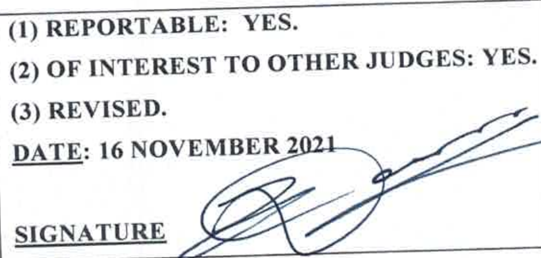
HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 88359/2019


(1) REPORTABLE: YES.
(2) OF INTEREST TO OTHER JUDGES: YES.
(3) REVISED.
DATE: 16 NOVEMBER 2021

SIGNATURE

In the matter between:

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

and

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

Coram: DAVIS J

Revenue – taxpayer confidentiality – exception when substantial contraventions of law committed and disclosure is in the public interest.

Constitutional law – when freedom of speech and right of access to information in public interest trump rights to privacy.

Declaration of constitutional invalidity of exclusion of "public interest override exceptions" to confidentiality provisions contained in the Promotion of Access to information Act 2 of 2000 (PAIA)

JUDGMENT

This matter has been heard virtually and was otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically. The deemed date of the order is the date of signature of the judgment.

DAVIS, J

[1] Introduction

This is the judgment in an application brought by a media house and others, challenging the constitutional validity of the statutory prohibition of the disclosure of a taxpayer's tax information held by the South African Revenue Services (SARS), in circumstances where such disclosure would reveal evidence of "*a substantial contravention of the law*" and would be in the public interest.

[2] Parties

2.1 The applicants are Arena Holdings (Pty) Ltd t/a Financial Mail (Financial Mail), the Amabhungane Centre for Investigative Journalism NPC (Amabhungane) and a Mr Warren Thompson, who is an employee of the Financial Mail.

2.2 The respondents are SARS, the former president of South Africa, Mr Zuma, the Minister of Justice and Correctional Services (the Minister of Justice), the Minister of Finance and the Information Regulator (the Regulator).

2.3 Only SARS and the two ministers opposed the application. The Regulator has delivered a notice to abide and neither the Regulator nor Mr Zuma took part in the hearing of the application.

[3] Issues to be determined

In addition to issues of *locus standi*, misjoinder and the appropriateness of the constitutional challenge at this stage, all issues which were raised by the Minster of Justice but not pursued with much vigour, the parties have, in their joint practice note, identified the following substantial issues which require adjudication:

3.1 Whether the impugned prohibition of disclosure limits the rights of access to information provided for in section 32 of the Constitution and /or the right to freedom of expression provided for in section 16(1) of the Constitution.

3.2 If the prohibition limits either or both of the aforesaid rights, whether such limitation is justifiable in terms of section 36 of the Constitution.

3.3 Should the limitation(s) not be justifiable, whether the relief sought by the applicants of a "reading-in" into the Tax Administration Act 28 of 2011 (the TAA) of an additional sub-section (6A) into section 69(2) which provides that "*where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act (PAIA)*" and the "reading-in" of a corresponding exception into section 34(1) of the Promotion of Access to Information Act, 2 of 2000 (PAIA), are competent.

3.4 Whether SARS' contention that the provisions of the TAA strike a lawful balance between the right to privacy and the rights to access to information and freedom of speech claimed by the media, is correct.

3.5 Lastly, the Minister of Finance claims that the applicants have not made out a case for the substitution of this Court's decision for that of SARS.

[4] <u>The relevant statutory framework</u>

4.1 Section 25(2) of the TAA obliges a taxpayer to submit "full and true" tax returns while Section 234(d) provides that anyone who fails to do so, commits a criminal offence.

4.2 Sections 200 to 205 of the TAA make provision that SARS and taxpayers may agree to compromise a taxpayer's tax debts, but such compromise is dependent on full and true disclosure of all the material facts.

4.3 Sections 227 to 231 of the TAA provide for taxpayers to make voluntary disclosures of their own transgressions, which voluntary disclosures allow SARS to compromise such a taxpayer's exposure to civil and criminal liability. This is, again, dependent on full and true disclosure of material information.

