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**The disclosure of taxpayer information and the right to privacy**

by

**MPHO VIOLET MONAMA**

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Supervisor: PROF S VAN ZYL

Student nr: 19110198

Date: 21 SEPTEMBER 2022



Declaration of originality<sup>1</sup> for a research output<sup>2</sup>

Biographical information of student	
Student #	u19110198
Title	Ms
Surname	Monama
Initial(s)	MV
Registered for the:	LLM / MPhil (coursework) <input checked="" type="radio"/> : or LLM / MPhil <input type="radio"/> : or LLD / PhD <input type="radio"/>
Email	u19110198@tuks.co.za
Mobile phone #	079 376 3666
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## **ABSTRACT**

SARS ensures that revenue is collected and that there is tax compliance amongst taxpayers in South Africa, also that taxpayers' fundamental rights as contained in the Bill of Rights are properly protected.

This research evaluates the provisions of section 71 of the Tax Administration Act 28 of 2011('TAA') against the background of the taxpayers' right to privacy as guaranteed by section 14 of the Constitution of the Republic of South Africa Act 108 of 1996. The common law right to privacy and statutory right to privacy are discussed and how the right is limited in terms of section 36 of the Constitution of the Republic of South Africa Act 108 of 1996. Further, requirements for a justifiable limitation of the rights are briefly outlined. The TAA must seek to strike a balance between taxpayers' rights and its powers to combat tax offences.

The discussion also analyses the exceptions under the TAA that empowers SARS under certain circumstances to disclose taxpayer information, without breaching the right, to relevant authorities in order to combat tax offences. The information-gathering procedures by SARS, particularly the warrantless search and seizures provisions are discussed. This also includes the analysis of remedies that are available to taxpayers in case of an infringement of his constitutional rights

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# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND

The Constitution of the Republic of South Africa, Act 108 of 1996 as amended, was certified by the Constitutional Court ('CC') and came into force and replaced the Interim Constitution Act 200 of 1993.<sup>1</sup> De Waal *et al* state that the 1996 Constitution completes South Africa's constitutional revolution.<sup>2</sup> Furthermore, Croome mentions that before the adoption of the Interim Constitution, the South African Revenue Service ('SARS') could take any actions, without considering the taxpayers' rights, and the courts were reluctant to intervene.<sup>3</sup> SARS was a law unto itself.

After the adoption of the 1996 Constitution, SARS had to make its laws compliant with the provisions of the 1996 Constitution. The rights as contained in the Bill of Rights include, *inter alia*, the right to privacy; access to information; freedom; and equality.

The Chapter 2 of the 1996 Constitution, like its predecessor, contains a Bill of Rights,<sup>4</sup> which outlines how the State and its organs should interrelate with its citizens. The Bill of Rights is recognised as the cornerstone of our democracy,<sup>5</sup> and the State is obligated to respect, protect, promote, and fulfil the rights in the Bill of Rights.<sup>6</sup>

The Constitution also introduced and entrenched the values which are aimed at promoting an open and democratic society when interpreting the Bill of Rights.<sup>7</sup> In the matter of *Shabalala v The Attorney General of the Transvaal*,<sup>8</sup> the CC held that the Interim Constitution introduced a new legal order that promotes democracy and openness in South Africa. This new constitutional dispensation is founded on the principles of accountability, openness, and

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<sup>1</sup> The Constitution was adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly and was promulgated on 18 December 1996. See *Ex Parte Chairperson of the Constitutional Assembly in re: Certification of the Republic of South Africa* 1996 (4) SA 744 (CC).

<sup>2</sup> I Currie & B De Waal B *The Bill of Rights Handbook* (2013) 6.

<sup>3</sup> B Croome 'Constitutional law and taxpayers' rights in South Africa-an overview' (2002) *Acta Juridica* 1.

<sup>4</sup> Chapter 2, s 7 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>5</sup> S 7(1) of the Constitution.

<sup>6</sup> S 7(2) of the Constitution.

<sup>7</sup> S 39 of the Constitution.

<sup>8</sup> *Shabalala v The Attorney General of the Transvaal* 1995 (12) BCLR 1593 (C).

transparency.<sup>9</sup> The values set out in judgment are equally applicable to the 1996 Constitution, even if it was issued under the Interim Constitution.

In *United Democratic Movement v President of the Republic of South Africa*,<sup>10</sup> the CC held that the founding values set out the standard to which South African laws must comply to be valid. Furthermore, in the matter of *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders*,<sup>11</sup> the CC further confirmed that the Bill of Rights gives effect to the founding values and must be interpreted in a manner that is consistent therewith.<sup>12</sup>

The fundamental rights afforded to taxpayers are not absolute and may be limited in terms of section 36 of the 1996 Constitution, provided that such limitation is reasonable and justifiable in an open and democratic society. Croome states that, many taxpayers are under the false assumption that because the Constitution protects rights, those rights cannot be infringed upon.<sup>13</sup>

De Waal *et al* states that,

[in order] to satisfy the limitation test, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefit designed to achieve (the purpose of the law).<sup>14</sup>

The aggrieved taxpayer has the right to request the court for the appropriate relief if he believes that his constitutional rights have been unreasonably and unjustifiably limited. To evaluate whether the limitation is unreasonable and unjustifiable, the court will take in to account various factors outlined in section 36 of the Constitution. These factors include, *inter alia*, the following:

- 1.1.1 The nature of the right;
- 1.1.2 The importance of the purpose of the limitation;

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<sup>9</sup> *Shabalala v The Attorney General of the Transvaal* 1995 (12) BCLR 1593 (C) para 21.

<sup>10</sup> *United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 (CC).

<sup>11</sup> *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280.

<sup>12</sup> *Minister of Home Affairs* 2005 (3) SA 280 para 23.

<sup>13</sup> B Croome *Taxpayers' Rights in South Africa* (2010) 9.

<sup>14</sup> Currie & De Waal (2013) 9.



- 1.1.3 The nature and extent of the limitation;
- 1.1.4 The relation between the limitation and its purpose; and
- 1.1.5 Less restrictive means to achieve the purpose.

In *S v Makwanyane*,<sup>15</sup> Chaskalson P held that the limitation test depends on various circumstances and factors. In *S v Manamela*,<sup>16</sup> it was decided that the factors must not be used as a checklist, but rather as a guideline to determine whether the limitation is reasonable and justifiable.<sup>17</sup> De Waal *et al* state that there must be compelling justifications for limiting rights.<sup>18</sup> The limitation must be justifiable and must serve a purpose that the majority of people would regard to be of utmost importance.<sup>19</sup>

In *S v Manamela*, it was held that restrictions on the rights, no matter how significant the purpose of the limitation, it will be unjustifiable unless there is good reason to believe that the restrictions would accomplish the purpose for which they are intended and that there is no other ‘realistically available’ way to accomplish its purpose without restricting the rights.<sup>20</sup>

## 1.2 RESEARCH PROBLEM

The research problem to be addressed in this research is whether a taxpayer’s right to privacy is sufficiently protected by the TAA 28 of 2011, and if not – what remedies do taxpayers have if their rights are breached? Section 71 of the TAA imposes a duty on SARS to disclose information relating to criminal, public safety, and environmental matters.

A judge may order SARS to disclose information to *National* Commissioner of the South African Police Services (‘SAPS’) or the National Director of Public Prosecution (‘NDPP’) under section 71 of the TAA.<sup>21</sup> The disclosure may reveal information that proves the commission of an offence other than a tax offence for which the court may impose a sentence of imprisonment exceeding five years.<sup>22</sup>

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<sup>15</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) (hereafter the *Makwanyane* case).

<sup>16</sup> *S v Manamela* 2000 (3) SA 1 (CC) para 32.

<sup>17</sup> *Manamela* 2000 (3) SA 1 (CC) para 43.

<sup>18</sup> Currie & De Waal (2013) 151.

<sup>19</sup> D Meyerson *Rights limited: freedom of expression, religion and the South African Constitution* (1997) 36-43.

<sup>20</sup> *Manamela* 2000 (3) SA 1 (CC) para 32.

<sup>21</sup> S 71(2) of the Tax Administration Act 28 of 2011 (hereafter the TAA).

<sup>22</sup> S 71(2)(a)–(c) of the TAA.

Furthermore, a senior SARS official has the power to request a judge in chambers for an *ex parte* order authorising them to disclose information to the Commissioner of the SAPS or the NDPP or the NPA that they believe is likely to be important in the prosecution of an offence, or in avoiding of the risk to the environment or public safety.<sup>23</sup> If The National Commissioner of the SAPS or the NDPP, or any person acting under their authority believes that SARS is in possession of pertinent information that assist in investigations relating to an offence or public safety or environmental risk, may bring an *ex parte* application to a judge for an order compelling SARS to disclose that information.<sup>24</sup>

The confidentiality provisions do not protect a taxpayer's secrecy if information in SARS's possession is that is deemed to be crucial for an investigation or the prosecution of a serious criminal offence. In such circumstances the information may be disclosed by SARS to the National Commissioner of the SAPS or the NDPP and this disclosure will not be regarded as contrary to the Bill of Rights.

