IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 365/21
HC Case No: 88359/19

In the matter between:

ARENA HOLDINGS (PTY) LTD t/a FINANCIAL MAIL	First Applicant
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
WARREN THOMPSON	Third Applicant

and

SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

FILING SHEET

FOR SERVICE AND FILING:

FIFTH RESPONDENT'S HEADS OF ARGUMENT AND PRACTICE NOTE

DATED AT JOHANNESBURG ON THIS THE 20th DAY OF MAY 2022.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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In the matter between:

ARENA HOLDINGS (PTY) LTD t/a	
FINANCIAL MAIL	First Applicant
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WARREN THOMPSON	Third Applicant

and

SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND	
CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

FIFTH RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. The Constitution of the Republic of South Africa Act 108 of 1996, (*"the Constitution"*) states the following in Section 16 (1): "*Everyone has the right to freedom of expression, which includes, freedom of the press and other media the freedom to receive or impart information or ideas*". Allied hereto, stands section 32 of the Constitution which provides for the right of access to information.

2. On the other hand, the Constitution entrenches, in section 14, the right to privacy.

3. This matter concerns the balancing of the right of access to information under the Promotion of Access to Information Act 2 of 2000 ("*PAIA*") with the right to the protection of personal information under the Protection of Personal Information Act 4 of 2013 ("*POPIA*").

4. The Information Regulator, being the fifth respondent ("*the Information Regulator*") has as part of its functions and powers under the Constitution and applicable legislation, the duty to balance these rights. The Information Regulator seeks to assist the Court in providing the basis for this balancing exercise.

STRUCTURE

5. The Information Regulator's argument, will be dealt with as follows: -

5.1. The powers of the Information Regulator;

5.2. The historical context which gave rise to the inception of the Information Regulator as it relates to the nexus between *PAIA* and *POPIA*;

5.3. The principles of legal interpretation relevant to this matter;

5.4. The public interest doctrine;

5.5. Factors to be considered when balancing the right of access to information against the right to privacy; and

5.6. Conclusion

POWERS OF THE INFORMATION REGULATOR

6. The mandate of the Information Regulator is contained in the Constitution; POPIA and PAIA. The Constitution requires the Information Regulator to ensure that the rights to privacy and the right to access to information are respected, promoted and enforced.

7. The Information Regulator fulfils a dual mandate in terms of PAIA and POPIA. We submit that it is this legislative mandate that brings the Information

Regulator before this Honourable Court. Thus, the Information Regulator has to ensure the balancing of the right to privacy against the right of access to information and the protection of important interests, such as public interest, including the free flow of information within the Republic and across international borders[1].

8. Section 83 of PAIA provides for the additional functions of the Information Regulator. Section 83(3)(a) is instructive as it deals with the issues before this court in that it provides that the Information Regulator may make recommendations for the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively.

HISTORICAL CONTEXT OF PAIA AND POPIA

9. The Information Regulator was established by POPIA, it is independent, subject only to the Constitution and the law, and is accountable to the National Assembly. The Information Regulator exercises its powers and performs it functions in accordance with POPIA and PAIA.[2]

10. The purpose of POPIA includes giving effect to the constitutional right to privacy, safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at balancing the right to privacy against other rights, particularly the right of access to information and

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[1] Fifth Respondent's explanatory affidavit para 12.
[2] Section 39 of POPIA.

protecting important interests, including the free flow of information within the Republic and across international borders.[3]

11. The objects of PAIA include giving effect to the constitutional right of access to information, subject to justifiable limitations, including but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance, and in a manner that balances the right of access to information with any other rights.[4]

12. The Information Regulator accordingly fulfils a dual statutory mandate and its powers include monitoring and enforcing compliance by public and private bodies with the provisions of POPIA and PAIA.[5]

13. POPIA was brought into operation incrementally and the Information Regulator assumed its enforcement powers and functions under PAIA on 30 June 2021 and under POPIA on 1 July 2021.[6] Section 83 of PAIA commenced on 30 June 2021 and provides for additional functions of the Information Regulator.

14. As set out earlier, section 83(3)(a)(i) is instructive and authorizes the Information Regulator to make recommendations for the development, improvement, modernization, reform or amendment of this PAIA or other

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[3] Section 2(a) of POPIA.
[4] Sections 9(a) and (b) of PAIA.
[5] Section 40(1)(b) of POPI and Chapter 1A of PAIA.
[6] Proclamation No. R. 21 of 2020: Commencement of Certain Sections of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), Government Gazette No. 43461, 22 June 2020.

legislation or common law having a bearing on access to information held by public and private bodies, respectively.

15. To appreciate the relevance of the relationship between PAIA and POPIA, it is important to consider the historical context which recognises that:

> *"Information that is available to the public is, of course available to enemy states, and it follows that certain information must be exempted from disclosure, even to the South African population."*[7]

16. Wilhelm Peekhaus, in his work; *South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence*[8]; records the following: -

> *"Fortunately, the South African government has finally undertaken significant steps to address some of these weaknesses in its access to information regime, as reflected in the passage of the Protection of Personal Information Act in 2013. This law, although promulgated to provide statutory protection for personal information, introduces a number of substantive amendments to PAIA. Once it enters into force, the new law will establish an independent Information Regulator, who will have jurisdiction throughout the country. The powers and duties of the Information Regulator in terms of PAIA are set out in Parts 4 and 5 of that Act (appeals against decisions and applications to the courts, respectively). Thus, the Information Regulator will assume all the powers*

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[7] Gilder "Submission to the Parliamentary ad hoc Committee on the Protection of Information Bill www.pmg.org.za/files/docs/080729barrygilder.doc (accessed 10/05/2022).
[8] Journal of Information Policy 4 (2014): 570-596.

and responsibilities currently performed by the South African Human Rights Commission under PAIA in respect of promotion and compliance monitoring. The Information Regulator will also be empowered to assess whether a public or private body generally complies with the provisions of PAIA. Such an assessment can be conducted at the initiative of the Information Regulator or at the request of the information officer of a public body, head of a private body, or any other person. Similarly, rather than having to apply to the courts for relief, requestors unsatisfied with the decision of a body will be able to submit a complaint to the Information Regulator, who will have investigatory, order-making, and enforcement powers.

This new body promises to respond to some key weaknesses in PAIA, particularly reliance on the courts for oversight and enforcement. Moreover, as outlined in some detail above, the courts have provided a strong foundation of common law precedent upon which this new body can draw in order to breathe new life into South Africa's access to information regime. However, since the Act containing these amendments to PAIA has yet to be enacted, it remains to be seen how well these new provisions will remedy this weakness in the Act."

17. Therefore, it is clear that PAIA and POPIA are inextricably linked as the weaknesses of the former were intended to be remedied by the latter.

RELEVANT PRINCIPLES OF INTERPRETATION

18. In what follows, we set out the principles of interpretation that we submit are applicable to the interpretation of PAIA and POPIA.

19. These principles of interpretation were articulated in, *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 and approved by the Constitutional Court in inter alia *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) para 29. Also see *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

20. These principles were recently thus summarised in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* (264/2019) ZASCA 16 (25 March 2020):

> *'It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.'*

21. In the same judgement and instructive for present purposes, the Supreme Court of Appeal further elaborated on the context for the interpretation of statutes, and said: -

> *The difference in the genesis of statutes and contracts provides a different context for their interpretation. Statutes undoubtedly have a context that may be highly relevant to their interpretation. In the first instance there is the injunction in s 39(2) of the Constitution of the Republic of South Africa, 1996 . . . that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. Third, where legislation flows from a commission of enquiry, or the establishment of a specialised drafting committee, reference to their reports is permissible and may provide helpful context. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.'*

THE PUBLIC INTEREST DOCTRINE

22. In this section, we merely provide this court with the various principles surrounding this concept to assist the court. This will assist the Information

Regulator in how it needs to implement the exercise of its discretion when it comes into play on similar matters.

23. According to *Rycroft*, it is difficult to prove what is and what is not in the public interest[9]. Thus, the question is under what circumstances would a person's tax information be disclosed to the public at large?

24. In line with the historical legislative context traversed above, the question would be to consider the difference between what constitutes the public interest on the one hand, and what is regarded as in the interest of the public on the other. What is the difference then?

25. There is a wide difference[10].

RELEVANT FOREIGN CASE LAW

26. In the next section of these heads, we set out relevant principles distilled from foreign case law in comparative jurisdictions. The approach demonstrated in these cases may usefully be considered by the Court in the determination of the factors to be taken into account when conducting the balancing exercise referred to earlier in these heads,

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[9] Rycroft "In the Public Interest" 1989 SALJ 172.
[10] *Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation*, EA/2006/0011 and 0013 (Information Tribunal), paragraph 34.

27. Section 39(1) of the Constitution states that when interpreting the Bill of Rights, a court must consider international law and may consider foreign law.

28. In *H v Fetal Assessment Centre 2015 (2) SA 193 (CC)*, Froneman J summarised the approach to be adopted regarding the use of comparative foreign law and jurisprudence as follows:

> "(a) *Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.*
>
> (b) *In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.*
>
> (c) *The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.*
>
> (d) *Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.*
>
> *The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal*

implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context."[11].

29. We set out below aspects of foreign law which we submit are relevant to this dispute.

Public interest

30. In New Zealand, the High Court in *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 733; has offered the following distinction:

> "*Once again it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level - between what is interesting to the public and what it is in the public interest to be made known.*"

[11] At paras 31 – 32.

31. Furthermore, in *Kelsey v the Minister of Trade* [2015] NZHC 2497 at paragraph 77, the court noted as follows:

> *"... The considerations favouring disclosure must outweigh the interest in withholding. If the competing considerations are so equally balanced that the decision maker (and Ombudsman on review) is in two minds as to whether the information should be disclosed in the public interest, notwithstanding any harm to interests protected under section 9(2), then the information should be withheld. Only if the considerations favouring disclosure and the public interests outweigh the need to withhold must the information be made available pursuant to the principle of availability set out in section 5 of the [Act]."*

32. The meaning of the term was also considered by Bathurst CJ in *Duncan v Independent Commission Against Corruption [2016] NSWCA 143* where the Justice referred to the High Court decision in *O'Sullivan v Farrer* [1989] in which the plurality pointed out that the expression "*the public interest*", when used in a statute, imports a value judgment to be made by reference to undefined factual matters confined only "*in so far as the subject matter and the statutory enactments enable ...* " (at 226).

33. Allied hereto, the Full Court of the Federal Court of Australia in its decision in *McKinnon v Secretary, Department of Treasury [2005] FCAGFC 142* where Timberline J noted that:

"9. *The expression 'in the public interest' directs attention to that* ***conclusion or determination*** *which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances. There will, as in the present case,* ***often be competing facets of the public interest*** *that call for consideration when making a final determination as to where the public interest lies and these are sometimes loosely referred to, in my view, as opposing public interests…*

10. The expression 'the public interest' is ***often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest.*** *It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...*".

34. Therefore, at one end of the spectrum, when addressing this issue, academic commentators and judicial officers have taken it as a given that; the "*public interest*" relates to the interest of members of the community as a whole, or at least to a substantial segment of them – that it should be distinguished from individual, sectional or regional interest[12].

[12] *Assessing the public interest in the 21st Century: A framework, Leslie A. Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.*

35. At the other end of the spectrum, "*public interest*" can extend to certain private '*rights*' of individuals - rights that in many societies are so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness and the right to silence[13].

36. This meaning was also canvassed by the Australian courts in various contexts. In one such case the Supreme Court of Victoria [Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith [1991] 1 VR 63(at 75)*, per Kaye, Fullagar and Ormiston JJ] said that:

> *"The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…".*

37. In another case, the Federal Court of Australia [*Full Court of the Federal Court of Australia in McKinnon v Secretary, Department of Treasury [2005] FCA FC 142 per Tamberlin J* (at 245)] said:

> *"9. The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of*

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[13] *Per Mason CJ in Attorney General (NSW) v Quin (1990) 64 ALJR 627 and Lord Keith in Glasgow Corporation v Central Land Board [1956] SC(HL) 1 at p25.*

the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances…

10. *The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...*

11. *The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination..."*

38. This we submit stands to show, the difficulty with which the term is fraught; as we gather from the judgment *a quo*; thus, we urge the above Honourable Court to deal with this issue in order for the Information Regulator to perform its duties and functions effectively.

The interest of the public

39. To understand the purpose or objective of this concept, in some ways it is easier to distinguish what is in the public interest from what is not.

40. There often is personal curiosity, i.e., what is of interest to know, that which gratifies curiosity or merely provides information or amusement is what this

phrase is all about [*Director of Public Prosecutions v Smith [1991] 1 VR 63 (at pp73-75), R v Inhabitants of the County of Bedfordshire (1855) 24 L.J.Q. B.81 at (p84) and Lion Laboratories Limited v Evans [1985] QB 526 (at p537]*. This is to be distinguished from something that is of interest to the public in general [*Re Angel and Department of Arts, Heritage & Environment (1985) 9 ALD 113 (at 114)*].

41. Allied hereto, are parochial interests, which often relate to the interests of a small or narrowly defined group of people.

42. In Canada, Ontario, it is suggested that; wide-spread curiosity about the contents of a record, which may be newsworthy, does not automatically lead to the application of the public interest override[14].

FACTORS FOR CONSIDERATION

43. It is important to note at the outset that exceptions to the right of access exist in order to protect legitimate interests, and in some cases, there can also be a public interest in ensuring that information is withheld when it is appropriate to do so. We turn to consider these principles hereunder.

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[14] *Grant v. Torstar Corp. 2009 SCC 61. File No.: 32932. 2009: April 23; 2009: December 22, para 101 to 109.*

The Howard principle

44. In *Re Howard and The Treasurer of the Commonwealth of Australia (1985) 3 AAR 169*; a different emphasis was evident. Justice Davies allowed that the public interest in non-disclosure was not to be circumscribed. The emphasis here was in the concluded words that; "*there must often be an element of conjecture in a decision as to the public interest*", and that *"[w]eight must be given to the object of the Act*".[15]

45. This approach enabled agencies to shift the focus of attention away from the contents of and circumstances surrounding the particular document in issue, to a focus on what kind of document it is; to or what might in the future be the effect of the disclosure of the document on the behaviour of others.

46. To understand its import, in *In Re Murtagh and Commissioner of Taxation,* 1984) 1 AAR 419 at 430 (emphasis added). *(which presaged the analysis in Re Howard) Davies J* said that:

> "*If the release of the documents would impair [the decision-making process] to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access.*"

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[15] *Re Howard and the Treasurer of the Commonwealth of Australia (1985) 3 AAR 169 at 178 (emphasis added).*

The Vaughn index

47. In *Vaughn v. Rosen, 484 F.2d 820, 825 (D.C.Cir.1973), the court developed a procedure* to avoid the cumbersome alternative of routinely having a court to examine numerous multi-page documents *in camera,* where detailed affidavits from agency officials may indicate that the requested documents are exempt from disclosure.

48. The index gives the court and the challenging party a measure of access without exposing the withheld information.

The Marcel principle

49. In *Marcel v Commissioner of Police of the Metropolis [1992] Ch 225*; Sir Christopher Slade held that; public power should only be used for the purposes for which they were conferred [Marcel (n 13), 262.]. The Marcel principle was recently affirmed by the *Marcel v Commissioner of Police of the Metropolis [1992] Ch 225*. Nolan LJ agreed and emphasized that:

> *"The precise extent of the duty is, I think, difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals*".

50. *Ingenious Media Holdings PLC v Commissioners for her Majesty's Revenue and Customs [2016] UKSC 54* concerned a claim against the Commissioners for Her Majesty's Revenue and Customs (HMRC) for disclosing to the media information about the claimants' tax affairs and HMRC's investigations of

them. The information – which was disclosed by a senior revenue official – included the fact that HMRC believed that the claimant had been involved in tax avoidance schemes which were costing the revenue billions of pounds, descriptions of the claimant as "*urbane*", "*clever*", and a "*big risk*" for the revenue, and very general comments about the efforts made to "*clean up*" the film schemes in question.

51. Speaking for the Court, Lord Toulson described the information as being about *"the tax activities of Mr McKenna and Ingenious Media and HRMC'S attitude towards them, derived from information held by HMRC about them".*

52. Lord Toulson held that, the defendants were liable for breach of confidence because of the "well-established principle" – "*sometimes referred to as the Marcel principle*" – that: *where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes.*

53. The import of this principle seems to suggest that confidential information which was given for a defined purpose; must not be disclosed. However, this court must weigh this principle with all the factors when coming to its decision.

54. Accordingly, as Lord Griffiths explained in *Attorney-General v. Guardian Newspapers Ltd (No 2) (n 14), 268.*, *"[t]he duty of confidence is, as a general*

rule, also imposed on a third party who is in possession of information which she knows is subject to an obligation of confidence".

55. These principles set out above all play a role in this matter. This Honourable Court, we submit, may be guided by the extent to which these principles are applied to balancing the competing constitutional rights at issue in this matter.

CONCLUSION

56. It is hoped that these submissions assist the Court in deciding this issue which will guide the Information Regulator in performing its duties and functions in terms of both pieces of legislation under its mandate.

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20 May 2022

TABLE OF AUTHORITIES

Statutes

1 Constitution of South Africa, 1996.

2 Promotion of Access to Information Act 2 of 2000.

3 Promotion of Administrative Justice Act 3 of 2000.

4 Protection of Personal Information Act 4 of 2013.

5 Tax Administration Act 28 of 2011.

Case law

6 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC).

7 *Attorney General (NSW) v Quin* (1990) 64 ALJR 627.

8 *Attorney-General v Guardian Newspapers Ltd* (No 2) (n 14), 268.

9 *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

10 *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* (264/2019) ZASCA 16 (25 March 2020).

11 *Director of Public Prosecutions v Smith* [1991] 1 VR 63.

12 *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143.

13 *Full Court of the Federal Court of Australia in McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142.

14 *Grant v. Torstar Corp.* 2009 SCC 61. File No.: 32932. 2009.

15 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

16 *In Re Murtagh and Commissioner of Taxation* (1984) 1 AAR 419.

17 *Ingenious Media Holdings PLC v Commissioners for her Majesty's Revenue and Customs* [2016] UKSC 54.

18 *Kelsey v the Minister of Trade* [2015] NZHC 2497.

19 *Lion Laboratories Limited v Evans* [1985] QB 526.

20 *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225.

21 *McKinnon v Secretary, Department of Treasury* [2005] FCAGFC 142.

22 *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

23 *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113.

24 *Re Howard and The Treasurer of the Commonwealth of Australia* (1985) 3 AAR 169.

25 *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720.

26 *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C.Cir.1973).

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FIFTH RESPONDENT'S PRACTICE NOTE

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1 NATURE OF PROCEEDINGS

1.1 This is an application brought by the applicants for confirmation of the High Court's orders of constitutional invalidity in respect of the provisions of sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 ("*PAIA*") and sections 67 and 69 of the Tax Administration Act 28 of 2011, as well as an application for leave to

appeal by the first to fourth respondents against certain orders of the High Court.

1.2 This matter concerns the balancing of the right of access to information under PAIA with the right to the protection of personal information under the Protection of Personal Information Act 4 of 2013 ("*POPIA*").

2 NECESSARY PORTIONS OF THE RECORD

2.1 The fifth respondent did not participate in the proceedings before the court *a quo* but filed a notice to abide.

2.2 In these proceedings, the fifth respondent has filed a notice to abide and an explanatory affidavit.

2.3 The record as it relates to these documents must be read.

3 SUMMARY OF THE FIFTH REPONDENT'S ARGUMENT

3.1 This matter concerns the balancing of the right of access to information PAIA with the right to the protection of personal information under *POPIA*.

3.2 The Information Regulator, being the fifth respondent, has as part of its functions and powers under the Constitution and applicable legislation, the duty to balance these rights. The Information Regulator seeks to assist the Court in providing the basis for this balancing exercise.

3.3 The legal submissions, as set out in the fifth respondent's heads of argument, deal with the following:-

3.3.1 The powers of the Information Regulator;

3.3.2 The historical relevance of PAIA and POPIA;

3.3.3 The principles of legal interpretation relevant to this matter;

3.3.4 The public interest doctrine;

3.3.5 The relevance of foreign jurisprudence; and

3.3.6 Factors relevant to the above Honourable Court's jurisdiction.

4 With the aforesaid exposition in mind, the fifth respondent seeks to assist the above Honourable Court.

AL Platt SC

TW Snyders

Fifth Respondent's Counsel

Chambers, Johannesburg

20 May 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 365/21

HC Case Number: 88359/19

In the matter between:

ARENA HOLDINGS (PTY) LTD	
t/a FINANCIAL MAIL	**First Applicant**
THE AMABHUNGANE CENTRE FOR	
INVESTIGATIVE JOURNALISM NPC	**Second Applicant**
WARREN THOMPSON	**Third Applicant**
and	
SOUTH AFRICAN REVENUE SERVICE	**First Respondent**
JACOB GEDLEYIHLEKISA ZUMA	**Second Respondent**
MINISTER OF JUSTICE AND	
CORRECTIONAL SERVICES	**Third Respondent**
MINISTER OF FINANCE	**Fourth Respondent**
INFORMATION REGULATOR	**Fifth Respondent**

FILING SHEET

Filing of Second Respondent's Heads of Argument.

DATED AT HONEYDEW ON THIS THE 20TH OF MAY 2022.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.: **CCT 365/2021**
High Court Case No.: **88359/19**

In the matter between:

ARENA HOLDINGS (Pty) Ltd t/a FINANCIAL MAIL	First Applicant
THE AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
WARREN THOMPSON	Third Applicant
and	
SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

SECOND RESPONDENT'S SUBMISSIONS

INTRODUCTION

1. The second respondent is the former President of the Republic of South Africa, Mr. Zuma, against whom orders in paragraph 5 and 6 were made by the Court a quo. The court a quo accepted the factual basis of the Applicants' case which alleged that there is "*serious and credible evidence*" that Mr Zuma's tax affairs were not in order "*while he was President.*" The Applicants alleged that he "*evaded tax, received income from sources other than his official presidential income that he did not disclose, and that he received various fringe benefits that he has not paid tax* on."[1]

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[1] Vol. 1 page 10, para 15.

2. The Applicants further contend that "*the question of whether President Zuma's tax affairs were in order while he was President is a critically important one from the point of view of the public.*"[2] They further contend that they have public interest standing in terms of section 38 of the Constitution to compel the disclosure of Mr Zuma's tax returns "*to ensure that those currently in office hold him to account.*"[3] (Emphasis added.)

3. The law does not confer on the Applicants the right to access to Mr Zuma's tax records and upon that realisation, they mounted a frontal attack on the constitutional validity of certain provisions of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") and the Tax Administration Act 28 of 2011 (***TAA***"). That way, the Applicants perceived would create a legal right to access Mr Zuma's tax information – which if they got their hands on – would allow them to publish the information in the public interest and presumably to trigger a criminal investigation against him for the alleged violation of his tax obligations. The Court a quo granted all the orders of constitutional invalidity[4] – setting aside sections 35 and 46 of PAIA and sections 67 and 69 of TAA on the basis that they unconstitutionally violated the Applicants' right to access tax information even where they were able to demonstrate a public interests right to such information.

4. Upon declaring the provisions of PAIA and TAA to be unconstitutional, the court reviewed and set aside a decision of SARS that declined the Applicants' request to access Mr Zuma's tax record and directed SARS to give the Applicants access to Mr Zuma's tax records. The court a quo presumably granted the orders in paragraph 5 and 6 of the judgement on the basis of its discretion in section 172(1)(b) of the Constitution. As will be demonstrated below, the Court a quo does not accurately reflect established jurisprudence in the litigation of constitutional rights

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[2] Vol. 1 page 11, para 19.
[3] Ibid. page 11, para 19.
[4] Vol. 9 pages 838 to 840.

and consequently granted orders that unjustifiably violated the constitutional rights of Mr Zuma. Prior to the orders of constitutional invalidity being confirmed by the Constitutional Court, it is simply incompetent for the court a quo to give effect to those orders by directing that SARS conducts itself in line with its ruling on the constitutionality of PAIA and TAA. Section 167(5) of the Constitution says that any order of invalidity made by the Supreme Court of Appeal, a High Court or Court of similar status has no force or effect prior to being confirmed by the Constitutional Court. In line with section 167(5) of the Constitution, the court a quo was not entitled to treat its order of constitutional invalidity as though it was final by directing SARS to grant the Applicants Mr Zuma's tax records.

5. The orders granting access to Mr Zuma's tax records would not stand even if the orders of constitutional invalidity in respect of PAIA and the TAA were to be upheld.

APPLICATION FOR CONFIRMATION OF ORDERS

6. As required by the Constitution and the rules of the Court, an application to have the orders of constitutional invalidity was lodged in terms of rule 16(4) of the Rules of this Honourable Court.[5] It is important to note that the Applicants seek that the court a quo orders that are relevant to Mr Zuma are confirmed by this Honourable Court.[6] Mr Zuma opposes the confirmation of paragraphs 5 and 6 of the court a quo's orders and supports the position taken by SARS in relation to the disclosure of his tax records as reflective of the underlying constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[7] The confirmation of orders in paragraph 5 and 6 is also opposed on the basis, even if

[5] Vol. 9 page 844.
[6] Vol. 9 page 854, para 1.3.
[7] See also section 7 of the Bill of Rights

the constitutional invalidity orders in paragraph 1 to 4 are upheld, it does not follow that the Applicants have established a right to access Mr Zuma's tax records.