4.4 In addition to the abovementioned disclosure obligations of a taxpayer, the TAA creates wide-ranging investigative and information-gathering powers for SARS such as those contained in section 45 (the power of inspection), sections 46 to 49 (the power to subpoena), sections 50 to 58 (the power of interrogation) and sections 59 to 66 (the power of search and seizure).

4.5 The TAA, in section 69(1) thereof, imposes an obligation on SARS officials to "*preserve the secrecy of taxpayer information*" and prohibits the officials from disclosing taxpayer information to a person who is not a SARS official.

4.6 "*Taxpayer information*" would include information submitted to SARS in the prescribed IT 12 document by a taxpayer relating to his income received, deductions, tax credits, investment income, foreign income, income from trusts, capital gains, rental income, pension fund-, provident fund- and retirement annuity contributions and/or pay-outs.

4.7 Moving away from the TAA, Section 32 of the Constitution provides as follows:

"*Access to information*

(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 exercise or protection of any rights*".

4.8 Since the enactment of PAIA however, which is the national legislation contemplated in Section 32(2) of the Constitution to give effect to the section 32(1) rights, a person can generally not rely on section 32(1)

directly to obtain access to information, but must rely on the provisions of PAIA. The exception hereto, is that the right contained in section 32(1) can be relied on directly when the constitutional validity of PAIA itself for failing to guarantee or enable the exercise of the right of access to information is questioned.

4.9 Section 11(1) of PAIA provides that access must be given by a public body (such as SARS) to a record held by such a body (i.e. information must be disclosed) to a "requester" when such a requester has complied with PAIA's procedural requirements. As request may only be refused when a ground for refusal of such access (disclosure) exists as provided for in Chapter 4 of Part 2 of PAIA. This will for instance be when disclosure "*could reasonably be expected to endanger*" the safety of an individual, where it would impair the security of any system for protecting the public, or where the information relates to crime investigation methods or the security or international relations of the country.

4.10 The relevant provisions in aforementioned Chapter 4 of PAIA relied on by SARS in this matter are sections 34(1) and 35(1).

4.11 Section 34(1) of PAIA provides that access to a record may be refused if the record requested contains confidential information of another party and access to the record would involve the "*unreasonable disclosure*" of such confidential information.

4.12 Section 35(1) of PAIA goes further and provides that disclosure of information obtained or held by SARS for the purpose of enforcing legislation concerning the collection of revenue (such as the TAA) must be refused if that information relates to a person other than the requester.

4.13 Once refusal of access to a record (disclosure) has been conveyed to a requester, an internal appeal against such refusal may be lodged in terms of section 74 of PAIA.

4.14 Should such an internal appeal be unsuccessful, the requester may apply in terms of section 78(2)(a) of PAIA to a court for "appropriate relief".

4.15 Section 46 of PAIA is referred to as the "public interest override" section. The provisions contained in this section are at the hub of the present dispute and the section provides as follows:

> "*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 ... 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*".

4.16 By way of incorporation, section 46 refers to many instances where the public interest override provision finds application, such as access to commercial information (section 36), police dockets (section 39), economic interests and commercial activities of public bodies (section 42) and operations of public bodies (section 44). Access to the information

held by SARS as contemplated in Section 35 of PAIA referred to in paragraph 4.12 above is not one of those categories referred to in section 46 and the "public interest override" therefore does not apply to the prescribed prohibition of disclosure of "certain records" held by SARS.

4.17 In a nutshell, the statutory framework providing for "taxpayer secrecy" contained in the TAA, which is mirrored by provisions of PAIA, provides that taxpayer information disclosed to SARS, may not be disclosed to anyone, except in certain very narrowly described exceptions and generally only as part of tax recovery proceedings and there is no "public interest override" applicable to these non-disclosure provisions.

4.18 In addition, the Constitution protects the rights of privacy in section 14 thereof, which provides as follows: "*Everyone has the right of privacy, which includes the right not to have – (a) ... (b) the privacy of their communications infringed ...*".

