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South African Coal Ash

SARS Tax Exemption No: 930012713

SACAA GENERAL LEGAL ISSUES

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Dear all,

INTRODUCTION:

SACAA came across “legal” issues that might not be directly focussed on the work situation, but which could affect daily lives.

1. The New TV License Law:

The South African Broadcasting Corporation SOC Ltd Bill for comment has been published.

The Bill has kept the SABC's TV Licensing scheme rather than adopting a household levy, and it does not expand the requirement of a TV license beyond buying television sets.

The Bill outlines the penalties payable to those who evade paying their TV license fee and allows the SABC to appoint inspectors with powers to enter any property to execute their duties.

It may make regulations on the following, which could affect us;

- The television licence fee, payable for any television licence issued, including the manner of payment and the collection thereof, penalties, and ancillary costs.
- The period of validity of a television licence.
- The manner of determining fees of a television licence.
- The purpose for which and the place where you may use a television set.
- Different categories of television licenses which any user of a television set may be required to possess.
- The duty to keep, maintain and furnish record and information, including a duty to supply the SABC with such records and information as may be prescribed.
- Exemptions from the obligation to have a TV licence.
- The transferability of a TV Licence.

In addition, the Bill proposes that SABC should be allowed to appoint anyone as an authorized inspector.

Authorized inspectors may enter upon any land to do their jobs, so long as they do not try and gain entry into a home after dark without a warrant or the occupier's permission.



Anyone found guilty of not paying their dues can be liable for the following penalties:

- ❑ In addition to their regular TV licence fee, a penalty equal to double the amount of the applicable prescribed licence fee.
- ❑ If you can prove that you have used your television set for less than a year, the penalty is 10% of the TV licence fee for every month you did not pay.

A dealer who sells or alienates a television set to a person who doesn't have a TV licence and who is not exempted from having one is liable to pay a penalty of between R3,000 and R10 000 for each television set.

In addition to the penalties above, the Bill also proposes to make it a criminal offence to fail to pay your TV licence or sell a TV to someone without a TV licence.

2. Working from home – “The home office” and Tax



Listening to people, it seems there is and was a great expectation of all working from home will make some money. Maybe just some information to help us understand.

During a recent webinar, the SARS Commissioner, Edward Kieswetter, advised taxpayers to think carefully before claiming their home office expenses and cautioned against a 'catch me if you-can' attitude.

Since working from home has become far more prevalent, SARS anticipated an influx of these claims and confirmed that they will work hard to detect non-compliance, said Elanie Nunez, an attorney at specialist firm Tax Consulting SA.

"It is their intention to give the honest taxpayer a seamless and pleasant costly if they are noncompliant.experience, but for the dishonest or negligent taxpayer, it will be hard and even costly if they are non-compliant.

"They further recognize that, although there are honest taxpayers who are entitled to claim a home office expenses deduction, there are also individuals.

For this reason, taxpayers who claim the deduction, and especially those who claim it for the first time, will be subjected to an audit.

To date, SARS has received 10,000 claims from taxpayers for the deduction of home office expenses. Of these claims, 8,500 were selected and deferred for further verification or an audit and 70% thereof were denied due to non-compliance. This amounts to a disallowance rate of around 60% of all claims. Once flagged for an audit, 400 taxpayers revised their submissions and removed the claim for the deduction. Kieswetter confirmed that this prevented about R10 million in impermissible or unlawful refunds from being paid out,

Legal requirements

SAPS said that the legal requirements for claiming a home office expenses deduction have not changed. Salaried employees who worked from home can claim the deduction provided they meet all the requirements in the Income Tax Act.

"The home office must be occupied for purposes of a trade — which includes employment; it must be specifically equipped for purposes of the trade, and the home office must be used regularly and exclusively for business purposes," said Nunez.

"In addition, the employee must perform more than half of their employment duties from the home office during the year of assessment. The employee must also have incurred the actual expenses and not their employer." The key consideration for taxpayers is that they must be able to provide adequate supporting documentation to discharge their burden of proof, said Nunez.

SAPS provided some guidance for the supporting documentation that a taxpayer must submit and/or may be required to present upon request:

- ✔SARS A letter from their employer confirming that the employee was allowed to work away from the office;
- ✔SARS An adequate record of the dates that they worked from home as opposed to the dates worked from their employer's office;
- ✔SARS Invoices for actual expenses incurred;
- ✔SARS A floorplan or building plan of the premises to indicate the floor area of the home office;
- ✔SARS A proper and acceptable calculation of apportionment of expenses where necessary;
- ✔SARS Photographs of the home office may be requested; and
- ✔SARS If SAPS is not satisfied with the above, they may conduct a site visit to the employee's home office.

"Finally, the commissioner warned that taxpayers who make a dishonest claim or fraudulent declaration, must remember that in such instance there will be no prescription," said Nunez.

3. Roadblocks – searching vehicles and homes by SAPS:

We have seen serious destruction, violence and when we watched the various media platforms, one gets anxious to leave home.

