected evidence could extend beyond the objects and purpose of the original warrant. However, it is important for taxpayers to note that it is not always the case that Sars officials would need to furnish them with a warrant to search and seize their property and, as the court highlighted, the circumstances in which these powers may be exercised by Sars are highly fact dependent.

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