7. Mr Zuma has filed his own application for leave to appeal and in support of that application, filed an affidavit setting out the legal basis on which he opposes the confirmation of the relief granted against him.[8]

8. Mr Zuma's application is opposed by the Applicants on a number of meritless technical grounds. The first is that he needs condonation because his application for leave to appeal is late. The second is that he fails to make out a case for condonation. The third is that Mr Zuma has no prospects of success in the appeal and that it would therefore not be in the interests of justice for leave to appeal to be granted – "*given that he chose not to participate in the court a quo.*"[9] While opposing the application for leave to appeal, the Applicants concede that "*it is in the interests of justice for Mr Zuma's condonation application to be heard and determined together with the confirmation proceedings and the other related leave-to-appeal applications (although, to be clear, the result should be that this Court should confirm the High Court order, dismiss Mr Zuma's condonation application alternatively his leave to appeal application, and dismiss the other leave to appeal applications.)*"[10]

CONDONATION FOR THE LATE FILING OF THE APPLICATION FOR LEAVE TO APPEAL

9. The Applicants contend that the fact that Mr Zuma did not participate in the court *a quo* proceedings the doors of the Court should be closed against him at this stage, even if the orders directly implicate his constitutional rights. The reason he was not able to participate is explained in his affidavit in paragraph 5.[11] It is however not necessary for the Court to decide whether

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[8] Vol. 10, page 976.
[9] Vol. 10, page 1012 para 6.1.
[10] Vol. 10, page 1013 para 7.2.
[11] Vol. 10, page 977.

Mr Zuma's reasons are reasonable or should be believed. What is critical is whether there is anything in law preventing a party who is subject of an order of Court from participating, for the first time, on appeal. The answer to that question is none. There is none that the Applicants rely on for the contention that a party who is a subject of a court order, may not, for the first time, participate in the appeal process of the case. The Applicants' contentions against Mr Zuma's participation appear to be based on the principle of peremption. If that is so, such contention has similarly no merit.

10. The non-participation in the court a quo proceedings by Mr Zuma does not give rise to the application of the principle of peremption[12] since he did not abide the decision of the court *a quo* and his non-participation does not amount to an "*unequivocal conduct inconsistent with an intention to appeal*" an order that violates his constitutional rights. His conduct is not that of a person who "*has clearly and unconditionally acquiesced in and decided to abide by the judgment*" and is therefore barred from *'thereafter challenging it'.*

11. In Dabner,[13] Innes CJ concisely defined the principle of peremption as follows:

> "*If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with an intention to appeal. And the onus of establishing that position is on the party alleging it. In doubtful cases, acquiescence, like waiver, must be held non-proven.*"[14]

12. Mr Zuma, for bad or good reasons, is not barred from participation in this application or these confirmation or appeal proceedings on the basis of his prior conduct in relation to *court a quo* proceedings. His right of access to courts is guaranteed in section 34 of the Constitution – and the exercise of that right does not depend on whether he participated in the court a quo

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[12] *Samancor Group Pension Fund v Samancor Chrone* 2010 (4) SA 540 (SCA) at para 25.
[13] *Dabner v SA Railway and Harbours* 1920 AD 583 at 595.
[14] Dabner n 28 at 594.

proceedings. Any party may participate in appeal or confirmation proceedings of this nature if that party is able to demonstrate a legal interest relevant to the protection of his or her constitutional rights. Appeal courts will not likely close the door in violation of section 34 of the Constitution to a party merely because that party did not participate in the court a quo proceedings. The Honourable Court, for example, has a procedure for the involvement of a*micus curie* for the first time on appeal – who meets the requirements. Mr Zuma is a party to the case as second respondent with a legal interest – and such a status is not forfeited on the basis that he did not participate in the court a quo. In any event, the Applicants have not shown how they are prejudiced if Mr Zuma participates in the appeal proceedings.

13. Mr Zuma's application to participate and oppose the relief granted against him should be granted for the following reasons:

13.1. The relief specifically granted against him violates his constitutional rights to privacy guaranteed in section 14 of the Constitution.

13.2. The reasons advanced by the Applicants for seeking to close the mighty doors of the court to Mr Zuma do not meet the threshold of section 36 of the Constitution – which would justify limiting Mr Zuma's section 34 rights only on the basis that he participated in the court a quo proceedings.

13.3. The approach to the relief sought by the Applicants violate section 9(1) of the Constitution in that its main target in changing the law is to specifically target him in order "*to ensure that those currently in office hold him to account*". The idea that the law should be changed to target a single individual is inimical to the principles of section 9(1) of the Constitution which guarantees everyone the right to equality and the equal protection of the law. The single purpose of the Applicants' application in seeking the constitutional invalidation of a series of legislative provisions in PAIA and TAA to

get their hands on Mr Zuma's tax records has no constitutionally justifiable basis based on public interest. On the terms of Mr Pauw's books, and its own narrative, the Applicant seek to parade Mr Zuma's tax records as symbols of corruption and to subject him to the alter of public humiliation and lynching – irrespective of what that tax information discloses. Mr Pauw does not write in neutral terms on whether Mr Zuma has committed tax crimes but is definitive and unkind. The purpose of the application is to use unlawfully obtained tax information of Mr Zuma to humiliate him and not praise him. As the Applicants themselves state, they do not have direct evidence that Mr Zuma has committed any tax crime otherwise they would publish that evidence.

13.4. The nature of the appeal proceedings in this matter are such that there is no prejudice to the proper adjudication of the legal and constitutional disputes if Mr Zuma's participation is permitted and his application is granted to deal with the merits of the orders of the court *a quo*. The appeal court has a ready procedure and the judicial discretion vast enough to adjudicate the scale of this constitutional dispute on all the facts necessary for the drastic legislative changes with serious implications for the rights of everyone that are protected in the Constitution and the functioning of SARS in the performance of its tax collection duties.

13.5. In any event, the relief sought by the Applicants of constitutional invalidity has legal teeth only when confirmed by the Constitutional Court. It follows that until confirmed by the Constitutional Court, the orders of constitutional invalidity in relation to the legislation is of no legal effect. Section 167(3)(b) of the Constitution provides that the Constitutional Court makes the final decision whether a matter is a constitutional matter or whether an issue is connected with the decision on a constitutional matter. Section 167(5) of the Constitution provides that the Constitutional Court "*makes the*

final decision whether an Act of Parliament, a provincial act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or court of similar status, before that order has any force." This means that when the Constitutional Court is engaged in confirming orders or constitutional invalidity made by the lower courts, a party who is directly affected by such a declaration is entitled to participate in the proceedings.

13.6. The order of the court *a quo* directly implicates Mr Zuma's section 14 constitutional rights. On the basis of that, it would be in the interest of justice to grant Mr Zuma's application to appeal order 5 and 6 of the court a quo.

13.7. Mr Zuma has in any event provided reasons for his failure to participate in the proceedings before the court *a quo*. Those reasons cannot be gainsaid even if the Applicants would not believe them.

14. It is clear that Mr Zuma would have participated in the court *a quo* proceedings if the circumstances permitted it. In respect of the delay in filing this application for leave to appeal, he provides reasons that cannot be gainsaid. First, his lawyers were unavailable to consult with him on this matter within the fifteen days of the rules. The suggestion that he could engage a second set of lawyers misses the point because he also specifically points out that he did not have the financial resources that are required to engage a new set of lawyers. Second, it is well-known that Mr Zuma is under medical parole conditions that requires that he is under constant medical check-up from the South African Military Health Services. It is therefore not easy to schedule consultations with his lawyers as he wishes.

15. In any event the nature of the constitutional questions raised in this application are significant – even though largely about Mr Zuma, will have far-reaching implications for the statutory regime that has existed from ancient times which was designed to offer protection of tax information

from abuse and malicious activities. It is therefore in the interest of justice to condone the late filing of this application. That the court *a quo* took the drastic step of invalidating a myriad of legislation in order to enable journalists to access Mr Zuma's tax information for mere publicity is a far-reaching judicial intervention in particular because it is premised on untested and unpleasant allegations of alleged criminal wrongdoing.

16. There is no constitutional dispensation or public interest justification sanctioned by the Constitution for the position adopted in relation to Mr Zuma's tax information.

17. In any event, Mr Zuma seeks to make legal submissions relevant to the protection of his constitutional rights. There is no discernible prejudice to any of the parties if leave to appeal is granted. There is also no prejudice to the Court's adjudication of this matter if leave to appeal is granted to Mr Zuma on the terms and scope he seeks or as directed by the Court.

18. Finally, if condonation for the late filing of this application is granted, there are reasonable prospects of success on appeal.

GROUNDS ON WHICH APPLICATION FOR LEAVE TO APPEAL SHOULD BE GRANTED

19. The grounds on which leave to appeal should be granted reflect the prospects of success on the merits. Before dealing with the reasonable prospects of success on the merits, it is important to reflect on the accusations made against Mr Zuma by the Applicants on which they contend for public interest access to his private information.

The allegations

20. The allegations on which the Applicants seek access to Mr Zuma's tax information are set out in the founding affidavit and are based on the allegations made in a book published by a Mr Pauw called "***The President's Keepers***". The relevant extract is attached as "**FA1**"to the

filed record.[15] A careful reading of the extract does not disclose specifics facts on which to hold that there is credible evidence of any tax violation specifically by Zuma. The language employed in the book is speculative, judgmental and demonstrative of a writer who is invested in a political narrative of Zuma corruption. He speaks in very vague terms such as allegations that certain people and businessman were alleged paying unknown or unquantified sums of money to the family of Zuma. There are no allegations of the specific amounts allegedly paid to Zuma personally for which he could be held liable for tax under the Tax Income Act.

21. In the founding affidavit of the Applicants, the full content of the allegations on which it is alleged a breach of Mr Zuma's privacy rights as encapsulated in the Constitution and the relevant statutory provisions in the suite of application legislation, is contained in numerous paragraphs:

21.1. In paragraph 25 of the founding affidavit, *a quo*te from the book of Pauw is the starting point. The quote refers to the "*darkest secret at the heart of Jacob Zuma's compromised government: a cancerous cabal that eliminates the President's enemies and purges the law-enforcement agencies of good men and women.*"[16] The allegation does not provide specific evidence and support for the invasive order sought against Mr Zuma in relation to his alleged conduct relevant to tax compliance. It is a gratuitous political comment on Mr Zuma but contains no *prima facie* evidence of a violation of any tax obligation.

21.2. In paragraph 27 of the founding affidavit, the Applicants contend, based on the hearsay allegations of Mr Pauw.[17] By reference to the relevant content of the book, there is no support for the allegation that Mr Zuma "*did not submit tax returns at all for the first seven years of his presidency.*" The allegation made in the book is that Mr Pauw has

[15] Vol. 1, pages 53 to 81.
[16] Vol.1, page 14 at para 25.
[17] Vol. 1 page 14 para 27.

"*sources*" who informed him that by May 2015 Zuma had not submitted his returns. This is far from supporting the allegation that he did not submit tax returns at all for the first seven years, later alone for the allegation that the unnamed or undisclosed "*sources*" are a credible basis on which the relief sought against Mr Zuma should be granted.

21.3. Based on a speculative belief of Mr Pauw, it is alleged by the Applicants that Mr Zuma as a fact "*owed millions of rand in tax for the fringe benefits*" he received because of the "*so-called*" security upgrades to his Nkandla residence. The amount allegedly owed is unspecified and as will be argued further, the allegation does not provide a *prima facie* basis for the order sought by the Applicants.

21.4. Based again on undisclosed official or unofficial sources, the Applicant contend that Mr Zuma "allegedly received various "*donations*" from illicit sources – alleged tobacco smugglers, Russian oligarchs and the Gupta family – while he was President. In the book, Pauw on page 106 says that "*There is another reason why Mr Zuma was hesitant to submit his tax returns: 'alternative' sources of income. There is, firstly, the 'Nthanthla' payments that alleged tobacco smugglers made from their Royal Sonnic bank account. I don't know what happened to the money or whether it was indeed delivered to Zuma and his Nkandla household. The president – via Edward Zuma – may have known that SARS was aware of some of these payments. What if he didn't declare them in his tax returns and SARS established that the money was indeed handed to the president?*" (Emphasis added.) It is clear that there is simply no prima facie evidence from this book on which to justify the granting of these invasive orders that violate Mr Zuma's constitutional rights.

21.5. The entirety of the allegations made against Mr Zuma would in any event not require him to answer to Mr Pauw on the basis of how he has framed the allegations.

22. In the absence and without any regard to Mr Zuma's constitutional rights, Mr Justice Davis in the court a quo granted all the relief sought by the media respondents against Mr Zuma.

23. Mr Zuma does not intend to make legal submissions on whether the court *a quo* was correct in its order declaring the provisions of the PAIA and TAA to be unconstitutional. The legal submissions made on behalf of SARS and the other government respondents in the *court a quo* on the constitutionality of the statutory regime created in PAIA and TAA are supported in that they provide a balance that accords with the protection of the right to privacy and access to information in a manner that is constitutionally permissible. The law as reflected in PAIA and TAA is consonant with the values of human dignity, the achievement of equality and advancement of human rights and freedoms. They provide constitutionally unassailable premise for regulating the right to access private information and the right to that private information.

24. With specific regard to the "*public interest*" justification for granting the Applicants access to Mr Zuma's confidential tax information, the legal questions to be addressed in this appeal is the following:

24.1. The first is whether the court *a quo*'s approach to Mr Zuma's constitutional rights accords with established jurisprudence on the right to privacy in section 14 of the Constitution where such right is juxtaposed with that of the right to access information under section 32 of the Constitution as given effect to under PAIA.

24.2. The focus of Mr Zuma's submissions will therefore be on whether the court *a quo* has accurately and fairly reflected the true extent and content of his rights, even if the impugned legislation, were to be confirmed as being unconstitutional. In other words,

does the order of constitutional invalidity in respect of the impugned legislation confer a right higher to his to privacy in relation to that sought to be enforced by the Applicants of access to private information? This will require an examination of whether there is a public interest basis represented by the Applicants that may limit the right to privacy in relation to that of the right to access to information in a manner permitted by the Constitution.

24.3. Related to the first issue is whether there is evidence to support a public interest right justifying the granting to the Applicants of access to Mr Zuma's private tax information based on Mr Pauw's book and for salacious publication and public scrutiny. It is particularly important in assessing the case for the rights of the Applicants that they seek access to Mr Zuma's private information in order to publish and scrutinise it for any criminal wrongdoing.

24.4. This calls for determining whether the court *a quo* was entitled to make far-reaching constitutional orders based entirely on unreliable and inadmissible hearsay evidence contained in a published book and reports of commissions of inquiry – the Nugent Commission of Inquiry and the so-called Zondo Commission of Inquiry.

24.5. The judgment is designed to operate only in relation to Mr Zuma's tax information and it is unclear whether it would apply generally to all taxpayers – although it is clear that this would be the case to all accused Zuma-alikes.

24.6. Finally, the order violates Mr Zuma's right to inherent dignity guaranteed in section 10 of the Constitution. The intended use of the Applicants of this private information based on the book of Mr Pauw and the hearsay allegations in commissions of inquiries is to continue to parade Mr Zuma as a corrupt person who has successfully managed to avoid being held to account by law enforcement agencies. That political narrative while

falling under section 16 of the Constitution as protected political speech in that it is routinely and ordinarily perpetrated by Mr Zuma's political foes, it cannot likely be endorsed by the Courts as reflective of the type of evidence on which constitutional rights must be protected. The relief sought by the Applicants is designed to be abusive of Mr Zuma's constitutional right to inherent dignity in that it is based on information from a book that has no legal credibility to find a constitutional cause of action in favour of the Applicants' right to access Mr Zuma's tax information.

PRIOR CONSTITUTIONAL COURT RULING ON SECURITY UPGRADES AND STARE DECISIS

25. The total sum of the judgement of the court *a quo* revolves around the following totally unsubstantiated findings of facts:

25.1. In paragraph 5.1 of the judgment, the applicants relied on the averments extracted from a book published in October 2017, titled "*The President's keepers*". by Taleberg publishers. The author is an investigative journalist, Jacques Pauw. The averments relied on by the applicants in their papers regarding Mr Zuma's tax affairs during his presidency are the following:

25.1.1. that Mr Zuma did not submit tax returns at all for the first seven years of his presidency;

25.1.2. that he owed millions of rand in tax for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence;

25.1.3. that he received various donations from illicit sources — alleged to be tobacco smugglers, Russian oligarchs and the Gupta family;

25.1.4. that he had drawn a six-figure "salary" as an "employee" of a Durban security company for the first few months of his Presidency (it appears that he had subsequently paid the money back in response to queries);

25.1.5. that Mr Zuma had appointed Mr Tom Moyane as the Commissioner of SARS to undermine the institution's enforcement capability and to prevent it from prosecuting Mr Zuma for non-payment of taxes and other financial malfeasance, and from investigating people linked to him; and

25.1.6. that it was not clear whether Mr Zuma was tax-compliant at the time of publication and that it was probable that SARS was not taking steps to extract the tax he owed.

26. The court *a quo* overlooked this Honourable Court's ruling in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11. The applicants before him made allegations that Mr Zuma "*owed millions of rand in tax for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence*." The Constitutional court resolved exactly that issue in *Economic Freedom Fighters v Speaker* through the following order that:

> "*5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.*
>
> *6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.*
>
> *7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.*

8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report."

27. This Honourable Court was very clear that security-related upgrades were not taxable fringe benefits and that the state had the legal obligations to provide those security upgrades at Mr Zuma's homestead. The responsibility for providing security to the President as head of state belongs to the national executive and is not an undeserved benefit or one for which the former President must be required to submit tax return. There is no precedence for this approach to Mr Zuma's circumstances.

28. The court *a quo* committed a fundamental error on this score in that it permitted the media respondents to formulate their own interpretation of the Constitutional Court's ruling and the Public Protector's findings and based on their reformulated view to claim "*public interest*" standing to seek the relief against Mr Zuma.

29. Without question, decisions of the Constitutional Court are binding on all lesser courts based on the principle of *stare decisis,* which is a juridical command to the courts to respect decision already made in a given area of the law. This means that the High Court must follow the decisions of the courts superior to it even if it believes such decisions are clearly wrong. The statement of principle by Didcott J in *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) that is thus concisely summarised in the headnote to that judgment is in point:

> "*The doctrine of judicial precedent would be subverted if judicial officers, of their own accord or at the instance of litigants, were to refuse to follow decisions binding on them in the hope that appellate tribunals with the power to do so might be persuaded to reverse the decisions and thus to vindicate them ex post facto. Such a course cannot be tolerated.*"

30. In practical terms this means that once the Constitutional Court ruled that Mr Zuma was obligated to pay "*the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security*" as determined by National Treasury, it was no longer permissible for any litigant in a lower court to argue that Mr. Zuma had a duty to pay "*millions of rand in tax for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence*." Because the Constitutional Court was clear that only costs that "*do not relate to security*" were payable, it was no longer open for the High Court to rule that Mr Zuma was liable in tax for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence. Unfortunately, the High Court judgment not only contradicted and undermined a judgment of the apex court on exactly the same issue.

31. The Constitutional Court was unambiguous and clear that the National Treasury first had to determine "*a reasonable percentage of the costs of those measures which ought to be paid personally by the President*", that the National Treasury "*must report back to this Court on the outcome of its determination*" within a specified period and that the "*President must personally pay the amount determined by the National Treasury*" in terms of the Court order. The entire universe of what costs and related taxes Mr. Zuma owed on the Nkandla non-security upgrades was dictated by the Court's order and not journalists. Faced with an explicit Constitutional Court judgment that specifically said Mr. Zuma was liable only for costs not related to security on the one hand and the argument of the applicant journalists that Mr. Zuma was liable in tax "*for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence*" on the other, the court *a quo* preferred and endorsed the prejudiced opinions of the applicants. The entire premise of the court ruling on the Nkandla tax issue was grossly erroneous and insufficient to sustain a judgment invoking the so-called "*public interest*" exception.

32. Justice Davis opined that "*Mr Zuma has not opposed the application, neither in general nor in respect of the relief aimed at disclosure of his personal tax affairs and has not delivered any affidavit addressing the aforesaid allegations made regarding himself and his tax compliance.*" But that was all beside the point. Justice Davis and all the litigants including counsel were fully conversant with the Constitutional Court's ruling in the *EFF v Speaker* (Nkandla) case. The court *a quo* was bound by it on the specific question and held the applicants' case trenched on a ruling of the apex court on exactly the same issues and that he was bound by the principle of *stare decisis* to follow the Constitutional Court ruling. The record reveals that Justice Davis was willing to take judicial notice of hearsay testimony before the Zondo Commission proceedings which were ongoing and the hearsay testimony before the Nugent Commission but he could not take judicial notice of a binding ruling by the highest court in the land, the Constitutional Court.

33. Another fundamental error emanating from the judgment of the court *a quo* is manifested in paragraph 5.2 of his judgment. The Court states:

> "*Some of the allegations are confirmed or corroborated by public documents, such as the findings of personal benefit derived from the upgrades to the Nkandla residence contained in the then Public Protector's report entitled 'Secure in Comfort', evidence led at the Nugent commission and the findings made regarding the undermining of SARS by a previous commissioner, Mr Moyane and the evidence led at commission of enquiry into 'State Capture' chaired by DCJ Zondo.*"

34. It is simply untrue that the findings of personal benefit derived from the upgrades to the Nkandla residence contained in the then Public Protector's report entitled "*Secure in Comfort*", are confirmed or corroborated by public documents as alleged by the court *a quo*. On the contrary, the Public Protector's report confirmed that the security upgrades at Mr Zuma's residence were the responsibility of the state and Mr Zuma was not liable for the costs thereof. She ruled that

only the costs of the non-security upgrades were payable by Mr Zuma and that finding was confirmed by this Court in the **EFF** judgment.

35. It is apparent from the above reasoning of the court *a quo* that the court completely misapprehended and misapplied the basic "***Plascon Evans***" rule applicable in motion proceedings. Where the applicants seek final relief on motion, "*bona fide factual disputes must thus be determined on the respondents' version. A purported factual dispute will lack bona fides only if the respondent's version is a bald or uncreditworthy denial or is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it on the papers. See, Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 55; National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.*" Even worse, the court *a quo* not only admitted and relied on inadmissible hearsay but went on to resolve *bona fide* factual disputes in favour of the applicants and contrary to the evidence on the record. The sincerity of the applicants' belief in the veracity of Mr Pauw's allegations cannot serve as a substitute for cogent admissible evidence that must be a basis for a court judgment. Nor can a Public Protector's report be falsely characterized as a confirmation and corroboration of allegations it clearly did not support.

36. With all due respect, the court *a quo* misapprehended the general rule that where, in proceedings on notice of motion, disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent or not placed in dispute, together with the facts alleged by the respondent, justify such an order. But here the respondent SARS not only denied the averments but the very Public Protector report relied upon by the applicants refuted and contradicted their assertions. It was simply a basic error for the court *a quo* to rely on the said material which created further factual disputes.

37. As a general rule, if the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may then proceed on the basis of the correctness thereof, and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. But here there was both a denial by SARS and lack of admissible evidence from the applicants. Inadmissible evidence does not become admissible simply because an applicant has relied on it in a sworn affidavit placed before the Court. The court *a quo* compounded the problem by not only taking allegations in a published book as gospel truth but by proceeding to make findings that those allegations sufficiently undergird a "*public interest*" justification for making confidential taxpayer information available to any inquisitive journalist. In this process, the journalists were not only allowed to falsely attribute untrue statements to the Public Protector and her reports, but they were also allowed to disregard the apex court judgment on exactly the same issue. Inevitably, this resulted in a judgment which is not only factually and legally flawed but placed the court *a quo* in a position where it violated the fundamental principle of *stare decisis*.

38. The court *a quo* asserts in paragraph 5.3 of the judgment that based on these allegations, "*the applicants aver that 'credible evidence' exists that Mr Zuma was not tax-compliant while he was president.*" Again, there is a huge jurisprudential problem that collapses the entire judgment. The applicants did not produce any evidence – they simply averred that "*credible evidence*" exists that Mr Zuma was not tax-compliant while he was president without providing any credible source for these allegations. But the alleged "*credible evidence*" is hearsay statements contained in books and the applicants did not even bother to obtain confirmatory affidavits from the Book authors. Instead, they misrepresented the content of the Public Protector report as clarified and enforced by this court's very explicit order. The applicants' allegations actually contradicted both the Public Protector's findings and the subsequent

Constitutional Court judgment. And yet the court *a quo* ruled that these allegations were supported and corroborated by the Public Protector's report which contradicted them.

VIOLATION OF THE SEPARATION OF POWERS PRINCIPLE

39. The fundamental premise of the applicants' allegations was flawed – it was both factually false and was contradicted by the prior ***EFF*** judgment of this Court. It was not permissible for the High Court to strike down the statute and regulations based on false submissions of the applicants who claimed to be acting in the public interest. Extrapolation may take place in drawing factual conclusions on the basis of inference. The judgment disregarded ***Plascon-Evans*** and ignored evidence which contradicted the applicants' pleaded case. It goes without saying that any judgment should be the product of thorough consideration of, inter alia, forensically tested argument from both sides on issues that are necessary for the decision of the case.

40. A cursory examination of the order which was ultimately issued is based on false factual assertions which were contradicted by the applicants' own evidence and court judgments. Thus, not only was the SARS denied a proper hearing, but the respondents were granted relief that could never been supported by the evidence they submitted. In that sense, not only did the judgment suffer a failure of proper judicial reasoning, but it also failed to recognise and respect – as it was constitutionally obliged to do – the limits of the judicial function, and hence the separation of powers. The court *a quo* failed to heed the admonition of the SCA in the *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277; 2009 (1) SACR 361 as follows:

> "*It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law. The underlying theme of the court's judgment was that the judiciary is independent; that judges are no respecters of persons; and that they stand*

between the subject and any attempted encroachments on liberties by the executive (para 161-162). This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.

Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office."

41. The foundation of the Applicants' case was based upon sweeping generalisations and broad conclusions that did not make out a prima facie case from which an obligation on Mr Zuma was expected to rebut these unverifiable rumours. In the first place, the respondents did not file any confirmatory affidavits from those persons such as Mr Pauw who had allegedly provided "*credible evidence*" that Mr Zuma was not tax compliant. The evidence relied on by the Applicants is rank hearsay, speculative, false and a distortion of the Public Protector's finding confirmed by this apex court.

