IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 63/2020

In the matter between:

PUBLIC PROTECTOR	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	First respondent
JACOB GEDLEYIHLEKISA ZUMA	Second respondent
MMUSI MAIMANE	Third respondent
ROYAL SECURITY CC	Fourth respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

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A. Introduction

1. Does it accord with the Constitution to contend (as she does) that the Public Protector is not subject to "any law" when "obtaining or subpoenaing information from SARS"?[1]

2. Clearly not, as this Court already confirmed.[2] The Constitution explicitly provides that Chapter 9 institutions (of which the Public Protector is one) are indeed subject to "the Constitution and the law".[3] This Court's consistent subsequent judgments reiterate that the Public Protector is indeed, like all other public officials, "required to act in accordance with the law".[4] And like all "other organs of state", the Public Protector is obliged to "compl[y] with the Constitution and other relevant laws in exercising public power."[5]

3. There is therefore no prospect of success, least of all in circumstances where material parts of the High Court's *ratio* are not even competently challenged. Particularly in such circumstances the Public Protector's claim to bypass the constitutional hierarchy of courts of appeal is not in the interests of justice.

4. The Constitution and the law are quite clear. Taxpayer information is protected by law giving effect to the constitutional right to privacy. The right to privacy is

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[1] Record vol 2 p 102 para 43.
[2] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 49.
[3] Section 181(2) of the Constitution.
[4] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 155; *Economic Freedom Fighters v Speaker, National Assembly supra* at para 49.
[5] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* 2020 ZACC 10 at para 105.

routinely protected in constitutional democracies by requiring either the waiver or permission by the right-bearer, or judicial permission, prior to infringing privacy.[6] South African courts have consistently confirmed this legal position in the context of tax records.[7] This is supported by this Court's caselaw.[8] The same principle applies also under (and is therefore buttressed by)[9] international law,[10] and also comparative law.[11] The Public Protector is not so bold as to contend that any of these precedents is incorrect, unconstitutional or liable to be overruled or even revisited.[12] Absent such suggestion – which in any event in the interests of justice would have militated yet further against a direct appeal to this Court (bypassing the Supreme Court of Appeal) – there is no arguable point of law warranting the Public Protector's purported approach to this Court.

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[6] See e.g. *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at para 29, which deals with the right to privacy as entrenched in the interim Constitution in circumstances where an impugned statutory provision allowed entry without warrant of any place, and then to inspect documents.

[7] We refer to the well-known caselaw governing taxpayer information below in addressing the Public Protector's purported counter-application.

[8] See e.g. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at paras 17, 40, 52 and 55. See, too, *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at paras 76 and 78, in which Langa CJ reiterated the importance of the right to privacy entrenched in section 14 of the Constitution. Hence "courts … jealously guard them by scrutinising search warrants 'with rigour and exactitude'." Whereas a "search and seizure operation will inevitably infringe a person's right to privacy", the legislation considered in *Thint* "provides considerable safeguards which ensure that the infringement goes no further than reasonably necessary in the circumstances." Of these "the requirement of judicial authorisation for search warrants" constituted a significant part of "a broader scheme which ensures that the right to privacy is protected", Langa CJ held. See further *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) at para 69.

[9] Section 233 of the Constitution.

[10] Valderrama *et al* (eds) "The Rule of law and the effective protection of taxpayers' rights in developing countries" *WU International Taxation Research Paper Series* No. 2017–10 (Wirtshafts Universität Wien, Vienna 2017) at 7 and 11; article 12 of the UN Declaration of Human Rights; article 17(1) of the International Covenant on Civil and Political Rights.

[11] See e.g. the Supreme Court of Canada's judgment in *Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt* [1993] 3 SCR 430, to which we revert below.

[12] Quite the contrary: she contends for the application of the doctrine of precedent (Record vol 3 p 218 para 75; Public Protector's written submissions at paras 57 and 146).

5. Unable to answer SARS' case in the court *a quo*, the Public Protector now obliquely adopts what can only be characterised as an untenable severance approach.[13] She contends – explicitly – for the negation of section 11(3) of the Public Protector Act ("the PPA")[14] in interpreting and applying her subpoena powers under section 7(5) of the PPA. This is not only incompetent in law.[15] It is also inconsistent with the facts.[16] The Public Protector explicitly and repeatedly threatened SARS with section 11(3) for purposes of coercing compliance with her subpoenas,[17] and even reiterated her threats in press statements.[18] This in the teeth of section 14 of the Constitution itself, to which the Tax Administration Act ("the TAA")[19] gives effect in protecting taxpayer information.

6. Its constitutional and actual factual demerits apart, the Public Protector's argument is also conceptually contrived. It effectively contends for the

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[13] Record vol 3 p 198 paras 11-13; Public Protector's written submissions para 19, contending that the "only question" is whether "the Public Protector's subpoena powers, defined [sic] in section 7(4) of the PP Act, extend to the taxpayer's information as defined in the TA Act"; Public Protector's written submissions para 47, contending that the High Court "erred in entertaining the irrelevant question pertaining to section 11(3) and 11(4) of the PP Act when the matter simply involves the scope and ambit of the specific powers contained in section 7(4) of the PP Act *vis-à-vis* the general prohibition contained in section 69(1) of the TA Act".

[14] Act 23 of 1994.

[15] *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) at para 57, holding that in interpreting legislation a court "must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant." Mokgoro J comprehensively cited authorities for this well-established principle, including *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436; *R v Bishop of Oxford* (1879) 4 QBD 245 at 261; and *Secretary for Inland Revenue v Somers Vine* 1968 (2) SA 138 (A) at 156, which acknowledges the principle of non-redundancy as the "cardinal rule" of interpretation.

[16] Record vol 4 p 301 para 58.

[17] Record vol 4 p 289 para 28.

[18] Record vol 4 pp 289-290 para 29.

[19] Act 28 of 2011.

severance of penal sanctions from the subpoena in issue.[20] This is flawed on first principle. A subpoena is intrinsically a coercive directive. It puts a recipient to compliance with a command on pain of penalty for non-compliance.[21] Hence its name: "subpoena", *sub* (under) *poena* (penalty).[22] Not *sans poena* (without penalty).

7. The Public Protector is now driven to the latter contradiction in terms, which negates the legal nature of a subpoena. This argument is advanced before this Court for the first time, and it is inconsistent with the Public Protector's heads of argument filed in the High Court.[23]

8. The *sans poena* construct is also untenable and self-destructive in its own terms. This is, firstly, for theorising erroneously regarding "*mens rea*" (the mental element required for criminal liability).[24] The correct position is that the issue is one of legality (not fault), both under criminal law and the Constitution. Under the Constitution SARS is only empowered to do what its empowering legislation

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[20] Public Protector's written submissions para 49.

[21] This is the "consequences of non-compliance" with a subpoena, which the Public Protector's written submissions correctly concede are "well-known" (para 49).

[22] Garner (ed) *Black's Law Dictionary* 11th ed (Thomson Reuters, St Paul MN 2019) s.v. "subpoena".

[23] Record vol 4 pp 301-302 para 58.

[24] Public Protector's written submissions para 50, which expounds the proposition that it is "theoretically perfectly possible" for the Commissioner of SARS to breach his constitutional duty but nonetheless escape section 11(3) of the PPA on account of "lack[ing] the requisite *mens rea*". Section 11(3) does not require any *mens rea*. It imposes strict criminal liability. It reads

> "Any person who, without just cause, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence."

permits.[25] Section 69(1) of the TAA precludes what the Public Protector purported to compel. In doing so she specifically invoked section 7(4) of the PPA,[26] not *any* constitutional authority or provision.[27] Secondly, if it is correct (as the Public Protector is driven to argue) that the section 11 issue and criminal liability are beyond this Court's jurisdiction,[28] then her application for leave to appeal must of course fail on this basis too.

9. Self-evidently the Public Protector's newfound *sans poena* construct is advanced to avoid an equally untenable legal terminus. Unless section 11(3) of the PPA is rendered a dead letter (on the Public Protector's construct), SARS officials are fated to commit a criminal offence. Whether a SARS official accedes to the Public Protector's demand for taxpayer information, or instead respects the constitutionally and statutory protected status of taxpayer information, the official would incur criminal consequences. This is because under section 69(1) read with section 236 of the TAA the disclosure of taxpayer information is a criminal offense. Simultaneously, under section 11(3) of the PPA non-compliance with a subpoena issued under section 7(4) of the PPA is a criminal offense. Both scenarios expose SARS officials to imprisonment.[29]

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[25] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56.
[26] Record vol 1 p 75 line 11, citing specifically the empowering provision invoked: "section 7(4)(a) of the Public Protector Act 23 of 1994". Similarly, the Public Protector's written submissions at para 20 acknowledges that "the subpoena [was] issued by the applicant in terms of section 7(4) of the PP Act".
[27] The rest of the subpoena cites sections 7(8), 11(3) and 11(4) of the PPA. There is not a single reference to the Constitution anywhere to be found in the subpoena. The constitutional consequences of this is as explained by this Court in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) and *Liebenberg NO v Bergrivier Municipality* 2013 (5) SA 246 (CC) at paras 93-95.
[28] Public Protector's written submissions paras 51-52.
[29] Section 236 of the TAA provides

10. Thus not only a taxpayer's constitutional right to privacy is infringed by the Public Protector's approach,[30] but also SARS officials' constitutionally-entrenched right to liberty.[31] It is only the latter form of unconstitutionality (triggered by the approach for which the Public Protector contends) which is purportedly palliated by the Public Protector's *sans poena* proposition. Protecting privacy is a constitutional obligation which her conduct and legal argument disrespect. This despite her own constitutional obligations under *inter alia* section 7(2) and 8(1) of the Constitution.[32]

11. Unfortunately, the Public Protector has seen fit to pillory variously SARS or its counsel,[33] and now the High Court.[34] This by attempting to attribute to either or all of them some nostalgia for the Westminster system of parliamentary supremacy.[35] This rhetoric is unworthy. It disregards the status attributed by this Court's caselaw and the Constitution to Parliament.[36] This Court itself recognised Parliament's important responsibilities and crucial constitutional role in the particular context of the Public Protector's powers.[37] SARS has at all times

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"A person who contravenes the provisions of section 67(2), (3) or (4), 68(2), 69(1) or (6) or 70(5) is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding two years."

