

applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect.

Sections 74A and 74B results in a decision to investigate that includes a determination of culpability that could adversely affect the rights of the taxpayer, in a manner that has a direct and external legal effect, in that revised assessments may likely ensue, triggering the applicability of PAJA.

In conclusion, the analysis above shows that the exercise by SARS of its public powers in terms of ss 74A and 74B is part of a multi-staged investigative process, where a determination of culpability that could adversely affect the rights of the taxpayer, in a manner that has a direct and external legal effect, may be inevitable through the issuing of revised assessments at the end of the process. Therefore, SARS must ensure that every step in its decision-making process is not unlawful, unreasonable or procedurally unfair, and that it complies with all its constitutional obligations in terms of ss 41(1), 195(1) and 237 of the Constitution. The fact that it is multi-staged does not justify a deviation by SARS from these constitutional obligations.

Where SARS fails to comply with these constitutional obligations, the courts through s 172(1) of the Constitution will come to the aid of aggrieved taxpayers on the basis that non-compliance by SARS will result in an unconstitutional and ‘invalid’ decision – entitling taxpayers to invoke the grounds of review in s 6(2) of PAJA, or by virtue of the principle of legality.

3.8 ‘JUST CAUSE’ DEFENCE

The provisions of s 75(1)(b) of the Income Tax Act provide:

75. **Penalty on default.**—(1) Any person who—
- (a) fails or neglects to furnish, file or submit any return or document as and when required by or under this Act; or

(aA) any person who fails to register as a taxpayer as contemplated in s 67;

(b) without *just cause shown* by him, *refuses* or neglects to—

(i) *furnish, produce or make available any information, documents or things;*

(ii) reply to or answer truly and fully, any questions put to him; or

(iii) attend and give evidence,

as and when required in terms of this Act;

...

(3) Any person who has been convicted under sub-section (1) of failing to furnish any return, information or reply, shall, if he fails within any period deemed by the Commissioner to be reasonable and of which notice has been given to him by the Commissioner, to furnish the return, information or reply in respect of which the offence was committed, be guilty of an offence and liable on conviction to a fine of R50 for each day during which such default continues or to imprisonment without the option of a fine for a period not exceeding 12 months. (Emphasis supplied)

Section 75(1)(b) provides the first line of defence that a taxpayer has against an attack by SARS when refusing to comply with a request for information, documents or things. If a taxpayer can show ‘just cause’ for its non-compliance with a SARS request, SARS will be unsuccessfully in obtaining a conviction in terms of s 75(3).

What is ‘just cause’?

In *Chetty v Law Society of Transvaal*,¹⁹⁸ the court pointed out that ‘sufficient cause’ (or ‘good cause’) defies precise definition. This was also found to be the case in *Attorney-General, Tvl v Abdul Aziz Kader*.¹⁹⁹ ‘Sufficient cause...comprises of two essential elements, namely that (a) the party seeking relief must present a reasonable and acceptable explanation for his default and (b) that on the merits such party has a bona fide defence which prima facie, carries some prospect of success...’. In *Attorney-General, Tvl*

¹⁹⁸1985(2) SA 756 (AD).

¹⁹⁹1991(4) SA 727 (A).

*v Abdul Aziz Kader*²⁰⁰ it was held the 'just cause' is not confined to matters of privilege, compellability and admissibility – and has a wider connotation than an excuse sanctioned by rules of law – otherwise it would have been 'lawful cause'.

The direct, external legal effect on rights that would entitle a taxpayer not to participate in a ss 74A and 74B inquiry and audit by using the 'just cause' defence, would be, *inter alia*, that the fundamental rights to privacy and dignity in terms of ss 10 and 14 of the Constitution are intruded upon, outside justifiable grounds²⁰¹ (the case law on justification says that there is no 'privacy' when investigating business affairs - but on the premise of the encroachment being one that is *intra vires* i.e. within the scope of the empowering provision of section 74 and 'administration of this Act'). Here the deprivation theory is trumped by the determination theory, where the latter is broader in meaning. The taxpayer must merely show that determined rights that emerge going forward may be affected (such as the right to privacy and dignity,²⁰² lawful, reasonable and fair procedural administrative action,²⁰³ compliance by SARS with its constitutional obligations that must obey and fulfil). Various academic writers favour this approach.²⁰⁴

