CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 365/21

In the matter between:

ARENA HOLDINGS (PTY) LIMITED 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

Neutral citation: *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13

Coram: Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J

Judgments: Mhlantla J (minority): [1] to [122]
Kollapen J (majority): [123] to [205]

Heard on: 23 August 2022

Decided on: 30 May 2023

Summary: Promotion of Access to Information Act 2 of 2000 — constitutionality of sections 35 and 46 — provisions are unconstitutional

Tax Administration Act 28 of 2011 — constitutionality of sections 67 and 69 — provisions are unconstitutional

Unconstitutional — absolute prohibition of access to tax records — right to access to information — right to freedom of expression — right to privacy — section 36 of the Constitution — public-interest override

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ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of constitutional invalidity of the High Court of sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 (PAIA), 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 section 46 of PAIA are met, is confirmed.
2. The order of constitutional invalidity of the High Court of sections 67 and 69 of the Tax Administration Act 28 of 2011 (TAA) to the extent that they—
    (a) preclude access to information being granted to a requester in respect of tax records in circumstances where the requirements set out in section 46 of PAIA are met; and
    (b) preclude a requester from further disseminating information obtained as a result of a PAIA request

is confirmed.

3. The declarations of invalidity in paragraphs 1 and 2 above are suspended for a period of 24 months from the date of this order to enable Parliament to address the constitutional invalidity found to exist.

4. Pending any measures Parliament might take to address the constitutional invalidity, the impugned provisions shall be read as follows:

   (a) Section 46 of PAIA shall read:

   > "46 Mandatory disclosure in public interest.—Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), **35(1)**, 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—
   >
   > (a) the disclosure of the record would reveal evidence of—
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   > (i) a substantial contravention of, or failure to comply with, the law; or
   >
   > (ii) an imminent and serious public safety or environmental risk; and
   >
   > (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

   (b) Subsection 69(2) of the TAA shall be read as if it contained an additional paragraph (bA) after the existing paragraph (b):

   > "(bA) where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act 2 of 2000"

   (c) Section 67(4) of the TAA shall be read as if the phrase "unless the information has been received in terms of the Promotion of Access to Information Act 2 of 2000" appeared immediately before the full stop.

5. In the event that Parliament does not remedy the constitutional defects within 24 months of this order, paragraph 4 of this order shall continue to apply.

6. The applications for leave to appeal of the first to the fourth respondents are granted.
7. The appeals by the first respondent and the fourth respondent against paragraph 9 of the High Court order are dismissed.
8. The appeal by the third respondent against paragraphs 1, 3 and 4.1 of the High Court order is dismissed.
9. The appeal by the fourth respondent against paragraphs 2, 4.2 and 4.3 of the High Court order is dismissed.
10. The appeals by the first respondent and the second respondent against paragraphs 5 and 7 of the High Court order are upheld and those paragraphs of the High Court order are set aside.
11. The appeal by the first respondent against paragraph 6 of the High Court order is upheld and that paragraph of the High Court order is set aside.
12. The request of the third applicant under PAIA for access to the individual tax returns of the second respondent for the 2010 to 2018 tax years is referred to the first respondent for consideration afresh in the light of this order.
13. The third applicant is afforded one month from the date of this order to supplement his request for access to the records referred to in paragraph 12 of this order.
14. The costs of the applicants in this Court in respect of the confirmation proceedings shall be paid by the first, third and fourth respondents and shall include the costs of two counsel.
15. The parties shall bear their own costs in respect of the appeals by the first to the fourth respondents.

JUDGMENT

MHLANTLA J (Madlanga J, Mbatha AJ and Tshiqi J concurring):

Introduction

[1] This matter is about the balance to be struck between competing rights. That is, on the one hand, the right to privacy and, on the other, the rights of access to information and freedom of expression. The matter concerns the constitutionality of sections 67 and 69 of the Tax Administration Act[1] (TAA) and sections 35 and 46 of the Promotion of Access to Information Act[2] (PAIA). It is primarily centred on the question whether the order granted by the High Court of South Africa, Gauteng Division, Pretoria[3] (High Court), declaring section 35[4] and section 46[5] of PAIA unconstitutional

[1] 28 of 2011.

[2] 2 of 2000.

[3] *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service*, reported judgment of the High Court of South Africa, Gauteng Local Division, Case No 88359/2019 (16 December 2021) (High Court judgment).

[4] Section 35 provides:

> "(1) Subject to subsection (2), the information officer of the South African Revenue Service, referred to in section 2(3), 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 as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997).
>
> (2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf the request is made."

[5] Section 46 provides:

> "Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—
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> (a) the disclosure of the record would reveal evidence of—
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> (i) a substantial contravention of, or failure to comply with, the law; or
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> (ii) an imminent and serious public safety or environmental risk; and
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> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

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, should be confirmed.

[2] As these are confirmation proceedings, this Court's jurisdiction is engaged. In terms of section 167(5) of the Constitution, this Court makes the final decision whether an Act of Parliament is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal and High Court before that order has any force. Of course, this Court must conduct its own evaluation and satisfy itself that the impugned provisions do not pass constitutional muster before confirming the order of invalidity.[6]

Parties

[3] The first applicant is Arena Holdings (Pty) Ltd (Arena), formerly known as Tiso Blackstar Group (Pty) Ltd, a private company that owns various media houses, including the Sunday Times, the Sowetan, the Herald, the Daily Dispatch, the Business Day and the Financial Mail. The second applicant is AmaBhungane Centre for Investigative Journalism NPC (AmaBhungane), a non-profit company engaged in public interest investigative journalism. The third applicant is Mr Warren Thompson, a financial journalist, who was employed by Arena at the time of the High Court application.

[4] The first respondent is the South African Revenue Service (SARS), South Africa's tax-collection authority. The second respondent is Mr Jacob Gedleyihlekisa Zuma (Mr Zuma), the former President of the Republic of South Africa. The third and fourth respondents are the Minister of Justice and Correctional Services (Minister of Justice) and the Minister of Finance, respectively. The fifth respondent is the Information Regulator (Regulator), the authority tasked with the monitoring and enforcement of PAIA.

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[6] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[5] The respondents – except for the fifth respondent – oppose this application and have each filed an application for leave to appeal[7] against the order of the High Court. The fifth respondent has filed an explanatory affidavit and a notice to abide. Due to the number of applications before this Court, the applicants in the confirmation proceedings will collectively be referred to as the applicants. The respondents will be referred to individually.

Background facts

[6] Early in 2019, the third applicant made an application to SARS, in terms of PAIA, to gain access to Mr Zuma's tax records. The application was premised on allegations that were made by Mr Jacques Pauw in his book titled *The President's Keepers*[8] and subsequently by several other persons. It was averred that there was "credible evidence" that, while he was President, Mr Zuma was not tax compliant.

[7] On 19 March 2019, SARS refused the third applicant's application on the basis that Mr Zuma was entitled to confidentiality under sections 34(1) and 35(1) of PAIA as well as section 69(1) of the TAA. The third applicant launched an internal appeal against SARS' refusal. On 30 March 2019, SARS dismissed the appeal on the same grounds. Following SARS' refusal, the applicants launched an application in the High Court.

Litigation history

High Court

[8] On 25 November 2019, the applicants launched a constitutional challenge in the High Court requesting it to determine whether tax information held by the state receives

[7] Section 172(2)(d) of the Constitution provides that "any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection".

[8] Pauw *The President's Keepers: Those Keeping Zuma in Power and Out of Prison* (Tafelburg, 2017).

absolute protection from disclosure under PAIA. In their application, the applicants challenged the constitutional validity of the statutory prohibition of the disclosure of a taxpayer's tax information held by SARS, in circumstances where such disclosure would reveal evidence of a substantial contravention of the law and would be in the public interest.

[9] Before the High Court, the applicants contended that there was credible evidence that Mr Zuma: (a) had evaded tax while he was President; (b) had failed to disclose other sources of income he received; and (c) did not pay tax on the fringe benefits he received. The applicants relied on allegations contained in Mr Pauw's book. They submitted that there is credible evidence in that book that Mr Zuma was not tax compliant.[9] Thus, they argued that all the evidence they tendered could only be verified by the tax information SARS refused the applicants to access.

[10] The applicants argued that the prohibition to access information of a taxpayer rendered by sections 35(1) and 46 of PAIA and Chapter 6 of the TAA is unconstitutional in so far as such access is in the interest of the public. In addition, that this prohibition is an unjustifiable limitation of their constitutional right to freedom of expression and right of access to information. Consequently, they sought the following relief: (a) a declaration that PAIA and the TAA are unconstitutional to the extent that they do not permit access to a taxpayer's tax information under PAIA by a requester other than the taxpayer concerned, even if it is clearly in the public interest that this information should be disclosed; (b) reading-in relief that would extend the limited public interest exception in PAIA; and (c) an order granting access to Mr Zuma's tax records.

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[9] *The President's Keepers* id and the various findings made against Mr Zuma, such as; the findings of personal benefit derived by Mr Zuma from the upgrades to his 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 the Judicial Commission of Inquiry into the allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State chaired by DCJ Zondo.

[11] Mr Zuma did not participate in the High Court proceedings. SARS, the Minister of Justice, and the Minister of Finance opposed the application. The Regulator filed a notice to abide the order of court.

[12] The High Court held that the notion proffered by SARS and the Ministers that voluntary disclosure and taxpayer compliance is inextricably linked to, or dependent on the taxpayer secrecy regime is not a universal truth.[10] The Court said that there are various foreign jurisdictions with less restrictive and secretive regimes and their tax administration is neither hampered nor prevented thereby. The High Court further said that research shows that voluntary tax compliance will increase if government spends tax wisely and that taxpayers will pay their tax honestly if they get valuable public services in return.[11] Thus, the Court was doubtful about SARS' assertion that tax compliance is heavily reliant on the secrecy of taxpayer information.

[13] The Court stated that there was a need to decide whether the premise relied upon by SARS was sacrosanct enough to support the limitation it contends is constitutionally justifiable. The Court then held:

> "The 'compact' relied on by the Commissioner, namely that truthful and accurate disclosure is made in exchange for secrecy, is open to some doubt . . . [T]he non-disclosure provisions are not linked to the provisions obliging taxpayers to make truthful and accurate submissions to SARS. On the contrary, the failure to make truthful and accurate submissions are indeed linked to the penalty and criminal sanction . . . To put it bluntly, there is no direct or factual evidence that taxpayers in South Africa rather make disclosure of their affairs because of the secrecy provisions as opposed to the coercion of the penalties and sanctions which follow upon non-disclosure."[12]

[10] High Court judgment above n 3 at para 8.2.

[11] Id at para 8.4.

[12] Id at paras 8.5-6.

[14] The High Court held that the assertion of the right to privacy and secrecy relied on by SARS and the Ministers did not fulfil the limitation test as set out in section 36 of the Constitution. Therefore, the limitations on the access to information are not justified. The High Court found that the argument that public interest overrides the limitation of taxpayer confidentiality was justified. The Court held that the blanket prohibitions of disclosure of taxpayer information contained in section 35 of PAIA and section 69 of the TAA unjustifiably limit the right of access to information provided for in section 32 of the Constitution. It concluded that a "reading-in" of the "public–interest override" provisions contained in section 46 of PAIA was justified and competent.

[15] The High Court thus declared the impugned provisions invalid and unconstitutional. It ordered an interim reading-in. After making the declaration of invalidity, the Court granted the application for the release of Mr Zuma's tax records.

In this Court

[16] The applicants now approach this Court to confirm the declaration of invalidity made by the High Court (confirmation application).

Applicants' submissions

Constitutionality of the impugned provisions

[17] The applicants submit that there is an absolute prohibition on disclosure of tax information of a taxpayer held by SARS to a PAIA requester other than the taxpayer concerned. They submit that a "public-interest override" which permits disclosure of information listed in Chapter 4 of Part 2 of PAIA does not apply to section 35 of PAIA. The applicants submit that, although section 69 of the TAA is subject to some exceptions, these exceptions do not include a PAIA request. Additionally, section 67 of the TAA prohibits the disclosure to a third party and prohibits the further disclosure of taxpayer information that has been obtained contrary to Chapter 6 of the TAA. The applicants contend that these prohibitions prevent the media from obtaining tax information, through PAIA or in any other way, from SARS, and from reporting on

any tax information the media has managed to obtain, "even if the information contains conclusive evidence of corruption, malfeasance or other law-breaking".

[18] The applicants argue that the impugned provisions are unconstitutional to the extent that they limit the right of access to information, under section 32(1) of the Constitution, in that taxpayer information is information held by the state, access to which has been unjustifiably precluded. They also submit that the right to freedom of expression, under section 16 of the Constitution, is implicated in that the media is prevented from lawfully obtaining tax information and from reporting on it.

[19] The applicants submit that the limitation of the rights in sections 16 and 32(1) of the Constitution is not justifiable under section 36 of the Constitution. They contend that the impugned prohibitions are not justifiable, as they are not necessary to protect the privacy of taxpayers or for taxpayer compliance. The applicants submit that the respondents have failed to prove that the limitation is justifiable. They argue that the limitation of the section 16 and section 32(1) rights is disproportionate and unconstitutional. Therefore, the impugned provisions should be declared invalid.