Under the control of the Commissioner, SARS is responsible for the administration of the TAA.<sup>25</sup> The Act gives SARS the authority to give the Commissioner extensive statutory powers to effectively perform its duties and fulfil the objective of the institution. It is important to note that all the powers and duties of SARS may be exercised for the administration of the TAA.<sup>26</sup>

Yet, SARS is also bound by the Constitution. One of the most important rights that SARS has to uphold is the right to privacy. The common law and the Constitution both regulate the right to privacy in South African law. The right to privacy was articulated by Warren and Brandeis in 1890, in what is among the most influential law review articles of all time.<sup>27</sup> They argue that although not yet having a specific name, the legal right to privacy already existed in common law.<sup>28</sup> They argue that common law already had an overarching element of privacy protection known as the right to be left alone.<sup>29</sup> They further argue that respecting the right to privacy was a part of what it meant to live a civilised life and to have civil relations with one another.<sup>30</sup>

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<sup>23</sup> S 71(3) of the TAA.

<sup>24</sup> S 71(4) of the TAA.

<sup>25</sup> S 3(1) of the TAA.

<sup>26</sup> S 6(1) of the TAA.

<sup>27</sup> M Hatfield 'Privacy in taxation' (2017) *Florida State University Law Review* 579.

<sup>28</sup> SD Warren & LD Brandeis 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

<sup>29</sup> SD Warren & LD Brandeis 'The Right to Privacy' (1890) 4 *Harvard Law Review* 197–213.

<sup>30</sup> SD Warren & LD Brandeis 'The Right to Privacy' (1890) 4 *Harvard Law Review* 195–196.

Neethling defines the concept of privacy as ‘an individual condition of life, characterised by seclusion from the public and publicity.’<sup>31</sup> It embraces all the personal facts that the person concerned has determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they are kept private’.<sup>32</sup>

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,<sup>33</sup> Langa DP (as he then was) held that the right to privacy comes into play whenever a person has the choice to disclose information to the public and have a reasonable expectation that their choice will be respected.<sup>34</sup> Hatfield states that privacy rights are often stated as a person’s right against others or government officials.<sup>35</sup> It is the right to seclusion, the right not to be embarrassed, and the right to make decisions for oneself.<sup>36</sup>

In the matter of *Wainwright v Home Office*,<sup>37</sup> the English courts held that privacy is a value that supports the existence of the rule of law. It also gives the law guidance as it develops.<sup>38</sup> The CC considered the meaning of privacy in *Bernstein v Bester*,<sup>39</sup> and held that,

‘privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state. The unlawfulness of a factual infringement of privacy is adjudged in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the court’.<sup>40</sup>

### 1.3 THE COMMON LAW RIGHT TO PRIVACY

The origin of the right to privacy in South African law can be traced back to Roman-Dutch law. The *actio iniuriarum* which is an action to remedy a privacy breach, protects the right to privacy.<sup>41</sup> The common-law right to privacy is concerned with whether the infringement of

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<sup>31</sup>J Neethling, JM Potgieter & PJ Visser *Neethling’s Law of Personality* (2005) 32.

<sup>32</sup>J Neethling, JM Potgieter & PJ Visser *Neethling’s Law of Personality* (2005) 32.

<sup>33</sup>*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC).

<sup>34</sup>*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at 557.

<sup>35</sup>Hatfield (2017) *Florida State University Law Review* 590.

<sup>36</sup>Hatfield (2017) *Florida State University Law Review* 590.

<sup>37</sup>*Wainwright v Home Office* 2003 UKHL 53, 31.

<sup>38</sup>*Wainwright* 2003 UKHL 53, 31.

<sup>39</sup>*Bernstein v Bester* 1996 (4) BCLR 449 (CC) (hereafter the *Bernstein* case).

<sup>40</sup>*Bernstein para 484-485.*

<sup>41</sup>Currie & De Waal (2013) 295.

someone's privacy is unlawful.<sup>42</sup> The common law right to privacy is protected by the principles of delict.<sup>43</sup>

A delict is an intentional and wrongful interference with another's right to seclusion in his or her private life. In accordance with the concept of *dignitas*, common law recognises the right to privacy as an independent personality right. Roos emphasises that in order to exercise a person's right to privacy, the person must be in control of their personal information.<sup>44</sup>

In *National Media Ltd v Jooste*,<sup>45</sup> Harms J pointed out that an objective test must be used in order to establish whether the right to privacy has been infringed.<sup>46</sup> In *Financial Mail (Pty) Ltd v Sage Holdings Ltd*,<sup>47</sup> the court held that the contemporary *contra bonos mores* and the community's overall sense of justice as viewed by the courts are used to determine whether an infringement of a person's right to privacy is unlawful.<sup>48</sup>

## 1.4 THE CONSTITUTIONAL RIGHT TO PRIVACY

The constitutional right to privacy is much broader than the common law concept of privacy. It is provided for in terms of section 14 of the 1996 Constitution. This section states that,

‘everyone has the right to privacy, which includes the right not to have their persons or homestead, their property searched, or their communications infringed’.

Section 14 protects the right to make decisions about one's private life, protects individuals against unauthorised intrusions, and limits the State's (and others') ability to disclose information about others. Section 14, obliges the state to pass legislation that protects the right to privacy of personal information.<sup>49</sup>

In *Bernstein v Bester*, Ackermann J stated that constitutional privacy is the continuum of privacy interests. It is not an absolute right and is limited by other rights that accrue to another citizen. Privacy does not only refer to a person's personal space, such as his home environment

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<sup>42</sup>Currie & De Waal (2013) 295.

<sup>43</sup>A Roos 'Data Protection: explaining the international backdrop and evaluating the current South African position' (2007) *SALJ* 422.

<sup>44</sup>A Roos 'Data Protection: explaining the international backdrop and evaluating the current South African position' (2007) *SALJ* 422.

<sup>45</sup>*National Media Ltd v Jooste* 1996 (3) SA 262 (A).

<sup>46</sup>*National Media Ltd* 1996 (3) SA 262 (A) at 271

<sup>47</sup>*Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1991 (2) SA 11 (W).

<sup>48</sup>*Financial Mail (Pty) Ltd* 1991 (2) SA 11 (W) para 133-134.

<sup>49</sup>J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2005) 272.

or sexual preference. Although, it is recognised as a private right, it diminishes as soon as a person moves into communal relations such as business or the workplace.<sup>50</sup>

The court in *Bernstein v Bester* established a two-part test for determining whether an infringement occurred. Whether there is a subjective expectation of privacy is the first test, and whether the society as a whole has objectively recognised the expectation is the second test.<sup>51</sup>

The right to privacy is protected by Article 12 of the Universal Declaration of Human Rights, 1948 ('UDHR'), which expressly states that no one shall be subjected to arbitrary interference and intrusions in their personal space, home, or correspondence, as well as attacks on their good name and reputation. Everyone has the right to legal protection from such intrusions or attacks.<sup>52</sup>

Similarly, the American Restatement of the Law of Torts states that any person who unreasonably violates on another's right to privacy by disclosing his affairs to others will be held liable for the violation.<sup>53</sup>

Constitutional rights are not absolute. Section 7(3) of the Constitution provides that the rights in the Bill of Rights are subject to the limitations in section 36 or elsewhere in the Bill of Rights. In *S v Manamela*, it was held that the limitations of the right will not be justifiable unless there is good reason for thinking that the purpose it is intended will be achieved and that there is no alternate way to achieve the purpose without restricting the rights.<sup>54</sup>

The limitations as outlined in the Bill of Rights under sections 7(3) and 36(1) are not always unconstitutional. This is based on the premise not every infringement of a fundamental right is unlawful. Only if it is authorised by section 36 of the Constitution; and is justifiable in an open and democratic society based on human dignity, equality, and freedom will a limitation of a fundamental right be deemed valid.<sup>55</sup>

In *S v Makwanyane*, Chaskalson P stated that,

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<sup>50</sup> *Bernstein* 1996 (2) SA 751 (CC)

<sup>51</sup> *Bernstein* 1996 (2) SA 751 (CC) para 75.

<sup>52</sup> Article 12 of the UDHR.

<sup>53</sup> American Restatement of the Law of Torts, 1939(4) at 398 para 867.

<sup>54</sup> *Manamela* 2000 (3) SA 1 (CC) para 32.

<sup>55</sup> Currie & De Waal (2013) 151.

‘the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing of competing values and an assessment based on proportionality. There is no absolute standard which can be laid down to determine reasonableness and necessity. Application of these principles can only be done on a case-by-case basis. The Constitutional Court follows a two-staged approach in order to determine the reasonableness and justifiability of limiting a constitutional right’.<sup>56</sup>

In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,<sup>57</sup> the Constitutional Court described the two-staged approach as follows:

‘[T]he question of whether a right in the Bill of Rights has been violated generally involves a two-pronged enquiry. The first enquiry is whether the invalidated provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second enquiry is whether the limitation is reasonable and justifiable under section 36 (1) of the Constitution. Courts considering the constitutionality of a statutory provision should therefore adhere to this approach for constitutional adjudication’.<sup>58</sup>

In the case of *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*,<sup>59</sup> Moseneke DCJ held that once a fundamental right has been granted, the State bears the negative duty not to limit the right without justification. Therefore, the party alleging breach of the right, bears the onus to prove breach.<sup>60</sup> McQuoid-Mason states that proof of an infringement will render the relevant statutory provision *prima facie* unlawful.<sup>61</sup>

Section 36(1) of the Constitution allows the court to validate limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. For the test to be satisfied, it must be proven that the law in question serves a constitutionally acceptable purpose and there is sufficient proportionality between the infringement of the fundamental right and the benefits it seeks to achieve (the purpose of the law).

