

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 7627/2001

6958/2001
In the matter between:

FERUCCIO FERUCCI & 13 OTHERS Applicants

and

**THE COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE AND ANOTHER** Respondents

JUDGMENT

—

OOSTHUIZEN A.J.:

BACKGROUND

This is an application relating to a search and seizure warrant issued at the behest of the First Respondent, the Commissioner of the South African Revenue Service (*“the Commissioner”*), in terms of Section 74D of the Income Tax Act, No 58 of 1962 as amended (*“the Income Tax Act”*) and Section 57D of the Value-Added Tax Act, No 89 of 1991 as amended (*“the VAT Act”*).

The First Applicant, Ferruccio Ferucci, is married to the Second Applicant. The Third to Thirteenth Applicants are companies, close

corporations and, in the case of the Fifth Applicant, a trust. In all of these the First Applicant or his family hold an interest as members or beneficiaries. The companies, close corporations and trust are to all intents and purposes controlled by the First Applicant. Various of the business interests of the Ferucci family, which include farming and property owning activities, are conducted through the companies, close corporations and trust.

The First Respondent is charged with the administration of the Income Tax Act and the VAT Act. On 14 August 2001 the First Respondent applied for a warrant for search and seizure in terms of Section 74D of the Income Tax Act and Section 57D of the VAT Act. A sworn declaration by one Nico Venter, an investigator at the Bellville office of the South African Revenue Service, was used in support of such application. Pursuant to such application, the warrant sought was granted by Van Reenen J. The terms of the warrant will be analysed in greater detail below. The warrant was executed at various premises on Wednesday, 15 August 2001. A considerable number of items were seized by officials of the SA Revenue Service, and are currently retained by it in a number of boxes, which boxes are under the control of the First Respondent.

On 20 August 2001 an application was brought as a matter of urgency for an order directing that the boxes of documentation and other items which the First Respondent had seized not be opened pending the final resolution of a further application to be brought for an order setting aside the warrant or portions thereof and ordering the return of all or alternatively some of the said documentation. This application is hereinafter referred to as "*the interim application*". A further application (hereinafter referred to as "*the main application*") was launched on 29 August 2001 for the setting aside of the warrant and for an order directing that the information, documents and things seized pursuant thereto be returned to the Applicants. Certain alternative relief was sought in the main

application regarding, *inter alia*, the furnishing of certain information to the Applicants.

THE APPLICABLE LEGISLATIVE DISPENSATION

Both the Income Tax Act and the VAT Act impose obligations on the parties liable to effect payment of the taxes levied thereunder to furnish information to the SA Revenue Service (“SARS”) regarding matters relevant to the calculation and payment of such taxes. Such information is used by SARS *inter alia* to assess the tax payable by taxpayers. A situation which no doubt frequently arises is that information furnished by taxpayers is incomplete, inaccurate and sometimes misleading. Both Acts accordingly contain extensive provisions which vest in the Commissioner a wide range of powers in regard to the obtaining and verifying of information.

Section 74A of the Income Tax Act states that the Commissioner or any officer authorised thereto may, for the purpose of the administration of the Income Tax Act in relation to any taxpayer, require such taxpayer to furnish such information, documents or things as the Commissioner or the authorised officer may require. Section 74B empowers the Commissioner or an officer named by him in an authorisation letter to require a taxpayer or other person, on reasonable prior notice, to furnish any such information, documentation or things as the Commissioner or such other officer may require to inspect, audit, examine or obtain. The Commissioner or such authorised officer is moreover empowered to call on any person at any premises, during such person’s normal dwelling hours, save that the Commissioner may not enter a dwelling house or domestic premises without the consent of the occupant. The

authorised officer shall, when exercising any power under this section, on demand produce the authorisation letter issued to him. It is immediately apparent that the powers vesting in the Commissioner under Section 74B are more extensive than those entrusted to him under Section 74A and include the power to inspect and audit documentation and to attend upon the premises of any person, where this is necessary for purposes of the investigation.