4.19 The rights relied on by Financial Times, namely the right of access to information provided for in PAIA is further sourced in the freedom of the press and the media and everyone's right to receive or impart information, contained in the freedom of expression provision contained in section 16(1) of the Constitution.

4.20 It is clear that there is an interplay or tension between the competing rights of taxpayer privacy and the rights of access to information claimed by the Financial Mail. Both the rights of privacy and access to information are contained in the Bill of Rights in the Constitution.

4.21 Where two competing constitutional rights intersect, the exercise of one right may result in a corresponding limitation of the other. The Bill of

Rights portion of the Constitution provides in section 36 thereof that any such limitation may only take place in terms of law of general application and only to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and then only after taking into account a number of relevant factors.

4.22 So far the Constitutional and statutory framework within which the disputes must be adjudicated.

[5] The applicant's case

5.1 Although the relief claimed by the applicants and the declarations of constitutional invalidity that they seek, potentially have implications of general application for all taxpayers, the applicants' case was generated by the requests for access to the IT 12 documents relating to Mr Zuma for the years that he was president. The applicants relied on the averments extracted from a book published in October 2017, titled The President's Keepers, by Tafeberg publishers. The author is an investigative journalist, Jacques Pauw. The averments relied on by the applicants in their papers regarding Mr Zuma's tax affairs during his presidency are the following:

- that Mr Zuma did not submit tax returns at all for the first seven years of his presidency;
- that he owed millions of rand in tax for the fringe benefits he received because of the so-called security upgrades to his Nkandla residence;
- that he received various 'donations' from illicit sources – alleged to be tobacco smugglers, Russian oligarchs and the Gupta family;
- that he had drawn a six-figure 'salary' as an 'employee' of a Durban security company for the first few months of his Presidency (it

appears that he had subsequently paid the money back in response to queries);

- that Mr Zuma had appointed Mr Tom Moyane as the commissioner of SARS to undermine the institution's enforcement capability and to prevent it from prosecuting Mr Zuma for non-payment of taxes and other financial malfeasance, and from investigating people linked to him; and
- that it was not clear whether Mr Zuma was tax-compliant at the time of publication and that it was probable that SARS was not taking steps to extract the tax he owed.

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

5.3 Based on these allegations, the applicants aver that "credible evidence" exists that Mr Zuma was not tax-compliant while he was president.

5.4 Mr Zuma has not opposed the application, neither in general nor in respect of the relief aimed at disclosure of his personal tax affairs and has not delivered any affidavit addressing the aforesaid allegations made regarding himself and his tax-compliance.

5.5 In SARS' opposing affidavits and in arguments presented on its behalf by Adv Trengove SC, it pleaded "agnostic" to the tax affairs of former

president Zuma. This must not be construed as either an admission or denial of the allegations, but merely an extension of its obligations not to disclose the tax affairs of any taxpayer in terms of section 69 of TAA and in circumstances as the present.

5.6 The applicants argue that the tax compliance of a head of state of South Africa, in circumstances where accusations of non-compliance are in the public domain, particularly without any protest about the veracity thereof, entitle them to invoke their rights of access to information and, if those rights are statutorily limited, to challenge the constitutionality of such limitations.

[6] The crux of the matter

6.1 It must immediately be obvious that there are two sets of rights at issue in this matter. The first are those asserted by the applicants, namely the rights of access to information and freedom of speech and the second, the rights of privacy (and possibly also dignity) of taxpayers. These can rightfully be labelled "competing" constitutional rights for, in this case, the more one set of rights is granted absolute protection, the more that same protection limits the other set of rights and *vice-versa*.

6.2 There is general consensus that the general limitation of access to taxpayer information held by SARS, imposed by a law of general application (the TAA), is justified in an open and free democratic society. The applicants do not seek to do away with that regime. Their case is rather that the limitation imposed on their rights to publish matters which they say are in the public interest regarding tax offences by public figures should not be absolutely infringed upon (by a blanket prohibition), but that there are less restrictive means whereby their rights can be infringed upon, in this case,

the application of the "public interest override" provisions contained in section 46 of PAIA.

