

Search and Seizure of Documents in the Investigation of Tax-related Cases

by

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## ABSTRACT

The goal of this research was to determine the procedures used for conducting a search and seizure in a tax-related offence in terms of the Criminal Procedure Act, Act 51 of 1977. Aspects that cause problems for the South African Revenue Service (SARS) investigators are the application for a search warrant and the activities that take place before, during and after the search and seizure.

An introduction, definition and explanation are given of certain key concepts such as forensic and criminal investigations, as well as their objectives and purpose. The various search methods are also discussed and explained as are the chain of custody and evidence in general.

A large part of this research deals with the legal requirements for a search and seizure in a tax-related offence and encompasses issues such as the procedures for obtaining a search warrant, pre-raid briefing, conducting the search, and the seizing of, marking, storage and disposal of documents.

The findings of the research are discussed and recommendations subsequently made regarding the shortcomings identified. The findings that were made related to the process and procedure to obtain a search warrant, the actual execution of a search and seizure and the legislation that authorises searches and seizures in tax-related offences. Further findings were made in respect of the mandate of SARS criminal investigators to investigate, the admissibility of evidence obtained from a search and seizure and the marking, recording, storage and disposal of seized items. Recommendations were made regarding training, improved communication and skills transfer to address the shortcomings identified.

## KEY TERMS

Criminal investigation

Forensic investigation

Chain of custody

Search methods

Legislation pertaining to search and seizure

Planning and preparation for the search

Conducting the search

General guidelines for conducting the search

## LIST OF ACRONYMS

OPA:	Operational Policy Agreement
SARS;	South African Revenue Services
SAPS:	South African Police Services
NPA:	National Prosecuting Authority
STU:	Specialised Tax Unit
VAT:	Value Added Tax

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This work is dedicated to Sirisha, who has amazed me not only with her strength and courage but also her determination in fighting cancer. This work is also dedicated to Andre Marais Basson, who sadly succumbed to cancer during August 2011.

## DECLARATION

I, Lindsay Mudaly, hereby declare that “Search and Seizure of Documents in the Investigation of Tax-related Cases” is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Date

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# CHAPTER 1

## GENERAL ORIENTATION

### 1.1 Introduction

The Criminal Investigation Unit is a section within the Enforcement Division of the South African Revenue Services (hereinafter referred to as “SARS”) whose mandate is to prosecute tax offenders criminally. This mandate is made possible by virtue of an Operational Policy Agreement (hereinafter referred to as “the OPA”) dated 23 October 1998 between the South African Police Services (SAPS) and SARS (Seaman, 2011). A copy of this OPA is attached as Annexure A. Although the OPA aids the progress of investigations, it is not uncommon for these investigations to be very time consuming.

A common complaint at meetings, seminars and workshops by the various business divisions of SARS is the slow rate at which investigations of tax-related crimes are finalised. Managers and staff within these divisions are quick to provide reasons for such delay, of which the following are but a few contributors:

- (i) Investigations by their very nature are time intensive.
- (ii) The constitutional rights of taxpayers, who have the same rights as accused persons that have been charged with a criminal offence, slow down the investigations.
- (iii) To prosecute tax offenders criminally there must be evidence that substantiates the charges.
- (iv) The evidence must be sought lawfully and must be admissible.
- (v) Financial transactions in the commission of tax offences are intricate and complex in nature.
- (vi) Tax crimes overlap with other crimes such as corruption and smuggling of illicit and illegal goods.

Criminal investigation involves the obtaining of evidence which is used to prove the guilt of an accused. This involves taking statements of witnesses, as well as obtaining documentary evidence held by third parties to prove the offence in question. These documents can, for example, be bank statements and/or cheques to show proof of/or receipt of payment. They could also include invoices that were received or furnished as well as cellphone records. This evidence can also be found on suspected persons or residence or business premises. Finding such evidence in the possession of suspected persons may not necessarily prove the guilt of the suspect, but could also prove their innocence. Evidence could also link the suspect to

other offences which the investigator was not aware of. The researcher is of the view that an effective search of the crime scene and subsequent seizure of incriminating evidence may enable the investigator to obtain evidence which could be used to finalise the investigation much quicker.

Currently there are hardly any search and seizures of documents that take place during criminal investigations into tax matters. The researcher conducted a preliminary enquiry with the nine Criminal Investigations managers at a national meeting. It was confirmed that very few searches and seizures actually take place during criminal investigations at their offices. It is suspected that there could possibly be a lack of knowledge with regard to searches and seizures in tax-related offences by the investigators.

## **1.2 Delimitations of the research**

Section 57D of the Value Added Tax Act (South Africa, 1991) and section 74D of the Income Tax Act (South Africa, 1962) provide for a search and seizure where an *ex parte* (without giving notice to the other party) application can be made by SARS to a High Court judge for a search warrant. The wording of both these sections provides for the search and seizure to be conducted for the purpose of the administration of the Act and implies that it cannot be used for the purposes of criminal investigations into tax offences.

Section 4 of the Customs and Excise Act (South Africa, 1964) provides for a search and seizure with a search warrant but is restricted only for customs officers and for the purpose of the administration of the said Act. This implies that it cannot be used for the purposes of criminal investigations into customs and excise-related offences.

This research focuses on search warrants issued in terms of the Criminal Procedure Act (South Africa, 1977), which can be used for criminal investigations in tax-related investigations.

## **1.3 Research aims**

According to Leedy and Ormrod (2005:xxii):

“Research has only one end, that is to learn what has never been known before, to ask a significant question for which no conclusive answer has

previously been found, and by collecting and interpreting relevant data, to find an answer to that question.”

The aim of this research is to research how SARS investigators should execute search and seizure of documents in terms of the Criminal Procedure Act (South Africa, 1977), as a method in the investigation of tax-related cases.

#### **1.4 The research purpose**

Leedy and Ormrod (2005:95) state that in qualitative research, researchers “seek a better understanding of complex situations. Their work is often exploratory in nature, and they may use their observations to build theory from the ground up.”

According to Denscombe (2002:25), “there must be a reason for doing research; otherwise there would be no point in spending time, money and effort undertaking the research.” This research addresses the problem of why tax-related investigations take so long and whether search and seizure would speed up these investigations. In carrying out the research, the researcher explored, evaluated and applied search and seizure techniques as a method in tax-related investigations. The purposes of this research were to:

- (i) Evaluate the current search and seizure procedures used by SARS and identify areas where they could be improved. The researcher evaluated the current manner in which criminal investigators conduct search and seizure, the advantages and disadvantages of such procedures and how they can be improved on or strengthened;
- (ii) Explore national and international literature in the area of search and seizure to try to discover new information and ascertain whether it can be applied to SARS practices. The researcher explored how searches and seizures take place in other comparable environments both locally and internationally and compared them to current practice in SARS;
- (iii) Empower the researcher and other criminal investigators by enabling them to use improved techniques and procedures for conducting searches and seizures. This can be achieved through the drafting and implementation of a policy document as well as through training; and
- (iv) Develop good practice and make recommendations from this research for adoption by management as procedures in SARS. One of the purposes of the research was to develop good practice that would optimise performance and decrease the time it takes to finalise tax-related investigations.

## 1.5 Research questions

In addition to listing objectives or purposes of the research, Hussey and Hussey (1997:124) recommend the writing of research questions to guide the research process. The following research questions are not only relevant but also essential to guide this research as they provide key themes and also shed light on the topic:

- What does forensic investigation entail?
- What procedure should SARS investigators follow to conduct a search and seizure in a tax-related criminal investigation?

## 1.6 Key concepts

The key concepts of this study are identified and defined to assist the reader's understanding of the topic and the definitions provide a quick and easy mechanism for reference purposes. The key concepts are those that are the most important and integral to this research. More importantly, the identification of key concepts assisted the researcher to narrow down the search for literature and ensured that only literature that was relevant to the topic was considered. The following key concepts and their definitions were identified as being central to the research and guided the researcher:

**1.6.1 Search:** Joubert (2001:283) states that a search may be regarded as “any act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on, or upon such person, container or premises”.

**1.6.2 Seizure:** In *Ntoyakhe v Minister of Safety and Security* it was held that “seize” encompassed both the act of taking possession of the article, as well as the subsequent detention thereof.

**1.6.3 Evidence:** Van Rooyen (2004:8) states that “from a judicial point of view, evidence may be defined as all relevant information that is admissible and presented in court”.

**1.6.4 Forensic investigation:** “forensic”, according to Du Preez (1996:9), refers to a “specific skill or activity aimed at serving justice with specific scientific knowledge”. According to Bennet and Hess (2004:4), an investigation is “a patient, step by step, inquiry or observation, a careful examination, a recording of evidence or a legal enquiry”. A forensic investigation in a nutshell would therefore be the conducting of an investigation using the sciences for criminal and administrative purposes.

**1.6.5 Crime:** a crime is an act or omission forbidden by law and punishable by a fine, imprisonment or even death (Bennet, 1987:6). Snyman (1991:2) defines a crime as an

unlawful, blameworthy conduct punishable by the state. The definitions are similar except for the provision relating to the death penalty, which is not applicable in South Africa.

**1.6.6 Tax-related offences:** these are all the offences committed in terms of all statutes administered by the Commissioner of SARS and include the:

The Customs and Excise Act (South Africa, 1964);

The Value Added Tax Act (South Africa, 1991); and

The Income Tax Act (South Africa, 1962).

## **1.7 Research approach and design**

Pope, Lovell and Brandl (2001:369) suggest that the choice of methodologies used in a study should be guided by the questions and topics that are being studied. The researcher garnered participants' opinions as part of the design as a good way of answering the research questions. In this research, it was crucial that the participants were asked open-ended questions that would allow them to give an explanation. In this way the participants were also able to qualify or explain their responses further. The researcher therefore decided that a qualitative research approach was best suited to the research.

### **1.7.1 The research design**

Welman and Kruger (1999:46) define research design as the “plan according to which we obtain research participants (subjects) and collect information from them”. According to Leedy and Ormrod (2005:85), “the research design provides the overall structure for the procedure the researcher follows, the data the researcher collects and the data analysis the researcher conducts.”

The researcher decided to use the empirical design for this research since, according to Denscombe (2002:12), empirical research involves “establishing the facts. It is generally recognized that scientific research is something more than armchair theorizing, something more than philosophy, something more than dogma.” The researcher intended to produce new data by interviewing a sample of research participants and integrate data from the literature he reviewed with practical experience because of a lack of sufficient information in the body of literature reviewed to answer the research questions properly. Choosing interviewing as a data-collection technique implied that the researcher needed to go out of the office and actively seek the information he required through the following:



- Meeting with the participants face to face;
- Obtaining information directly from the participants;
- Obtaining information based on their experiences or observations;
- Asking in-depth questions;
- Clarifying ambiguities;
- Obtaining information in the own words of the participants; and
- Conducting the research in their natural settings.

The researcher decided to make use of a qualitative research approach, which, according to Pope et al. (2001:369), involves focus groups, in-depth interviews and extensive examination of documents. This approach is useful when previous research and theories do not yield enough information about the topic and issues being studied and do not provide a useful guide to the specific situation. The researcher chose this design and approach because there was insufficient information in the literature he reviewed to cover the research questions properly. He also discovered that no research had been conducted on the same topic.

According to Leedy and Ormrod (2005:133), qualitative research encompasses several approaches to research that are quite different from each other. They do, however, have two things in common:

- They focus on phenomena that occur in natural settings.
- They involve studying those phenomena in all their natural complexity.

With these common features in mind, an empirical design with a qualitative approach was used as the researcher was of the view that this would be best suited for the purpose of this research.

## **1.8 The target population and sampling**

### **1.8.1 Population**

According to Diamantopoulos and Schlegelmilch (2000:10), a population is defined as “the totality of entities in which we have an interest, i.e. the collection of individuals, objects or events about which we want to make inferences”. In this research the “population” referred to all the investigators, team leaders, administrative staff and managers at the Criminal Investigations Division at SARS, who number just over 200 in the whole of South Africa.

Searches and seizures in tax-related offences are usually conducted by criminal investigators; therefore, managers, team leaders and administrative staff have been excluded from this research. However, there are just 110 criminal investigators nationally and they form the population to be studied. They are stationed at the nine criminal investigations offices in each of the provinces. It would have been ideal to conduct the research on the entire population. However, the cost and time factors would have been restrictive. The researcher therefore drew a sample from the target population, which were all the criminal investigators in the Gauteng Province.

### **1.8.2 Target population**

Welman and Kruger (1999:122) define a target population as “the population to which the researcher ideally would like to generalize his or her results”. The target population for this research was all the criminal investigators in the Gauteng Province. The reason for this was that the researcher is based in Gauteng and to conduct this research outside this province would have been costly and time consuming. There are a total of 53 criminal investigators in Gauteng, who are based in three offices located in Alberton, Pretoria and Sunninghill. This represents 33% of all the SARS criminal investigations offices and 48% of all criminal investigators in the country.

### **1.8.3 Sample**

The researcher drew a sample of 30 investigators from the target population of 53 investigators. A sample of 10 investigators was drawn from each of the Alberton, Pretoria and Sunninghill criminal investigations offices. These offices comprised of 17, 19 and 17 investigators respectively. Diamantopoulos and Schlegelmilch (2000:10) define a sample as a “subset of a given population”. Denscombe (1998:11) refers to a sample as “a small portion of the whole”. The researcher is of the view that the sample of 30 criminal investigators would provide a true reflection of the target population, with all the relevant features of that population. The reason for this was that criminal investigators are usually drawn from the ranks of SARS and other law enforcement agencies. All the investigators attend a compulsory basic fraud course provided by SARS. There are 110 criminal investigators nationally, excluding team leaders and managers. As the sample represents only 27% of the entire population, findings and conclusions drawn are reflected back to the target population only and not to the entire population.

According to Leedy and Ormrod (2005:199),

“The sample should so carefully be chosen that, through it, the researcher is able to see all the characteristics, of the total population in the same relationship that they would be seen were the researcher, in fact, to examine the total population.”

After selection, three of the 30 participants declined to participate in the research. As a result, the sample was brought down to 27 participants.

#### **1.8.4 Sampling procedure**

The researcher used the simple random sampling method to draw the sample from the population of 53 investigators.

##### **1.8.4.1 Sample**

A researcher is usually not able to study an entire population of interest and therefore selects a sample of that population from which the results of that sample can be used to make generalisations about the target population (Leedy & Ormond, 2005:198).

##### **1.8.4.2 Random sampling**

In random sampling, the researcher chooses a sample in such a manner that each member of the population has an equal chance of being selected. The advantage of such a method is that characteristics of the sample mirror the characteristics of the entire population (Leedy & Ormond, 2005:199).

Bailey (1987:87) states that:

“In a random sample, each person in the universe has an equal probability of being chosen for the sample, and every collection of persons of the same size has an equal probability of becoming the actual sample, as long as they are members of the same universe. All that is required to conduct a random sample, after an adequate sampling frame is constructed, is to select persons without showing bias for any personal characteristics.”

Random sampling has the advantage of cancelling bias and providing a statistical means of estimating sampling errors (Bailey, 1987:87). According to Denscombe (1998:12), the

resulting sample when using the random technique is likely to provide a representative cross-section of the whole.

Apart from the above, the researcher attempted to ensure that the sample was representative by following a rigorous sampling method. Furthermore, the participants were representative of the target population because the same selection process was used in employing them. The participants had also received the same training and investigated the same tax offences in terms of the legislation that SARS administers.

As part of the rigorous sampling method followed, the researcher wrote down the names of only the criminal investigators from the target population on a strip of paper for each one of the 53 criminal investigators in Gauteng and placed all the strips of paper inside a hat and stirred the content to mix the papers. Thereafter the researcher put his hand inside the hat, without looking, and drew names one by one until he had the number of 30. No team leaders, managers or administrative staff was included. This was the sample from which the researcher conducted his research. Each criminal investigator from the target population therefore had an equal opportunity of being selected.

## **1.9 Data collection**

According to Leedy and Ormrod (2005:88), “data are those pieces of information that any particular situation gives to an observer.” According to Diamantopoulos and Schlegelmilch (2000:5), there are two main sources of data: primary and secondary data.

Primary data, according to Leedy and Ormrod (2005:89), are “the most valid, the most illuminating, the most truth manifesting”. The researcher made use of data-collection methods to collect both primary and secondary data. The researcher used data-collection techniques that he considered the best for obtaining data to solve the problem being researched. The researcher conducted structured individual interviews to obtain primary data. The researcher also obtained and made use of primary literature (such as academically sound journal articles and relevant South African legislation) and policy documents from the SARS Criminal Investigations Head Office to provide valuable insight into the problem being researched.

To enhance the validity of the research the researcher used information gleaned from the literature obtained, the structured individual interviews and the official documents from the SARS Criminal Investigations Head Office to look for common themes that emerged from these different sources. This is referred to as “triangulation” (Leedy & Ormrod, 2005:99).

### **1.9.1 Data-collection techniques**

There are different techniques to collect data. The researcher used individual interviews, literature, his own experience as well as pre-existing data and documents in this research to collect data.

#### **1.9.1.1 Interviews**

The researcher conducted individual interviews to collect data. Leedy and Ormrod (2005:185) state that personal interviews allow the researcher to clarify ambiguous answers and when appropriate to seek follow-up information. Face-to-face interviews yield the highest response (Leedy & Ormrod, 2005:184).

According to Robson (2000:89), interviews are a widely used method in small-scale evaluations and come in many different forms. He identifies three broad styles: informal interviews; semi-structured interviews and structured interviews. The researcher chose the structured interview style. According to Robson (2000:90), in the structured interview there would “be a fixed sequence of predetermined questions”. Robson also points out that structured interviews allow for both open-ended and closed questions. The advantage with this type of interview, according to Robson (2000:90), is that “data obtained are then more easily compared with less risk of bias occurring simply because different people are being asked rather different questions.”

The researcher compiled an interview schedule that included all the questions that the participants needed to answer. These questions were aligned to and guided by the research questions. An advantage of this type of approach is that all the participants are asked the same questions. The researcher discussed the problem statement with a select group of five senior and knowledgeable experienced criminal investigations personnel and highlighted the issues for the research. With their assistance, a draft schedule of questions was compiled and thereafter it was checked for appropriateness and relevance by compiling a pilot study that involved five investigators. This method was employed by the researcher to enhance the

validity and reliability of the contents of the interview schedule. These five investigators were part of Criminal Investigations Head Office management staff, as well as from the SARS National Enforcement Unit. None of them was part of the sample. The recommendations made by this group were taken into consideration when drafting the questions for the final interview schedule. The pilot study also revealed some ambiguity with the questions, as well as duplications of questions. In certain instances some questions were taken out because they did not align themselves with the research questions. The researcher's supervisor also made recommendations and provided inputs when drafting the final questions for the interview schedule, which is attached as Attachment A.

Leedy and Ormrod (2005:147) offer the following advice about conducting interviews. The researcher used this advice as a guideline for the individual interviews in the following way:

- The researcher compiled a list of questions in advance that covered the area that the researcher wanted to research.
- The participants were representative of the group. All the participants in a sample are expected to have a very similar background in respect of minimum educational qualifications and minimum standards of experience and skills. In terms of the sample chosen for the current study, educational background and skills are specified when SARS posts are advertised and recruitment takes place. Furthermore all recruits underwent an internal six-week basic forensic course at SARS. The sample was selected by making use of the simple random sampling technique, which ensures that all biases are cancelled out and representivity is ensured.
- A quiet office was identified in which the individual interviews were conducted.
- Written permission was first obtained from both the participants and their managers for conducting the interview by the researcher sending them both a letter, in response to which they both consented to the interview in writing. Written permission was also obtained from the Head of the SARS Criminal Investigations Division. Refer to Annexures B and C respectively.
- The researcher endeavoured to maintain rapport with the participants at the beginning of the interviews by putting them at ease through skillful discussion of current events to break the ice.