Section 74C vests in the Commissioner even more comprehensive investigatory powers. Under that section the Commissioner or his authorised representative may apply to a judge for an order designating a presiding officer before whom an enquiry is to be held. The application to such judge must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based. The judge is entitled to grant the order if satisfied that there are reasonable grounds to believe:

- (a) that there has been non-compliance by any person of his obligations in terms of the Income Tax Act or that an offence in terms of the Income Tax Act has been committed by any person.
- (b) that information, documents or things are likely to be revealed which may afford proof of such non-compliance or of the commission of such offence;
- (c) that the enquiry which is sought is likely to reveal such information, documents and things.

The order issued by the judge must name the presiding officer, refer to the alleged non-compliance or offence, identify the perpetrator thereof and be reasonably specific as to the ambit of the enquiry. The presiding officer thus appointed thereafter conducts the enquiry, utilising such procedure as he thinks fit. He has the same powers to enforce the attendance of witnesses, and compel them to give evidence and produce evidentiary material, as are vested in the President of the Special Court contemplated in Section 83 of the Income Tax Act. The person whose affairs are being investigated is entitled to be present during such enquiry, and has the right to be assisted at such enquiry by legal representatives. The enquiry shall be private and confidential. The provisions of Section 4 of the Income Tax Act regarding the preservation of secrecy apply to the questioning of any person at such enquiry. Those giving evidence at the enquiry must do so under oath or solemn declaration, and may not refuse to answer any question during the enquiry on the ground that the answer may incriminate that person. Subject to certain limitations, however, no incriminating evidence given at an enquiry

by any person shall be admissible in subsequent criminal proceedings against such person.

Section 74D of the Income Tax Act is the section of immediate relevance to the instant application. Section 74D(1) stipulates that a judge may, on the application of the Commissioner or a person authorised by him, issue a warrant authorising the officer or officers specified therein without prior notice and at any time to:

- (i) Enter and search any premises; and
- (ii) Search any person present on such premises, provided that such search is conducted by an officer of the same gender as the person being searched

for information, documents or things which may afford evidence as to the non-compliance of any taxpayer of his obligations in terms of the Income Tax Act, and to seize any documents or things authorised by the warrant.

Section 74D(2) requires that an application to the judge for the issue of such warrant shall be supported by information supplied under oath or solemn declaration “*establishing the facts on which the application is based*”. The judge may issue the warrant requested if he is satisfied that there are reasonable grounds to believe:

- (1) that there has been non-compliance by any person with his obligations in terms of the Income Tax Act or that an offence in terms of the Income Tax Act has been committed by any person;
- (2) that information, documents or things are likely to be found which may afford evidence of such non-compliance or the commission of such offence; and
- (3) that the premises specified in the application are likely to contain such information, documents or things.

Section 74D(4) sets out certain requirements with which such a warrant must comply. It reads as follows:

“(4) A warrant issued under subsection (1) shall -

(a) refer to the alleged non-compliance or offence in relation to which it is issued;

(b) identify the premises to be searched;

(c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and

(d) be reasonably specific as to any information, documentation or things to be searched for and seized.”

Section 74D(5) and 74D(6) afford certain additional powers of search and seizure to the officers executing the warrant. Those sections provide as follows:

“(5) Where the officer named in the warrant has reasonable grounds to believe that-

(a) such information, documents or things are -

(i) at any premises not identified in such warrant; and

(ii) about to be removed or destroyed; and

(b) a warrant cannot be obtained timeously to prevent such removal or destruction,

such officer may search such premises and further exercise all the powers granted by this section, as if such premises had been identified in a warrant.

(6) Any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of this Act.”

Section 74D(7) requires the officer exercising any power under Section 74D to produce the warrant on demand. Section 74D(8) stipulates that the Commissioner must take reasonable care to preserve and retain all information, documents or things seized pursuant to the warrant until the conclusion of any investigation into the non-compliance or offence in relation to which such information, documents or things were seized, or until they are required for use for the purpose of any legal proceedings under the Act.