6.3 Once the balance of the competing rights are found to be tilted in the applicants' favour, the declaration of constitutional invalidity of the statutory limitations should follow. Conversely, should be balance favour SARS and be against the application of a public interest override provision, the statutory regime should be left intact and unaltered.

[7] <u>The basis of SARS opposition</u>

7.1 SARS' opposition to the relief sought, is founded on the purpose and importance of taxpayer secrecy. It is summed up in the following arguments contained in written heads of argument submitted on its behalf: "*In return for their full and frank disclosure, SARS promises to keep taxpayers' secrets*" and "*the scheme of the TAA thus makes it clear that it strikes a bargain between SARS and the taxpayers: in return for their full and frank disclosure, SARS promises to keep their secrets*".

7.2 The SARS Commissioner formulated this approach as follows in his answering affidavit:

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

7.3 In support of its opposition to allow a public interest exception to confidentiality, SARS further relies on a comparative analysis of legislation in certain foreign jurisdictions, notably Kenya, the United Kingdom, the USA, Canada, New Zealand and Germany. In these countries, for various reasons and based on varied statutory instruments, there is no provision for such an exception as contended for by the applicants.

7.4 In addition, SARS referred to a number of international treaties of which South Africa is a signatory and a number of inter-country agreements of which South Africa are part of. Virtually all these treaties and agreements contain prohibitions similar to that contained in Section 69 of the TAA in respect of the secrecy and maintenance of confidentiality in relation to taxpayer information received from SARS's foreign counterparts.

7.5 The argument is then further that these treaties and agreements have, upon their countersigning and acceptance, become part of domestic law. See: *Glenister v President of South Africa* 2011 (3) SA 347 (CC).

7.6 SARS also argued that the obligation of a taxpayer to make full and true disclosure, upon an application of the provisions of sections 57 and 72, deprives a taxpayer of the privilege against self-incrimination and that this is a weighty consideration in favour of taxpayer secrecy.

7.7 SARS however also points out that, despite the "bargain" regarding taxpayer information secrecy and the applicability of international law, treaties and agreements, the TAA itself provides for a number of exceptions to the secrecy principle. The "ban" on disclosure is therefore not absolute. These exceptions are narrowly circumscribed and SARS referred in this regard to the following:

- Section 69 (2)(c) of the TAA allows disclosure under a High Court order, subject to the limitation imposed by section 69 (5), which provides that a court may only grant a disclosure order if the information "is central" to a case before it.

- Section 67 (5) allows the Commissioner to disclose taxpayer information in defence of a case against SARS in circumstances where the taxpayer has, by his misconduct, forfeited the right to secrecy. The section reads as follows:

  > *"67(5) The Commissioner may, for purpose of protecting the integrity and reputation of SARS as an organization 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 ..."* .

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

- Section 71 of the TAA provides for the disclosure of taxpayer information to the South African Police Services or the National Director of Public Prosecutions, but under strictly controlled conditions and only if authorized by a judge in chambers.

7.8 SARS's argument is further that the above exceptions to the concept of taxpayer secrecy strikes the necessary balance between such secrecy and the taxpayer's privacy rights on the one hand, and the rights of access to information and freedom of speech on the other hand.

[8] Evaluation

8.1 The principle espoused by the Commissioner of SARS that without taxpayer secrecy, tax administration cannot properly function, is not a universal truth. The research referred to by the experts relied on by the parties, on both sides of the spectrum, indicate that there are many tax regimes in foreign jurisdictions, which have a far lesser degree of prohibition of access to taxpayer information, even by private citizens and on lesser thresholds than those contended for by the applicants in this case. In those tax regimes where there are a less taxpayer secrecy, tax administration is neither hampered nor prevented thereby.

8.2 The notion that voluntary disclosure and taxpayer compliance is inextricably linked to or dependent on the taxpayer secrecy regime also appears not to be a universal truth. Even SARS's Group Executive: Legislative Research & Development, in his supporting affidavit, when dealing with the principle relied on by the applicants, namely that a measure which may improve compliance in one jurisdiction may not be effective in another, refers to a caveat contained in the Organisation for Economic Co-operation and Development's published Information Note in November 2010 entitled "*Understanding and Influencing Taxpayers' Compliance Behaviour*" which caveat provides as follows: "*National revenue bodies face a varied environment within which they administer their taxation systems. Jurisdictions differ in respect of their administrative practices and culture. As such, a standard approach to tax administration may be neither practical nor desirable in a particular instance. ... Care should always be taken when considering a country's practices to fully appreciate the complex factors that have shaped a particular approach*".