- The questions in the interview schedule dealt with the searches and seizures in the context of actual incidents as well as incidents that are likely to occur during the course of criminal investigations.
- The researcher ensured that no words were put into any participant's mouth.
- In each interview a recorder was used to record the conversation verbatim after permission had been obtained from the interviewee beforehand. The researcher made comprehensive notes during each interview and used the recording to verify some of the responses. The recording was not transcribed.
- The researcher's reactions to the answers given by the participants were kept to himself.
- The researcher was mindful to treat each interviewee's responses as perception rather than fact.

The researcher ensured that he did not lead or put words into the mouths of the participants during the interviews. The interview schedule provided the basis for the interview and the researcher only deviated from the questions on the interview schedule when he needed clarity on the answers given by the participants. The researcher therefore did not allow his experience and knowledge to sway the participants in any particular direction with their answers.

### **1.9.1.2 Literature**

Hussey and Hussey (1997:87) refer to literature as "all sources of published data". Primary sources in the form of books and journals were used and secondary data in the form of notes were collected to obtain information with regard to search and seizure. This allowed the researcher to acquaint himself with the various aspects of the research and to make comparisons from the interviews with the participants. The researcher visited the UNISA reference library and searched the library database for books that related to searches and seizures for criminal and forensic investigations. This included searches for books that dealt with criminal and forensic investigations as well as books that dealt only with searches and seizures. In addition the researcher also requested the librarian to assist in finding publications and journals on this topic.

The researcher also conducted a search on the internet for related articles and publications. In addition the researcher searched for more recent publications and books and case law using keywords such as “search and seizure,” “tax-related offences,” “search warrants” and “evidence”. Once the books, publications and journals had been located and received the researcher made a careful study of all the material, noting all the salient points, issues, arguments and theory and recording them as such. Thereafter, the responses from the interviews were compared to the information that was obtained from the literature reviewed. Conclusions, findings and common themes were then identified and explained where possible.

The researcher was unable to find literature on the topic of his research. However, he found research that had been conducted on search and seizure. The researcher did manage to find literature on the two key concepts that are integral to this research:

- (i) Search and seizure; and
- (ii) Tax-related offences.

The researcher read widely on search and seizure in law reports, decided cases and forensic investigation websites and was able to draw comparisons between those investigations and those of tax-related offences. There was also extensive literature on the topic of search and seizure by international and local authors.

The researcher also ensured that he approached all the literature he accessed in the same way when looking for relevant information, by following the guidelines set down by Denscombe (2002:63), especially with regard to the relevance of each source, the identification of key texts and the research questions that must guide the researcher.

### **1.9.1.3 Experience**

The researcher has 20 years of experience in the investigation field. He has served as an investigating officer for three years and five years in the SAPS Uniform Investigations Branch and the SAPS Commercial Crimes Unit respectively. Upon resigning from the SAPS, he joined the SARS Criminal Investigations Division, where he is currently employed, having served as an internal corruption investigator, senior criminal investigator, criminal investigations team leader, criminal investigations business area manager and specialist investigator over a period of 12 years. As an investigator, team leader and business area



manager, the researcher has conducted, participated in and supervised various searches and seizures of documents, records and computers. The researcher has applied his experience to evaluate search and seizure procedures, to understand the impact of new case law on search and seizure and to give an opinion on possible new procedures. The researcher has a Masters Degree in Business Administration, as well as a National Diploma in Police Administration. Over the years the researcher has undertaken various in-house training courses both in the SAPS and SARS.

### **1.10 Data analysis**

Leedy and Ormrod (2005:150) state that “there is no right way to analyse data.” Researchers begin with a “large body of information” and “through inductive reasoning, sort, and categorise it” and “boil it down to a small set of abstract, underlying themes”. The researcher used the data analysis spiral devised by Leedy and Ormrod (2005:150) to organise and analyse the data. It involved the following steps:

- The researcher personally obtained the primary data from the interviews.
- The researcher read through the comprehensive handwritten notes which he had compiled from the interviews and organised them into similar topics by use of index cards.
- Large amounts of data and information were broken down further into smaller more manageable texts so that they could be grouped under the topics mentioned above.
- To prevent information and data being overlooked the researcher went over them at least five more times to ensure that all the data had been grouped under the relevant topics. This is referred to as “perusal”.
- Once all the data had been grouped into topics, the data were further sub-divided into sub-categories and mini themes to ascertain what they meant. This is referred to as “classification”.
- The data were then categorised according to the topic, themes, and sub-themes and a preliminary analysis was performed.
- The findings were then incorporated into the dissertation.

#### **1.10.1 Historic information**

From the background information gathered during the interviews and from the interview schedule, the researcher established that all the participants are designated criminal

investigators. These criminal investigators are attached to one of the three criminal investigations offices in Gauteng. These criminal investigators have between one and 15 years of service in the SARS Criminal Investigations section. All the participants have undergone a six-week SARS Tax Academy Basic Forensic Investigation training course and have also received training in search and seizure as well as the handling of documents from a search and seizure. The participants ranged in age from 22 years to 52 years old.

### **1.11 Methods to ensure validity**

According to Hussey and Hussey (1997:57), validity is the “extent to which the research findings accurately represent what is really happening in the situation”. Generally, validity relates to the data and analysis used in the research. To ensure that this research was valid, the researcher ensured that the data collected were of a high quality and that proper analysis was made of the data as well as of the responses of those that were interviewed.

According to Denscombe (2002:100), validity concerns the accuracy of the questions asked, the data collected and the explanations offered. To ensure that the questions asked were valid, the researcher asked each participant the same questions in accordance with the interview schedule during the structured interviews. The questions that were asked were tested by five other senior investigators and managers that were not part of the actual sample. This was undertaken to ensure that participants could answer the questions in the interview schedule and to also identify potential problems. The questions in the interview schedule were also compiled only after consultation with the researcher’s academic supervisor. Furthermore, the questions in the interview schedule were based on the research questions. Lastly, the questions were framed in a manner that was easy to understand.

To ensure that the data-collection techniques were valid, the researcher personally collected and perused the literature and conducted the structured interviews face to face with the participants. The researcher was able to observe and note each participant’s reaction, as well as describe each of their explanations and answers in detail.

To ensure that the analysis was valid, the researcher made certain that all the data collected were categorised and grouped under topics. Further groupings were then made and themes and sub-themes were identified from which analysis could be made. The researcher went over

the data at least five times to ensure that all the information was correctly grouped under a specific topic.

Mouton (2001:101) lists a number of factors that affect validity positively. These include data sources that are accessible, complete, unbiased and have no legal and ethical constraints. The researcher first obtained permission from the Head of SARS Criminal Investigations, who gave him access to all investigators for the purpose of this research. The managers of the participants selected for the sample were also requested to give permission for the participants to take part in the research. Once permission had been granted by the managers, the participants were then requested to participate in the research voluntarily. Three of the 30 participants did not want to participate in this research and were subsequently excluded. The researcher ensured that all data sources were accessible, complete and unbiased and that there were no legal and ethical constraints with regard to access to certain investigators. The participants were chosen by the researcher using the random sampling method. Thus it may be said that the researcher was not influenced in any way as to whom he should or should not interview.

### **1.11.1 Internal validity**

Leedy and Ormrod (2005:97) state that internal validity of a research study is the “extent to which its design and the data it yields allows the researcher to draw accurate conclusions about cause and effect and other relationships within the data”. To ensure internal validity Leedy and Ormrod (2005:98) state that researchers must take whatever precautions they can to eliminate other possible explanations for the results they observe. In the current research the researcher used triangulation as a method to ensure internal validity. Leedy and Ormrod (2005:99) describe triangulation as “a method whereby multiple sources of data are collected with the hope that they will all converge to support a particular hypothesis or theory”. In this research the researcher conducted individual interviews and a literature search, and also reviewed policy documents from the SARS Criminal Investigations Head Office and the SARS Tax Academy Forensic Investigations Training Unit, where after the researcher looked for the emergence of common themes.

### **1.11.2 External validity**

According to Leedy and Ormrod (2005:99), external validity is “the extent to which the conclusions drawn can be generalised to other contexts”. The researcher considered all the

possible questions that might be relevant to the topic of the study and checked with experienced and knowledgeable colleagues about whether the questions were valid. The researcher also conducted a pilot study to check for relevance as well as to identify ambiguous questions. There was also a single interview schedule for all participants. The researcher obtained the most recent literature on the subject and also enlisted the assistance of the librarian to obtain relevant literature. The researcher ensured that all data obtained were recorded in addition to the comprehensive notes made during the interview by the researcher. The researcher also sent a written copy of each interview transcript to the relevant participants to confirm their responses to the questions. The data were analysed by breaking down large chunks of information into smaller groups and themes and then sorting them out according to relevance and in order of importance.

These findings are only valid for the investigators at SARS in the Gauteng Province since the research was carried out there. Depending on the findings and other factors, it could be argued that there is a probability that the findings could apply to SARS Criminal Investigations divisions nationally. However, to be absolutely certain, one would have to conduct the same research in other provinces to confirm or rebut these findings.

### **1.12 Methods to ensure reliability**

According to Hussey and Hussey (1997:57), reliability is concerned with the findings of the research. If the research can be repeated elsewhere with similar research findings, then it can be said to be reliable. Leedy and Ormrod (2005:29) state that “reliability is the consistency with which a measuring instrument yields a certain result when the entity being measured hasn’t changed.”

To ensure reliability, Denscombe (2002:101) recommends that the researcher:

- Must ask the right questions: This was achieved by asking five senior investigators and managers that were not part of the sample to answer the questions in the interview schedule and to provide feedback on the relevance of the questions. The researcher’s academic supervisor also assisted in drafting the questions. The researcher ensured that once the questions were formulated they were checked for ambiguity, errors and leading questions. The researcher also ensured that the participants answered questions that they had knowledge of and were expected to have knowledge of. Lastly the questions were derived from the research questions.

- Must produce precise, detailed data: In order to ensure that the data were precise and detailed, the researcher ensured that all the literature was acknowledged throughout the report. The researcher also ensured that the data obtained were relevant and appropriate by enlisting the assistance of a librarian to search for relevant literature, periodicals and journals. All information obtained was referenced so that it could be checked for accuracy.
- Must ensure that the information gathered is the truth: The researcher achieved this by not asking any leading questions or influencing the participants in any way. All the notes that were taken were properly documented and presented in such a manner that if another researcher used the same documented notes, they too would obtain similar results. Furthermore, none of the participants were forced to answer any of the questions. None of the participants refused to answer any of the questions. However, some of the participants who did not know the answers to certain questions on the interview schedule opted not to answer those questions.

The sample was drawn according to the simple random sampling method, which gave every member of the target population an equal chance of being selected.

### **1.13 Ethical considerations**

Hussey and Hussey (1997:37) state that “it is difficult to conduct much research at all without running into ethical arguments.” Leedy and Ormrod (2005:101) highlight four categories into which ethical issues fall. These categories are elaborated on below.

#### **1.13.1 Protection from harm**

The researcher ensured that none of the participants was exposed to undue physical or psychological harm. This also included them not being subjected to unusual stress or embarrassment or loss of self-esteem. This was achieved through careful consideration of the questions asked, as well as the setting for the interviews. An assurance was also given to the participants that their names would not be used in the research. Each of the participants was given a number from one up to 30 and the participants are referred to by their number in this report.

### **1.13.2 Informed consent**

The researcher gave each participant a letter informing them of the nature of and reason for the study, as well as what their participation entailed and the duration of the interview. The letter also served to confirm that their participation was voluntary and that they could withdraw at any time that they wanted to. The participants were also informed in the letter, as well as at the interview that their responses would remain anonymous and confidential. Lastly the participants were shown the letter from SARS Criminal Investigations Head Office giving permission to the researcher to conduct the interviews. Prior to conducting the individual interview, each of the participants was asked if they had any objections to the interview being recorded and they all replied no.

### **1.13.3 Right to privacy**

The researcher ensured that the participants were assured at all times that their responses to the questions were private and confidential and would not be discussed with anyone else unless permission was first obtained from the participants. This assurance was given to them in the form of a letter as well as verbally before, during and after the interview.

### **1.13.4 Honesty with professional colleagues**

The researcher ensured that credit and acknowledgement would always be given to someone else's ideas and words by referring to them as that person's idea or words. The researcher also ensured that all the answers given by the participants were recorded correctly and accurately. The researcher also ensured that the findings were not misrepresented and that no attempt was made to mislead anyone to support any particular conclusion.

The UNISA code of conduct prescribes certain principles of ethical behaviour. The researcher adhered to this code by ensuring that all answers to the questions were correctly recorded and reduced to writing accurately or in the handwriting of the participant. The participants were informed at all times that their confidentiality was assured and that at no stage would their identity or their answers to the questions be revealed to any other person without their consent. The researcher also took into account the impact this research might have on the environment. Due regard was given to upholding the integrity of the principle of ethicality and to maintaining ethical principles governing humans and animals. In this regard the researcher is convinced that this research will stand the test of being ethical in terms of the code of conduct for researchers from UNISA [s.a]. Refer to Annexure D.

## **1.14 Chapter layout**

The rest of this dissertation is divided into three chapters, each addressing a specific research question:

### **Chapter 2: Forensic investigation**

In this chapter the researcher discusses research question one.

### **Chapter 3: Search and seizure**

In this chapter the researcher discusses research question two.

### **Chapter 4: Findings and recommendations**

This chapter concludes this study. In this chapter the findings of the research are discussed and recommendations made with regard to the research findings and to shortcomings identified during the research.

## CHAPTER 2

### FORENSIC INVESTIGATION

#### 2.1 Introduction

Brandl (2008:xi) states that police work is more complicated now than ever before. According to Gilbert (2010:46), investigations are a highly important function in the fight against crime, especially where the criminal justice system struggles to maintain its effectiveness. Gilbert (2010:46) also claims that if investigations are properly accomplished, the answers to the traditional questions of who, what, where, when and how become evident.

Crimes against the fiscus also contribute to the crime statistics and undermine the public's confidence in the South African Revenue Services (SARS). This type of crime also results in decreased tax collections. In recent years SARS has also become a victim of crimes by unscrupulous taxpayers, as well as organised crime syndicates.

By way of background, SARS is an autonomous government department that, in terms of the South African Revenue Services Act (South Africa, 1997), is tasked with the collection of taxes and duties in South Africa, as well as the administration of all the legislation administered by the Commissioner of SARS. This legislation includes but is not limited to the:

- Income Tax Act (South Africa, 1962);
- Value Added Tax Act (South Africa, 1991); and
- Customs and Excise Act (South Africa, 1964).

The Criminal Investigation Unit of SARS forms part of SARS' Enforcement Division, which is tasked with the investigation into and subsequent criminal prosecution of tax offenders. The rationale behind the prosecution of tax offenders is no different from the objectives and purposes of any other criminal investigation and prosecution.

In order to cover the topic, aims and research questions of the current study, it was important for the researcher to determine if the participants were familiar with the following concepts in terms of their working environment:

- Criminal investigation;



- Forensic investigation;
- Evidence; and
- Documents.

It was equally important for the researcher to find out from the participants their powers and mandate to investigate. As background for this research, before discussing the meaning of the concepts listed above, it is important to discuss the mandate under which SARS criminal investigators operate.

## **2.2 The mandate to investigate**

The SAPS is mandated in terms of section 205 of the Constitution of the Republic of South Africa (South Africa, 1996) to combat and investigate all crimes. It is a widely held view that the SAPS is unable to investigate all crimes owing to manpower constraints, particularly in cases that require specialist knowledge and skills. Various government agencies and parastatals have set up their own internal investigation units such as:

- The Military Police of the Department of Defence;
- The Internal Investigations Division of The Department of Home Affairs;
- The Marine and Coastal Division of The Department of Environmental Affairs;
- The Internal Investigations Unit of the Electricity Supply Commission (ESKOM);
- The Internal Investigations Unit of Spoornet; and
- The Internal Investigations Unit of Transnet.

In *S v Botha and others* the court held that the SAPS does not have the sole mandate to investigate crime and that private and corporate institutions conduct their own investigations before handing them over to the SAPS to institute criminal proceedings.

SARS is mandated in terms of the South African Revenue Services Act (South Africa, 1997) to investigate any contravention of the said Act to determine if any offences have been committed. In addition to this, an OPA dated 23 October 1998 (Seaman, 2011) provides a framework for conducting, as well as gives SARS the necessary authority to conduct, criminal investigations into tax-related crimes. Section 74(1)(e) of the Income Tax Act (South Africa, 1962) and section 57(1)(e) of the Value Added Tax Act (South Africa, 1991) state that for purposes of this section “administration of this Act” means “ascertaining

whether an offence in terms of this Act has been committed”. It is therefore evident that the legislation pertaining to the Income Tax Act (South Africa, 1962) and the Value Added Tax Act (South Africa, 1991) provide the authorisation for SARS to determine whether an offence has been committed but do not authorise SARS criminal investigators to conduct criminal investigations into tax-related offences. The OPA dated 23 October 1998 between the SAPS and SARS provides SARS criminal investigators with the authority only to conduct criminal investigations into tax- and customs-related investigations.

It is worth noting that all SARS criminal investigators carry an identification card which, in terms of section 10(1)(c) of the South African Revenue Services Act (South Africa, 1997), stipulates that they are authorised “in terms of legislation, administered by the Commissioner: SARS, to exercise such powers required for the purpose of performing such duties as described therein”.

According to section 9 of the South African Revenue Services Act (South Africa, 1997), the Commissioner of SARS is responsible for the execution of functions in the interest of efficient and effective tax administration in ensuring tax compliance and collection of taxes. In order to achieve its aims and execute its statutory functions effectively, SARS has appointed investigators to perform investigative work. Both section 74 of the Income Tax Act (South Africa, 1962) and section 57 of the Value Added Tax Act (South Africa, 1991) provide for ascertaining whether an offence in terms of the Act has been committed. However, both these Acts only provides for ascertaining whether an offence was committed and not for the actual criminal investigation by SARS investigators. The OPA between SARS and the SAPS provides authorisation for SARS investigators to conduct tax-related investigations (Seaman, 2011).

In response to the question, “Do you have any mandate to investigate?” all the participants replied ‘yes’. However, the sample was divided when it came to specifying what their mandate to investigate was. In response to the question, “What is your mandate to investigate?” the sample answered as follows:

- Twenty stated that the tax legislation gave them the mandate to investigate.
- Six stated that an OPA between SARS and the SAPS gave them the mandate.
- One participant abstained from answering this question.

It is clear that 21 of the participants know that they have a mandate to investigate. However, they are not aware of where their mandate to investigate emanates from. This can be attributed to:

- SARS criminal investigators carrying an identification card that states that they are authorised “in terms of legislation, administered by the Commissioner: SARS, to exercise such powers required for the purpose of performing such duties as described therein”;
- The wording of section 74 of the Income Tax Act (South Africa, 1962) and section 57 of the Value Added Tax Act (South Africa, 1991), which provide for ascertaining whether an offence in terms of the Acts has been committed but not for the actual criminal investigation into the tax offence.

This may result in investigators either not being aware of how to exercise their powers and functions or exercising these powers incorrectly.

### **2.3 Criminal investigation**

Van Heerden (1982:8) states that criminal investigation is a matter of assembling facts that may act as prima facie evidence. To this Marais and Van Rooyen (1990:17) add that crime investigation is a systemised search for the truth and is primarily aimed at the positive classification of the crime situation on the basis of objective and subjective traces.

Supplementing this definition, Weston and Wells (1997:1) indicate that criminal investigation is a reactive process involving people and things and the reconstruction of the crime scene. More importantly the authors refer to seeking the truth as the goal of an investigation. Bennet and Hess (2004:4) on the other hand refer to criminal investigation as “the process of discovering, collecting, preparing, identifying and presenting evidence to determine what happened and who is responsible”. In this context, the authors refer to the identification, collection and processing of evidence to determine what happened and who the perpetrator is. This would also involve the reconstruction of the crime scene.

While the researcher agrees for the most part with the views expressed by the various authors (Bennet & Hess, 2004:4; Marais & Van Rooyen, 1990:17; Van Heerden, 1982:8; Weston &

Wells, 1997:1), he believes there needs to be a more comprehensive explanation. Du Preez (1996:2) provides a more comprehensive and suitable explanation of what exactly a criminal investigation is and what its components are.