Section 74D therefore contains measures which are more drastic and far reaching than those contained in the preceding Sections 74A, B and C. Both Sections 74C and 74D require that the mechanisms created thereunder can only be utilised once an appropriate order has been obtained from a judge. The sections set out the information that must be placed before such judge and the aspects on which he must be satisfied, before issuing an order in terms of the relevant section.

Sections 57A, 57B, 57C and 57D of the VAT Act contain provisions substantially identical to those found in Sections 74A, 74B, 74C and 74D of the Income Tax Act, save that the former would obviously be utilised in relation to any matter pertaining to the payment of VAT, and the latter in relation to any income tax matter.

THE MAIN APPLICATION AND THE COURT'S POWER IN RELATION THERETO

Section 74D(9) of the Income Tax Act and Section 57D(9) of the VAT Act are identically worded. They read as follows:

“(a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.

“(b) The court hearing such application may, on good cause shown, make such order as it deems fit.”

In **Ferela & Others v Commissioner for Inland Revenue, 1998**

(4) SA 275 (T) Botha J said the following concerning the Court's

power under Section 74D(9) of the Income Tax Act:

“It confers on the Court, not Judge, a wide discretion to order the return of any information, documents or things seized under a warrant. In effect it empowers the Court to reverse the effect of a warrant in toto. It also empowers the Court on hearing such an application to make such an order as it deems fit. It therefore empowers the Court to grant such further relief as may be appropriate, which would obviously include an order for costs. It could of course order other relief as well, such as the retention of copies by the Commissioner. It is not necessary for me to speculate on all the types of grounds on which section 74D(9) could be invoked. Grounds that spring to mind are: if a party concerned needs any documents that have been seized; if the documents seized do not have any bearing on the affairs of a taxpayer; if the documents seized are not covered by the warrant and also if the warrant is deficient or if it should not have been obtained.”

I am in agreement with the view expressed in the aforesaid *dictum* of Botha J. It is perhaps necessary to elaborate on the one aspect raised by him, namely that a warrant can, in appropriate circumstances, be set aside on the grounds that it should not have been obtained. It must be borne in mind that a warrant is issued as part of an investigation against the taxpayer which will frequently result in criminal or civil proceedings. The taxpayer may, in seeking to have the effect of a warrant reversed in terms of Section 74D(9), or the equivalent provision in the VAT Act, raise all manner of exculpatory and other explanations in regard to the material which

has been put up by the Commissioner, when applying for the warrant. A number of factual disputes may be created in relation to the averments raised by the Commissioner. It cannot be the function of the Court, when determining an application for the setting aside of a warrant under section 74D(9) or an application for the return of documentation, to decide on the correctness or otherwise of such factual issues. That is a task reserved for the Court dealing in due course with the criminal or civil proceedings which may be instituted against the taxpayer. The Court dealing with an application under section 74D(9) need do no more than satisfy itself, as does the judge issuing the warrant, that there are reasonable grounds for believing that there has been a non-compliance by any person of his obligations or an offence committed under the Act, and that information, documents or things affording evidence of such non-compliance or offence are likely to be found at the premises specified in the warrant. If it is not so satisfied, that may constitute a ground for setting aside the warrant.

In order to decide an application such the instant one, the court is not confined only to a consideration of the facts put up by the Commissioner when applying for the warrant. Firstly, no such limitation is to be found in Section 74D(9) of the Income Tax Act or the equivalent provision of the VAT Act. Secondly, one can readily

conceive of various instances where facts not contained in the initial warrant application are highly relevant to the question of whether the taxpayer is entitled to have the warrant set aside or be granted other relief relating thereto. That the Court does not confine itself simply to the facts contained in the warrant application appears, *inter alia*, from the unreported decision of the Supreme Court of Appeal in **Shelton v Commissioner for the South African Revenue Service** where the court considered and analysed certain allegations put up by the taxpayer, when applying for an order in terms of Section 74D(9). Similarly, in the unreported decision of **Oberholzer & Others v Commission for the South African Revenue Services (CPD Case No 8714/98)** Blignault J, in determining an application in terms of Section 74D(9) did not confine himself to the facts contained in the original warrant application. I am therefore of the view that, in order to decide the application now before us, regard may be had to the affidavit filed in support of the warrant application as well as all the other affidavits put up in the instant proceedings.