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<sup>56</sup> *Makwanyane 1995 (3) SA 391 (CC)* para 104.

<sup>57</sup> *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 (4) SA 222 (CC)*.

<sup>58</sup> *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 (4) SA 222 (CC)* at 141.

<sup>59</sup> *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC)*.

<sup>60</sup> *Head of Department: Mpumalanga Department of Education 2010 (2) SA 415 (CC)* at 52.

<sup>61</sup> D McQuoid-Mason ‘Invasion of privacy: common law v constitutional delict-does it make a difference’(2000) *Acta Juridica* 227–246.

In *COT v CW (Pvt) Ltd*,<sup>62</sup> the court stated that,

reasonable was held to imply intelligent care and deliberation. The court held that the test is whether the classification challenged by the taxpayer rests upon some ground of difference having a fair, equitable, and substantial relation to the achievement of a valid legislative objective so that all persons similarly circumstanced shall be treated alike.<sup>63</sup>

If the classification lacks these attributes, legislative action must be taken to be unreasonable. Under section 36(1) ‘fairness’ is not an absolute standard. In the case of *Christian Education of South Africa v Minister of Education*,<sup>64</sup> the CC held that there is no single criteria or approach to determine reasonableness. Therefore, for the purposes of section 36(1), fairness of the limitation is therefore assessed in accordance with the values and standards that apply in an open and democratic society founded on human dignity, equality and freedom.<sup>65</sup>

Despite the developments and protection of privacy in our law, some scholars criticise the right to privacy and are of the view that it no longer plays an important role in encouraging tax compliance, as it did in the past. Hatfield states that those who criticise the right, often equate it with, and limit it to, a concern for secrecy.<sup>66</sup>

Richard Posner J has emphasised that privacy as secrecy is the concealment of true facts about oneself, especially discreditable information such as criminal conduct.<sup>67</sup> He argues that few people want to be left alone and believes that they want to manipulate others through the selective disclosure of facts about themselves.<sup>68</sup>

Mark Zuckerberg, the founder of Facebook, has said that the age of privacy is dead, as a social norm for keeping information secret has evolved.<sup>69</sup> The rise of online social networking means that people no longer expect privacy.<sup>70</sup> Mackinnon has focused on privacy as a tool used by men to oppress women.<sup>71</sup> This oppression is possible because privacy shields the oppressor,

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<sup>62</sup>*COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 265 D.

<sup>63</sup> *COT* 1990 (2) SA 245 (ZS) 265 D.

<sup>64</sup>*Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC).

<sup>65</sup> *Christian Education of South Africa* 2000 (4) SA 757 (CC) 31.

<sup>66</sup>Hatfield (2017) *Florida State University Law Review* 591.

<sup>67</sup> Hatfield (2017) *Florida State University Law Review* 591.

<sup>68</sup>R Posner ‘The right to privacy’ (1978) 12 *Georgia Law Review* 399–400.

<sup>69</sup> B Jonson ‘Privacy no longer a societal norm, says Facebook Founder’ *The Guardian* 10 January 2010, available at <http://www.theguardian.com>, accessed on 17 April 2021.

<sup>70</sup>B Jonson ‘Privacy no longer a societal norm, says Facebook Founder’ *The Guardian* 10 January 2010, available at <http://www.theguardian.com>, accessed on 17 April 2021.

<sup>71</sup> www C McKinnon *Toward a feminist theory of the state* (1989)168.

making him unaccountable for his actions.<sup>72</sup> Schwartz comments that tax returns are no longer regarded as the single most comprehensive and trustworthy source of personal data. There are many sources of information available nowadays that are stored in databases of public and private organisations.<sup>73</sup>

Scholars who are in favour of the protection of the right to privacy, such as Knight, argue that it is still necessary for taxpayers to ensure that their privacy is protected, as it is their right.<sup>74</sup> Taxpayers should also be entitled to disclose information that is absolutely necessary for tax purposes, without the assumption that they are hiding something and can trust that the government will keep this information private.<sup>75</sup>

Furthermore, it has been argued that if the veil of tax privacy was lifted, tax deterrence efforts would be more effective and visible.<sup>76</sup> In addition to improving deterrence, confidence in the tax system will increase amongst compliant individual taxpayers.<sup>77</sup> The traditional justification for tax privacy means that taxpayers will only disclose information to the government only if they trust that their private information will be kept private by the government.<sup>78</sup>

Blank further argues that this backs up the claim made by proponents of taxpayer privacy that disclosure to the government will decrease unless people can trust that their information will be kept private.<sup>79</sup>

Chapter 6 of the Tax Administration Act, also referred to as the "confidentiality of information clause," contains provisions that prohibit SARS employees from releasing information to any unauthorized parties.<sup>80</sup> Croome states that the primary reason for the secrecy provisions is to encourage taxpayers to make full disclosures of their personal financial affairs, if they know that such information could be readily available to third parties, without good reason.<sup>81</sup>

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<sup>72</sup>C McKinnon *Toward a feminist theory of the state* (1989)168.

<sup>73</sup>P Schwartz 'The future of tax privacy' (2008) 61(4) *National Tax Journal* 896.

<sup>74</sup>A Knight 'Privacy planning' (2016) *Without prejudice* 280.

<sup>75</sup>A Knight 'Privacy planning' (2016) *Without prejudice* 280.

<sup>76</sup>JD Blank 'In defense of individual tax privacy' (2011) 61(2) *Emory Law Centre* 272.

<sup>77</sup>JD Blank 'In defense of individual tax privacy' (2011) 61(2) *Emory Law Centre* 272.

<sup>78</sup>JD Blank 'In defense of individual tax privacy' (2011) 61(2) *Emory Law Centre* 272.

<sup>79</sup>JD Blank 'In defense of individual tax privacy' (2011) 61(2) *Emory Law Centre* 272, para 280.

<sup>80</sup>Ss 67–71 of the Tax Administration Act.

<sup>81</sup>Croome (2010) 156.



However, this obligation under the TAA, to maintain taxpayer information, is subject to certain limitations and exceptions. The Commissioner may disclose confidential taxpayer information, in his possession, to the SAPS or the NPA, if such information relates to the tax offence.<sup>82</sup>

The Commissioner is also allowed to disclose information to specified third parties, such as the Statistician-General; the Governor of the Reserve Bank; the National Credit Regulator; or the Financial Services Conduct Board.<sup>83</sup> In a more recent case, *Commissioner of Revenue Services v Public Protector*,<sup>84</sup> the court confirmed that a taxpayer's information is confidential.<sup>85</sup> The court further confirmed that since SARS is entitled to release information to public institutions, the exception does not include the disclosure of information to the Public Protector.<sup>86</sup> If such information is disclosed to the Public Protector, it will be in breach of its duties.<sup>87</sup>

In essence, the rules and regulations in Chapter 6 seek to ensure that SARS's authority, and its discretion, are appropriately applied and that any violation(s) of a taxpayer's rights are reasonable.

There are many research papers written on the right to privacy and the disclosure of taxpayer information, but little research has been conducted on the disclosure of information in terms of section 71 of the Tax Administration Act. This study aims "at contributing to an existing gap of knowledge by seeking to investigate the taxpayer's right to privacy and disclosure of information in terms of section 71 of the Tax Administration Act".

## 1.5 RESEARCH QUESTIONS

The main or focal question that this dissertation seeks to answer is whether the provisions contained in the Tax Administration Act infringe on the taxpayers' constitutional right to privacy. To formulate an approach to answering this question, the following sub-questions need to be discussed:

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<sup>82</sup>S 69(2)(a) of the TAA.

<sup>83</sup>S 70 of the TAA.

<sup>84</sup>*Commissioner of Revenue Services v Public Protector and Others* 2020 (4) SA 133 (GP) (hereafter the *Commissioner of SARS* case).

<sup>85</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 54.

<sup>86</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 54.

<sup>87</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 54.