8.3 In the same affidavit, mention is made, with reference to certain internet links to the vast number of articles, mostly scientific, which deal with taxpayer compliance and behaviour. In the abovementioned note, for example, the Webs of Science, was in 2010 listed as holding 528 articles with 187 100 'hits' at the time, which is more than a decade ago.

8.4 Governments settle their financial obligations and pay their public expenditure largely through finances generated by taxes. Voluntary tax compliance differs from country to country and is generally perilous in developing countries. In particular, studies have shown that "*voluntary tax compliance will increase if governments spend tax wisely ... Taxpayers will pay their taxes honestly if they get valuable public services in exchange*". See, inter alia "*Voluntary Tax compliance behavior of individual taxpayers in Pakistan*", Ibn Hassam et al, Financial Innovation, Vol 7 Article 21 (2021). It is a well known fact in tax regime administration that the level of a tax burden significantly affects the degree of tax compliance. A perceived excess of the burden beyond the "ideal" or "optimal" tax rate is an important determinator for tax compliance or non-compliance. See the analysis of 58 countries in "*Determinants for tax compliance – A cross country analysis*" by Sy Wu and Mei Teng, Public Finance Analysis Vol 61 N3 (2005) pp 393 – 417. Although these are only academic papers, expressing the opinions of their authors, they appear to reflect generally known facts or perceptions but either way, they cast some doubt on the assertion by SARS that voluntary compliance, at least as far disclosure goes, is dependent on the secrecy "compact' written in to law. It appears that there might be far weightier compulsions to voluntary tax compliance than the guarantee of confidentiality at play. I need not decide this issue (if indeed it can be decided), I need only to decide whether the premise

relied on by SARS is sacrosanct enough to justify the limitation it contends is constitutionally justified.

8.5 The "compact" relied on by the Commissioner, namely that truthful and accurate disclosure is made in exchange for secrecy, is, on my reading of the TAA itself, also open to some doubt. Despite SARS' denial of the threat of detection and punishment being a driving force, the 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 provisions as referred to in paragraph 4.1 above.

8.6 To put it bluntly, there is no direct or factual evidence that taxpayers in South African 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.

8.7 In answer to the reliance on the confidentiality "compact" described by the Commissioner quoted in paragraph 7.8 above, the applicants were at pains to point out that they are not calling for a blanket removal of the confidentiality regime. What the applicants are contending for is that the same "public override" requirements imposed by Section 46 of PAIA, namely where there is reason to believe that the disclosure of the taxpayer information would reveal evidence or failure to comply with the law and where "*public interest in the disclosure ... clearly outweighs the harm contemplated in the provision in question*" should apply.

8.8 The "public interest override" already provided for in Section 46 of PAIA as referred to in paragraph 4.16 above, applies to a range of "extraneously

sensitive" or otherwise confidential information, such as trade secrets, national security secrets, the details of active police investigations, privileged documents and even information that may threaten the life of an individual. These are all examples of where a limitation of rights to privacy have been limited. Such a limitation would, as already pointed out, only be constitutionally valid if justified in terms of section 36 of the constitution. In comparison, these types of information at first blush appear to be of a weightier nature and/or affecting or possibly affecting the rights or interests of more people than the rights of a private or individual taxpayer. Therefore, so the applicants contend, there should not be an objection against a similar limitation of the privacy rights in respect of taxpayer information.

8.9 The test of whether the limitation claimed by SARS meets the test of Section 36 of the Constitution, is a normative one. The parties relying on such a limitation (SARS ad the Minister), bear the onus to prove that the limitation passes Constitutional muster. Put differently in the context of this case, have the state respondents satisfied the onus that rests on them to show that the limitations on rights of access to information and freedom of speech imposed by taxpayer secrecy provisions are justified in an open and democratic society based on human dignity, equality and freedom?