[30] Section 14 of the Constitution.
[31] Section 12(1)(a) of the Constitution.
[32] These provisions require organs of State to respect, protect, promote and fulfil the rights contained in the Bill of Rights; and stipulate that the Bill of Rights applies to all law and binds all organs of State.
[33] Public Protector's written submissions para 33.
[34] Public Protector's written submissions para 28; Record vol 3 p 207 para 35.
[35] Public Protector's written submissions para 28.
[36] *Gaertner supra* at para 71; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 54; and *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 73.
[37] *EFF v Speaker, National Assembly supra* at para 90.

demonstrated its adherence to and reliance on the supremacy of the Constitution and the rule of law.[38]

12. In specifically citing its obligations in this regard, SARS extensively engaged with the Public Protector prior to the High Court litigation.[39] It did so in an attempt to assist her functions through the extant legislative means.[40] The Public Protector was advised to pursue the taxpayer information from the taxpayers concerned, or to approach the High Court for such relief.[41]

13. Both forms of recourse are available to the Public Protector under the legal regime, which has – as the founding affidavit filed in this Court reiterates – *never* been contended to be unconstitutional.[42] They must, moreover, be interpreted to give the fullest possible effect to the entrenched right to privacy and freedom from incarceration without just cause.[43] Thus the "battle"[44] for which the Public Protector repeatedly[45] contends (between sections 181 and 182 of the Constitution and the TAA's protection of privacy) is self-defeating.[46] None of

[38] This is reflected *inter alia* in the contemporaneous correspondence SARS addressed to the Public Protector (Record vol 1 p 57 paras 2-3).
[39] Record vol 4 p 290 para 30; Record vol 4 p 291 para 32.
[40] Which is what section 181(3) of the Constitution contemplates.
[41] Record vol 2 p 127 para 32.3, which advice the Public Protector now accepts in this respect (Record vol 3 p 194 para 10.6).
[42] Record vol 3 p 209.
[43] *Tshwane City v Link Africa* 2015 (6) SA 440 (CC) at para 153.
[44] Record vol 3 p 209 para 43.
[45] Public Protector's written submissions para 28.
[46] It is also self-contradictory. The Public Protector's written submissions contend in para 47 that "the matter simply involves the scope and ambit of the specific powers contained in section 7(4) of the PP Act *vis-à-vis* the general prohibition contained in section 69(1) of the TA Act". And it resorts to the "statutory framework" itself (not any provision of the Constitution) for the "limitations or safeguards" required to protect the constitutional right to privacy (para 70).

the provisions of the latter Act is under constitutional attack. Its taxpayer-privacy provisions are promoted by Chapter 2 of the Constitution itself, and dovetail with section 11(3) of the PPA. Far from detracting from the PPA, the TAA provides a twofold alternative recourse regime to the Public Protector to obtain taxpayer information.

14. Despite SARS assisting her in identifying and pursuing the available legal course of action, the Public Protector persisted in eschewing these available legal routes. She resorted to a singular extra-judicial device: subpoenaing the Commissioner of SARS. Not once, but twice. In each instance she threatened penal consequences, including imprisonment and penalties, in the event of non-compliance. This despite SARS explaining the legal constraints, and despite a legal opinion jointly obtained by SARS and the Public Protector confirming the legal position. Yet the Public Protector vilified SARS in media statements and continues to do so even before this Court,[47] in conflict with section 41 of the Constitution.[48]

15. Before this Court the Public Protector now finally concedes that the TAA indeed "does not undermine the effectiveness" of the Public Protector, because she "may access [taxpayer] information by making an application to the High Court in terms of section 69(2)(c) of [the TAA] or obtaining consent from the taxpayer".[49]

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[47] Record vol 1 p 66 para 10.4.
[48] It provides that organs of State must *inter alia* respect each other's functions and powers, and not interfere with their effective exercise.
[49] Record vol 2 p 127 para 32.3.

This is the conclusion in the legal opinion procured by the Public Protector and SARS jointly, long before the subpoena and High Court litigation spawning this application. The Public Protector confirmed in her affidavit filed in this Court that she does not contest this conclusion.[50] Her heads of argument reiterate this concession emphatically.[51]

16. There is therefore no purposive argument in favour of the absurd, text-defiant, context-disjointed, and privacy-impinging construction for which the Public Protector contends. Her construction only serves to undermine SARS' important functions, which – it is common cause – depend heavily on the confidentiality of taxpayer information.[52] While the Public Protector has at least two available statutory alternatives to subpoenaing taxpayer information from SARS, SARS remains reliant on taxpayers' disclosure of private information. Taxpayers disclose this information to SARS on the very basis that the law recognises the privacy interest in this information. This longstanding legal policy has been specifically enacted by the democratic Parliament. It had been respected by courts for decades. And it enjoys constitutional protection under section 14 of the Constitution.

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[50] Record vol 3 p 194 para 10.6.

[51] Public Protector's written submissions para 86, which records that "the Public Protector had no qualms with the other three conclusions contained in paragraph 32 of the Maenetje SC opinion". It is only the conclusion contained in the first subparagraph which she contests. The contested conclusion is that "[t]here is no conflict between the Public Protector's subpoena powers and the TAA's prohibition on disclosure of SARS confidential information and taxpayer information" (Record vol 2 p 127 para 32.1).

[52] Record vol 1 p 24 para 32; admitted at Record vol 2 p 105 para 62.

17. Thus the Public Protector's case is bad at its core: legally, factually, procedurally, and, most importantly, also constitutionally. This is compounded by the Public Protector's heads of argument failing to address in multiple respects SARS' answering affidavit filed in this Court, and affidavits and written and oral argument before the High Court. The High Court's judgment is, furthermore, criticised by the Public Protector on spurious and demonstrably defective bases. The attempt to cavil with various observations and findings is in any event not a competent approach to appeals.[53] And the arguments on the Public Protector's purported counter-application and costs are devoid of merit and entirely inconsistent with this Court's caselaw.

18. In demonstrating this we follow the scheme set out in the above index. For the reasons provided below and in SARS' opposing affidavit, we submit that the application – alternatively, the appeal (if leave to appeal is granted) – falls to be dismissed with costs.

B. <u>Factual and procedural background</u>

19. The subpoena precipitating the litigation culminating in this application was issued on 21 October 2019.[54] It purportedly compelled the Commissioner of SARS to divulge taxpayer information at an interrogation scheduled for 13 November 2019.[55]

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[53] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) at para 59.
[54] Record vol 1 p 26 para 37.
[55] Record vol 1 p 26 para 37.

20. The 2019 subpoena was the sequel to a similarly-worded prequel dated October 2018.[56] In response to the 2018 subpoena the-then Commissioner engaged extensively with the Public Protector.[57] In doing so it was pointed out that the Public Protector's subpoena powers do not extend to taxpayer information.[58] SARS' consistent stance is that it is under a statutory obligation to preserve the confidentiality in such information.[59] SARS has been advised and accepted that acting accordingly constitutes – in the words of the *unimpugned* PPA[60] – "just cause".[61]

21. SARS contemporaneously explained the legal position in correspondence and other engagements with the Public Protector.[62] Regrettably the Public Protector rejected these, adopting the posture that her subpoena powers surpasses any legislation Parliament passes.[63] In response SARS suggested that the parties approach the High Court to determine whether the Public Protector's position is

[56] Record vol 1 p 18 para 18; Record vol 1 pp 51-54.
[57] Record vol 1 p 19 para 20; Record vol 1 p 21 para 26; Record vol 1 p 23 para 31; Record vol 1 p 24 para 33.
[58] Record vol 1 p 19 para 20.
[59] Record vol 1 p 13 para 4.
[60] Significantly, SARS' founding affidavit in the High Court already pointed out that neither the PPA nor the TAA was at any stage contended to be unconstitutional or in need of any special interpretation (to the extent appropriate and permissible) to render either of them constitutionally compliant (Record vol 1 p 17 para 12; specifically admitted at Record vol 2 p 103 para 51). Yet the Public Protector's conditional counter-application seeks the disclosure of the information identified in the 2019 subpoena explicitly "[i]n the event that this Honourable Court rules that the stance adopted by the Public Protector is not supportable *in terms of the law as it currently stands*" (Record vol 2 p 100 para 33, our emphasis). Such relief is legally incompetent in the absence of any successful constitutional challenge against "the law as it currently stands".
[61] Record vol 1 p 14 para 4; Record vol 2 p 121 para 14.4.
[62] Record vol 1 p 19 para 20; Record vol 1 p 23 para 31.
[63] Record vol 2 p 102 para 43.

correct.[64] However, the Public Protector resisted such recourse, claiming a lack of financial resources (implausibly, given the scale on which she has litigated).[65] Hence the parties instead instructed independent senior and junior counsel jointly to prepare the aforesaid legal opinion.[66]

22. The opinion was duly produced by Advs Maenetje SC and Ferreira.[67] It was furnished under cover of a letter by Cliffe Dekker Hofmeyr Attorneys expressing agreement with its reasoning and conclusion.[68] The opinion was also provided to the Public Protector.[69]

23. The Public Protector thereupon repudiated the opinion, claiming an absolute entitlement to access all and any "taxpayer information".[70] She accused SARS of violating section 181(3) of the Constitution and section 7(4) of the PPA, despite the joint legal opinion to the contrary.[71] She embarked on a unilateral "process of sourcing" a different legal opinion supporting her stance.[72] She also threatened SARS with section 11(3) of the PPA.[73] This is the provision which,