According to Du Preez (1996:2), a criminal investigation is a systematic, planned process consisting of the following components:

- Information: This involves the gathering of information from which the whole truth of a crime situation can be revealed. Once again reference is made to establishing the truth.
- Recognition: The investigator must be able to identify all relevant information that can shed light on the crime committed and must also know the evidential requirements for the different crimes.
- Gathering and preservation of information: The investigator must collect, handle and preserve information or evidence in such a manner that its physical and legal integrity is maintained. This refers to the admissibility of the evidence, as well as the maintaining of a chain of evidence.
- Evaluation: All the information gathered must be properly evaluated to determine its relevance and also whether it has any positive potential to reveal the whole truth.

Du Preez (1996:8) is of the view that criminals are acting more and more scientifically each day and, by implication, investigators must also keep up with criminals and science. This means that, according to Du Preez (1996:8), criminal investigations should also involve the use of scientific methods and techniques.

Thus, in summarising the aforementioned, criminal investigation involves the:

- Identification, gathering, analysing, processing and presentation of evidence in a court and for the court to determine whether the accused committed the crime in question.

In response to the question, “What is criminal investigation?” the entire sample answered that it was:

- To gather evidence and to criminally prosecute the offender in court.

When comparing this answer with the foregoing discourse it is plainly obvious that the view of the participants is very one dimensional. It is, therefore, not improbable that this narrow understanding of what criminal investigations entail and all the dynamics involved in such investigations could hamper the performance of the investigators. In addition, if this narrow understanding is also to be found among managers and team leaders, it might be contributing to the impression that the tax investigations take 'too long'. While this is mere speculation on the part of the researcher it may be a worthwhile consideration for further research.

## **2.4 Forensic investigation**

Forensic investigation is regarded as an investigation aimed at instituting court proceedings, criminal, as well as civil, and where some other scientific knowledge is applied to a legal problem (Pollex, 2001:93). Both Berning (2008:38) and Van Rooyen (2007:31) state that forensic investigation is the application of science to law and that it entails the use of scientific methods and techniques. Hans Gross, an Austrian magistrate, was the first to recognise the need for science in police investigations. He strongly supported "scrupulous accuracy and high ethics in criminal investigations". The joining of science with traditional criminal investigation techniques offers new horizons of efficiency in criminal investigations (Weston & Wells, 1997:2).

Weston and Wells (1997:1) state that some people believe that successful police investigations result from:

- Intuition, flashes of inspiration or imagination;
- Routine, plodding legwork requiring little imagination and no inspiration; or
- Microscopic examination and laboratory analysis during criminal investigations.

The researcher, based on his experience, believes that all three views are correct. Criminals have become increasingly sophisticated and so too should investigators.

The term 'forensic', according to Du Preez (1996:9), refers to a specific skill or activity aimed at serving justice with specific scientific knowledge. White (1998:1) broadly defines forensic science as the science used for the purpose of the law and thus as any branch of science used in the resolution of legal disputes in forensic science. He goes on to state that in general usage the term is applied more narrowly to the use of science in the investigation by

the police and the courts as evidence in resolving the issue in any subsequent trial. Jackson and Jackson (2004:xiii) state that “science is valuable in that it has the potential to provide reliable, pertinent and often definitive information about a given case. Science can be used to identify individuals, objects and substances.”

An investigation, on the other hand, according to Bennet and Hess (2004:4), is a patient, step-by-step, inquiry or observation, a careful examination, a recording of evidence or a legal enquiry. Horgan, as quoted by Du Preez (1996:2), states that an investigation amounts to observation and enquiry in order to collect factual information concerning allegations, circumstances and associations. According to Berning (2008:39), forensic investigations can be described as the search for the truth by collecting evidence which reveals the truth surrounding a crime and using specific scientific knowledge to identify and gather evidence. The author goes on to state that forensic investigation applies not only to investigators but also to forensic specialists since both of them utilise the sciences. Meijer (2006:74) states that forensic investigation involves obtaining information by using sophisticated investigation techniques.

The process involved in forensic investigation involves a number of steps as outlined by Lee, Palmbach and Miller (2006:17). These are recognition, documentation, collection and preservation, identification, comparison, individualisation, evaluation, interpretation, reconstruction, reporting and presentation. It becomes clear from these steps that they invariably involve scientific processes and examination, especially with regard to the identification, comparison, individualisation, interpretation and reconstruction of evidence.

The literature reviewed states that:

- Forensic investigation involves the use of science and scientific methods and techniques in the search for the truth where a crime has been committed or a legal dispute has arisen resulting in a criminal or civil trial or departmental enquiry.

In response to the question: “What is forensic investigation?” the sample responded as follows:

- Nineteen of the participants stated that it involved the examination of documents and the analysis of all financial transactions, as well as the work performed by auditors.

- Seven of the participants referred to the examination of bodies, firearms and documents.
- One participant stated that “forensic investigation” refers to the use of science in solving a case.

It is evident that the majority of the participants are not aware of what forensic investigation entails. Given that the nature of the work performed by SARS criminal investigators involves financial transactions, it is inconceivable that only one participant knew that forensic investigation utilises the sciences during the investigation process. This limited knowledge of what forensic investigation is may imply that this concept is either not covered at all or is not sufficiently covered during training.

## **2.5 The difference between forensic and criminal investigation**

The views of authors such as Bennet and Hess (2004:4), Du Preez (1996:2) and Weston and Wells (1997:1) are that criminal investigations would involve:

- Identifying the crime that has been committed;
- Gathering evidence;
- Individualising crime;
- Identifying and apprehending the accused;
- Locating and recovering stolen property; and
- Assisting the prosecutor when the case goes on trial.

The researcher, on the basis of his experience as a detective in the SAPS, is aware that science also plays a role in criminal investigations whether these are investigations into murder, robbery or fraud. The researcher therefore disagrees with the views of Meijer (2006:74), Pollex (2001:93) and Van Rooyen (2007:31), who state that forensic investigation, in contrast to criminal investigation, involves any of the following in an investigation:

- The application of science to law;
- The use of science;
- Scientific knowledge;
- Sophisticated investigation techniques; and
- Scientific methods and techniques.

Berning (2008:41) quoting van Zyl states that there seems to be no real difference between criminal investigations and forensic investigations. Horne (2007:22) also agrees with this view. Weston and Wells (1997:1) state that successful police investigations result from intuition, flashes of inspiration as well as routine, unimaginative work and can also include microscopic examination and laboratory analysis.

Van Heerden (1982:8) states that the laboratory analysis by forensic experts and the methods and techniques of the criminal investigator are not separate entities but rather complementary in the reconstruction and individualisation of a crime situation.

The researcher is in agreement with Horne (2007:22) that there is no real difference between forensic investigation and criminal investigation. On the basis of the researcher's experience, the outcomes of these types of investigations are where the difference lies. Criminal investigations result in criminal prosecutions, while forensic investigations can result in criminal or civil proceedings, departmental enquiries, suspension and dismissal of employees, or mitigation of risks. Both criminal and forensic investigations use science, scientific knowledge, scientific methods and techniques in solving a case.

The literature reviewed for this study gives conflicting views on the difference between forensic and criminal investigations and so, too, did the participants. The contentious issue in the opinion of the researcher is the use of the sciences and scientific methods in forensic investigations. The researcher, on the basis of his experience, argues that there is no difference between forensic and criminal investigation, as they both utilise science and scientific methods. The following example clears this up. The police would conduct a criminal investigation in a case of murder where a firearm was used. The fact that a ballistics expert and pathologist would give scientific evidence with regard to the firearm used and the cause of death does not change the criminal investigation into a forensic investigation. The perpetrator would still have to be criminally prosecuted for the crime.

The outcomes of these types of investigations can differ in that criminal investigations result in criminal prosecutions while forensic investigations can result in criminal or civil proceedings, departmental enquiries, suspension and dismissal of employees, and mitigation of risks.



The participants also gave conflicting answers to the question, which, in view of the contrasting arguments presented in the literature, can be expected. In response to the question regarding whether, according to their experience or understanding, there is a difference between forensic and criminal investigation, the participants replied as follows:

- Eight stated that there is a difference.
- Nineteen stated that there are no differences.

In terms of the results of the analysis, when compared with the information obtained from the literature, there is a likelihood that a limited or too narrow understanding of criminal and forensic investigation may be impacting on the effectiveness of the investigators.

The researcher makes use of the term “investigation” throughout this report, keeping in mind that this term is inclusive of and refers to a “forensic investigation” and/or a “criminal investigation”.

## **2.6 The purpose of investigation**

Du Preez (1996:1) states that a criminal investigation is a search for the truth, with the primary purpose of finding a solution to the crime with the help of objective and subjective clues. “Objective clues” refer to objects that are directly or indirectly linked with a crime from which the association of an object or person is directly obvious or logically deduced while “subjective clues” refer to the direct evidence of eye witnesses (Van Heerden, 1982:1).

Brandl (2008:4) refers to “purpose” as the goal. The author states that the most common and significant purposes of a criminal investigation are to:

- Solve the crime;
- Produce evidence to support a conviction in court; and
- Provide a level of service to satisfy crime victims.

Becker (2009:xvii) provides another view in that he believes that the pursuit of truth is admirable but the main aim of a criminal investigation is to convict the criminal. Brandl (2008:4) and Du Preez (1996:1) share the view that the purpose of investigation includes the solving of the crime and to gather evidence. Brandl (2008:4) adds to this (and this view is supported by Becker (2009:xvii)) that the conviction of an accused is also a purpose.

However, Lyman (2002:16) and Du Preez (1996:4) suggest that the purpose of investigations also includes the prevention of crime through arrest and prosecution of the suspect. To this understanding Lyman (2002:16) adds when he identifies three types of investigation responses, which are:

- Reactive: which entails the investigator responding to a crime that has been committed;
- Proactive: which involves investigations into anticipated criminal activity; and
- Preventive: which is achieved through arrests and aggressive prosecutions

In contextualising reactive policing (which in terms of this discipline is crime investigation), Du Preez (1996:4), citing Van Heerden, states that:

- Reactive policing concerns the restoration of order through repressive policing methods and that these processes relate to law enforcement through criminal investigations; and
- Effective repressive action has preventative value because effective law enforcement has a deterrent effect.

Investigators investigate to determine what happened and thereafter to trace, arrest and bring the perpetrator before court for punishment, which should have a correctional and preventative effect. During the investigation, the investigator should identify shortcomings in the security system and then recommend preventative measures. Therefore, the overarching purpose of investigation is the prevention of crime through the arrest and aggressive prosecution of offenders, which serve as a deterrent. Olivier (1997:228) comes to the same conclusion. According to the literature reviewed, the purpose of an investigation also includes searching for the truth, solving the crime, obtaining evidence and convicting the accused (Lyman, 2002:16; Olivier, 1997:228; Du Preez, 1996:4).

With regard to the definitions and discussions provided by the authors mentioned above, it would appear that an investigator would firstly need to identify if a crime has been committed and thereafter to solve the crime using scientific methods and techniques. In doing so the investigator must identify, apprehend and bring the accused before a court, which would then decide whether the accused is guilty and, if so, punish the accused accordingly.

The sample in response to the question regarding the purpose of investigation answered as follows:

- Twenty-six stated that it was to find the accused guilty.
- One answered that it was to seek the truth.

Although the sample did not answer the question in the same way as the authors reviewed, it is evident that they have a narrow understanding of the purpose of investigations, which, in the researcher's view, is because:

- The SARS criminal investigators' performance is measured according to the number of criminal cases that they have investigated and the convictions that they have achieved; and
- The SARS Forensic Investigation Training Manual (SARS Academy, 2007:22) only refers to the objective of criminal investigations and not to its purpose. According to this manual the objective of criminal investigations is "to obtain a conviction in a court of law and the ultimate goal is to determine the truth". It is possible that the participants are confusing the terms "objective" and "purpose" or are using them interchangeably.

## **2.7 The objectives of investigations**

An objective describes more precisely a commitment which must be achieved within an appointed time and according to a specified standard (Du Preez, 1996:4). The literature reviewed (Becker, 2009:12; Bennet & Hess, 2004:5; Lyman, 2002:14; Du Preez, 1996:4) lists the following objectives of criminal investigations:

- Determine whether a crime has been committed: This involves the identification of the specific crime that has been committed and the kind of information or clues that can be collected. This can be achieved through preliminary observations made at the scene of crime (Du Preez, 1996:4). Every crime has its own elements and it is important for the investigator to know these elements. A wrong identification can result in a futile investigation.
- Legally obtain information and evidence: Du Preez (1996:4) draws a distinction between direct and indirect information. Direct information pertains to an actual sensory observation or experience described in words by the witness. "Indirect information" on the other hand refers to the physical clues which reveal the

circumstances of the events. Buckwalter (1984:3) states that evidence is the means of proving or disproving facts and issues on trial in a court of law. Evidence is of little value if it has been handled, tagged, or stored improperly (Becker, 2009:34).

- Identify the responsible person: Du Preez (1996:5), quoting Van Heerden, states that the emphasis here is on the involvement of the perpetrator in the act and on showing that the crime was committed by a specific person. The author draws a distinction between identification and individualisation: in identification a strand of hair can be identified as a strand of hair while in individualisation a strand of hair can be confirmed as belonging to a specific person.
- Arrest the suspect: Once all the relevant information and facts have been collected and the criminal has been identified, the investigator can proceed to have the suspect arrested, keeping in mind that an arrest is a drastic act which has far reaching implications (Du Preez, 1996:7).
- Recover stolen property: According to Du Preez (1996:7), this serves two purposes: to minimise the loss to the victim and to present the recovered property as an exhibit at the trial.
- Present the best possible case to the prosecutor: The investigator's involvement here is mainly in the presentation of the information gathered and in making sure that everyone and everything is present in the court on the date of the trial (Du Preez, 1996:7).

Becker (2009:xvii) provides a different perspective and states that the real objective of criminal investigators is to convict criminals. The pursuit of truth and the reconstruction of crimes are admirable objectives, but they are academic exercises if the ultimate point is not to provide admissible evidence upon which convictions can be based. Bennet (1987:9) disagrees with this view and argues that determining the truth is more important than obtaining a conviction or closing a case.

In response to the question "What are the objectives of an investigation?" all the participants in the sample stated that it is to gather evidence, arrest the suspect, and recover monies stolen from SARS and to prosecute the offender criminally in court. These answers were in line with the views expressed in the literature studied. However, the participants did not identify the objectives of:

- Identifying whether a crime has been committed. A possible explanation for this, in the experience of the researcher, is that SARS criminal investigators are only allowed by their managers and team leaders to proceed with their investigation after identifying that a specific tax crime(s) has been committed; and
- Presenting the best possible case to the prosecutor. The researcher, on the basis of his experience, knows that this objective is actually a given and that SARS criminal investigators in terms of their work are actually forced to liaise and work closely with the Specialised Tax Unit (STU) of the National Prosecuting Authority (NPA).

From the participants' answers, it is evident that all the participants have a narrow understanding of the objectives of an investigation in comparison with the range of objectives provided in the literature. The fact that two of the objectives, identifying whether an offence was committed and presenting the best possible case to the prosecutor, are part of the criminal investigation process at SARS does not mean that the participants know what the objectives of an investigation are. Having a too narrow understanding of the objectives of an investigation can possibly impact on the effectiveness of investigators.

## **2.8 Evidence**

Investigations can be described as the search for the truth by collecting evidence which reveals the truth. According to Du Preez (1996:4), one of the objectives of an investigation is to obtain information and evidence legally. From the foregoing, the identification, gathering, handling, analysing and presenting of evidence make up an important process in an investigation. According to the literature, the overarching purpose of evidence is to enable a court to make a decision with regard to factual disputes and to determine whether an accused person is guilty or not.

### **2.8.1 What is evidence?**

Buckwalter (1984:xiii) states that evidence "is the means by which investigators, clients, attorneys, judges, and others arrive at the factual truth of a matter under investigation", while Du Preez (1996:4), quoting Schmidt, defines evidence as "encompassing in its normal meaning all the information presented to a court in order to enable it to settle a factual dispute so that it includes the written and oral statements by witnesses as well as objects submitted for inspection". Adding to the discourse, Brown (2001:85) defines evidence as any species of

proof, or probative matter, legally presented at the trial of an issue, by the act of parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing in the minds of the court or jury as to their contention. Van Rooyen (2004:8) is in agreement that “from a judicial point of view, evidence may be defined as all relevant information that is admissible and presented in court.”

From the literature, the researcher can surmise that evidence can:

- Be classified as physical objects associated with a crime;
- Assist a court in making a finding in respect of a factual dispute;
- Be a decisive factor in determining the guilt of an accused; and
- Be admissible in court, provided it is obtained legally.

The researcher, on the basis of his experience, is aware of the view that media coverage of law enforcement officials bungling investigations through negligence, ineptitude and incompetence draws negative criticism and undermines the feeling of trust and respect for the law enforcement agencies. People commit crimes and, when they do, they make mistakes by invariably leaving behind some type of evidence, irrespective of whether they have removed anything from the scene or not (Bennet, 1987:8). Van Heerden (1982:1) refers to this as the “Locard principle,” where a reciprocal transfer of traces or physical clues takes place when people come into contact with one another or with objects, or enter a certain area. In light of the crucial role played by evidence, the researcher, also based on his experience, needs to emphasise that evidence which is obtained unlawfully usually results in an otherwise guilty accused walking free.

From the aforementioned literature, the researcher can thus present his interpretation of evidence as:

- Any information whether oral, written or physical (objects) presented before a court that enables the court to make a finding in a matter before it.

To the question “What is evidence?” the participants responded as follows:

- Twelve participants stated that it is information or documents that can be used in court to prove a case.

- Five participants stated that it is information or documents that can help a magistrate in his findings.
- Ten participants stated that it is information and objects that can be used to prove a fact.

There is therefore no difference between the participants' understanding of what evidence is and that expressed in the literature.

This means that the sample knew what evidence is and this knowledge would invariably assist them in being effective in their work. Furthermore it would assist SARS criminal investigators in fulfilling their role of criminally prosecuting tax offenders successfully.

### **2.8.2 The different types of evidence**

There are different types of evidence which can be used to prove a crime. From the literature review, it became apparent that different authors provide different categories of evidence. These are discussed below.

Palmiotto (2004:35) lists five different types of categories:

- Direct evidence, which is eyewitness evidence;
- Indirect evidence, which implies that the offender committed the act where, for example, the witness saw the offender walking away from the automobile with a package in his hand;
- Testimonial evidence, which is evidence given orally by the witness. It need not be accompanied by real evidence;
- Documentary evidence, which includes everything from photographs to handwritten and printed materials; and
- Real evidence, which consists of physical objects such as handguns or fingerprints. This type of evidence must be accompanied by testimonial evidence.

Lyman (2002:24) provides six categories of evidence:

- Physical evidence, which includes fingerprints, drugs, and firearms;

- Direct or prima facie evidence, which at face value proves a fact in dispute, such as a blood alcohol content report, which shows the accused exceeded the minimum blood alcohol level;
- Indirect or circumstantial evidence, which tends to incriminate a person without offering conclusive proof, such as a footprint found outside the window at a point of entry in a burglary case;
- Testimonial evidence, which consists of a witness giving evidence under oath either verbally or in the form of a written statement or affidavit;
- Trace evidence, which consists of extremely small items of evidence such as hair or clothing fibres; and
- Demonstrative evidence, which is evidence used to clarify or demonstrate, such as the use of an anatomical doll used in the testimony of small children in a sexual abuse case.

The researcher agrees with Buckwalter (1984:6) that evidence can be differentiated according to three types. These types are:

- Testimonial evidence, which is presented orally or in a statement or affidavit form by the witness;
- Documentary evidence, as determined by the contents of and signatories to many types of documents; and
- Physical or real evidence, which includes all tangible objects, substances, prints and impressions that have a relevant bearing on a case.