8.10 Section 36(1) list a number of "relevant factors" to be taken into account in determining the justification of a limitation such as taxpayer secrecy:

- "*(a) the nature of the right*" – here, one should not consider taxpayer secrecy in general or wide terms, but the nature of the more limited right to privacy of a person whose conduct may be in the public interest, such as a member of the executive as well as the right to

privacy in a disclosure to SARS which may reveal substantial contraventions of law.

- "*(b) the importance of the purpose of the limitation*". In this regard I have already referred to the argument of the Commissioner who avers that the "compact" created by taxpayer secrecy is necessary or "important" for tax administration purposes.

- "*(c) the nature and extent of the limitation*". It is here where the parties largely part ways. As indicated earlier, SARS seeks to protect the entire secrecy regime in its current form whilst the applicants merely seek orders resulting in the Section 46 PAIA override, which they contend is an exception to the regime, in very exceptional and limited circumstances.

- "*(d) the relation between the limitation and its purpose*". This aspect is closely related to the "secrecy compact" argument and the recovery of revenue, already dealt with above.

- "*(e) less restrictive means to achieve the purpose*". On SARS's papers, there is no "less restrictive reasons" whereby the public interest can be served on this context. The public interest override is, on the other hand, a less restrictive limitation of the applicants' rights than a blanket ban.

8.11 I find it instructive that the Constitutional Court has already in different contexts struck down prohibitions relating to provisions of a sensitive nature or where privacy rights were involved. In *Mail and Guardian Media Ltd v Chipu NO* 2013 (6) SA 367 (CC), the absolute confidentiality

surrounding applications for asylum was struck down. There the court held as follows per Zondo J:

> "*[92] I cannot see why the integrity of the asylum system and the safety of the asylum applicants and their families and friends would be threatened by the publication of information in an asylum application that would not tend to disclose the identities of the asylum applicant, his family and friends ... [93] ... . In my view, absolute confidentiality is not essential (to achieve the object of the Refugees Act 130 of 1998)*".

8.12 The above decision also referred to the Constitutional Court's earlier decision in *Johncom Media Investments Ltd v M and Others* 2009 (4) SA 7 (CC) whereby the absolute prohibition against publication of details of a divorce action was struck down.

8.13 In similar fashion as in the abovementioned two cases where international comparisons were made with reference to various other jurisdictions, SARS also conducted such an exercise in the present matter. References were made to the countries mentioned in paragraph 7.3 above. Significantly, in my view, references were not to the same extent made to jurisdictions where a contrary view to that of SARS was held.

8.14 In weighing up the limit imposed by the absolute taxpayer secrecy on the rights to freedom of speech and access to information when the exercise of those rights are in the public interest against the contentions raised by SARS, I find the following observation by Cora Hoexter in *Administrative Law in South Africa* (2nd Ed) at 98 (albeit in a slightly different context) to be apposite: "*the claim [is] that free access to official (state-held) information is a prerequisite for public accountability and an essential*

feature for participatory democracy". When this principle is then juxtapositioned to the right of taxpayer confidentiality or personal privacy of those in whose affairs the public have a legitimate interest (such as members of the Executive), I find that the limitations on the access to information are not justified. The corollary is that I find that the public interest override encroachment or limitation of taxpayer confidentiality is, on the other hand justified.

[9] A last objection by SARS to the relief claimed, which objection is completely unrelated to the Constitutional issues, expect in a very oblique way, is that the public interest override provision would breach a number of international instruments. In particular, SARS referred to Double Taxation Agreements (DTAs), Tax Information Exchange Agreements (TIEAs) and the Convention of Mutual Administrative Assistance in Tax Matters (the CMAA). These international instruments involve a mutual sharing and disclosure of taxpayer information between the revenue administrations of different countries. They are, generally, further premised on the observance of taxpayer confidentiality by the receiving countries. The agreements, however, do make provision for respect of the domestic legislation of participating countries and require disclosure by participating members of exceptions such as the public interest override provision claimed by the applicants in this matter. SARS claims that if this provision is allowed or adopted, all the DTAs, TIEAs would be breached and the benefit of the CMAA might be lost with the consequential dire consequences for revenue collection. From a reading of SARS' affidavit, it does not appear that this would automatically be the position. It might or might not follow once disclosure of such exceptions had been made. But there is, to my mind, a more fundamental solution to SARS' objections sourced in a point well made by the applicants: disclosure of taxpayer