1.5.1 What is the right to privacy under common law and constitutional law?

1.5.1.1 How is the right to privacy regulated under common law?

1.5.1.2 How is privacy regulated under constitutional law?

1.5.1.3 When, and how, can the right to privacy be limited?

1.5.2 How does the Tax Administration Act regulate the disclosure of information?

1.5.2.1 Under which circumstances may SARS disclose a taxpayer's information?

1.5.2.2 What protection must SARS provide before disclosing taxpayer information?

1.5.3 What are the remedies for breach of confidentiality?

## **1.6 METHODOLOGY**

This research uses a desk-based methodology, employing primary sources like the 1996 Constitution, subsidiary legislation, regulations, and case law. As secondary sources, books, journals, SARS Interpretation notes, websites, and online news are utilised. In *Marshall No v CSARS*,<sup>88</sup> the court held that interpretation notes are not binding on taxpayers and the court. They, however, constitute persuasive explanations and interpretation of statutory provisions.<sup>89</sup>

## **1.7 FRAMEWORK/OUTLINE OF CHAPTERS**

This study is divided into five chapters, arranged as follows:

**Chapter 1: Introduction, problem statement, research questions, the purpose of the research, scope of the study, methodology and organisation of the study**

This chapter serves as an introduction in which the background and objectives of the study are examined. The research questions are defined, and the scope and methodology of the study are discussed.

**Chapter 2: The right to privacy**

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<sup>88</sup> *Marshall v CSARS* (CCT208/17) (2018) ZAAC 11.

<sup>89</sup> *Marshall v CSARS* (CCT208/17) (2018) ZAAC 11, para 19.

In this chapter, the right to privacy in South Africa will be discussed regarding the applicable legislation. This chapter will discuss the importance and regulation of the right to privacy in South Africa. This chapter will also analyse the justifiable limitations of the right to privacy in South Africa.

### **Chapter 3: The tax secrecy regime and its exceptions**

In this chapter, the relevant provisions that collectively create the regime of tax secrecy in the TAA and their rationale are explored. This chapter also discusses circumstances that allow for the disclosure of taxpayers' information.

### **Chapter 4: Remedies for breach**

This chapter discusses the instances under which the breach of the right to privacy occurs, as well as what recourse(s) the taxpayer has when their right has been infringed.

### **Chapter 5: Conclusion and recommendations**

This chapter will contain the summary and recommendations of the research. The purpose of this chapter will be to highlight how the right to privacy has developed under the South African constitutional dispensation. This chapter will further highlight the importance of this right in South Africa.

## CHAPTER 2

### THE RIGHT TO PRIVACY

#### 2.1 INTRODUCTION

Under section 14 of the Constitution, everyone has the right to privacy. A person's right to privacy also protects them against having their property seized or information disclosed. This chapter briefly discusses the right to privacy, its protection, and its limitations in common law and constitutional law.

#### 2.2 DEFINITION OF PRIVACY

The definition of privacy is not stagnant and may change over time. Roos states that privacy consists of the sum of information or facts that relate to the individual in his or her state of withdrawal from publicity and are excluded from the knowledge of outsiders.<sup>90</sup> Neethling states that the right to privacy only relates to those true facts about a person.<sup>91</sup> Privacy has been defined in various ways and in law has been described as 'an amorphous and elusive one'.<sup>92</sup> Wacks states that privacy has been defined as a 'right', 'condition', 'state', 'area of life' and is also widely defined in terms of 'control'.<sup>93</sup>

The right to privacy has also been defined as the freedom from government and third-party involvement in one's private affairs.<sup>94</sup> The right to privacy is commonly described as 'the right to be let alone to live one's own life with the minimum degree of interference'.<sup>95</sup>

It has been said by Ruebhausen that

'the essence of privacy is the freedom of the individual, to pick and choose for himself or herself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behaviour and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity'.<sup>96</sup>

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<sup>90</sup> Roos A, Data Protection (Privacy) 555-56.

<sup>91</sup> Neethling, Potgieter & Visser, Law of Personality,34.

<sup>92</sup> *Bernstein* 1996 (2) SA 751 (CC) para 65.

<sup>93</sup> R. Wacks The Protection of Privacy (1980) at 10 & 11.

<sup>94</sup> A Roos The Law of Privacy (Data) Protection: A Comparative and Theoretical Study (2003) at 555.

<sup>95</sup>SD Warren & Brandeis LD "The Right to Privacy" (1890) 4 Harvard Law Review 193.

<sup>96</sup> M Ruebhausen & O G Brim "Privacy and Behavioural Research" (1965) 65 Columbia Law Report at 1185.

Fried states that privacy is the individual's control over the information he possesses about himself, rather than just the lack of information about the individual in the minds of others.<sup>97</sup>

The right to privacy in the South African law originates from Roman-Dutch law and case law. It was protected under *actio iniuriarum*. The Roman-Dutch law adopted the concept of *iniuria* from Roman law and privacy was protected under the concept of *dignitas*. *Dignitas* is a collective term for all personality rights, to the exclusion of the right to a good name (*fama*) and the right to bodily integrity (*corpus*).<sup>98</sup>

Burchell submits that the concept of privacy was recognised from the 1950s onwards. It is submitted that this fact is incorrect.<sup>99</sup> The right to privacy in South African law was initially protected by the wider concept of *dignitas*.<sup>100</sup> However, the common law right was recognised as an independent right within the wider concept of *dignitas* by case law.

In the case of *University of Pretoria v Tommie Meyer Films (Edms) Bpk*,<sup>101</sup> it was held that corporations do not possess personality rights like *dignitas* and a body that can be kicked or privacy that can be invaded like a natural person. Consequently, corporations cannot claim the right to privacy.<sup>102</sup> Burchell holds the argument in favour of recognising privacy as an independent right and states that such recognition can only be significant when the concept of impairment of dignity is given a narrow focus linked to insulting behaviour.<sup>103</sup>

In the matter of *De Foord v Town Council of Cape Town*,<sup>104</sup> De Villiers CJ held that the conduct of the police in entering women's houses to establish whether they are carrying on the trade of prostitution without consent must be addressed. These women have their rights, and no policeman can enter their houses and interfere with their privacy without their permission or legal warrant.<sup>105</sup>

This clearly shows a recognition of the right to privacy. Privacy, being a personality interest, is non-patrimonial. A violation of one's right to privacy is regarded as a delict known as an

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<sup>97</sup> C Fried "Privacy" (1968) 77 Yale Law Journal 483.

<sup>98</sup> Neethling, Potgieter & Visser, *Law of Personality* 50.

<sup>99</sup> J Burchell *Personality rights and freedom of expression (the modern actio injuriarum)* Juta (199) 372.

<sup>100</sup> Neethling, Potgieter & Visser, *Law of Personality* 50.

<sup>101</sup> *University of Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A).

<sup>102</sup> *University of Pretoria* 1979 (1) SA 441 (A) para 455H-456H.

<sup>103</sup> J Burchell "The legal protection of privacy in South Africa: A transplantable hybrid electronic" (2009) 13 *Journal for Comparative Law*.

<sup>104</sup> *De Foord v Town Council of Cape Town* 1898 SC 399

<sup>105</sup> *De Foord* 1898 SC 399 para. 402.

*iniuria* and is actionable under the *actio iniuriarum*. The first case to recognise the right to privacy in South Africa is the case of *O’Keeffe v Argus Printing and Publishing Co Ltd*.<sup>106</sup> Neethling considers this case as the *locus classicus* for the recognition of an independent right to privacy in South African case law.<sup>107</sup> In this case, the defendant published an advertisement for guns that contained a photograph of the plaintiff without his consent.

With the plaintiff’s consent, the defendant’s employee had taken a photograph, but it was solely intended to serve as an illustration for article that would appear in the section of the defendant’s newspaper. The plaintiff alleged that such publication constituted an intentional infringement of her right to privacy, it was also unwarranted aggression on her dignity and suffered humiliation as a result. The court held that the unauthorised publication of a person’s photograph and name for advertising purposes is capable of “constituting an aggression upon that person’s *dignitas*’.<sup>108</sup>

The decision in the O’Keeffe-case demonstrates the significant influence the United States of America (US) legal system has had on our legal system particularly with regard to the right to privacy. Upon analysis of this case, it is becoming clear that the right to privacy was not infringed but the right to identity and not privacy. This matter was decided concerning the US legal jurisprudence. Watermeyer AJ referred to the American Restatement of Law, Torts<sup>109</sup> and states that in the US legal system, the principle of privacy was well-established and actionable.

## **2.3 INFRINGEMENT OF THE RIGHT TO PRIVACY**

An infringement of the right to privacy occurs when the taxpayer’s information or private facts are revealed without the taxpayer’s consent, knowledge and will.

### **2.3.1 INFRINGEMENT OF COMMON LAW PRIVACY**

The person’s right to privacy will be protected when a person has a subjective expectation of privacy, and it is considered to be objectively reasonable by society. The burden of proof rests with the party alleging that their rights have been violated. According to De Waal et al., a privacy invasion might take the form of an unauthorised intrusion into someone’s privacy or an

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<sup>106</sup> *O’Keeffe v Argus Printing and Publishing Co Ltd* 19543) SA 224 (C).

<sup>107</sup> Neethling, Potgieter & Visser, *Law of Personality*, 217.

<sup>108</sup> *O’Keeffe* 19543) SA 224 (C) para 248.