42. As argued below, the court *a quo* simply failed to consider either the admissibility of the allegations advanced by the applicants or their evidential weight, if any to determine serious constitutional question. Had it done so, it would have arrived at the conclusion that, even on their own version, no cognisable case had been made out by the respondents. It was legally impossible for any court to conclude that Mr Zuma could possibly incur tax liability for "*security-related*" upgrades at his Nkandla homestead. Neither the Public Protector nor the Constitutional Court ever ruled that such liability for security-related upgrades existed.

43. The court *a quo*'s determination of "*public interest*" was based on inadmissible hearsay evidence, a violation of the ***Plascon-Evans*** rule and a blatant disregard of the doctrine of *stare decisis*. Constitutional questions ought to be approached by litigants and courts alike with the

appropriate degree of care. The Constitutional Court has repeatedly warned that constitutional attacks on the validity of legislation must be pleaded explicitly and with specificity to enable the State to know what case it has to meet and to adduce the evidence necessary to do so. But here the court *a quo* erroneously accepted as credible inadmissible hearsay evidence as justification for the invalidation of the relevant statutes.

44. The nature of the hearsay was so defective and uncurable as to be a reliable basis on which to conduct a constitutional case of this magnitude. Not even the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 could give credibility to the nature of the evidence sought to be relied on by the Applicants.

45. Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 provides:

> "*3 Hearsay evidence*
>
> *(1)Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-....*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

46. In this case, the Applicants, by their own admission, have no personal knowledge of the facts underpinning the allegations made from the sources that they seek to rely on. Instead, they purport to rely on wild speculations of a published book of Mr Pauw and the irrelevant findings of the Nugent Commission of Inquiry.

47. The court *a quo* discussed the so-called evidence led at the "*Nugent Commission and the findings made regarding the undermining of SARS by a previous commissioner, Mr Moyane.*"

48. But the well-established rule is that the findings of the Nugent Commission of Enquiry are not automatically admissible in court proceedings – and may particularly not be used against a party who was not the subject of that investigation, whose evidence was not sought by that Commission and where no direct evidence was led supportive of the extravagant claims made against Mr Zuma.

49. There is simply no principle of law relied on by the court *a quo* to justify its dependence or reliance on these unreliable sources as supportive of the Applicants' case for access to Mr Zuma's tax record in violation of the rights of Zuma.

50. It is accepted almost universally that that Commissions of Inquiry are not courts of law and evidence adduced during a commission's inquiry is not automatically admissible in civil or criminal proceedings.

COMPARATIVE JURISPRUDENCE ON THE ADMISSIBILITY OF THE HEARSAY EVIDENCE OF A COMMISSIONS OF INQUIRY

51. In New Zealand the courts have made it clear that commissions of inquiries are not courts of law, nor administrative tribunals. See, for example, *Peters v Davison* [1999] 2 NZLR 164, 181

(CA). Such Commissions do not have the power of determination, and their recommendations and findings bind no one. They can even be ignored or rejected by the executive arbitrarily.

52. The **Davison** Court cited *In Re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 at p 109 where North J said:

> "*A Commission of Inquiry is certainly not a Court of law ... Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a lis, a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one.*"

53. The **Davison** court also made the following observation:

> "*In opposition are basic characteristics of a commission of inquiry. Its report is merely an expression of its opinion. A commission of inquiry is not to be likened to a Court of law nor to an administrative tribunal entrusted with the duty of deciding questions between parties; there is nothing approaching a lis and the commission has no general power of adjudication (North J in Re the Royal Commission to Inquire into and Report upon State Services in New Zealand at p 109). It follows that the reports of commissions of inquiry have no immediate legal effect. Because the reports of commissions of inquiry are, in the end, only expressions of opinion, "[i]n themselves they do not alter the legal rights of the persons to whom they refer*"

54. The Court, in another New Zealand case, *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618, made important observations as follows:

> "*This is not an appeal. Parties to hearings by Commissions of Inquiry have no rights of appeal against the reports. The reason is partly that the reports are, in a sense, inevitably inconclusive. Findings made by Commissioners are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer. Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our*

> *judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice.*"[18]

55. Canadian courts have also accepted the well-established principle that a commission of inquiry may not draw conclusions or make recommendations regarding the civil or criminal responsibility of any person or organization. They are generally prohibited from making any findings of criminal or civil responsibility, and no such finding may be inferred from any of a commissioner's remarks. Such a prohibition is necessary because a commission may admit evidence not given under oath, and the ordinary rules of evidence which provide protection against such matters as hearsay do not apply to public inquiries. Justice Cory of the Canadian Supreme Court in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* (1997), 151 D.L.R. (4th) 1, said the following about the history, nature and role of inquiry commissions in that country:

> "*29 Commissions of inquiry have a long history in Canada, and have become a significant and useful part of our tradition. They have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations.*
>
> ...
>
> *34 A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules*

[18] In Erebus (No 2) at p 653, Cooke, Richardson and Somers JJ.

of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. ... Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility."

56. Very interesting insights are contained in the judgments in the High Court and in the Supreme Court of Ireland. The leading case of *Goodman International and Lawrence Goodman v. The Honourable Mr Justice Liam Hamilton, Ireland and the Attorney General* [1992] 2 IR 542. This decision is now the foundation, in Irish law, of the constitutionality of the evidence of a Tribunal of Inquiry, as known in Irish law. In ***Goodman***, the former Chief Justice said at p.590:

> "*With regard to the suggestion that the findings of the Tribunal if not an impermissible administration of justice by a body other than a court, is a usurpation of the activities of courts in cases where either civil cases are pending or may be instituted, it seems to me that again this submission arises from a total misunderstanding of the function of the Tribunal. A finding by this Tribunal, either of the truth or of the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal conduct or malpractice. I am, therefore, satisfied that the submission under Article 34 must fail.*" (Emphasis added.)

57. Commissions of inquiries all seem to have common several attributes - such tribunals operate "*in vacuo*" and are "*sterile of legal effect*" in that their reports are simply opinions and "*devoid of legal consequences*". The court *a quo* erred in using the findings of the Nugent Commission report as evidence to support the case of the Applicants against Mr Zuma. There is no legal principle utilised by the court *a quo* to support the finding that such incurable hearsay opinions

of Mr Pauw stood as credible evidence on which to make far-reaching constitutional findings that have the effect of changing well-established and respected legal framework designed for the effective protection of rights.

58. The court *a quo* did not regard the Nugent Commission report as "*devoid of legal consequences*" or "*sterile of legal effect*". Instead, the court *a quo* elevated the findings of the commission improperly, and without a credible legal principle, to assume the status of a binding court judgment. That was clearly wrong. A matter of fact requiring to be established before a court must be established by admissible and credible evidence which is open to cross-examination and contradiction, and is given publicly before the Court. It is not normally an admissible form of proof to produce a statement by a third party whether a policeman, a government minister or a Commission of Inquiry and to claim that as having evidential effect, *prima facie* or otherwise.

59. An exception to this arises, of course, where there is an issue which, by virtue of a decision of a court of competent jurisdiction, is *res judicata* between the parties; but such a decision of a court will itself have been reached on admissible evidence duly adduced in a hearing which observes all the parties' procedural rights.

60. Even assuming that the court *a quo*'s reliance on the "*findings*" of the Nugent Commission could somehow be explained or justified, the court *a quo*'s reliance on the "*evidence led at commission of enquiry into 'State Capture' chaired by DCJ Zondo*" is grossly incompetent. DCJ Zondo is still considering and writing a report in which all evidentiary issues including the credibility of witnesses, the admissibility of evidentiary material, cogency of the evidence and what weight to accord to said evidence will be made. It is simply incompetent for a court to rely on the nature of the evidence tendered at a Commission of Inquiry to support a constitutional inquiry into whether the rights of an individual are limited by reference to those facts.

THE RIGHT TO PRIVACY v ACCESS TO INFORMATION

61. The *court a quo* had to deal with whether there was a right of the Applicants to access private information belonging to Mr Zuma that is worthy of protection than his right or that justifies the limitation of the right to privacy. To responsibly address this legal problem, the *court a quo* was obliged to give attention to the established jurisprudence on the right to privacy.[19] The Supreme Court of Appeal[20] recently affirmed the long-held position that the right to privacy "*is the right of a person to be free from intrusion or public of information or matters of a personal nature. It is central to the protection of human dignity, and forms the cornerstone of any democratic society. It supports and buttresses others rights, such as the freedoms of expression, information and association. It is also about respect, every individual has a desire to keep at least some of his/her information private and away from the prying eyes. Another individual or group does not have a right to ignore his wishes or to be disrespectful of his desire for privacy without an solid and reasoned basis.*"

62. Courts hold the right to privacy with an abiding sense of reverence and have held that the privacy right protect inherent dignity of people and enables them to live from the fear of state and private terror. The Constitutional Court in *Mistry v Interim Medical and Dental Council of South Africa and Others*[21] dealing with the content of the right to privacy within the context of the provisions in section 13 of the Interim Constitution [22] set out the constitutional benchmark for limiting the right to privacy. Granting private parties, like the Applicants the right to access private information of taxpayers like Mr Zuma unjustifiably elevates one right above the other. Section 14 of the Constitution is drafted in similar terms as section 13 of the Interim Constitution.

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[19] See: *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2 para 75.
[20] 2022 (2) SA 425 at para 8
[21] 1998 (4) SA 1127 (CC) (1998 (7) BCLR 880; [1998].
[22] "*Every person shall have the right to his or her personal privacy, which shall include the right noy to be subject to searches of his or her person, home or property, the seizure of private possession or the violation of private communications*".

63. The Court reflected on the historical context on which the right to privacy is enshrined. It said that: "*generations of systematised and egregious violations of personal privacy established norms of disrespect for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standards of conduct now required by the Bill of Rights.*"[23] The right to privacy therefore 'exists to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were inconsistent with these values.'[24]

64. In addressing the purpose for which the right to privacy may be limited, the provisions of section 36 of the Constitution apply where the law limiting the right is of general application. In this case, the Applicants content that there is a law that should give them the right to access private tax records of Mr Zuma – and since there was no such law, they launched a constitutional attack on the provisions of PAIA and TAA – which if declared unconstitutional would presumably provide a section 36 justification for accessing the private tax information of Mr Zuma. The problem though with the Applicants' approach is that it is incompetent for the court a quo to have directed SARS – without Mr Zuma's consent- to provide to the Applicants private tax information on the strength its order of constitutional invalidity of the impugned legislative provisions in PAIA and TAA.

65. The court *a quo* misconceived its judicial power to give the Applicants the right to access private tax information of Mr Zuma, without his express consent, on the basis of its order of constitutional invalidity. This is so because its order of constitutional invalidity in respect of the provisions of PAIA and TAA have no effect – in terms of section 167(5) of the Constitution – to independently give justification for the order giving the Applicants the right to access Mr Zuma's private tax records. If the Constitutional Court confirms the orders of constitutional

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[23] Op cit, Mistry at para 25.
[24] Mistry, para 25.

invalidity and upholds the ruling of the court *a quo*, a just and equitable order in terms of section 172(1)(b) of the Constitution could limit the rights to access private tax information retrospectively. Moreover, the order of constitutional invalidity may be suspended for Parliament to take appropriate legislative measure giving effect to the order of the Constitutional Court. The court *a quo* has no power to direct SARS in the absence of Mr Zuma's consent, to surrender his tax records to the Applicants on the basis of its order of constitutional invalidity of the provisions of the PAIA and TAA. Since there is no independent legal basis giving the Applicants the right to access the private records of Mr Zuma, the court was not entitled to rely on its order declaring the provisions of PAIA and TAA as justification for overriding Mr Zuma's privacy rights and the obligation of SARS to comply with its legislative obligations in relation to Mr Zuma's tax records.

66. As the law currently stands – it is clear that the Applicants accept that there is no legal right to access Mr Zuma's private tax or to enforce that right against Mr Zuma's will. That is the basis of the Applicants' approach in the court a quo – to first seek an order of constitutional invalidity that would open the door for them to lawfully demand access to Mr Zuma's private tax information.

67. On the current status of the law and the Constitution, the Applicants should accept that there is no right to access Mr Zuma's private tax information without his consent or a court order. The question therefore is whether the Court engaged with the content of the right to privacy *vis-à-vis* that of the Applicants to have access to Mr Zuma's tax records. On a careful examination of the judgement, it is clear that the court *a quo* failed to conduct an appropriate balancing act of the competing constitutional rights but rather unduly elevated the Applicants' rights over that of Mr Zuma.

68. It stands to reason therefore that the *court a quo* was wrong when it ordered that Mr Zuma's private tax information be supplied to the Applicants for the 2010 to 2018 tax years, ten days after the order. The order is simply unconstitutional because it is based on orders of constitutional invalidity that have no effect until such time they are confirmed by the Constitutional Court and appropriate legislative procedures completed for amending the law to reflect the confirmation orders if granted.

69. The order directing that Mr Zuma's tax information should be supplied to the Applicants cannot flow from order under section 172(1)(a) – for 172(1)(b) requires that the consequences of an order of constitutional invalidity be considered within the discretionary powers to fashion a just and equitable order – which order may limit the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

70. The Court failed to lawfully exercise its section 172(1)(b) discretionary powers in directing that Mr Zuma's private be made available to the Applicants consequent upon the orders of constitutional invalidity involving the provisions of PAIA and TAA. The order in paragraphs 6 and 7 are not just and equitable orders as envisaged in section 172(1)(b) of the Constitution – mainly because the orders of constitutional invalidity have no effect unless confirmed by the Constitutional Court.

THE EXTENT OF THE LIMITATION OF THE RIGHT OF THE RIGHT TO PRIVACY

71. The statutory regime of TAA and PAIA is designed to strike a balance acceptable within limitation threshold of the Constitution in section 36, between the right to privacy and the right to access information. The regulatory system for the protection of tax information is designed to ensure that taxpayers comply with their tax obligations without the prejudice of prejudicial disclosure of their information on sources of income. However, Disclosure of private tax

information may be ordered by a court in specific circumstances.[25] The Commissioner of SARS is permitted to disclose taxpayer private information "*in self-defence*" but only if the taxpayer has, by conduct forfeited the right to secrecy.[26]

72. Section 70 of the TAA provides that taxpayer information may be disclosed to other state agencies but only for purposes associated with the performance of their statutory duties. Section 70(5) provides that the information may be disclosed to the extent necessary for the performance of prescribed state duties. Section 71 provides for the disclosure of taxpayer information to the South African Police Services or the National Director of Public Prosecutions, but only under regulated conditions designed to protect the dignity of the person. The disclosure to law-enforcement agencies may be made on the strength of an order by a judge who may grant it in chambers.

73. Section 67(4) provides that anyone who receives taxpayer information under any of these exceptions in terms of sections 68 to 71 "*must preserve secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those functions.*" A breach of this duty is a criminal offence under section 236.

74. It is clear that the scope of protection offered to taxpayers in relation to their tax information is designed to prevent a constitutional violation to dignity and the right to privacy. On their own version, the Applicants seek to rely on evidence that points to a breach of Mr Zuma's constitutional rights.

UNJUSTIFIED BREACH OF MR ZUMA'S PRIVACY RIGHTS

75. On the clean-hands doctrine, the Applicants should not have been granted their orders even if their application demonstrated a reasonable basis to support a right to access Mr Zuma's private

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[25] See: Sections 62(2)(c) read with sections 69(3)- 63(5) of the TAA.
[26] Section 67(5) of the TAA.

information. This is because it is clear that Mr Pauw, whom they rely on for the allegation to support their claim to a right of access to Mr Zuma's private tax information, relies on sources who breach the obligation against unauthorised disclosure of private information.

76. Mr Pauw definitively finds that "*SARS determined that Zuma was probably liable for taxable fringe benefits of around R145 185 235 relating to upgrades. Taxation at the rate of 40% is around R58 074 094.*" He then finds that "*because Zuma hadn't declared these fringe benefits, a penalty of 10% - amounting to R5 807 409 – would have to be added, plus additional interest. This alone would have brought his tax bill for Nkandla to R63 881 503*".[27] The SARS source for this information is not disclosed and whether such disclosure was authorised by law to be made to him or the public as made out in this book.

77. Mr Pauw discloses that by "*October 2013 SARS had completed its preliminary inquiries into the upgrades and other aspects of Zuma's non-compliance with tax laws. The file was kept with the VIP Taxpayer Unit and locked away while SARS waited for Zuma's tax submissions. Although Michael Hulley had promised that Zuma would submit his tax returns, nothing was forthcoming. SARS, mainly through Kingon, kept nagging Hulley to comply, but Hulley kept giving SARS the runaround.*"[28] The source of this information is declared by the author as being SARS. However, it is not disclosed who gave Mr Pauw access to this SARS information on Mr Zuma's alleged tax liability – in breach of the law and itself a criminal offence.

78. Mr Pauw also discloses that he had "*sources*" who informed him that "*by May 2015 Zuma had still not submitted his returns.*"[29] It is clear that he would not disclose these sources because he appreciates that such sources were breaking the law by disclosing to him SARS information about Mr Zuma's tax liability. Mr Pauw on whom the applicants depend for their request to

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[27] Pauw, Presidents' Keepers, page 104.
[28] Pauw, President's Keepers at page 104.
[29] *Ibid* page 105.

access Mr Zuma's private tax records appears to rely on what he calls "*my sources*" "*My SARS sources*" but does not disclose who those are – because he knew that his so-called "*my SARS sources*" were breaking the law when they disclosed confidential information about Mr Zuma's tax information.

79. It is clear from reading the book of Mr Pauw that SARS sources had acted in breach of the law to disclose information on Mr Zuma's tax matters. The case of the Applicants is based on serious and admitted breaches of the law.

80. The problem with the court *a quo*'s approach is that it failed to have regards to the fact that the Applicants were not just relying on inadmissible hearsay to falsely claim a public interest right to access Mr Zuma, but they were relying on admitted criminal conduct of his undisclosed SARS sources. The court should have found that such criminal conduct did not represent a public interest right of access to Mr Zuma's private tax information. In addition, the court should have relied on the doctrine of clean hands to refuse to entertain an application for the violation of Mr Zuma's privacy right.

THE CLEAN-HANDS DOCTRINE

81. The "clean hands" (or conversely the "unclean hands") concept, as applied in South African contract and labour law, is a modification of an old English law where the "unclean hands" of an applicant usually meant an absolute bar to any relief claimed by him or her. In its modified form in South Africa, the "unclean hands" of both the applicant and the respondent are taken into consideration by a court but are not an absolute bar to being granted relief (*Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 (8) BCLR 971 (E)). In this case, the court found that the applicant employees had displayed a lack of respect for the Constitution and its democratic processes and institutions, but ironically had relied on the self-same Constitution when their lawless conduct brought about their dismissal.

The court specifically referred to the fact that the applicants' hands were not "*clean*"[30] but nevertheless granted the application for reinstatement because the Constitution was supreme and its fundamental rights protect everyone, "*even the basest of individuals, from the abuse of governmental power*" (also at 977). Most importantly, the court also referred to the fact that "*the employer had acted with complete disregard for the disciplinary code and procedure that it was bound to apply. The employer displayed a cynical disregard for the Constitution and the law, similar to that displayed by the employees.*" The court, in spite of holding in favour of the employees, showed its displeasure by denying them the costs that would normally have followed a successful application. What is important is that the Constitutional Court applied the doctrine against the government as well.

82. The "clean hands" doctrine, which is of English origin, is very much similar to the Roman-Dutch law maxim "*in pari delicto potior est condition possidentis vel defendentis*" (*Klokow v Sullivan* 2006 (1) SA 259 (SCA) at 265G). The *pari delicto* rule has been set out in *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA) at para [39] by Brand JA as follows:

> "*The principle underlying the par delictum rule is that, because the law discourages illegality, it would be contrary to public policy to render assistance to those who defy the law. Prior to the judgment in* ***Jajbhay v Cassim*** *1939 AD 537, the pari delictum rule found strict and consistent application in our courts (see eg* ***Brandt v Bergstedt*** *1917 CPD 344). But in* ***Jajbhay*** *this court – while affirming the considerations of public policy underlying the rule - decided that it should be relaxed, as Stratford CJ put it (at 544), in those instances where 'public policy should properly be taken into account the doing of simple justice man and man'.*"

83. The concept has been applied in tax cases where SARS was allegedly at fault, for example, not by applying the rules of natural justice (*Deacon v Controller of Customs and Excise* (61 SATC

[30] At para 977.

275; 1999 (6) BCLR 637 (SE) or is unreasonable (*KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk* (58 SATC 273; 1996 (4) SA 58 (A), or tries to muddy the waters by making unfounded allegations to support its unreasonable contentions (*Ferucci and Others v C:SARS and Another* (65 SATC 47; 2002 (6) SA 219 (CPD), the courts usually come to the rescue of the taxpayer and grant the relief requested.

84. In 2017, the SCA[31] had occasion to discuss whether the conclusion of a fee agreement constituted administrative action and whether it could be set aside on the principle of legality which includes the doctrine of clean hands. In paragraph 24 of the judgment, the court dealt with the doctrine of clean hands and abuse of process. In para 25 the SCA stated the following:

> "*While courts are entitled to prevent any abuse of process it is a power that should be sparingly exercised. The starting point is the constitutional guarantee of the right of access to courts in s 34 of the Constitution. The right is of cardinal importance for the adjudication of justiciable disputes. But where the procedures of the court are being used to achieve purposes for which they are not intended that will amount to ab abuse of process.*"

85. The court dismissed the allegation of abuse of process or clean hands doctrine because on the facts, nothing supported these complaints. It is a trite principle that the courts will use its discretion to refuse to grant a remedy on judicial review where the party making the judicial review application does not come with clean hands. This could include seeking a remedy to facilitate illegal conduct or to obtain an unfair advantage or flouting the law or making misrepresentations.

86. The principle of clean hands doctrine is part of the abuse of process principle. Where a party claiming relief from the court has taken the law into their own to cure the alleged prejudice – as

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[31] *Mostert and Others v Nash and Another* (604/2017 and 597/2017) [2018] ZASCA 62 (21 May 2018).

in this case where the Applicant took the law into its own hands by unlawfully charging an electricity tariff – the courts have refused to aid such an applicant.[32]

87. In discussing the "clean hands" doctrine, there must always be a distinction between a "*law of general application*" and the "*conduct*" of a government official.

88. A Constitutional Court case relevant to the clean-hands doctrine analysis is the *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) where the Constitutional Court sketches out the distinction between a "*law of general application*" and the "*conduct*" of a government official. In Walker's case, the City Council was accused of unfairly imposing high levies for municipal services on certain residents in a formerly advantaged (white) suburb of Pretoria. A further complaint was that the municipality not only attempted to collect high levies from this community but made a conscious decision not to recover levies (albeit at a much lower rate) from residents perceived by the municipality to belong to formerly disadvantaged communities. Thus, two constitutional issues were at stake, namely –

88.1. whether the legislation that imposed higher service levies on the so-called formerly advantaged community constituted a violation of their right to equality; and/or

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[32] Southwood AJA in *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) at [43] "*In my view this approach is consistent with the right enshrined in s 34 of the Constitution: Everyone has the right to have any dispute that ... can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. On a number of occasions the Constitutional Court has emphasised the importance of this right: It is of cardinal importance and requires active protection and courts have a duty to protect bona fide litigants (Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) ... in para [17]); the 'untrammelled access of the courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom' (Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre a Amicus Curiae) 2001 (4) SA 491 (CC) ... in para [23]); it is the foundation for stability of an orderly society and it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help': it is a 'bulwark against vigilantism, and the chaos and anarchy which it causes' (Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC) ... in para [22]; it is fundamental to a democratic society that cherishes the rule of law (First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another 2000 (3) SA 626 (CC) ... in para [6]).*"

88.2. whether the "*conduct*" of the Council's officials, in only collecting levies from the so-called formerly advantaged community, violated their right to equality.

89. The first question deals entirely with the constitutionality of the perceived unfair discriminatory legislation, and not with the conduct of the Council's officials in enforcing the legislation – the court's decision was that the legislation was not unfair or unequal – and thus constitutional.

90. Applied to this case, the following features are critical:

90.1. The alleged conduct of SARS sources that unlawfully disclosed Mr Zuma's tax information to Pauw;

90.2. The conduct of the Applicants in relying on that unlawfully conduct in relation to unauthorised disclosure of information in contravention of Mr Zuma's right to privacy;

90.3. The conduct of the Applicants in relying on inadmissible hearsay evidence without any attempt to verify its authenticity or even considering the implications of relying on such unreliable sources to find a constitutional cause of action;

90.4. The failure to have regard to Mr Zuma's right to dignity when relying on such information;

90.5. Failing to consider whether it is consistent with the "*dignity*" of the Court as envisaged in section 165(3) of the Constitution to seek its endorsement of criminal conduct committed in violation of Mr Zuma's constitutional rights by granting an order disclosing Mr Zuma's private information.

91. In any event, the allegations against Mr Zuma amounts to allegations of criminal conduct. The Applicants do not have the lawful enforcement duties and therefore cannot investigate criminal conduct. The South African Police Services or law enforcement agencies have that authority

which they are entitled to exercise on behalf of the public. The Applicants' intention with Mr Zuma's private information is to abuse him using the Court processes in violation of principles set out in section 165(3) of the Constitution.

92. For all the reasons set out above, it is in the interest of justice to condone the late filing of this application, to grant leave to appeal orders in paragraphs 5 and 7 of the judgment of Mr Justice Davis and uphold the appeal and to uphold the appeal in respect of Mr Zuma's application with costs including costs of two counsel.