THE TERMS OF THE WARRANT

Section 74D(4) of the Income Tax Act and Section 57D(4) of the VAT Act require the warrant to “*refer to the alleged non-compliance or*

offence in relation to which it is issued". This requirement is imposed, *inter alia*, to assist the functionaries executing the warrant by delineating the documents liable to be seized thereunder with reference to the offence or omission in question; and also to afford the party against whom the warrant is issued an indication of the offence or non-compliance under investigation, and the ambit of documents that may permissibly be seized under the warrant. Both the VAT and Income Tax Acts provide that the executing functionary shall, on demand, produce the relevant warrant.

The aforesaid requirements in the two Acts regarding the contents of the warrant and the information to be placed before the issuing judge serve as an important constitutional safeguard. As was said in **Investigating Director: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others, 2001 (1) SA 545 CC at 567 I - 568 C:**

"There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the State has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of

crime from the criminal justice process. On the other hand, State officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the State, a task that lies at the heart of the inquiry into the limitation of rights. On a proper interpretation of the sections concerned, the investigating directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy. The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals."

In order to meet the objective standards imposed by the legislature, it is necessary for a warrant to set out the offence or non-compliance which led to the issue thereof in sufficient detail. The degree of particularity need not be that contained in a charge sheet commencing criminal proceedings. On the other hand, the safeguards which the legislature sought to achieve when promulgating Section 74D and Section 57D would not be met by simply referring to certain sections of the Act, without further elaboration. The applicable legislative provisions require not that the warrants must specify that they are issued in terms of, respectively, the Income Tax or VAT Acts, but that they should refer to something more specific, namely the alleged non-compliance or

offence in relation to which it is issued. That requires a setting out of the facts relating to the non-disclosure or offence, in sufficient detail to enable the party against whom the warrant is executed to be adequately informed as to the purpose and ambit of the search. To suggest that it is sufficient for the warrant to simply identify specific sections of the Income Tax Act or the VAT Act, without any further particularising of the alleged offence or non-compliance, would be to render Section 74D(4)(a) of the Income Tax Act and Section 57D(4)(a) of the VAT Act largely meaningless, and would fall far short of providing the necessary constitutional balance and protection referred to in the **Hyundai Motor Distributors** case, *supra*.

The warrant in the instant case refers to the offences in respect whereof the warrant was issued in the following terms:

“Ferccio (sic) Ferucci has committed an offence under Section 104 and Section 75 of the Income Tax Act, No 58 of 1962, and Section 59 of the Value Added Tax Act, No 89 of 1991, in his private capacity and/or his capacity as trustee, director, shareholder, member of the following entities. .. [the Third to Thirteenth Applicants are then listed as the entities to which reference is made].”

This is followed by an allegation that the Second Applicant “*has committed an offence under Section 104 and Section 75 of the Income Tax Act, No 85 of 1962, and Section 59 of the Value Added Tax Act, No 89 of 1991*”, allegedly also in her private capacity or her

capacity as trustee, director or shareholder of the Ferucci Family Trust, Boland Travel Paarl (Pty) Ltd and Ferucci Finance Co (Pty) Ltd.

No further details are provided regarding the conduct said to constitute the offences themselves.

Section 75 of the Income Tax Act creates no less than thirteen distinct offences as diverse as the failure to file tax returns and impersonating an income tax officer.