In response to the question “What are the different types of evidence?”, all the participants were able to identify the different types of evidence as documentary, physical, real, oral, testimonial, circumstantial and evidence involving minute particles such as fibres, inks and hair. In going through the different types and examples of evidence as discussed by Bennet (1987:8), Buckwalter (1984:6) and Lyman (2002:24), the researcher was able to classify all these types of evidence into three broad categories as identified by Buckwalter (1984:6), i.e. physical, testimonial and documentary.

All the participants were able to identify the different types of evidence which can be categorised according to the three broad categories identified by Buckwalter (1984:6). There



is therefore no difference in the participants' understanding of the different types of evidence when compared to the views presented in the literature reviewed.

This means that not only did the participants know what evidence is, they also had a sound knowledge of the different types of evidence. This common understanding of what evidence is and the different types of evidence apart from making them effective in doing their work also demonstrates the effectiveness of the training that the investigators received.

### **2.8.3 The chain of evidence**

International authors generally refer to this concept as the "chain of custody". Fisher (2004:10) states that a court will require proof that evidence collected during an investigation and the evidence ultimately submitted to the court are one and the same. To prove that the integrity of the physical evidence has been maintained, a chain of custody must be demonstrated. This chain shows who had contact with the evidence, at what time, under what circumstances and what changes if any were made to the evidence. Adams, Caddel and Krutsinger (2004:103) state that from the moment the evidence is collected until the moment it is introduced in court as evidence there must be an unbroken chain of custody of every item of evidence.

In response to the question, "What do you understand by the term 'chain of evidence'?" the participants gave various answers:

- Twelve said that it is proof that the evidence has not been contaminated.
- Nine said that it is proof that evidence found at the scene of the crime is one and the same produced in court.
- Two said that it is a record of who handled the evidence at every step of the way.
- Four said that it is proof that the evidence is properly marked, collected, stored and presented in court.

It is evident that all the participants understood what a chain of evidence is.

To maintain a chain of evidence a court will require proof that evidence collected during an investigation and the evidence ultimately submitted to the court is one and the same (Fisher,

2004:10). The reason for this, according to Van Rooyen (2004:12), is that the chain of evidence demonstrates that:

- The evidence offered is the same evidence found at the scene;
- There has been no opportunity to replace or improperly alter the evidence; and
- Any change in the condition of the evidence can be explained.

In response to the question, “Why it is necessary to maintain a chain of evidence?” the participants answered as follows:

- Fifteen of the participants stated that it was to show the court that the evidence is the same as that found at the scene of the crime.
- Eight of the participants stated that it is necessary to show that the evidence has not been tampered with.
- Four of the participants stated that it shows that the evidence has not been contaminated in any way.

It is evident that although the participants gave different answers to the question they all came down to the same thing that the evidence found at the scene is the same as that presented in court.

Van Rooyen (2004:12) states that to preserve the integrity of physical evidence the following guidelines must be adhered to:

- (i) Limit the number of individuals who handle the evidence from the time it is found to the time it is presented in court.
- (ii) If the evidence leaves your possession, record in your notes to whom it was given, the time and date, the reason for it being given to another, and when and by whom it was returned.
- (iii) Ensure that the person handling the evidence affixes their names and assignment to the package.
- (iv) Obtain a signed receipt from the person accepting the evidence.
- (v) When the evidence is returned, check for your identification mark and ensure that it is the same item. Determine if it is in the same condition as it was when it was recovered.

- (vi) Bring any change in the physical appearance of the evidence to the attention of the court.

In response to the question “How do you go about maintaining the chain of evidence?” the participants answered as follows:

- Fifteen said as few people as possible must handle the evidence and each time the evidence leaves the control of any person, it must be documented and the investigator must be able to explain any changes to the evidence.
- Twelve said that there must be a statement for the custody of the evidence each time it moves from one person to another, with all the details of the person from whom it was received and to whom it was handed, and the statement must include the dates and times as well as the reasons for it being given to or handed over to another person.

To the question, “Have you received any training in maintaining a chain of evidence?” all the participants replied that they had. The participants were able to define and give practical insight into the importance of and the steps to take in maintaining a chain of evidence.

There are no differences in the participants’ understanding of how to maintain a chain of evidence when compared to the arguments put forward in the literature. The participants’ answers also demonstrated and reflected favourably on the training they had received. It must be pointed out here that although the participants had been trained and showed knowledge of how to maintain a chain of evidence, this would be of little use if other aspects involved in a search and seizure were not addressed such as the relevant legislation, the procedure for obtaining and executing search warrants as well as admissibility of evidence, amongst others.

The concepts of the chain of evidence and maintaining the chain of evidence are crucial in the investigation process. A good understanding of both these concepts can lead to greater successes in the investigation of tax-related crimes and can increase the effectiveness of investigators. Knowledge of both these concepts also conveys to the courts, the police, the accused and the public that SARS criminal investigators are professional and competent. The knowledge of the participants with regard to the chain of evidence reflected favourably on the training they had received.

## 2.9 Documents

Kelly and Lindblom (2006:9) state that, in the broadest sense, a document is any material containing marks, symbols or signs that convey meaning or a message. While the great majority of documents are produced on paper either by electronic/mechanical means or by hand with pen or pencil, they can be produced with other instruments on a variety of surfaces. Schmidt and Rademeyer (2003:11-3) provide a judicial definition of a document as any writing or printing capable of being made evidence. They add that the concept is wide enough to include a piece of wood, a wall or a metal sheet on which information has been written or engraved.

The researcher, based on his experience, is of the view that the authors are indeed correct in their definition in that a document need not only refer to a piece of paper with some form of writing on it but can also include labels on compact discs, graffiti on walls, and the writing in lipstick on mirrors as examples of documents that go beyond the narrower definition. Buckwalter (1984:6) states that documentary evidence consists of evidence in written, typed, printed, or recorded form that contains relevant data, information, or proof-of-fact material. The author goes further to include handwritten and typewritten materials as well as photostats, tape recordings, computer printouts, photographs and any other writings. The researcher agrees with Buckwalter that genuine documents are the evidence of their own content. In *S v Tsapo*, as quoted by Schmidt and Rademeyer (2003:11-3), a map was viewed as a document.

In response to the question, “What is a document?” all the participants answered that a document is any paper that contains information. The literature states that a document can be any material on which any information can be written, printed or engraved and can include wood, metal, a wall and even a mirror with writing on it. There is a difference between the literature and the participants’ response. The participants were only aware of paper being regarded as a document. According to the researcher’s experience, this can be attributed to the nature of tax-related investigations, where documents are mainly paper based.

It is clear that all the participants had a very narrow understanding of what a document is. The implication of this in terms of this research is that investigators may overlook “documentary evidence” such as writing on mirrors or engraving on metals at a scene of crime which may be pertinent to a crime under investigation.

It is important for criminal investigators to know that a document can be any material on which information can be printed, written or engraved and can include metal, mirror or any other surface that contains information. This ignorance will in all probability hamper them in their work as they may ignore potential evidence that does not fit into their definition. When linked with the finding that they had all received training in search and seizure as well as the handling of documents, this ignorance may indicate that there is a problem in terms of the training content or perhaps assessment methods employed during the training intervention. One may only speculate as to where the cause of the ignorance lies. This issue may be a topic worth researching in the future.

## **2.10 Summary**

The SARS criminal investigators are mandated to investigate all offences in terms of the various Acts that are administered by the Commissioner of SARS. Section 74(1)(e) of the Income Tax Act, (South Africa, 1962) and section 57(1)(e) of the Value Added Tax Act, (South Africa, 1991) also make a statutory provision for ascertaining whether any offences have been committed in terms of those Acts. An OPA signed between the SAPS and SARS also gives SARS criminal investigators further authorisation to conduct criminal investigations into alleged tax offences (Seaman, 2011). The court's decision in *S v Botha and others* also paves the way for government departments, parastatals and private entities to conduct investigations.

Criminal investigation, according to the literature reviewed, is a search for the truth and involves the identification of the crime and the gathering and preserving of information which must be evaluated to bring an offender before court. If one takes the view of Du Preez (1996:8) that for investigators to compete with criminals, investigators should have comprehensive expertise and extensive scientific knowledge to accomplish specialised tasks such as the gathering of facts, then it can be concluded that criminal investigations make use of scientific methods and techniques.

Forensic investigation, according to the literature, is also an investigation aimed at court proceedings where scientific methods and techniques are used. The result of these investigations can be used in either a criminal or a civil court. The literature also shows that there is no real difference between a forensic and a criminal investigation. Both have similar

purposes and objectives. The overarching purpose of any investigation is to act as a deterrent and play a preventative role in that offenders may think twice before committing a crime or any other unlawful act knowing that they can be prosecuted and severely dealt with by the authorities.

The objectives of an investigation, both criminal and forensic, will include the:

- Identification of the crime or unlawful act;
- Gathering of information or evidence;
- Individualisation of the crime or unlawful act;
- Identification of the suspect or offender;
- Arrest of the suspect or bringing of the offender before a relevant authority or enquiry;
- Recovering of stolen property or proceeds from the unlawful act; and
- Assistance of the prosecutor or any relevant authority.

Evidence is what enables an investigator to solve a case. It also allows for people to arrive at the factual truth of a matter under investigation, according to Buckwalter (1984:xiii). Van Rooyen (2004:8) defines evidence as all relevant information that is admissible and presented in court. Other literature also indicates that there are different categories of evidence, which can be classified into three types of evidence:

- Testimonial;
- Documentary; and
- Physical evidence.

According to the literature, the chain of evidence provides for the continuous safe possession of evidence to demonstrate to the courts that the evidence handed in is the same evidence collected at the scene. During this process the investigator also proves that the evidence is in the same condition that it was found in and also that any change in the evidence can be explained. Bennet (1987:174) states that to maintain a chain of evidence, the evidence must be properly packaged to keep it in substantially the same condition in which it was found and that at every stage custody of the evidence must be documented. In the next chapter a more detailed discussion of the admissibility of evidence that is obtained from a search and seizure is presented.

## **CHAPTER 3**

### **SEARCH AND SEIZURE IN THE SOUTH AFRICAN REVENUE SERVICE**

#### **3.1 Introduction**

In this chapter the researcher defines and discusses the concept of search and seizure in relation to the Constitution (South Africa, 1996), as well as the Criminal Procedure Act (South Africa, 1977), South African tax legislation and case law. Further discussions follow with regard to the theoretical and practical application of search and seizure in terms of a search warrant, the requirements and procedure for obtaining a search warrant, and the actual conducting of a search and seizure. The seizure, handling, marking, storage and disposal of seized items are also discussed.

The researcher attempted to ascertain from the participants if searches and seizures were taking place during tax-related investigations and, if so, whether they knew and understood the legal processes and procedures relating to search and seizure. It was also important to find out whether the participants knew when a search and seizure can be conducted, as well as its consequences. The researcher also endeavoured to establish if the participants knew the different search methods prescribed as well as how seized items are handled, marked, stored and disposed of. The information obtained from literature studied as part of the research was compared to the participants' responses and a finding was thereafter made.

#### **3.2 The Constitution of the Republic of South Africa**

According to Joubert (2005:4), the Constitution (South Africa, 1996) of the Republic of South Africa is not an ordinary Act of Parliament. It is the supreme law of the land, which implies that it is more important than any other law. Joubert goes further to state that any law inconsistent with the said Constitution is invalid and will be declared as such by the Constitutional Court. The Constitution (South Africa, 1996) also contains a Bill of Rights that promotes human dignity, equality and freedom. The Bill of Rights appears to conflict with the Criminal Procedure Act (South Africa, 1977), where provisions are made for searching and seizing. Therefore, the Bill of Rights restricts police powers to the extent that crimes cannot be investigated without infringing a person's right to privacy at some stage or another.

In terms of section 36(1) of the said Constitution, the Bill of Rights may be lawfully limited only if the limitation is:

- Contained in law of general application; and
- Reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

This means that every right is limited at some stage and that no right is absolute (Joubert, 2005:22). Therefore, a search and seizure can be conducted provided it is authorised by a law of general application, such as the Criminal Procedure Act (South Africa, 1977), which also sets out reasonable requirements to be complied with (Joubert, 2005:284; Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen, 2007:129). Any other law that confers powers to search and seize co-exists with the Criminal Procedure Act (South Africa, 1977), and is not repealed by the said Act (Joubert, 2005:285). This therefore applies to searches and seizures in terms of:

- Section 4 of the Customs and Excise Act (South Africa, 1964);
- Section 57D of the Value Added Tax Act (South Africa, 1991); and
- Section 74D of the Income Tax Act (South Africa, 1962).

### **3.3 Search and seizure in terms of the Criminal Procedure Act 55 of 1977**

The search and seizure of articles is dealt with under sections 21 and 22 of the Criminal Procedure Act (South Africa, 1977). Section 20 of the said Act confers powers to search only where the objective of the search is to find a certain person or articles which fall into one of three classes of articles, which also include documents that may be seized by the State (Joubert, 2005:129). According to Joubert (2005:129), these include articles:

- Which are concerned in or on reasonable grounds believed to be concerned in the commission of an offence whether within the Republic or elsewhere;
- Which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
- Which are intended to be used or are on reasonable grounds believed to be intended to be used in the commission of an offence.

Under normal circumstances an article or document falling into one of the above categories may be seized by the State. The only exceptions are privileged documents, such as communications between an attorney and his client, which are subject to legal professional



privilege (Joubert, 2005:129). In *Prinsloo v Newman* the court held that such a document may not be seized.

### **3.3.1 Search and seizure with a search warrant**

As a general rule, Joubert (2005:129) states that search and seizure should wherever possible be conducted only in terms of a search warrant issued by a judicial officer, such as a magistrate or judge who must decide whether or not there are reasonable grounds for the search.

In terms of section 21 of the Criminal Procedure Act (South Africa, 1977), an article referred to in terms of section 20 may be seized by virtue of a search warrant issued:

- (1) by a magistrate or justice of the peace if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person or upon or at any premises within his area of jurisdiction.
- (2) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession, or under the control of any person, or upon or at any premises is required in evidence at such proceedings.

From the above it is clear that section 21 differentiates between a search warrant that is issued before a criminal trial (section 21(1)) and one issued during a criminal trial (section 21(2)). For the purposes of this dissertation only the former is discussed owing to its relevance to the work that SARS criminal investigators perform, in the experience of the researcher.

In practice a search warrant is usually issued after a statement under oath is placed before a magistrate setting out the offence and the grounds upon which the investigating officer believes that such an object or article may be in the possession or under the control of any person or on any premises.

### **3.3.2 Search and seizure without a search warrant**

The Criminal Procedure Act (South Africa, 1977) provides for search and seizure without a search warrant under the following circumstances.

### **3.3.2.1 Search with consent**

Section 22(a) provides for a police official to search without a warrant any person, container or premises if the person concerned consents to the search and seizure. In *S v Motloutsi* it was held that a lessee cannot give consent to a search. Only the lessor can consent to the search. In *S v Madiba* it was held that the consent must be voluntary without any undue influence or duress.

### **3.3.2.2 Search under urgent circumstances**

Section 22(b) provides for a police official to search any person or container for and seize any article referred to in section 20 without a search warrant if he believes on reasonable grounds that:

- “a search warrant will be issued to him/her under section 21(1)(a) and that
- the delay in obtaining the warrant would defeat the object of the search”.

### **3.3.2.3 Search of arrested person**

Section 23 authorises the search without a warrant of an arrested person and the seizure of articles found. In *S v Nader* it was held that the words “in the custody or under the control of” do not only refer to items on a person but would include articles found in a motor vehicle, flat or on the premises associated with the arrested person.

## **3.4 Search and seizure in terms of the Acts that the South African Revenue Services administers**

The various Acts that SARS administers provide for search and seizure in the following legislation.

### **3.4.1 Search and seizure with a search warrant**

Section 74D of the Income Tax Act (South Africa, 1962) and section 57D of the Value Added Tax Act (South Africa, 1991) state that an application can be made to a judge for a warrant to search and seize anything that may afford evidence of any act of non-compliance by that taxpayer. This is referred to as an “*ex parte* application,” where SARS makes an application to a judge in chambers who then decides on the merits of the application before issuing a search warrant.

It must be noted that a search warrant obtained in terms of the Value Added Tax Act (South Africa, 1991), and the Income Tax Act (South Africa, 1962), only authorises SARS personnel to conduct the search and seizure. The documents and evidence obtained as a result of these searches can only be used to ascertain if the taxpayer/s concerned are complying with their tax obligations. For the researcher this suggests that a search warrant obtained in terms of section 74D of the Income Tax Act (South Africa, 1962), and 57D of the Value Added Tax Act (South Africa, 1991), cannot be used for the purpose of obtaining evidence in a criminal investigation.

### **3.4.2 Search and seizure without a search warrant**

Section 4(4)(a) of the Customs and Excise Act (South Africa, 1964) states the following:

“A customs 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.”

The Customs and Excise Act (South Africa, 1964) only empowers customs officers to perform this function in relation to the said Act, which governs the import and export of goods as well as dutiable goods. Criminal investigators are not customs officers and are therefore excluded. Hence section 4(4)(a) of the Customs and Excise Act (South Africa, 1964) would not apply to search and seizure during criminal investigations. Furthermore, the

search and seizure provisions of the Customs and Excise Act (South Africa, 1964) would not apply to search and seizure for VAT (Value Added Tax) and income tax-related offences as the provisions of the Value Added Tax Act (South Africa, 1991) and the Income Tax Act (South Africa, 1962) only allow for the obtaining of evidence that confirms non-compliance with the said tax Acts. This does not authorise search and seizure for criminal investigation purposes. The investigation and subsequent criminal prosecution of tax offenders is governed by the Criminal Procedure Act (South Africa, 1977). Hence, SARS criminal investigators would need to adhere to the provisions of the Criminal Procedure Act (South Africa, 1977), including the search and seizure provisions, if they want to prosecute tax offenders successfully.

Therefore, in view of the provisions of the Constitution (South Africa, 1996), the Criminal Procedure Act (South Africa, 1977) and the tax legislation, it would appear that SARS criminal investigators would not be able to utilise the provisions of the legislation that SARS administers to obtain and execute a search warrant. In order for the investigators to conduct a search and seizure they would have to use the provisions of section 21 of the Criminal Procedure Act (South Africa, 1977) to obtain a search warrant.

A SARS criminal investigator is not a police officer and therefore cannot apply for a search warrant in terms of the Criminal Procedure Act (South Africa, 1977). In order to apply for such a search warrant, the SARS criminal investigator must first register a criminal case with the SAPS and lodge affidavits with the SAPS. The SAPS must then be requested to obtain the search warrants in terms of the Criminal Procedure Act (South Africa, 1977). A search and seizure can only be conducted by SARS criminal investigators by virtue of a search warrant issued to the SAPS in terms of section 21 of the Criminal Procedure Act (South Africa, 1977), during criminal investigations into tax-related offences.

In answering the question “In terms of what legislation can a SARS investigator conduct a search and seizure in a tax-related offence?”, only five of the participants knew that SARS criminal investigators can only conduct a search and seizure in a tax-related offence with a search warrant issued in terms of the Criminal Procedure Act (South Africa, 1977). The remaining 22 participants stated that the Value Added Tax Act (South Africa, 1991), the Income Tax Act (South Africa, 1962), and the Customs and Excise Act (South Africa, 1964) authorise them to conduct a search and seizure.

The participants provided different answers to this question. The researcher perused the SARS Tax Academy Criminal Investigations Training Manual (SARS Tax Academy, 2002:46), which deals with searches and seizures by SARS criminal investigators. The training manual only refers to searches and seizures in terms of section 74D of the Income Tax Act (South Africa, 1962), and section 57D of the Value Added Tax Act (South Africa, 1991). There is no reference to search and seizure in terms of the Criminal Procedure Act (South Africa, 1977). This could be the reason that the large majority of the sample was not aware that only the Criminal Procedure Act (South Africa, 1977) authorises search and seizure in tax-related offences. The five participants that were aware of this fact were at the time of the study involved in a joint criminal investigation with the SAPS in a VAT refund fraud scheme that involved searches and seizures.