THABANI MASUKU SC
MENZI SIMELANE
Chambers
Cape Town & Johannesburg
20 May 2022

TABLE OF AUTHORITIES

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2. Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) (1996 (4) BCLR 449; [1996] ZACC 2
3. City Council of Pretoria v Walker 1998 (3) BCLR 257 (CC)
4. Credex Finance (Pty) Ltd v Kuhn 1977 (3) SA 482 (N)
5. Dabner v SA Railway and Harbours 1920 AD 583
6. Deacon v Controller of Customs and Excise (61 SATC 275; 1999 (6) BCLR 637 (SE)
7. Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11
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9. KBI v Gekonsolideerde Sentrale Ondernemingsgroep (Edms) Bpk 58 SATC 273; 1996 (4) SA 58 (A)
10. Klokow v Sullivan 2006 (1) SA 259 (SCA) at 265G
11. Mistry v Interim Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC) (1998 (7) BCLR 880; [1998]
12. Mostert and Others v Nash and Another (604/2017 and 597/2017) [2018] ZASCA 62 (21 May 2018)
13. National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277; 2009 (1) SACR 361
14. Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others 2006 (8) BCLR 971 (E)
15. Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd 2004 (6) SA 66 (SCA)
16. Samancor Group Pension Fund v Samancor Chrone 2010 (4) SA 540 (SCA)
17. Smuts v Botha 2022 (2) SA 425

COMPARATIVE JURISPRUDENCE

1. Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System) (1997), 151 D.L.R. (4th) 1

2. Goodman International and Lawrence Goodman v. The Honourable Mr Justice Liam Hamilton, Ireland and the Attorney General [1992] 2 IR 542
3. In Re the Royal Commission to Inquire into and Report upon State Services in New Zealand [1962] NZLR 96
4. Peters v Davison [1999] 2 NZLR 164, 181 (CA)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: CCT 365/21

In the matter between :-

ARENA HOLDINGS (PTY) LTD t/a FINANCIAL MAIL	First Applicant
THE AMABHUNGANE CENTTRE FOR INVESTIGATIVE JOURNALISM	Second Applicant
WARREN THOMPSON	Third Applicant

and

THE SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. The fourth respondent ("**the Minister of Finance**") seeks leave to appeal directly to this Honourable Court, against orders 2, 4.2, 4.3 and 9 of an order of Mr Justice Davis which declared sections 67 and 69 of the Tax Administration Act, 2011[1] ("**the TAA**") unconstitutional and invalid,[2] on the basis that the impugned sections constitute an unjustifiable limitation on the right to access to information.[3]

2. The judgment of Mr Justice Davis does not mention any of the evidence and arguments presented by the Minister of Finance in the Court *a quo*. This was based on the findings made by him on the arguments presented by SARS, which he contended justified a finding that the points raised by the Minister of Finance do not have any merit.[4] Consequently, Mr Justice Davis simply declared sections 67 and 69 of the TAA unconstitutional and invalid without laying any basis for such declaration of constitutional invalidity. It is therefore impossible for the Minister of Finance to attack the specific paragraphs of Mr Justice Davis' judgment which were supposed to form the basis for the unconstitutional declaration of sections 67 and 69 of the TAA.

3. Following the judgment of Mr Justice Davis, the applicants brought an application for confirmation of Mr Justice Davis' order, declaring sections 35 and 46 of the Promotion of Access to Information Act[5] and sections 67 and 69 of the

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[1] Tax Administration Act, 28 of 2011 ("the TAA").
[2] Appeal Record, Vol. 9, pp 817 - 840 ("Mr Justice Davis' Judgment").
[3] Appeal Record, Vol 9, p837, para 10.1.
[4] Mr Justice Davis' judgment, Appeal Record, Vol 9, p 838, para 10.6
[5] Act 2 of 2000

TAA unconstitutional and invalid on the basis that these provisions constitute an unjustifiable limitation on the right to access to information ("**the confirmation application").** In terms of the Directions of this Honourable Court, the confirmation application and all the respective applications for leave to appeal brought by the first to fourth respondents, respectively, will be heard simultaneously.

4. The impugned sections of the TAA, which were declared unconstitutional by Mr Justice Davis essentially provide that the Commissioner (as well as his agents) "…*must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official*…"[6] Furthermore, the Commissioner (as well as his agents) are precluded from disclosing, disseminating, or publishing *"any information provided by a taxpayer or obtained by SARS in respect of the taxpayer…"*[7]

5. According to the applicants, sections 67 and 69 of the TAA are unconstitutional because they do not allow for an exception to this rule on confidentiality, even in instances where[8]:

5.1 The disclosure of taxpayer information would reveal evidence of unlawfulness; or of an imminent serious public safety or environmental risk; or

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[6] Section 69, TAA.
[7] Section 67, TAA.
[8] Applicants' heads of argument, p 9, para 22

5.2 The public interest in disclosing the taxpayer information outweighs the harm that the impugned sections addresses.[9]

6. Mr Justice Davis found in favour of the applicants, and ordered a reading in of the "public interest override" provisions into sections 67 and 69 of the TAA, respectively, thereby "curing" the alleged unconstitutionality of the impugned sections. Therefore, Mr Justice Davis' judgment crafted and introduced a new exception to the doctrine of taxpayer confidentiality contained in the TAA.

7. Thus, Mr Justice Davis' judgment expanded the list of exceptions explicitly contained in the TAA. In doing so, Mr Justice Davis judgment ignored the important public policy considerations that underpin the TAA's confidentiality regime, which was adopted by the Legislature. These public policy considerations, which are set out in detail below, favour upholding the TAA's confidentiality regime. If properly considered, these considerations would have led to the dismissal of the applicants' application.

8. The Minister of Finance is the custodian of the TAA, even though SARS is responsible for the administration of the TAA under the control or direction of the Commissioner.[10] The Minister of Finance limits his submissions to this issue.

LEAVE TO APPEAL DIRECTLY TO THIS HONOURABLE COURT

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[9] These exceptions resemble the exceptions contained in section 46 of the Promotion of Access to Information Act, 2000 ("PAIA"), and are referred to by the applicants as the "public interest override."
[10] Section 3 of the TAA

9. Nowhere in his judgment does Mr Justice Davis mention that, in addition to the sections of PAIA that were attacked, sections 67 and 69 of the TAA were also under attack. These provisions were the basis for the Minister of Finance being cited in the court *a quo*. The Minister of Finance opposed the constitutionality attacks on sections 67 and 69 of the TAA on the basis that (i) the media respondents had failed to establish the unconstitutionality of sections 67 and 69 of the TAA; (ii) that the reading relief that they seek is incompetent; and (iii) the substitution order sought incompetent.[11]

10. Nowhere does he deal with any of the defences provided by the Minister of Finance in response to the constitutional challenge of invalidity to sections 67 and 69 of the TAA.[12]

11. Mr Justice Davis further disregarded the findings of Prof Roeleveld on the comparable law on the taxpayer secrecy. The Minister of Finance had relied extensively on Prof Roeleveld's report to demonstrate that studies in most countries show that protection of taxpayer's right to privacy encourages taxpayer compliance.[13] We will deal with this issue in detail below.

12. Mr Justice Davis only made a cursory reference to Professor Roeleveld in paragraph 8.1 of the judgment when he mentioned *"the research referred to by experts relied on by parties, on both sides of the spectrum…"* when discussing the international treaties that South Africa is party to and the comparative analysis of legislation of other jurisdiction, he failed to take into account Prof

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[11] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 900, para 61
[12] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 900, para 62
[13] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 900, para 63

Roeleveld's report which adds depth to the submissions made by SARS. We refer to the discussion above relating to Prof Roeleveld's evidence.[14]

13. In fact, Mr Justice Davis ignored completely the submissions made by the Minister of Finance both in the answering affidavit and the heads of argument as well as the oral submissions made on behalf of the Minister of Finance at the hearing of the application.[15]

14. Mr Justice Davis only mentioned the Minister of Finance's input in paragraph 3.5 of the judgment where he stated that *"lastly, the Minister of Finance claims that the applicants have not made out a case for the substitution of this Court's decision for that of SARS"*. Even then, he decided not to deal with it conclusively and simply made a substitution order that lacked any basis.[16]

15. Mr Justice Davis laid no basis whatsoever for finding in paragraph 10.3 that the *"*reading in*"* of the "public interest override" provisions otherwise contained in section 46 of PAIA is both justified and competent. In fact, he ignored submissions made by both SARS and the Minister of Finance about how the reading in that is proposed by the applicants would not cure the alleged defects.[17]

ISSUES THAT ENGAGE THIS COURT'S JURISDICTION

16. Mr Justice Davis, after declaring sections 67 and 69 of the TAA unconstitutional under order 2, also substituted the decision of SARS with that of the court and

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[14] Minister of Finance's Founding Affidavit, Appeal record Vol 9, pp 900 – 901, para 64
[15] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 901, para 65
[16] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 901, para 66
[17] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 901, para 67

ordered the state respondents, including the Minister of Finance to pay costs of the application. The Minister of Finance submits that this Honourable Court should grant leave to appeal orders 2, 4.2, 4.3 and 9 directly to it for the following reasons[18]:

16.1 This application engages the jurisdiction of this Honourable Court as it engages a constitutional issue in the sense that the impugned orders for which the Minister of Finance seeks leave to appeal, were granted purely on the basis of declarations of constitutional invalidity made by the Court *a quo*;

16.2 Even though the case in the court *a quo* related to access to former President Zuma's tax records, it raises serious public interest issues. This was recognised by Mr Justice Davis in the court *a quo* when he stated in paragraph 5.1 of the judgment that *"although the relief claimed by the applicants and the declarations of constitutional invalidity that they seek, potentially have implications of general application for all taxpayers…".*

16.3 As demonstrated above, the Minister of Finance made valid and meritorious submissions in response to the challenge on the constitutionality of sections 67 and 69 of the TAA, respectively. Mr Justice Davis ignored all of those submissions. We respectfully submit that these submissions require the determination by this Honourable Court.

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[18] Minister of Finance's Founding Affidavit, Appeal record Vol 9, p 903 - 905, para 74

16.4 As matters stand, SARS is only obliged by Mr Justice Davis' court order to release Mr Zuma's tax returns to Mr Thompson. SARS is however under no such obligation in relation to other taxpayers. Furthermore, if there is no confirmation of the order of invalidity, then SARS may never come under such an obligation. However, the operability of Mr Justice Davis' order against former President Jacob Zuma, whose justification is yet to be confirmed by this Honourable Court, raises serious concerns that engage the jurisdiction of this honourable court;

16.5 This application is already before this Honourable Court as the media respondents have referred it for confirmation arising from the judgment and order of Mr Justice Davis;

16.6 In relation to the costs order, We submit that there is no reason why the Minister of Finance should pay the costs of the application below if it succeeds in resisting the confirmation of the orders of invalidity. Order 9 is therefore appealed on that basis.

THE ESSENCE OF THE MINISTER'S CASE

17. The essence of the Minister of Finance's case is that the confidentiality regime imposed by the impugned sections of the TAA meets constitutional muster, given that it represents a fair and proportionate balance between, on the one hand, of the taxpayer's right to privacy, SARS's duty to effectively collect on due taxes, and South Africa's international law obligations; and on the other, the public's right to access to information, which is only partially restricted by the impugned sections.

18. The Minister of Finance further contends that the applicants failed in the court *a quo* to establish the case for the alleged unconstitutionality of sections 67 and 69 of the TAA, respectively. The reading-in relief as well as the substitution order that they sought, and which were granted by Mr Justice Davis are therefore incompetent.

19. It is for this reason that the Minister of Finance seeks leave to appeal against the order of Mr Justice Davis insofar as it relates to the TAA.

THE RELEVANT STATUTORY FRAMEWORK

20. Section 67(3) of the TAA provides that in the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter[19], the person to whom it was so disclosed may not in any way disclose, publish or make it known to any other person who is not a SARS official.

21. The applicants took issue with section 67(3) of the TAA on the basis that it prohibits any person who obtains taxpayer information contrary to Chapter 6 of the TAA from disclosing it to anyone else. The applicants make an example of a journalist who unlawfully obtains taxpayer information from a whistle-blower that reveals serious malfeasance, who, according to section 67(3) of the TAA cannot publish it without breaking the law. [20]

22. It is unclear why this Honourable Court is expected to confirm the constitutional invalidity of the provision of the TAA that would authorize a person who unlawfully obtained taxpayer information of another to disclose to anyone else.

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[19] Chapter 6 of the TAA
[20] Applicants' Heads of Argument, p 8, para 21.1

We ask this Honourable Court to resist the urge to do so as that would not only be contrary to section 67(3) of the TAA but also *contra bonos mores* as this Honourable Court is prohibited from aiding and abetting the applicants or any other third party from committing unlawful conduct.

23. Section 67(4) of the TAA provides that a person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections.

24. The applicants also took issue with this provision on the basis that it infringes their right of access to information. We submit that the applicants are obliged to demonstrate to this Honourable Court why they should be exempt from complying with the proviso that is set out in section 67(4), which is demonstrating that (i) the disclosure is necessary to perform the functions specified in those sections before they are allowed to disclose it others. Absent them complying with this proviso we submit that there is nothing constitutionally invalid about section 67

25. Section 69(1) of the TAA provides that 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.

26. Furthermore, the prohibition in section 67(3) read with section 69(1) is supported by section 236 of the TAA, which provides that 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.

THE FINDINGS OF THE COURT *A QUO*

27. In summary, Mr Justice Davis' judgment found the "blanket prohibitions" related to the disclosure of taxpayer information contained in section 69 of the TAA to be overbroad, in that they do not make provision for the public interest override contended for by the applicants; and therefore unjustifiability limits the right to access of information provided under section 32 of the Constitution. It must be noted that this finding is despite the TAA recognising several exceptions to the TAA's confidentially regime. We set out these exceptions in detail below.

28. Mr Justice Davis' judgment "remedied" this purported breach of section 32 by reading-in the public interest override provisions into section 69 of the TAA.[21]

29. When making this finding, the Mr Justice Davis failed to properly consider and apply the following public policy considerations, both of which informed the Legislature's decision to adopt the TAA's confidentiality regime:

29.1 First, the link between taxpayer confidentiality and taxpayer compliance which has been established by South African courts in the past; and

29.2 Second, international best practice regarding taxpayer confidentiality.

30. Another important feature of the high court judgment was its reliance on this honourable Court's decision in *Chipu.*[22] The High Court, however, ignored the

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[21] Appeal Record, Vol 9, p837, para 10.
[22] Mail and Guardian Media Limited and Others v Chipu NO and Others 2013 (6) SA 367 (CC), paras 13, 45 and 70; Appeal Record, Vol 9, p834 -835, para 8.11 – 8.14.

fact that this case is distinguishable from *Chipu*, because the TAA does not create an absolute prohibition on the disclosure of taxpayer information as contended by the applicants and as was the case in *Chipu* in relation to asylum seeker's application and information contained therein. Instead, it sets out several exceptions to the TAA's general position on confidentiality of taxpayer information. For this reason, this matter is distinguishable from *Chipu* and therefore no reliance should be placed on *Chipu.*[23]

THE PUBLIC POLICY CONSIDERATIONS ON TAXPAYER CONFIDENTIALITY

31. The TAA's protection of taxpayer information gives effect to four features of tax collection:

31.1 First, that confidentiality of information is critical for effective tax administration;

31.2 Second, SARS's primary duty is to collect the correct amount of tax through voluntary compliance, founded on the public's trust;

31.3 Third, SARS' ability and statutory obligations to keep information confidential is an important pillar on which taxpayers' trust is built; and

31.4 Fourth, SARS must exercise vigilance when dealing with access to information, and does so solely to comply with its statutory obligations.

32. The High Court judgment, when faced with submissions that public policy requires that the TAA's confidentiality regime remains intact because it ensures

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[23] Applicants' Heads of Arguments, paras 36 - 38

tax compliance, found that the links between the former and the latter were somewhat uncertain.[24] This, however, is contrary to a string of judgments handed down by South African and foreign Courts over the past few decades.

33. In *Wellz v Hall*,[25] the Court held that:

> *"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. One reason for this reluctance is found in public policy.*
>
> *The 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. This object might easily be defeated it was said in Greenspan v R 1944 SR 149 at 155 6, if orders were freely made for disclosure of those communications. These dicta were referred to by the Appellate Division in R v Kassim 1950 (4) SA 522 (A) at 526G, without dissent."* (Emphasis added)

34. In *Estate Dempers v Secretary for Inland Revenue*[26], The Appellate Division (as it then was) clarified the public policy considerations related to the confidentiality of taxpayer information. In this regard, Corbett JA held as follows:

> *"In each of these statutes sec. 4 [the predecessor of the impugned sections] prescribes that every person employed in carrying out the provisions of the Act (or the Ordinance) shall preserve and aid in preserving secrecy with regard to all matters that may come to his knowledge in the performance of his duties and*

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[24] Appeal Record, Vol. 9, p833 - 836, para 8.
[25] Wellz v Hall 1996 (4) SA 1073 (C).
[26] Estate Dempers v Secretary for Inland Revenue 1977 (3) SA 410 (A)

shall not communicate any such matter to any person other than the tax payer concerned or his lawful representative, nor may he permit any person to have access to any records in the possession or custody of the Secretary except in the performance of his duties under the Act (or the Ordinance) or by order of a competent Court." (Emphasis added)

As explained in Silver v Silver 1937 B N.P.D. 129, it is necessary for the purpose of administering the Act that the fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy. For this reason the Courts do not readily grant orders, against the will of the taxpayer, for the disclosure of information falling within the terms of sec. 4."[27] (Emphasis added)

35. In a more recent judgement, *Sackstein*[28], it was held that:

"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 and Others v Receiver of Revenue, Port Elizabeth and Others 1995 (2) SA 433 (SE) 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.*

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[27] Estate Dempers v Secretary for Inland Revenue 1977 (3) SA 410 (A) at 420A-C.

[28] Sackstein NO v South African Revenue Service 2000 (2) SA 250 (E) at 257G-258B

> *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."* (Emphasis added)

36. These principles were recently affirmed by Mabuse J in *Commissioner, South African Revenue Service v Public Protector & Others*.[29] The Constitutional Court refused to grant leave to appeal in respect of Mabuse J's decision,[30] which therefore remains good law.

37. In *Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt*[31], The Supreme Court of Canada held that:

> *"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."*

38. The above is relevant in this regard , much like Canada, South Africa's income tax system is also based on a self-assessment and self-reporting system. On that basis, the principles relating to the importance of taxpayer confidentiality to ensure taxpayer compliance will be as applicable to South Africa as they are to Canada.

39. In *Slattery*, the Court explained the purpose behind the provisions relating to taxpayer confidentiality as follows:

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[29] Commissioner, South African Revenue Service v Public Protector And Others 2020 (4) SA 133 (GP).
[30] Public Protector v Commissioner for the South African Revenue Service and Others [2020] ZACC 28.
[31] Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt [1993] 3 SCR 430 at 441-442.

> *"[The confidentiality provisions] 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."*[32] (Emphasis added)

40. The Court in *Slattery* concluded as follows:

[32] Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt [1993] 3 SCR 430 at 443-444.

> *"This legislative interpretation [precluding disclosure of taxpayer information] 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."*[33] (Emphasis added)

41. These decisions set out the impact that the confidential treatment of taxpayer information has on the proper administration and functioning of the revenue service. This is especially the case in South Africa, which not only relies on self-assessment and self-reporting in order to ensure the proper calculation and collection of income tax, but which also allows for the levying of taxes on illegally sourced income. This link has been clearly established by several Courts, including the Supreme Court of Appeal.

42. The High Court judgment cannot simply wish away this link, as it has done. Neither can the applicants. Instead, the High Court should have considered the applicants' challenge through the prism of this link, which is now a crystallised component of our law. The High Court misdirected itself when it came to the enquiry of whether or not the infringement of the right of access to information was proportionate and justifiable in terms of section 36 of the Constitution. The applicants are also incorrect in claiming that their right of access to information and freedom of expression are limited, when they have not justified why they should be allowed disclosure of information under sections 67(3) and 67(4) of the TAA.

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[33] Slattery v Doane Raymond Limited, Trustee of the Estate of Raymond P. Slattery, a Bankrupt [1993] 3 SCR 430 at 447.

43. Furthermore, the public policy considerations set out in the abovementioned judgments speak to the purpose behind the limitation of the right of access to information.

44. This purpose, of course, is ensuring that SARS can serve the public interest through its efficient operation.

45. In *Metcash*, this Honourable Court found that obtaining full and speedy settlement of tax debts is in the public interest.[34] In *Pienaar Bros*, this was understood to mean that the fiscus plays a vital role in the public interest of collecting taxes for the economic well-being of the nation as a whole.[35]

46. In *FNB*, this Honourable Court found that fiscal statutory provisions are indispensable for the economic well-being of the country, and therefore serve a legitimate governmental objective of undisputed high priority.[36]

47. The public purpose behind the TAA's confidentiality regime also appears from the history of TAA's drafting process.

48. Even before the Tax Administration Bill ("**the Bill**"), which was later signed into law as the TAA, the National Assembly's Sub Committee on Finance hearing took place on 13 June 2011. As for the Bill, the following was said[37]:

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[34] Metcash Trading Limited v Commissioner for the South African Revenue Service and Another 2001 (1) SA 1109 (CC) at para 60.
[35] Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and another 2017 (6) SA 435 (GP) at para 35.
[36] First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another 2002 (4) SA 768 (CC) at para 31.
[37] The history of the drafting process of the TAA is dealt with in the Minister of Finance's answering affidavit in the high court, Appeal Vol 4, pp 286 - 293, paras 55 – 66

"The Tax Administration Bill was to be introduced later this month. Two issues relating to customs were dealt with in the draft Taxation Laws Second Amendment Bill.

These Bills were part of a larger package that included alleviating the burden for the middle class, incentives to save, promoting growth and jobs, promoting equity and fairness, and protecting the tax base. This briefing was only the start of the consultative process. Adjustments based on public comment were to be reported in the response document in late July/August 2011."

49. The National Council of Province's (NCOP) Committee on Finance hearing took place on 30 August 2011. The Bill was described as a preliminary step towards the intended rewriting of the Income Tax Act. The purpose of the Bill was described as follows[38]:

"The Bill dealt exclusively with tax administration and was intended to address the shortcomings of current tax legislation and to provide for a modern tax administration framework. The briefing included an overview to the background to the Bill, the intended impact, the consultative process followed in drafting the Bill and the salient points under each Chapter of the proposed legislation. The briefing concluded with an overview of the balancing of the powers of SARS contained in the Bill to the rights of taxpayers.

The Bill was intended to provide a modern framework for the administration of revenue collection and to address certain disparities in the existing legislation. The Bill was a preliminary step towards the intended rewriting of the Income Tax Act. The background to the Bill included the importance of effective revenue collection; the mandate of SARS; the rationale for tax administration legislation and international best practice in tax administration. The intended impact of the Bill was the reduction of the compliance burden on taxpayers and the administrative burden on SARS.

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[38] Minister of Finance's answering affidavit in the high court, Appeal Vol 4, pp 286 – 288, paras 55 and 56

> *The intention was to strengthen the enforcement powers over tax evaders and to improve the service levels for compliant tax payers. The Bill was designed with due regard for the constitutional rights of taxpayers, balanced with the obligations of SARS. In drafting the Bill, the international best practice was considered and an extensive consultation process was undertaken. In general, the Bill was favourably received but the consultative process had highlighted additional issues requiring attention. The original draft legislation was amended, where appropriate, to take account of the input received.*

50. During the public consultation period, there was no discussion of confidentiality of taxpayer information, save for a concern raised by PricewaterhouseCoopers related to confidentiality between client and tax practitioner.

51. During this public hearing there was no discussion relating to the confidentiality of taxpayer information.[39] On day 1 of the Finance Standing Committee public hearings on the Bill, which took place on 16 August 2011 the concerns regarding confidentiality of taxpayer information related to confidentiality between client and tax practitioner and was addressed accordingly. Counsel for the applicants stated during the public hearings that the Tax Administration Bill is constitutional in all respects. The response [read denial] that he provided in the applicants' replying affidavit in the High Court in an attempt to justify what he meant at the public hearing should be rejected.[40]

52. The National Treasury (and SARS) did a briefing to the Standing Committee on Finance on 19 September 2011 on the Tax Administration Bill. In this briefing, SARS emphasised the fact that taxpayer confidentiality was paramount and that the integrity of SARS should not be compromised. It was further explained that

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[39] Minister of Finance's answering affidavit in the high court, Appeal Vol 4, p 288, para 58

[40] Minister of Finance's answering affidavit in the high court, Appeal Vol 4, p 289 - 290, paras 59 - 62

taxpayer confidentiality was paramount and it was impossible to run a tax administration system without such taxpayer confidentiality, because if taxpayers ever believed that their information was not in credible hands and that it was used for any other reason, then the levels of non-compliance would increase.[41]

53. Following all of the abovementioned engagements, the final Bill was passed. It contains similar provisions as are contained in sections 67 and 69 of the TAA.

54. The applicants contend that the Minister of Finance (and the Commissioner) failed to establish a link between these policy objectives and the relevant provisions of the TAA.[42] This, however, ignores:

54.1 First, the true character of Prof Roeleveld's evidence, which is set out in more detail below, and which proves a rational link between the impugned provisions and the policy objectives mentioned above; and

54.2 Second, the fact that several Courts have established the existence of this link.

55. The applicants, in trying to disprove the evidence of Prof Roeleveld where she states that *"the disclosure of taxpayer information can only be disclosed to those legislated to receive such information"*, contend that this is a truism "as disclosure must happen in accordance with the law."[43] This is untrue as the applicants challenge the constitutionality of section 67(3) of the TAA which

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[41] Minister of Finance's answering affidavit in the high court, Appeal Vol 4, p 291 - 292, para 63
[42] Applicants' Heads of Argument, paras 49 to 54.
[43] Applicants' Heads of Argument, para 51.3

prohibits disclosure of unlawfully obtained information. Should this Honourable Court confirm the declaration of constitutional invalidity of this provision, then this would amount to disclosure that is **not** in accordance with the law.

56. To the extent that the applicants' suggest that the existence of other exceptions to the confidentiality regime is dispositive of this link,[44] then that suggestion is incorrect. As explained below, the exceptions currently contained in the TAA and across other legislation represent a manifestation of the Legislature's policy position, which represents the intention of the electorate. There is good reason why the public interest override was not included in that list of exceptions set out in the TAA and the applicants have not demonstrated why it should[45].