Let's have a look at the law and searching vehicles and homes:

If you are stopped at a roadblock, may the police search your car? Are the police entitled to enter your home and search it without a warrant?

What the law allows:

In most circumstances, the police should have a warrant issued before searching your car or home.

However, under certain circumstances the Criminal Procedure Act, the Police Act and the Drugs and Drug Trafficking Act empower the police to search your car or home without first obtaining a warrant.



The police can search your home or car without your permission and without first getting a warrant if an officer has a "reasonable suspicion" that you:

- ⊗ have committed a crime; or
- ⊗ are in possession of material used, or to be used, in a crime.

A police officer can't simply search your home or car on a whim. He or she must have evidence to back up the reasonable suspicion.

Exceptions when police can proceed with searches:

A warrant is needed in most circumstances for the police to legally carry out a search of your car or home, but there are exceptions.

You give permission

If a police officer asks for your permission to search your car or home and you grant permission, it is a legal search.

Roadblocks

The Police Act allows the police to set up roadblocks with the permission of the National or Provincial Police Commissioner. The Act allows a police officer to search any car stopped at a roadblock.

An officer can seize any item that's reasonably believed to have been used in a crime or can be used as evidence in proving the commissioning of a crime.

Clearly, this is open to abuse. A police officer at a roadblock can search your car when he or she has no reason to believe you have committed, or are planning to commit, a crime.

Urgency



Police are legally allowed to search your home or car without your permission and without a warrant when the need to execute the search is so urgent that any delay caused by obtaining a warrant "would defeat the object of the search". This means the police can search your home or car to search and seize evidence they believe would be imminently moved or destroyed. There are restrictions on this power. The police officers involved must have reasonable grounds to believe a warrant would have been issued. If evidence is obtained when there was no real urgency or insufficient grounds for the search to take place, the

evidence can't be used in a trial against the accused.

2016 Constitutional Court ruling

Any unwarranted search of your home or car can be an invasion of privacy and an abuse of police power. In theory, The Constitution protects an individual's right to privacy. In 2016, a Constitutional Court ruling invalidated sections of the Drugs and Drug Trafficking Act that authorized warrantless searches. This came after a high-profile case involving the seizure of drugs worth R13 million from two properties leased by Grace Kunjana.

Kunjana was charged with possession of and dealing in drugs. While the criminal case was still pending, her legal team filed a Western Cape High Court application challenging the constitutionality of the sections of the Drugs Act that allowed warrantless searches. The High Court declared sections of the Drugs Act invalid and this was upheld by the Constitutional Court. It found that sections infringe on the right to privacy to a degree that cannot be justified and is unconstitutional. In the case of the Drugs Act going forward, this set a precedent for searches generally requiring warrants.

How to respond to a police search

Remember to always remain calm, polite and cooperative. Firstly, ask for identification so that you know you're dealing with a real police officer and ask to see a search warrant. Take notes of names, time and the location of the search.

If you're stopped at a roadblock, remember that your car can be searched. You can't refuse it. You can and must ask the police officer to show you ID and the written authorisation from the National or Provincial Police Commissioner for the setting up of the roadblock.

4. COVID-19 Vaccination – Sick Leave

With COVID-19 we have had many requests, stories and even misinformation on what is law and what is not.

To explain the whole situation could be a lengthy one, we will try and keep it short.

In this whole discussion one would have to look at the Basic Conditions of Employment Act 1997 (“BCEA”), on top of this, we would have to also look at the CCMA and the Labour Court, but we would not have space to do all of this.

Rather a summary:

If an employee asks to be given time off to go and have the vaccination done and it is refused, then what?



In short:

- 🧑 In light of the above, we are of the view that employees may be entitled to take paid sick leave in terms of the BCEA in order to be vaccinated against Covid-19.
- 🧑 In order to safeguard against the abuse of sick leave, an employer may be able request that employees produce proof of an appointment for vaccination.
- 🧑 Failure to provide proof of vaccination may form the basis of disciplinary action against an employee for dishonesty or abuse of sick leave.
- 🧑 The above notwithstanding, employers should exercise caution in a situation where an employee refuses to take sick leave and simply takes time off in order to be vaccinated. It is likely that an arbitrator or the courts would scrutinize the fairness of any disciplinary action, especially the appropriateness of the sanction, very carefully.
- 🧑 Employees could convincingly argue that being vaccinated is in accordance with government policy; is a reasonable step for them to take in order to protect their health; is also in the interests of the employer; and that the employer is required to take steps to accommodate the employee.
- 🧑 It is also important to note that an entitlement to paid time off in order to be vaccinated may also be derived from employer policies and/or practices, but this would depend on the formulation of the specific policy or the nature and extent of the practice.

In Conclusion:

It must be understood that all of the above discussions are views and not legal opinions and as facts change, the advice might change too.

Always consult with your legal people, lawyers, and others.

We trust the above assists.

Yours sincerely,



Nico Pienaar Administrator