There was confusion among the participants as to what legislation authorises SARS criminal investigators to conduct searches and seizure. This confusion could possibly hamper the investigators in the performance of their functions.

### **3.5 The search and seizure of articles**

Although the search and seizure of articles is regarded as a serious infringement on a person's right to privacy, section 36(1) of the Constitution (South Africa, 1996) makes it possible to conduct a search and seizure under certain circumstances. To conduct a search and seizure of articles, investigators must know what a search and seizure is. In addition they must also know what a search warrant is, the procedure to obtain a search warrant and the legal requirements for such a search warrant. The investigators must also know what the requirements are for the admissibility of evidence obtained through a search warrant. The planning for and execution of a search warrant are also very important as are the marking, cataloguing (drawing up an inventory) and disposal of seized articles.

#### **3.5.1 Search and seizure**

Joubert (2001:283) states that "search may be regarded as any act whereby a person, container or premises is visually or physically examined with the object of establishing whether an article is in, on, or upon such person, container or premises." In *Ntoyakhe v Minister of Safety and Security* it was held that "seize" encompassed both the act of taking possession of the article, as well as the subsequent detention thereof.

According to Palmiotto (2004:122), the crime scene is searched in order to find, collect and preserve physical evidence for obtaining a conviction in court and to solve the crime. Joubert (2001:284) states that “crime cannot be properly prevented or investigated unless police officials are adequately empowered to do so. Since it is sometimes essential to search for and seize property in order to properly prevent or investigate crime.”

The researcher is of the view that finding evidence is just one part of a search and seizure. In this regard the researcher disagrees with Palmiotto (2004:122) in that search and seizure need not only result in finding evidence to convict an accused. It could also result in exonerating an accused. Furthermore, it could also assist in linking more suspects to a case and assist investigators in establishing whether other crimes have been committed which they were unaware of.

From the foregoing discussion, a search and seizure can therefore be regarded as a physical examination of a person or premises for any article which can afford evidence that a crime was committed and the subsequent detention of that article for analysis, as well as criminal prosecution.

In response to the question: “How do you define search?” all the participants stated that a search involves going to a place or premises specified on a search warrant and finding evidence, such as documents, books or other items specified on the warrant which could confirm that an offence was committed or could assist in the investigation of an offence. There was therefore no difference in terms of what the participants understood and what is contained in the literature reviewed pertaining to the definition of search.

In response to the question: “How do you define seizure?” all the participants stated that seizure would involve the retaining of evidence by the investigator which would have been the subject of a search. There was therefore no difference in the participants’ understanding of the definition of search and what was discussed in the literature.

### **3.5.2 Search warrants**

According to Lansdowne and Campbell (1982:137), “a search warrant is a document issued by a judge, magistrate or justice directing any policeman named therein to search the person, premises or receptacle therein specified and if found, to seize that particular thing detailed in

the search warrant.” A search warrant, according to Lyman (2002:75), represents an authorisation by the courts for (police) officers to enter a designated location or structure and search for specific items. Lyman (2002:75) states further that a search warrant can be used to:

- Recover stolen property;
- Seize drugs or other contrabands; and
- Seize any other type of property used in the commission of crime.

A warrant represents the authority of the State mediated by an impartial magistrate (Becker, 2009:89). Palmiotto (2004:33) states that a valid search warrant makes a search legal and protects the investigator from civil and criminal liability. Joubert (2005:290) states that a search warrant must be executed during the day unless the person authorising the warrant authorises that it be executed at night. The search warrant shall be effective until it is executed or cancelled. A copy of the search warrant must be handed over to the person whose rights are affected by the search and seizure if such a person requests a copy.

In answering the question: “What is a search warrant?” all the participants knew that a search warrant is a document issued by a magistrate who allows specific persons to enter specific places identified on the warrant and to seize items specifically mentioned in the warrant for the purpose of criminal investigations or criminal proceedings. This explanation is in line with the information obtained from the literature.

### **3.6 The legal requirements for a search warrant in a tax-related offence**

Lee, Palmbach and Miller (2006:61) state that one of the most commonly used means to diminish the value of a particular piece of evidence is to demonstrate that the evidence was obtained illegally. Investigators must therefore ensure that the search warrant and the actual search and seizure must withstand the most rigorous scrutiny.

According to South African case law, as well as the different authors reviewed, the following legal requirements are necessary for a search warrant under section 21 of the Criminal Procedure Act (South Africa, 1977):

- A statement must be made under oath to the magistrate that there are reasonable grounds for believing that an article is under the control of a certain person and that article is believed to have been used in the commission of a tax offence. This is in line

with the requirements as laid down by the court in *Mandela and Others v Minister of Safety and Security and Another*.

- The names of the police officers, including those from specialised police units, such as the SAPS Cyber Crime Investigation Unit, must also be reflected in the search warrant and directed by the magistrate to conduct the search and seizure. This is also in line with the literature (Lansdowne & Campbell, 1982:137).
- The name and details of any other personnel that would be present, such as SARS criminal investigators or personnel from private forensic firms must be included. In *De Wet and Others v Williers NO and Another* and *Smit & Maritz Attorneys and Another v Lourens NO and Others* it was held that there must be a valid empowerment for persons that are not police officials to participate in the search.
- Accurate details of the offence, as well as the suspect and the address or premises where the suspected items are to be found must be presented. This is in line with the court's decision in *Smit & Maritz Attorneys and Another v Lourens NO and Other*. In *Community Repeater Services CC v Minister of Justice* the warrant and the seizure were set aside because the warrant did not mention the name of the suspect. In *Van der Merwe and Others v Additional Magistrate, Cape Town and Others* the court set aside the search warrant because it did not stipulate the offence for which it was issued.
- An accurate description and listing of the items or articles that are the subject of the search and seizure must be provided. This is also in line with the court's decision in *World Wide Film Distributors v Divisional Commissioner, South African Police*, where the court set aside the search warrant as being too wide by allowing the seizure of articles whose possession did not constitute an offence.

In answering the question: "What are the legal requirements for a search warrant in a tax-related offence?", only five participants knew that a statement under oath outlining the tax offence in question must be made to a magistrate and that the affidavit must show that reasonable grounds exist to believe that specific documents on a specific premises or under the control of a specific person can prove the offence in question. This is in line with the requirements of section 21 of the Criminal Procedure Act (South Africa, 1977). These five participants were involved in a VAT refund fraud investigation with the SAPS at the time of the study. The remaining 22 participants did not know what the legal requirements for a



search warrant are. Ten of these 22 participants stated that the SARS legal officer must deal with this issue. The reasons for the lack of awareness of these requirements on the part of these 22 participants were their inexperience and lack of exposure to the investigations which the other five participants had been involved in. Furthermore, these 22 participants were not familiar with the provisions of section 21 of the Criminal Procedure Act (South Africa, 1977).

It is possible that the investigators' performance may be hampered without this knowledge, thereby rendering them ineffective. It is also possible that the opportunity to conduct a search and seizure in a tax-related investigation where the appropriate circumstances exist may be lost because investigators do not know what the legal requirements for a valid search warrant are.

### **3.7 Admissibility of evidence obtained through a search warrant in a tax-related offence**

Palmiotto (2004:35) states that "to be admissible, evidence must have been obtained legally" and "must be considered material, relevant and competent". Bennet (1987:76) states that "the courts are bound by rules and can admit evidence only if it is obtained constitutionally. Thus the legality of a search must always be kept in mind during an investigation." Adams et al. (2004:2) state that it is not enough just to have evidence: it must have been collected and processed properly, lawfully, and in a manner that is above reproach and proves the guilt of the accused "beyond all reasonable doubt". Bekker et al. (2007:137) state that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. Lyman (2002:69) states that investigators must have legal grounds to begin a search and in doing so should not contaminate any evidence. Should a court determine that the evidence was obtained illegally or that the legal or scientific requirements for the collection and preservation of the evidence were not followed, then the evidence can be deemed to be inadmissible (Lee et al., 2006:61). The same authors argue that search and seizure falls into two general concerns:

- Is the actual search of the premises lawful?
- Is the seizure of a specific piece of evidence within the confines of a legal seizure?

Investigators therefore need to ensure that only articles specified in the search warrant are seized. Joubert (2005:289) provides the following guidelines with regard to the articles that can be seized according to the search warrant:

- Every article need not be described in detail. It would suffice if a reasonably clear description is given. In *Cine Films (Pty) Ltd v Commissioner of Police* it was held that only articles specified in the warrant could be seized even though they were not clearly indicated or accurately described. However, those items seized under a general, wide or broad description must be returned to the appellant.
- A search warrant that authorises the seizure of “documents” is adequate authorisation to seize “books,” as was the case in *Seccombe and Others v Attorney General and Others*.
- The description of the article must not be too general in nature. The person who is executing the warrant must be able to determine with reasonable certainty what has to be seized. In *Sasol III (Edms) BPK v Minister van Wet en Orde en 'n Ander* it was held that where a document is the subject of a legal privilege it must not be seized without the consent of the client.

If an article does not fall within the authorisation of the search warrant, but is relevant to the crime, it should not be seized until a search warrant is obtained. Only in exceptional circumstances such as in terms of section 22 of the Criminal Procedure Act (South Africa, 1977) can an article be seized without a search warrant.

In *De Wet and Others v Williers NO and Another* and *Smit & Maritz Attorneys and Another v Lourens NO and Others* search warrants were obtained by the police authorising the seizure of documents and computers. Both search warrants were addressed to all police officers. However, during the search, representatives of a forensic auditing firm assisted the police as specialists providing logistical services when the search warrants were executed. These representatives were not authorised in terms of the search warrants either to be present at or involved in the execution of the search. It was held that the document empowering the search and seizure must contain a valid empowerment: The literature states that the courts can only accept evidence if it is obtained constitutionally and by virtue of a search warrant. A valid search warrant issued for a tax offence can only be obtained using the Criminal Procedure Act (South Africa, 1977). The search warrant must not be too vague or general in its

description. It must also specify who must carry out the search and who can be present. Furthermore, the evidence must be collected and processed in a manner that is above reproach.

The researcher established that in the majority of the decided cases he reviewed, the admissibility of the evidence obtained as a result of the search and the seizure was an issue. The South African courts, through decided cases, have laid down strict criteria and guidelines for searches and seizure. According to Du Toit, De Jager, Paizes, Skeen and Van der Merwe (2010:2-4):

“the warrant should authorise a police official to seize the article in question, identify a person identified in the warrant, or to enter and search premises identified in the warrant, or to search any person found on or at such premises with a view to seize the article in question.”

It also appeared to the researcher that each case was decided on its merit. The literature also pertained mainly to physical evidence at a scene of crime, especially the chain of evidence. The researcher used the very same principles in relation to physical evidence found at the scene of crime to address the issue of admissibility of evidence, which had been an issue in many of the cases. According to Van Rooyen (2004:12), these include:

- (i) Limit the number of individuals who handle the evidence from the time it is found to the time it is presented in court.
- (ii) If the evidence leaves your possession, record in your notes to whom it was given, the time and date, the reason for it being given to another, and when and by whom it was returned.
- (iii) Ensure that the person handling the evidence affixes their names and assignment to the package.
- (iv) Obtain a signed receipt from the person accepting the evidence.
- (v) When the evidence is returned, check for your identification mark and ensure that it is the same item. Determine if it is in the same condition as it was when it was recovered.
- (vi) Bring any change in the physical appearance of the evidence to the attention of the court.

To the question “what is the admissibility of evidence obtained from a search and seizure?” 18 participants stated that the evidence obtained would be admissible provided it was obtained lawfully in terms of a search warrant, and handled, marked and stored correctly with regard to the chain of evidence. This is in line with the information obtained from the literature. The remaining nine participants did not know what the admissibility of evidence would be if the evidence was obtained from a search and seizure. This lack of knowledge will obviously hamper these investigators in the performance of their investigations and render them less effective.

### **3.8 Procedure to obtain a search warrant in a tax-related offence**

In view of the legislation pertaining to search warrants, which has already been discussed in paragraph 3.4.2 supra, a SARS criminal investigator would not be able to obtain a search warrant in terms of the Criminal Procedure Act (South Africa, 1977), since the SARS criminal investigator is not a police officer. The SARS criminal investigator would have to liaise with and arrange with the SAPS investigating officer to obtain such a warrant. Only five of the participants were able to specify the procedure for obtaining a search warrant in terms of the Criminal Procedure Act (South Africa, 1977). They listed the following steps:

- A criminal case of tax evasion must be registered with the SAPS and the necessary affidavits must be submitted to support the allegations.
- The SAPS investigating officer must be requested to obtain a search warrant from the magistrate’s court that has jurisdiction.
- The SARS criminal investigator can assist the SAPS investigating officer in obtaining the search warrant by providing a statement under oath to the SAPS specifying the offence and the details of the accused, including the addresses, as well as describing the items that should be searched for and seized and their relevance to the offence under investigation.
- The SAPS investigating officer in the application for the search warrant must be requested to include the names of specific SARS criminal investigators to be present and partake in the search to identify articles specified in the warrant.

The remaining 22 participants stated that the Legal Department of SARS must apply for and obtain the search warrant from the courts.

There is a difference between current practice and previous practice with regard to the procedure for applying for a search warrant. In 1999 SARS changed its focus from investigations with the view to collecting outstanding taxes to prosecuting tax offenders criminally. Up until this time, the procedure according to the experience of the researcher was for SARS investigators to request the SARS Legal Department to apply for the search warrant and for the investigators to execute the search warrant. In order to apply for a search warrant in terms of the Criminal Procedure Act (South Africa, 1977), the SARS criminal investigator would have to engage and liaise with the SAPS investigating officer.

The five participants that were able to specify the procedure for obtaining a search warrant in terms of the Criminal Procedure Act (South Africa, 1977) were the same participants that were involved in a joint investigation with the SAPS into a VAT fraud refund scheme, where search warrants were obtained during their investigation. The researcher, from his experience, is in agreement with these five participants, who provided the steps above for applying for a search warrant in a tax-related criminal investigation.

### **3.9 Planning for the search**

Bennet (1987:120) states that if a search is properly organised, it will be thorough and there will be no accidental destruction of evidence. Adams et al. (2004:60) state that planning is the key to greater success in finding what the investigator is looking for, as well as other items the investigator may have had no idea they would find. Bennet (1987:120) further states that whether one works alone or with other searchers, one must draw a plan on paper and apportion the search so that each area is searched at least twice and each time by a different person. Bennet (1987:120) proceeds to clarify that the building plans and blueprints of the location being searched may reveal valuable information about the original structure compared with its current configuration.

Bennet (1987:120) refers to a “search leader” when organising the search. According to this author, the search leader determines the number of personnel needed, the type of search best suited for the area, and the items most likely to be found. Personnel are assigned according to the selected search patterns.

Van Rooyen (2007:71) provides the following guidelines for the investigator, which the researcher has summarised for the planning and preparation stages of a search and seizure in a tax-related investigation:

- Obtain as much information as possible about the type, size and location of the premises;
- Make sure that the application for the search warrant is in accordance with the provisions of the Criminal Procedure Act (South Africa, 1977) and that the search warrant complies with the applicable provisions in terms of the law. In *S v Motloutsi* it was held that evidence regarding an unlawful search is unconstitutional and therefore inadmissible;
- Obtain in advance as much information about the crime under investigation as possible, such as the number of people involved, the type of paper records that are kept, as well as the search area and its location; and
- Obtain as much information about the intricacies of the case as possible to avoid mishaps.

As soon as all possible information has been considered, then the planning for the application for the search warrant can begin.

In response to the question: “What planning must be done before conducting a search and seizure?” all the participants stated that the type and layout of the premises to be searched will determine how many personnel and how much equipment will be needed. In addition all the participants stated that background information on the crime and the suspect and what articles are being sought and where they can be found would be crucial during the planning of the search. The participants had the same understanding as expressed in the literature with regard to the planning required before a search and seizure is conducted.

### **3.10 Personnel**

In response to the question: “How many personnel should be involved in a search and seizure?” all the participants stated that there should be sufficient personnel to conduct the search and to cover the search area adequately. However, five of the participants, those involved in the joint VAT refund fraud scheme investigation with the SAPS, also added the following, which the researcher from his experience agrees with:

- The personnel involved in the search and seizure must be restricted to those specified in the search warrant. This is in line with the decision in *De Wet and Others v Williers NO and Another* and *Smit & Maritz Attorneys and Another v Lourens NO and Others*.
- The type of premises and the area to be covered, as well as the items to be seized, will dictate the number of persons that will be required.
- A legal advisor is necessary in the event of court interdicts or other legal issues that may arise.

The participants had a similar understanding that there should be sufficient personnel to conduct the search and seizure. Although the participants knew that sufficient personnel must be available to conduct the search, it was clear that 22 of the participants were not aware that their names needed to be specified on the search warrant if they intended to participate in the search and seizure. This can be attributed to their inexperience in searches and seizures because the five participants that were aware of this requirement were involved in the joint investigation with the SAPS into a fraudulent VAT refund scheme, as mentioned above.

### **3.11 Equipment and vehicles**

In order to conduct a successful search and seizure it is important that the investigator has suitable and appropriate equipment that enables him or her to gain access to, identify, retrieve, mark, record and store seized items.

Marais (1992:12) recommends the following articles and instruments to be used:

- A reliable flash light (torch);
- Suitable writing paper (A4) and note book;
- Pen, pencils, chalk and crayons;
- A magnifying glass and hand mirror;
- A steel tape measure and ruler;
- Rubber gloves, forceps, tweezers and scissors;
- Tools such as screwdrivers, a hammer and pliers;
- Sufficient containers for packaging and transporting physical evidence, such as cardboard boxes, envelopes and plastic bags;
- Wrapping paper, sealing wax, rope, string, labels and rubber bands; and
- Several small towels or cotton dusters.

In response to the question: “What equipment do you take along to a search and seizure?” all participants gave a comprehensive practical answer which was in line with the literature. Their answers included various items of stationery for marking, labelling, making notes and issuing receipts; boxes for storing and removing seized items; tools for opening up draws, cupboards and gates; and gloves, torches and seals.

The five participants that were involved in the VAT refund fraud investigation with the SAPS also included the following items, which the researcher from his experience agrees with:

- Seals with numbers;
- Numbering stamp for documents;
- Bolt cutters;
- Motor vehicles, including trucks if a considerable number of items are expected to be found. Depending on the terrain 4 x 4 or other off-road vehicles may be required; and
- Radios and cellphone for communication.

Although all the participants had the same understanding as the literature with regard to the equipment that must be taken to a search and seizure, the five participants that were involved in the VAT refund fraud investigation with the SAPS were able to furnish additional information in respect of equipment, which demonstrated their practical knowledge and insight into searches and seizures.

### **3.12 Pre-raid briefing**

According to Van Rooyen (2007:86), the briefing before the execution of a search warrant is very important. He provides guidelines for information to be provided in the pre-raid briefing, which are summarised below:

- The ignorance of officers not familiar with the investigation must not interfere with the investigation.
- Only items specified in the warrant must be seized; otherwise, a narrowly crafted search warrant becomes a search forbidden by law.
- It is important to protect both the identity and integrity of the evidence.
- The investigating officer should be sensitised to collect all traditional types of evidence, e.g. fingerprints.



- One person should be appointed to take charge of all evidence and make the inventory.
- An officer should be designated to make a running commentary on the video recording if the search and seizure is being recorded.

In addition the participants that were involved in the joint investigation into a fraudulent VAT refund scheme with the SAPS also provided the following practical guidelines for the person presenting the pre-raid briefing. According to these participants, this person should:

- Brief the group about the type of activity of the criminal(s) and the number of persons involved in the crime;
- Brief the persons involved in the search on the alleged offence(s) and how it is suspected that it was committed; the premises to be searched as such; who the suspects and all other parties involved are; what each one's task would be (some individuals must secure the premises; some must perform the physical search); who is designated to certain areas/rooms; and who is responsible to take down the inventory of what is seized (index, record etc.);
- Present the persons involved in the search with photos of the scene of crime/premises. A map must also be presented of how to get to the premises, as well as copies of inventories which must be filled in regarding exhibits found. A scribe must be identified;
- Inform each one that they must keep a record of precisely what they found and where; specify what they must do if they come across evidential material not specified on the search warrant; instruct them to perform the search with the least disturbance and in a professional manner;
- Point out what documents/articles they must search for (hand each a copy of the annexure of the articles to be searched for);
- Tell them to, on arrival, determine who the owner/person in charge is and what must be done if entrance is refused or if the owner/person in charge refuses to allow the search to continue because of claims of privilege;
- Prescribe that a copy of the receipt of what was seized must be left with the owner, as well as contact details of the SAPS investigating officer;

- Inform the SAPS investigating officer that he must brief the other role-players on where to place personnel and the allocation of specific tasks at the scene of crime. They must know what they are looking for.