57. The applicants further contend that the TAA's confidentiality regime should be pierced to ensure that crime is not allowed to "thrive in the dark."[46] This, however, misses the point. The fact that South Africa has taken the decision to allow for unlawfully earned income to be taxable means that it is important that such unlawful conduct is not outed by way of publication of a person's tax information. If the applicants' approach is adopted, South Africa will run the risk of damaging its ability to collect tax on those unlawful income streams, as taxpayers will be hesitant to include such income in their tax returns. This was confirmed by the courts to be in order in *Wellz v Hall* as far back as in 1996 and still remains good.[47]

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[44] Applicant's Heads of Argument, paragraph 53.5 to 53.8.
[45] Applicants' Heads of Argument, paras 53.9 and 54
[46] Applicants' Heads of Argument, para 53.9.
[47] *Wellz v Hall*, discussed above

THE STATUTORY EXCEPTIONS TO TAXPAYER CONFIDENTIALITY

58. The applicants contend that their challenge targets the "absolute protection of tax information."[48] It is for this reason that they place great reliance in *Johncom* and *Chipu*, respectively. However, no such absolute protection exists. The TAA creates several statutory exceptions to its confidentiality regime. The applicants acknowledge this,[49] but despite this concession, continue to assert that the TAA creates a constitutionally impermissible iron curtain of confidentiality.

59. The applicants' understanding of "absolute confidentiality" relates only to the fact that no statutory exception has been crafted for journalists and members of the media.[50] The applicants' difficulty, then, is not that the TAA's confidentiality regime is too opaque, generally, but rather that the TAA does not carve out an exception from which the applicants can benefit.

60. The reality is this: the TAA does not provide for an absolute prohibition of disclosure. The TAA contains several exceptions to the general rule of confidentiality which were put in place by the Legislature. These provisions strike a balance between the need to ensure the protection of taxpayer information and the need to protect certain other legal requirements, such as criminal accountability. The fact that these exceptions do not avail themselves to the applicants is neither here nor there. The exceptions contained in the TAA are a manifestation of the Legislature's policy positions. In a representative democracy, these policy decisions are reflective of the electorate's intention, and should be respected as far as possible. We have already set out above why

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[48] Applicants' Heads of Argument, para 11.2.
[49] Applicants' Heads of Argument, para19.
[50] Applicants' Heads of Argument, para 20.

the public interest disclosure was not included in the list of exceptions in the TAA.

61. Sections 67(5), 69(2) read with 69(5), 69(8), 70 and 71 of the TAA set out exceptions to prohibiting disclosure set out in sections 67 and 69 of the TAA, respectively. They are the following:

61.1 Section 67(5) allows the SARS Commissioner, to protect the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours' notice, to disclose taxpayer information as is needed to counter or rebut false allegations or information disclosed by the taxpayer, the taxpayer's duly authorised representative or other person acting under the instructions of the taxpayer and published in the media or in any other manner;

61.2 Section 69(2) allows a SARS official, in performance of their duties under a tax Act or customs and excise legislation, including (i) to the SAPS or the NPA, in relation to a tax offence; (ii) as a witness in civil or criminal proceedings under a tax Act; or (iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person; (b) under any other Act which expressly provides for the disclosure of the information despite the provisions in Chapter 6 of the TAA; (c) by order of a High Court; or (d) if the information is public information;

61.3 Section 69(5) prohibits the court from granting the order referred to in section 69(2)(c) unless it is satisfied that (i) the information cannot be obtained elsewhere; (ii) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results; (iii) the information is central to the case; and (iv) the information does not constitute biometric information;

61.4 Section 69(8) allows the SARS Commissioner to disclose - (i) the name and taxpayer reference number of a taxpayer; (ii) a list of pension funds,

pension preservation funds, provident funds, provident preservation funds and retirement annuity funds; and public benefit organisations; approved under sections 18A and 30 of the Income Tax Act; (iii) the name and tax practitioner registration number of a registered tax practitioner; and (iv) taxpayer information in an anonymised form;

61.5 Section 70 provides for disclosure by a senior SARS official of taxpayer information to various entities in some cases, including to: a commission of enquiry established by the President where the commission is authorised by law to have access to information; the Governor of the Reserve Bank; the Financial Services Board; and the Financial Intelligence Centre; and

61.6 Section 71 provides that if so ordered by the judge, a senior SARS official must disclose to the National Commissioner of the SAPS or the NDPP information that reveals evidence; that a (non-tax) offence may have been committed where a sentence of more than 5 years may be imposed; or that may be relevant to an investigation or prosecution of the offence; or of an imminent and serious public safety or environmental risk.

62. What is apparent from the above is that the Legislature, having regard to the public policy considerations related to the collection of taxes and the link between that objective and taxpayer confidentiality, has identified certain clear exceptions to the general rule against disclosure. For reasons set out in these heads of argument, the “public interest override” is correctly not one of them.

63. The effect of these exceptions is that that any perceived or alleged limitation of the right to access to information through the TAA is far less extensive, and therefore, the threshold for justification of the limitation is far lower.

INTERNATIONAL BEST PRACTICE

64. The High Court judgment failed to adequately consider or analyse the effect of the impugned provisions of the TAA against the yardstick of international best practice. This yardstick is set out in some detail in the report prepared by Prof Roeleveld,.[51] The contents of this report should be incorporated into these submissions.

65. In essence, Prof Roeleveld contends that there must be a legitimate balance struck between transparency and confidentiality, which are the two underpinnings which exist in all countries in regard to tax legislation. Prof Roeleveld describes transparency as maintaining the right to gain access to information held by a public administration. A government is seen to be transparent when information it holds is accessible. Confidentiality on the other hand means that the public administration does not reveal information to the public.[52]

66. In relying on the Observatory on the Protection of Taxpayers Rights (OPTR) 2018 report, Prof Roeleveld notes that although there have been leaks of confidential information held by the tax authorities, some countries have taken technical measures to increase protection of such data.

67. The illegal disclosure of confidential information by tax officers is punishable in most of the 42 countries participating for the compilation of the 2018 report. Naming and shaming is noted to be a possible exception to confidentiality in

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[51]Prof Roeleveld's report: Annexure AA1 to Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, pp 319 – 333.
[52] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 273, paras 16 - 17

some countries, under specific circumstances and after the administration or judicial decision is final.

68. Prof Roeleveld refers to different countries that have recently undertaken measures to restrict access to personal data by their employees and gives details of how they have managed to do so, including appointing data protection officers in accordance with the General Data Protection Regulation (DGPR).

69. Prof Roeleveld contends that the minimum standard for the OPTR is that "information supplied to the revenue authorities for tax purposes should not be made available to other government departments. Any exceptions should be explicitly stated in the law, and taxpayers should be made aware of those exceptions: unauthorized disclosure to other civil servants (even to other tax officials who are not authorized to receive the information) should be regarded as a breach of taxpayer confidentiality."

70. One of the major findings by Prof Roeleveld is that the impugned prohibitions ensure taxpayer compliance, and are therefore justified. In this regard, Prof Roeleveld finds that – in accordance with the international best practice— countries like the USA, Germany, and the United Kingdom have moved away from a regime of broader accessibility to one of extensive restriction on public access. She points out that in these countries, authorised disclosures are only justified under some exceptions. Yet there is still protection of taxpayer‘s right to confidential information.[53]

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[53] Minister of Finance’s answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 275, para 23

71. In this regard, Prof Roeleveld explains that the USA has moved from a broad accessibility to individual tax return information to extensive restriction on public access.[54] She points out that a taxpayer may waive confidentiality in respect of his own return. Furthermore that there is strict protection of taxpayer information in Germany.[55]

72. Prof Roeleveld demonstrates how protection of the taxpayers' rights to privacy promote taxpayer compliance.[56]

73. As for the effect of disclosing sensitive commercial information of taxpayers, Prof Roeleveld points out that since the tax return information contains details beside income—such as employment status, medical information/disability status, liabilities, personal belongings, and donations to charities—the taxpayer‘s right to confidentiality of their personal information (privacy rules) should outweigh the public‘s right to information as evidenced by sections 67 and 69 of the TAA.[57]

74. Prof Roeleveld states that in order to give effect to these privacy rules, certain countries often use the anonymisation of rulings and judgments to protect the taxpayer‘s privacy, while allowing the judiciary to be transparent and the taxpayers to know the court‘s criteria for relevant tax cases in advance.[58]

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[54] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, pp 275 - 276, para 23
[55] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, pp 276 - 277, para 24
[56] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, pp 277 - 278, para 25 - 29
[57] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 279, para 29 - 30
[58] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 279, para 31

75. As to the impact that disclosure will have on international information exchange agreements between SARS and other countries, Prof Roeleveld states that South Africa would be ill-advised to take steps in breach of the confidentiality rules set out as minimum standards for the exchange of information. This is because South Africa needs to ensure it continues to pass the progress reviews attached to association.[59]

76. According to Prof Roeleveld, South Africa is part of the G20 and the Global Forum on Transparency and Exchange of Information (158 members at end of 2019) and has signed up to the Convention to Mutual Administrative Assistance in Tax Matters. The full name is the Multinational Convention on Mutual Administrative Assistance in Tax Matters. We are advised that there are presently 161 members who are signatories to the Multinational Convention on Mutual Administrative Assistance in Tax Matters.

77. Prof Roeleveld deals in detail with how the countries who are members of the OECD and who are signatories to various other international treaties have conducted themselves as far as information exchange is concerned. She points out, however, that South Africa is not a member of the OECD but has an enhanced status. It appears that this position is not limited only to the OECD member countries as the Global Forum on Transparency and Exchange of Information has 161 members (which includes both OECD and non-OECD member countries).

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[59] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 281, para 35

78. Prof Roeleveld states that South Africa's exchanges (providing information to partner jurisdictions) increased from 57 in 2017 to 63 in 2019. In total 94 jurisdictions participated in the automatic exchange of information. The report (at page 2) also notes that the Automatic Exchange of Information (AEOI) standard contributed to the international community recouping over EUR 100 billion in additional revenue (Tax, penalties and interest). South Africa would be ill advised to take steps in breach of the confidentiality rules set out as minimum standards for the exchange of information. South Africa has passed a first review but needs to ensure they pass the second progress review due in 2021.[60]

79. Prof Roeleveld further contends that while there are several confidentiality procedures that are taken very seriously in the process of exchange of information between tax authorities suffers from one serious flaw, that being (and specifically in the context of exchange by request), that the taxpayers are not informed about an exchange. Particularly, the taxpayer has no opportunity to confirm that the information about them is correct or that it may contain secret commercial information.

80. According to Prof Roeleveld, the OPTR advocates that as a minimum standard the requesting state should notify the taxpayer of cross-border requests for information unless it has specific grounds that this would prejudice the process of investigation. The requested state should also inform the taxpayer unless the requesting state specifically requests this not to be done for the same reasons.[61]

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[60] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 280 -281, para 32 - 35

[61] Minister of Finance's answering affidavit in the application *a quo*; Appeal Record, Vol 4, p 281, para 36

81. In light of the abovementioned findings of Prof Roeleveld, the applicants are therefore incorrect in stating that the relief that they sought in the high court and which was granted by Mr Justice Davis would not result in South Africa violating its international agreements.[62]

82. The applicants contend that today, in Sweden, a person's total income in his tax return is public information.[63] This, however, is not the case.

83. In fact, Prof Roeleveld corrects the misconception that Sweden freely discloses taxpayer information.[64] In this regard, she refers to *Hambre*,[65] who states that:

> *"Access to information in the return is protected through secrecy rules in PAISA chapter 27. The total of earned income or capital income is public because it occurs in a decision, but the source (or sources) and any deductions remain secret because that is ‗information'. 22 Public access is placed above secrecy in Sweden but nevertheless the personal or economic circumstances of individuals are protected and detailed in chapter 27 of PAISA —secrecy for the protection of individuals in activities concerning tax, customs duty, etc.‖ What is worth noting is the amount of detail and guidance in the legislation to ensure conflicts do not occur. Secret information is subject to time limits, from 2 to 70 years, depending on the risk of damage."*

84. The applicants' reliance on Sweden and the alleged openness of its legislation in allowing taxpayer information to be accessible to third parties in contention of their —public interest override‖ is misplaced and therefore should be rejected as it has no basis. They contend that the documents that they seek in this

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[62] Applicant's Heads of Argument, para 64 – 68
[63] Applicant's Heads of Argument, para 53.2.
[64] Prof Roelvedeld's Report, Appeal Record Vol 4, p 325; Minister of Finance's Answering Affidavit in the High Court, Appeal Record Vol 4, p 274, para 22

[65] Prof Roelvedeld's Report, Appeal Record Vol 4, p 325; Minister of Finance's Answering Affidavit in the High Court, Appeal Record Vol 4, p 274, para 22

application in relation to former President Zuma are the documents that are already made public in Sweden and that has not significantly undermined taxpayer compliance.[66] This is blatantly incorrect, for the reasons set out above.

THE DECISION IN *CHIPU* AND THE RIGHT TO PRIVACY

85. Mr Justice Davis' judgment, referencing the *Chipu* judgment, held as follows[67]:

> *"[8.11] I find it instructive that the Constitutional Court has already in different contexts struck down prohibitions relating to provisions of a sensitive nature or where privacy rights were involved. In Mail & Guardian Media Ltd and Others v Chipu NO and Others 2013 (6) SA 367 (CC) (2013 (11) BCLR 1259; [2013] ZACC 32) the absolute confidentiality surrounding applications for asylum was struck down. There the court held as follows per Zondo J:*
>
> > *'[92] I cannot see why the integrity of the asylum system and the safety of the asylum applicants and their families and friends would be threatened by the publication of information in an asylum application that would not tend to disclose the identities of the asylum applicant, his family and friends. . . .*
> >
> > *[93] . . . In my view absolute confidentiality is not essential [to achieve the object of the Refugees Act 130 of 1998]. . . .'*
>
> *[8.12] The above decision also referred to the Constitutional Court's earlier decision in Johncom Media Investments Ltd v M and Others 2009 (4) SA 7 (CC) (2009 (8) BCLR 751; [2009] ZACC 5) whereby the absolute prohibition against publication of details of a divorce action was struck down.*

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[66] **Minister of Finance's Replying Affidavit, paras 54 – 55.**
[67] Mr Justice Davis' judgment, Appeal Record Vol 9, pp 835 – 836

> *[8.13] In similar fashion as in the abovementioned two cases where international comparisons were made with reference to various other jurisdictions, SARS also conducted such an exercise in the present matter. References were made to the countries mentioned in [7.3] above. Significantly, in my view, references were not to the same extent made to jurisdictions where a contrary view to that of Sars was held.*
>
> *[8.14] In weighing up the limit imposed by the absolute taxpayer secrecy on the rights to freedom of speech and access to information, when the exercise of those rights is in the public interest, against the contentions raised by Sars, I find the following observation by Cora Hoexter in Administrative Law in South Africa 2 ed at 98 (albeit in a slightly different context) to be apposite: 'The claim [is] that free access to official (state held) information is a prerequisite for public accountability and an essential feature for participatory democracy.'*
>
> *When this principle is then juxtapositioned [sp] with the right to taxpayer confidentiality or personal privacy of those in whose affairs the public has a legitimate interest (such as members of the executive), I find that the limitations on the access to information are not justified. The corollary is that I find that the public interest override encroachment or limitation of taxpayer confidentiality is, on the other hand, justified."*[68]

86. The High Court, however, erred in comparing the judgment in *Chipu* (and *Johncom*) with the present application. This is because those judgments dealt with instances where the Constitutional Court has struck down absolute prohibitions based on the right to privacy, and not partial prohibitions, as is the case under the TAA. This is because the TAA already contains numerous exceptions, which are fully set out above. The only problem that the applicants have against those exceptions is that they do not serve their ends and that is

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[68] Appeal Record, Vol 9, p835.

why they sought that public interest override be added to the list of exceptions. In this regard, the decisions in *Chipu* and *Johncom* are distinguishable.

87. Despite this, the taxpayer's right to privacy is at issue. That is because, as set out above, the information that a taxpayer supplies to SARS can contain several intimate details, relating to employment, disability, healthcare benefits that should be excluded from taxation, thereby disclosing confidential health information of the relevant taxpayer and everything in between.

88. In this regard, section 14 of the Constitution guarantees the right to privacy. At its core the right to privacy entails the right to be left alone.[69]

89. In *Bernstein*, Ackermann J held that as follows:

> *"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority".*[70] *In Gaertner the apex court added "the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life."*[71]

90. Applied in the present case, the right to privacy protects a taxpayer – who hands over intimate and private information to SARS under threat of criminal sanction – from having that information supplied to third party requesters by SARS.

91. By its nature, taxpayer information attracts an expectation of a high degree of privacy. This is because the information contained on one's tax submissions include details related to one's "inner sanctum", and should therefore – as far

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[69] Minister of Justice v Prince 2018 (6) SA 393 (CC) at para 45.
[70] Bernstein v Bester 1996 (2) SA 751 (CC) at para 77.
[71] Gaertner v Minister of Finance 2014 (1) SA 442 (CC) at para 47.

as possible – be shielded from erosion by conflicting rights of the community, including the public interest.

92. The applicants further contend that taxpayer information does not attract an intense aspect of the right to privacy, as the contents of these returns (i.e. income earned and capital gains realised) are the result of transactions with other people, conducted in the commercial sphere.[72] This, however, loses sight of the fact – placed beyond doubt by Prof Roeleveld –that taxpayer records include private matters such as employment status, medical information/disability status, liabilities, personal belongings, and donations to charities.

93. Contrary to the applicants' assertions, this category of information falls within the "inner sanctum" referred to by this Court in *Bernstein* and therefore ought to be protected from disclosure by SARS to third parties.

94. The right to privacy is a constitutionally entrenched legal interest, and should be appropriately considered when determining whether or not a new exception to should be carved out the TAA's confidentiality regime.

THE IMPUGNED SECTIONS STRIKE AN APPROPRIATE BALANCE

95. As demonstrated above, the impugned sections strike an appropriate balance between the right to access to information, the taxpayer' right to privacy, and the legitimate government objective of fiscal efficiency. This is because:

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[72] Applicant's Heads of Argument, para 47.

95.1 The right to access to information is only partially restricted by the impugned sections, because the TAA contains several exceptions to the principle of taxpayer confidentiality;

95.2 The existence of these exceptions reveal that the Legislature did not simply impose a blanket or absolute prohibition on the disclosure of taxpayer information, but determined the least restrictive means available to ensure tax compliance by way of the non-disclosure requirements. These exceptions were seriously considered prior to being included as subsections under section 69 of the TAA. It is no mistake that the ”public interest override” is not one of those exceptions;

95.3 The taxpayer’s right to privacy is protected through the machinery of the impugned sections, given that the impugned provisions ensure that some of the taxpayer’s most intimate details, such as employment status, medical information, disability status, liabilities, personal belongings, donations to charities, and potential criminal activity can be discerned from the information handed to SARS by the taxpayer.

95.4 It is therefore incorrect that a lot of the information that is in the tax return is mostly in the public domain and mainly relates to commercial transactions entered into by the taxpayer[73] and therefore does not require strict protection from disclosure to third parties;[74]

[73] Applicants’ Heads of Argument, para 47
[74] Applicants’ Heads of Argument, pare 47

95.5 In the context of a system of self-declaration of income tax, in which even unlawfully earned income is taxable, SARS's ability to efficiently calculate and collect tax debts is heavily dependent on the existence of a confidentiality regime, which fosters a relationship of trust between SARS and the taxpayer. The applicants have not provided an answer on why this information ought to be disclosed under the alleged public interest override; and

95.6 The current TAA confidentiality regime, which is in place, tracks international best practice, and therefore maintaining this regime ensures that South Africa can comply with its obligations under various international agreements, including Double Taxation Agreements and other international treaties; and

96. On balance, and upon consideration of section 36(1) of the Constitution, it is apparent that even if the impugned sections limit the right to access of information, then the impugned sections constitute a justifiable limitation of that right, and therefore meets constitutional muster. Further arguments will be presented at the hearing of this application.

THE APPROPRIATE REMEDY

THE READING-IN RELIEF

97. In *C v Department of Health and Social Development*,[75] this Honourable Court dealt with a Court'sreading-in powers. It held that this remedial intervention should be understood as an attempt to enter into a deliberative constitutional

[75] 2012 (2) SA 208 (CC) at paras 46 and 57

dialogue with the legislature -- that when reading in can provide an effective remedy, it will generally be preferable to a bald declaration of invalidity and to a suspensive order, coupled with interim relief.

98. This Honourable Court further held that a final order of reading-in does not give the judiciary the ultimate word on pronouncing on the law. Instead, it initiates a conversation between the Legislature and the courts. This is because Parliament‘s legislative power to amend the remedy continues to subsist beyond the granting of the relief and may be exercised within constitutionally permissible limits at any future time.

99. The applicants’ chosen remedy was a reading-in of the public interest override provisions into sections 67 and 69 of the TAA. Mr Justice Davis’ judgment granted this remedy, on the basis that it will remedy the alleged unconstitutionality of the impugned sections pending the final correction of the TAA by the Legislature.[76]

100. Mr Justice Davis’ judgment ultimately ordered as follows:

100.1 Section 69(2) of the TAA is to be read as if it contained an extra subsection (bA) after existing subsection (b)‘ which provides as follows:

“(bA) where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act; and

100.2 Section 67(4) of the TAA is to be read as if the following phrase appeared right before the full stop.

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[76] Mr Justice Davis’ appeal; Appeal Record, Volume 9, p837, para 10.3.

"unless the information has been received in terms of the Promotion of Access to Information Act"

101. The applicants' contention, which appears to have been upheld by Mr Justice Davis judgment, is that the reading-in relief leaves the taxpayer confidentiality regime untouched. This, as the argument goes, is because of the two requirements contained in the public interest override provisions, being either, (i) substantial non-compliance with the law or (ii) that the public interest in disclosure outweighs the harm of disclosure. The applicants also contended these requirements are unlikely to be met for most non-compliant taxpayers; and that they will likely only be met for certain public figures, such as politicians and prominent businesspeople, who have substantially contravened the law.[77]

102. According to the applicants, only public figures – particularly senior public officials—might lose some confidentiality, as only taxpayer information that would reveal substantial illegality or for which the public interest in disclosure outweighs the harm of disclosure could be released in terms of the public interest override provisions. Law-abiding taxpayers (and even non-compliant taxpayers for which disclosure would not be in the public interest or who have not substantially broken the law) would not lose any protection.[78]

103. This would have offered cold comfort if it were true. But it is not. The relief that the applicants sought in the notice of motion in the high court and which they were awarded in Mr Justice Davis judgment is not ring-fenced to public officials. It declared the impugned provisions unconstitutional and read in public interest,

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[77] Applicants' Heads of Argument, para 56.2
[78] Applicants' Heads of Argument, para 56.2

framed broadly, as a new exception to the TAA's confidentiality regime. There is therefore nothing that prevents the applicants from going after any other person whom they deem to be of interest to them, for whatever flimsy reasons, including celebrities, sports stars, influencers or any other ordinary Joe Soap that they find to be of interest to them.

104. The public interest override exception which was introduced into the TAA in the judgment of Mr Justice Davis does not stipulate what is or not *"in the public interest",* or when this public interest will outweigh the harm attached to disclosure. The provisions, then, are dangerously overboard, as the applicants – as well as any other third party requester—can decide on a whim whose tax records they seek, and cloak their request for those tax records under the vague umbrella of public interest. Once SARS has released this confidential information to the requesting third parties, then SARS loses control of what can be done to that information. Thus, the very harm that the TAA seeks to protect in disclosure of the taxpayer information, except in limited instances referred to in the exceptions, and the publication of such information will now become an weapon in the hands of the applicants, as well as other third parties. This should not be allowed.

105. More inappropriately, this weapon would have been given to these third party requesters by this Court, in complete contradiction to the explicit, well-grounded exceptions listed in the TAA, which were included by the Legislature after a rigorous interrogation. Simply, the reading-in proposed by the applicants, which was upheld in Mr Justice Davis' judgment, does not initiate a conversation between the Legislature and the Courts as was required by this Honourable Court in *C v Department of Health and Social Development*. Instead, it amounts

to the High Court having made a final, instructive pronouncement on when taxpayer information should be disclosed. This is impermissible.

106. Should this Court confirm Mr Justice Davis' declaration that the impugned sections are unconstitutional, then we submit that it should craft this relief along the lines of 3 of Mr Justice Davis' judgment and suspend that declaration of invalidity for a period of 24-months to enable the Legislature to rectify those sections.

107. In *Joubert Galpin Searle*[79] the Court held that when determining whether it is just and equitable to grant relief "such as a suspension of an order of invalidity for a period . . . a court must consider not only the interests of the parties, but also the public interest."

108. In *Khumalo*,[80] the Constitutional Court held that:

> *"Under the Constitution, however, the requirement to consider the consequences of declaring the decision unlawful is mediated by a court's remedial powers to grant a just and equitable order in terms of s 172(1)(b) of the Constitution. A court has greater powers under the Constitution to regulate any possible unjust consequences by granting an appropriate order. While a court must declare conduct that it finds to be unconstitutional and invalid, it need not set the conduct aside."*

109. A just and equitable remedy would be the dismissal of the confirmation application. If this honourable Court is so inclined to grant it then just and equitable remedy would be the suspension of invalidity for 24 months to allow

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79 Joubert Galpin Searle Inc v RAF 2014 (4) SA 148 (ECP) at para 98.
80 Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC) at para 53.

Parliament to consider an appropriate amendment to the TAA, as well as engage in all the necessary processes to bring about such an amendment.

SUBSTITUTION

110. While unrelated to the issue of constitutionality, Mr Justice Davis' judgment made the following finding on whether SARS should disclose to the applicant the second respondent's private taxpayer information:

> *"[10.5] Ad [3.5] Having regard to the nature of the case and the legal and constitutional questions involved, I am of the view that this is an appropriate case where a substitution of the decision of SARS to refuse access to information should be made.*

SARS was bound by the statutory prohibitions and, once those had been found to be unconstitutional, the remainder of the elements of the public override provisions has been demonstrated with sufficient particularity that the case and the novelty thereof constitute an 'exceptional case' as contemplated in s 8(1)(c)(ii)(aa) of PAIA."