Section 59 of the VAT Act and Section 104 of the Income Tax Act make provision for a number of additional offences. Section 59(1) of the VAT Act provides as follows:

“59. Offences and penalties in regard to tax evasion. - (1) Any person who with intent to evade the payment of tax levied under this Act or to obtain any refund of tax under this Act to which such person is not entitled or with intent to assist any other person to evade the payment of tax payable by such other person under this Act or to obtain any refund of tax under this Act to which such other person is not entitled -

(a) makes or causes or allows to be made any false statement or entry in any return rendered in terms of this Act, or signs any statements or return so rendered without reasonable grounds for believing the same to be true; or

(b) gives any false answer, whether verbally or in writing, to any request for information made under this Act by the Commissioner or any person duly authorized by the Commissioner or any officer referred to in section 5(1); or

(c) prepares or maintains or authorizes the preparation or maintenance of any false books of account or other records or authorizes the falsifications of any books of account or other records; or

(d) makes use of any fraud, art or contrivance whatsoever, or authorizes the use of such fraud, art or contrivance; or

(e) makes any false statement for the purposes of obtaining any refund of or exemption from tax; or

(f) receives, acquires possession of or deals with any goods or accepts the supply of any service, knowing or having reason to believe that the tax on the supply of the goods or services has been or will be evaded; or

(g) knowingly issues any tax invoice, credit note or debit note required under this Act which is in any material respect erroneous or incomplete; or

(h) knowingly issues any tax invoice showing an amount charged as tax where the supply in respect of which the tax is charged will not take place; or

(i) for the purpose of section 16(2), fabricates, produces, furnishes or makes use of any tax invoice, debit note, credit note, bill of entry or other document contemplated in that section knowing the same to be false,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 60 months."

Section 104(1) of the Income Tax Act creates, in respect of income tax assessments or taxations, the same offences as are specified in sections 59(1)(a), (b), (c) and (d) of the VAT Act.

The warrant in the instant matter does not specify which of the various offences referred to in Sections 75 and 104 of the Income Tax Act and Section 59 of the Value Added Tax Act have allegedly been committed. There is no particularity whatsoever as to what conduct on the part of the First or Second Applicants constituted such offence or offences. The warrant does no more than list,

without elaboration, various sections of the two Acts. That does not constitute sufficient compliance with Section 74D(4)(b) of the Income Tax Act or Section 57D(4)(a) of the VAT Act.

Both the Income Tax Act and the VAT Act require that the warrant issued should *“be reasonably specific as to any information, documents or things to be searched for and seized”*. Here, too, the need to apply Section 74D and Section 57D in such a way as to provide sufficient safeguards against an unwarranted invasion of the right to privacy must be recognised. In this regard, there is much to be said for the approach adopted in **R v McAvoy, (1971) 12 CRNS 56 (NWT) at 65** where Morrow J said:

“To avoid search warrants becoming an instrument of abuse it has long been understood that if a search warrant ... fails to give an accurate description of the articles to be seized then it will be invalid.”

This approach was endorsed in **Re a Search Warrant issued by Bench JP: Schumiatcher v Attorney General of Sask & Others, (1960) CCC 270 (Sask. Q.B.)** where Hall CJ said:

“I do not think it was every contemplated by parliament that ... those executing the warrant would have carte blanche to open and read the private papers of clients and of partners in the hope of finding something therein that might in the sole judgment of those searching have evidentiary value relevant to the charges made against Schumiatcher.”

The aforesaid approach must obviously take account of practical realities. Given the tremendous volume of documentation of which a taxpayer might be possessed, and the fact that the authorities may still be in an investigatory stage of proceedings and therefore may not be able to precisely identify the things they are looking for with precision, one could not expect a warrant to always individually itemise each of the documents sought. (**Re Lubell and the Queen, (1973) 11 CCC (2d) 188 at 199**). The description of the documents in the warrant should, as was held in **R v Trottier, (1966) 4 CCC 321 (Que. CA)** be adequate if the person charged with executing the warrant can, by referring to the warrant, ascertain with reasonable accuracy what is to be seized. The person against whom the warrant is executed should similarly be able to ascertain from the warrant itself what it is that he is obliged to surrender. The warrant should moreover indicate some nexus between the documents to be seized and the offence or non-compliance in respect whereof the warrant was issued.