<sup>109</sup> S 867 American Restatement of Law, Torts 1939.

unauthorised revelation of that person's private information.<sup>110</sup> In *Bernstein v Bester*,<sup>111</sup> the court held that an infringement can be either an act of disclosure or an act of intrusion.<sup>112</sup>

In *R v Umfaan*,<sup>113</sup> Innes CJ held that there are three essential elements of *injuria*. The act complained of must be wrongful, and intentional, and must violate one or other rights of those real rights, those rights in *rem*, related to personality, which every free man is entitled to enjoy.<sup>114</sup> From the dictum of Innes CJ in the *Umfaan* case, at common law, an infringement of privacy must be established by proving that there was an intentional and unlawful infringement of the right to privacy. Devenish also defines the common law right to privacy as “intentional and wrongful interference with another’s right to seclusion in his or her private life.”<sup>115</sup>

In *NM v Smith*,<sup>116</sup> the court held that to succeed with this claim for privacy infringement, the plaintiff must prove that his or her right to privacy was violated in both a wrongful and intentional manner.<sup>117</sup>

### 2.3.2 UNLAWFULNESS

The unlawfulness is determined by employing the principles of contemporary *boni mores* and the general sense of justice of the community as perceived by the courts. A presumption of *animus iniuriandi* emerges if wrongfulness has been proven, which the defendant may rebut. If he or she fails to do so, then the action *iniuriarum* is available to the plaintiff.<sup>118</sup> Ackerman J in *Bernstein v Bester* states the determination of a privacy infringement constitutes a single enquiry and its unlawfulness must also be assessed.<sup>119</sup>

In *National Media Ltd v Jooste*,<sup>120</sup> Harms J states the following:

[A]bsent a will to keep a fact private, absent an interest (or a right) that can be protected. The boundary of a right or infringement remains an objective question. As a general proposition, the

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<sup>110</sup> Currie & De Waal (2013) 268.

<sup>111</sup> *Bernstein* 1996 (2) SA 751 (CC).

<sup>112</sup> *Bernstein* 1996 (2) SA 751 (CC) para 68.

<sup>113</sup> *R v Umfaan* 1908 T.S. 62.

<sup>114</sup> *Umfaan* 1908 T.S. 62 para 66.

<sup>115</sup> GE Devenish *A Commentary on the South African Bill of Rights (1999)* 145.

<sup>116</sup> *NM v Smith (Freedom of Expression as Amicus Curiae)* 2007 (7) BCLR 751 (CC).

<sup>117</sup> *NM* 2007 (7) BCLR 751 (CC) para 55.

<sup>118</sup> J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Delict* (2001) 356.

<sup>119</sup> *Bernstein* 1996 (2) SA 751 (CC) para 71.

<sup>120</sup> *National Media Ltd v Jooste* 1996 (3) SA 262 (A).

general sense of justice does not require the protection of a fact that the interested party has no wish to keep private.<sup>121</sup>

The view expressed by Harms J in the *Jooste* case is following the legitimate expectation of privacy test. Therefore, only the aspects of privacy where an individual has a legitimate and reasonable expectation of privacy are protected.<sup>122</sup>

### 2.3.3 WRONGFULNESS

If the knowledge of private facts is both against the subjective decision and will of the prejudiced party and, when evaluated objectively, is *contra bonos mores*, the revelation will be regarded as a wrongful and unlawful infringement of the right to privacy.<sup>123</sup> An objective test based on the reasonableness principle is used to determine *boni mores*. De Waal *et al* explain that a person's privacy expectations must be reasonable to qualify for protection.<sup>124</sup> Loubser states that the infringement of privacy would be wrongful if the court is satisfied that the invasion was such as to attract liability-

'in accordance with the general principle, courts used the criterion of reasonableness or the *boni mores* or legal convictions of the community to determine whether they should recognise a claim. Factors that the courts consider include whether society would protect confidentiality in the situation, whether a public value or a constitutional right such as freedom of expression is involved or whether the information disclosed is of public concern'.<sup>125</sup>

Parent,<sup>126</sup> opines that an adequate conception of privacy must not allow for the possibility that a person's privacy should be considered to have been violated when another simply observed that person openly engaging in public activities.<sup>127</sup>

## 2.4 THE CONSTITUTIONAL RIGHT TO PRIVACY

The constitutional right to privacy is much broader than the common law concept of privacy. It is provided for in terms of section 14 of the Constitution. This section states that,

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<sup>121</sup> *National Media Ltd* 1996 (3) SA 262 (A) para 271.

<sup>122</sup> *National Media Ltd* 1996 (3) SA 262 (A) para 271.

<sup>123</sup> Neethling, Potgieter & Visser, *Law of Personality*, 221.

<sup>124</sup> Currie & De Waal (2013) 298.

<sup>125</sup> MM Loubser, A Mukheibir, R Midley, D Perumal & L Niesing *The Law of Delict in South Africa*, Oxford, University Press 2010

<sup>126</sup> Parent, WA "Recent work on the concept of privacy" 1983 *American Philosophy Quarterly* 341-55.

<sup>127</sup> Parent, WA "Recent work on the concept of privacy" 1983 *American Philosophy Quarterly* 341-55, para 344.



‘everyone has the right to privacy, which includes the right not to have their persons or homestead, their property searched, or their communications infringed’.

Many conventions and treaties were formed at international level to raise the standard of human rights, especially the right to privacy, and states are held accountable for adhering to these treaties. Several treaties recognise the right to privacy, therefore, making it lawful and enforceable. Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms states that:

- (1) ‘everyone has the right to respect of their private life and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

Article 12 of the Universal Declaration of Human Rights 1948 states that no one may be subjected to arbitrary interference with their privacy, families, or correspondence. Articles 11 and 14 of the American Convention on Human Rights and the American Declaration of Rights and Duties of Mankind both contain provisions that are similar to those in the Universal Declaration and International Covenant. Section 39 of the Constitution states that the courts and other legal bodies must consider international law and may consider foreign law when interpreting the Bill of Rights. Furthermore, section 231 of the Constitution provides that international law is part of law in South Africa, unless it is inconsistent with the Constitution or legislation. International conventions and treaties therefore are an integral part of our law and assist the courts when domestic laws are not able to.

Both natural and juristic persons are subject to the Bill of Rights. Section 8(4),<sup>128</sup> provides that Section 8(4),<sup>129</sup> provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. In principle, the Bill of Rights, which includes the right to privacy, can be invoked by corporations just like by natural persons.

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<sup>128</sup> S 8(4) Constitution Act 106 of 1996.

<sup>129</sup> S 8(4) Constitution Act 106 of 1996.

The right to privacy of natural persons will be protected more because companies are considered to have less (if any) dignity. The right to privacy is protected both in relation to intrusions into a person's life by the state or by other individuals.<sup>130</sup> It also protects personal autonomy to make decisions about family relationships and private life,<sup>131</sup> it restricts the state's and other people's access to, use of, and disclosure of other people's personal information.<sup>132</sup>

In *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*,<sup>133</sup> the Constitutional Court (CC) stated that the term "private facts" refers to information that has been agreed to remain secret since disclosing it would be detrimental to anyone with normal sentiments and intellect in the same situation.<sup>134</sup>

In terms of the constitutional right to privacy, an individual may decide which details to make public if they have a reasonable expectation that their decision would be respected.<sup>135</sup> The scope of privacy was explained by Ackerman J in *Bernstein v Bester*,<sup>136</sup> as follows:

'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 or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that the 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'.<sup>137</sup>

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,<sup>138</sup> Langa DP indicates that Ackerman J's remark should not be taken to imply that someone does not have a right to privacy when interacting socially with others. The right to privacy will

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<sup>130</sup> LAWSA First Reissue vol 5, part 3 para 45.

<sup>131</sup> *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR (CC).

<sup>132</sup> *C v Minister of Correctional Services* 1996 (4) SA 292 (T).

<sup>133</sup> *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC).

<sup>134</sup> *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) para 34.

<sup>135</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at 557.

<sup>136</sup> *Bernstein* 1996 (2) SA 751 (CC).

<sup>137</sup> *Bernstein* 1996 (2) SA 751 (CC) para 67.

<sup>138</sup> *Investigating Directorate: Serious Economic Offences* 2001 (1) SA 545 (CC).

be relevant, in accordance with the courts, if a person has the right to decide which information, they want to make public, and a reasonable expectation that their decision will be respected.<sup>139</sup>

De Waal *et al* state that the right in section 14 applies only to aspects of life or conduct regarding which a legitimate expectation of privacy can be held.<sup>140</sup> According to him, having a legitimate expectation of privacy entails having a subjective expectation of privacy that society acknowledges as being objectively reasonable.<sup>141</sup> Freedman further states that

‘privacy should be seen as existing in a continuum where the “inner sanctum” of a person’s life is more rigorously protected than when he or she is moving outside the inner core of privacy to the outer fringes of the right’.<sup>142</sup>

#### 2.4.1 INFRINGEMENT OF CONSTITUTIONAL LAW PRIVACY

A two-stage inquiry is utilised to determine whether a violation of the right to privacy has occurred. First, to determine whether or not law or conduct has violated the right to privacy, the scope of the right must be assessed. Secondly, if an infringement has occurred, it must be established whether or not it is a justified infringement under the limitation clause.<sup>143</sup>

McQuoid-Mason states that if an infringement is proved, it must be assessed whether it is justifiable in terms of the limitation clause.<sup>144</sup> In *National Coalition of Gay and Lesbian Equality v Minister of Justice*,<sup>145</sup> Ackerman J held that privacy recognizes that we all have a right to a space of private intimacy and autonomy that permits us to create and maintain human relationships without interference from the outside.<sup>146</sup>

Blackman J in *Bowers, Attorney General of Georgia v Hardwicks*,<sup>147</sup> states that the ‘right to be left alone’ should not just be viewed as a negative right to move on with your life and express your personality.<sup>148</sup> It must also be interpreted positively and as suggesting that the state bears

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<sup>139</sup> *Investigating Directorate: Serious Economic Offences* 2001 (1) SA 545 (CC) para 557.