[20] The applicants submit that a just and equitable remedy would be to extend the "public–interest override" to section 35 of PAIA and to read–in an exception into section 69(2) of the TAA to permit disclosure of taxpayer information where access has been granted under PAIA. They contend that the proposed remedy would not violate South Africa's international obligations as it would only apply to the disclosure of information held by SARS where it has been gathered domestically. They further submit that the "public–interest override" would not demand the disclosure of information that would result in South Africa breaching its international obligations. The applicants thus seek an order confirming the declarations of invalidity made by the High Court, the reading-in relief, the disclosure order, and the costs order. They also seek costs in this Court against the state respondents and Mr Zuma.

[21] The applicants do not contest Mr Zuma's application for leave to appeal save to state that since he did not participate in the High Court proceedings, he is not entitled to participate in the proceedings before this Court. They submit that the appeal falls to be dismissed for lack prospects of success.

SARS' submissions

[22] SARS submits that the regime created by the TAA and PAIA was established after extensive consultation and careful consideration of other tax regimes, and it strikes a fair and reasonable balance between the right to privacy and the right of access to information. According to SARS, taxpayers are not only encouraged, but are compelled, to make full and frank disclosure of their personal information and "secrets" to SARS, including disclosure of their own criminal conduct. Taxpayers are essentially stripped of their privilege against self-incrimination. SARS submits that the impugned provisions serve to preserve taxpayers' secrets and that the extension of the override provision in section 46 will materially undermine the assurance given to taxpayers that SARS will keep their secrets and undermine taxpayers' confidence in SARS.

[23] SARS submits that the impugned provisions of the TAA are not absolute as they are subject to narrowly circumscribed and tightly controlled exceptions. Further, SARS submits that the relief sought by the applicants cuts across these carefully circumscribed disclosure provisions and renders all the strict conditions of disclosure obsolete, regardless of the fact that these provisions were not subject to the constitutional challenge.

[24] SARS contends that the relief sought by the applicants violates the right to privacy, under section 14 of the Constitution, as well as the *Marcel* principle,[13] in that the relief would enable a PAIA requester to freely disseminate tax information to any

[13] The *Marcel* principle is a well-established principle of the law of confidentiality which states 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 who it was received or to who it relates not to use it for other purposes. See *Marcel v Commissioner of Police of the Metropolis* [1991] 1 All ER 845 (Ch) 851.

person, without constraint. SARS submits that this incursion into the right to privacy and the *Marcel* principle has not been justified by the applicants. Furthermore, SARS submits that if taxpayer information were to be made subject to disclosure to the media and the public under section 46 of PAIA, it would be an undue limitation of taxpayers' rights to privacy. According to SARS, an appropriate balance must be found between the right to privacy, on the one hand, without limiting the rights of access to information and freedom of expression, on the other. SARS believes that Parliament has already struck a rational and appropriate balance between these rights by placing the impugned provisions in the TAA and PAIA.

[25] SARS contends that all the implicated rights are equally poised and there should be no preference of one over the other. It further submits that the relief proposed by the applicants, which is the extension of the "public-interest override", is "not only not less restrictive, [it] also exhibits a misguided understanding of the court's role in polycentric cases of this kind".

[26] SARS submits that, in any event, the policy of keeping taxpayers' secrets gives effect to South Africa's obligations under international law. South Africa is bound by an interlocking network of international treaties to keep taxpayer secrets and certainly not to release them to the media and the public. SARS submits that if the relief sought by the applicants is granted, South Africa would be in breach of its obligations under these treaties and would be ostracised from the international network for the exchange of taxpayer information.

[27] SARS seeks a dismissal of the confirmation application and the setting aside of the order of the High Court declaring the impugned provisions unconstitutional. However, as an alternative to the relief sought by the applicants, SARS submits that in the event this Court confirms the order of invalidity, a 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.

Mr Zuma's submissions

[28] Mr Zuma submits that his non-participation in the High Court does not give rise to the principle of peremption as he did not file a notice to abide. He argues that his right of access to courts under section 34 of the Constitution enables him to participate in these proceedings. Mr Zuma also submits that, in any event, the relief sought by the applicants implicates his right to privacy, and this warrants his participation in the proceedings.

[29] Mr Zuma seeks leave to appeal against the order that SARS should disclose his tax records to the applicants. He submits that the applicants largely relied on the allegations of non-compliance made in *The President's Keepers*. According to Mr Zuma, the book does not disclose any facts that would demonstrate credible evidence that he violated his tax obligations in that: there are no allegations of specific amounts paid to him that were not subject to tax; the allegations that he was not tax compliant emanate from unnamed and undisclosed sources; the amount of tax alleged to be owed by him is not specified; and the author of the book has not been called to testify about the allegations. Thus, the applicants' case is based on hearsay and does not cross the admissibility threshold. Mr Zuma submits that the relief sought by the applicants infringes on his rights to privacy and dignity.

[30] Mr Zuma submits that before an order of invalidity is confirmed by this Court, it is incompetent for the High Court to order SARS to release his tax records. Mr Zuma also submits that even if the order of invalidity is confirmed, it does not follow that the applicants have established a right to access his tax information.

Submissions by the Minister of Justice

[31] The Minister accepts that this matter implicates the right of access to information; however, he submits that this right is not absolute and is subject to the limitations imposed by section 36 of the Constitution. The Minister concedes that, in

accordance with this Court's decisions in *Johncom*[14] and *Chipu*,[15] absolute prohibitions are unconstitutional. However, the Minister submits that these cases are distinguishable from the provisions of section 35 of PAIA.

[32] The Minister contends that the applicants relied on hearsay evidence from *The President's Keepers* to advance their allegations that Mr Zuma was not tax compliant during his tenure as President. According to the Minister, the applicants' reliance on this evidence supports an inference that they are on a fishing expedition. The Minister submits that since Mr Zuma has left office, he is an ordinary citizen who must be afforded protection and there is no public interest in the disclosure of his tax information.

[33] Furthermore, the Minister submits that maintaining the confidentiality of taxpayer information is in the public interest. He contends that the proposed extended "public-interest override" is both speculative and discriminatory – as between ordinary non-compliant citizens and prominent figures. Consequently, the Minister of Justice seeks a dismissal of the confirmation application.

Minister of Finance's submissions

[34] The Minister of Finance in essence seeks a variation of the order of the High Court declaring sections 67 and 69 of the TAA invalid and unconstitutional, the resultant reading-in remedy and the costs order against him. He submits that the High Court did not consider the arguments and evidence advanced on his behalf, and that it declared sections 67 and 69 of the TAA unconstitutional and invalid without laying any basis for such declaration. The Minister further submits that the applicants have failed to establish that sections 67 and 69 of the TAA are unconstitutional and that the reading-in and substitution order they seek are incompetent.

[14] *Johncom Media Investments Ltd v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC).

[15] *Mail and Guardian Media Ltd v Chipu N.O.* [2013] ZACC 32; 2013 (6) SA 367 (CC); 2013 (11) BCLR 1259 (CC).

[35] Like SARS, the Minister submits that the confidentiality regime created by the impugned provisions of the TAA passes constitutional muster in that it strikes a fair balance between the rights of a taxpayer to privacy, SARS' duty to effectively collect taxes and South Africa's international obligations, on the one hand, and the public's right to access information, on the other.

[36] The Minister asserts that section 67(3) of the TAA prohibits the disclosure of unlawfully obtained tax information to any other person. The contravention of section 67(3) of the TAA is a criminal offence. The Minister contends that confirming the High Court's order would be *contra bonos mores* (against good morals) in that it would be tantamount to aiding a person who committed an unlawful act.

[37] Further, the Minister submits that the High Court failed to take cognisance of public policy considerations, in that the confidentiality of information is critical for effective tax administration and the subsistence of the voluntary compliance policy. The Minister contends that the prohibition of disclosure of tax information is not absolute as it is subject to some exceptions. According to the Minister, the applicants only take issue with the TAA because the available exceptions do not meet their ends. The Minister states that the exclusion of the "public–interest override" is a policy decision. He submits that the High Court merely made cursory reference to his submission and the expert evidence provided by Professor Roeleveld and did not fully engage with his submissions and adequately consider Professor Roeleveld's evidence concerning the impugned provisions of the TAA and international best practice.

[38] The Minister argues that the proposed "public-interest override" is too broad in that the applicants and any other party may "decide on a whim whose tax records they seek and cloak their request for those tax records under the vague umbrella of public-interest". The Minister further advances an argument that once the tax information has been released, SARS will not have any control over what is done with the information. The Minister submits that, in the event that this Court confirms the

order of the High Court, the order of invalidity should be suspended for 24 months to allow Parliament to remedy the defect.

[39] Lastly, the Minister avers that the High Court substituted its order for that of SARS when it ordered the release of Mr Zuma's tax information. According to the Minister, the order for substitution is incompetent and is contrary to the jurisprudence of this Court on this issue as the applicants have not satisfied the *Trencon* test.[16]

The Regulator's submissions

[40] The Regulator has filed a notice to abide in these proceedings. Notwithstanding this, it has filed an explanatory affidavit and written submissions to assist this Court in its decision. The Regulator submits that the right to access any information held by the state includes the right to access records held by SARS, as it is a public body established in terms of the South African Revenue Services Act.[17] Therefore, section 32(1) of the Constitution guarantees the right to access information held by SARS, subject to justifiable limitations aimed at the reasonable protection of privacy and, effective and efficient good governance in a manner which balances those considerations with other rights contained in the Bill of Rights.

[41] The Regulator further submits that any law that prohibits the disclosure of a record of a public or private body without reasonable and justifiable limitation as required by section 36 of the Constitution, as well as without grounds for refusal of access to records as contained in PAIA,[18] is materially inconsistent with the objects of PAIA. The Regulator contends that section 35 of PAIA provides SARS with the absolute right of refusal of access to records it holds, which is contrary to the factors under which the right of access to information can be limited. Consequently, the Regulator supports the finding of the High Court in relation to the constitutional

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[16] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

[17] 34 of 1997.

[18] Chapter 4 of Part 2 of PAIA deals with the grounds for refusal to access records of public bodies.

invalidity of sections 35 and 46 of PAIA, and the reading-in of section 35 of PAIA into section 46 of PAIA until Parliament amends PAIA.

Issues

[42] The issues that must be determined by this Court are: (a) whether leave to appeal should be granted; (b) whether the impugned provisions infringe the right of access to information, and if so; (c) whether the limitation is justified in terms of section 36 of the Constitution; and (d) the appropriate remedy.

Analysis

Leave to appeal

[43] As these are confirmation proceedings, the first, third and fourth respondents ought not to have sought leave as they are organs of state and have sufficient interest in the matter. They may appeal as of right in terms of section 172(2)(d) of the Constitution.[19] Mr Zuma, on the other hand, was obliged to apply for leave to appeal the substitution order, which was issued by the High Court after making the declaration of invalidity. As his case is inextricably linked to the confirmation application, he should be granted leave to appeal.

[44] Before I consider the main issues, it is apposite at this stage to dispose of two aspects. These are the evidentiary conclusions by the High Court and the rationality argument as against other protected forms of information.

The evidentiary conclusions of the High Court

[45] From a reading of the High Court judgment, it appears that the High Court largely relied on the facts and evidence presented by the applicants – specifically the allegations contained in the book *The President's Keepers* as well as the preliminary State Capture reports – in reaching its conclusion that the impugned provisions were

[19] See n 7 above.

unconstitutional and fell to be declared invalid. It is so that evidence does become relevant during the section 36 justification analysis. However, in this matter, that evidence related to allegations contained in a book and it is not clear whether that evidence was subjected to the requisite tests for it to be admissible.

Rationality of subjecting other protected forms of information to the section 46 override to the exclusion of taxpayer information

[46] During oral argument, the applicants questioned the rationale of excluding taxpayer information from disclosure under the "public-interest override", whereas the other forms of information contained in Chapter 4 – which is mandatorily protected from disclosure – are susceptible to disclosure under the section 46 "public-interest override". The applicants emphatically submitted that there could be no legitimate or rational basis from protecting and elevating taxpayer information over information such as "medical records" and "national defence information".

[47] In my view, this argument has no merit. According to the applicants' own admissions during the hearing, the test before this Court is one of reasonableness under section 36 of the Constitution, and not one of rationality. Thus, delving into the rationality of this legislative decision falls outside of the scope of our enquiry. Second, as it stands, this Court does not have all the details and reasons for this legislative choice. To rely on this submission in assessing the merits of this matter would at best be tantamount to relying on speculation. I now proceed to deal with the issues.

Legislative scheme

[48] This case is about the balance to be struck between competing rights, that is the right to privacy, on the one hand, and the right of access to information and freedom of expression, on the other. The case concerns the provisions of the TAA and PAIA. Before the main issues are determined, it is necessary to outline the legislative scheme of the two Acts that contain the impugned provisions together with the relevant constitutional rights as outlined above.

[49] The starting point is section 32 of the Constitution which provides:

> "(1) Everyone has 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."

[50] On the other hand, is section 14 of the Constitution that the respondents contend would be unjustifiably limited by the declaration of invalidity of the impugned sections. This section provides:

> "Everyone has the right to privacy, which includes the right not to have—
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

[51] At this level, freedom of information is closely connected to and overlaps with the right to privacy.

[52] From the constitutional right of access to information clause came into operation PAIA which is a landmark that gives legislative effect to section 32 of the Constitution.