This would include non-compliance by SARS with the relevant jurisdictional facts. In *Farjas (Pty) Ltd another v Regional Land Claims Commissioners, KwaZulu-Natal*²⁰⁵ Dodson J held the approach of the courts to judicial review on the 'ground of illegality' has been based on what is known as the 'jurisdictional facts doctrine': 'A public official must first consider the law which empowers her and decide whether on the facts of the particular matter, she has the power or jurisdiction to deal with it ... These prerequisite legal facts and circumstances are usually described as "jurisdictional facts". According to this doctrine, if the public official errs in her decision about the presence or absence of the necessary jurisdictional facts, then a court will not hesitate to intervene and set aside her decision to review because she will have acted outside her powers'. An example of a

²⁰⁰ *Ibid.*

²⁰¹ *Bernstein and Others v Bester and Others* NNO 1996(2) SA 751 (CC) at para's [67], [73] and [79].

²⁰² Section 10 and 14 of the Bill of Rights, the Constitution.

²⁰³ See sections 3.3: *Lawfulness*, 3.4: *Reasonableness* and 3.5: *Procedural Fairness*, *supra*.

²⁰⁴ Hoexter C *The Future of Judicial Review in South African Administrative Law* (2000) 117 South African Law Journal 484 at page 516 states that the deprivation theory 'clearly creates an unacceptably high threshold for admission to the category of "administrative action" '. In addition, had the Act intended to be more restrictive, it could have inserted the words 'existing rights' instead of 'rights'.; Woolman et al *Constitutional Law of South Africa* 2nd ed Juta 2002 at page 63-21.

²⁰⁵ 1998(5) BCLR 579 (LCC) at [22], quoting *South African Defence and Aid Fund and another v Minister of Justice* 1967(1) SA 31(C) at pages 34H – 35F and Baxter L *Administrative law* (1984) Juta at page 456; See section 3.3.2: *Jurisdictional facts supra*.

‘public official err(ing) in her decision about the presence or absence of the necessary jurisdictional facts’ would be the failure by SARS to give ‘adequate reasons’ in terms of s 5(1) and (2) of PAJA, without justification in terms of s 5(3) of PAJA. The absence of adequate reasons would confirm that the conduct is devoid of reasons, unconstitutional and ‘invalid’. Non-compliance with the jurisdictional facts would be a ‘ground of illegality’, and give a taxpayer ‘just cause’ not to respond to a ss 74A and 74B inquiry and audit.

‘Just cause’ used in the context of s 75(1)(b) contains the following key elements extracted from the case law set out above. The taxpayer:

- must have ‘a reasonable and acceptable explanation for his default’;
- must have some *prima facie* ‘prospect of success’ in respect of ‘the merits such party’ relies upon as ‘a *bona fide*’ defence;
- does not have to rely on an excuse sanctioned by rules of law, such as matters of privilege, compellability and admissibility.²⁰⁶

In applying these principles to a refusal by a taxpayer to submit to a decision by SARS in terms of ss 74A and 74B, the following examples are appropriate. The taxpayer:

- can explain that the conduct of SARS in making a decision in terms of ss 74A and 74B is unconstitutional and ‘invalid’ in terms of s 2 of the Constitution, in that SARS has exercised its powers, and has therefore exercised unconstitutional and ‘invalid’ conduct in one or more of the following ways:
 - SARS has transgressed ‘the rule of law’ in contravention of s 1(c) of the Constitution by failing generally to comply with its constitution obligations spelt out below – this includes the constitutional principle of legality;
 - SARS has failed to ‘respect and protect’ the dignity of the taxpayer, because the overhanded conduct by SARS in making demands without proper reasons impairs the self-esteem of the taxpayer, as the taxpayer

²⁰⁶ *Attorney-General, Tvl v Abdul Aziz Kader* 1991(4) SA 727 (A).

regards SARS' conduct offensive, in that SARS has failed to respect the taxpayer's right to privacy without proper justification;²⁰⁷