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[64] Record vol 1 p 20 para 21.
[65] Record vol 1 p 20 para 21
[66] Record vol 1 p 20 para 22.
[67] Record vol 1 p 20 para 24.
[68] Record vol 1 p 21 para 25.
[69] Record vol 1 p 21 para 26.
[70] Record vol 1 p 21 para 27; Record vol 1 p 59 para 3 (expressly recording that "I [the Public Protector] still maintain that I am not precluded by any law from obtaining or subpoenaing taxpayer information from SARS").
[71] Record vol 1 p 60 para 6.
[72] Record vol 1 p 21 para 27.
[73] Record vol 1 p 60 para 7. The Public Protector's answering affidavit variously asserts that her repeated references to criminal consequences under the PPA is not a "threat" but an inevitable legal reality. See e.g. Record vol 2 p 106 para 71: "I reiterate that there [sic] consequences which flow from the Public Protector Act for instances where there is non-compliance with my directives as required in the subpoenas. Repeating them does not amount to a threat by [sic] any construction."

as mentioned, criminalises non-compliance "without just cause" with the Public Protector's directions or requests.[74]

24. In a press statement issued at the time in relation to a separate investigation the Public Protector similarly cited sections 7(4), 7(6) and 11(4) of the PPA against SARS.[75] Explicit reference was also made to a 12-month prison sentence in addition to a R40 000 criminal penalty, should records directly demanded from SARS by the Public Protector be withheld.[76]

25. This despite it being common cause that both the 2018 and 2019 subpoenas seek information qualifying as taxpayer information under the TAA.[77] The taxpayer information relates not only to the second respondent (Mr Zuma), but also to the fourth respondent (Royal Security CC).[78] Thus even had any admissible evidence been adduced (however belatedly) which could conceivably suggest that Mr Zuma has suddenly granted any legally-cognisable consent for the disclosure of *his* taxpayer information, this does not assist the Public Protector. At least for this reason the tweet postdating the institution of the High Court

[74] The legal consequences of these provisions are not in issue. The Public Protector only contends that her repeated resort to these provisions and their consequences "does not amount to a threat by any construction" (Record vol 2 p 106 para 71). See similarly Record vol 2 p 104 para 60.
[75] Record vol 1 pp 22-23 para 30.
[76] Record vol 1 pp 22-23 para 30.
[77] Record vol 1 p 28 para 41 (noting that the information identified in the 2018 and 2019 subpoenas constitute taxpayer information), which the Public Protector specifically admits in individually traversing this part of the founding affidavit (Record vol 2 p 106 para 74).
[78] See e.g. Record vol 1 p 77 para 7.5; Record vol 1 pp 78-79 para 8.1 items 1-3.

application, which the Public Protector attempts to attribute to Mr Zuma,[79] cannot constitute consent as required under the TAA.[80]

26. It is further common cause that the TAA's protection of taxpayer information gives effect to four undisputed features of tax collection. The first is that confidentiality of information is absolutely critical for effective tax administration. Second, SARS' primary duty is to collect the correct amount of tax through voluntary compliance, founded on the public's trust and respect. Third, SARS' ability and statutory obligations to keep information confidential is an important pillar on which taxpayers' trust is built. Fourth, SARS is obliged to exercise vigilance when dealing with access to information, and does so solely for purposes of complying with its statutory obligations.[81]

27. A further procedural fact which was common cause before the High Court is that Mr Zuma's belated affidavit did not assist the Public Protector.[82] The Public Protector's counsel specifically so argued before the High Court and did not press the admission of that affidavit. It was filed many months out of time, on the day before the High Court hearing.[83] The Public Protector now somehow seeks to suggest before this Court that the High Court erred in not admitting this

[79] Record vol 2 p 93 para 7.
[80] Record vol 2 p 152 para 25.
[81] Record vol 1 p 24 para 32, recording that this "significant factual aspect has correctly not been contested ever since by anyone, including the Public Protector"; and Record vol 2 p 105 para 62, in which the Public Protector concedes this by "admit[ting] the allegations contained in these paragraphs insofar as they correctly reflect the contents of 'G'."
[82] Record vol 4 p 319 para 96.
[83] Record vol 4 p 319 para 96.

affidavit.[84] This despite its admission (and explanation for its lateness) having been opposed by SARS,[85] and not even sought by the Public Protector.[86] There is no merit in this contention.

28. As we shall show, the circumstances regarding the availability of the deponent of that affidavit is a crucial fact bearing on the Public Protector's conduct in this litigation; her resort to coercive subpoena powers; and her purported counter-application *a quo*.

C. The Commissioner's case

29. Unlike the Public Protector's, the Commissioner's case has remained consistent. It is, in short, that SARS is by law required to respect the privacy vested in taxpayer information.

30. SARS has always accepted the extant legal position. At each juncture SARS has been advised that its stance is indeed correct, and this was confirmed by the High Court. Indubitably the statutory compulsion under the TAA to keep taxpayer information confidential constitutes "just cause" under the PPA. Accordingly the Public Protector cannot compel by subpoena (backed by contempt proceedings and criminal sanctions against SARS officials) the disclosure of such information. The information in question may, however, be disclosed if

[84] Record vol 3 p 211 para 52.
[85] Record vol 4 p 319 para 97.
[86] Record vol 4 p 319 para 96.

written consent by the taxpayer is provided; or if a court order authorises the disclosure. The availability of these exceptions demonstrates that neither expediency or efficiency militates in favour of any different construction. Conversely, effective tax collection requires that taxpayer information be preserved.

31. This is consistent with the text of the applicable provisions, their context and purpose, and the Constitution itself. We address each separately.

(1) <u>The statutory text</u>

32. This Court confirmed that the correct departure point in interpreting legislation is its text.[87] The text of the relevant statutory provisions is reflected in annexure J to SARS' founding affidavit filed in the High Court.[88]

33. The statutory interpretative exercise is narrowed by the parties' correct acceptance that the information in issue indeed constitutes "taxpayer information", as defined in the TAA.[89] The parties also correctly accept that SARS officials are indeed under a legal compulsion under the TAA to treat taxpayer information as confidential, and not to disclose it.[90] The only question

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[87] *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 70; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 58; *Diener NO v Minister of Justice and Correctional Services* 2019 (4) SA 374 (CC) at para 37.

[88] Record vol 1 pp 80-88.

[89] Section 67(1)(b) of the TAA provides

> "taxpayer information … means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information."

[90] Section 69(1) of the TAA provides

placed in contention by the Public Protector's approach and subpoena is whether the latter legal compulsion constitutes "just cause" as contemplated in section 11(3) of the PPA.[91]

34. In interpreting precisely the same concept contained in the Constitution itself, this Court held that "the concept of just cause must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole."[92] The relevant residual constitution provisions are identified and addressed below, in dealing with the constitutional context. For present purposes it suffices to refer to the constitutional values codified in section 1 of the Constitution. They include "the advancement of human rights and freedoms",[93] and the "[s]upremacy of the Constitution and the rule of law".[94]

35. The human rights and freedoms engaged in subpoenaing taxpayer information include the right to privacy, as SARS' founding affidavit filed in the High Court

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"A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official."

[91] Section 11(3) of the PPA provides

"Any person who, without just cause, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7 (6), shall be guilty of an offence."

[92] *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para 30, applied in *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (6) SA 1 (CC) at para 28.

[93] Section 1(a) of the Constitution.

[94] Section 1(c) of the Constitution.

already reflected.[95] This is supported by international and comparative law.[96] It militates against an interpretation of "just cause" which detracts from the TAA's protection of taxpayer information.[97]

36. The supremacy of the Constitution and the rule of law, in turn, require that "just cause" be interpreted to give effect to the rule of law. This is the proposition which the Public Protector finds variously unpalatable[98] or incomprehensible,[99] precipitating the "parliamentary supremacy" slur slung at SARS and the High Court. But the proposition is, with respect, quite coherent and constitutionally compelling. It is that

(a) if a rule of law (in other words, a legal rule)

(b) which is codified in an Act of Parliament (i.e. legislated by the constitutionally competent Legislature)

(c) precludes the production of subpoenaed information (i.e. prohibits the disclosure of taxpayer information),

(d) then it is inescapable (from a constitutional perspective)

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[95] Record vol 1 p 35 para 61. SARS officials' rights entrenched in section 12(1)(a) of the Constitution – which itself contains the concept "just cause", without which no-one may be incarcerated (as section 11(4) of the PPA contemplates) – are also engaged.

[96] See e.g. Valderrama *et al* (eds) "The Rule of law and the effective protection of taxpayers' rights in developing countries" *WU International Taxation Research Paper Series* No. 2017–10 (Wirtshafts Universität Wien, Vienna 2017) at 7 and 11, referring to article 12 of the UN Declaration of Human Rights and article 17(1) of the International Covenant on Civil and Political Rights, which protect the right to privacy.

[97] Section 39(2) of the Constitution compels courts to adopt a construction which best promotes the rights in the Bill of Rights, as this Court confirmed in *inter alia Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 89 and *POPCRU v SACOSWU* 2019 (1) SA 73 (CC) at para 85.

[98] Public Protector's written submissions para 32.

[99] Record vol 3 p 207 para 34.

(e) that *just cause* (i.e. a cause which a constitutionally-competent sense of justice, as conceived by the constitutionally-competent lawgiver, recognisees)

(f) exists for withholding such information.

37. The High Court correctly understood and accepted this proposition. It is, with respect, clearly correct. A SARS official is indeed required by the Constitution itself to act *intra vires* the applicable empowering provisions. Such official is not at liberty to second-guess the constitutional validity of a legal prohibition imposed on the official by Parliament.[100] This is not nostalgia for Westminster parliamentary supremacy; it is consistency with this Court's caselaw.

38. This conclusion (reached first and foremost from a constitutional perspective) also coincides squarely with the ordinary grammatical meaning of the words "just cause".[101] The most authoritative foreign legal dictionary defines "just

[100] See e.g. *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at paras 102-103 and *Head of Department, Department of Education, Free State Province v Welkom High School* 2013 (9) BCLR 989 (CC) at para 86, confirming that an official may not take the law in his or her own hands (even if the outcome is correct), because this violates the rule of law.