<sup>140</sup> Currie & De Waal (2013) 297-298.

<sup>141</sup> Currie & De Waal (2013) 297-298.

<sup>142</sup> P De Vos, W Freedman & D Brandt, *South African Constitutional Law in context, Oxford University Press, Southern Africa, 2014*.

<sup>143</sup> *Bernstein* 1996 (2) SA 751 (CC) para 75.

<sup>144</sup> D McQuoid-Mason ‘Invasion of privacy: common law v constitutional delict-does it make a difference’ (2000) *Acta Juridica* 227–246.

<sup>145</sup> *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR (CC).

<sup>146</sup> *National Coalition of Gay and Lesbian Equality* 1998 (12) BCLR (CC) para 32.

<sup>147</sup> *Bowers, Attorney General of Georgia v Hardwick* 478 US 186 (1985).

<sup>148</sup> *Bowers, Attorney General of Georgia* 478 US 186 (1985) para 112.

at least some responsibility for fostering environments that allow for personal realization to take place.<sup>149</sup>

#### 2.4.1 LIMITATION OF THE RIGHT TO PRIVACY

The South African limitation clause was largely influenced by foreign jurisprudence especially the Canadian Charter and case law. Section 36 of the Constitution is the cornerstone of the protection of fundamental rights. It protects them from unjustified and unreasonable intrusion in a free and democratic society based on the principles of human dignity, equality, and freedom. The degree of their protection is reflected in the rule that fundamental rights may not be waived.<sup>150</sup>

Fundamental rights are not absolutely inviolable or impenetrable. Friedman J in *Nyamakazi v President of Bophuthatswana*<sup>151</sup> held that it is accepted that human rights are absolute. They need to be weighed against the state's representation of the community's interests and welfare.<sup>152</sup> The fact that the rights are not absolute is obvious from the provisions of section 7(3) of the Constitution. It reads as follows:

‘the rights in the Bill of Rights are subject to limitations contained in section 36 or elsewhere in the Bill of Rights’.

The limitations in section 7(3) read with section 36(1) are not entirely unconstitutional. This is so because not every violation of a fundamental right is unlawful.

Section 36(1) is a general limitation clause and stipulates that the rights in the Bill of Rights may only be limited by the law of general application. In an open and democratic society founded on human dignity, equality, and freedom, the limitation must be reasonable and justifiable, taking into account all relevant circumstances, 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

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<sup>149</sup> *Bowers, Attorney General of Georgia* 478 US 186 (1985) para 116.

<sup>150</sup> K Hopkins “Constitutional rights and the question of waiver: How fundamental are fundamental rights? (2001) 16 (1) SAPL 122.

<sup>151</sup> *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BG.

<sup>152</sup> *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BG para 566G-567H.

(e) less restrictive means to achieve the purpose.

In addition, only laws that are based on the Constitution may limit the rights outlined in the Bill of Rights. In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*,<sup>153</sup> Moseneke DCJ held that the state has a negative duty to refrain from restricting fundamental rights without proper justification once they have been granted.<sup>154</sup>

McQuoid-Mason states that the party alleging the infringement of a fundamental right bears the onus of proving the alleged breach.<sup>155</sup> The relevant statutory provisions will become prima facie unlawful upon proof of violation.<sup>156</sup>

It was held in the case of *S v Makwanyane* that:

‘The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). 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 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’.<sup>157</sup>

Section 36(1) requires that rights be limited only in terms of law of general application. All limitations that are considered to be unreasonable and unjustifiable are prohibited and regarded as unlawful. Thereof, a court may accept a limitation to the extent that it

‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

The reasonableness as quoted from section 36(1) is complex. Rautenbach states that this is not an empty, useless term.<sup>158</sup>

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<sup>153</sup> *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC).

<sup>154</sup> *Head of Department: Mpumalanga Department of Education* 2010 (2) SA 415 (CC) para.45.

<sup>155</sup> D McQuoid-Mason ‘Invasion of Privacy: common law v constitutional delict-it does make a difference? 2000 *Acta Juridica* 227-246.

<sup>156</sup> D McQuoid-Mason ‘Invasion of Privacy: common law v constitutional delict-it does make a difference? 2000 *Acta Juridica* 227-246.

<sup>157</sup> *Makwanyane* 1995 (3) SA 391 (CC) para 104.

<sup>158</sup> Rautenbach IM ‘Proportionality and the limitation clauses of the South African Bill of Rights’ (2014) 17(6) PELJ 2229 2250.

Woolman states that it is rife with interpretive challenges that are as old as the political theory itself.<sup>159</sup> Alexy states that in law, reasonableness has a variety of meanings and uses. It is utilised to evaluate judgments as well as acts, decisions, laws, and institutions.<sup>160</sup>

In *COT v CW (Pvt) Ltd*,<sup>161</sup> reasonableness was deemed to imply ‘intelligence, care and deliberation’.<sup>162</sup> In order to establish whether an infringement was rationally justifiable in a democratic society, the court looked into its justification and rationality.<sup>163</sup> Cormick states that the essence of reasonableness is balancing of various factors and values.<sup>164</sup> Loi goes further to state that the reasonableness principle mandates that, when a number of elements and values are at odds with one another when trying to solve a practical situation, all factors and values should be taken into account and balanced according to their relevant weight and importance.<sup>165</sup> In *Christian Education SA v Minister of Education*,<sup>166</sup> the court held that no single criterion is used to determine reasonableness.<sup>167</sup>

However, if a right is limited for a legitimate purpose, it will be seen to have satisfied the reasonable and justified condition.<sup>168</sup> Alexy states that reasonableness requires a consideration of all relevant factors and reasons, and a balance must be struck in accordance with their relative weight and importance.<sup>169</sup> He contends that striking a balance is the essence of reasonableness.<sup>170</sup> Also, its application is fair in the circumstances of a particular case. For a limitation to be considered fair and reasonable, a determination is made by considering the values and norms applicable in an open and democratic society based on human dignity, equality, and freedom.

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<sup>159</sup> Woolman S & Botha H ‘Limitations’ in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 2 (Original service 07-06) 34-113

<sup>160</sup> Alexy R ‘Reasonableness of the law in Bogiovanni G, Sartor C, Valentini G (ed), *reasonableness and law*, Dordrecht Heidelberg London New York: Springer 2009 pg7.

<sup>161</sup> *COT* 1990 (2) SA 245 (ZS)265.

<sup>162</sup> *COT* 1990 (2) SA 245 (ZS)265, para 266 H.

<sup>163</sup> *COT* 1990 (2) SA 245 (ZS)265, para.199.

<sup>164</sup> Cormick M ‘Rethoric and the rule of law, Oxford, OUP,2005,173.

<sup>165</sup> Loi P ‘The reasonableness and proportionality principle in labour law’ Law Department, University of Cagliari, Italy, pg.5.

<sup>166</sup> *In Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC).

<sup>167</sup> *In Christian Education SA* 2000 (4) SA 757 (CC) para 31.

<sup>168</sup> *In Christian Education SA* 2000 (4) SA 757 (CC) para 31.

<sup>169</sup> Alexy R ‘Reasonableness of the law in Bogiovanni G, Sartor C, Valentini G (ed), *reasonableness and law*, Dordrecht Heidelberg London New York: Springer 2009 pg7.

<sup>170</sup> Alexy R ‘Reasonableness of the law in Bogiovanni G, Sartor C, Valentini G (ed), *reasonableness and law*, Dordrecht Heidelberg London New York: Springer 2009 pg7.

If a limitation is incapable of being rationally justified, then the limitation will be regarded as unconstitutional. In the matter of the *Law Society of South Africa v Minister of Transport*,<sup>171</sup> the court held that

‘it is self-evident that a measure which is irrational could hardly pass muster as reasonable and justifiable for purposes of restricting a fundamental right’.<sup>172</sup>

The limitation clause compels courts to consider relevant factors when deciding whether that limitation is in accordance with the reasonable and justifiable limitation in an open and democratic society based on human dignity, equality, and freedom. Rautenbach opines that the limitation test is very broad and no single test can be used for all limitations, hence the inclusion of the requirement that the relevant factors must be considered when limiting fundamental rights.<sup>173</sup> In order to do this, it outlines five factors, and they are:

- (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.<sup>174</sup>

In *S v Manamela*, the court held that the factors listed in section 36(1) are just a guideline and more factors can be considered.<sup>175</sup> In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*, the court stated that these circumstances that may also be considered may include whether the person affected is a juristic or natural person.<sup>176</sup>

## 2.5 CONCLUSION

Taxpayers are guaranteed fundamental rights under the Constitution, including the right to privacy, which is enshrined in section 14 of the Constitution. Although the Bill of Rights guarantees certain rights, they are not absolute. Section 36 of the Constitution places limitations on them, mandating that they be justifiable and reasonable.