Promotion of Access to Information Act

[53] PAIA provides statutory right of access to records held by the state and private bodies. In the latter instance, this right is exercisable to the extent that a requested record is required for the exercise or protection of rights. Both private and public bodies are under a duty to provide access to requested records, or part thereof, unless refusal of the request is permitted by one or more grounds of PAIA. The grounds of refusal

limit the constitutional right of access to information in order to protect fundamental rights and important aspects of the public interest. Before this Court the applicants are challenging section 35 of PAIA. This section states:

> "**Mandatory protection of certain records of South African Revenue Services**
>
> (1) Subject to subsection (2), the information officer of the South African Revenue Service, referred to in section 2(3), 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 as defined in section 1 of the South African Revenue Services Act, 1997 (Act No. 34 of 1997).
>
> (2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf the request is made."

[54] This section is not subject to the "public-interest override" and there is no comparable private body exemption.

[55] In addition, section 46 provides:

> "Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, 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
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

[56] Most South African tax legislation contains secrecy provisions prohibiting the disclosure of information collected by revenue officials to third parties.[20] Taxpayer

[20] The examples of South African tax legislation with secrecy provisions are the following: Income Tax Act 8 of 1914; Income Tax Act 31 of 1941; and Income Tax Act 58 of 1962.

information in the hands of SARS has therefore been collected under the statutory duty of confidentiality, and taxpayers have an expectation that the often extensive information about their personal and financial lives that they have supplied will remain confidential. Revenue records consisting of information about the requester are not exempt from disclosure. In terms of section 35(2) their disclosure to such requester may not be refused. Failure to provide the information concerned is subject to PAIA dispute resolution provisions. Section 35 is aimed at preserving the confidentiality of revenue-related information and there is no inconsistency between the objects of PAIA[21] and the secrecy provisions under the TAA.

Tax Administration Act 28 of 2011

[57] The relevant provisions of the TAA that provide for the taxpayer confidentiality and secrecy are sections 67 and 69. Section 67 provides:

> "(1) This Chapter applies to—
>
> (a) SARS confidential information as referred to in section 68(1); and
>
> (b) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.
>
> . . .
>
> (3) In the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.
>
> (4) 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.

[21] See section 9(b) of PAIA which justifies the limitation of the constitutional right to information as being in the interest of reasonable protection of privacy.

(5) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary 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."

[58] Further, section 69 of the TAA states:

"(1) 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.

(2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official—

(a) in the course of performance of duties under a tax Act or customs and excise legislation such as—

(i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, 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 this Chapter;

(c) by order of a High Court; or

(d) if the information is public information.

(3) An application to the High Court for the order referred to in subsection (2)(c) requires prior notice to SARS of at least 15 business days unless the court, based on urgency, allows a shorter period."

[59] The protection of taxpayer information dates back to the first legislation that was enacted in 1914 – the Income Tax Law Act.[22] The general protection of the taxpayer information was contained in section 3 of this Act. Section 22 also prohibited the public from accessing the register of assessment[23] and attending proceedings of special courts hearing tax appeals.[24] Through the years and amendments of the laws governing tax in South Africa, taxpayer confidentiality, and the prohibition of access to taxpayer information by the public, have been maintained. Around 1987 and under the Income Tax Act,[25] certain exceptions were introduced to the confidentiality provisions. There was no longer an absolute prohibition on disclosure as the exceptions were being ushered in. Even under the Constitutional dispensation, before the enactment of the TAA, the state had to conduct public consultations and debates which included members of the public, and the privacy and confidentiality of taxpayer information has still been maintained.

Are the impugned sections unconstitutional and invalid?

[60] There is no dispute between the parties that section 35 of PAIA limits the right to access tax information. The applicants submit that this limitation is unjustified and that sections 35 and 46 of PAIA as well as sections 67 and 69 of the TAA should be declared unconstitutional and invalid.

[61] The respondents contend that the secrecy and confidentiality provisions are not absolute as they are subject to tightly controlled exceptions. The exceptions are subject to the section 46 "public-interest override" and are the following:

(a) Section 69(2)(c) allows disclosure under a High Court order. Section 69(3) to (5) restrict and regulate this exception. Section 69(5)

[22] 28 of 1914.

[23] Section 22 of the Income Tax Law Act 28 of 1914.

[24] Section 22(6) of Act 28 of the Income Tax Law Act 1914.

[25] 58 of 1962.

provides that the court may only grant a disclosure order if the information "is central to the case" and cannot be obtained elsewhere.

(b) 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.

(c) Section 70 provides for the disclosure of taxpayer information to other state agencies but only for purposes of the performance of their functions.

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

One may argue that under the scheme of the TAA, the prohibition to access taxpayer information is not absolute as it can be accessible but only in exceptional cases as stated above. Even with these exceptions, the applicants contend that the limitation imposed on accessing tax records by "everyone" who alleges that a certain taxpayer has contravened the law is not reasonable and thus unjustified.

[62] It is undisputed that the impugned provisions limit the right of access to information and the right to freedom of expression. What is in dispute is whether this limitation is justified under the Constitution.

[63] I have read the well-crafted judgment penned by my Brother Kollapen J (second judgment). The second judgment concludes that sections 35(1) and 46 of PAIA are unconstitutional as they exclude access to tax records by a person other than the taxpayer even in circumstances where the requirements set out in section 46(a) and (b) of PAIA are met. Regrettably, I disagree with that conclusion and what follows is my reasoning and limitation analysis under section 36 of the Constitution.[26]

[26] Section 36 of the Constitution provides:

The nature of the right

The right of access to information

[64] The right of access to information is enshrined in section 32 of the Constitution. The scope and content of section 32 was dissected by this Court in *My Vote Counts*, where this Court held that "everyone" and "another person" largely encompassed natural and juristic persons.[27] A distinction was also drawn between information held by the state, which is generally readily accessible, and information held by another person, which may only be accessed when required.[28]

[65] The importance of the right of access to information has been expressed by this Court on several occasions.[29] In *Brümmer*, this Court held:

> "(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 relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[27] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) at para 20.

[28] Id at para 23 where this Court held—

> "when access is sought to information in the possession of the State, then it must be readily availed. A challenge is, generally speaking, likely to arise when information is 'held by another person'. There, information is accessible only when 'required'. And 'required' implies the need to demonstrate that there is a legitimate reason to grant access to that information. That ostensibly serves the purpose of ruling out unnecessary or spurious requests."

[29] See *PFE International Inc. (BVI) v Industrial Development Corporation of South Africa Limited* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) at para 3 and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 83.

> "The importance of this right [the right to access to information] too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.'"[30]

[66] It has also been recognised that the right of access to information is inextricably linked to the enjoyment and exercise of other rights.[31] In *My Vote Counts*, a nexus was established between the right to vote and access to information.[32] It was highlighted that "there is a vital connection between a proper exercise of the right to vote and the right of access to information"[33] and that the right to vote could "not to be exercised blindly or without proper reflection".[34] This Court acknowledged that "the proper exercise of the right to vote is largely dependent on information".[35] The right of access to information is also central to the exercise of: the right to public participation;[36] the right to freedom of expression;[37] the right to receive or impart information or ideas;[38] and the freedom of the press and other media.[39]

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[30] *Brümmer v Minister for Social Development* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at para 62. See also *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) (*M & G*) at para 10, where it was stated that "[t]he 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".

[31] In *M & G* id, it was held that "[t]he right of access to information is also crucial to the realisation of other rights in the Bill of Rights". See also *Brümmer* id at para 63 where it was held that "access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights".

[32] *My Vote Counts* above n 27 at para 35.

[33] Id.

[34] Id.

[35] Id at para 37.

[36] Id at para 36.

[37] *Brümmer* above n 30 at para 63.

[38] Id and *M & G* above n 30 at para 10.

[39] *Brümmer* above n 30 at para 63.

[67] Pursuant to the prescripts of section 32(2) of the Constitution, PAIA was enacted to give effect to the constitutional right of access to any information.

The right to freedom of expression

[68] Section 16 of the Constitution protects the right to freedom of expression. It provides:

> "(1) Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.
> (2) The right in subsection (1) does not extend to—
> (a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[69] The content of the right to freedom of expression has been explored by this Court in *Islamic Unity*, where it was held:

> "Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right."[40]

[70] As is the case with the right of access to information, the importance of the right to freedom of expression has been delineated by this Court numerous times. In *EFF*, this Court recognised freedom of expression as "the lifeblood of a genuine

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[40] *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 31.

constitutional democracy that keeps it fairly vibrant, stable and peaceful."[41] The same was stated in *Qwelane*,[42] *Chipu*,[43] *Phillips*,[44] *SABC*,[45] *SANDU*,[46] *Mamabolo*,[47] *Khumalo*,[48] *Oriani-Ambrosini*[49] and many others.

[71] In *Qwelane*, this Court stated that there are four specific values that underpin freedom of expression – "(a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfilment; and (d) the encouragement of tolerance".[50] Most pertinently, and similarly to the right of access to information, freedom of expression is a necessary corollary to other constitutional rights. In *SANDU*, this Court acknowledged that—

> "freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society

[41] *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) at para 1.

[42] *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) at para 67.

[43] *Chipu* above n 15 at para 49.

[44] *Phillips* above n 6 at para 23.

[45] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 23.

[46] *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7.

[47] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 37.

[48] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 21.

[49] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC) at para 43.

[50] *Qwelane* above n 42 at para 69.

> and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."[51]

[72] Freedom of expression also plays an important role in South Africa because of historical context. It is common cause that in the pre-constitutional era expression was considerably constrained. The institutionalisation of oppression and subjugation meant that expression had to be measured, failing which, punitive measures and sanction would be imposed. It is on this basis that freedom of expression occupies such an esteemed role in our legal order.[52]

[73] Regardless of this highly acclaimed role, freedom of expression, like other constitutionally enshrined rights, is not absolute. In contradistinction to the American position, in *Mamabolo* this Court held that "[w]ith us [freedom of expression] is not a pre-eminent freedom ranking above all others. It is not even an unqualified right".[53] This Court further held:

> "With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is the right to freedom of expression."[54]

[74] Likewise, this Court held in *Islamic Unity*:

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[51] *SANDU* above n 46 at para 8. See also *Islamic Unity* above n 40 at para 24; and *Mlungwana v S* [2018] ZACC 45; 2019 (1) BCLR 88 (CC) at para 70.

[52] *EFF* above n 41 at para 2, where this Court held:

> "Expression of thought or belief and own worldview or ideology was for many years extensively and severely circumscribed in this country. It was visited, institutionally and otherwise, with the worst conceivable punishment or dehumanising consequences. The tragic and untimely death of Steve Biko as a result of his bold decision to talk frankly and write as he liked, about the unjust system and its laws, underscores the point. This right thus has to be treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents in a genuine constitutional democracy, considering our highly intolerant and suppressive past."

[53] *Mamabolo* above n 47 at para 41.

[54] Id. This quote is apt because, insofar as it refers to the right to dignity, it is relevant to the present matter as the right to dignity undergirds the privacy right. In *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391; 1995 (6) BCLR 665; 1995 (2) SACR 1 (CC) at para 328 O'Regan J held that the right to dignity "is the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]". See especially *Khumalo* above n 48.

> "There is thus recognition of the potential that expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other state interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under section 36(1) of its exercise might intersect with other interests."[55]

The right of access to information and freedom of expression in international law

[75] The right of access to information and the right to freedom of expression are protected as fundamental human rights in international and regional law. Article 19(2) of the International Covenant on Civil and Political Rights[56] (ICCPR) provides:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[76] These rights are also enshrined in the African Charter on Human and Peoples' Rights[57] (ACHPR), the European Convention on Human Rights[58] (ECHR) and the American Convention on Human Rights[59] (ACHR).

[77] It must be noted that although these instruments only refer to the right to freedom of expression, it is generally accepted that the right of access to information is subsumed

[55] *Islamic Unity* above n 40**Error! Bookmark not defined.** at para 30.

[56] The International Covenant on Civil and Political Rights, 16 December 1966. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 December 1998. Article 19 of the ICCPR is sourced from article 19 of the Universal Declaration of Human Rights, 10 December 1948.

[57] See article 9 of the African Charter on Human and Peoples' Rights, 27 June 1981. South Africa signed and ratified the ACHPR on 9 July 1996.

[58] See article 10 of the European Convention on Human Rights, 4 November 1950.

[59] See article 13 of the American Convention on Human Rights, 22 November 1969.

in and integral to the right to freedom of expression.[60] As it relates to the right of access to information, a positive duty is placed on public bodies to give effect to the right.[61] With respect to the right to freedom of expression, the scope of coverage is wide, and it extends to forms of expression that may be divergent, unpopular or undesirable.[62]

[78] Similar to the position taken under domestic law, the rights of access to information and freedom of expression are recognised as central in free and democratic societies.[63] They are linked to the instruments in the exercise of other fundamental rights.[64] However, the status of these rights does not render them absolute. Under both international and regional law, these rights are subject to limitations.[65]

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[60] Human Rights Committee *General Comment No. 34: Freedoms of opinion and expression (Art. 34): 29/07/11*, CCPR/C/GC/34 at para 18. It outlines that "[a]rticle 19, paragraph 2 embraces a right of access to information held by public bodies."

[61] Id at para 19.

[62] *Handyside v The United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976) para 48. See also *Fedchenko v Russia* App no. 17221/13 (ECtHR, 2 October 2018) at para 32. *Handyside* has been cited with approval by this Court on several occasions.