In **Mistry v Interim Medical & Dental Council of South Africa, 1998 (4) SA 1127 (CC)** the Constitutional Court emphasised the dangers inherent in any legislative enactment which leaves it up to the functionary, normally not a judicial officer, to determine the precise framework within which a search can be

carried out. Commenting on certain provisions of the Medicine and Related Substances Control Act, No 101 of 1965 which authorised inspectors to enter and search premises, Sachs J said the following at **1147 D - 1148 B**:

“Inspectors, like any other persons exercising power on behalf of the State, are as entitled as the public to know the precise framework within which they can lawfully and effectively carry out their functions. The statute gives hardly any guidance. All is left to the discretion of the inspectors and their superiors. The fact that the Medicines Act is manifestly in the public interest in no way diminishes the need for the powers of inspection to be exercised according to constitutionally valid criteria and procedures. Lord Acton’s famous statement about all power tending to corrupt and absolute power corrupting absolutely was made in the context of power being exercised by the most worthy people, not the least.”

(See, too **Janse van Rensburg NO v Minister van Handel & Nywerheid, 1999 (2) BCLR 204 (T)** at **220C - F**).

Any warrant which leaves it to the person executing such warrant to determine the extent or ambit of the search creates a number of potential problems. The function of laying down the perimeters within which the search is to occur should be left to the judicial officer issuing the warrant and not to the person executing it.

The warrant in the instant matter authorises those executing it to enter upon no less than eleven premises, being primarily the places of business or residence of the various Applicants, and to search for twenty four categories of documentation as well as for “*any other*

financial documents or records and/or other relevant information, documents or things that may afford evidence as to the failure to comply with the provisions of the Value Added Tax Act 89 of 1991 and/or the Income Tax Act 58 of 1962 (hereinafter referred to as 'the Acts') alternatively the committing of offences in terms of the Acts" by the First and Second Applicants in their private capacities or their capacities as members, shareholders, directors or trustees of the other Applicants. Some of the categories of documents mentioned are so broad as to render them virtually meaningless. Thus, for example, the warrant authorises the seizure of "*contracts and agreements*" with no attempt to delineate which type of contracts may be seized, save for the aforestated proviso that such contracts should be capable of affording evidence as to the failure to comply with the provisions of the Income Tax and VAT Acts or the commission of an offence under these Acts. The warrant authorises the seizure of "*related correspondence*", without indicating what it is to which such correspondence should be related. The same comment can be made of the categories "*information on fixed and current assets*", "*diaries, minute books and office memos*" and "*cash and cash books*". There is no indication in the warrant as to the time periods to which the documents to be seized should relate.

The warrant also authorises the search of all persons found on the various premises, without distinguishing between persons who could

reasonably be thought to be in possession of relevant documents or things, and others who happen to fortuitously be on the premises. A warrant in such terms exposes persons who have no connection whatsoever to the offence or non-compliance, save that they happen to be present at certain premises when a search is conducted, to the risk of a search which would constitute a wholly unwarranted invasion of their privacy. From an overall perspective, the warrant is unclear to such an extent that it is by and large left to those executing it to determine what may or may not be taken thereunder. This, for reasons already dealt with, is not constitutionally justifiable.

A further point of concern arises from the fact that the Respondent applied for authorisation to search eleven different premises, for the seizure of books and documents pertaining to all thirteen Applicants. It is of course readily understandable that the Commissioner may wish to conduct a search at the premises of a specific taxpayer and the premises of certain corporate entities controlled by him. It is equally understandable that the Commissioner may have reason to believe that documentation related to the object of the search may be held at different premises. The point requiring emphasis, however, is that the Commissioner should at least make out a cogent case as to why he requires the search to be conducted at all such premises and/or documentation relating to various such corporate entities to be seized. He should not rely on unsupported and speculative averments such as those found in paragraph 11 of Mr Venter's affidavit in support of the warrant, where Mr Venter states as follows:

"In view of the tax evasion of the taxpayer as demonstrated above, it is submitted that it is probable that other incidences of tax evasion or failure to comply with the obligations imposed upon the tax payer, eg customs duty in terms of the Customs and Excise Act, No 91 of 1964, is also a possibility and information, documents or things showing this are therefore likely to be found at the relevant premises."