- SARS has acted *ultra vires* as demonstrated by not satisfying the jurisdictional facts of ss 74A and 74B, read with the constitutional obligations set out in ss 41(1), 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act;
- SARS has not complied with the taxpayer's right to 'just administrative action' in terms of s 33 of the Constitution, and as expanded in terms of PAJA, in that SARS has failed to comply with its obligations to give proper and adequate notice of its decision in terms of s 3(2) of PAJA, and 'adequate reasons' in terms of s 5(1) and (2) of PAJA (without proper justification in terms of s 5(3)) for its decision in terms of ss 74A and 74B, thereby transgressing one or more of the grounds of review in s 6(2) of PAJA;
- SARS has transgressed its constitutional obligation in terms of s 41(1) of the Constitution, and thereby the principle of legality by ignoring that provision – SARS is not entitled to 'assume any power or function except those conferred on them in terms of the Constitution', as set out in s 41(1). In terms of the principle of legality SARS cannot act *ultra vires* its empowering provision in ss 74A and 74B meaning compliance with the jurisdictional facts and all its constitutional obligations in ss 195(1) and 237 of the Constitution, read with s 4(2) of the SARS Act;
- SARS has transgressed its constitutional obligations in terms of s 195(1) of the Constitution, read with s 4(2) of the SARS Act, and thereby the principle of legality²⁰⁸ by ignoring those provisions – SARS is not entitled to conduct themselves contrary to:

²⁰⁷ Sections 10 and 14 of the Bill of Rights; See *Pretoria Portland Cement & Another v Competition Commission & Others* 2003(2) SA 385 (SCA) where a warrant to enter premises did not approve of film crew entering premises, was a grave violation of the right to privacy and the right to dignity. This is analogous to a concern on the part of the taxpayer, if SARS gives inadequate explanation, reasons and details for an inquiry and audit in terms of ss 74A and 74B, that SARS may enter the taxpayers premises, or share information, documents and things, with persons not properly authorised by the Commissioner and subject to the secrecy provisions (s 4) of the Income Tax Act; *Bernstein & Others v Bester NO & Others* 1996(2) SA 751 (CC) at para's [67], [73] and [79] identifies 'privacy' with the 'inner sanctum of a person', but that all privacy rights are limited 'to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience.'; *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001(1) SA 545 (CC) at para [18] where it was held that the right to privacy protects intimate space because such a space is a prerequisite for human dignity; *Probe Security CC v Security Offices' Board and Others* 98 JER 0849 (W).

²⁰⁸ Hoexter (2012) at pages 121-5.

- Promoting and maintaining ‘a high standard of ethics’;
- Promoting ‘efficient, economic and effective use of resources’;
- Services that are delivered ‘impartially, fairly, equitably and without bias’;
- ‘accountable’ Public Administration; and
- ‘timely, accessible and accurate information’ fostering ‘transparency’,

as set out in s 195(1)(a), (b), (d), (f) and (g). In terms of the principle of legality SARS cannot act *ultra vires* its empowering provision in ss 74A and 74B meaning compliance with the jurisdictional facts and all its constitutional obligations in ss 41(1) and 237 of the Constitution;

- SARS has transgressed s 237 of the Constitution, and thereby the principle of legality by ignoring the provisions that state ‘all constitutional obligations must be performed diligently and without delay’;
- SARS has transgressed its legitimate expectations created in accordance with the analysis in section 3.6: *Legitimate Expectations* in this thesis.

In conclusion, if a taxpayer can aver what is set out above, as substantiated with the relevant facts, ‘a reasonable and acceptable explanation for his default’ to the demands of SARS will be met; the taxpayer will be able to demonstrate a *prima facie* ‘prospect of success’ in respect of ‘the merits’ the taxpayer relies upon as ‘a bona fide’ defence; and the ‘just cause’ shown. It is not required for the taxpayer to rely on an excuse sanctioned by rules of law, such as matters of privilege, compellability and admissibility. As a result the taxpayer will successfully be entitled to raise the ‘just cause’ defence in terms of s 75(1)(b) to an attempt by SARS to enforce its demands through criminal sanction, and s 75 of the Income Tax Act.

The averments set out above will apply equally in any review application brought by taxpayers against the unconstitutional and ‘invalid’ conduct of SARS. What remains available to taxpayers is also the remedy of review by the courts, that is analysed in Chapter 5 below.