[101] For this Court's approach on the ordinary grammatical meaning of words as derived from dictionaries, see e.g. *S v Liesching* 2019 (4) SA 219 (CC) at paras 130-131

> "The words 'exceptional circumstances' have not been defined in the Superior Courts Act. Courts are enjoined to construe statutes consistently with the Constitution insofar as the language of the statute permits. Words in a statute must be read in their entire context and given their ordinary grammatical meaning consistent with the purpose of the statute. It is also important to note that, in conducting this interpretative exercise, all statutes must be interpreted through the prism of and in order to promote the spirit, purport and objects of, the Bill of Rights. The dictionary definition of 'exceptional' must be the starting point of the enquiry. The Oxford English Dictionary defines 'exceptional' as 'of the nature of or forming an exception; out of the ordinary course, unusual, special'."

cause" in the context of the fifteenth century Latin concept *justa causa*, which is "a lawful ground".[102] A just cause is a "legally sufficient reason".[103] A ground provided in a law passed by Parliament imposing a prohibition upon disclosure self-evidently suffices in law as valid reason for non-disclosure.

39. Similarly, established and binding South African precedents confirm that the wider concept "just cause" includes at the very least a *lawful* cause (or excuse).[104] Self-evidently "an excuse sanctioned by existing rules of law" is encompassed by the narrower concept "lawful excuse".[105] Thus an official is excused if a competing legal obligation imposed by an extant legal rule requires non-disclosure.

40. It follows that on its ordinary grammatical meaning the text "just cause" cannot be construed as excluding the legal prohibition against disclosure of taxpayer information under the TAA. To the contrary, in its ordinary meaning *as a minimum* the phrase contemplates an obligation imposed, as here, by law.

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[102] Garner (ed) *Black's Law Dictionary* 11th ed (Thomson Reuters, St Paul MN 2019) s.v. "justa causa".
[103] *Id* s.v. "cause" > "just cause", read with "good cause" (to which the former concept refers).
[104] *S v Lovell* 1972 (3) SA 760 (A) at 762G-763B. See similarly cases dealing with the concept "just excuse", including *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A) at 733E-737C, collecting the relevant caselaw, explaining the wider ambit of "just excuse [or cause]", and observing that "common benefit" has always been a basis for excusing evidence being adduced (*id* at 732H-I, citing Merula *Manier van Procederen* 4.65.4.1). *Kader* further confirmed "that 'just excuse' is not confined to matters of privilege, compellability and admissibility", and reiterated Rumpff JA's observation in *S v Heyman* 1966 (4) SA 598 (A) at 611*sup*-A that one of the two categories of "just excuse" recognised by law is when a person can invoke a common law or statutory provision pursuant to which no duty exists to act as witness. The same self-evidently applies *a fortiori* where a statutory provision imposes a duty to preserve the confidentiality of information.
[105] *Kader supra* at 734B-B/C.

(2) <u>The statutory context</u>

41. This Court's caselaw confirms the importance of considering the context in which the text for interpretation appears.[106] The statutory context of the words "just cause" is the rest of the relevant provisions of the PPA, and the TAA.

42. The Public Protector's argument in this Court now explicitly seeks to exclude section 11(3) of the PPA from the interpretative inquiry. Before the High Court she invokes no provision in the PPA for purposes of restricting the meaning of the wider concept "just cause" so as to exclude even the narrower component *lawful cause* (in the sense of acting under legal prohibition).[107] Instead, under the heading "[t]he relevant legal framework" the Public Protector's High Court answering affidavit refers to only two provisions in the PPA: sections 7(4)(a) and 11(3).[108] The latter provision – which her argument now inconsistently seeks to negate – contains the specific text ("without just cause") under consideration. The selfsame provision also criminalises a failure to comply with a direction by the Public Protector "to submit an affidavit or affirmed declaration or to appear

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[106] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18. In *Road Traffic Management Corporation v Waymark (Pty) Limited* 2019 (5) SA 29 (CC) at para 45 this Court recently collected and applied this and related principles governing statutory interpretation.

[107] To the contrary, the PPA itself recognises the need to protect members of the office of the Public Protector from being compelled to give evidence – even in a court of law (section 6(8) of the PPA). Hence the PPA cannot be construed as precluding similar protection against compulsion under legislation governing the conduct of SARS officials. Section 6(8) of the PPA provides

> "The Public Protector or any member of his or her staff shall be competent but not compellable to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with any information relating to the investigation which in the course of his or her investigation has come to his or her knowledge."

[108] Record vol 2 p 97 paras 24-25.

before [the Public Protector] to give evidence or to produce any document … which has a bearing on the matter being investigated" under section 7(4)(a).

43. The immediate statutory context of the text "just cause" as contained in section 11(3) demonstrates that "without just cause" cannot be construed as contended by the Public Protector. Otherwise exposure to criminal liability is expanded. Such result is inconsistent with the well-established *in favorem libertatis* canon of construction confirmed by this Court.[109]

44. The TAA in turn extensively supports the ordinary grammatical meaning of the text. This it does by providing ample alternative methods for obtaining taxpayer information. It could either be obtained from a taxpayer directly,[110] or it could be obtained by applying to court.[111] The Public Protector's High Court answering affidavit itself indeed attempted, albeit only in the alternative ("if all else fails"[112] under "the law as it currently stands"),[113] to invoke both these alternatives.[114] As mentioned, she had indeed been advised (already in the joint opinion provided by Adv Maenetje SC dated 14 March 2019)[115] that these two

[109] *Hira v Booysen* 1992 (4) SA 69 (A) at 78D-F; *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC) at paras 129-131, referring to and applying the common law principle that provisions providing for criminal consequences are interpreted restrictively.
[110] Section 69(6)(b) of the TAA.
[111] Section 69(2)(c) of the TAA.
[112] Record vol 2 p 100 para 34.
[113] Record vol 2 p 100 para 33.
[114] The conditional counter-application seeks the disclosure of taxpayer information (Record vol 2 p 100 para 33, specifically invoking section 69(2)(c) of the TAA); and to the extent that the Public Protector's reliance on the tweet by Mr Zuma is capable of being understood it appears to be a failed attempt to rely on taxpayer consent (as contemplated by section 69(6)(b) of the TAA).
[115] Record vol 2 p 113.

options were available.[116] She *elected*, however, at the time not to pursue either. This has significant implications for her conditional counter-application.[117]

45. For the present purpose of statutory interpretation, we reiterate, the availability of the various options provided by the TAA means that there is no purposive rationale for departing from the ordinary grammatical meaning of the text. Particularly not in the wider context of the TAA. It identifies specific constitutional and statutory functionaries (including a Chapter 9 constitutional institution)[118] to whom SARS officials may disclose taxpayer information.[119] However, the Public Protector is not one of the excepted entities.[120] This

[116] Record vol 2 p 124 para 23; Record vol 2 p 124 para 25.

[117] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC) at para 54, confirming that "[t]he principle of the right of election is a fundamental one in our law. … When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte-face is prejudicial or is unfair to another."

[118] Section 70(6) provides

> "SARS must allow the Auditor-General to have access to information in the possession of SARS that relates to the performance of the Auditor-General's duties under section 4 of the Public Audit Act, 2004 (Act No. 25 of 2004)."

[119] Section 70(1)-(4), which provide for discretionary ("may") disclosures of taxpayer information – if such disclosure is both (a) necessary for the purpose of exercising a power or performing a regulatory function or duty under the legislation referred to in section 70(1), (2) or (3); and (b) relevant and proportionate to what the disclosure is intended to achieve under such legislation; and only to the extent permitted in section 70(1)-(4) – to the Director-General of National Treasury; the Statistician-General; the Chairperson of the Board administering the National Student Financial Aid Scheme; a commission of inquiry appointed by the President; a designated employee; the controlling body of registered tax practitioners; the Department of Labour; the Governor of the South African Reserve Bank; the Financial Service Conduct Authority; the Financial Intelligence Centre; the National Credit Regulator; and a prescribed organ of State.

[120] Therefore the Public Protector is on first principle presumed not to be intended as entity to which any exception to section 69(1) applies: *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at para 40, recognising the principle articulated in the maxim *inclusio unius est exclusio alterius* as a rule of logic, albeit not as a conclusive indication of statutory intention for purposes of legal interpretation.

provides further statutory context which militates against adopting a word-changing interpretation.[121]

(3) <u>The statutory purpose</u>

46. The statutory purpose of the relevant provisions is a further factor for consideration in any exercise in legal interpretation.[122] This has been confirmed by this Court specifically in dealing with the "just cause" concept, holding that the purpose of the provision must be interrogated in such circumstances.[123]

47. As mentioned, this concept is contained in a provision which criminalises non-compliance with a demand by the Public Protector to produce information; and the criminal consequences include incarceration. At no stage during the litigation did the Public Protector contend that the purpose of effective investigation would be compromised unless SARS officials are under penalty (including incarceration) compelled to provide taxpayer information. She now, before this Court, concedes that the TAA indeed does not compromise her effectiveness.[124] This is crucial in the light of this Court's approach to the "without just cause" concept as found in the Constitution, and which protects

[121] Such approach is generally unavailing: *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D) at 719I/J-720A/B, quoting Lord Atkin *Liversidge v Anderson* [1942] AC 206 (HL) at 245.
[122] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd* 2014 (3) BCLR 265 (CC) at paras 84-86.
[123] *De Vos NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC) at para 41.
[124] Record vol 3 p 194 para 10.6; Public Protector's written submissions para 86.

personal liberty.[125] The Public Protector does not need to coerce the disclosure of taxpayer information from SARS, and obtaining such information as facilitated through the TAA read with section 11(3) of the PPA does not dilute her functions. Conversely, SARS needs to relay on taxpayer information's privacy, and SARS officials must be permitted to comply with SARS legislation without threats of incarceration.

48. Hence the Public Protector's inability to advance any tenable basis for contending that effectiveness or purposiveness support the construction for which she contends. Clearly the Public Protector's efficiency is not adversely affected by giving effect to the ordinary grammatical meaning of the statutory text. Not only does the Public Proctor now correctly accept that obtaining taxpayer information either through consent from the taxpayer or court order does not undermine her effectiveness. She also accepts that her subpoena power is conferred by section 7 of the PPA.[126]

49. There is therefore no scope for any reliance by the Public Protector on this Court's judgment in *EFF v Speaker, National Assembly* or section 181 and 182 of the Constitution, to which we now turn.