In similar vein, Mr Venter says the following in his answering affidavit in the main application:

"I was informed by the Cape Metropolitan District Council that Paarl Poultry Enterprises CC has been massively in arrears on its regional council levies."

My experiences shows that large-scale default on such levies is often associated with a broader pattern of income tax evasion, although this is by no means invariably the case."

Mr Venter appears to suggest that because information reveals the commission of certain offences, it is also likely that the taxpayer in question has committed other offences, possibly under wholly different statutory provisions and that the Commissioner should therefore be authorised to search for and seize documentation which might reveal "*a possibility*" of such other offences even though the Commissioner has no facts indicating that any such other offences had been committed. When applying for a warrant under Section 74D of the Income Tax Act or its equivalent in the VAT Act, the Commissioner is required *inter alia* to carefully set out the reasons why a warrant is required, and explain the terms which the Commissioner suggests should be applicable to such warrant. Unfounded speculation of the kind contained in the passages quoted above is of no assistance in achieving this objective.

Mr Heunis who, together with Mr Osborne, appeared for the Respondent referred us to certain Canadian authorities dealing with the adequacy of search warrants. The first of these was the case of **Regina v Carrier 36 CRR (2d) 310 Lata. C.A.** That was an appeal against an accused's conviction on charges of cultivating

marijuana, and of possession of marijuana for purposes of trafficking. One of the issues which arose was whether evidence obtained pursuant to a search warrant had properly been admitted. In that context, the Court considered whether there were grounds for quashing the search warrant. The Court accepted that there were deficiencies in the information relied on in applying for the warrant and, in particular, no information as to the reliability of the source of information relied on by the prosecuting authority, and no express mention that the plants which the accused was suspected of cultivating on the premises were marijuana. The Court held, however, that although the warrant application left out some details, the flaws were purely procedural and the information presented was sufficient to enable the issuing judge to draw reasonable inferences therefrom. The primary problem which arises in the instant matter, namely that the terms of the warrant were unclear and unacceptably broad did not arise for consideration in the **Carrier** case.

In **Euro-Can-Am Trading Incorporated, Gladwin & Gladwin v Attorney General of Ontario, 45 CRR (2d) 67 (Ont. C.A.)** the Court had occasion to consider a warrant which was defective in two respects. Firstly, it did not name the officer who was to execute it. That complaint does not arise in the instant matter. Secondly, the

warrant did not state the nature of the offence that was committed or suspected. The Court found, however, that all of the missing particulars were contained in the information or its appendices, which were available to the parties against whom the warrant was executed, and there was no suggestion that any prejudice had been caused by the lack of the particularity. The same comment cannot be made in regard to the warrant in the instant matter. The failure to specify the nature of the offence or non-compliance necessitating the issue of the warrant is not, in my view, remedied by the allegations contained in the warrant application.

Respondent's counsel referred thirdly to **R v Wong (1997) 45 CRR (2d) D1**. The warrant issued in that case authorised the search of twenty six residences and vehicles. The police did not know what evidence would be found at which location, but demonstrated as a probability that evidence would be found by a simultaneous search of all locations. The facts put up in the instant case demonstrate no such probability, and this case, too, is of little assistance to Respondents.

Upon a consideration of the various defects in the warrant Mr Heunis conceded, in my view correctly, that the warrant was too wide. He contended, however, that the bad portions therefore could be

severed from the rest and that the warrant as whole could thereby be saved. Mr Heunis relied, in this regard, on **Divisional Commissioner of SA Police, Witwatersrand Area v SAAN, 1966 (2) 503 (A)** and on **Cine Films (Pty) Ltd v Commissioner of Police, 1972 (2) SA 254 (A)**. In both those cases the warrant issued dealt with a number of items. In respect of certain of them, the Court accepted that the items complained of were so clearly severable from the other items that, were they to be declared invalid, this would be affect the rest of the warrant. Similar considerations do not apply in the instant case. The various difficulties flowing from the terms and contents of the warrant, which are dealt with above, permeate the warrant as a whole and lead, in my view, to the conclusion that the defects in the warrant cannot be cured by severing specified portions thereof.