In answering the question: “What must be discussed at the pre-raid briefing?” 22 of the participants did not know what must be discussed whilst the five participants that were involved in the VAT refund fraud scheme investigation with the SAPS provided the following guidelines:

- Reasons for the search;
- Layout of the premises;
- Search methods and patterns;
- Specified items according to the search warrant;
- Where these items can be expected to be found on the premises;
- The role, responsibilities and functions of each of the personnel; and
- An appointed person to handle all queries.

With the exception of the five participants, a large portion of the sample, 22 out of 27 participants did not know what should be discussed at a pre-raid briefing. This can be attributed to inexperience and the fact that these participants were not exposed to searches and seizures in the way the five participants that were involved in the investigation with the SAPS were. This would possibly render them ineffective in field operations.

The research revealed that the majority of the sample did not know what must be discussed at a pre-raid briefing. This lack of knowledge could result in investigators being ineffective in their work and could hamper their performance should they be involved in a search and seizure.

### **3.13 Conducting the search and seizure**

Conducting a search involves going out to and entering the premises to be searched and seizing the items as specified in the search warrant. It involves identifying oneself at the search premises and informing the owner or person in charge at the scene of the reasons for the search, carrying out the actual search and removing seized items from the premises.

Joubert (2001:285) states that a search must be conducted in a decent and orderly manner as stipulated in section 29 of the Criminal Procedure Act (South Africa, 1977), which is also consistent with the Constitution (South Africa, 1996), which states that regard should be given to the right to dignity and to be treated in a humane manner. According to Bennet (1987:79), “organizing a search includes dividing the duties, selecting a search pattern, assigning personnel and equipment and giving instructions,” and “a successful crime scene search locates, identifies and preserves all evidence present.” Lee et al. (2006:61) state that even if the best techniques are used to process a crime scene and analyse the evidence, little evidential value will be obtained if the evidence is not admissible at subsequent criminal proceedings.

Lee et al. (2006:128) state that the investigator must thoroughly evaluate and take into account obstacles, available equipment and resources, scope of the search and evidence sought or anticipated before searching. The same authors argue that there is no single correct search method for a specific type of crime scene. From his experience the researcher can also state that no two areas to be searched are likely to be the same and circumstances ultimately dictate how the search is to be conducted.

### **3.13.1 Procedure at the premises to be searched**

Van Rooyen (2007:89) refers to the term “freezing” when executing a search and seizure. This describes the procedure when entering the premises to be searched so that all sensitive points are put under the control of the investigating officer. Those points include the switchboard, computer centre/room or workstations. This process, he argues, serves as a protective measure to ensure that the evidence is preserved in its original condition as it was found. He emphasises that corroboration of the initial process is important to limit the possibility of allegations that some form of incorrectness occurred during the process. Corroboration measures would include isolating all staff from their working environment, not allowing any items to be removed and taking photographs or making videos or sketches of the working situation.

In answering the question: “How do you conduct a search and seizure?” only five of the participants were able to provide a practical step-by-step procedure on how to conduct a search and seizure that was in line with the guidelines referred to by Van Rooyen (2007:89). The remaining 22 participants did not know how to conduct a search and seizure and stated

that they had not participated in a search and seizure and therefore did not know how to conduct one. This lack of knowledge can be attributed to inexperience and the fact that these participants were not exposed to searches and seizures as the five participants that were involved in the investigation with the SAPS had been.

These five participants provided the following practical guidelines for conducting a search, which take into account the concept of “freezing” that Van Rooyen (2007:89) refers to. The researcher from his experience is in agreement with these guidelines:

- The search area must be cordoned off.
- The owner of the premises must be identified and informed that a search is to be conducted. A copy of the warrant can be given to him if he requests it. He must be allowed to call and consult with his attorney if he so desires.
- All other persons must be asked to leave the premises.
- The owner of the premises or his representative must be present when the search is conducted.
- The search must be systematic and due regard must be given to decency.
- The search area must be sketched, photographed and videotaped if necessary.
- All items that are being seized must be recorded and given an identification mark and then placed in a box for removal.
- Once the search is completed, a receipt must be given to the owner of the items and all the boxes must be sealed in the presence of the owner before they can be removed to a storage area or facility.

### **3.13.2 Different search methods**

Bennet (1987:80) states that “all search patterns have a common denominator: they are designed to locate systematically any evidence at a crime scene or any other area where evidence might be found.” Lee et al. (2006:122) argue that crime scene search patterns are varied and different in style and application but they all share a common goal of providing structure and organisation to ensure that no physical or pattern evidence is overlooked. These authors are also of the opinion that there is no single correct search method for any specific type of crime scene. The circumstances and location of each search area will dictate the type of search method. There are five types of methods although they are given different names by different authors.

The participants were asked to: “Name the different search methods.” In response, five participants correctly identified one method, 10 participants identified two methods and eight participants identified three methods. Two participants did not know the different search methods. None of the participants were able to identify the five different search methods.

The five investigators that were working with the SAPS jointly on the fraudulent VAT refund scheme were only able to identify three of the different search methods. This suggests that practical exposure to searches and seizures may result in one increasing one’s knowledge in this area. The fact that none of the participants could name all the different search methods shows a lack of knowledge in this area, which could hamper the performance of their duties.

Different authors provide different names for the search methods (Becker, 2009:52; Brown, 2001:91; Palmiotto, 2004:124). However, the various search methods can be divided into the categories detailed below.

### **3.13.2.1 Spiral method**

In this method Palmiotto (2004:124) states that the searcher initiates the search at the beginning of a spiral, starting on the outside and moving towards the centre. Brown (2001:91) refers to this search method as a “widening circle search pattern”. The searcher may repeat the search process by starting at the perimeter of the area and working back towards the centre (Becker, 2009:52; Brown, 2001:91). The researcher, on the basis of his experience, is of the view that this search technique can be further enhanced by having a second officer follow to double check the first searcher’s observation.

The spiral method is mainly used for outdoor search areas where there are a minimum of searchers available. Apart from the articles and instruments referred to by Marais (1992:12), a searcher would, in the view of the researcher, require minimal additional equipment. Furthermore too many searchers may trample on the crime scene and may possibly damage or destroy evidence.

According to Swanson, Chamelin and Territo (1988:41), the advantages of this method is that the search can be executed by a single person and can be used outdoors. The disadvantages according to James and Nordby (2009:180) are that this method has limited applications and requires the searcher to be able to trace a regular pattern with fixed diameters.



**Figure 1: Spiral method**  
**Source: Swanson et al. (1988:40)**

None of the participants were able to answer the question: “What is the spiral search method and how do you conduct a spiral search?”

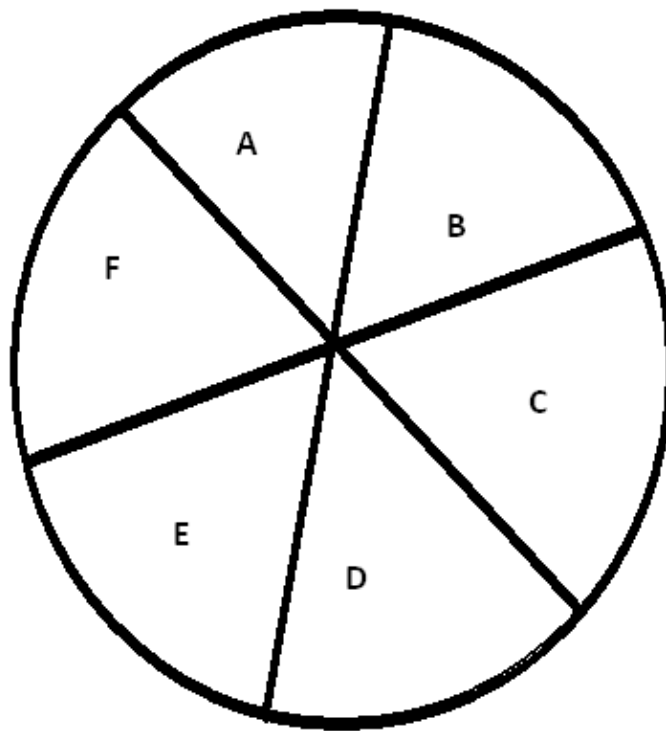
### **3.13.2.2 Wheel method**

According to Swanson et al. (1988:40), in the wheel method the search area is divided into a number of pie-shaped sections, usually six, which are then searched. They further state that this search pattern is “rarely employed but under certain unique circumstances, they might profitably be employed”. The wheel method is also used for outdoor search areas. Apart from the articles and instruments referred to by Marais (1992:12), a searcher would in the view of the researcher also require stakes and string to demarcate an area; otherwise, certain areas could be overlooked.

The advantages of the wheel method, according to James and Norby (2009:180), is that it can be used for special situations and that any search method can be used once the search area has been demarcated. James and Norby (2009:180) also state that it can be used for circular crime scenes.

The disadvantages of this method according to the experience of the researcher are that sufficient personnel are required to carry out the search with at least a minimum of four searchers. Furthermore according to the experience of the researcher there is a likelihood when using a team that the searchers can trample on evidence and even destroy clues when

they move towards the centre to begin the search. This method also has limited applications (James & Norby, 2009:180).



**Figure 2: Wheel method**  
**Source: Swanson et al. (1988:43)**

None of the participants were able to answer the question: “What is the wheel search method and how do you conduct a wheel search?”

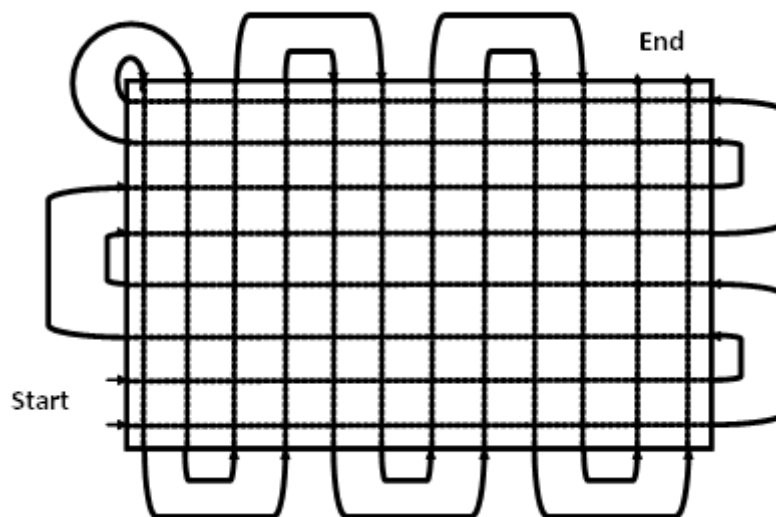
### **3.13.2.3 Grid method**

Palmiotto (2004:124) states that in the grid, or double strip method, the search is repeated from side to side. Becker (2009:51) describes this method as being similar to that used by archaeologists in field digs. The area is divided into small squares (grids), which are in turn divided into four smaller squares. Each of these small squares is completely searched before moving on to the next small square. This process repeats itself until the entire search area has been covered.

The grid method, according to the experience of the researcher, would require additional equipment, such as string and stakes to demarcate the lines of the search so that certain parts of the search area are not overlooked. This is in addition to the equipment that Marais

(1992:12) recommends. James and Nordby (2009:180) suggest that these searches require a search coordinator. Depending on the size of the search area, the researcher based on his experience recommends a team of at least four searchers to conduct the search. The researcher, also based on his experience, recommends that only the required number of searchers be involved in the search since there is a likelihood that important evidence can be destroyed or trampled upon if there are too many people.

According to James and Nordby (2009:180), the advantage of this method is that it is effective, whilst Becker (2009:51) states that it is comprehensive and thorough. The disadvantages of such a method are that it is time consuming (Becker, 2009:51; James & Nordby, 2009:180). Becker (2009:51) also states that this method is only suitable for certain search areas.



**Figure 3: Grid method**

**Source: Swanson et al. (1988:42)**

None of the participants were able to answer the question: “What is the grid search method and how do you conduct a grid search?”

#### **3.13.2.4 Zone method**

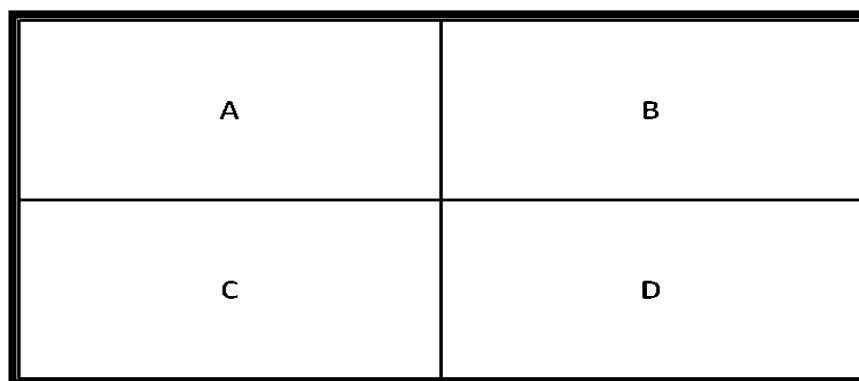
Palmiotto (2004:124) states that for this method the search area is divided into quadrants, with one searcher assigned to each. Brown (2001:91) states that after each zone is searched



the searching officers can change zones and search again. He states that this technique can be very effective in searching a house, in which each room can be thought of as a zone.

The zone method is best used for scenes with defined zones or areas, such as houses or buildings with rooms (James & Nordby, 2009:180). The equipment recommended by Marais (1992:12) should be sufficient according to the experience of the researcher. James and Nordby (2009:180) also suggest that once the search area is divided into zones, any search method can be utilised to search each zone. Depending on the size of the search area, the researcher based on his experience recommends a team of at least four searchers to conduct the search. He also recommends a search coordinator if the search area is as large as a warehouse or a building with many rooms, offices and storage areas.

The advantage of such a method is that the search area can be divided into four large quadrants and thereafter any search method can be used to conduct the search in each quadrant (James & Nordby, 2009:180; Swanson et al.,1988:41). The disadvantage of this method, according to James and Nordby (2009:180) is that it works best at scenes with defined zones or areas such as houses and buildings with rooms.



**Figure 4: Zone method**

**Source: Swanson et al. (1988:42)**

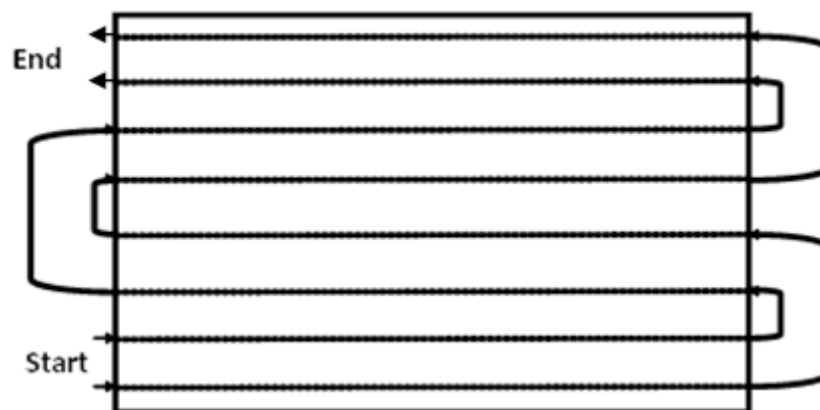
None of the participants were able to answer the question: “What is the zone search method and how do you conduct a zone search?”

### 3.13.2.5 Strip search

Brown (2001:92) and Becker (2009:52) state that areas to be searched may be divided into strips and systematically searched. The searcher begins by dividing the area to be searched into strips or lanes at one end and then walks or in some cases crawls through the scene looking for any possible items of evidence.

The strip method in the experience of the researcher would require additional equipment such as string and stakes to demarcate the lines of the search so that certain parts of the search area are not overlooked. This is in addition to the equipment that Marais (1992:12) recommends. James and Nordby (2009:180) suggest that these searches require a search coordinator. Depending on the size of the search area, the researcher based on his experience recommends a team of at least four searchers to conduct the search. The researcher also recommends based on his experience that only the required number of searchers be involved in the search since there is a likelihood that important evidence can be destroyed or trampled upon when too many searchers partake in the search.

Swanson et al. (1988:41) state that the advantages of this method are that it is more methodical and thorough whilst James and Nordby (2009:180) state that this method works best on large outdoor scenes. The disadvantages of this method are that it requires a coordinator and is also time consuming (James & Nordby, 2009:180).



**Figure 5: Strip method**

**Source: Swanson et al. (1988:41)**

None of the participants were able to answer the question: “What is the strip search method and how do you conduct a strip search?”

According to Adams et al. (2004:65), one can “choose to use any method you believe is best for each individual search, such as a spiral, quadrants, ever expanding or contracting circles or back and forth in a straight line in a pattern as one follows when mowing a lawn.” The circumstances and location of each search area will dictate the type of search method.

None of the participants in the sample were able to identify the five different search methods. As mentioned at the beginning of this section, of the sample:

- Two participants did not know any of the different search methods.
- Five participants correctly identified one method.
- Ten participants identified two methods.
- Eight participants identified three methods.

None of the participants were able to explain any of the search methods. The researcher is of the view that the reason for this is that none of the participants had been trained in the different search methods. Furthermore, the SARS Tax Academy Criminal Investigations Training Manual (SARS Tax Academy,2002:50-54) on search and seizure does not refer to or provide any information on any of the search methods. Another possible reason for the participants’ limited knowledge of the search methods could be the type of investigations they are involved in, namely looking for documents in confined areas such as offices, residential premises and warehouses.

### **3.13.3 Collection, marking and storage of seized documents**

Unlike other searches and seizures, the investigation of tax-related offences, in the researcher’s experience, invariably involves searches and seizures for documentary evidence. Lyman (2002:513) states that a single piece of evidence can have considerable impact in court. This means that correct collection and preservation techniques must be utilised by the investigator to maximise this evidence.

### **3.13.3.1 Collection and handling of documentary evidence**

Kelly and Lindblom (2006:23) provide the following guidelines when seizing documents:

- Use envelopes that are large enough to hold documents, especially in cases where a forensic examination needs to be carried out on them.
- Handle the documents as little as possible.
- Do not allow other people to handle or tamper with the documents.
- Do not use staples, pins or clips.
- Do not cut, tear or make perforations in the documents.
- Do not glue pieces of torn or fragmented documents.
- Do not mark the documents themselves but rather the envelope in which they are placed.
- Do not underscore, highlight or circle words in the documents.

All the participants stated that they had received training in the handling of documents obtained from a search and seizure.

In response to the question: “How must seized documents be collected and handled after they have been seized?” the participants gave various answers that included handling them as little as possible, refraining from damaging or making marks on the documents and placing the documents in an envelope for safe keeping. Although all the participants’ answers were in line with the literature, which indicated that they had been trained in this regard, the researcher was concerned that the majority of participants’ lack of experience and knowledge in obtaining and executing search warrants would negate the correct handling of seized documents.

### **3.13.3.2 Recording of documents after they have been seized**

Bennet and Hess (1987:137) state that the following must be recorded in the investigator’s notes in respect of each item seized:

- By whom the item was found;
- The description of the item;
- The date and the time the item was found;
- Where the item was found; and
- Who took custody of the item.