111. An order for substitution is incompetent here, and is contrary to the string of case law that has been developed on this issue.

112. The courts have expressed strong views regarding the undesirability of substitution of the decision of the decision maker with the decision of the court. The general rule is that the court will not substitute its own decision for that of the decision-maker. Instead, it will remit the matter to the administrator, together with an instruction to decide the matter again or other appropriate directions.

This is based on the courts' reluctance to usurp decision-making powers that the legislature has delegated to the administrator.[81]

113. In *Bato Star Fishing*,[82] this honourable Court held as follows:

> *[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker. (Underlining added)*

114. In *Legal Aid Board*,[83] the court held that:

> *"courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government".*

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[81] Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T) at 76 D – E.
[82] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 48
[83] Legal Aid Board v S and Others [2011] 1 All SA 578 (SCA) at para 45.

115. In *Trencon*,[84] an organ of state had not awarded the bid to the highest-scoring bidder because of a material error of law. The remedy sought was substitution of the decision of the organ of state with a court order awarding the contract to the bidder who scored the highest number of points. The Constitutional Court held that even where there are exceptional circumstances, it must be convinced that an order of substitution is just and equitable in the circumstances.

116. The test for substitution begins with an enquiry into whether the court is in as good a position as the administrator to make the decision. If the answer is affirmative, it must consider whether the decision is a foregone conclusion.[85] Other relevant factors include delay, which would cause unjustifiable prejudice; bias and incompetence.[86]

117. The applicants have failed the *Trencon* test.

118. The applicants have failed to explain and justify the substitution of the SARS refusals of its PAIA request with that of the court granting them access to former President Zuma's tax records. An order for substitution, therefore, is not in line with the cases discussed above and is therefore incompetent.

CONCLUSION

119. The impugned sections of the TAA, which creates a confidentiality regime related to the disclosure of taxpayer information, does not unjustifiably limit the right to access of information as contained under section 32 of the Constitution.

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[84] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC).
[85] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC) at paras 34 – 55.
[86] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC) at para 98.

120. The impugned sections of the TAA do not impose an absolute prohibition on disclosure, and on account of that partial restriction of right to access of information, does not require an overly compelling justification.

121. The impugned sections of the TAA serve to protect the taxpayer's right to privacy, as well as to ensure that SARS is able to effectively perform its statutory functions, and that South Africa aligns with certain of its international law obligations. All of these are valuable legal goods that favour the upholding of the impugned sections.

122. Should this Honourable Court find that the impugned sections do unjustifiably limit the right to access of information, then we submit, this Honourable Court should not grant the reading-in remedy proposed by the applicant, and should instead declare the impugned sections unlawful, and suspend that declaration for 24 months, in the interests of justice.

AFZAL MOSAM SC

BUHLE LEKOKOTLA

SUHAIL MOHAMMED (PUPIL)

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20 May 2022

FOURTH RESPONDENTS' LIST OF AUTHORITIES

CASE LAW

Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T)

Estate Dempers v Secretary for Inland Revenue 1977 (3) SA 410 (A)

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

Bernstein v Bester 1996 (2) SA 751 (CC)

Wellz v Hall 1996 (4) SA 1073 (C)

Sackstein NO v South African Revenue Service 2000 (2) SA 250 (E)

Metcash Trading Limited v Commissioner for the South African Revenue Service and Another 2001 (1) SA 1109 (CC)

First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another 2002 (4) SA 768 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)

Legal Aid Board v S and Others [2011] 1 All SA 578 (SCA)

C v Department of Health and Social Development 2012 (2) SA 208 (CC)

Gaertner v Minister of Finance 2014 (1) SA 442 (CC)

Mail and Guardian Media Limited and Others v Chipu NO and Others 2013 (6) SA 367 (CC)

Joubert Galpin Searle Inc v RAF 2014 (4) SA 148 (ECP)

Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC)

Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another 2015 (5) SA 245 (CC)

Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and another [2017] 4 All SA 175 (GP)

Minister of Justice v Prince 2018 (6) SA 393 (CC)

Commissioner, South African Revenue Service v Public Protector And Others 2020 (4) SA 133 (GP)

Public Protector v Commissioner for the South African Revenue Service and Others [2020] ZACC 28

Commissioner, South African Revenue Service v Public Protector And Others 2020 (4) SA 133 (GP)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 365/21
HC case number: 88359/19

In the matter between:

ARENA HOLDINGS (PTY) LTD	First Applicant
THE AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
WARREN THOMPSON	Third Applicant

And

SOUTH AFRICAN REVENUE SERVICES	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

FILING SHEET

DOCUMENTS FILED: Third Respondent's heads of argument and practice note

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case number: 365/21
HC case number: 88359/19

In the matter between:

ARENA HOLDINGS (PTY) LTD t/a *FINANCIAL MAIL*	First Applicant
THE AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
WARREN THOMPSON	Third Applicant

and

SOUTH AFRICAN REVENUE SERVICES	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

THIRD RESPONDENT'S HEADS OF ARGUMENT IN APPLICANTS' CONFIRMATION APPLICATION AND THIRD RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

PAGES

[A] INTRODUCTION: RELIEF SOUGHT BY APPLICANTS:

1. Applicants seek an order in the following terms:

   1.1 Confirming the orders made in paragraphs 11(1) to 11(9) of order of the Pretoria Division of the High Court on 16 November 2021, in which the Court *inter alia*:

      1.1.1 declared that sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 (**"PAIA"**) are unconstitutional and invalid to the extent that they preclude access to tax records by a person other than the taxpayer (**"a requester"**) even in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met;

   1.2 declared that sections 67 and 69 of the Tax Administration Act 28 of 2011 (**"the TAA"**) are unconstitutional and invalid to the extent that:

      1.2.1 they preclude access to information being granted to a requester in respect of tax record in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met; and

      1.2.2 they preclude a requester from further disseminating information obtained as a result of a PAIA request; and

   1.3 ordered the first respondent to supply the first and third applicants with the individual tax returns of the second respondent for the 2010 to 2018 tax years within ten days of the order.

2. Directing that the costs of this application be paid by any respondent that opposes.

3. Further and/or alternative relief.[1]

[B] THIRD RESPONDENT OPPOSES THE ABOVE RELIEF SOUGHT ABOVE:

4. Third respondent opposes the relief sought on the basis of the misdirections in the judgment of the High Court, as dealt with hereunder.[2]

[C] CONDONATION FOR THE LATE FILING OF AFFIDAVITS:

5. Third respondent seeks condonation for the late filing of the affidavits in this matter on the basis of the explanation tendered in the affidavit of Kalayvani Pillay.[3]

JOHNCOM MEDIA INVESTMENTS AND COMPETING RIGHTS:

6. As was stated by Jafta (AJ) (as he then was) in *Johncom Media Investments:*[4] *"This matter raises the difficult question of maintaining the correct balance between competing rights entrenched in the Bill of Rights. The present tension arises between, on the one hand the right to freedom of expression and the rights to privacy and dignity, on the other."*

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[1] Record: Volume 9; Order; pages 842 – 843; Applicant's Notice of Motion dated 24 November 2021; page 844 – Lines 17 – 22, page 845, Lines 1 – 17;
[2] Record: Volume 10; page 940, par 13 – 21; Lines 7 – 24; page 941; Lines 1 – 27; page 942; Lines 1 - 17
[3] Record: Volume 10; paragraph 6 , page 938; Lines 14 – 21; page 939; Lines 1 – 7;
[4] Johncom Media Investments Ltd v M and Others 2009(4)SA 7 (CC) @ 10 par [1];

THE COMPETING RIGHTS IN THE BILL OF RIGHTS FOR DETERMINATION:

7. In casu, the competing rights in the Bill of Rights for determination are on the one hand, the right of access to information and freedom of expression and on the other hand, the rights of individuals to privacy and dignity. These right must be considered against the provisions of Section 36 of the Constitution which places a limitation on the rights on the Bill of Rights.

[D] SECTION 32 OF THE CONSTITUTION AND THE RIGHT OF ACCESS TO INFORMATION:

8. Section 32 of the Constitution guarantees:

"(1) Everyone the right of access to:

(a) Any information held by the State; and

(b) Any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National Legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[E] SECTION 36 OF THE CONSTITUTION AND THE LIMITATIONS ON THE RIGHTS:

9. Section 36 of the Constitution places a limitation on the rights in the Bill of Rights and reads as follows:

"36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

(a) The nature of the right;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The relationship between the limitation and the purpose;

(e) Less restrictive means to achieve the purpose."

[F] NATIONAL LEGISLATION ENACTED BY VIRTUE OF THE PROVISIONS OF SECTION 32(1)(c) OF THE CONSTITUTION: PAIA:

10.1 Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.

10.2 The Preamble to PAIA categorically states:

"the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution."

11. It is submitted that the right embodied in Section 32 of the Constitution is not an absolute right.

12. Section 36 of the Constitution places limitations on the right embodied in Section 32 thereof.

13. Ngcobo CJ in ***President of RSA and others v M & G Media Ltd*** [5]dealt with the preamble in PAIA succinctly and held as follows:

"[9] As is evident from its long title, PAIA was enacted "(t)0 give effect to the constitutional right of access to any information held by the State" And the formulation of s 11 casts the exercise of this right in peremptory terms – the requester 'must' be given access to the report so long as the request complies with the procedures outlined in the Act and the record is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

[10] The constitutional guarantee of the right of access to information held by the State gives effect to 'accountability, responsiveness and openness' as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.

[5] President of RSA and others v M & G Media Ltd 2012 (2) SA 50 (CC) @ p 55 par [a] to par [11];

[11] But PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in its preamble, that there are 'reasonable and justifiable' limitations on the right of access to information, even in an open and democratic society. Those limitations emerge from the exemptions to disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the economic interest and financial welfare of the Republic and commercial activities of public bodies, and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law."

14. This principle was also enunciated in the decisions of both ***Belwana v Eastere Cape MEC for Education and Another***[6] and ***My Vote Counts v Minister of Justice***.[7]

15. In ***My Vote Counts v Minister of Justice***, Mogoeng CJ held:

"It cannot be emphasised enough that it would be erroneous to construe Section 32 as conferring an absolute or blanket entitlement to seekers of any information required from whomsoever for the exercise or protection of all rights. The ease with which it is made accessible ought to depend on the nature of the right whose exercise or protection is sought to be facilitated."

[6] Belwana v Eastern Cape MEC for Education and Another; Eastern Cape MEC for Education and Another; Langeveld vn Easter Cape MEC for Education and Another [2017] 3 ALL SA 32 [ECB] at p 35;
[7] My Vote Counts v Minister of Justice 2018 (5) SA 380 (CC) @ 402 [A];

STATUTORY PROVISIONS OF PAIA APPLICABLE IN CASU:

16. In terms of Section 11 of PAIA:

"(1) A requester must be given access to a record of a public body if-

(a) That requester complies with all the procedural requirements in this Act relating to a request for access to that record: and

(b) Access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by:

(a) any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access.

[G] MANDATORY PROTECTION OF PRIVACY OF THIRD PARTY WHO IS A NATURAL PERSON:

17. Section 34(1) of PAIA, relates to the Mandatory Protection of Privacy of Third Party who is a natural person. *Inter alia*, it reads as follows:

"The information officer of a public body must refuse a request for access to a record of a body if its disclosure would involve the unreasonable disclosure of personal information about a third party including a deceased individual."

[H] MANDATORY PROTECTION OF CERTAIN RECORDS OF SARS:

18. Section 35 of PAIA, which relates to the Mandatory Protection of Certain records of the South African Revenue Services; *inter alia*, reads as follows:

> *"the information officer of the South African Revenue Service, must refuse a request for access to a record of that service if it contains information which was obtained or is held by that service for the purposes of enforcing legislation concerning the collection of revenue."*

[I] MANDATORY DISCLOSURE IN THE PUBLIC INTEREST:

19. Section 46 of PAIA, relates to the Mandatory Disclosure in the public interest and reads as follows:

> *"the information officer of a public body must grant a request for access to a record of the body, ..., if:*
>
> *(a) The disclosure of the record would reveal evidence of:*
>
> *(i) a substantial contravention of, or failure to comply with the law or*
>
> *(ii) an imminent and serious public safety or environment risk: and*
>
> *(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

IDENTIFICATION OF REQUESTER IN TERMS OF PAIA:

20. A requester in terms of Section 1 of PAIA in relation to a public body, means any person making a request for access to a record of that public body.

21. In terms of Section 74, it is a requester who may lodge an internal appeal against a decision of the information officer of a public body.

22. In terms of Section 78(1), a requester referred to in 74(1) may only apply to Court for appropriate relief in terms of Section 82.

23. It is against the above statutory framework that the misdirections be considered.

[J] ESSENCE OF A SECTION 78(2) APPLICATION:

24. It is common cause that the application in the High Court was in terms of Section 78(2) of PAIA, against the refusal by the first respondent in an internal appeal to grant the third applicant access to the individual tax returns (ITR12) of Jacob Zuma, the second respondent, for the period 2010 to 2018.[8]

25. By virtue of the provisions of Section 82 of PAIA, a Court hearing an application in terms of Section 78(2), may grant any order that is just and equitable including orders:

[8] Record: Volume 1, par 56, page 27; Record: Volume 3; third respondent's AA, par 10, page 242;

"(a) confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the Court considers necessary within a period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation; or

(d) as to costs."

26. In ***President of RSA cited supra***, this Court held:

"[14] In proceedings under PAIA, a Court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure a fresh, engaging in a de novo reconsideration of the merits."[9]

27. In ***Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd***, [10]the Court held:

"the power in Section 82 to "grant any order that is just and equitable" is therefore intended to enable the Court to tailor the relief to which a successful applicant is entitled."

28. It is common cause between the applicants and the third respondent, that the Court *a quo* had the power to deal with the matter novo.

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[9] President of RSA at par [14], page 56;

[10] Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd 2006(6) 285(SCA) at 303 par [58];

29. In brief, the facts in ***President of RSA*** were thus:

"[1] Shortly before the 2002 presidential election in Zimbabwe, former President Thabo Mbeki appointed two senior judges to visit that country. It is by now common cause that the two judges were sent to assess the constitutional and legal issues relating to that election. Upon their return, the judges prepared a report and submitted it to the President. The report has never been released to the public. M & G Media Ltd (M & G), the publisher of a weekly newspaper, the Mail Guardian, requested access to the report pursuant to the Section 11 of the Promotion of Access to Information Act (PAIA or the Act). The President refused the request."

[2] The request was refused on two grounds:

First, that disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to s 41(1)(b)(i) of PAIA; and second, that the report had been prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in s 44(1)(a) of PAIA."

M & G approached the High Court of Pretoria pursuant to s 78 of who granted an order compelling the President and other respondents cited to make the report available in its entirely to M & G. the SCA upheld this order. The State appeal to the CC. the majority in the CC ordered, inter alia, that the matter be remitted to the North Gauteng High Court, Pretoria for the Court to examine the record in terms of the provisions of

Section 80 of PAIA and to determine the application under s 82 of PAIA in the light to the CC judgment."[11]

30. The dispute lies in whether the Court had the power to make an order concerning the Constitutional validity of PAIA under Section 172(2)(a) of the Constitution.

ABSOLUTE PROHIBITIONS ON THE DISCLOSURE OF TAX INFORMATION IN SEC 34(1) AND 35 OF PAIA:

31. It is submitted that the absolute prohibitions contained in Section 34(1) and 35 of PAIA precluded the information officer from disclosing the information sought by the third applicant.

32. The information officer was duty bound to consider the application in terms of Section 11(1) in the light of the above provisions.

33. The High Court held:

"There is general consensus that the general limitation of access to taxpayer information held by SARS, imposed by a law of general application (the TAA) is justified in an open and free democratic society. The applicants do not seek to do away with the regime."[12]

[11] President of RSA cited supra in note 5; at par A – C, page 53;
[12] Record: Judgment, Vol 9, par 4.11; 4.12, page 821; par 6.2, page 826;

[K] ABSOLUTE PROHIBITIONS AND THE DICTA IN *JOHNCOM AND CHIPU*:

34. It is so that in both ***Johncom*** and ***Chipu***[13] this Court held that absolute prohibitions are unconstitutional.

35. However, the relevant provisions of the statutes applicable in both of the above cases are distinguishable from the provisions of Section 35 of PAIA.

36. In ***Johncom,***[14] Jafta AJ (as he then was) in dealing with the Constitutional invalidity of Section 12 of the Divorce Act held as follows:

"[17] The answer to the question of invalidity lies in the interpretation of s 12 measured against the provisions of s 16 of the Constitution, which entrenches the right to freedom of expression. Section 12 reads:

> ***Limitation of publication of particulars of divorce action***
>
> *(1) Except for making known or publishing the names of the parties to a divorce action, or that a divorce action between the parties is pending in a court of law, or the judgment or order of the court, no person shall make known in public or publish for the information of the public or any section of the public any particulars of a divorce action or any information which comes to light in the course of such an action.*
>
> *(2) The provisions of subsection (1) shall no apply with reference to the publication of particulars or information-*
>
> *(a) for the purpose of the administration of justice;*

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[13] Mail & Guardian media Ltd v Chipu NO 2013(6) SA 367 (CC);
[14] Johncom cited supra in note 4; at par [17] E – J, page 13 – 14;

(b) in a bona fide law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or

(c) for the advancement of or use in a particular profession or science.

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to proceedings relating to the enforcement or variation of any order made in terms of this Act as well as in relation to any enquiry instituted by a Family Advocate in terms of the Mediation in Certain Divorce Matters Act, 1987.

(4) Any person who in contravention of this section publishes any particulars or information shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or both such fine and such imprisonment."

37. At page 14 in ***Johncom***[15], Jafta AJ held:

"A [18] Textually, the section – means that apart from the specified limited information, publication of information that comes to light during a hearing of the divorce case is prohibited irrespective of the nature of the information, and regardless of whether the publication will infringe the rights of the divorcing parties and the interests of their children."

[15] Johncom cited supra in note 4, [par 18], page 14;

38. In ***Johncom***[16], Jafta AJ held:

"[28] The prohibition in s 12 limits the right to freedom of expression in a manner that does not only affect the media but also the right of members of the public to receive information. In Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape), the Supreme Court of Appeal said:

> *"It is important to bear in mind that the constitutional promise of a free press is not one that is made for the protection of the special interest of the press. As pointed out by Anthony Lewis, in a passage was cited by Camron J in Holomisa v Argus Newspapers Ltd: "Press exceptionalism – the idea that journalism has a different and superior status in the Constitution – is not only an unconvincing but a dangerous doctrine." The constitutional promise is made rather to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press. To abridge the freedom of the press is to abridge the rights of all citizens and not merely the rights of the press itself."*

[29] The purpose of the limitation is apparent. The objective is to protect the privacy and dignity of people involved in divorce proceedings, in particular, children. However, as pointed out by the High Court and contended by the applicant and the amicus, the prohibition also affects, 'the general rule that courts are open to the public.' As the High Court further pointed out:

> *'Section 12 of the Divorce Act .... has an absolute prohibition. The prohibition, moreover, is unlimited as to time. Section 12 prohibits*

[16] Johncom cited supra in note 5, [par 28 – 29], pages 17 – 19;

publication of all information which comes to light in the course of the divorce proceedings, even if such information does not require protection. Matters of public interest which are raised in a divorce action and where there are legitimate reasons for such issues to be raised in public are prohibited."

39. It is further submitted that in consequence that Courts are open to the public who are entitled to listen to the evidence in divorce proceedings, the absolute prohibition on publication of information enunciated in Section 12 of the Divorce Act constituted an absurdity. The declaration of invalidity of Section 12 thereof by the High Court was confirmed by this Court.

[L] ATTENDANCE OF THE MEDIA AND PUBLIC IN OPEN COURT PROCEEDINGS:

40. The public and the media are as a rule entitled to be present at open Court proceedings, save in those instances involving children, when the proceedings are in camera. The presiding officer exercises a discretion on who to allow in respect of such Court proceedings involving children.

41. In ***Chipu***,[17] Zondo J (as he then was) held:

"It must be born in mind that the principle of "open justice" is normally applied to Courts".

[17] Chipu cited supra in note 13; par [53], page 385;

The issue arose on whether the Refugee Appeal Board had a discretion to allow access to its proceedings and in the alternative that the provisions of Section 21(5) of the Refugee Act 130 of 1998 be declared unconstitutional as it was inconsistent with the right to freedom of expression to the extent that it precluded the media from attendance at its proceedings and consequently the limitation was unreasonable and unjustifiable.

At par [93] in ***Chipu***[18] Zondo J held:

"I am satisfied that the legitimate purpose of Section 21(5) can be achieved by less restrictive means, namely, by conferring a discretion on the Appeal Board to allow access to its proceedings in appropriate cases under appropriate terms and conditions. In my view, absolute confidentiality is not essential."

At par [94] in ***Chipu***[19], Zondo J held:

"I conclude that s21(5) is not a reasonable and justifiable limitation of the right to freedom of expression and that to the extent it does not confer a discretion upon the Appeal Board to allow access to its proceedings in appropriate cases, it is inconsistent with s16 and thus invalid."

42. Consequently, it is submitted that the applicants reliance on ***Johncom*** and ***Chipu*** in justification of their argument on absolute prohibition, distingquishable.

[18] Chipu cited supra in note 13, [par 93], page 398;
[19] Chipu cited supra in note 13, [par 94], page 398;

PUBLIC INTEREST OVERRIDE AND THE PROVISIONS OF SECTION 46 OF PAIA:

43. In terms of Section 46 of PAIA, the information officer of a public body must grant a request for access to a record of the body, contemplated in Section 34(1) if:

"(a) the disclosure of the record would reveal evidence of:

(i) a substantial contravention of, or failure to comply with the law; or

(ii) an imminent and serious public safety or environmental risk; and

(c) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

[M] APPLICANTS RELIANCE ON HEARSAY EVIDENCE:

44. Applicants rely upon the hearsay of evidence of extracts from the book *"The President Keepers"* (FA1) for the allegations that the second respondent was not tax compliant and did not submit tax returns at all for the first seven years of his presidency.

45. The applicants further contended that:

"The applicants can only admit this evidence in hearsay form, as most of the sources for the Presidents Keepers are anonymous, and whether former President Zuma was tax-compliant during his presidency is uniquely within the knowledge of SARS and former President Zuma."

46. The purpose for which the evidence is tendered is merely to show that there is credible evidence that former President Zuma was not tax-compliant – not that he necessarily was not.[20]

47. It is submitted that the allegations referred to above support an inference that the applicants are on a fishing expedition. In any event, the second respondent is at present no longer a President, but an ordinary citizen who must be afforded the same protection as any other citizen in the country. Consequently, it is not in the public interest that the second respondent's tax returns be disclosed.

[N] IN THE PUBLIC INTEREST TO MAINTAIN CONFIDENTIALITY OF INFORMATION SUPPLIED TO SARS:

48. It is submitted that in the pre-Constitution era and the present, there is consistency in the Court's approach to income tax legislation, that it is in the public interest to maintain confidentiality of the information supplied to SARS.

49. In ***Estate Dempers v Secretary for Inland Revenue***[21], Corbett JA relied upon the decision of ***Silver v Silver,*** 1937 NPD 129, that:

"It is necessary…. that the fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy."

[20] Record: Volume 1: par 28.1 to par 38.3; page 21 lines 18 – 21; par 106, page 47;
[21] Estate Dempers v Secretary for Inland Revenue - 1977(3) SA 410(A) at 420 B – C, (cited in Chairman Board on Tariffs v Brenco Inc 2011(4) SA 51;

50. In the recent decision of ***Commissioner of South African Revenue Service v Public Protector and Others***[22], the High Court declared:

"1. that a South African Revenue Service Official is permitted and is required under the provision of "just cause" contained in Section 11(3) of the Public Protector Act 23 of 1994 read with Section 61(1) of the tax Administration Act 28 of 2001 to withhold taxpayer information as defined in Section 67(1)(a) of the Tax Administration Act 28 of 2011.

2. that the Public Protector's subpoena powers do not extend to the taxpayer information."

51. At par [39] of the above cited decision, Mabuse J held:

"There is the fundamental issue of taxpayer confidentiality which the Commissioner is by law compelled to uphold for the benefit of all the taxpayers."

52. Of further relevance in the above cited decision is the dicta at par [44] where Mabuse J held:

"The taxpayer's information in the possession of the Commissioner not only always information that was obtained from the taxpayer. So, of it might have come from other sources. Therefore, the Commission was not at large to disclose such information. In this regard, Commissioner's case enjoys the unqualified support of the established law of ***Weiz and Another v Hall and Others*** *1996(4) 1073 CPD at p 1076 G where the Court had the following to say:*

[22]Commissioner of South African Revenue Service v Public Protector and Others 2020(4) SA 133 (GP);

"It is well-established law that a Court will not lightly direct an officer of Revenue to divulge information imparted to him by a taxpayer. The reason for this reluctance is found in public policy.

The legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who on illegal trades or illegally come by amounts qualifying as gross income. This object is easily defeated it was said in ***Greenspan V R 1944 ST 149 at 6****, (if) orders were freely made for disclosure of those communication."*

53. The applicants' contention that the application of the public interest override to taxpayer information would not affect the vast majority of taxpayers at all in that, *inter alia*, the non-compliance must be "*substantial*" and the public interest in disclosure must clearly outweigh the harm of disclosure. These requirements are unlikely to be met for most non-compliant taxpayers. They can only be met for certain public figures, such as politicians, prominent businesspeople, who have substantially contravened the law (par 56.2, applicants head of argument, page 27).

54. It is submitted that this contention is both speculative and an attempt to discriminate between the ordinary non-compliant taxpayer as opposed to non – compliance by politicians and prominent businessman.

55. Third respondent prays that the relief sought by the applicants in the Notice of Motion dated 24 November 2021 be dismissed with costs, such costs to include the costs of Senior Counsel.