There is further factor which weighs against any suggestion that the warrant can be saved by excising parts thereof. As pointed out above, Sections 74A to 74D of the Income Tax Act, and the equivalent provisions of the VAT Act, create a hierarchy of mechanisms which the Commissioner can use to obtain and verify information, each more drastic than the provisions preceding it. The Applicants contend that the constitutional validity of the search and seizure authorised by a warrant is to be judged *inter alia* with regard

to the limitations imposed in Section 36 of the Constitution. Section 36 stipulates that the fundamental rights contained in the Bill of Rights may be limited only to the extent that such limitation is reasonable and justifiable having regard, *inter alia*, to the availability of less restrictive means to achieve the purpose in question. The Applicants contend that, where less restrictive means are available to the Commissioner for the obtaining of information sought by him, it is inappropriate to have regard to the drastic remedies which he enjoys under Section 74D of the Income Tax Act and Section 57D of the VAT Act.

In the instant case the Applicants point out that many of the queries raised by the Commissioner in the papers are readily capable of being answered. The Applicants also rely on the fact that in approximately 1995 SA Revenue Services performed an audit at Rosendal Farm for a period of approximately three weeks. As far as First Applicant can recall, no problems were raised by SA Revenue Services on that occasion. The Applicants suggest that a similar exercise could again be done in regard to any discrepancies or difficulties which currently present themselves regarding tax or VAT information furnished by the Applicants.

In my view, the contention that a search and seizure should not be permitted where the objective sought to be achieved thereby could be attained by other less drastic means is, generally speaking, correct. The decision of the Supreme Court of Canada in **Araujo & Others v The Queen, 79 CRR (2d) 1 (SCC)** is of some assistance on this issue. The Court there considered the requirements to be met when the prosecuting authorities seek authorisation for the

electronic interception of private communications. Delivering judgment LeBel J said the following:

“Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. The judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the State and its law enforcement agencies. Parliament and other courts have indeed recognised that the interception of private communications is a serious matter, to be considered only for the investigation of serious offences, in the presence of probable grounds ... There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”

The criterion laid down in the **Araujo** case, namely that there should be no other reasonable alternative method of investigation may perhaps be too stringent, and I refrain from expressing an opinion as to whether that exact formulation should be adopted by our courts. What is, in my view, clear is that the judge issuing the warrant in terms of Section 74D of the Income Tax Act or Section 57D of the VAT Act should consider whether one of the less drastic mechanisms

contained in those Acts could not be utilised in order to attain the objective sought. Appropriate facts dealing with this question should be placed before the issuing judge who may also make whatever enquiries he deems necessary on the question of why less drastic remedies are not utilised. In the instant case, this was not done at the time that the Respondents applied for the warrant. For this further reason the warrant should, in my view, not have been issued.

For the foregoing reason, I am of the view that the warrant should be set aside.

THE ORDER GRANTED

In my view, therefore, the main application should succeed. In regard to the interim application the relief therein sought has become academic. I am of the view, however, that the costs in that application should follow the result in the main application and that the Respondents should be ordered to pay the costs of the interim application, such to include the costs consequent upon the employment of two counsel.

The following order is made:

- A. In case number 7627/2001, an order is granted:
 - 1) Setting aside the warrants of search and seizure issued by the Second Respondent on 14 August 2002 under case number 6958/2001;
 - 2) Directing that any information, document or object seized by

the First Respondent pursuant to the said warrant be returned to the Applicants forthwith;

- 3) Directing that the Respondents pay the Applicants' costs, such to include the costs consequent upon the employment of two counsel.

B. In case number 6958/2001, an order is granted directing the Respondents to pay the Applicants' costs, such to include the costs consequent upon the employment of two counsel.

AC OOSTHUIZEN A.J.

I agree

NEL J.