information which would otherwise satisfy the public interest override, might not be in the public interest if it involves information received in terms of these international instruments and which may lead to a breach of their terms. Notionally then, disclosure of the information can then still be refused. This would be analogous to the position in the *Mail and Guardian v Chipu* (above at para 93) where, after the Court overrode the non-disclosure positions, the Refugee Appeal Board still had to exercise a discretion whether disclosure would be in the public interest, taking all relevant factors into consideration. In similar fashion, I do not find the reliance on these instruments to be a bar to the relief claimed.

[10] Summary of findings

To sum up then, with reference to the questions this court was called upon to decide, as set out in paragraph 3 above, the findings are as follows:

10.1 Ad para 3.1 above

The blanket prohibitions of disclosure of taxpayer information contained in section 35 of PAIA and section 69 of the TAA limit the rights access to information provided for in Section 32 of the constitution.

10.2 Ad para 3.2 above

The above limitation is not justifiable in terms of section 36 of the Constitution.

10.3 Ad para 3.3 above

A "reading-in" of the "public interest override" provisions otherwise contained in section 46 of PAIA is both justified and competent.

10.4 Ad para 3.4 above:

SARS' contention that the other limited disclosures of taxpayer information contained in the TAA strike the "necessary balance", is too limited and incorrect.

10.5 Ad para 3.5 above:

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.

10.6 In view of the above findings and conclusion, I do not find the remainder of the Ministers' points referred to in paragraph 3 above, to have any merit.

[11] Order

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

2. Section 67 and 69 of the Tax Administration Act 28 of 2011 ('the TAA') are unconstitutional and invalid to the extent that:

2.1 they preclude access to information being granted to a requester in respect of tax record in circumstances where the

requirements set out in subsections 46(a) and (b) of PAIA are met; and

2.2 they preclude a requester from further disseminating information obtained as a result of a PAIA request.

3. The declarations of invalidity in paragraphs 1 and 2 above are suspended for a period of two years from the date of this order to enable Parliament to correct the relevant defects.

4. Pending the correction of the defects:

4.1 Section 46 of PAIA shall be read as if the phrase "35(1)", appeared immediately after the phrase "section 34(1)" contained therein, and

4.2 Section 69(2) of the TAA shall be read as if it contained an additional sub-section (bA) after existing sub-section (b), which provides:

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

4.3 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*" appeared immediately before the full stop.

5. The decision of the first respondent, dated 19 March 2019, to refuse the third applicant's request under PAIA for access to the individual

tax return of the second respondent for the 2010 to 2018 tax year ("the refusal decision") is set aside.

6. The decision of the first respondent, dated 30 May 2019, to confirm the refusal decision on internal appeal is set aside.

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

8. The orders in paragraphs 1 to 4 above are referred to the Constitutional Court in terms of Section 172(2)(a) of the Constitution.

9. The costs of this application shall be paid by the first, third and fourth respondents jointly and severally, the one paying the other to be absolved and including the costs of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 03 June 2021

Judgment delivered: 16 November 2021

APPEARANCES:

For the Applicant:	Adv. S Budlender SC together with Adv. P Olivier
Attorney for Applicant:	Webber Wentzel Attorney, Johannesburg
For the 1st Respondent:	Adv. W Trengove SC together with Adv. L Sisilana
Attorney for 1st Respondent:	Ledwaba Mazwai Attorney, Pretoria
For the 3rd Respondent:	Adv. N Cassim SC
Attorney for 3rd Respondent:	State Attorney, Pretoria
For the 4th Respondent:	Adv. A Mosam SC together with Adv. B Lekokotla
Attorney for 4th Respondent:	State Attorneys, Pretoria