[63] Human Rights Committee General Comment No. 34 above n 60 at para 2. See also *Bowman v UK* App no 24839/94 (ECtHR, 19 February 1998) at para 42; *Claude-Reyes v Chile, Merits, Reparations and Costs Judgment* (IACtHR, 19 September 2006) at para 85; *Media Rights Agenda and others v Nigeria* Communication no 105/93, 130/94, 128/94 and 152/96 (ACHPR, 1998) at para 52; *Handyside* id at para 49; *Kenneth Good v Republic of Botswana* Communication no 313/05 (ACHPR, 2010); Fernand de Varennes 'Language and Freedom of Expression in international Law' (1994) 16 *Human Rights Quarterly* 163 at 165; *New York Times v Sullivan* 376 U.S. 254 at 270; and *Mavlonov and Sa'di v Uzbekistan* Communication 1334/2004 (UNHRC, 19 March 2009).

[64] Human Rights Committee *General Comment No. 34* above n 60 at para 4.

[65] *Mukong v Cameroon* Communication no 458/1991 (UNHRC, 21 July 1994) at para 9; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (UNHRC, 26 October 2000) at para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (UNHRC, 20 October 2005) at para 7.3; UN Human Rights Committee, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 at para 15; *Interights v Mauritania* AHRLR 87 Communication no 242/2001 (ACHPR, 2004) at paras 78–9; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Communication no 294/04 (ACHPR, 2009) at para 80; and *Konaté v Burkina Faso* App no. 004/2013 (ACtHPR, 2014). See also *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) at para 24; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) at para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) at para 124; *Francisco Martorell v Chile* (IACtHR, 3 May 1996) at para 55; and *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) at para 120.

The importance of the purpose of the limitation

Taxpayer privacy

[79] The Minister of Finance and SARS submit that the limitation of the right of access to information and the right to freedom of expression is primarily intended to protect taxpayers' right to privacy.

[80] The right to privacy is protected under section 14 of the Constitution.[66] In *Bernstein*, this Court made the following observations about the right to privacy:

> "The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate. The scope of privacy has been closely related to the concept of identity and it has been stated that 'rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity'."[67]

[81] The Court also said:

> "The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a

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[66] Section 14 of the Constitution provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
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> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

The right to privacy has also been recognised as a distinct personality right under the South African common law, particularly under the common law concept of *dignitas*. See *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) at 247F-249D and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) at 455H-456H.

[67] *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751; 1996 (4) BCLR 449 at para 65.

corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[68]

[82] In addition to guarding against intrusion of personal life, the right to privacy encompasses protection against unsanctioned disclosure of an individual's information. It allows individuals control over who has access to their personal information. This has been termed "information privacy".[69]

[83] The right to privacy is also recognised and protected under regional and international law. Article 17 of the ICCPR provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."[70]

Taxpayer compliance

[84] The significant role of tax in the proper functioning of any state is common cause. Principally, tax is aimed at defraying government expenditure and generally used to benefit the public. Tax is also instrumental and indispensable to the realisation of a state's socio-economic and political goals. Thus, it is imperative, for governance purposes, to maintain an effective and efficient tax administration system.

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[68] Id at para 67.

[69] Currie and de Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Cape Town 2005) at 323. See also Westin *Privacy and Freedom* (1967) at 7, wherein information privacy was defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". This Court notably refused to delve into the concept of information privacy. See *Mistry v Interim National Medical and Dental Council* [1998] ZACC 10; 1998 (4) SA 1127 (C); 1998 (7) BCLR 880 (CC) at para 47.

[70] ICCPR. See also article 12 of the Universal Declaration of Human Rights, article 14 of the International Covenant on the Protection of all Migrant Workers and Members of their family, 18 December 1990; article 12 of the ACHR; and article 8 of the ECHR.

[85] It is common cause that the South African tax system is largely premised on voluntary compliance. The Minister of Finance, the Minister of Justice and SARS contend that the limitations imposed on the right of access to information and the right to freedom of expression are also aimed at ensuring taxpayers' voluntary compliance.

[86] The connection between taxpayer compliance and tax secrecy has been recognised in our legal order for years. This is demonstrated by South Africa's long history of maintaining tax information secrecy. From as far back as 1914, South African tax legislation has contained tax secrecy provisions.[71] In 1962, the Income Tax Act also made provisions for the maintenance of secrecy.[72]

[87] The rationale for tax secrecy – ensuring taxpayer confidence and compliance – has also been recognised and accepted by our courts for countless years. In *Silver*, it was held:

> "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 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

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[71] See Income Tax Act 40 of 1925.

[72] Section 4(1) of the Income Tax Act 58 of 1962 provides:

> "Every person employed or engaged in carrying out the provisions of this Act shall preserve and aid in preserving secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties in connection with those provisions, and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his or her lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his or her duties under this Act or by order of a competent court . . .".

> 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."[73]

In its evidence in the present matter SARS seeks to justify taxpayer information secrecy on similar bases.

[88] It is accepted that the fact that a policy or practice is long-standing is not a conclusive demonstration of its constitutional legitimacy. That said, the historical justification for taxpayer information secrecy continues to be of relevance today. As outlined in *Silver*, taxpayer information secrecy was central to efficient tax administration. This reason remains central and relevant today. Thus, based on the history of tax information secrecy, as well as the connection between taxpayer compliance and confidentiality, I am of the view that the limitation of the right of access to information, as well as the right to freedom of expression, serves a vital role in the sustained and unhampered taxation system.

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[73] *Silver v Silver* 1937 NPD 129 at 134-5. See also *Ontvanger van Inkomste, Lebowa v De Meyer N.O.* 1993 (4) SA 13 (A) and *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A); [1977] 3 All SA 610 (A) where the Appellate Division held:

> "In each of these statutes section 4 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 shall not communicate any such matter to any person whatsoever other than the taxpayer 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. As was pointed out in *Silver v. Silver*, 1937 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 section 4.
>
> This secrecy extends to proceedings before the Special Court . . . The use in Court by the Secretary's representative of unreported judgments, where the consent of the taxpayer concerned has not been obtained, amounts thus, in my view, to a breach of section 4 of the Act either by the representative himself or, when he is not a member of the Department, by the Departmental member who briefed him. To the extent that this has become a practice in the Courts dealing with income tax appeals, this Court should, in my opinion, state that the practice is not in accordance with the above-mentioned secrecy provisions."

Compliance with international law obligations

[89] The respondents further submit that the limitation is aimed at ensuring South Africa's compliance with its obligations under the various international agreements.

[90] From a reading of the impugned provisions, it is evident that the tax information sought to be protected is broad. Section 35 of PAIA prohibits disclosure of tax records that are obtained or held by SARS "for the purposes of enforcing legislation concerning the collection of revenue". Section 68(1)(h) of the TAA includes "information supplied in confidence by or on behalf of another state or an international organisation to SARS" in the scope of confidential information held by SARS, and the disclosure of which is also prohibited under section 67.

[91] Importantly, and as submitted by SARS, South Africa is a party to: the Convention on Mutual Administrative Assistance in Tax Matters;[74] the USA Foreign Account Tax Compliance Act (FATCA) Intergovernmental Agreement;[75] several Bilateral Tax Information Exchange Agreements (TIEAs);[76] and several Bilateral Double Taxation Agreements and Protocols.[77] As a standard practice, these agreements constrain access to the tax records that are exchanged by the state parties – usually to courts, administrative bodies and supervisory authorities – through confidentiality clauses.[78]

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[74] The Convention on Mutual Administrative Assistance in Tax Matters, 1 June 2011. South Africa ratified the Convention on Mutual Administrative Assistance in Tax Matters on 1 March 2014.

[75] The USA\FATCA Intergovernmental Agreement, 9 June 2014. The agreement entered into force on 28 October 2014.

[76] By way of example, South Africa has a TIEA with a number of States: Argentina, which was concluded on 2 August 2013 and entered into force on 28 November 2014; Monaco, which was concluded on 23 September 2013 and entered into force on 6 December 2014; and Barbados, which was concluded on 17 September 2013 and entered into force on 19 January 2015. See SARS "Exchange of Information Agreements" (9 November 2018), available at https://www.sars.gov.za/legal-counsel/international-treaties-agreements/exchange-of-information-agreements/.

[77] See SARS "Double Taxation Agreements & Protocols" (17 May 2022), available at https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/.

[78] Article 22(1) and (2) of the Convention on Mutual Administrative Assistance in Tax Matters states:

[92] It is trite that international law plays a pivotal role in our legal order. Under the Constitution, international law performs a dual function: firstly, it is an interpretative

> "1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.
>
> 2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

Article 3(7) and (8) of the USA FATCA Intergovernmental Agreement states:

> "7. All information exchanged shall be subject to the confidentiality and other protections provided for in the Convention, including the provisions limiting the use of the information exchanged.
>
> 8. Following entry into force of this Agreement, each Competent Authority shall provide written notification to the other Competent Authority when it is satisfied that the jurisdiction of the other Competent Authority has in place (i) appropriate safeguards to ensure that the information received pursuant to this Agreement shall remain confidential and be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship (including established processes for ensuring timely, accurate, and confidential information exchanges, effective and reliable communications, and demonstrated capabilities to promptly resolve questions and concerns about exchanges or requests for exchanges and to administer the provisions of Article 5 of this Agreement). The Competent Authorities shall endeavor in good faith to meet, prior to September 2015, to establish that each jurisdiction has such safeguards and infrastructure in place."

By way of example, article 7 of the TIEAs between South Africa and Argentina contains a confidentiality clause that is similarly worded to the Convention on Mutual Administrative Assistance in Tax Matters. This is also the case in article 7 of the TIEAs between South Africa and Monaco, as well as article 7 of the TIEAs between South Africa and Barbados.

tool, as prescribed by section 39(1)(b) of the Constitution;[79] and secondly, it is prescriptive in that it is binding, as stated under section 231 of the Constitution.[80]

[93] It is also trite that where international agreements are prescriptive, they must be complied with. A failure to comply with an international obligation may amount to a breach of international law – an internationally wrongful act – and could result in the imposition of international responsibility.[81]

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[79] Section 39(1)(b) of the Constitution states: "When interpreting the Bill of Rights, a court, tribunal or forum must consider international law". As an interpretative tool, international law serves to flesh out the scope and content of rights and obligations in the Bill of Rights. See *Makwanyane* above n 54 at para 35, wherein this Court held:

> "In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood."

See also *AZAPO v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 672 (CC); 1996 (8) BCLR 1015 (CC) at para 26 and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 26.

[80] In its prescriptive role, international law is a source of binding treaty obligations for South Africa. Section 231 of the Constitution provides for circumstances under which international law (conventions and treaties) will be binding on South Africa. It outlines:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[81] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) 18 July 1950, ICJ p 221 at 228, where the International Court of Justice held that "it is clear that refusal to fulfil a treaty obligation involves international responsibility". See also *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, (Judgment) 25 September 1997, ICJ, p 7 at paras 38–9 at paras 46–8, where the International Court of Justice stated that "when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect" and that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character". See further *The 'Rainbow Warrior' (France v New Zealand)*, 30 April 1990, 20 RIAA p 215 at 251 at para 75, where it was held:

[94] Thus, insofar as the "information supplied in confidence by or on behalf of another state or an international organisation to SARS" is concerned, the limitation to access and/or dissemination of tax information is significant as it is aimed at maintaining compliance with international law obligations.

[95] Another important factor is that the general practice of maintaining taxpayer secrecy has also been adopted and sustained in various other jurisdictions.[82] By way of example, the United Kingdom (UK), has a long-standing practice of keeping taxpayer information strictly confidential.[83] Under the UK's Commissioners for Revenue and Customs Act, 2005, the disclosure of taxpayer information is prohibited, subject to some exceptions.[84] It must be noted that none of these exceptions include disclosure to the

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> "The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it."

[82] As is the case with international law, section 39(1)(a) of the Constitution encourages the consideration of the laws and best practices of foreign jurisdictions when engaging in an interpretive exercise.

[83] See *R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A C 617 and *R (on the application of Ingenious Media Holdings plc and another) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 54.

[84] Section 18 of the Commissioners for Revenue and Customs Act, 2005 provides:

> "(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
>
> (2) But subsection (1) does not apply to a disclosure—
>
> (a) which—
>
> (i) is made for the purposes of a function of the Revenue and Customs, and
>
> (ii) does not contravene any restriction imposed by the Commissioners,
>
> (b) which is made in accordance with section 20 or 21,
>
> (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
>
> (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
>
> (e) which is made in pursuance of an order of a court,
>
> (f) which is made to Her Majesty's Inspectors of Constabulary, the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,
>
> (g) which is made to the Independent Police Complaints Commission, or a person

public. In fact, the UK's Freedom of Information Act, 2000 – a statute that is akin to PAIA – exempts taxpayer information from disclosure.[85]

[96] Another relevant country is Canada, whose policy of maintaining taxpayer confidentiality dates back to 1917.[86] Under the Canadian legal order, the preservation

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acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or

(h) which is made with the consent of each person to whom the information relates.

(3) Subsection (1) is subject to any other enactment permitting disclosure.

(4) In this section—

(a) a reference to Revenue and Customs officials is a reference to any person who is or was—

(i) a Commissioner,

(ii) an officer of Revenue and Customs,

(iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or

(iv) a member of a committee established by the Commissioners,

(b) a reference to the Revenue and Customs has the same meaning as in section 17,

(c) a reference to a function of the Revenue and Customs is a reference to a function of—

(i) the Commissioners, or

(ii) an officer of Revenue and Customs,

(d) a reference to the Scottish inspectors or the Northern Ireland inspectors has the same meaning as in section 27, and

(e) a reference to an enactment does not include—

(i) an Act of the Scottish Parliament or an instrument made under such an Act, or

(ii) an Act of the Northern Ireland Assembly or an instrument made under such an Act".