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[125] *De Vos NO v Minister of Justice and Constitutional Development supra* at para 46, holding that
> "… [t]he tenets of our Constitution dictate that accused persons who are not considered dangerous should not have their freedom curtailed in a manner that is tantamount to inhuman and degrading punishment in a way that impinges on their dignity and breaches their right not to be deprived of their freedom without just cause."

[126] Record vol 2 p 102 para 43.

(4) <u>The constitutional context</u>

50. The final and fundamental consideration to take into account in construing the operative provisions is constitutional consistency and compatibility.[127] As mentioned, none of the provisions applicable to the Public Protector's subpoena is impugned for being unconstitutional. This in itself further restricts any scope for contending for a creative construction.[128]

51. The Constitution requires a construction congruent with the ordinary grammatical meaning of the text.[129] This is, as mentioned, *inter alia* because the provision the Public Protector invokes imposes criminal consequences.[130] Further, as the Commissioner's High Court founding affidavit already demonstrated (without any contradiction),[131] the TAA's provisions protecting taxpayer information give effect to the constitutional right to privacy.[132] They also promote the efficiency of tax collection,[133] which is in turn essential to

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[127] *SATAWU v Garvas* 2013 (1) SA 83 (CC) at para 37.
[128] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at para 17, holding that reading-in is only permissible as a constitutional remedy after a successful constitutional attack on the statutory provision in question. *Makate v Vodacom supra* at paras 89 and 91; *South African Transport and Allied Workers Union v Moloto NO* 2012 (6) SA 249 (CC) at para 44. See further *Chairperson, Council of the Municipality of Windhoek v Roland* 2014 (1) NR 247 (SC) at para 57, in which O'Regan AJA explained that "[w]hether 'reading in' is used as a tool of interpretation or as a constitutional remedy, a court should take care to avoid usurping the legitimate role of the legislature."
[129] See, again, section 39(2) of the Constitution and *Makate supra*.
[130] Thus sections 12 and 35 of the Constitution require that the qualification "without just cause" be read to maximise personal liberty and restrict criminal liability.
[131] Record vol 1 p 35 para 61; not denied at Record vol 2 pp 108-109 paras 90-91.
[132] Entrenched in section 14 of the Constitution.
[133] Record p 35 para 61. In *Krok v Commissioner, South African Revenue Service* 2015 (6) SA 317 (SCA) at para 25 the Supreme Court of Appeal recognised the efficiency of tax collection as statutory objective served by the TAA.

government acquitting itself of its constitutional duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[134]

52. Crucially, the Constitution itself contemplates that the Public Protector's powers be regulated by national legislation,[135] as this Court confirmed in *Economic Freedom Fighters v Speaker, National Assembly*.[136] The Chief Justice held that

(a) the PPA is the national legislation contemplated by the Constitution;[137]

(b) the constitutional drafters were aware of the pre-existing provisions of the PPA,[138] which already conferred on the Public Protector additional powers (including, as this Court specifically noted, the power to issue subpoenas)[139] not conferred by the Constitution itself;[140]

(c) the PPA provide details on the exercise of the Public Protector's powers, including specifically the power to issue subpoenas;[141] and

(d) the PPA either added to or regulated the Public Protector's powers "harmoniously" with section 182 of the Constitution.[142]

53. Confronted by this precedent the Public Protector correctly contends for no unconstitutionality affecting her empowering Act. She accordingly cannot argue

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[134] Section 7(2) of the Constitution.
[135] Section 182(1) of the Constitution. Section 182(2) in turn provides for additional powers as conferred by national legislation.
[136] 2016 (3) SA 580 (CC).
[137] *Id* at para 58.
[138] *Id* at para 59.
[139] *Id* at para 60 fn 60.
[140] *Id* at para 58.
[141] *Id* at para 60, including fn 60.
[142] *Id* at para 61 fn 61.

for an extraordinary construction of the PPA by resorting to the Constitution. The Constitution reinforces, as we have shown, the ordinary grammatical meaning of the text.

54. The same applies, as we have also shown, to each of the interpretative tools: text, context and purpose. They all confirm that the correct construction of the statutory text is as SARS contends. As the ordinary grammatical meaning of section 11(3) of the TAA conveys, a statutory prohibition against providing taxpayer information quite clearly constitutes just cause for withholding such information. This is what the High Court's order confirmed. Its judgment and order are, as we have shown, well-supported by this Court's caselaw. Nothing in the Public Protector's case before the High Court or her case before this Court detracts from the correctness of the High Court's order.

D. The Public Protector's case before the High Court

55. Before the High Court the Public Protector raised only thee "defences". The first impugned the High Court's jurisdiction. The second related to the merits. The third was no defence, but a conditional counter-application advanced on the basis mentioned above: "if all else fails"[143] under "the law as it currently stands".[144] None of these defences has any merit; they were correctly rejected by the High

[143] Record vol 2 p 100 para 34.
[144] Record vol 2 p 10 para 33.

Court; and nothing in the Public Protector's affidavit or written submissions filed in this Court establishes the converse. We address each separately.

(1) The Public Protector's allegation regarding the lack of "jurisdiction or competence"

56. The Public Protector pleaded in her answering affidavit simply that

> "First and foremost and *in limine*, the first respondent [the Public Protector] will raise the issue of jurisdiction or competence of this court to grant declaratory relief, in terms of section 21 of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'), in the present circumstances. The application ought to be dismissed on this ground alone."[145]

57. As SARS' heads of argument filed in the High Court demonstrated (with specific reference to this Court's caselaw),[146] there is no merit in this unsubstantiated contention. Section 21 of the Superior Courts Act quite explicitly confirms the jurisdiction and competence of the High Court to grant declaratory relief.[147] The

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[145] Record vol 2 p 95 para 15.

[146] *Metcash Trading Ltd v CSARS* 2001 (1) SA 1109 (CC) at para 44, specifically in the context of tax legislation; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at paras 107-108; *Competition Commission v Hosken Consolidated Investments Ltd* 2019 (3) SA 1 (CC) at paras 80-82, citing *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para 18.

[147] The relevant part of the provision cited in general terms in the Public Protector's answering affidavit is section 21(1)(c). It explicitly confirms the common law jurisdiction of this Court to grant declaratory relief. Section 21(1)(c) provides

> "A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

requirements for declaratory relief are clear.[148] They have been satisfied by SARS,[149] and not disputed by the Public Protector.[150] The Public Protector accordingly correctly abandoned her "first and foremost" defence in her heads of argument filed in the High Court.[151]

58. Yet there now appears – not only inconsistently, but also incongruously in the *applicant* for leave to appeal's written submissions – some attempt on behalf of the Public Protector to exhume this point. She now argues that it is *this Court* which lacks jurisdiction.[152] In that event she cannot approach this Court (since it lacks jurisdiction), least of all for purposes of impugning an order by a court whose jurisdiction she conceded.[153]

59. In any event, the inconsistency in her pleaded and argued case before this Court and the High Court itself demonstrates conduct in litigation which is manifestly inappropriate and put SARS to unnecessary costs.[154]

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[148] Harms *Civil Procedure in the Superior Courts* (LexisNexis, Durban 2019) SI 65 at A4.18; Joubert (ed) *The Law of South Africa* 3rd ed (LexisNexis, Durban 2017) vol 4 at para 38. Stated differently, "all that is required [to award declaratory orders] is that there be parties upon whom the order will be *binding*" (Baxter *Administrative Law* (Juta, Cape Town 1981) at 107). Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) at 559 confirms that the "only requirement" remains the existence of "interested parties on whom the order will be binding". For a general discussion of the applicable principles, see also Cilliers *et al Herbstein & Van Winsen The Practice of the High Courts of South Africa* 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1428*ff* and Van Loggerenberg *Erasmus Superior Court Practice* 2nd ed (Juta & Co Ltd, Cape Town2019) vol 1 serv. 9 at A2–126*ff*.

[149] Record vol 1 pp 15-16 paras 8-10.

[150] Record vol 2 p 102 paras 46-47, which "admit" and "note" the contents of paras 7-10 of SARS' founding affidavit.

[151] Record vol 4 p 301 para 57.

[152] Record vol 3 p 198 para 13.

[153] *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at paras 44-46.

[154] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para 24.

(2) <u>The Public Protector's argument that the Commissioner's "refusal to provide the relevant information is unlawful"</u>

60. The Public Protector's second ground of opposition asserts equally baldly that the Commissioner's conduct is unlawful, unconstitutional, and begets criminal consequences. Her High Court answering affidavit did not advance any factual or legal basis for this serious accusation. It contented itself with simply reproducing (with varying accuracy)[155] the text of some of the applicable provisions,[156] and purporting to "incorporate … by reference" the legal opinion disclosed for the first time in her answering affidavit.[157] In doing so it claimed that the latter opinion should be preferred over the Maenetje SC opinion.[158]

61. But the Public Protector's answering affidavit provided no analysis whatsoever of the Maenetje SC opinion. (It was not provided to Adv Sikhakhane SC, and accordingly also not considered – less still analysed – by him.) The Public Protector's singular attack on the Maenetje SC opinion is its supposedly being "significantly deficient more perpetually [sic] in its glaring failure to take into account the provisions of the Constitution."[159]

[155] For instance, section 181(3) of the Constitution and section 11(3) of the PPA is misquoted (at Record vol 2 p 96 para 33 and Record vol 2 p 97 para 25 respectively).
[156] Record vol 2 pp 96-98 paras 18-28.
[157] Record vol 2 p 98 para 29.
[158] Record vol 2 p 99 para 30.
[159] Record vol 2 p 99 para 31.