THIRD RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL DIRECTLY TO THIS COURT:

56. Third respondent prays that the contents of paragraphs 4 to 57 cited above be incorporated herein.

57. Third respondent has applied directly to this Court (albeit not in terms of Section 172(2)(d) not to grant the order of invalidity on the basis of the misdirections in the judgment of the High Court.

58. It is submitted that there are prospects of success in the misdirections advanced by the third respondent and dealt with above.

59. It is submitted that it is in the interest of justice that the order of invalidity declared by the High Court not be granted and leave to appeal to this Court be granted.

Nelly Cassim SC
Third Respondent's Counsel
Circle Chambers, Pretoria
Cell: 0824008022
19 May 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case number: 365/21
HC case number: 88359/19

In the matter between:

ARENA HOLDINGS (PTY) LTD *t/a FINANCIAL MAIL*	First Applicant
THE AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Second Applicant
WARREN THOMPSON	Third Applicant

and

SOUTH AFRICAN REVENUE SERVICES	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

THIRD RESPONDENT'S PRACTICE NOTE

[A] NATURE OF PROCEEDINGS:

1. Applicants raise a constitutional challenge to the absolute prohibition of disclosure of information into the provisions of Section 35 of the Promotion of

Access to Information Act 2 of 2000. They contend that Section 46 of PAIA be amended to include Section 35 thereof.

[B] JUDGMENT OF HIGH COURT:

2.1 In a judgment handed down on 07 April 2022, the High Court, *inter alia*, declared Section 35 and 46 of PAIA unconstitutional and invalid to the extent that they preclude access to tax records by a person other than the taxpayer (a requester) even in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met.

2.1 Pending the correction of the defects (by Parliament):

"Section 46 of PAIA shall be read as if the phrase 35(1), appears immediately after the phrase "Section 34(1)" contained therein."

[C] ISSUES TO BE ARGUED:

3. Third respondent submits that the misdirections advanced in the heads of argument hereto are of a nature entitling this Court not to confirm the order invalidity of Sections 35 and 36 of PAIA.

[D] JOHNCOM MEDIA INVESTMENTS AND COMPETING RIGHTS:

4. All 10 volumes of the record must be read.

[E] ESTIMATED DURATION OF ARGUMENT:

5. One day.

[F] SUMMARY OF ARGUMENT:

6. There are compelling rights at issue in this matter.

7. The right of access to information in Section 32 of the Constitution and the right to freedom of expression contained in Section 16 are not absolute rights.

8. Section 36 of the Constitution places a limitation of the rights in the Bill of Rights.

9. The preamble to the Promotion of Access to Information Act 2 of 2000, which is the national legislation contemplated in Section 32(1)(c) of the Constitution, reiterates that the rights of access to information is limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality freedom.

10. It is in the public interest to maintain confidentiality of information supplied to SARS.

11. The absolute prohibitions in the statutory provisions in both ***Johncom*** and ***Chipu*** are distinguishable from the mandatory protection of tax information contained in Section 35, and consequently have no application in casu.

12. The order of constitutional invalidity by the High Court be set aside.

13. Third respondent be granted leave to appeal to this Court as there are prospects of success on the merits. It is in the interest of justice that leave to appeal be granted.

[G] LIST OF AUTHORITIES RELIED UPON:

14. The list has been tabled in the heads of argument and must be incorporated herein.

TABLE OF AUTHORITIES:

STATUTES:

1. Constitution of RSA, 1996
2. Promotion of Access to Information Act 2 of 2000.

CASE AUTHORITIES:

1. Johncom Media Investments Ltd v M and Others 2009(4)SA 7 (CC);
2. President of RSA and others v M & G Media Ltd 2012 (2) SA 50 (CC);
3. Belwana v Eastern Cape MEC for Education and Another; Eastern Cape MEC for Education and Another;
4. Langeveld vn Easter Cape MEC for Education and Another [2017] 3 ALL SA 32 [ECB];
5. My Vote Counts v Minister of Justice 2018 (5) SA 380 (CC);
6. Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd 2006(6) 285(SCA);
7. Mail & Guardian media Ltd v Chipu NO 2013(6) SA 367 (CC);
8. Estate Dempers v Secretary for Inland Revenue - 1977(3) SA 410(A) at 420 B – C, (cited in Chairman Board on Tariffs v Brenco Inc 2011(4) SA 51;

9. Commissioner of South African Revenue Service v Public Protector and Others 2020(4) SA 133 (GP);
10. Weiz and Another v Hall and Others 1996(4) 1073 CPD;
11. Greenspan V R 1944 ST 149 at 6.

Nelly Cassim SC
Third Respondent's Counsel
Circle Chambers, Pretoria
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19 May 2022

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case 365/21

In the matter between:

ARENA HOLDINGS (PTY) LTD	First Applicant
THE AMABHUNGANE CENTRE NPC	Second Applicant
WARREN THOMPSON	Third Applicant
and	
SOUTH AFRICAN REVENUE SERVICE	First Respondent
JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF JUSTICE	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
INFORMATION REGULATOR	Fifth Respondent

SARS' SUBMISSIONS

TABLE OF CONTENTS

INTRODUCTION

1 The question in this case is whether the balance struck by parliament in the Tax Administration Act 28 of 2011 ("*the TAA*") and the Promotion of Access to Information Act 2 of 2000 ("*PAIA*"), between the rights in sections 14, 16, and 32 of the Constitution, is one that was available to a parliament of an open and democratic society based on human dignity, equality and freedom. If the answer is yes, then this court should not confirm the court *a quo*'s order. If the answer is no, then this court should affirm the order of constitutional invalidity and determine an appropriate remedy.

2 Mr Thompson and his employer, Arena Holdings, wanted access to Mr Jacob Zuma's tax information to publish it.[1] Their request for the information under PAIA failed. Now they say that sections 35 and 46 of PAIA and sections 67 and 69 of the TAA are unconstitutional. They go further, they invite the court to read words into the TAA. They also want to set aside the decisions refusing them access to Mr Zuma's "*individual tax returns*" for the "*tax years*" 2010 to 2018. Finally, they want a court order directing SARS to furnish the first and third applicants with Mr Zuma's "*individual tax returns*" for the "*tax years*" 2010 to 2018. The High Court agreed with them on everything, including the disclosure of Mr Zuma's tax returns within ten days of its order,[2] even though the basis for that order depended on the confirmation of the

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1 Vol 1 Thompson para 19 page 11

2 Vol 9 Judgment, order 7, p 840

invalidation of the impugned sections in the two acts. This impermissible order prompted an application for leave to appeal it.[3]

3 The applicants' case is unfounded. The regime created by the TAA and PAIA carefully balances the right to privacy and the right to access to information. It does so in a way that permits optimum revenue-collection. The regime was established after extensive consultation and careful consideration of other tax regimes around the world.[4] The system is rational and the provisions under attack are constitutional. On the other hand, if the applicants succeed in this application, South Africa would be in immediate breach of its international treaty obligations, and SARS' ability to collect revenue would be severely prejudiced.

4 The applicants present their case as if it was solely about access by journalists to tax information of public figures (a concept that has no definition). In fact, however, the relief sought and granted by the court below goes much further than that. Everyone's tax information will be disclosed to any requester, provided the requester is able to bring herself within the "*public interest override*" in section 46 of PAIA. It is therefore not a true reflection of the applicants' case to say, as they suggest many times in their submissions, that the case is primarily about journalistic access to tax information of public figures. It is about any requester's access to tax information.

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3 Vol 9 NoM para 1 p 859

4 Vol 6 Tomasek paras 8 to 13.10 pp 543 to 551

5 The applicants have selected four provisions of the TAA and PAIA. They say that these provisions are unconstitutional because they impose what is rhetorically but inaccurately called a "*blanket prohibition*" on access to taxpayer information. It is therefore necessary to look closely at the structure of these two Acts and to examine how they work.

TAXPAYER SECRECY UNDER THE TAA

The duty of full disclosure

6 The TAA imposes a wide and comprehensive duty on all taxpayers to make full and frank disclosure of all their income and its sources. The duty is not only wide-ranging but is also underpinned by serious civil and criminal penalties for breach.

7 Section 25(2) obliges taxpayers to submit "*full and true*" tax returns. Anybody who fails to do so commits a criminal offence under section 234(d).

8 Sections 40 to 66 confer wide-ranging information-gathering powers on SARS including,

- powers of inspection in section 45;
- powers of subpoena in sections 46 to 49;
- powers of interrogation in sections 50 to 58; and
- powers of search and seizure in sections 59 to 66.

Anybody who fails to co-operate with SARS in its exercise of these powers commits a criminal offence under section 234(h).

9 Sections 200 to 205 provide for SARS and taxpayers to compromise their tax debts. Section 205 makes every compromise dependent on the taxpayer's full and true disclosure of all the material facts.

10 Sections 227 to 231 provide for taxpayers to make voluntary disclosure of their own transgressions. The procedure allows SARS to compromise the taxpayers' exposure to civil and criminal liability. But it may terminate any voluntary disclosure agreement if it discovers that the taxpayer failed to disclose material information.

11 Another crucial and drastic feature of these powers is that sections 57 and 72 deprive taxpayers of their privilege against self-incrimination. All taxpayers are obliged to make full disclosure to SARS even if their answers incriminate them by implicating them in criminal conduct. Taxpayers are accordingly not only encouraged, but are indeed obliged, to make full disclosure of their own criminal conduct.

The secrecy provisions

12 In return for their full and frank disclosure, SARS promises to keep taxpayers' secrets. The following provisions are designed to make sure that taxpayers' secrets are preserved.

13 Section 67(1)(b) defines "*taxpayer information*" to mean "*any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information*".

14 Section 69(1) provides that all current and former SARS officials "*must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official*".

15 Section 67(3) supplements that prohibition by providing that, if any taxpayer information is unlawfully leaked, the person to whom it was leaked "*may not in any manner disclose, publish or make it known to any other person who is not a SARS official*".

The circumscribed exceptions

16 The secrecy provisions are not absolute. They are subject to narrowly circumscribed and tightly controlled exceptions. The main exceptions are the following.

17 Section 69(2)(c) allows disclosure under a High Court order. Sections 69(3) to (5) restrict and regulate this exception. Section 69(5) provides that the court may only grant a disclosure order if the information "*is central to the case*" and cannot be obtained elsewhere. Even then, the court exercises strict and narrow discretion to grant disclosure and may impose its own secrecy provisions to contain the disclosure of the information.[5]

18 Section 67(5) allows the Commissioner to disclose taxpayer information "*in self defence*" but only if the taxpayer has, by his misconduct, forfeited the right to secrecy:

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[5] Jeeva v Receiver of Revenue, Port Elizabeth 1995 (2) SA 433 (SE); Welz v Hall 1996 (4) SA 1073 (C)

18.1 This section is only triggered if a taxpayer, or somebody acting on his behalf, discloses false allegations or information.

18.2 The Commissioner may then disclose information about the taxpayer concerned but only,

- after giving the taxpayer at least 24 hours' notice; and
- to the extent necessary to counter or rebut the taxpayer's false allegations or information.

19 Section 70 provides for the disclosure of taxpayer information to other state agencies but only for purposes of the performance of their functions. Section 70(5) provides that the information may only be disclosed to the extent that it is necessary for purposes of the performance of the functions of the state agencies concerned and is relevant and proportionate to the purpose for which the disclosure is made.

20 Section 71 provides for the disclosure of taxpayer information to the South African Police Service or the National Director of Public Prosecutions, but only under strictly controlled conditions. The disclosure may only be made if it is authorised by an order of a judge in chambers.

The prohibition of secondary disclosure

21 Section 67(4) provides that anybody who receives taxpayer information under any of these exceptions in terms of sections 68 to 71 "*must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those functions*".

22 Any breach of this prohibition is a criminal offence under section 236.

Conclusion

23 The relief sought by the applicants (and granted without adequate reasons by the court below) cuts across these carefully circumscribed disclosure provisions. It renders obsolete all the strict conditions of disclosure for which they provide, without any challenge to the constitutionality of these provisions. This exposes the applicants' simplistic approach to carefully considered legislation. In their one-eyed focus on PAIA, the applicants have simply ignored the nullifying impact of their relief on the TAA.

24 By contrast, the scheme of the TAA makes it clear that it strikes a bargain between SARS and the taxpayers. In return for their full and frank disclosure, SARS promises to keep their secrets. The Commissioner of SARS, Mr Kieswetter, puts it as follows:

> "*The guarantee of confidentiality is what the taxpayer gets in return for the compulsion to provide full information to SARS. Without this statutory guarantee of confidentiality, the expectation that the taxpayer will be candid and accurate with SARS diminishes. This compact, written into law, between a tax authority and the public is the foundation of the tax system, without which the tax administration cannot properly function*."[6]

25 This policy has long been recognised by our courts. In Silver v Silver 1937 NPD 129 pp 134-135, the court said:

> "*In the case of income tax returns, and matters in connection therewith, there is definite statutory provision that these documents should be regarded as secret, though the last words of the sub-section 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 the Revenue*

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6 Vol 6 Kieswetter para 33 pp 503-504

> *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*."

TAXPAYER SECRECY UNDER PAIA

26 The starting point is section 11(1) of PAIA which establishes the general rule that anyone is entitled to access to the records of public bodies.

27 Section 12, however, excludes records of some public bodies and officials from this general rule altogether, or, more accurately, from the application of the PAIA as a whole. They are the records of Cabinet, its committees, the records courts and judicial officers, members of parliament and members of the provincial legislatures (the latter three only in their official capacities). The Act accordingly recognises that it is in the public interest for some institutions and officials to be wholly excluded from the operation of PAIA. It could have excluded SARS from the operation of PAIA. It chose instead not to do so but to afford SARS a carefully circumscribed immunity from disclosure of taxpayer information.

28 Section 35(1) obliges SARS to refuse access to a record which "*contains information which was obtained or is held by (SARS) for the purposes of enforcing (tax) legislation….*"

29 The override in section 46 provides for the disclosure of information that would otherwise have been protected against disclosure. It does, however, not override the protection of SARS' records under section 35.

30 The question in this case is whether taxpayer information should be subject to disclosure under the override in section 46. The applicants contend that it should because the override is narrowly defined. SARS contends on the other hand that, even though the override might be narrowly defined, it would materially undermine the assurance given to taxpayers that SARS will keep their secrets. If the applicants were to have their way, SARS will have to make it known to taxpayers that there is a risk that it might have to disclose their secrets to the media and the public if it should be in the public interest to do so. The risk of public disclosure, however small, will materially undermine taxpayers' confidence in SARS' ability to keep their secrets.[7]

THE FUNDAMENTAL RIGHTS IMPLICATED

The right to privacy

31 Section 14 of the Constitution provides that everyone has the right to privacy which, *inter alia*, includes the right not to have the privacy of their communications infringed.

32 When the law limits this right, by providing for the disclosure of private information, the information may only be used for the purpose for which the disclosure was required. This is sometimes called the "*Marcel principle*"

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[7] Vol 6 Kieswetter para 34 pp 504-505

because it was famously articulated by Sir Nicholas Browne-Wilkinson VC in Marcel v Commissioner of Police of the Metropolis as follows:

> "*Powers conferred for one purpose cannot lawfully be used for other purposes without giving rise to an abuse of power. Hence, in the absence of express provisions, the 1984 Act cannot be taken to authorise the use and disclosure of seized documents for purposes other than police purposes*."[8]

33 The UK Supreme Court more recently articulated this principle in Ingenious Media as follows:

> *"It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes. The principle is sometimes referred to as the Marcel principle, after Ms Marcel v Commissioner of Police of the Metropolis [1992] Ch 225. In relation to taxpayers, HMRC's entitlement to receive and hold confidential information about a person or a company's financial affairs is for the purpose of enabling it to assess and collect (or pay) what is properly due from (or to) the taxpayer…."*[9]

34 The High Court of Australia endorsed the Marcel principle in Johns v Australian Securities Commission.[10]

35 In South Africa, the Cape Provincial Division of the High Court adopted and applied the Marcel principle in City of Cape Town v Premier, Western Cape.[11]

36 The Marcel principle moreover accords with the fundamental principles of our law. Both the legality principle and sections 6(2)(e)(i) and (ii) and (f)(ii)(aa)

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8 [1991] 1 All ER 845 (Ch) 851

9 Ingenious Media Holdings plc v Commissioners for Her Majesty's Revenue and Customs [2016] UKSC 54 para 17

10 [1993] 116 ALR 56

11 2008 (6) SA 345 (C) paras 142.9 to 144

and (bb) of PAJA give effect to the principle that a public power may only be used for the purpose for which it was conferred. Any limitation of a fundamental right must moreover be narrowly construed to serve only the purpose for which the limitation was made.

37 Section 67(4) of the TAA itself gives effect to the Marcel principle in the following terms:

> "*A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person* ***if the disclosure is necessary to perform the functions specified in those sections***." [Emphasis added]

38 On the relief sought in this case, the violation of the Marcel principle, and of the right to privacy, is obvious and irremediable. Recall that the applicants want section 67(4), with its embodiment of the Marcel principle, to be declared unconstitutional. They suggest reading into that section the words "*unless the information has been received in terms of the Promotion of Access to Information Act*." The effect of this would be to render nugatory the Marcel principle in the words underlined above. In other words, once a requester has obtained a tax return under section 46 as amended by the court *a quo*, she is free, untrammelled by the Marcel principle, to disseminate the tax return (because it is obtained under PAIA) to any person whomsoever.

39 This coach-and-horses incursion into established principles, and into the right to privacy, is not anywhere justified by the applicants.

40 At all events, we submit that any rule which allows or obliges SARS to disclose confidential taxpayer information to the media and public will

accordingly constitute a material invasion of the right to privacy. And no justification for it has been put up by the applicants.

The right of access to information

41 Section 32(1)(a) affords everyone the right of access to any information held by the state. We accept that the secrecy provisions of the TAA constitute a *prima facie* limitation of this right.

Freedom of expression

42 Section 16(1) of the Constitution recognises everyone's right to freedom of expression including freedom of the press and other media and freedom to receive or impart information or ideas.

43 We accept that section 67(3) of the TAA, which prohibits the publication of taxpayer information which has been unlawfully leaked, constitutes a *prima facie* limitation of this right.

44 The applicants contend that the other secrecy provisions of the TAA also limit this right because they or the media are entitled to access all secret information. But that is not so. In our Constitution, the right of access to information is encapsulated in section 32. The media do not have any greater right of access to information than anybody else. The cases of Johncom[12] and Chipu[13] both concerned the media's right to publish known information.

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[12] Johncom Media Investments v M 2009 (4) SA 7 (CC)

[13] Mail and Guardian Media v Chipu 2013 (6) SA 367 (CC)

Neither held that the media had greater rights of access to information than anybody else.

BALANCING THE RIGHTS IMPLICATED

Not mere one-sided justification

45 As our description of the rights implicated makes clear, this case is not simply about the justification of one-sided limitation of fundamental rights. It is instead about striking the right balance between competing fundamental rights in tension with one another. One cannot give full effect to the right to privacy on the one hand without limiting the rights of access to information and freedom of expression on the other. The converse is also true. An appropriate balance must be found between the rights because they must be interpreted to be in harmony with one another.

46 The Constitutional Court held in Doctors for Life that the Constitution must be construed in a manner that harmonises its provisions with one another. Ngcobo J put it as follows:

> *"(W)here there are provisions in the Constitution that appear to be in conflict with each other, the proper approach is to examine them to ascertain whether they can reasonably be reconciled. And they must be construed in a manner that gives full effect to each. Provisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them."*[14]

47 The Constitutional Court recently reaffirmed this principle in New Nation as follows:

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[14] Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC) para 48

> "*The Constitution is one composite whole. As such, it could not have been framed to be contradictory. That is exactly why this court has held that "(i)t is not to be assumed that provisions in the same constitution are contradictory". To the extent that there may be tensions between its provisions, everything possible must be done to harmonise them*."[15]

48 So, the inquiry in this case is not, as the applicants suggest, a one-sided inquiry into the limitation of the rights of access to information and freedom of expression. It is, instead, an inquiry into the proper balance between the right to privacy on the one hand and the rights to access to information and freedom of expression on the other.

49 Parliament has already struck a fine balance between them by the taxpayer secrecy provisions in the TAA and PAIA. It is, in the first place, the prerogative of parliament to strike such a balance.[16] It has done so. We submit with respect that the balance it has struck is both rational and appropriate.

50 We proceed, then, to deal with the various aspects of section 36 which this court has to take into account in determining whether the policy choices of parliament in the TAA and PAIA were ones available to it.

The determination of "*legislative facts*"

51 The applicants say that there is no evidence that the purpose—protection of privacy and efficient tax collection—is met by the measures in the TAA and

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[15] New Nation Movement v President of the RSA 2020 (6) SA 257 (CC) para 63

[16] My Vote Counts v Speaker of the National Assembly 2016 (1) SA 132 (CC) paras 155 and 156

PAIA which prohibit disclosure.[17] The applicants argue this case as if it concerns the ordinary proof of facts in dispute between the parties. But that is not so.

52 The Constitutional Court drew a sharp distinction between the proof of "*adjudicative facts*" on the one hand and "*legislative facts*" on the other. Professor Hogg describes them as follows:

> "*Adjudicative facts (sometimes called "historical facts") are facts about the immediate parties to the litigation: "who did what, where, when, how and with what motive or intent?" Legislative facts (sometimes called "social facts") are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts are rarely in issue in most kinds of litigation, but they are often in issue in constitutional litigation, where the constitutionality of a law may depend upon such diverse facts as the existence of an emergency, the effect of segregated schooling on minority children, the relationship between alcohol consumption and road accidents, the susceptibility to advertising of young children, the effect of pornography on behaviour, or the effect of advertising on tobacco consumption.*"[18]

53 In Lawrence, Chaskalson P adopted Professor Hogg's rationality test for the determination of legislative facts:

> "*While a court must reach a definite conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional cases. The most that a court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist.*
>
> *The rational basis test involves restraint on the part of the court in finding legislative facts. Restraint is often compelled by the nature of the issue: for example, an issue of economics which is disputed by professional economists can hardly be definitively resolved by a court staffed by lawyers. The most that can realistically be expected of a court is a finding that there is, or is not, a rational basis for a particular position on the disputed issue.*

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[17] Applicants' submissions para 45

[18] Hogg Constitutional Law of Canada 5th Edition p60-12

> *The more important reason for restraint, however, is related to the respective roles of court and legislature. A legislature acts not merely on the basis of findings of fact, but upon its judgment as to the public perceptions of a situation and its judgments as to the appropriate policy to meet the situation. These judgments are political, and they often do not coincide with the views of social scientists or other experts. It is not for the court to disturb political judgments, much less to substitute the opinions of experts. In a democracy it would be a serious distortion of the political process if appointed officials (the judges) could veto the policies of elected officials.*"[19]

54 Chaskalson P later returned to this issue and commented as follows:

> "*Where the purpose is one sanctioned by s26(2) the question whether that purpose is justifiable in an open and democratic society based on freedom and equality is essentially a question of law; so too is the question whether there is a rational basis for the means used to achieve the legislative purpose. That is not to say that evidence will not be relevant to these inquiries; it may well be. The evidence, however, is more likely than not to consist of "legislative facts"."*[20]

55 Professor Hogg illustrates this point with reference to the judgment of the Supreme Court of Canada in the RJR-MacDonald case.[21] A tobacco manufacturer attacked a legislative ban on advertising tobacco products. The issue in the case was whether the ban would indeed reduce tobacco consumption. In the trial, which ran for 71 days, a parade of expert witnesses called by both sides from all over the world debated the issue. The trial judge concluded, on the basis of the expert evidence, that there was no rational connection between the advertising ban and the purpose of reduced consumption of tobacco. The Supreme Court of Canada however overturned

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[19] S v Lawrence , S v Negal ; S v Solberg 1997 (4) SA 1176 para 42

[20] Lawrence para 52

[21] RJR-MacDonald v Canada [1995] 3 SCR 199 (1995)

his finding, not on the basis of the expert evidence, but on the basis of the court's own application of "*common sense*", "*reason*" and "*logic*".[22]

56 This is moreover a case on paper where disputes of fact are not resolved by the application of the *onus*. They are, on the contrary, resolved by the application of the Plascon-Evans rule.

57 This case is accordingly not one, as the applicants suggest, where the respondents bear an *onus* of proof on a balance of probabilities. On the contrary, the inquiry is one into the proper interpretation of the Constitution by balancing its own provisions to harmonise them. The inquiry is one of law and legislative fact. The court has a wide discretion to take judicial notice of legislative facts. If disputes should arise, however, the respondents are entitled to the benefit of the doubt under the Plascon-Evans rule.

The nature of the rights involved

58 The applicants invoke the rights to freedom of expression and access to information. These rights are clearly important. But then so is the right to privacy. This is one of those special and complex cases in which the limitation of the rights identified by the applicants is done in protection of another right in the Bill of Rights, namely the right to privacy. On this aspect of the section 36 analysis, therefore, all the engaged rights are equally poised and there could be no ready preference of one over another.

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[22] Hogg Constitutional Law of Canada 5th Edition p38-35 to p38-36

59 Therefore, when the applicants say, at paragraph 41 of their submissions, that "*our democracy cannot exist without these rights*", they are not saying anything that helps in resolving the question how to balance these rights. The way to balance them, we submit, is through the careful scheme that has been adopted in the TAA and PAIA.

The importance of the purpose of the limitation

60 The applicants say at paragraph 42 of their submissions that, from the perspective of the media, the limitations are absolute. This, however, is not a true reflection of the limitation. The focus on the media suggests that the limitation on disclosure of taxpayer information affects only the media. The limitation affects everyone. And there is no constitutional attack on <u>that</u> limitation. The section 16 attack is on the limitation only as it affects the media. It is true that the section 32 attack is wider, but nothing in the applicants' case is said to advance the case that non-media requesters should obtain tax information.