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<sup>171</sup> *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC).

<sup>172</sup> *Law Society of South Africa* 2011 (1) SA 400 (CC) para 37.

<sup>173</sup> Rautenbach IM ‘The limitation of rights in terms of provisions of the Bill of Rights other than the general limitation clause: A few examples’ (2001) 4 TSAR 617-4, para 307-308.

<sup>174</sup> S 36 (1) Constitution.

<sup>175</sup> *Manamela* 2000 (3) SA 1 (CC) para 32.

<sup>176</sup> *Investigating Directorate: Serious Economic Offences* 2001 (1) SA 545 (CC) para 18.

Taxpayers' fundamental constitutional rights are violated by the TAA and section 36 should be used to establish whether or not this violation is reasonable and justifiable in a free and democratic society. The TAA can only violate the taxpayers' fundamental rights in as far as the infringement allows SARS to further its mandate and ensure tax compliance. For SARS to properly fulfil its statutory mandate, confidential information of the taxpayer will be disclosed to third parties especially in instances where there is reasonable suspicion that a tax offence has been committed, and in conducting warrantless searches and seizures. The infringement must also not be unreasonable and unjustifiable. This means that SARS will be precluded from disclosing any confidential information that is concerned with state security or have the ability to endanger the tax-payer. As long as the infringement of the right to privacy is limited within the provisions of section 36, then there will be no violation of taxpayers' rights.



## CHAPTER 3

### THE TAX SECRECY REGIME AND ITS EXCEPTIONS

#### 3.1 INTRODUCTION

In South Africa, a taxpayer is obliged to submit tax returns to SARS annually. By doing so, taxpayers are required to disclose information that they would not normally disclose voluntarily to third parties. Croome opines that by requiring taxpayers to disclose such information, their right to privacy is infringed.<sup>177</sup> Once SARS receives taxpayers' private information, it is subjected to strict secrecy provisions. This duty is crucial in ensuring that the limitation of the right to privacy is not extreme, unjustified and unreasonable. Feetham JP in *Silver v Silver*<sup>178</sup> held that it is important for all information to be provided by the taxpayer for the administration of tax and secrecy must be guaranteed by the Department of Inland Revenue.<sup>179</sup>

#### 3.2 CONFIDENTIAL INFORMATION

Confidentiality lies at the core of the secrecy regime hence the imperative of appreciating what it entails to interrogate the violation or not of taxpayers' rights to privacy. The concept of confidential information is defined in section 68(1)(a-j) of the Tax Administration Act as follows: SARS confidential information refers to the information that is important and relevant to the administration of a tax act and that is personal information concerning a current or former SARS official, whether deceased or not, information that is protected by SARS's legal privilege, information that a third party provided to SARS in confidence and whose publication may reasonably be expected to prejudice the supply of similar information or information from the same source in future, information related to an investigations and prosecutions in terms of section 39 of the PAIA.<sup>180</sup>

It further includes information about SARS operations including opinions, advice, reports, recommendations or accounts of consultations, discussions or deliberations that have taken place, if the information was provided, obtained or prepared by or for SARS with the intention of assisting in the formulation of a policy or the taking of a decision in the performance of a

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<sup>177</sup> Croome (2010) 125.

<sup>178</sup> *Silver v Silver* 1937 NDP 129.

<sup>179</sup> *Silver* 1937 NDP 129 para 134-135.

<sup>180</sup> Sec 68 (1)(a&d) TAA.

duty conferred by law, it is reasonably expected that the disclosure of information could impede SARS's deliberative process with other organs of state by preventing open communication of an opinion, advice, report or proposal, as well as the conduct of consultations, discussions or deliberations, undermining the success of a current policy or one that is currently being evaluated by prematurely disclosing it.<sup>181</sup>

Furthermore, it includes information on research conducted or about to be conducted by or on behalf of SARS, the disclosure of which is likely to have a detrimental effect on the outcome of the research and information that if disclosed, could reasonably be expected to prejudice the Republic's financial interests, economic interests or government's ability to manage the economy effectively in the Republic's best interest, including a change in tax law or a decision to change a tax, duty, penalty, interest or similar moneys imposed under tax law or Custom and Excise Act.<sup>182</sup>

Further to the above, it includes information provided to SARS under strict confidence by or on behalf of another state or international organisation, a computer program held by SARS that satisfies the requirements of section 1 (1) of the Copyright Act 98 of 1978 and information about the security of SARS's facilities, buildings and systems. Also, information about SARS's verification or audit selection procedures, the disclosure of which would reasonably be expected to impede and jeopardise the process of efficacy and inspection.<sup>183</sup>

The SARS Short Guide to the TAA defines confidential information as information that is pertinent and necessary for the administration of the tax Act.<sup>184</sup> The information only relevant for tax purposes and tax administration is included hence the narrow definition. According to Hambre, secrecy means that the tax administration will not reveal confidential information to the general public.<sup>185</sup>

In *Rolls-Royce Ltd v Jeffrey*<sup>186</sup> Lord Radcliffe held that,

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<sup>181</sup> Sec 68 (1)(e) (i-ii) TAA.

<sup>182</sup> Sec 68 (1)(f-g) TAA.

<sup>183</sup> Sec 68 (1)(h-j) TAA.

<sup>184</sup> SARS Short guide to the Tax Administration Act 28 of 2011, version 3, 29 March 2018, p.35, available on [http: www.sars.gov.za](http://www.sars.gov.za), accessed on 21 September 2021.

<sup>185</sup> Hambre, A 'Tax confidentiality: "A comparative study and impact assessment of global interest, Ombre University 2015, pg 17.

<sup>186</sup> *Rolls-Royce Ltd v Jeffrey* (1962) 1 All E.R.801.

confidential information is conceptually *sui generis*. It is an intangible, and it would be wrong to confuse physical records with the information itself.<sup>187</sup>

In the case of *Saltman Engineering Co Ltd et al v Campbell Engineering Co Ltd*,<sup>188</sup> Lord Greene MR discusses the general nature of secret information and states that; for information to be regarded as confidential, it must not be public knowledge. It is also possible to have documents such as plans, and sketches resulting from work done by someone. It is confidential by the fact that the author of the document applied intellect to produce a result which requires someone to undergo the same process.<sup>189</sup>

### 3.3 REGULATION AND PROTECTION OF TAX INFORMATION SECRECY

The confidentiality provisions of SARS are governed by Chapter 6 of the TAA, and SARS is obligated to safeguard taxpayers' information. The general rule is that all SARS employees are obligated by law to protect the privacy of taxpayer information and are prohibited from disclosing it with anyone who is not a SARS employee.<sup>190</sup> Botha states that SARS officials are further required to make solemn declarations to uphold the secrecy of information.<sup>191</sup> The Multilateral Convention on Mutual Administrative Assistance in Tax Matters',<sup>192</sup> Article 22 mandates that all information obtained and received in accordance with the convention be treated as confidential and protected in the same ways as information obtained in accordance with that country's domestic law.

The OECD Glossary of tax terms<sup>193</sup> defines tax secrecy as an

'obligation usually imposed on tax officials not to reveal particulars about the identity and personal circumstances of taxpayers, or about any of the various aspects governing their tax liability, except in certain strictly limited circumstances'.<sup>194</sup>

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<sup>187</sup> *Rolls-Royce Ltd* (1962) 1 All E.R.801 para 805.

<sup>188</sup> *Saltman Engineering Co Ltd et al v Campbell Engineering Co Ltd* (1948) 65 R.P.C 203.

<sup>189</sup> *Saltman Engineering Co Ltd et al* (1948) 65 R.P.C 203 para 215.

<sup>190</sup> S 69 (1) TAA.

<sup>191</sup> S 69 (2) Tax Administration Act, Botha D 'Has the definition of SARS confidential information gone too far?'

<sup>192</sup> The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, amended by the 2010 Protocol, OECD at <https://www.oecd.org.za>, accessed on 23 January 2023.

<sup>193</sup> Glossary of Tax Terms, available at <http://www.oecd.org.za>, accessed on 18 August 2021

<sup>194</sup> Glossary of Tax Terms, available at <http://www.oecd.org.za>, accessed on 18 August 2021.

However, confidential information in SARS's possession may not be disclosed to any SARS employee who lacks authorisation to access the information or any other person not employed by SARS.<sup>195</sup>

The obligation to maintain taxpayer confidentiality is, however, subject to certain limitations and exceptions. The Commissioner is allowed, expressly to disclose information to third parties, such as the SAPS or the NPA if the information relates to a tax offence<sup>196</sup> or by an order of the High Court.<sup>197</sup> A 'tax offence' means an offence in terms of a tax Act or any other offence involving fraud against SARS or a SARS official in connection with the administration of a tax Act.<sup>198</sup>

According to section 71(1) TAA, if the judge believes that information relating to a tax offence, investigation, or prosecution of a tax offence, and a serious risk to public safety or the environment may be revealed, the judge may issue an order requiring SARS to disclose information to the SAPS or NPA. Therefore, SARS is permitted under certain circumstances to utilise information provided by taxpayers and information collected during investigations to inform the SAPS or NPA to institute criminal proceedings or investigations against the taxpayer.