62. However, this disregards the dispositive judgment by this Court cited and applied in the Maenetje SC opinion.[160] The Public Protector correctly does not contend that this Court erred in that judgment; nor that the Maenetje SC opinion incorrectly applied this binding precedent; nor that the judgment is distinguishable. *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* indeed supports the proposition for which it is cited. It is that legislation should be interpreted and applied where possible to "operate harmoniously in the same field".[161] Applying this principle in the current context, the question is whether section 11(3) of the PPA and section 69(1) of the TAA are capable of being obeyed at the same time, or whether the Commissioner (or any other SARS official) will unavoidably incur criminal sanctions whatever he does, and whichever provision he attempts to honour. If the phrase "without just cause" is given its ordinary grammatical meaning, then no inescapable criminal "consequences … flow"[162] by operation of law.

63. The ordinary grammatical meaning which the Maenetje SC opinion attaches to the phrase "without just cause" is consistent with the principles of statutory interpretation confirmed by this Court (as shown above), and supported by the

[160] *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC).
[161] *Id* at para 24, cited in the Maenetje SC opinion (at Record vol 2 p 121 para 15).
[162] Record vol 2 p 104 para 60; Record vol 2 p 106 para 71.

judgment in *Kader*.[163] *Kader* is correctly cited and applied in the Maenetje SC opinion,[164] and the Public Protector does not suggest otherwise.

64. The Sikhakane SC opinion, for its part, also does not suggest otherwise. Instead, it in terms confirms that "[t]he Act [i.e. the PPA] expressly empowers the Public Protector to subpoena any information …".[165] Thus it correctly accepts, as the Public Protector does in her pleadings, that the empowering provision authorising issuing subpoenas is contained in the PPA, not the Constitution.[166] Therefore, also for this reason,[167] in the words used in the Sikhakhane SC opinion, the question for advice cannot be approached on the *a priori* basis that it is "trite law that the TAA cannot have the power of watering down the constitutional powers of the Public Protector".[168]

65. The correct question is whether the PPA confers subpoena powers capable of "compelling the provision of information" which "overrides the secrecy provision of the TAA."[169] In its own terms, the PPA demonstrably does not. It respects a SARS official's obligation to safeguard the privacy in taxpayer information.

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[163] *Attorney-General, Transvaal v Kader supra*.
[164] Record vol 2 p 120 para 14.2.
[165] Record vol 2 p 133 para 14.
[166] This is, as mentioned, explicitly accepted by the Public Protector herself (Record vol 2 p 102 para 43).
[167] Apart from the Public Protector's acknowledgment that her powers are not rendered ineffective, and certainly not nugatory, by section 11(3) of the PPA read with the relevant provisions of the TAA.
[168] Record vol 2 p 141 para 35.
[169] Record vol 2 p 141 para 35.

66. Therefore, contrary to the Public Protector's second defence, SARS' conduct was entirely consistent with the PPA and the TAA. It adopted what courts have consistently confirmed (in caselaw to which we revert below) is "a perfectly proper approach", namely the "fiscus could not be seen to … relinquish [the] right to confidentiality of the taxpayer's information".[170]

(3) <u>The Public Protector's claim for disclosure of taxpayer information "if all else fails"</u>

67. The conceptual confusion in the Public Protector's final purported defence *a quo* is self-evident. She contends for precisely the same information contained in the 2019 subpoena in the event that her arguments have been dismissed by the Court. This she aims to accomplish by a conditional counter-application.

68. However, the conditional counter-application is formally and substantively defective on multiple bases identified already in SARS' replying affidavit filed before the High Court.[171] The Public Protector did not attempt to meet them in any fourth affidavit serving as a replying affidavit in her counter-application *a quo*.

69. The formal defect in the conditional counter-application is fundamental. It infringes the right to a fair hearing entrenched in section 34 of the Constitution

[170] *Welz v Hall* 1996 (4) SA 1073 (C) at 1083I/J-1084A.
[171] Record vol 2 p 146 para 8; Record vol 2 p 148 para 13; Record vol 2 p 155 paras 33-34; Record vol 2 pp 158-162 paras 43-52.

itself. This is in that no proper notice, as laid down in the clearest terms in Rule 6(7) or Rule 6(11) of the Uniform Rules of Court,[172] was provided. It does not suffice in the circumstances of this case to insert a prayer for relief in an answering affidavit after other co-respondents have already indicated that they do not oppose the application, and therefore did not intend to participate in the proceedings. Such litigants cannot reasonably be expected to trawl through papers filed months later by a co-respondent to check whether relief is not suddenly sought which affect their rights and interests adversely. It is a notice of motion which alerts litigants of such relief. None was filed by the Public Protector, and no steps were taken by her to ascertain that her co-respondents (particularly the fourth respondent) were apprised of the relief she conditionally sought in her counter-application *a quo*.

70. Despite this defect being pointed out in SARS' replying affidavit (which effectively constitutes an answering affidavit to the purported conditional counter-application, and therefore precipitated a further affidavit by the Public Protector),[173] it had not been remedied.[174] This is inexcusable, particularly by the Public Protector. She not only claims legal training.[175] She is also – as this

[172] Rule 6(11) requires that interlocutory and other applications incidental to pending proceedings may be brought *on notice* supported by such affidavits as the case may require. Rule 6(7) provides for counter-applications, which are governed by the ordinary principles applicable to applications (including the rule that they must be brought on notice).
[173] Record vol 2 p 148 para 13; Record vol 2 p 155 para 34; Record vol 2 p 162 para 52.
[174] The Public Protector neither filed any affidavit in response, nor any notice setting out the relief sought in her purported counter-application.
[175] Record vol 2 p 108 para 87.

Court confirmed – under a "higher duty … to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights."[176]

71. Secondly, the counter-application is in any event also substantively defective. Demonstrably the first three legal requirements for the relief sought had not been satisfied.[177] The Public Protector completely failed to establish that the taxpayer information sought cannot be obtained elsewhere; that the primary mechanisms available under the TAA for obtaining the information (which is, self-evidently, to request it from the taxpayer concerned) is unavailing; and that the information sought was indeed central to the case.[178] The highwater mark of her case is that "the information is necessary",[179] but even this is clearly incorrect.[180]

72. Instead, the Public Protector attempted to introduce a tweet which she contends can be attributed to Mr Zuma.[181] If it is indeed attributable to him, and if the

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[176] *Public Protector v South African Reserve Bank supra* at para 155.

[177] The relief sought is governed by section 69(5) of the TAA. It provides

> "The court may not grant the order [to disclose taxpayer information] unless satisfied that the following circumstances apply
> (a) the information cannot be obtained elsewhere;
> (b) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;
> (c) the information is central to the case; and
> (d) the information does not constitute biometric information."

[178] The "case" which Mr Maimane lodged with the Public Protector concerned (as the 2019 subpoena records) "allegations of impropriety and conduct failure by former President Jacob Gedleyihlekisa Zuma", and Mr Maimane "requested the Public Protector to investigate the alleged payment of a monthly salary of R1 million to former President Zuma" which he had allegedly failed to "declare" and disclose particulars of to the Secretary of Cabinet" (Record vol 1 p 77 paras 7.1-7.4). None of this is information obtainable from SARS.

[179] Record vol 2 p 107 para 79.

[180] All that was "necessary" was to inquire from Mr Zuma whether he had received the alleged salary; and, if so, disclosed it to the Secretary of Cabinet, if required.

[181] The admissibility of this tweet is contested on the bases set out in SARS' replying affidavit (Record vol 2 pp 150-152 paras 20-25).

tweet is accurate, then she should have attempted to obtain the information from Mr Zuma himself.[182] She did not attempt to do so,[183] and only vaguely averred in her answering affidavit that attempts were made to seek a confirmatory affidavit from Mr Zuma.[184] Demonstrably no attempt was made to obtain the information from him himself. Nor to obtain Mr Zuma's consent for its disclosure. Why this was not done has not been disclosed (and the failure was not sought to be remedied) by the Public Protector before the High Court.[185] This failure is still not explained before this Court – despite SARS specifically noting this defect in the Public Protector's case.[186]

73. Thirdly, further fundamental issues of law operate against the Public Protector. The legal position has been clear, the operative legislation is not under constitutional attack, and the Public Protector did not ask the High Court (and does not now ask this Court) to depart from any established principle of law.

74. It is "well-established law that a Court will not lightly direct an official of the Revenue to divulge information imparted to him by a taxpayer."[187] This is for reasons of sound public policy.[188] In giving effect to this important policy, the

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[182] Record vol 2 p 150 para 20.
[183] Record p 158 para 43.
[184] Record vol 2 p 94 para 9.
[185] Record vol 2 p 150 para 19.
[186] See particularly Record vol 2 pp 158-162 paras 43-52.
[187] *Welz v Hall* 1996 (4) SA 1073 (C) at 1076G/H.
[188] *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A) at 420A-C (per Corbett JA, as he then was), approving *Silver v Silver* 1937 NPD 129 at 134. The latter judgment explains that

> "in the case of income tax returns and in matters in connection therewith, there is definite statutory provision that these documents should be regarded as secret though the last words of the subsection quoted seem to imply that the court has a discretion in the matter. The reason why the statute requires these income tax returns, and all information obtained by officials of

"Legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income."[189] This legislated legal policy object would be defeated if orders were too readily made for disclosure of those communications.[190] Therefore departure from the principle that privacy in taxpayer information must be protected by courts should not be permitted without sufficient cause.[191]

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the Revenue Department in connection with them to be kept secret is apparent. For the purpose of the administration of the Income Tax Act, it is necessary that the fullest information should be available to the Department of Inland Revenue. If that information is to be obtained, there must be some guarantee as to secrecy. It is obvious that if courts were to be in the habit of making orders requiring such information to be disclosed in suits between private individuals, there could be no guarantee at all as to secrecy and the difficulties of the Department of Inland Revenue would be greatly increased. On grounds of public policy the department should be enabled to carry out its duty without being hampered and, if I were to make the order for disclosure of the information and documents asked for in this case, I should certainly be hampering the department in carrying out its duties. It may be that, if the order were made, the plaintiff might obtain some evidence which would assist him in establishing his contentions, but the mere fact that the plaintiff might be enabled to obtain such evidence is not a sufficient ground for making the order, and I consider I must uphold the contention that the officials concerned are justified in withholding the documents, and in declining to disclose the information."