61 This is important because, as we show below, the applicants accept that the limitation on taxpayer information is necessary. They accept, for example, that SARS' internal practice of limiting access to taxpayer information is crucial. In this regard, Mr Kieswetter says the following:

> "*SARS' processes and policy reflect the seriousness with which SARS recognises the importance of confidentiality of taxpayer information. Quite apart from the law, there is a culture within SARS which protects taxpayer information from unauthorised disclosure. For example, not every SARS official can access taxpayer information. Officials such as auditors, debt collectors and investigators, whose functions require them to access taxpayer*

> *information, must apply for access to an electronic information system that retains taxpayer information.*
>
> *Even within these functional areas, there are levels of access based on "the need to know". For instance, only a limited number of officials have access to taxpayer information obtained by SARS in the course of considering an application for relief under the voluntary disclosure programme contained in Part B of Chapter 16. The affairs of some taxpayers are ring-fenced and their information is retained separately—that is to say, only officials whose function is to work with the relevant taxpayer's affairs have right of access to that taxpayer information."* [23]

62 In reply, the applicants say that SARS's measures are "*to be commended*".[24] But they then go on to say, illogically, that they "*deny that the reading-in relief would 'undo' these measures*".[25]

63 If confidentiality and the nature and extent of the limitation of the access are admitted to be so important that they must extend internally to SARS, then the applicants cannot seriously contend that permitting every requester access to tax records under the public interest override in section 46 will not undo SARS' internal arrangements. If any requester can gain access to tax information to which other SARS' employees have no uncontrolled access, and disseminate that information, then anyone can have access to it. And SARS' careful internal arrangements would be rendered useless.

64 The ultimate point however is this. The nature and extent of the limitation of the rights identified by the applicants reflects the importance of confidentiality to the whole system. One is not here talking, as the applicants seem

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[23] Vol 6 Kieswetter paras 57-58 pp 510-511

[24] Vol 8 Replying affidavit para 140 p 750.

[25] Vol 8 Replying affidavit para 141 p 750.

simplistically to assume, of a random limitation of rights. This is one of those rare cases in which the extent of the limitation is a reflection of its necessity.

The relationship between the limitation and its purpose

65 There are twin purposes behind the limitation: protection of privacy and efficient collection of revenue, aided by the guarantee of privacy. There is near universal consensus throughout the world, and has been for a long time, that the protection of the secrecy of taxpayer information is a foundational requirement for the optimum collection of taxes. This consensus is epitomised by the statement of Lord Wilberforce, to which we shall later return, that "*The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system*".[26]

66 This near universal international consensus is important in this case. It illustrates that open and democratic societies, based on human dignity, equality and freedom, throughout the world, have struck the same balance between privacy on the one hand and access to information and freedom of expression on the other as our parliament has done.

Taxpayer secrecy in South Africa

67 Mr Tomasek describes the secrecy provisions of South African Income Tax legislation for more than a century since the first Income Tax Act 8 of 1914.[27]

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[26] IRC v National Federation of Self-employed and Small Businesses [1982] AC 617 (HL) 633

[27] Vol 6 Tomasek paras 11 and 12 pp 544 to 547

It is clear that the South African parliament has always provided comprehensive protection to the secrecy of taxpayer information.

68 This policy is judicially recognised. In Dempers, Chief Justice Corbett endorsed the statement of an earlier High Court judgment that,

> "*it is necessary for the purpose of administering the (Income Tax Act) that fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy*."[28]

69 The Appellate Division endorsed this view in De Meyer.[29] Smalberger JA elaborated as follows:

> "*The foundation of the secrecy provisions of s4(1) is that the* ***disclosure of information provided by taxpayers would be contrary to public policy*** *because it would harm the trust between taxpayers and the Department of Inland Revenue, might cause the withholding of information and impede the work of the Department. A guarantee of secrecy is accordingly required to encourage taxpayers to make full disclosure of their income and its sources to the department.*"[30] (our translation and emphasis added[31])

70 The High Court again endorsed this principle in Jeeva,[32] Welz[33] and Sackstein.[34]

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[28] Estate Dempers v Secretary for Inland Revenue 1977 (3) SA 410 (A) 420

[29] Ontvanger van Inkomste, Lebowa v De Meyer NO 1993 (4) SA 13 (A) 26

[30] p25

[31] "*Dit lê die geheimhoudingsbepalings van art 4(1) ten grondslag dat openbaarmaking van inligting verstrek deur belastingpligtiges teen die openbare belang sal wees omdat dit die vertroue tussen belastingpligtiges en die Departement van Binnelandse Inkomste sal skaad, die weerhouding van inligting tot gevolg kan hê en die werksaamhede van die Departement sodoende sal bemoeilik. 'n Waarborg van geheimhouding word dus benodig om belastingpligtiges aan te moedig om volledige inligting aangaande hulle inkomste en die bronne daarvan aan die Departement te verstrek*."

[32] Jeeva v Receiver of Revenue, Port Elizabeth 1995 (2) SA 433 (SE) 458

[33] Welz v Hall 1996 (4) SA 1073 (C) 1076

[34] Sackstein NO v SARS 2000 (2) SA 250 (SE) 257

71 This long legislative and judicial history accordingly fully supports the views expressed by Mr Kieswetter[35] and Tomasek[36], both very experienced tax collectors, that the taxpayer secrecy provisions are of fundamental importance for the optimal collection of taxes in the public interest.

72 Mr Tomasek describes the way in which the balance has been struck in a number of other jurisdictions.[37] What is significant about them is not only that they protect taxpayers' secrecy but also that they specifically exclude taxpayer information from their access to information legislation.

Taxpayer secrecy in Kenya

73 Mr Tomasek describes the protection of taxpayer secrecy in Kenya at paras 76 to 80.[38] Taxpayer secrecy is fully protected even against a constitutional right of access to information.[39]

74 The Kenyan protection of taxpayer secrecy is of particular significance in this case because the very issue in this case has been decided by the Constitutional and Human Rights Division of the High Court of Kenya in the case of Njoya.[40] The important features of the case are the following:

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35 Vol 6 Kieswetter paras 33 to 56 pp 503 to 511

36 Vol 6 Tomasek paras 95 to 97 p 595

37 Vol 6 Tomasek paras 49 para 94.5 pp 569 to 594

38 Vol 6 Tomasek pp 584 to 586

39 Vo 6 Tomasek paras 79 to 80 585

40 Njoya v Attorney General [2014] eKLR

74.1 Section 125 of the Kenyan Income Tax Act protected taxpayer secrecy and excluded access under the Kenyan access to information legislation.

74.2 The applicant challenged the constitutional validity of section 125 on the basis that it was in conflict with section 35 of the Kenyan Constitution. The latter provision confers a constitutional right of access to information in terms substantially identical to section 32 of our Constitution.[41]

74.3 The High Court however dismissed the challenge because it held that section 125 was a reasonable limitation of the right of access to information due to the importance of its protection of taxpayer secrecy.[42]

75 The applicants unsurprisingly have nothing to say about Kenya.

Taxpayer secrecy in the United Kingdom

76 Lord Wilberforce held in the case of the National Federation of Self-employed and Small Businesses that the system of tax collection requires "*that matters relating to income tax are between the commissioners and the taxpayer concerned*" and that the "*total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system*."[43]

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[41] Njoya para 34

[42] Njoya paras 39 to 42

[43] IRC v National Federation of Self-employed and Small Businesses [1982] AC 617 (HL) 633

77 The UK Supreme Court recently endorsed Lord Wilberforce's statement in Ingenious Media.[44]

78 Mr Tomasek describes the protection of taxpayer secrecy in the UK at paras 85 to 92.[45] He makes the point that the taxpayer secrecy provisions exclude access under the Freedom of Information Act.[46]

Taxpayer secrecy in the USA

79 Mr Tomasek describes the protection of taxpayer secrecy in the USA at paras 50 to 57.[47] The protection excludes access under the Freedom of Information Act.[48]

Taxpayer secrecy in Canada

80 Mr Tomasek describes the protection of taxpayer secrecy in Canada at paras 58 to 65.[49] The protection excludes access under the Freedom of Information Act.[50]

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[44] Ingenious Media Holding plc v Commissioners for Her Majesty's Revenue and Customs [2016] UK SC 54 (19 October 2016) para 17

[45] Vol 6 pp 589 to 592

[46] Vol 6 Tomasek paras 91 to 92 pp 591 to 592

[47] Vol 6 Tomasek pp 570 to 574

[48] Vol 6 Tomasek paras 56 to 57 pp 573 to 574

[49] Vol 6 Tomasek pp 574 to 579

[50] Vol 6 Tomasek para 58 p 574

Taxpayer secrecy in New Zealand

81 Mr Tomasek describes the protection of taxpayer secrecy in New Zealand at paras 73 to 74.[51] It excludes access under the freedom to information legislation.

Taxpayer secrecy in Germany

82 Mr Tomasek describes the protection of taxpayer secrecy in Germany at paras 81 to 84.[52] It excludes access under the freedom of information legislation.[53]

Conclusions

83 The applicants say that, of these countries, only Kenya has a constitutionally entrenched right to access to information.[54] This is obfuscation. These countries are "*open and democratic societies based on human dignity, equality and freedom*" of the kind contemplated by the test for justification in section 36(1) of our Constitution.

84 It is clear that the South African parliament has for more than a century protected taxpayer secrecy in recognition of the fact that it is a fundamental requirement for optimal taxpayer disclosure and thus tax collection. It finds itself in good company on this score. Most other open and democratic

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[51] Vol 6 Tomasek pp 579 to 584

[52] Vol 6 Tomasek pp 586 to 589

[53] Vol 6 Tomasek para 84 p 589

[54] Vol 8 Replying affidavit paras 189 to 201 p 760 to 762

societies based on human dignity, equality and freedom have struck the same balance between privacy protection on the one hand and access to information and freedom of expression on the other, in exactly the same way. It thus cannot be said that the balance struck by our parliament is irrational or unreasonable.

85 The Kenyan example is particularly relevant because the High Court adjudicated on the very issue before this court and dismissed a challenge to the secrecy provisions on the basis that they were in breach of the Kenyan constitutional right of access to information.

Less restrictive means

86 The applicants say that the application of the public interest override is a less restrictive means of achieving the purpose behind the impugned measures. There are at least two reasons why this is misguided.

87 First, the purpose of taxpayer secrecy will be seriously undermined if it is made subject to the override in section 46 of PAIA. SARS would henceforth have to qualify its message to taxpayers along the following lines:

> "*We want you to make full and frank disclosure of all your affairs including your criminal conduct, if any. We should warn you, however, that, if your information reveals evidence of your substantial contravention of, or failure to comply with, the law, then SARS may have to release it to the media and the public if it would be in the public interest to do so*."

88 Such a qualified message will, for obvious reasons, seriously undermine the willingness of taxpayers to make full and frank disclosure to SARS of all their affairs including their criminal conduct. The applicants argue in effect that the

harm will be outweighed by the benefit of public disclosure of criminal conduct. But that is not their call. It is for parliament to judge whether the compromise of the purpose of taxpayer secrecy is outweighed by the benefit of public disclosure.

89 Second, there is an objection of principle to the way in which the applicants proceed in this regard. Our courts have over the years cautioned that, in assessing less restrictive means, courts are not there to second-guess legislative choices. In S v Makwanyane and Another 1995 (6) BCLR 665 this court said at para 104:

> "*In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "**the role of the Court is not to second-guess the wisdom of policy choices made by legislators***." [Emphasis added]

90 This is in part because it is the easiest thing for any applicant to conjure up less restrictive means and then ask the court to adopt them. Care must always be taken to avoid that temptation. In S v Mamabolo 2001 (3) SA 409 (CC) the court said at para 49:

> "[*49] Mr Fabricius argued, however, that the public interest in the protection of the legitimacy of the judicial process could be better served by allowing calumnies, even malicious falsehoods, concerning the judiciary to be aired and refuted by open public debate. There is a certain stark appeal in such an absolutist stance, yet it is both unrealistic and inappropriate — unrealistic in an imperfect world with massive concentration of power of communication in relatively few hands and inappropriate where the Constitution requires a balancing exercise. Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. **And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section**. It is but one of the enumerated considerations which have to be weighed in conjunction with one*

> *another, and with any others that may be relevant. On balance, while recognising the fundamental importance of freedom of expression in the open and democratic society envisaged by the Constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalising the court.*" [Emphasis added]

91 The reason why a court should not be beguiled by lawyer-inspired "*less restrictive means*" has to do with the deep structure of our Constitution and the central role of separation of powers in that structure. In New National Party v Government of the Republic of South Africa and Others 1999 (3) SA 191 the court said this at para 24:

> "*[24] O'Regan J in her dissenting judgment measures the importance of the purpose of the statutory provision in relation to its effect, and asks the question whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable, and for that reason, to hold that the relevant provisions of the Electoral Act are inconsistent with the Constitution.* ***In my view this is not the correct approach to the problem. Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose****."* [Emphasis added]

92 For all the above reasons, we submit that the less restrictive means proposed by the applicants are not only not less restrictive, they also exhibit a misguided understanding of the court's role in polycentric cases of this kind. It is instructive that other democratic societies have the same secrecy provisions as contained in PAIA and the TAA.

TAXPAYER SECRECY UNDER INTERNATIONAL LAW

The importance of international law

93 South Africa is a party to a range of international agreements under which it exchanges taxpayer information with other countries. The free flow of taxpayer information under those treaties dramatically increased in recent times. Mr Tomasek describes the rapid escalation in the international flow of taxpayer information across the globe at paras 39 to 40.[55] He says for instance that, in 2019 alone, SARS received 1,388,756 records of accounts held by South African residents in 38 foreign jurisdictions.[56] One of the spinoffs, for South Africa, of this increasing inflow of taxpayer information, has for instance been that taxpayers have increasingly made voluntary disclosure of their offshore assets and income because they can no longer conceal them.[57]

94 It is, however, a condition of all these treaties that the taxpayer information exchanged under them be kept secret. The purposes for which the information may be used and disclosed are strictly limited. They do not permit disclosure to the media and the public under access to information legislation. South Africa would be in breach of its obligations under these treaties if it were to allow taxpayer information to be exposed to disclosure under the override in section 46 of PAIA.

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[55] Vol 6 Tomasek p 564

[56] Vol 6 Tomasek para 40.3 p 564

[57] Vol 6 Tomasek para 41 p 565

95 This unequivocal and strict insistence on the secrecy of taxpayer information under international law is crucial to the inquiry in this case for the following reasons.

96 The Constitutional Court held in Glenister that our Constitution appropriates the state's obligations under international law and "*draws it deeply into its heart*". The court put it as follows:

> "*The obligations in these conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere.*"[58]

97 In his concurring judgment in Glenister, Chief Justice Ngcobo articulated the same principle as follows:

> "*Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular, international human rights law…. These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution*."[59]

98 The Constitutional Court endorsed the latter description of the principle in the Torture Docket Case.[60]

99 The Constitutional Court most recently affirmed and elaborated upon the principle in the Law Society case.[61] The court added that the implication of

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[58] Glenister v President of the RSA 2011 (3) SA 347 (CC) para 189

[59] Glenister para 97

[60] National Commissioner of Police v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC) para 22

[61] Law Society of SA v President of the RSA 2019 (3) SA 30 (CC) paras 4, 5, 48, 74 to 79

this principle is that no constitutional office bearer may act contrary to its provisions:

> "*For these reasons no constitutional office bearer, including our President, may act, on behalf of the State, contrary to its provisions. They are all, as agents of the State, under an international law obligation to act in line with its commitments made in terms of that Treaty. And there was and still is no legal basis for the President to act contrary to the unvaried provisions of a binding Treaty*."[62]

100 The implication of this first principle is clear that South Africa is obliged to protect the secrecy of incoming taxpayer information against access under the override in section 46 of PAIA.

101 The international treaties are, in the second place, important because they are powerful and compelling evidence of an international consensus about the manner in which revenue authorities may and should protect taxpayer secrecy.

102 The international law perspective, thirdly, introduces a vitally important consideration in the debate about taxpayer secrecy. It is namely that South Africa may lose the benefit of the international exchange of taxpayer information if it were to subject taxpayer information subject to the override in section 46 of PAIA. It would have to tell its counterparts under the international treaties that it cannot guarantee the secrecy of incoming taxpayer information because it might be compelled to disclose the information to the media and the public if it or a court should deem it to be in the public interest to do so.

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[62] Law Society para 48. See also 77

103 This risk is not fanciful. Mr Tomasek describes the way in which the international community recently excluded Bulgaria from the international exchange of taxpayer information because of its security breaches.[63]

104 These implications are borne out by the particular international treaties to which we now turn.

The Double Taxation Agreements

105 Mr Tomasek describes South Africa's Double Taxation Agreements with some 82 countries at paras 17 to 23.[64] Most of the DTAs are based on the OECD's Model Tax Convention. Article 26 of the Model Tax Convention requires both parties to the treaty to preserve the secrecy of taxpayer information. It reads as follows:

> "*Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and* ***shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in 1, or the oversight of the above.*** *Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."* (our emphasis)

106 The OECD has made clear that this clause only permits disclosure to the tax authorities concerned,

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[63] Vol 6 Tomasek para 42 p 567

[64] Vol 6 Tomasek pp 551 to 554

> "*regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to government documents*."[65]

The Tax Information Exchange Agreements

107 Mr Tomasek describes South Africa's Tax Information Exchange Agreements with some 27 countries at paras 24 to 28.[66] They also preclude disclosure to the media or the public under the override in section 46 of PAIA.[67]

The Convention on Mutual Administrative Assistance in Tax Matters

108 South Africa is a party to the Convention on Administrative Assistance in Tax Matters. Mr Tomasek describes its provisions at paras 24 to 28.[68] It provides for the automatic exchange of taxpayer information. Article 22 also imposes strict secrecy requirements which would preclude disclosure taxpayer information under the override in article 46 of PAIA.[69]

The OECD – Global Forum Guide

109 The OECD cooperated with the Global Forum on Transparency and Exchange of Information for Tax Purposes to publish a guide on the protection of confidentiality of information exchanged for tax purposes. The Global Forum is a group of more than 160 states charged with in-depth monitoring and peer review of the implementation of the international

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65 Vol 6 Tomasek para 22 p 553

66 Vol 6 Tomasek pp 555 to 557

67 Vol 6 Tomasek para 28 p 556

68 Vol 6 Tomasek pp 555 to 557

69 Vol 6 Tomasek paras 32 and 33 pp 557 to 558

standards of transparency and exchange of information for tax purposes. South Africa is a member of the group.

110 The OECD – Global Forum Guide makes it clear that international law requires strict secrecy protection of taxpayer information:

110.1 The Guide makes the point in its introduction:

> "*Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems. In order to have confidence in their system and comply with their obligations under the law, taxpayers need to have confidence that the often-sensitive financial information is not disclosed inappropriately, whether internationally or by accident. Citizens and their governments will only have confidence in international exchange if the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged*."[70]

110.2 The Guide reiterates this principle later in the same introductions:

> "*Confidentiality is a cornerstone for all functions carried out within the tax administration and as the sophistication of the tax administration increases, the confidentiality processes and practices must keep pace*."[71]

110.3 The Guide again emphasises the importance of confidentiality in its description of the applicable legal framework:

> "*Effective mutual assistance between competent authorities requires that each competent authority be assured that the other will treat with proper confidence the information which it obtains in the course of their cooperation. For this reason, all treaties and exchange of information instruments contain provisions regarding tax confidentiality and the obligation to keep information exchanged as secret or confidential.*
>
> *Information exchange partners may suspend the exchange of information if appropriate safeguards are not in place or if there has a been a breach in confidentiality and they are not satisfied that the situation has been appropriately resolved*."

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[70] Guide p7

[71] Guide p8 to p9

110.4 The Guide summarises the chapter on the need for confidentiality in the following three key points:

> *"• Domestic laws must be in place to protect confidentiality of tax information.*
> *• Treaty obligations regarding confidentiality must be binding in countries.*
> *• Effective penalties must be in place for unauthorised disclosure of confidential information exchanged."*[72]

110.5 The Guide makes it clear that other domestic legislation must be reviewed to ensure that they do not impugn upon the confidentiality of taxpayer information. It must be specifically excluded from the operation of access to information legislation:

> "*Regardless of the approach adopted, jurisdictions must ensure that the confidentiality obligations are respected when information is received under a tax treaty or other exchange of information mechanism.*
>
> *Other domestic laws must also be reviewed to ensure that they do not require or allow the release of information obtained under a tax treaty or other exchange of information instrument. For example, information may not be disclosed to persons or authorities not covered in Article 26 regardless of domestic information disclosure laws (for example, freedom of information or other legislation that allows access to governmental documents). Many jurisdictions have specific exemptions in their freedom of information laws so that information obtained under tax treaties is not subject to disclosure."*[73]

110.6 The same point is repeated in the final recommendations in the report:

> "*Domestic legislation (for example, freedom of information or access to information) must not require or allow the release of information obtained under a tax treaty or other exchange of information mechanism in a manner inconsistent with the confidentiality obligations in that mechanism*."[74]

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[72] Guide p15 para 2

[73] Guide p16

[74] Report p33 recommendations para 3

Conclusions

111 International law, binding on South Africa, is unequivocal that the secrecy of taxpayer information must be ensured. The release of such information to the media and the public under the override in section 46 of PAIA would be in breach of South Africa's obligations under international law and would jeopardise its participation in the international exchange of taxpayer information.

112 The international law rules moreover reinforce the balance our parliament has struck between the rights to privacy on the one hand and access to information and freedom of expression on the other. It is entirely in line with an international consensus on the manner in which the balance should be struck. It can accordingly not be credibly contended that the balance struck by our parliament is in any way irrational or unreasonable.

THE CONSTITUTIONAL ATTACK IS UNFOUNDED

113 We submit in conclusion that the applicants' constitutional attack is unfounded for the following reasons.

114 First, the TAA and PAIA strike a fair and reasonable balance between the privacy rights of taxpayers on the one hand and the rights of access to information and freedom of expression of others. Taxpayers are compelled to disclose their secrets to SARS. They are required even to confess to their own criminal conduct. They are stripped of their privilege against self-incrimination. In return for their full and frank disclosure, SARS promises to keep their secrets.

115 This balance is in the public interest. Experience has taught that the secrecy of taxpayer information promotes full and frank disclosure and enhances tax collection. This has been the legislative and judicial experience in South Africa for more than a century. It also accords with the experience and policies of open and democrat societies based on human dignity, equality and freedom throughout the world.

116 The policy of keeping taxpayers' secrets in any event gives effect to South Africa's obligations under international law. South Africa is today bound by an interlocking network of international treaties to keep taxpayer secrets and certainly not to release them to the media and the public. The Constitutional Court has repeatedly held that the Constitution and the law must be interpreted and applied to give effect to South Africa's international law obligations. That can be done only by recognising and upholding the secrecy of taxpayer information. If South Africa were to accede to the applicants' demand, to render taxpayer information subject to the override in section 46 of PAIA, it would be ostracised from the international network for the exchange of taxpayer information. The South African taxpayer would ultimately be the loser.

117 The other side of the same coin is that, if taxpayer information were to be made subject to disclosure to the media and public under section 46 of PAIA, it would be an undue limitation of taxpayers' rights to privacy. That would be so because the law requires them to make full and frank disclosure of their secrets, including details of their criminal conduct, and strips them of their

privilege against self-incrimination. To then take their secret information and release it to the media and the public would be travesty.

118 The applicants' constitutional attack should accordingly be dismissed.

ALTERNATIVELY: A JUST AND EQUITABLE REMEDY

119 We submit in the alternative, if this court should uphold the applicants' constitutional attack, that the just and equitable remedy would be to suspend this court's declaration of invalidity for a period of two years to afford parliament an opportunity to rectify the constitutional defect. It would, for the following reasons, not be just and equitable to accede to the applicants' claim for an immediate remedy of reading-in.

120 If this court were to hold that taxpayer information should be subject to disclosure under the override in section 46 of PAIA, parliament may wish to reconsider the formulation of the override itself. Its constitutional validity has never been tested and may indeed be in doubt. It for instance provides for the public disclosure of documents subject to legal-professional privilege otherwise protected under section 40 of PAIA. It means, for instance, that every witness statement given by an accused person to his or her counsel is vulnerable to disclosure to the media and the public. Such disclosure of privileged material would, on the face of it, clearly be in violation of the right to a fair trial under sections 34 and 35(3) of the Constitution.

121 Parliament may also wish to reform section 46 if it has to provide for the public release of confidential taxpayer information. The current rendition of section 46 may certainly be improved in at least two respects:

121.1 The ultimate requirement for disclosure under section 46(b) is that "*the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question*", that is, the section under which the material is otherwise protected from disclosure. But how does the information officer of a public body assess and weigh the public interest in the disclosure of the record, the harm contemplated by the provision under which it is ordinarily protected, and the balance between the two. The suggestion that this is within the competence of the average information officer is indeed farfetched. It in any event renders the outcome wholly unpredictable. Parliament may accordingly wish to prescribe the test for disclosure with greater specificity to render it more practical and predictable.

121.2 Parliament may also wish to prescribe the procedure for application of the override under section 46 more specific than it currently is. It may, for instance, want to provide for requesters and the information officers dealing with their requests to have ready access to a judicial officer to determine whether otherwise sensitive material should be publicly released.

122 It is accordingly not a foregone conclusion at all that parliament would simply render taxpayer information subject to release under the override in section 46 as it currently stands. The question whether to do so or not should, in any event, be left to parliament.

123 Paragraph 4 of the High Court's orders provides for words to be read into section 46 of PAIA and sections 67(4) and 69(2) of the TAA but only with

prospective effect ("*shall be read*"). It would be highly undesirable for this court to amend the law with retrospective effect at all and, in any event, without regulating its retrospective operation. There is consequently no justification for the High Court's consequential orders 5, 6, 7, and 8.

PRAYERS

124 SARS asks that:

124.1 the application for confirmation be dismissed;

124.2 its application for leave to appeal be granted; and

124.3 the High Court's orders 5, 6, 7 and 9 be set aside.

125 Alternatively, if this court were to hold that the impugned provisions are unconstitutional and invalid, then SARS asks that its declaration of invalidity be suspended for a period of two years to allow parliament to cure the constitutional defect.

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20 May 2022

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