Further, section 19 of the Commissioners for Revenue and Customs Act 2005 sanctions wrongful disclosure of tax information.

[85] Section 44 of the Freedom of Information Act, 2000:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

(b) is incompatible with any [retained EU obligation], or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)."

[86] See Canada's Income Tax Act of 1917, which states:

"No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any written statement furnished under the provisions of this Act. Any person violating any of the provisions

of taxpayer information secrecy is effected through various statutes, including the Income Tax Act, the Excise Tax Act, the Privacy Act and the Excise Act.[87] Further, under the Access to Information Act – Canada's PAIA equivalent – taxpayer information is explicitly protected from disclosure.[88]

[97] Other countries with similar sustained taxpayer information secrecy policies include: Australia;[89] New Zealand;[90] Germany;[91] and the United States of America.[92]

The nature and extent of the limitation

[98] It is undisputed that the nature and extent of the limitation constrains the right (of third parties) of access to tax information as well as the right to further disseminate such tax information where obtained. The applicants submit that the limitation is absolute, and they argue that this case is similar to information sought against analogous prohibitions on access to information in *Chipu* and *Johncom*. This is also the conclusion of the second judgment.

[99] Regrettably, I do not agree with the second judgment. As I see it, the limitation is not absolute and this case can be distinguished from *Johncom* and *Chipu*. I say so for the following reasons.

[100] *Johncom* concerned the general rule that courts are open to the public and the prohibition on the publication of the identity of parties to court proceedings. This Court

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of this section shall be liable on summary conviction to a penalty not exceeding two hundred dollars."

[87] See section 241 of the Income Tax Act, section 211 of the Excise Act, 2001, section 295 of the Excise Tax Act and section 8 of the Privacy Act.

[88] See section 24 and Schedule II of the Access to Information Act.

[89] See Division 355 of Schedule 1, Part 5 - 1 of the Taxation Administration Act, 1953 and section 13 of the Public Service Act.

[90] See sections 81 and 88 of the Tax Administration Act, 1994 and section 18 of the Official Information Act.

[91] Section 30 of the Fiscal Code.

[92] See sections 6103 and 6105 of the Internal Revenue Code.

held that the absolute prohibition on the publication of information related to divorce proceedings contained in section 12 of the Divorce Act[93] prohibited publication of any information emanating from divorce actions or any related proceedings, regardless of whether the publication of that information might infringe the divorcing parties' right to dignity and privacy and the interests of their children.[94]

[101] The Court held that section 12 of the Divorce Act unjustifiably infringed the right to freedom of expression as enshrined in section 16 of the Constitution. The Court further held that the purpose of protecting the rights of divorcing parties and their children could be achieved by less restrictive means, and accordingly, the limitation occasioned by section 12 of the Divorce Act could not be justified in terms of section 36 of the Constitution. In the result, this Court confirmed the High Court's order of invalidity declaring section 12 of the Divorce Act unconstitutional and invalid. The Court retained the prohibition on the publication of the identity of any party or child in divorce proceedings.

[102] The main issue in *Chipu* was whether the requirement of absolute confidentiality in proceedings before the Refugee Appeal Board was a justifiable limitation of the constitutional right to freedom of expression (which includes the freedom of the press and the freedom to receive and impart information or ideas).

[103] This Court held that, to the extent that section 21(5) of the Refugees Act[95] does not confer a discretion upon the Refugee Appeal Board to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable and accordingly invalid.

[104] *Johncom* and *Chipu* are distinguishable. I say so because in both the prohibitions went beyond the purpose for which they existed. And there was simply no evidence to

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[93] 70 of 1979.

[94] *Johncom* above n 14 at para 29.

[95] 130 of 1998.

justify what, in each instance, was plainly an overreach. In the instant matter there is no basis for readily concluding that the impugned prohibitions go beyond the purpose they are meant to serve; not in the face of the evidence relied upon by SARS in justification. Regarding that evidence, the applicants argue that it did not sufficiently establish the correlation between tax compliance and taxpayer information secrecy. A fundamental flaw in the exercise the applicants embarked upon in their attempt to demonstrate this perceived insufficiency of the evidence is that they weighed the evidence as if it was evidence in ordinary litigation unconnected to a constitutional challenge. As submitted by SARS, that is at variance with this Court's jurisprudence. In a constitutional challenge, a court weighs up "legislative facts differently". In *Lawrence*, this Court adopted Hogg's approach on dealing with legislative facts, which is this:

> "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.
>
> 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."[96]

[96] *S v Lawrence, S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC) at para 42.

[105] Also, it is not as though taxpayer information is never disclosed. It is so that the statutorily sanctioned disclosure is not what the applicants would like to see. Sections 70 and 71 of the TAA make provision for exceptions to the prohibition of disclosure of tax information. They permit disclosure of taxpayer information to: the South African Reserve Bank (section 70(3)(a)); the Financial Sector Conduct Authority (section 70(3)(b)); the Financial Intelligence Centre (section 70(3)(c)); the National Credit Regulator (section 70(3)(d)); an organ of state or institution listed in a regulation issued by the Minister under section 257 (section 70(4)); the National Commissioner of the South African Police Service (section 71(1)(a)); and the National Director of Public Prosecutions (section 71(1)(b)).

[106] Although the exceptions provided for in the TAA do not include the public or media houses, the mere presence of exceptions demonstrates that the limitation in question is not absolute.

[107] Even though the prohibition is in relation to the public as was in the two cases, which may receive that information once it is used in Court proceedings, there is no rationale behind making taxpayer information available to the media as there is no equilibrium struck by elevating the interest of the public and the right to freedom of expression above that of privacy. The current matter does not concern court proceedings or proceedings before a quasi-judicial body like the Refugee Appeal Board.

[108] Consequently, the applicants' reliance on *Johncom* and *Chipu* in their justification of their argument for absolute prohibition cannot be sustained.

The relation between the limitation and its purpose

[109] The nexus between the limitation – being restricted access to tax information – and the purpose of the limitation – that is the protection of taxpayer privacy and maintaining taxpayer compliance – is self-evident.

[110] The limitation is aimed at preserving taxpayer privacy, tax compliance and compliance with international law obligations. If access to tax records is granted to the public, it would constitute a manifest breach of these objectives.

Less restrictive means to achieve the purpose

[111] Whilst mindful of the important role played by the media in exposing corruption, what is sought by the applicants is a drastic measure that may have grave consequences to a taxpayer. The applicants have proposed that the "public-interest override", as contained in section 46 of PAIA, should be extended to include section 35.

[112] A major concern is the ambit of the "public-interest override". While the facts that underlie this application relate to a public figure, section 46 of PAIA does not make the status of a public figure a precondition of the applicability of the test. By necessary implication, if the "public-interest override" were to be extended as proposed, the provision would be indiscriminately applicable to ordinary civilians or private individuals where their tax records could potentially prove "a substantial contravention of, or failure to comply with, the law" or "an imminent and serious public safety or environmental risk" and where their disclosure would potentially be in the public interest.[97] This poses a challenge to the privacy interests of those individuals and the proposed remedy could be detrimental to the reputations and societal standings of taxpayers. It also raises questions about the nature and extent of the judgment calls that would inevitably have to be made by a tax administrator pertaining to whether PAIA requesters and their reasons for filing a request have satisfied the requirements of the "public-interest override".

[113] In my view, there are less restrictive means to achieve the purpose. The current framework already has measures that may be resorted to for purposes of striking a balance between the access to taxpayer information and maintaining taxpayer secrecy. As outlined above, the TAA contains numerous exceptions in terms of which taxpayer

[97] I use "would potentially" as the framing of the test seems to suggest that only a prima facie case need be made.

information may be disclosed. Therefore, for purposes of addressing substantial contravention of the law, a report may be filed with the relevant authorities – namely SARS itself, the National Prosecuting Authority and/or the SAPS.

Conclusion on limitation analysis

[114] On balance, I am satisfied that, the limitation is justifiable, and the order of invalidity should not be confirmed.

[115] In light of this finding, it is not necessary for me to consider the other issues. However, for the sake of completeness, it is imperative to address the substitution order issued by the High Court.

Substitution order

[116] After declaring the impugned provisions unconstitutional, the High Court considered the request for the release of Mr Zuma's tax records and held:

> "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 have been demonstrated with such sufficient particularity, that the case and the novelty thereof constitutes an 'exceptional case' as contemplated in section 8(1)(c)(ii)(*aa*) of PAJA."[98]

[117] The High Court then set aside SARS' decision and ordered SARS to supply the first and third applicants with Mr Zuma's tax records for the 2010 to 2018 tax years within ten days of its order. During the hearing in this Court, the applicants conceded that the order of substitution should not have been made. That concession was well made. I say so for the following reasons. The High Court erred in granting the substitution order. The first consideration is that the High Court's purported

[98] High Court judgment above n 3 at para 10.5.

substitution order is in terms of section 8(1)(c)(ii)(*aa*) of PAJA. The application of section 8(1)(c)(ii)(*aa*) presupposes a review brought in terms of PAJA. However, the application proceedings before the High Court were brought in terms of section 78 of PAIA. Thus, the purported section 8(1)(c)(ii)(*aa*) substitution is incompetent.

[118] Further, even if the application proceedings before the High Court were brought in terms of PAJA, no decision had been taken by SARS after the High Court's declaration of invalidity was made. In the ordinary course, SARS should have been afforded an opportunity to consider the applicants' request after the declaration of invalidity had been made and confirmed by this Court.

[119] Another point is that the substitution order fell short of the threshold set out in *Trencon*.[99]

Costs

[120] Before this Court, the applicants seek costs including costs of two Counsel if they succeed, and if unsuccessful they submit that no costs order should be made as the *Biowatch*[100] principle applies. Mr Zuma also seeks costs and contends that *Biowatch* applies to him as he is a private party. SARS, the Minister of Justice, and Minister of Finance conceded that, in respect of costs, *Biowatch* applies should the applicants be unsuccessful.

[121] Based on the circumstances of this case, I agree that *Biowatch* applies, and the applicants should not be mulcted in costs. However, Mr Zuma has succeeded in his opposition of the matter and as a private party is entitled to his costs. His case was on a limited scale as he challenged the order that his tax records be released and, as a result, the employment of two counsel is not warranted.

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[99] *Trencon* above n 16.

[100] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[122] Had I commanded the majority, I would have dismissed the confirmation application.

KOLLAPEN J (Baqwa AJ, Majiedt J, Mathopo J and Rogers J concurring):

Introduction

[123] This case is about taxpayer records. It concerns the confidentiality in and the prohibition on their disclosure. It also raises the related question of whether it is constitutionally permissible for it never to be possible to disclose such records in the public interest.

[124] Individual autonomy and the rights associated with it are important aspects of human development in the modern world.[101] In the context of this application, these rights include the rights of freedom of expression, access to information and privacy. At the same time, and beyond the demands of individual autonomy, the legitimate communal interests and the rights of others must moderate the outer bounds of individual autonomy. This Court said as much in *Bernstein*:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[102]

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[101] Kant *Critique of Practical Reason* (1788); Kant *Groundwork of the Metaphysics of Morals* (1785); Kant *Answer the question: What is Enlightenment?* (1784).

[102] *Bernstein* above n 68.

[125] I have had the pleasure and benefit of reading the comprehensive and reasoned judgment penned by my Colleague, Mhlantla J (first judgment). I agree with her that this matter engages our jurisdiction and that leave to appeal should be granted. I disagree, however, with the conclusion in the first judgment that the prohibition on access to taxpayer records found in section 35(1) read with section 46 of PAIA is not absolute. I conclude that the impugned provisions do not pass constitutional muster as they do not meet the limitation test in section 36 of the Constitution.

[126] The first judgment provides a detailed overview of the background to this case, the facts underpinning it, the litigation history, the submissions of the parties before this Court and the relevant legal framework. I rely on that overview and do not intend to repeat any of it except to the extent that it becomes necessary to do so.

[127] The conclusion of the first judgment that the impugned provisions of PAIA and the TAA pass the limitation test is based in part on the following substantive conclusions:

(a) The prohibition on disclosure is not absolute and this matter is thus distinguishable from *Johncom*[103] and *Chipu*.[104]

(b) Taxpayer compliance is dependent on the assurance of the confidentiality of taxpayer information, which is what the impugned provisions seek to do.

(c) The disclosure of taxpayer information may breach the confidentiality required by South Africa's international obligations arising out of bilateral and multilateral taxation agreements that it has entered into.

(d) Extending the "public-interest override" to taxpayer information would impact public figures and ordinary citizens alike and unduly impact the

[103] *Johncom* above n 14.

[104] *Chipu* above n 15.

privacy interests of ordinary citizens who may warrant a higher level of privacy.

(e) There are less restrictive means to achieve the purpose, and these include the various exceptions in the TAA as well as the right of an interested person to report a substantial contravention of the law to the investigative or the prosecutorial authorities.

[128] I intend setting out the rights framework and the key legislative provisions that find application before returning to deal with the matters above and on which the first judgment places reliance.