Palmiotto (2004:125) states that “Records are kept by the investigator from his initial assignment to the case and maintained until the case has been completed. Written records are supplemented by sketches, drawings and photographs. An accurate and objective description must be made before any items or objects are removed, altered, or destroyed, since the crime scene plays an important part in collecting evidence.” Documents must be handled as little as possible, no marks may be made on them and they should not be altered or tampered with in any way (Bennet & Hess, 1987:137; Lyman, 2002:513; Palmiotto, 2004:125).

In answer to the question: “How must seized documents be recorded during a search and seizure?”, all the participants were able to furnish the information specified by the literature, which included noting the description of the document, the details of the person who found the document, as well as where the document was found and the details of the person to whom the document was handed. There were thus no differences between what was contained in the literature and the participants’ understanding.

### **3.13.3.3 Marking of seized documents**

Bennet and Hess (1987:136) provide the following guidelines for the marking and identification of evidence:

- Use a personal, easily recognised identification that is as small as possible.
- Mark all evidence as it is collected.
- Do not alter, change or destroy evidence or reduce its value by the identification.
- Look at the item itself to determine where and how to make the identification mark on the item.

According to Kelly and Lindblom (2006:23) and Bennet and Hess (1987:136), a distinctive identification mark should be given to the seized item so that it can be linked back to where, when and on whom it was found.

In response to the question: “How are documents marked once they have been seized?” each of the participants gave different answers. It became evident that there is no standard way of marking documents and each investigator is left to their own devices in this regard:

- Ten participants stated that documents are marked alphabetically, such as Annexure A, Annexure B and so on.

- Thirteen participants stated that they use the initials of the person that found the documents, followed by a sequential number such as LM 1, LM 2 and so on.
- Four participants stated that they compile an exhibit file and label the documents alphabetically, such as Exhibit A, Exhibit B and so forth.

The researcher is of the view that even though there is no set procedure for marking documents in SARS, a policy manual should be drawn up by the SARS Training Academy to compile a standardised procedure for all investigators to use so that there is consistency in this regard.

Even though the participants were correct and knew how to mark documents, it was found that there was no set procedure or uniformity according to the SARS training literature on how the marking should be made (SARS Tax Academy, 2002:61). No mention of what type of distinctive mark must be used is given. Investigators are therefore left to use their own discretion as is shown by the different answers given by the participants. In the absence of proper guidelines from the SARS Training Academy, the researcher suggests the following procedure, based on his experience, which can be incorporated into the SARS Forensic Training Manual after consultation and after feedback is obtained from experts in this field:

- Seized documents should be placed in an envelope.
- The initials of the person finding the document and the sequential number should be endorsed on the envelope, such as LM 1, LM 2 and so forth.
- The details of the person who found the document as well as the date and time and the place where the document was found must also be endorsed on the top of the envelope.
- The person handing over the seized document inside the envelope as well as the person receiving the document and envelope must each sign the top of the envelope thus ensuring a proper chain of evidence.
- Under no circumstances may any marks be made on original seized documents.

#### **3.13.3.4 Safekeeping of seized documents**

Bennet (1987:173) states that evidence is subject to chemical change, negligence, accident, intentional damage, theft, or alterations during handling. Moreover, while evidence is stored in vaults, property rooms, evidence rooms and evidence lockers, the author warns that

protecting and storing of evidence is often the weakest link in the chain of evidence (Bennet, 1987:174). He further states that a proper storage area has ample space and that a responsible person is in charge to ensure that established procedures are followed and that the area is secured at all times.

All seized items should be kept in a safe or a locked office at a police station. It is important that due regard is given to the chain of evidence. Bennet (1987:174) advises that every person taking any evidence needs to sign for it: giving the date, place, time and reason for taking the evidence. The same procedure must be followed when the evidence is returned. It must be ensured that the evidence is in the same condition as when it was taken. Any change in condition should be noted and explained.

In response to the question: “Where must seized documents be stored?” 22 participants stated that the seized documents must be stored in a storeroom at a SARS office for SARS criminal investigators to conduct their investigations. The remaining five participants, those involved in the joint criminal investigation with the SAPS, stated that the seized documents must be stored at a secure storage room at a police station.

The researcher, drawing on his experience, agrees with the five participants who stated that the documents must be stored at a police station. A search warrant authorises a named police officer to seize specified items for a criminal investigation by the police. This means that the seized items may only be stored at a police station or the exhibit rooms of specialised SAPS investigation units.

The reason that 22 participants were unaware of this can be attributed to inexperience and the fact that these participants were not exposed to searches and seizures in the same way as the five participants involved in the investigation of the VAT refund fraud scheme with the SAPS. Furthermore, these participants possibly confused the searches and seizures used in criminal investigations with those conducted by SARS in terms of the tax legislation and not for criminal investigation purposes.

In the researcher’s experience, it is good practice for copies of the original documents to be made available to SARS criminal investigators for investigation purposes. The SAPS

investigating officer should make copies and record details of all copies of documents that are handed over to SARS criminal investigators, who in turn should also record those details.

### **3.14 Disposal of seized articles at the finalisation of investigation**

The Criminal Procedure Act (South Africa, 1977) provides for the disposal of seized articles by virtue of the following sections:

- Section 31 deals with the disposal of articles where no criminal proceedings are instituted or where the article is not required for criminal proceedings.
- Section 32 deals with the disposal of articles where criminal proceedings are instituted and an admission of guilt fine is paid.
- Section 34 deals with the disposal of articles after commencement of criminal proceedings.

The above sections provide for the seized article to be returned to the person from whom it was seized if such a person can lawfully possess it or to anyone else that can lawfully possess it. Sections 31 and 32 also state that if no person can lawfully possess it or the lawful owner does not claim the article within 30 days after he has been informed via registered post at his last known address, then the article can be forfeited to the State. Section 34 further provides for a judicial officer to forfeit the article to the State if no person is entitled, or is lawfully entitled, thereto or if the person entitled to the article cannot be traced. It also provides for the judicial officer to hear further evidence to make a decision.

In response to the question: “How are seized items disposed of after the criminal case has been finalised in court?”

- Fifteen of the participants stated that the seized items can be returned to the accused or owner.
- Eleven of the participants said they cannot be returned.
- One participant did not answer the question.

There was confusion among the participants in respect of the disposal of seized items, with 15 participants stating that they can be returned to the owner or the accused while 11 participants stated that they cannot be returned. One participant did not answer this question.



Sections 31, 32 and 34 of the Criminal Procedure Act (South Africa, 1977) provide for the return of a seized article to the person from whom it was seized or the lawful owner and if such a person cannot be traced or no one is entitled to it, then it can be forfeited to the State. The reason that almost half the sample stated that the seized items cannot be returned to the owner or the accused is that these participants were unaware of the provisions of sections 31, 32, and 34 of the Criminal Procedure Act (South Africa, 1977). This is further confirmed by the fact that 22 participants were not aware that searches and seizures in a tax-related offence can only be conducted in terms of section 21 of the Criminal Procedure Act (South Africa, 1977). Furthermore, the SARS Tax Academy Criminal Investigations Training Manual on search and seizure (SARS Tax Academy, 2002) does not deal with the disposal of seized items.

It was discovered that half the sample did not know that seized items can be returned to the owner because they were unaware of the provisions of the Criminal Procedure Act (South Africa, 1977). This gap in their knowledge could result in investigators being hampered in the performance of their duties.

### **3.15 Training**

All the participants stated that they had received training in the search and seizure of documents. However, the conclusion of this study is that most of the sample was very inexperienced in the search and seizure aspect of investigation, especially with regard to the legislation, the planning and conducting of searches and seizures and the procedure for applying for a search warrant. This is attributed to the majority of investigators interviewed not being exposed to cases involving searches and seizures in comparison to five of their colleagues in the sample who at the time were working closely with the SAPS in a joint investigation involving fraudulent VAT refunds. Furthermore, the researcher found by examining the SARS Tax Academy Criminal Investigations Training Manual on entry search and seizure that the training received by SARS investigators only dealt with searches and seizures in terms of the tax legislation. Guidelines and procedure for search and seizure in terms of the Criminal Procedure Act (South Africa, 1977) are not covered in this SARS training manual.

Although all the participants have confirmed that they have received basic investigation training, as well as training in search and seizure of documents, it is apparent that there is a

problem in terms of the training content or perhaps assessment methods employed during the training intervention. This training as well as the training material does not cover important and relevant aspects such as search warrants issued in terms of the Criminal Procedure Act (South Africa, 1977), admissibility of evidence, pre-raid briefings, search methods and actual conducting of a search and seizure.

### **3.16 Summary**

According to the responses from the sample, there is confusion with regard to search and seizure. Just five of the participants were aware that search warrants for search and seizure can only be obtained in terms of the Criminal Procedure Act (South Africa, 1977) for criminal investigations into tax-related offences. The remaining participants in the sample did not know the procedure for obtaining a search warrant as well as how to safeguard the seized items. There was also confusion with regard to the disposal of seized items after a tax investigation has been finalised at court. None of the participants from the sample were able to identify and explain each of the different search methods. Twenty-two participants did not know the requirements for the admissibility of evidence obtained from a search and seizure.

Although all the participants indicated that they had received training in the search and seizure of documents, it was discovered that the sample was very inexperienced in search and seizure matters. The SARS Tax Academy Criminal Investigations Training Manual on entry search and seizure does provide guidelines to SARS criminal investigators on searches and seizures in terms of the tax legislation. However, a more comprehensive training intervention is required that combines both the theory and practical aspects of search and seizure, especially with regard to the Criminal Procedure Act (South Africa, 1977). In the next chapter the researcher discusses the findings presented in this chapter and the previous chapter in more detail and makes recommendations on the basis of these findings.

## **CHAPTER 4**

### **FINDINGS, RECOMMENDATIONS AND CONCLUSIONS**

#### **4.1 Introduction**

The aim of this research was to research how SARS investigators should execute search and seizure of documents as a method in the investigation of tax-related cases. To address this aim, two research questions were asked:

- What does forensic investigation entail?
- What procedure should SARS investigators follow to conduct a search and seizure in a tax-related criminal investigation?

The researcher used a qualitative research approach with an empirical design which involved personal experience, literature and individual interviews. The researcher gathered information from case law, legislation and international and national literature.

#### **4.2 Findings**

The findings related to the research questions are presented below.

##### **4.2.1 Research question one: What does forensic investigation entail?**

Through the literature and the discussion in paragraph 2.4 supra, it was established that forensic investigation involves the use of science, scientific methods and techniques in the search for the truth where a crime has been committed or a legal dispute has arisen resulting in a criminal or civil trial or departmental enquiry.

It is evident that the majority of the participants were not aware of the full magnitude of what forensic investigation entails. Given that the work performed by SARS criminal investigators involves financial transactions, it is inconceivable that only one participant knew that forensic investigation utilises the sciences during the investigation process. There is a likelihood that a limited or too narrow understanding of forensic investigation may be impacting on the effectiveness of the investigators.

#### **4.2.2 Research question two: What procedure should the South African Revenue Services investigators follow to conduct a search and seizure in a tax-related criminal investigation?**

In answering the research question “What procedure should SARS investigators follow to conduct a search and seizure in a tax-related criminal investigation?” the researcher found that the following procedure which has been discussed in paragraph 3.8 – 3.13 must be adhered to by SARS criminal investigators when obtaining a search warrant in a tax-related offence:

- (i) The SARS criminal investigator must identify the tax offence that has been committed and register a criminal case with the SAPS.
- (ii) The requirement for a legal search warrant, the affidavit and the principles concerning the contents of a search warrant must be adhered to. To comply with this requirement, the SARS criminal investigator must provide the SAPS investigating officer with an affidavit to obtain a search warrant.
- (iii) The affidavit furnished by the SARS criminal investigator must contain sufficient information describing the alleged offence for a magistrate to be able to conclude that an offence in terms of the Acts that SARS administers has been committed. The affidavit must also include and specify that reasonable grounds exist to believe that certain items referred to in terms of section 20 of the Criminal Procedure Act (South Africa, 1977) are in the possession of a specific person at a specific premises, which may afford evidence that the offence specified has been committed.
- (iv) The affidavit must also include a request for a search warrant to be issued to the SAPS to search for and seize the items referred to in the affidavit. A further request must also be made to the magistrate that named SARS criminal investigators be allowed to be present at, partake in and provide logistical support to the SAPS during the search and seizure owing to their skills and knowledge of the case under investigation.
- (v) The search warrant must clearly state which official is entrusted with the execution of the warrant as well as what items or articles must be seized, including which person, premises, place or receptacle must be searched. It must also include an empowerment naming specific SARS officials that can be present and can partake in the search and seizure.

- (vi) The articles or items that may be seized are to be used as evidence in subsequent criminal proceedings. This implies that a chain of custody must be maintained and that the evidence must be correctly identified, marked, stored and preserved before it can be disposed of.
- (vii) The Criminal Procedure Act (South Africa, 1977) provides general powers for the State to search for and seize certain articles.
- (viii) The executing of the search involves a pre-raid briefing which deals with the briefing of personnel involved in the search; the offence/s; details of the search area and suspects; specified items to look for in accordance with the search warrant; chain of custody; marking, collection and storage of items; and the assigning of tasks.
- (ix) During the actual execution of the search warrant:
  - The search area must be cordoned off and the owner informed that a search is to be conducted. All other persons must be asked to leave the premises. The owner of the premises or his representative must be present when the search is conducted.
  - The search area must be sketched, photographed and videotaped if necessary.
  - All items that are being seized must be recorded and given an identification mark and then placed in a box for removal.
  - Once the search is completed, a receipt must be given to the owner of the items and all the boxes must be sealed in the presence of the owner before they can be removed to a storage area or facility.
  - The search must be systematic and due regard must be given to decency, which must be consistent with the right to dignity and to be treated in a humane manner.
- (x) The seized items must be stored at a police station and copies of documents must be made available to SARS investigators for conducting their investigations.

With the exception of five participants, the sample did not know how to conduct a search and seizure.

The finding is that 22 participants did not know how to conduct a search and seizure. This can be attributed to inexperience and the fact that these participants were not exposed to searches and seizures, as the five participants that had an understanding of search and seizure

were involved in the investigation of a VAT refund fraud scheme with the SAPS at the time. It is further found that the SARS Forensic Investigation Training Manual (2002:43) does not deal adequately with the conducting of a search and seizure. Furthermore, the same manual does not deal with search and seizure in terms of the Criminal Procedure Act (South Africa, 1977).

### **4.3 Secondary findings**

Secondary findings are findings that are not directly related to the research questions but were identified by the researcher as being important to this research. These included findings in respect of forensic and criminal investigations, evidence, empowering legislation, searches and seizures, search warrants and documents.

#### **4.3.1 The mandate to investigate**

The researcher, from the discussion in paragraph 2.2, found that:

- The OPA between the SAPS and SARS dated 23 October 1998, which is attached as Annexure A, provides the only authorisation for SARS criminal investigators to conduct criminal investigations into tax offences (Seaman, 2011). Only five of the participants were aware of this.
- The one participant that refrained from answering Question 2 of Section A of the interview schedule had just one year of service in the SARS Criminal Investigations Unit and only had audit experience. It is suspected that this could be the reason that he refrained from answering.
- Twenty-two participants did not know that the mandate to investigate emanates from the OPA between SARS and the SAPS. Twenty-one of these participants believed that the tax legislation authorises them to conduct criminal investigations into tax-related offences. This is an important issue and it is inconceivable that such a large portion of the sample did not know what their mandate to investigate is even though they all agreed that they do have a mandate to investigate.

#### **4.3.2 Criminal investigations**

According to the literature reviewed and the discussion in paragraph 2.3, criminal investigations seek to establish the truth and in doing so to follow a systematic process of obtaining evidence to identify the perpetrator and bring the case before the courts. The

finding is that the sample has a narrower understanding of what criminal investigation entails than that expressed in the literature consulted.

#### **4.3.3 The difference between criminal and forensic investigation**

The researcher, from the discussion in paragraph 2.5, found that the use of science in both these types of investigations was a pivotal issue with regard to their differences. The finding of this research is that there is no real difference between a forensic and criminal investigation.

#### **4.3.4 The purpose of investigations**

According to the literature reviewed and the discussion in paragraph 2.6, the purpose of an investigation includes the following:

- Searching for the truth;
- Solving the crime;
- Producing evidence to allow the court to reach a verdict;
- Convicting the accused; and
- Preventing crime.

The sample, in response to the question regarding the purpose of investigation, answered as follows:

- Twenty-six participants stated that it was to find the accused guilty.
- One participant answered that it was to seek the truth.

The sample did not include in their answers to the question the reasons provided in the literature, and it is evident that they had a narrow understanding of the purpose of investigations. If investigators are not clear on the purpose of doing something then they will have no common focus or direction when conducting investigations.

#### **4.3.5 The objectives of investigations**

According to the literature reviewed and the discussion in paragraph 2.7, the following are regarded as objectives of both criminal and forensic investigations:

- Determine whether a crime has been committed;
- Legally obtain information and evidence;

- Identify the responsible person;
- Arrest the suspect;
- Recover stolen property; and
- Present the best possible case to the prosecutor.

All the participants listed the above objectives, except for determining whether an offence was committed and presenting the best possible case to the prosecutor.

The finding is that the sample has a narrow understanding of the objectives of an investigation.

#### **4.3.6 Evidence**

The overarching purpose of evidence according to the literature and the discussion in paragraph 2.8 is to enable a court to make a decision with regard to factual disputes and to determine whether an accused person is guilty or not.

##### **4.3.6.1 What is evidence?**

Evidence, according to Brown (2001:85), can be defined as “any species of proof, or probative matter, legally presented at the trial of an issue, by the act of parties and through the medium of witnesses, records documents, exhibits, concrete objects, etc., for the purpose of inducing in the minds of the court or jury as to their contention”. All the participants were able to explain what evidence is according to the discussion in paragraph 2.8.1.

##### **4.3.6.2 What are the different types of evidence?**

The literature lists three broad categories of evidence: testimonial, physical and documentary evidence. All the participants correctly identified the different types of evidence, which was in line with the information obtained from the literature and the discussion in paragraph 2.8.2.

##### **4.3.6.3 What is a “chain of evidence”?**

The term “chain of evidence” which has been discussed in paragraph 2.8.3, is also referred to as “the chain of custody”. Maintaining a chain of evidence means that the evidence that is collected at the scene of the crime is the very same evidence that is presented in court and



that any changes to the evidence can be explained. It also implies that each time the evidence changes hands, it is recorded and that there are no gaps that a defence attorney can exploit.

Although the participants gave different answers to the question: “What is ‘chain of evidence’?” their answers all amounted to the same thing. This is a clear indication that the participants understand what a chain of evidence is.

#### **4.3.6.4 Why is it necessary to maintain a “chain of evidence”?**

In response to the question: “Why is it necessary to maintain a chain of evidence?”, all the participants correctly answered that the evidence must be the same as that which was found at the scene of crime and that the evidence should not have been tampered with or contaminated in any way. This was in line with the literature and the discussion in paragraph 2.8.3.

#### **4.3.6.5 How does one maintain a “chain of evidence”?**

In response to the question regarding how one maintains a chain of evidence, the participants explained that as few people as possible must handle the evidence and that each time the evidence leaves the control of any one person, it must be documented. The investigator must be able to explain any changes to the evidence. The participants also stated that there must be a statement for the custody of the evidence each time it moves from one person to another, with all the details of the person from whom it was received and of the person to whom it was handed. The statement of custody must include the dates and times of the handing over as well as the reasons that it was given to or handed over to another person. The participants’ explanations are also in line with the literature and the discussion in paragraph 2.8.3.

The finding therefore is that all the participants know:

- What evidence is;
- What the different types of evidence are;
- What a chain of evidence is;
- Why it is necessary to maintain a chain of evidence; and
- How to maintain a chain of evidence.

#### **4.3.7 Search**

According to all the participants, a search is a physical examination of a premises or a person for any item, including documents that would afford evidence that a crime was committed. This was in line with the literature consulted and the discussion in paragraph 3.5.1.

#### **4.3.8 Seizure**

According to the literature, the discussion in paragraph 3.5.1 and all the participants, a seizure would involve the detention of any article, including documents, that was the subject of a search for analysis, audit and criminal prosecutions.