[189] *Welz v Hall supra* at 1076I-1077A.

[190] *Greenspan v R* 1944 SR 149 at 155-156, cited with approval in *R v Kassim* 1950 (4) SA 522 (A) at 526G.

[191] *Ontvanger van Inkomste, Lebowa v De Meyer NO* 1993 (4) SA 13 (A) at 26A-C.

75. These principles and precedents have been applied consistently by South African courts.[192] The same applies to their comparative counterparts.[193] For instance, the Supreme Court of Canada explained the important implications of the legal principles applicable to taxpayer information thus:[194]

> "At the outset, it is worth noting that the taxation of income in Canada has been and is based on a self-assessment and self-reporting system. Confidentiality of taxpayer information has been an important part of our income tax collection system."[195]

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[192] See e.g. *Sackstein NO v South African Revenue Service* 2000 (2) SA 250 (E) at 257G-258B

> "In exercising its discretion, the Court shall have regard to the aims and objects of the provisions viewed in the full context of the Acts. The purpose of both Acts, and therefore also of the secrecy provisions, is the optimum collection of the State's revenue. The underlying idea is that this objective will be promoted by the free flow of information between taxpayer and tax collector. To that end, the secrecy provisions are designed to afford the taxpayer the assurance that information conveyed by him to the Commissioner will not fall into the hands of other persons or government departments. (*Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (E) at 458E.) This thinking is expressed as follows in Silke on South African Income Tax 11th ed vol 2 at para 18.2:
>
> > '(I)t is the function of s 4 to ensure that secrecy is rigorously maintained about the details of a taxpayer's affairs and so encourage him to be truthful in reporting those details to Inland Revenue, even if he cannot afford their disclosure to his personal or business associates, competitors or even some other departments of the Government.'
>
> The provisions are said to have the secondary and subsidiary purpose of preventing the disruption to the functioning of the revenue service which would result from unrestricted rights of access by all for any purpose to the records of the Commissioner (*Silver v Silver* 1937 NPD 129 at 134; *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A) at 420B-C; *Welz v Hall* 1996 (4) SA 1073 (C) at 1076J-1077E).

See similarly *Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 (2) SA 934 (T) at 955I-956A which (after citing *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A) at 420B-C; *Ontvanger van Inkomste, Lebowa v De Meyer NO* 1993 (4) SA 13 (A) at 25I-J; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (E) at 458D-F and *Welz v Hall* 1996 (4) SA 1073 (C) at 1076G) held that "[t]he guarantee of secrecy contained in these provisions is to encourage full disclosure of their tax affairs by taxpayers. In the absence of such guarantee there will not be full disclosure which will be to the detriment of the tax authorities and accordingly the fiscus."

[193] See e.g. *R v Parker* 1966 (2) SA 56 (R), in which the Appellate Division of Southern Rhodesia held that "[a]s far as possible the right of a person to keep information to himself is respected and it is only when respect for privacy would or might adversely affect the interests of justice that the law intervenes to compel a person to speak" (*id* at 58D). Therefore a statutory provision authorising evidence being obtained under subpoena issued by a magistrate "constitutes an inroad into the right of privacy" (*id* at 58D-E). This right enjoys in-principle protection (*id* at 58H).

[194] *Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt* [1993] 3 SCR 430.

[195] *Id* at 441-442.

76. The same considerations apply in South Africa. Therefore the same legal conclusion should apply, particularly in the light of the South African Constitution's entrenchment of the right to privacy. As was confirmed in *Slattery* by the apex constitutional court for Canada, the equivalent provision (governing taxpayer information under Canadian law)

> "involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the Income Tax Act and other federal statutes referred to in s. 241(4).
>
> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interests, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in those exceptional situations does the privacy interest give way to the interest of the state.
>
> As alluded to already, Parliament recognised that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their incomes and expenses and for calculating the tax owed to Revenue Canada. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: if taxpayers lack this confidence, they may be reluctant to disclose voluntarily all of the required information (Edwin C. Harris, Canadian Income Taxation (4th ed. 1986), at pp. 26-27)."[196]

[196] *Id* at 443-444.

77. Accordingly the Supreme Court of Canada concluded

> "This legislative interpretation [precluding disclosure of taxpayer information absent statutory authority] accords with the necessary balancing of privacy and state interests which takes place in s. 241. Confidentiality of tax information is necessary in order to promote the privacy interests of taxpayers and the success of voluntary tax reporting."[197]

78. Thus the South African and comparable legal position is, as the above cases confirm, that "[a] court will be most reluctant to order disclosure of information if such information can be obtained elsewhere".[198] It is only if alternative sources or procedures "have, through no fault of an applicant, yielded disappointing results that a Court would ordinarily think of exercising its power in terms of section 4(1) [of the predecessor to section 69(2)(c) of the TAA]."[199] It is accordingly "necessary to look at the adequacy or otherwise of the steps taken by the applicants to procure evidence elsewhere than from [SARS]."[200]

79. In this case there has been no steps at all by the Public Protector to procure the taxpayer information from anyone other than SARS itself. The first simple inquiry would, could and should first have been directed to one of the two taxpayers concerned, Mr Zuma, asking him whether he had indeed been on the payroll of the fourth respondent and whether he had disclosed this to the

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[197] *Id* at 447.
[198] *Welz v Hall supra* at 1077F/G.
[199] *Id* at 1077H.
[200] *Id* at 1080A-B, noting that the application in that matter was "entirely silent in this respect", and that a court would expect that parties seeking the exercise of a discretion in their favour should, at the very least, explain that the evidence that they require has not been procurable from anyone else.

Secretary of Cabinet. To this day the Public Protector has provided no explanation for not doing so since the undisclosed date on which Mr Maimane lodged his complaint precipitating the 2018 subpoena.

80. Yet the Public Protector now seeks to approach this Court directly on the basis that the dispute is now suddenly "relatively urgent", and that "[n]o adequate and substantial relief will be obtained if the matter is first referred to the Full Court and/or the Supreme Court of Appeal".[201] But the Public Protector failed since 2018 to institute her own application for this relief,[202] which SARS consistently stated it would not have opposed if a competent case had been established for such relief.

81. The afterthought conditional counter-application demonstrably fails to comply with the law in multiple respects, and was therefore correctly dismissed with costs by the High Court. The Public Protector's application to this Court does not establish that the High Court erred in this (or any other) respect.

E. <u>The Public Protector's case before this Court</u>

82. The Public Protector's application for leave to appeal to this Court is addressed comprehensively in SARS' opposing affidavit.[203] Space limitations do not

[201] Record vol 3 p 217 para 72.
[202] Record vol 4 pp 326-327 paras 117-118, demonstrating that also in other respects any contended urgency (of whatever degree or relativity) is contrived.
[203] Record vol 4 pp 278-332.

permit a full treatment of all the defects in the Public Protector's application. We therefore respectfully request that SARS' opposing affidavit be read, particularly for purposes of determining the first question for consideration. It is whether leave to appeal directly to this Court from the High Court ought to be granted.

83. This Court recently considered this very issue in an application for leave to appeal directly from the High Court by *inter alios* the Public Protector.[204] The Public Protector's written submissions correctly concede that this judgment is indeed "directly applicable".[205] But it is not addressed at all by the Public Protector, other than in the context of costs. This Court's judgment is demonstrably unanswerable in the context of leave to appeal.

84. *EFF v Gordhan; Public Protector v Gordhan* unanimously confirms this Court's earlier caselaw, in which it was

> "cautioned that [this Court] will not grant leave to appeal merely because an applicant is aggrieved by a lower court's application of the law. In *Mankayi*, it was observed that 'this Court has refused to entertain appeals that seek to challenge only factual findings or the incorrect application of the law by the lower courts'. Thus, for this Court to adjudicate on the merits of a matter, that matter must 'not merely involve the application of an uncontroversial legal test to the facts'. Similarly, in *Jiba*, this Court held that the application of an established legal test does not raise an arguable point of law which would ground our jurisdiction."[206]

[204] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* 2020 ZACC 10.
[205] Public Protector's written submissions para 140.
[206] *EFF v Gordhan; Public Protector v Gordhan supra* at para 39, citing *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC) at para 12; *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC)

85. As mentioned, in this case the Public Protector does not contend for a different application of the established legal test governing the disclosure of taxpayer information. She contends for the application of what she argues is the established legal standard arising from *EFF v Speaker, National Assembly*.[207] As we have shown, this judgment, too, does not support her.

86. Returning to *EFF v Gordhan; Public Protector v Gordhan*, Khampepe ADJP (writing for a unanimous Court) confirmed that the mere fact that constitutional questions are raised does not necessarily justify leave to appeal.[208] Prospects of success is an important consideration, and arguments which are "novel and interesting" but "ha[ve] no merit" do not warrant this Court's consideration.[209] This applies specifically in the context of an "argument that the Public Protector exercises a constitutional power", which this Court held "does not render her unique to the extent that a stricter tests is required".[210] No compelling reason exists, this Court held, "to create a special test applicable to the Public Protector."[211]

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at para 27; *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC) at para 9; *S v Boesak* 2001 (1) SA 912 (CC) at para 15; *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para 33; and *General Council of the Bar of South Africa v Jiba* 2019 (8) BCLR 919 (CC) at para 59.

[207] Record vol 3 p 218 para 75; Record vol 4 pp 328-329 para 121.

[208] *EFF v Gordhan; Public Protector v Gordhan supra* at paras 45-46.

[209] *Id* at para 53.

[210] *Ibid*.

[211] *Id* at para 54.