The balancing of rights

[129] The first judgment correctly describes this matter as involving the balance to be struck between competing rights.[105] Modern democracies are in many respects characterised by the challenge of competing interests, especially in diverse societies – such as ours. In this diversity, it is not uncommon for communal interests to stand in conflict with individual interests. It is also not uncommon for the interests of privacy and individual self-determination to stand in conflict with the collective public interest and the values of openness and transparency. When those interests and rights come into conflict, there is no magical hierarchy that one can resort to in order to resolve the conflict. The conflict is invariably approached through the lens of the Bill of Rights by balancing those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution.

[130] In *Makwanyane*, this Court described that process as follows:

> "The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the

[105] See the first judgment at [1].

> application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."[106]

[131] The communal relations referred to in *Bernstein* also relate to how those in society are empowered to participate in the issues that are relevant and give meaning to their world. Their ability to do so is in part dependent on the free flow and access to information and the freedom to express their views.[107]

[132] In this regard, the role of a free and independent media as an important source of information and education and in advancing the idea of an open society has also been properly acknowledged.[108] In *EFF*, this Court recognised "freedom of expression as the lifeblood of a genuine constitutional democracy that keeps it fairly vibrant, stable and peaceful".[109]

[133] The rights to privacy, access to information and freedom of expression all come together in this matter, in order to achieve different but legitimate and interconnected individual and societal interests. The challenge is not only about the choices we are required to make but about the balance we are able to strike when rights stand in competition with each other, as *Makwanyane* so powerfully reminds us.

[134] This case is, in particular, about how that balance is managed between the right to privacy in respect of taxpayer records against the communal interest and the claimed

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[106] *Makwanyane* above n 54 at para 104.

[107] *Brümmer* above n 30 at para 63.

[108] See *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 85; *Brümmer* id; *Khumalo* above n 48 at para 24; and *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 (2) SA 221 (T) at paras 227H/I-228A, where it was held that—

> "[t]he role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators."

[109] *EFF* above n 41.

right to access those records when they provide evidence of serious criminality or a risk to public health or safety.

[135] Chapter 4 of PAIA contains extensive provisions that provide for the mandatory protection of various categories of information from public disclosure. These categories include:

(a) private personal information about individuals;[110]

(b) trade secrets of private parties;[111]

(c) records which parties are obliged by law to keep confidential;[112]

(d) information that could endanger the lives or safety of individuals or jeopardise the security of buildings and infrastructure systems or jeopardise procedures for individuals in witness protection schemes and the like;[113]

(e) information in police dockets, information relating to the methods of preventing and investigating crime; information, the disclosure of which might impede a prosecution or prejudice an investigation or reveal the identity of confidential sources and so forth;[114]

(f) information subject to legal privilege;[115]

(g) military and security information that could cause prejudice to the country's defence and security or would reveal information supplied in confidence by another state or international organisation;[116]

(h) information containing confidential financial information or trade secrets of the state, the disclosure of which might jeopardise the country's

[110] Section 34 of PAIA.

[111] Id section 36.

[112] Id section 37.

[113] Id section 38.

[114] Id section 39.

[115] Id section 40.

[116] Id section 41.

economic interests or put public bodies at a disadvantage in contractual or other negotiations and so forth;[117]

(i) research information, the disclosure of which might expose others to serious disadvantage;[118]

(j) information about opinions and advice received by public bodies or other information, the disclosure of which might frustrate their deliberative processes and so forth;[119] and

(k) requests, whereby the processing of which would substantially and unreasonably divert the resources of a public body.[120]

[136] All these categories of information enjoy a general claim to confidentiality as they relate to personal and/or private matters of individuals and matters relating to the security and well-being of the country. PAIA provides that an information officer receiving a request for a record containing this information is obliged in some instances and permitted in others to refuse such a request.[121]

[137] However, having created the mechanism for the mandatory or discretionary protection of those categories of information, PAIA in section 46 goes on to provide for what has been termed a mandatory "public-interest override" that obliges the disclosure of information that would otherwise have been the subject of protection.[122]

[138] Chapter 4 of PAIA does two things. First, it creates a framework for the mandatory or discretionary protection of records that generally contain information deserving of protection from disclosure by virtue of private or public considerations. Second, it moderates that framework by including a "public-interest override". The

[117] Id section 42.

[118] Id section 43.

[119] Id section 44.

[120] Id section 45.

[121] Section 33 of PAIA distinguishes between instances when an information officer *must* refuse a request for access to information and when they *may* refuse such a request.

[122] See n 5 above.

consequence of this legislative scheme is that records that generally contain information deserving of protection by virtue of private or public considerations, must be disclosed if the requirements of the "public-interest override" are met.

[139] At first sight, this may appear to negate the constitutionally valid claim that an individual, a third party or the state may have to the confidentiality of personal or sensitive state information. Section 46 does not, however, remove the cloak of confidentiality without just cause or due process – it sets a relatively high bar for the lifting of confidentiality. It may be described as finding the balance between the withholding of information generally worthy of protection from disclosure and the mandatory disclosure of information in the public interest.

[140] A PAIA requester who seeks to successfully invoke the benefit of section 46 has formidable substantive and procedural hurdles to overcome. An information officer must be satisfied that the record sought reveals evidence of a substantial contravention of the law or an imminent or serious public safety or environmental risk. This in itself is a high threshold to meet and, at least objectively, represents aims that are closely aligned with the public interest. The procedural provisions in Part 4 of PAIA ensure that third parties must be notified where disclosure of a record pertaining to them is contemplated. If a person (including such a third party) is aggrieved by a decision of the information officer concerning the application of section 46, there can be recourse to an internal appeal,[123] a complaint to the Information Regulator,[124] or an application to the High Court, if need be.[125] A decision of the High Court may in turn be subject to further appeal. These procedures would have to be exhausted before a record is finally disclosed or withheld in terms of section 46.

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[123] Sections 74-7 of PAIA.

[124] Id sections 77A-K. These provisions came into force on 30 June 2021 and were thus not in operation when the present dispute arose and was adjudicated in the High Court.

[125] Id sections 78-82.

[141] In a rules-based society, serious criminality undermines the values of the Constitution, just as a serious and imminent environmental or health risk poses a high level of threat to the populace. These considerations are, objectively, sufficiently serious in the public interest to warrant lifting the cloak of confidentiality that would otherwise vest in information worthy of protection by virtue of private or public considerations.

[142] This fits neatly into the framework referred to in *Bernstein* – that as one moves away from the inner sanctum of one's life to the communal space that comes with living in society, the scope of that personal space shrinks.[126] In those circumstances, the claim to individual autonomy and the right of privacy that attaches to it becomes less pressing and must be moderated against the public interest.

[143] Section 46 goes on to provide that the information officer, before being obliged to release the record, must also be satisfied that the public interest in disclosure *clearly outweighs* the harm that the provision in question contemplates. What is contemplated is not just a balancing between equally weighted considerations of the public interest and the personal information of individuals or the interests of the state. It is an exercise that requires that the public interest must quantitatively outweigh the harm contemplated. This bias in favour of the non-disclosure of information generally worthy of protection means that section 46, far from negating the claim to confidentiality, retains it, not absolutely but substantially so. This again is a weighted exercise in balancing rights.

[144] The effect of the "public-interest override" is to continue to maintain a high level of confidentiality while providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest.

[126] *Bernstein* above n 68.

[145] PAIA provides that before a decision is taken by an information officer, in terms of sections 34(1), 35(1), 36(1), 37(1) and 43(1), a third party in respect of whom the information relates must be informed[127] and given the opportunity to make representations[128] before any decision is taken on a request for a record.[129] The provisions dealing with this process are extensive and provide the detail of what the information officer must provide to a third party, and the rights that a third party has to make written or oral representations on both the request as well as the possibility of the section 46 override being considered.

[146] In sum, PAIA contains substantive and procedural provisions relating to the prohibition on disclosure and the circumstances under which the "public-interest override" will operate. All of this collectively increases the reliability of the system of mandatory or discretionary protection and its counterpart, mandatory disclosure – it also enhances the likelihood of an informed and well-considered decision emerging.

The section 35(1) insulation and the question of absoluteness

[147] I agree with the conclusion reached in the first judgment, that taxpayer records generally contain personal information submitted to the tax authorities as part of compliance with the tax obligations imposed by law.[130] That information should ordinarily be of no concern or interest to the public at large, is correctly characterised as confidential and warrants the mandatory protection from disclosure that PAIA affords it. It involves quintessentially the relationship between the taxpayer and the tax authority in terms of which the taxpayer provides information to the tax authority on the basis of confidentiality.

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[127] Section 47 of PAIA. It is noted that although section 35(1) (which concerns certain records of the SARS) is included in section 47, the section 46 override does not apply to information in terms of section 35(1).

[128] Id section 48.

[129] Id section 49.

[130] The Employment Tax Incentive Act 26 of 2013, TAA, Customs and Excise Act 91 of 1964, Income Tax Act 58 of 1962 and Value-Added Tax Act 89 of 1991, all form part of the primary legislation which governs the obligation to pay tax. See first judgment at [79] - [88].

[148] The more focused question, however, is whether such information should enjoy unqualified and absolute protection from public disclosure. In this regard, the language of section 35(1) is so wide and limitless that it extends protection to all information in the tax records held by the state, irrespective of its nature and regardless of whether those records or parts thereof justify a claim to protection. This is in contrast to the other provisions in Chapter 4 which provides protection from disclosure to carefully and explicitly worded categories of information. Section 35(1) protects all taxpayer information irrespective of whether its character warrants protection. It is protected simply because it is taxpayer information. It is this wide category of information that is the subject of the challenge in this case. It is totally immunised from the section 46 override that applies to all other categories of information that enjoy protection in terms of Chapter 4 of PAIA.

[149] In addition, although in this case we are concerned with the income tax returns of an individual taxpayer, section 35 also protects the income tax information of companies from disclosure – including public companies and listed companies. Companies in general have attenuated privacy interests, and this is even more pronounced in the case of public and listed companies. The publicly available financial statements of listed companies might disclose almost as much information about the company's financial affairs as the information held by the SARS.[131] Section 35 would prevent the disclosure of these categories of information which would ordinarily be in

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[131] See for example section 29(1) of the Companies Act 71 of 2008, which deals with financial statements and requires, amongst others, that—

> "[i]f a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must–
>
> (a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;
>
> (b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;
>
> (c) show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information;
>
> (d) set out the date on which the statements were published, and the accounting period to which the statements apply . . ."

the public domain. Such a prohibition could never be said to protect any confidentiality interests by rendering public information secret.

[150] Further, flowing from the language of section 35 of PAIA, read with the definition of "revenue" in the South African Revenue Services Act,[132] evidently section 35 applies to all tax statutes, and not only the Income Tax Act.[133] Thus, the records of taxpayers relating to the Mineral and Petroleum Resources Royalty Act,[134] Securities Transfer Tax Act,[135] Value-Added Tax Act,[136] Customs and Excise Act,[137] Estate Duty Act,[138] and Transfer Duty Act[139] would be covered. The arguments with reference to privacy have less traction in respect of these other statutes, as they relate to the activities of a taxpayer that are removed from the inner sanctum that *Bernstein* describes.

The Tax Administration Act

[151] The TAA also contains provisions that preserve the secrecy of taxpayer information.

[152] Section 69(1) of the TAA, which deals with the secrecy of taxpayer information and general disclosure, provides that:

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[132] Section 1 of the South African Revenue Services Act under the heading "Definitions" provides:

> "In this Act, unless the context indicates otherwise—
>
> > 'revenue' means income derived from taxes, duties, levies, fees, charges, additional tax and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys."

[133] 58 of 1962.

[134] 28 of 2008.

[135] 25 of 2007.

[136] 89 of 1991.

[137] 91 of 1964.

[138] 45 of 1955.

[139] 40 of 1949.

> "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."

[153] The prohibition on disclosure found in section 35(1) is reinforced by the provisions of section 69(1) of the TAA as well as those of section 67(3) and (4). It seems that the applicants challenged the constitutionality of sections 67 and 69 to ensure that, in the event of the section 35(1) challenge being successful, there would be no other impediments, especially in the TAA, which would stand in the way of disclosure. To that extent, the challenge to sections 67 and 69 was ancillary to the main challenge, but the applicants probably regarded it as necessary, and a matter of caution, to ensure that disclosure under PAIA was complete and effective.

[154] I make these comments to locate PAIA and the TAA separately in the legislative scheme, mindful that the thrust of this confirmation application is about asserting a right of access to information, in particular taxpayer records. PAIA is the national legislation contemplated in section 32 of the Constitution to give effect to a general right of access to information. The TAA is not the legislation that provides for a right of access to information and does not purport to do so. The prohibitions contained therein, particularly those reflected in section 67(3) and (4) and section 69, primarily relate to the administration of the tax system and the work of other organs of state – they are not prohibitions on any general right of access to information.

The Tax Administration Act exceptions

[155] After creating a general prohibition in section 69(1) on disclosure by a SARS official of confidential information to a person other than another SARS official, section 69(2) goes on to provide for some exceptions to the general prohibition. They relate in the main to the disclosure of such information to a court in respect of proceedings relating to the TAA or the SAPS and the NDPP for the purpose of proving a tax offence. In addition, disclosure may be made under the order of a court in relation to proceedings before it and provided the information is central to the case. Section 70

of the TAA also provides for disclosure to listed organs of state for particular purposes, including the South African Reserve Bank, the Financial Sector Conduct Authority, the National Credit Regulator, the Auditor-General and other state organs.[140]

[156] While these are all important exceptions, they relate to the work of state organs and courts in investigating, prosecuting and adjudicating tax cases and related matters. Disclosure under sections 69 and 70 is not public disclosure and, in any event, was never intended to constitute disclosure that would be aligned with the public interest.