#### **4.3.9 Search warrants**

According to the literature and the discussion in paragraph 3.5.2, a search warrant is a document issued by a judicial officer directing a specific police investigator named in the warrant to search the person, premises or receptacle specified in the warrant and to seize the specified item detailed in the search warrant, if found.

All the participants knew that a search warrant is a document issued by a magistrate that allows specific persons to enter specific places identified on the warrant and to seize items specifically mentioned in the warrant for the purpose of criminal investigations or criminal proceedings. This explanation is in line with the literature.

#### **4.3.10 Empowering legislation authorising search and seizure by SARS criminal investigators**

According to the literature and the discussion in paragraphs 3.2, 3.3 and 3.4, it was found that the majority of the sample did not know the legislation that authorises them to conduct a search and seizure in a tax-related offence. This could be the reason that the participants' practical knowledge of search and seizure is limited, in spite of the fact that they have received training on this topic! However, this research also demonstrates that if one is exposed to practical, real life searches and seizures as happened to the five participants that worked closely with the SAPS, then one's knowledge and skills in this area can increase or improve.

#### **4.3.11 The legal requirements for a search warrant**

The search warrant as discussed in paragraph 3.6 must contain certain information and the principles laid down by the South African courts must be complied with as follows:

- The details of the offence for which the warrant was issued and the name of the alleged offender are specified.
- Specific SARS personnel are identified and named as empowered to assist specific SAPS officials, who are also identified and named.
- The warrant must state what the SAPS officer entrusted with its execution must do; namely, what person, premises, place, vehicle, or receptacle he must search and what property or items, if found, must be seized.
- The items to be seized need not be described in great detail; however, the description of the items should not be too wide or too general in nature either. The person executing the warrant must be able with reasonable certainty to determine what has to be seized.
- The authority to seize documents is adequate authority to seize books.
- An article or item not specified in the warrant but which is relevant to the investigation should only be seized if circumstances justify a search and seizure without a search warrant. Section 22 of the Criminal Procedure Act (South Africa, 1977) details these circumstances.
- The execution of a search warrant by day is compulsory unless the magistrate issuing it authorises its execution at night.

It was found that only five of the 27 participants knew the requirements for a valid search warrant. The research found that the majority of the sample did not know what the legal requirements for a valid search warrant are.

#### **4.3.12 The procedure to obtain a search warrant in a tax-related offence**

In view of the legislation pertaining to search warrants and the discussion in paragraph 3.8, a SARS criminal investigator would not be able to obtain a search warrant in terms of the Criminal Procedure Act (South Africa, 1977), since the SARS criminal investigator is not a police officer. The SARS criminal investigator would have to liaise with and arrange with the SAPS investigating officer to obtain such a warrant. The following procedure must be followed:

- A criminal case of tax evasion must be registered with the SAPS and the necessary affidavits must be submitted to support the allegations.
- The SAPS investigating officer must be requested to obtain a search warrant from the magistrate's court that has jurisdiction.
- The SARS criminal investigator can assist the SAPS investigating officer in obtaining the search warrant by providing a statement under oath to the SAPS specifying the offence, with the details of the accused, including the addresses, and describing the items that should be searched for and seized as well as their relevance to the offence under investigation.
- The SAPS investigating officer must be requested to include the names of specific SARS criminal investigators in the application for the search warrant, requesting them to be present and partake in the search to identify articles specified in the warrant.

The five participants that were able to specify the procedure for obtaining a search warrant in terms of the Criminal Procedure Act (South Africa, 1977) are the same participants that were involved in a joint investigation with the SAPS into a VAT fraud refund scheme, where search warrants were obtained during their investigation.

The finding is therefore that the majority of the sample did not know the procedure for obtaining a search warrant for a tax-related offence.

#### **4.3.13 The admissibility of evidence obtained from a search and seizure in a tax-related offence**

According to the literature reviewed and the discussion in paragraph 3.7, evidence obtained as a result of a search warrant in a tax-related offence would only be admissible if:

- The evidence was obtained constitutionally;
- A search warrant was issued by a magistrate in terms of section 21 of the Criminal Procedure Act (South Africa, 1977); and
- The evidence followed legal or scientific requirements for its collection and preservation.

The finding is that the majority of the sample was not aware of the admissibility of evidence as a result of a search and seizure in a tax-related offence mainly because these investigators did not know the correct legislation that authorises search and seizure in a tax-related offence.

#### **4.3.14 Search and seizure**

“Search and seizure” refers to the effective and lawful search of the crime scene and the subsequent seizure of articles that can afford evidence that a crime was committed.

##### **4.3.14.1 Planning for the search**

Planning takes into account the following, according to the literature and the discussion in paragraph 3.9:

- Identification of the applicable tax offence;
- Application for the search warrant;
- Identification of the premises to be searched and details of the suspects;
- Recording of details of the items to be searched for and seized; and
- Recording of details of where these items can be found.

Only five of the participants were able to explain adequately how planning before a search and seizure should be carried out in a way that was in line with the literature.

The finding was that the majority of the participants, 22 out of the 27, did not know how to plan for a search and seizure. This can be attributed to their inexperience as well as not being exposed to the same type of investigations as the other five participants were involved in.

##### **4.3.14.2 Pre-raid briefing**

In addition to the guidelines given by Van Rooyen (2007:86) as well as the discussion in paragraph 3.12, five of the participants included the following guidelines for the content of the pre-raid briefing:

- Reasons for the search;
- Layout of the premises;
- Search methods and patterns;
- Specified items according to the search warrant;
- Where these items might be expected to be found on the premises;

- The role, responsibilities and functions of each of the personnel; and
- An appointed person to handle all queries.

The remaining 22 participants did not know what should be discussed at a pre-raid briefing. The finding here was that a large portion of the sample did not know what should be discussed at a pre-raid briefing.

#### **4.3.14.3 Equipment**

In response to the question about what equipment one takes to a search and seizure, both the literature and the participants provided a list of equipment that would be essential during a search and seizure which was discussed in paragraph 3.11. These items were torches; writing equipment, including permanent markers; magnifying glasses; hand mirrors; gloves; tweezers; tools; packaging material; boxes; seals; numbering stamps; vehicles; and communication items such as radios and cellphones, amongst others.

The finding here is that all the participants knew what equipment to take along to a search and seizure.

#### **4.3.14.4 Personnel**

According to the literature and the discussion in paragraph 3.10, there are no hard and fast rules governing the number of personnel that must be present during a search and seizure. It is stressed that there should be sufficient personnel present to search the area effectively and efficiently. However, the courts have held that the personnel partaking in the search must be restricted to those specified in the warrant, which fact only five of the participants were aware of.

The finding is that all the participants knew that the number of personnel required in conducting a search and seizure is dependent on a number of factors, including the size of the premises, the number of premises to be searched as well as the items that must be seized. This is in line with the requirements specified in the literature. The fact that a large portion of the sample was unaware that only personnel specified by name in the search warrant can partake in the search and seizure is a concern.

#### **4.3.14.5 Conducting the search and seizure**

According to the literature and the discussion in paragraph 3.13:

- The search area must be cordoned off and the owner informed that a search is to be conducted. All other persons must be asked to leave the premises. The owner of the premises or his representative must be present when the search is conducted;
- The search must be systematic and due regard must be given to decency, which must be consistent with the right to dignity and to be treated in a humane manner;
- The search area must be sketched, photographed and videotaped if necessary;
- All items that are being seized must be recorded and given an identification mark and then placed in a box for removal;
- Once the search is completed, a receipt must be given to the owner of the items and all the boxes must be sealed in the presence of the owner before they can be removed to a storage area or facility;
- The seized items must be stored at a police station and copies of documents must be made available to SARS investigators for conducting their investigations.

Only five members of the sample knew how to conduct a search and seizure. These five participants were those involved in the VAT refund fraud investigation with the SAPS and had partaken in searches and seizures during the investigation. Their knowledge of and exposure to search and seizure could have provided them with insight into how searches and seizures should be executed.

The finding is that a large portion of the sample did not know how to conduct a search and seizure. This can be attributed to their inexperience as well as not being exposed to the same type of investigations that the other five participants were involved in.

#### **4.3.14.6 Search methods**

There are five search methods, according to the literature and the discussion in paragraph 3.13.2:

- Strip method;
- Grid method;
- Zone method;
- Spiral method; and

- Wheel method.

The finding is that none of the participants were able to identify correctly all the search methods and neither were they able to explain how to conduct each of the different search methods.

#### **4.3.15 Documents**

Documents are broadly defined as any item, including a piece of wood, metal or a wall that contains any mark, symbol, sign or writing that can convey meaning or messages.

##### **4.3.15.1 What is a document?**

According to the literature and the discussion in paragraph 2.9, a document is any material on which any information can be written, printed or engraved. All the participants referred to a document as any paper that contains information. The participants provided a very narrow definition of a document.

The finding therefore is that the participants had a very narrow understanding of what a document is.

##### **4.3.15.2 How must seized documents be collected and handled?**

To the question regarding how documents must be collected and handled after they have been seized, the participants gave various answers that included handling them as little as possible, refraining from damaging or making marks on them as well as placing documents in an envelope for safe keeping.

The finding here is that all the participants' answers were in line with the literature and the discussion in paragraph 3.13.3. This shows another more positive side to the efficacy of the training.

##### **4.3.15.3 How must seized documents be recorded?**

According to the literature and the discussion in paragraph 3.13.3.2, the following must be recorded in the investigator's notes in respect of any item seized:

- By whom it was found;
- The description of the item;



- The date and the time it was found;
- Where it was found; and
- Who took custody of it.

All the participants were able to specify correctly how seized documents must be recorded in line with the literature.

#### **4.3.15.4 How are documents marked after they have been seized?**

According to the literature and the discussion in paragraph 3.13.3.3, the participants gave different answers to this question. Even though the participants were correct and knew how to mark documents, it was found that there was no set procedure or uniformity in the literature on how the marking should be made (SARS Tax Academy, 2002:61). No mention of what type of distinctive mark must be used is given in the SARS Training Academy manuals. Investigators are therefore left to use their own discretion as is shown by the different answers given by the participants. In the absence of proper guidelines from the SARS Training Academy, the researcher suggests the following procedure, which can be incorporated into the SARS Tax Academy Forensic Training Manual.

The researcher from his experience provides the following guidelines

- Seized documents should be placed in an envelope.
- The initials of the person finding the document and the sequential number should be endorsed on the envelope, such as LM 1, LM 2 and so on.
- The details of the person finding the document as well as the date and time and the place where the document was found must also be endorsed on the top of the envelope.
- The person handing over the seized document inside the envelope as well as the person receiving the document and envelope must each sign the top of the envelope, thus ensuring a proper chain of evidence.
- Under no circumstances may any marks be made on original seized documents.

The finding on this is that even though the participants knew how to mark documents, there is a need for uniformity in this process in SARS.

#### **4.3.15.5 Where are documents stored after they have been seized?**

All seized items should be kept in a safe or a locked office at a police station according to the literature and the discussion in paragraph 3.13.3.4.

A search warrant for a tax offence issued in terms of the Criminal Procedure Act (South Africa, 1977) authorises a named police official to conduct the search and to seize the items specified on the warrant. This implies that the seized documents must be removed and stored at a police station by the named police official for further investigation.

The finding on this is that the majority of the sample did not know that seized documents must be stored at a police station. This could have implications during court proceedings when the defence counsel might challenge the correctness and validity of SARS actions.

#### **4.3.15.6 Disposal of seized documents**

According to the literature and the discussion in paragraph 3.14, when items are seized in terms of the Criminal Procedure Act (South Africa, 1977), sections 31, 32 and 34 of the said Act provide for the return of seized articles to the person from whom they were seized or to the lawful owner, and if such a person cannot be traced, or if no one is entitled to them, then they must be forfeited to the State.

The sample was divided as to how the seized articles should be disposed of after the criminal case has been finalised at court. Fourteen participants stated that they can be returned to the owner or accused whilst 11 participants stated that they cannot be returned. One participant refrained from answering this question. This can be attributed to their not knowing how seized articles must be dealt with after a criminal case has been finalised.

The finding is that 11 participants did not know that seized items can be returned to the lawful owner after the criminal case has been concluded. This can be attributed to their being unaware of the provisions of the Criminal Procedure Act (South Africa, 1977).

#### **4.4 Recommendations**

On the basis of the findings of the study, recommendations are made regarding training, improved communication to SARS criminal investigators and skills transfer.

#### **4.4.1 Recommendation 1: Training**

It is recommended that SARS criminal investigators be given training which must incorporate the following aspects which the researcher found to be lacking.

##### **4.4.1.1 Mandate to investigate**

The mandate to investigate is an important issue and it is imperative that the contents of the OPA between the SAPS and SARS of 23 October 1998 be brought to the attention of all criminal investigators in SARS as a matter of urgency. There should also be a communication sent to all SARS investigators to the effect that this OPA provides the only authorisation for SARS criminal investigators to conduct criminal investigations and not the legislation that SARS administers. Furthermore the identification card that SARS criminal investigators carry must also refer to the provisions of the OPA between SARS and the SAPS.

##### **4.4.1.2 The legal requirements and procedure to obtain a search warrant and admissibility of evidence**

This can be addressed through a training intervention using instructional DVDs and in-service training involving a practical application for a search warrant. The notes from the literature that were used in this research should be incorporated in the SARS Tax Academy Forensic Training Manual. The researcher has also drafted practical guidelines in Section 4.3.12 on the procedure to be followed in obtaining a search warrant, which would assist SARS criminal investigators.

##### **4.4.1.3 Definition, objectives and purpose of and differences between forensic and criminal investigations**

In respect of the findings dealing with the definition of forensic investigation, the difference between forensic and criminal investigations, and the purpose and objectives of investigations, it is recommended that the notes from the literature that were used in this research be incorporated in the training curriculum of the SARS Tax Academy Forensic Training Manual for training new learners. Investigators that have already undertaken the course must be sent the notes dealing with all the changes to the previous training material.

##### **4.4.1.4 Executing a search and seizure**

In respect of the findings dealing with the actual conducting of a search and seizure which showed an incomplete knowledge on the part of the sample, the following aspects must be

comprehensively dealt with during the training: planning, the pre-raid briefing, conducting the search and seizure, the different search methods, seizure as well as the collection, handling, and the standardised method of recording, removing, storing and disposal of seized documents.

In addition a training DVD can be used to teach SARS investigators the above steps. This DVD could be further complemented by practical training involving role play and simulations to acquaint investigators with the necessary skills. Where possible this should involve the inputs of both the SAPS and the NPA. This training intervention could go a long way in addressing important issues, informing investigators on the ground of the correct sections of the various Acts to use when conducting searches and seizures, the admissibility of evidence and other legal issues that must be taken into account, and in inculcating the appropriate skills in them. Furthermore it would also provide investigators with the necessary background, knowledge and skills for testifying in court as well as during cross-examination.

#### **4.4.1.5 External role-players**

It is recommended that the SAPS units that work closely with the SARS Criminal Investigations Unit in terms of the OPA between the SAPS and SARS also be invited to training sessions and also be requested to make inputs into the training presentation from an SAPS perspective so that both the SAPS and SARS have a better understanding of each other's role during searches and seizures.

#### **4.4.2 Recommendation 2: Improved communication**

SARS can improve its communications with its criminal investigators so that they have a better understanding of empowering legislations that govern searches and seizure as well as the restrictions that it imposes according to case law.

##### **4.4.2.1 Empowering legislation in respect of search and seizure in tax-related offences**

In respect of the findings dealing with the legislation that authorises search and seizure for a criminal investigation into a tax offence, it is imperative that an Internal SARS circular dealing with the appropriate legislation and procedure be distributed to all SARS Criminal Investigations Unit offices as a matter of urgency. The majority of the sample is labouring under the impression that the tax legislation allows criminal investigators to conduct searches and seizures in tax-related offences whereas the literature indicates otherwise.

#### **4.4.2.1 Restrictions imposed by a search warrant**

It is important to note that personnel taking part in the search and seizure are restricted to only those specified in the search warrant and that case law dictates that only items specified in the search warrant can be seized. Since the majority of the sample was unaware of these restrictions it is further recommended that this also forms part of the training given to investigators.

#### **4.4.3 Recommendation 3: Skills transfer**

Skills transfer refers to the different ways in which new or in experienced investigators can learn different aspects of investigations through either mentoring or job rotation.

##### **4.4.3.1 Mentoring**

Consideration should be given to mentoring investigators. This is where inexperienced investigators are assigned to work with investigators that are skilled and experienced in searches and seizure. If this is not possible, then investigators should be rotated during investigations so as to expose them to cases that involve searches and seizures as discussed below. This research has shown that investigators exposed to searches and seizures have a better knowledge of the procedures and the legislation pertaining to searches and seizures.

##### **4.4.3.2 Job rotation**

This research has also shown that where SARS criminal investigators are exposed to certain cases such as the joint investigation by the SAPS and SARS criminal investigators into a fraudulent VAT refund scheme, then these investigators appear to be more knowledgeable about searches and seizure than their counterparts who have not been exposed to such cases. It is recommended that, where possible, all SARS criminal investigators be given an equal opportunity to participate in similar types of investigations.

#### **4.5 Conclusion**

It is important that SARS criminal investigators enhance their investigative skills and utilise the most effective and efficient methods and techniques in the investigation of tax-related crimes. The aim of this research was to determine how SARS criminal investigators should conduct a search and seizure and to develop good practice so that the evidence obtained would stand the scrutiny of the courts.

It was found that investigators have a very poor understanding of their mandate to investigate. They also had a very narrow and limited understanding of forensic and criminal investigations as well as the objectives and purpose of an investigation. In addition there was confusion around specific legislation that authorises searches and seizures in a tax- related investigation. Investigators also had minimal knowledge of the legal requirements for obtaining a search warrant and the admissibility of evidence from such a search and seizure. It was found that investigators had minimal knowledge with regard to the procedure for obtaining, conducting and executing a search warrant. It was established that investigators had a poor knowledge of the different search methods. It was also found that there was no standard procedure for the marking of documents. Investigators also did not know how seized documents are disposed after a case has been finalised in court.

It must be noted that the SARS Criminal Investigations unit changed its focus about 10 years ago from investigating with the view to collecting outstanding taxes to prosecuting tax offenders criminally. This changed the manner in which SARS conducted search and seizure in terms of legislation and the requirements as prescribed by the courts in different decided cases.

The SARS Tax Academy Criminal Investigations Training Manual for entry, search and seize (2002:50-62) does not deal adequately with the issue of planning and executing a search warrant. In fact there is no reference to the legal requirements for a valid search warrant, the admissibility of evidence obtained from a search and seizure, searches in terms of the Criminal Procedure Act (South Africa, 1977), the disposal of seized items and the identification, seizure and storage of seized items.

In the course of the research, it was established that SARS criminal investigators cannot rely on the provisions of sections 4, 57D and 74D of the Customs and Excise Act (South Africa, 1964), the Value Added Tax Act (South Africa, 1991), and the Income Tax Act (South Africa, 1962), respectively, to conduct a search and seizure for criminal investigation purposes. All search and seizure in tax-related offences must be carried out in terms of the Criminal Procedure Act (South Africa, 1977). Using the data obtained from the interviews and literature study, guidelines and procedures were drafted by the researcher in sections 4.2.2, 4.3.12 and 4.3.14 to assist SARS criminal investigators when applying for a search warrant.

This research has shown that SARS criminal investigators are unaware that the tax legislation and case law prohibit them from obtaining a search warrant in terms of the tax legislation for criminal investigation purposes. In order for these investigators to conduct searches and seizures effectively they need to be trained in the aspects identified in this research.

Search and seizure is a powerful weapon in an investigator's arsenal. To be effective and successful, an investigator needs to ensure that he is abreast of legislation, case law and new techniques in the field of search and seizure. He can only accomplish this through continued training in this field that will enable him to stay ahead of the criminals.

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2. Annexure B: Request for Permission from Participants
3. Annexure C: Request for Permission from SARS Head Office
4. Annexure D: UNISA Research Ethics Policy