87. The Court held that the Public Protector's purported bypassing of the appeal hierarchy of courts militated against entertaining a direct appeal,[212] and reiterated that "a direct appeal is not merely available for the asking", and that "exceptional circumstances must exist before this Court can condone the bypassing of the channels of appeal in the lower courts" least "the interests of justice considerations" – which governs this Court's jurisdiction – be impeded.[213] On this basis the Court refused leave to appeal, save insofar as the application of the *Biowatch* principle arose in the context of costs.[214]

88. In that case leave to appeal was granted exclusively in relation to costs, since the High Court provided no reasons to justify a personal costs order *mero motu* against Ms Mkhwebane,[215] despite the Public Protector having invoked the *Biowatch* principle.[216] In this case the Public Protector explicitly disavowed any reliance on the *Biowatch* principle;[217] a personal costs order against her was specifically sought and granted in the terms formulated in SARS' notice of motion,[218] founding affidavit,[219] and heads of argument;[220] and the High Court provided extensive reasons for such order,[221] after having invited and considered

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[212] *Id* at para 68.
[213] *Id* at para 72.
[214] *Ibid*.
[215] *Id* at para 87.
[216] *Id* at para 25.
[217] Public Protector's written submissions para 128.
[218] Record vol 1 p 2 prayer 7.
[219] Record vol 1 p 40 para73.
[220] SARS' High Court heads of argument at para 70(b), which are not included in the record before this Court.
[221] Record vol 3 pp 266-271 paras 49-52.

yet further submissions on costs from both parties,[222] and applying this Court's caselaw (including judgments particularly applicable to costs against the Public Protector).[223]

89. This Court's judgments support the High Court's conclusion on costs, and demonstrate that no scope for interference in the High Court's wide discretion exists.[224] Particularly not in circumstances where the Public Protector's conduct in the litigation has demonstrably been manifestly unreasonable, negligent and inconsistent with her constitutional obligations and the law. She undertook before the High Court to explain at the hearing why a confirmatory affidavit by Mr Zuma could not be obtained.[225] At the hearing she did not do so. When a belated affidavit was purportedly filed by Mr Zuma on the previous day, she did not support its admission. Now she contends, before this Court (in written argument) that that affidavit – purportedly filed at the eleventh hour by Mr Zuma, and on which the Public Protector placed no reliance – had somehow overtaken her undertaking to the Court.[226]

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[222] Record vol 4 p 323 para 106; Record vol 2 pp 173-183.

[223] Record vol 3 pp 266-267 paras 49-50, citing and applying *Public Protector v South African Reserve Bank supra*; *Black Sash Trust v Minister of Social Development* 2017 (9) BCLR 1089 (CC); and *South African Social Security Agency v Minister of Social Development* 2018 (10) BCLR 1291 (CC).

[224] *Public Protector v South African Reserve Bank supra* at para 144; *EFF v Gordhan; Public Protector v Gordhan supra* at para 79; *Florence v Government of the Republic of South Africa* 2014 (6) SA 456(CC) at para 113.

[225] Public Protector's High Court heads of argument at para 67, in which it was stated that

> "For reasons which will be explained at the hearing, the [Public Protector] was not at liberty to disclose the reasons why an affidavit could not be obtained from the taxpayer in question (i.e. the second respondent [Mr Zuma]). This matter will be more fully explained in due course and/or from the Bar."

Although attention was drawn to this in argument, none was offered.

[226] Public Protector's written submissions at para 139.

90. Her founding affidavit in this Court further contains material non-disclosures;[227] persists in advancing bald and spurious excuses;[228] unwarrantably accuses the High Court of misrepresenting the Public Protector's argument;[229] misstates material parts of the High Court's judgment;[230] and continues to contend – despite this Court's judgment in *EFF v Gordhan; Public Protector v Gordhan* and *Public Protector v South African Reserve Bank* for exceptionalism applicable to herself, a higher status than other Chapter 9 institutions,[231] and a *supra*-statutory stratosphere permitting her to exercise subpoena and other powers irrespective of any applicable legislation[232] – including her own legislation, which she herself concedes constitutes the source conferring subpoena powers.[233]

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[227] E.g. claiming that she had received no notice of the request for a personal costs order against herself (Record vol 3 p 212 para 56; Record vol 4 p 300 para 55; Record vol 4 p 322 para 105); and omitting to disclose the opportunities provided by the High Court to address the issue of costs (Record vol 4 p 300 para 55).

[228] E.g. the claim that her busy schedule is "mainly" the basis for not informing SARS of the Sikhakhane SC opinion (Record vol 2 p 104 para 58), despite various engagements with SARS – e.g. on 11 October 2019 (Record vol 1 p 25 para 35), when the issue of compellability of taxpayer information was raised by the Public Protector herself (Record vol 1 p 25 para 36) without a word as regards the status of any such opinion, which is dated many months earlier: 7 May 2019 (Record vol 2 p 143). See further Record vol 4 p 292 para 34; Record vol 4 p 298 para 52.

[229] Record vol 3 pp 207, 209, 211-212 paras 36, 43 and 53.

[230] E.g. contending that the High Court "erred in finding that the mere holding of a different opinion … was in *fraudem legis*" (Record vol 3 p 202 para 22). This is demonstrably incorrect (Record vol 4 p 306 para 69). Nor did the High Court hold, as the Public Protector deposed, that "the Public Protector's failure to share the Sikhakhane SC opinion with the SARS Commissioner was by definition a sign of *mala fides*" (Record vol 3 p 203 para 25; Record vol 4 p 307 para 72). Nor did the High Court err in referring to the Public Protector's legal qualifications in circumstances where she herself invoked them (Record vol 3 p 208 para 40; Record vol 4 p 313 para 83). Nor did the High Court fail to sustain its conclusion (or make a "bare" finding) that the counter-application was not established (Record vol 3 p 211 para 51; Record vol 4 p 318 para 93, referring to Record vol 3 pp 262-264 para 44).

[231] Public Protector's written submissions para 63.

[232] Record vol 2 p 102 para 43.

[233] Record vol 2 p 102 para 43.

91. Her written submissions, for their part, substantially reproduce the contents of the Public Protector's founding affidavit. They demonstrably fail to meet SARS' opposing affidavit.[234] They advance *non sequiturs*.[235] They make bald assertions unsupported by any record reference.[236] And they contain crucial concessions.[237]

F. Conclusion and appropriate relief

92. The Public Protector's case is devoid of merit in every aspect. Moreover, in multiple respects the Public Protector's conduct in this litigation directly contradicts binding law. None of the governing statutory provisions of judicial precedents is sought to be impugned, distinguished, developed or disapplied by the Public Protector. Instead, she has litigated in the teeth of these precedents, and despite their full ventilation by SARS before the High Court already. The

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[234] E.g. Public Protector's written submissions para 71 (which is addressed at Record vol 4 p 299 para 53 and Record vol 4 p 310 para 77). SARS' opposing affidavit demonstrates – with reference *inter alia* to this Court's judgment in *Dawood supra* – that neither section 7(2) of the PPA nor section 67(4) of the TAA assists the Public Protector's argument regarding "in-built safeguards".

[235] E.g. Public Protector's written submissions para 118, which contends that since SARS did not oppose the conditional counter-application *on the basis of section 69(4) of the TAA* therefore it "must be regarded as unopposed". Section 69(4) provides additional bases of opposition, and does not preclude SARS from opposing the relief on the basis that the requirements therefor are not satisfied under section 69(5). A further example is Public Protector's written submissions at para 137. It does not follow in law or logic that a "[f]ailure" to reject a ground contended baldly by a litigant to be "baseless" somehow "amounts to a material misdirection".

[236] E.g. Public Protector's written submissions para 119.1, which asserts that "the taxpayer information in question is the sole preserve of SARS and that there is no indication that it is attainable anywhere else". No factual basis is established for this proposition. The Public Protector bore the burden to establish it. The allegation is, furthermore, quite inconsistent with the simple inquiry actually required for purposes of investigating Mr Maimane's complaint invoked for purposes of the subpoena. Similarly the contentions advanced in the rest of para 119 are untenable. Significantly, it is only contended that "the information has a bearing on the investigation" (Public Protector's written submissions at para 119.1). This fails completely to satisfy the requirement in section 69(5)(c) of the TAA that the information must be "central to the case".

[237] E.g. Public Protector's written submissions para 26. Even if "the applicant herein" is to be read as "the first respondent" (for which no factual basis exists, and no record reference is provided) then the remaining arguments in that paragraph operate directly against the Public Protector.

High Court correctly applied binding precedent, including the caselaw of this Court.

93. Despite these principles already having been identified by SARS prior to the High Court litigation, the Public Protector elected not to pursue the indicated legal recourse available to her. She negligently failed to provide SARS with the legal advice intended to counter the legal opinion obtained by SARS and the Public Protector jointly, and disclosed it for the first time in her answering papers filed in the High Court. She litigated with reckless disregard for various procedural requirements, substantive rights, and constitutional principles. She also wantonly accused the Commissioner of violating the law and the Constitution, persisting in this stance even before this Court. She attacks SARS' counsel for an attributed constitutional "nostalgia". She asserts her own knowledge as a lawyer, and she has access to attorneys and senior and junior counsel. She is not an unrepresented or underrepresented or untrained litigant, but the holder of an important Chapter 9 office.

94. In litigating in this fashion the Public Protector has failed to remedy her conduct in litigation on which this Court adversely commented in *Public Protector v South African Reserve Bank*. As this Court confirmed, where organs of State (and more specifically the Public Protector herself) litigates in such fashion, courts can and should make an appropriate, punitive *de bonis propriis* costs order

against her.[238] This the High Court did, and this Court's recent judgment in *EFF v Gordhan; Public Protector v Gordhan* confirms the competence of such costs orders and the limit bases on which a court of appeal will interfere with such order. None of these bases exists in this case. She herself sought a punitive costs order against SARS before the High Court,[239] and cannot now complain that one was impermissibly granted against herself.

95. We accordingly ask that the application for leave to appeal be dismissed with costs. The Public Protector herself accepts before this Court that costs should follow the event if her appeal fails. The same should apply *a fortiori* to the dismissal of the application for leave to appeal directly to this Court, particularly in the light of this Court's judgment in *EFF v Gordhan; Public Protector v Gordhan*. It reiterates (in litigation specifically concerning the Public Protector) the relevant principles governing not only costs but also direct appeals.

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11 August 2020

[238] *Public Protector v South African Reserve Bank supra* at para 237.
[239] Record vol 2 p 109 para 94.