[157] What is the consequence of these exceptions on the operation of PAIA and in particular the prohibition found in section 35(1) of PAIA? The first judgment says that the exceptions found in the TAA mean that the prohibition is not absolute. It says that "although the exceptions provided for in the TAA do not include the public or media houses, the mere presence of exceptions demonstrates that the limitation in question is not absolute".[141] The difficulty with this proposition is that it impermissibly seeks to import the TAA exceptions into PAIA to support the conclusion that the prohibition in section 35(1) of PAIA is not absolute.

[158] It is worth recalling that this case is about the limitation of the right of access to information under PAIA, and the prohibition that is referred to can only be the prohibition in section 35(1) of PAIA. The TAA does not provide for a right of access to information. Section 32 of the Constitution and PAIA, which is the national legislation contemplated in section 32, are concerned with the right which "everyone", that is the public at large, has of access to information held by the state. The "exceptions" in the TAA are not a partial allowance of the constitutional right that the public has of access to information held by the state. The TAA "exceptions" do not afford any public right of access to information.

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[140] Section 70 of the TAA.

[141] See the first judgment at [106].

[159] The exceptions that the first judgment rely on in supporting the conclusion that the prohibition is not absolute are all exclusively TAA exceptions. They are standalone exceptions, solely relevant to the operation of the TAA, and disclosure can only be made to the entities described therein. There is nothing in the language of the TAA that suggests that those exceptions are or can be anything more than the limited and fit-for-purpose exceptions that they are. They are not inspired by section 32 of the Constitution. They would exist in the TAA regardless of whether we had section 32 of the Constitution and PAIA.

[160] Of course, if the exceptions to the TAA could somehow have the effect of ameliorating the prohibitions in PAIA they could not be ignored, but they do not have any effect on the operation of PAIA and on what PAIA determines may be disclosed.

[161] Even if confidential taxpayer information was made available by a SARS official under the authority of any of the exceptions found in sections 69(2) and 70 of the TAA, the fact of such disclosure would not affect the prohibition on disclosure found in section 35(1) of PAIA. The result would be that the section 35(1) prohibition would remain absolute, and an information officer faced with a request for taxpayer information would be absolutely barred from granting such a request, regardless of whether the same information had been the subject of limited disclosure under the exceptions of the TAA.

[162] Given that the TAA exceptions are totally disconnected from the operation of PAIA, there can be no basis to suggest that those exceptions have the effect of rendering the prohibition on disclosure found in section 35(1) anything other than absolute. Mindful that the limitation in this matter is about the right of access to information and freedom of expression, none of the exceptions advance those rights in any manner and they cannot, therefore, be regarded as exceptions to the prohibition on the right of access to information.

[163] What then would the consequence and the sustainability of an absolute prohibition be in the light of the holdings of this Court in *Johncom* and *Chipu*?

[164] In *Johncom*, the issue in confirmation proceedings was the absolute prohibition in section 12 of the Divorce Act regarding the publication of any particulars of a divorce action or any information that came to light during such an action. This Court, in confirming the unconstitutionality of section 12, said the following:

> "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 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.'
>
> But the chosen method of protecting the rights of children, quite apart from going too far, is also not particularly efficient in achieving the purpose. The legislature almost 30 years ago chose to allow the publication of the identities of children as well as of parties to a divorce action and, at the same time, prohibited the publication of any evidence at a divorce trial, whether or not the prohibition of publication was necessary to protect the relevant privacy and dignity interests. Yet, as will be shown, another way to protect children and parties would, in my view, be to prohibit publication of the identity of the parties and of the children. If that were to be done, the publication of the evidence would not harm the privacy and dignity interests of the parties or the children, provided that the publication of any evidence that would tend to reveal the identity of any of the parties or any of the children is also prohibited. The purpose could be better achieved by less restrictive means. In the circumstances it must be held that the limitation cannot be justified."[142] (Footnotes omitted.)

[142] *Johncom* above n 14 at paras 29-31.

[165] This Court took the view that there were less restrictive means available to achieve the purpose of the limitation, and the overbroad nature of the limitation meant that it could not pass constitutional scrutiny. It also raised sharply its discomfort with the absolute prohibition covering even matters that were in the public interest. That is precisely the effect that sections 35(1) and 46 of PAIA have.

[166] In *Chipu*, the issue before this Court was the absolute prohibition in section 21(5) of the Refugees Act, which provided for the "confidentiality of asylum applications and the information contained therein".

[167] This Court, in finding that the impugned provision was unconstitutional, held that the absolute prohibition contained in section 21(5) could not pass constitutional muster. Likewise, it concluded that there were less restrictive means to achieve the purpose of the limitation, which was to provide a level of confidentiality to asylum applications and the information that emerged from them. This could have been achieved by giving the Refugee Appeal Board a discretion to allow the media to attend its proceedings and impose conditions, if need be, on the reporting of those proceedings. Such an approach would strike the balance between the privacy interests of an applicant before the Refugee Appeal Board and the public interest in issues that may arise from such a hearing.

[168] It is of some interest that in *Chipu* the media wished to attend and report on the application before the Refugee Appeal Board as it was interested in the national and international criminal activities that the applicant before the Refugee Appeal Board was allegedly involved in.[143] The issue that crisply emerged there was whether the absolute prohibition on reporting on matters before the Refugee Appeal Board could be used as a shield to protect those involved in criminal activity and who were a threat to society. This in part is what the section 46 override traverses.

[143] *Chipu* above n 15.

[169] *Johncom* and *Chipu* dealt with two vulnerable categories of people – children and refugees. Despite this, the Court was unwilling to condone an absolute prohibition. One must ask – is there any basis to suggest that taxpayers form a special category of persons that are entitled to an absolute level of protection from the disclosure of information that may reveal serious criminality?

[170] Arising from *Johncom* and *Chipu* and the conclusion that the prohibition in section 35(1) is absolute, it must follow that the prohibition cannot withstand constitutional scrutiny. The first judgment characterises this matter as one involving competing rights from which the need emerges to find a balance between such rights. Sections 35(1) and 46, however, close the door firmly in the face of any balancing of rights when it comes to taxpayer information.

[171] The approach in section 35(1) read with the exclusion of the section 46 override is not about balance and is not about a consideration of the less restrictive means that section 46 offers. It is an approach of absoluteness – one that cannot be reconciled with the proper constitutional approach to competing rights. It is not open to a consideration of any other means to achieve the purpose of the limitation of the right. This is, in essence, the case advanced by the respondents in seeking to defend an absolute prohibition.

[172] One must be careful not to elevate taxpayer confidentiality to some sacrosanct place where no exception to enable public access to it is possible. This is the effect of section 35(1) of PAIA. It is difficult to conceive any reasonable basis to hold that taxpayer information cannot be subject to the "public-interest override" in circumstances where the override is potentially available to justify the disclosure of information that may relate to the life and the safety of an individual, the defence or the security interest of the country or the private information of a third party (including their medical records), all of which can happen in terms of section 46.

[173] It must therefore follow that section 35(1) cannot survive constitutional scrutiny on this basis alone. It is offensive to the idea that, when rights compete, the desirable approach is to seek to find a balance between them. The legislative approach in Chapter 4 and section 46, in particular, is about seeking and finding that balance. That approach is, however, abandoned in respect of taxpayer records without proper justification and even in the face of a carefully balanced override.

[174] In addition, the first judgment finds that this matter is distinguishable from *Johncom* and *Chipu* as it does not concern court proceedings or proceedings before a quasi-judicial body.[144] However, both cases engaged the right to freedom of expression contained in section 16 of the Constitution and not the right of access to courts in section 34. Moreover, divorce proceedings and asylum applications were both considered to be proceedings of a sensitive nature requiring privacy. Ultimately, the nature of the proceedings was not instrumental to this Court's holdings that the absolute prohibitions were unconstitutional.

The purpose of the limitation

[175] The first judgment correctly recognises the need for an efficient tax administration system in a functioning democracy. Taxpayers who comply with their tax obligations are essential for a healthy fiscus and are entitled to a measure of confidentiality in the tax information they submit. The first judgment accepts this as a legitimate purpose for limiting the right of access to such information.

[176] The SARS Commissioner says that—

> "[t]he 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. The compact, written into law, between a tax authority and the

[144] First judgment at [107].

public is the foundation of the tax system, without which the tax system cannot properly function."[145]

[177] Even without the section 46 override, there exists no absolute confidentiality if one has regard to the provisions of the TAA, so it must be accepted that even the confidentiality that the Commissioner refers to is relative confidentiality. A taxpayer under the existing regime would know that tax information could be passed on to the SAPS, the NDPP and numerous other organs of state. There can then be little justification in seeking to defend the absolute prohibition in section 35(1) in the face of the various exceptions to confidentiality found in the TAA. The argument that absolute confidentiality is necessary to advance taxpayer compliance loses traction.

[178] Again, the difficulty with this approach is that it proceeds from the premise that absolute confidentiality is necessary to ensure taxpayer compliance. Having done so, it then fails to explain why relative confidentiality in the TAA will not erode taxpayer compliance while relative confidentiality in PAIA will have the opposite effect.

[179] There is, in addition, no evidence in support of the conclusion that absolute confidentiality is a pre-condition for taxpayer compliance. Professor Roeleveld, whose report the state respondents rely upon, describes the conceptual approach to the question of taxpayer confidentiality as being characterised by two underpinnings – transparency and confidentiality – and says that "overall there should be a legitimate balance".[146] She goes further and quotes Hambre[147] who acknowledges that privacy is not an absolute right, but that the interference (which may have the effect of limiting the right) has to be legitimate.[148]

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[145] High Court judgment above n 3 at para 7.2.

[146] Roeleveld *Expert Report on Taxpayer Information Commissioned by Minister of Finance* University of Cape Town (undated).

[147] Hambre *Tax Confidentiality: A Comparative Study and Impact Assessment of Global Interest* (Doctoral Thesis, Örebro University, 2015).

[148] Id at 113.

[180] Professor Roeleveld then references the work of the Observatory on the Protection of Taxpayers Rights[149] (OPTR). In dealing with exceptions to confidentiality, she quotes from an OPTR report as follows:

> "Exceptionally, the right to privacy needs to give priority to other values constitutionally protected in a democratic society by operation of balancing. Provided that the fundamental nature of the right of privacy, as part of a bundle of 'constitutional rights positions' [is] granted to taxpayers because of their human dignity, it seems obvious that situations in which the right to privacy is superseded by other public considerations should be exceptional, explicitly stated in the law and narrowly interpreted."[150] (Footnotes omitted.)

[181] I pause to make the observation that the "public-interest override" found in section 46 is one that is narrowly constructed, incorporating a manifestly high substantive and procedural bar, which may well accord with the OPTR exception to the confidentiality framework.

[182] It follows that the idea of absolute provisions, either in terms of openness or in terms of confidentiality, is not the uniform standard, either in terms of our jurisprudence or (from what we are able to glean from Professor Roeleveld's report) internationally. In this matter, the applicants do not seek absolute transparency – they accept there must be general secrecy in taxpayer information, subject only to a "public-interest override". This appears to fit neatly into the conceptual framework that Professor Roeleveld uses to preface her report, underpinned by the writing of Hambre and the work of the OPTR. In addition, *Bernstein* reminds us of the truism that no rights are absolute and "from the

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[149] Professor Roeleveld attributes this passage to Observatory on the Protection of Taxpayers' Rights *2015-2017 General Report on the Protection of Taxpayers' Rights* (2018), however, it in fact comes from Observatory on the Protection of Taxpayers' Rights *2018 General Report on the Protection of Taxpayers' Rights* (2019).

[150] Observatory on the Protection of Taxpayers' Rights *2018 General Report on the Protection of Taxpayers' Rights* (2019) at 73.

outset of interpretation each right is always already limited by every other right accruing to another citizen”.[151]

[183] In conclusion, there is no basis in principle nor in terms of any evidence that absolute confidentiality is required to achieve taxpayer compliance. On the contrary, while most taxpayers might assume that in general their tax information will be protected, it is another matter to suggest that such taxpayers may also insist, as a condition of compliance, that information that evidences serious criminality or a public risk will also be the subject of protection. Does individual autonomy and privacy extend this far? The Constitution and the protection it affords in the pursuit of individual liberty and freedom were never intended to be used as an impermeable shield to protect an individual from scrutiny in respect of conduct that represents a threat to society.

[184] In this regard, I do not accept the language used by the SARS Commissioner of a “compact” between SARS and taxpayers regarding confidentiality. Whether or not there is absolute confidentiality, taxpayers have a statutory duty to comply with the law. They are in no position to bargain with SARS for absolute secrecy as a condition for their compliance with the law. Nor do I accept, either on the evidence or as a matter of inherent probabilities, that most taxpayers only comply (or only comply fully) with the law because of a guarantee of absolute confidentiality. Ordinary law-abiding taxpayers are likely to comply with their tax obligations because the law so commands and because of the serious financial and criminal consequences of non-compliance. The dishonest taxpayer, who is not afraid of the potential financial and criminal consequences of evasion, is unlikely to be lured to make candid disclosure by a guarantee of secrecy.

[185] Further, in support of its submissions, SARS made reference to the position of taxpayer secrecy in various jurisdictions. However, this comparative analysis is of

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[151] *Bernstein* above n 68.

limited assistance. For example, reliance was placed on the decision of the Constitutional and Human Rights Division of the High Court of Kenya in the case of *Njoya*.[152] Here, section 125 of the Kenyan Income Tax Act[153] protected taxpayer secrecy and excluded access under the relevant access to information legislation. Section 125 provided that a document that has come into the possession of an officer in the performance of his duties in terms of the Income Tax Act could not be produced in court. A constitutional challenge was brought on the basis that section 125 was inconsistent with section 35 of the Kenyan Constitution providing the right of access to information. While the Kenyan High Court dismissed the challenge on the grounds that section 125 was a reasonable limitation of the right of access to information due to the importance of its protection of taxpayer secrecy, this decision was overturned on appeal in the Kenyan Court of Appeal.[154] The Kenyan Court of Appeal held that the applicant's right of access to information was violated. Accordingly, it ordered the disclosure of the tax information of the individuals relating to their parliamentary salary allowances. In weighing up the importance of taxpayer confidentiality and the right of access to information, the Kenyan Court of Appeal stated as follows:

> "It is true to say that traditionally confidentiality of tax information is a globally recognised and accepted concept which is meant to be an aid in compliance. See for instance English jurisprudence on the subject including *In Re The Companies Acts 1862 to 1890 & In Re Joseph Hargreaves Limited* [1900] 1 Ch 347 and *Browns Trustees vs Hay* 3 RTC [1890-1898] 598. Still we entertain no doubt that the right to information is critical to the attainment of transparent and accountable government and is an enabler to the exercise and enjoyment of other rights by citizens."[155]

[152] *Njoya v Attorney General* [2014] eKLR.

[153] Kenyan Income Tax Act (CAP .470) as at 2014.

[154] *Timothy Njoya v Attorney General* [2017] eKLR.

[155] Id.

[186] Relying on this Court's decisions,[156] the Court of Appeal perceived the Kenyan Constitution as "a deliberate effort to fashion an open and free country where governance is democratic and accountable to the 'wananchi', the citizenry".

[187] Moreover, Professor Roeleveld also tells us that there are countries with absolute prohibitions and others with exceptions to confidentiality and, in this regard, one must accept that national jurisdictions will in part shape their laws by reference to both international norms as well as a country's own history and its trajectory for the future.

[188] The first judgment reminds us quite compellingly that, given our own history of subjugation and oppression, freedom of expression has now come to occupy an esteemed place in our constitutional order. And so, while international comparisons have some value, they are limited, and much would depend on the prevailing legal culture, the existence or not of a written constitution, the time period when the law would have been enacted and other unique and localised considerations. The fact that the United Kingdom and Canada have absolute prohibitions while Sweden and Slovenia provide for disclosure is really of no moment. The more pressing question, and the one central to these proceedings, is whether section 35(1) stands up to our constitutional framework.

[189] Accordingly, I differ from the conclusion in the first judgment that the purpose of the limitation, as being necessary to achieve taxpayer compliance, passes the limitation test. Some limitation may be justified, but no case has been advanced for an absolute limitation.

[190] In addition, there cannot be a concern that if the section 46 override was made applicable to the provisions of section 35(1), there would be the risk of the disclosure of personal taxpayer information that fell outside of the override provisions. Such a

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[156] *Brümmer* above n 30 and *M & G* above n 30.

risk, if it did exist, could be effectively managed by using the provisions of section 28 of PAIA, which deals with severability, provides as follows:

> "(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which—
>
> (a) does not contain; and
>
> (b) can reasonably be severed from any part that contains,
>
> any such information must, despite any other provision of this Act, be disclosed."

[191] The option of severing information in a record or redacting a record would provide a suitable mechanism to overcome any risk that over-disclosure may pose. It is the same mechanism that can be deployed to deal with the concern the first judgment raises – that subjecting section 35(1) to the section 46 override may result in the disclosure of information that South Africa may have obtained through international tax agreements, and which it is prohibited from disclosing.

[192] Finally, the first judgment is concerned that the section 46 override, if applied to section 35(1), would result in high-profile public figures and ordinary citizens being equally exposed to the risk of the disclosure of personal information. I do not think we should be unduly concerned about that. The override is not directed at a category of individuals but rather information that is in the public interest. An ordinary citizen would not have a claim to a higher level of protection of information that provides evidence of serious criminality or a public safety or health risk. On the contrary, the commitment to equality that our Constitution evinces must mean that when individuals engage in conduct that imperils the interests of society, and when the public interest justifies the disclosure of their personal information, it should not matter whether they are high-profile people or ordinary citizens. The law must apply equally to them in this context. If high-profile public figures more often find themselves the subject of requests to invoke the "public-interest override", that would not be because they are subject to a different test than other members of the public, but because their conduct might more readily meet the high standard set by section 46.

[193] Viewed in its entirety, what would be the effect of applying the section 46 override to the mandatory protection of taxpayer information found in section 35(1)? The effect would be:

(a) Confidentiality would continue to be the default position.

(b) The override would only apply in limited and closely defined circumstances, with a relatively high bar to lift confidentiality.

(c) Section 28 could be invoked to deal with severability and ensure that the parameters of what is disclosed are properly managed.

(d) The third party notice procedure would enable the taxpayer to make representations and be heard before a decision on disclosure is taken.

(e) An aggrieved party would have recourse to internal appeal mechanisms and the courts if necessary.

[194] All of this collectively provides a compelling mechanism where the less restrictive means to limit the right could be put in place precisely in the manner that *Makwanyane* urges us to do – an exercise in balancing interests.

[195] It is for these reasons that I conclude that the limitation in section 35(1) is absolute and cannot be said to be reasonable and justifiable in an open and democratic society. The section 46 override provides a mechanism that is not only less restrictive than an absolute prohibition, but is one that is narrowly constructed with substantial checks and balances. It must follow that sections 35(1) and 46 of PAIA as well as sections 67(4) and 69(2) of the TAA are unconstitutional to the extent found by the High Court. The order of invalidity of the High Court stands to be confirmed.

Remedy

[196] The parties were in agreement that in the event that the High Court's order of unconstitutionality was upheld, the request of the third applicant for access to the taxpayer records of the Mr Zuma should be referred to SARS to be dealt with in terms of PAIA, incorporating the reading-in that would follow upon this Court's confirmation

of the declaration of constitutional invalidity. That appears to be a sensible approach, which I support.

[197] Having found that the insulation of section 35(1) from the section 46 override is unconstitutional, it would be appropriate for Parliament to properly consider the matter with a view to bringing sections 35(1) and 46 in line with the Constitution. That process will benefit from Parliament's consultative and deliberative process. An order of suspension and referral would thus be appropriate, and a period of 24 months would be reasonable to allow Parliament to address the unconstitutionality found to exist. It may be argued that an order of suspension may not be necessary in a case such as this as the reading-in cures the constitutional deficiency and nothing more would be required of Parliament. This much was stated by Goldstone J in *J v Director General*[157] as follows:

> "Where the appropriate remedy is reading-in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading-in is to cure a constitutional deficiency in the impugned legislation. If reading-in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the legislature need not be given an opportunity to remedy the defect, which has by definition been cured. In the present case, the effect of the order is not to leave a *lacuna* but to remedy the constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended."[158] (Footnote omitted.)

[198] On the other hand, and apart from the constitutional deficiency found to exist, it is also so that there are issues relating to the overreach of section 35(1),[159] and that suspension, while not strictly necessary, may nevertheless provide an opportunity for

[157] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[158] Id at para 22.

[159] See [148] to [154].

Parliament to deal with section 35(1) in its totality if it so desires. Of course, it may do so even without an order of suspension but, as indicated, such an order creates the opportunity for that to happen. It is for these reasons that I would favour an order of suspension. The merit of such an approach is described by Bishop in the following terms:

> "It permits the Court to have the best of both worlds – deferring ultimately to the Legislature, but providing interim relief to the litigants and other similarly situated persons. Because they are only stop-gap measures that do not permanently interfere with the law, the Court feels free to go further than it might were the judgment to require permanent reading-in of potentially contentious wording or the fashioning of quite detailed procedures to guide the executive. Such flexible 'new tools' can be used to vindicate rights without interfering with other remedial goals."[160]

[199] For the rest, the part of the order of the High Court with the limited reading-in would serve as an adequate and constitutionally compliant legal framework in the interim. Having found that the omission of section 35(1) from section 46 of PAIA is unconstitutional, reading-in section 35(1) into the scope of section 46 of PAIA would cure this defect with the least interference as it merely extends the Legislature's existing formulation of section 46 of PAIA.

[200] The applications for leave to appeal by the state respondents must accordingly be dismissed in respect of the order of unconstitutionality of sections 35(1) and 46 of PAIA, as well as sections 67 and 69 of the TAA.

[201] In respect of the TAA, the High Court's declaration of invalidity and reading-in does nothing more than give practical effect to section 5 of PAIA. This is because, the impugned provisions of the TAA would preclude access to information held in tax records being granted to a requester where the requirements in section 46(a) and (b) of PAIA have been met. Additionally, they would preclude a requester from further

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[160] Bishop "Remedies" in Woolman and Bishop (eds) *Constitutional Law of South Africa* Service 5 (2013) at 126.

disseminating information obtained as a result of a PAIA request. In such circumstances, I am inclined to extend the confirmation of invalidity to the impugned provisions of the TAA.

[202] Paragraphs 5, 6 and 7 of the High Court order stand to be set aside. It was not in dispute that, notwithstanding the order of unconstitutionality in respect of sections 35(1) and 46, the proper order is to refer that request back to SARS to deal with afresh in the light of this judgment.

Costs

[203] Given that the applicants have enjoyed success in obtaining the order of confirmation they seek, they should be entitled to their costs, which should include the costs of two counsel. The costs of the successful appeal in respect of some of the provisions of the High Court order fall to be dealt with by *Biowatch*[161] and no orders as to costs will be made in respect of those matters.

[204] Mr Zuma, even though he did not oppose the matter in the High Court, was entitled to participate in these proceedings to protect his interests. He did not oppose the confirmation proceedings and no costs order is warranted either in his favour or against him.

[205] The following order is made:

1. The order of constitutional invalidity of the High Court of sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 (PAIA), 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 section 46 of PAIA are met, is confirmed.

[161] *Biowatch* above n 96.

2. The order of constitutional invalidity of the High Court of sections 67 and 69 of the Tax Administration Act 28 of 2011 (TAA) to the extent that they—

   (c) preclude access to information being granted to a requester in respect of tax records in circumstances where the requirements set out in section 46 of PAIA are met; and

   (d) preclude a requester from further disseminating information obtained as a result of a PAIA request

   is confirmed.

3. The declarations of invalidity in paragraphs 1 and 2 above are suspended for a period of 24 months from the date of this order to enable Parliament to address the constitutional invalidity found to exist.

4. Pending any measures Parliament might take to address the constitutional invalidity, the impugned provisions shall be read as follows:

   (a) Section 46 of PAIA shall read:

   > "46 Mandatory disclosure in public interest.—Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), **35(1)**, 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, 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
   >
   > (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

   (b) Subsection 69(2) of the TAA shall be read as if it contained an additional paragraph (bA) after the existing paragraph (b):

   > "(bA) where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act 2 of 2000"

(d) Section 67(4) of the TAA shall be read as if the phrase "unless the information has been received in terms of the Promotion of Access to Information Act 2 of 2000" appeared immediately before the full stop.

5. In the event that Parliament does not remedy the constitutional defects within 24 months of this order, paragraph 4 of this order shall continue to apply.
6. The applications for leave to appeal of the first to the fourth respondents are granted.
7. The appeals by the first respondent and the fourth respondent against paragraph 9 of the High Court order are dismissed.
8. The appeal by the third respondent against paragraphs 1, 3 and 4.1 of the High Court order is dismissed.
9. The appeal by the fourth respondent against paragraphs 2, 4.2 and 4.3 of the High Court order is dismissed.
10. The appeals by the first respondent and the second respondent against paragraphs 5 and 7 of the High Court order are upheld and those paragraphs of the High Court order are set aside.
11. The appeal by the first respondent against paragraph 6 of the High Court order is upheld and that paragraph of the High Court order is set aside.
12. The request of the third applicant under PAIA for access to the individual tax returns of the second respondent for the 2010 to 2018 tax years is referred to the first respondent for consideration afresh in the light of this order.
13. The third applicant is afforded one month from the date of this order to supplement his request for access to the records referred to in paragraph 12 of this order.
14. The costs of the applicants in this Court in respect of the confirmation proceedings shall be paid by the first, third and fourth respondents and shall include the costs of two counsel.

15. The parties shall bear their own costs in respect of the appeals by the first to the fourth respondents.

For the Applicants:	S Budlender SC and P Olivier instructed by Webber Wentzel
For the First Respondent:	W Trengove SC and L Sisilana instructed by Ledwaba Mazwai
For the Second Respondent:	T Masuku SC and M Simelane instructed by Ntanga Nkuhlu Incorporated
For the Third Respondent:	N Cassim SC instructed by the State Attorney
For the Fourth Respondent:	A Mosam SC and B Lekokotla instructed by the State Attorney
For the Fifth Respondent:	AL Platt SC and TW Synders instructed by Cheadle Thompson & Haysom Incorporated