Even if the taxpayer's privacy is being violated, section 35(5) of the Constitution, which mandates that evidence gathered in a manner that breaches rights be excluded from the trial because it would make the trial unfair, will not be applicable in this case.

SARS is also empowered by other legislation to assist in the investigations of tax offences. There are laws such as the Prevention of Organised Crime Act 121 of 1998 and the Prevention and the Financial Intelligence Centre Act 38 of 2001 that obliges SARS to support the SAPS and other criminal investigation agencies. The relevant provisions in these acts are discussed below.

### **3.3.1 PREVENTION OF ORGANISED CRIME ACT 121 OF 1998**

The Prevention of Organised Crime Act ('POCA') aims to combat organized crime, money laundering, criminal gang activity, and racketeering, and it provides for the seizure and

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<sup>195</sup> S 68 (2) (a&b) TAA.

<sup>196</sup> S 69 (2) (a) TAA.

<sup>197</sup> S 69 (2) (c) TAA.

<sup>198</sup> S 1 TAA.

forfeiture of illicit and illegal proceeds of crime. The Act also imposes an obligation to report suspicious activities. In the matter of *National Director of Public Prosecutions v Seevnarayan*,<sup>199</sup> the court held that a link must be established between the unlawful activity and the property for it to be referred to as the proceeds of unlawful activity.

In general, no obligation as to secrecy or restriction to the disclosure of information whether imposed by law or any agreement affects this duty to report or allow access to any part of the document.<sup>200</sup> SARS will not be held accountable for violating its obligation to maintain secrecy and privacy if information is disclosed.<sup>201</sup>

### **3.3.2 DRUG TRAFFICKING ACT 140 OF 1992**

The Act creates an obligation to report certain information to the police.<sup>202</sup> Sections 9 (a)-(b) allows any person the power to reveal information regarding another person's affairs or business if the information disclosed is necessary in the prevention of criminal activities in the Republic or elsewhere. Section 10 further obligates directors or officers of a financial institution suspecting criminal activities to report it to the SAPS. The Act places an obligation on SARS to disclose any information uncovered during a tax audit and it expressly overrides the provisions of the TAA.

### **3.3.3 FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001**

The purpose of the Act is to establish a financial intelligence centre and a money laundering advisory council to combat money laundering activities. Additionally, it is created to impose certain duties and obligations on organisations and people who might be utilised for money laundering.

Section 36(1) authorises SARS and other supervisory bodies to report and disclose information regarding the receipt and suspected receipts of proceeds resulting from unlawful activities by the taxpayer. In disclosing the information, the Commissioner must establish reasonable procedural arrangements and protections regarding the disclosure of information to maintain

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<sup>199</sup> *National Director of Public Prosecutions v Seevnarayan* 66 SATC 15.

<sup>200</sup> S 7(5)(a) POCA 121 of 1998.

<sup>201</sup> S 7(5)(b) POCA 121 of 1998.

<sup>202</sup> S 10(1) Drug Trafficking Act 140 of 1992.

the confidentiality of the information. No duty imposed by common law, legislation or agreement affects compliance by SARS with this provision.<sup>203</sup>

### **3.4 DISCLOSURE OF INFORMATION FOR PUBLIC SAFETY OR ENVIRONMENTAL RISKS**

Section 71(3) of the TAA gives SARS further authority to divulge information that it deems likely to be important in the prosecution or avoidance of risk to the public safety or environmental risk to the SAPS or NPA. According to the Act, information must be given if it is shown that doing so will expose evidence of a serious violation of or failure to comply with the law, or an imminent and serious public safety or environmental risk. Allan states that after the two conditions are met, the second step requires a determination that the public interest in the disclosure of information "clearly outweighs" the harm envisioned in the specific exemption provisions.<sup>204</sup>In spite of any other grounds for non-disclosure stated in the Act, the record must be released if both requirements are satisfied.<sup>205</sup>

The assessment done on the applicability of section 71(3) of the TAA must be on a balance of probability that the disclosure of the information would disclose evidence of a substantial contravention of or failure to comply with the law.<sup>206</sup> In *De Lange v Eskom Holdings Limited*,<sup>207</sup> the South Gauteng High court found notwithstanding the exemptions allowed for, the records in question would expose evidence of an imminent and serious public safety or environmental risk and therefore must be disclosed.<sup>208</sup> The sections below discuss concepts of environmental risk and public safety risk.

#### **3.4.1 ENVIRONMENTAL RISK**

Environmental risk refers to the risk that economic activities by economic agents, especially firms, pose a danger to the environment.<sup>209</sup> Beer states that environmental risk deals with the

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<sup>203</sup> S 37 Financial Intelligence Center Act 38 of 2001.

<sup>204</sup> Allan, K, Applying PAIA: Legal, political and contextual issues."In paper wars: access to information in South Africa, Johannesburg Wits University Press, 2009, pg150.

<sup>205</sup> Allan, K, Applying PAIA: Legal, political and contextual issues."In paper wars: access to information in South Africa, Johannesburg Wits University Press, 2009, pg150.

<sup>206</sup> Peekhaus, W, South Africa's promotion of access to information act: an analysis of relevant jurisprudence, *Journal of Information Policy*, 2014 vol 4 (2014) 570-596, pg 589.

<sup>207</sup> *De Lange v Eskom Holdings Limited* 2012 (1) SA 280 (GSJ).

<sup>208</sup> *De Lange* 2012 (1) SA 280 (GSJ) para 18.

<sup>209</sup> Boachie, E, Environmental risk, FDI and tax reforms, why must we worry, Department of Finance, University of Ghana Business School, Accra, Ghana,21/12/2020 pg 5.

likelihood of an event causing a potentially undesirable effect.<sup>210</sup> In a general context, environmental risk can be described as a risk to human health and ecosystems. Broadly speaking, this risk can be measured as environmental quality relevant to the economy, human health and ecosystems.<sup>211</sup> The most popular reason why environmental disclosure is important is to hold companies accountable for their environmental stewardship.<sup>212</sup>

Section 31(4) of National Environmental Management Act 14 of 2009 ('NEMA') Any person who has, in good faith, disclosed information that he or she reasonably believed at the time of disclosure to be disclosing evidence of environmental risk of section 31 H (5) NEMA disclosure is not subject to civil or criminal liability for that disclosure.

If the information is disclosed to the Public Protector, a Parliamentary Committee, a provincial legislature, an organ of the state in charge of defending the environment or emergency services, or the human rights commission, the individual will not be held liable.<sup>213</sup> The Act gives SARS the discretion to disclose information relating to environmental risk.

Unless the information is given in accordance with the requirements of the legislation, a court order, or for the administration of justice, it is an offence for anyone to reveal information they gather while performing their duties under NEMA. The recent judgment of the SCA in *Company Secretary of Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance*<sup>214</sup> changed the landscape concerning the accessibility of environmental-related information held by companies.

The SCA agreed with the high court's ruling and determined that the Alliance had a right to rely on provisions of section 24 of the Constitution. The court went on to say that it is unlikely for the courts to support a denial to access the documents if they are required for the protection of section 24 constitutional rights and are requested in the public interest.<sup>215</sup>

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<sup>210</sup> Beer, T & Ziolkowski, F, Environmental risk assessment: an Australian perspective, 1995 Australia Academy of Science, Fenner Conference on the Environment.

<sup>211</sup> Jones, R N, An environmental risk assessment/ management framework for climate impact assessments. Natural Hazards, 2001, 197-230 pg 197.

<sup>212</sup> De Villiers, C and van Staden, C, Shareholders' corporate environmental disclosure needs, vol 13 no 4, July 2010, South African Journal of Economic and Management Sciences.

<sup>213</sup> S 31 (5) NEMA 14 of 2009.

<sup>214</sup> *Company Secretary of Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance* (69/2014), 2014 ZASCA 184, 26 November 2014.

<sup>215</sup> *Company Secretary of Arcelormittal South Africa Ltd* (69/2014), 2014 ZASCA 184, 26 November 2014 para 52.

Upon finding information relating to an imminent environmental risk during an audit, the SARS official must, after considering the seriousness of the matter, disclose information to the relevant environmental authorities or the SAPS. In instances where, information relating to an offence of dumping in terms of section 2 of the Dumping Sea Control Act (DSCA),<sup>216</sup> the person in charge must immediately report the offence to the Director General at the Department of Environmental Affairs, and relevant fines will be imposed on the taxpayer.<sup>217</sup> The duty imposed on SARS is discretionary.

In cases where, information relating to a more serious offence such as nuclear radiation leakage, the SARS official is obligated to disclose the information to the SAPS for criminal investigations. The SARS official may in circumstances that he reasonably believes that the information relating to the offence will be removed or destroyed from the premises by the taxpayer, seize the information.<sup>218</sup>

Snijman states that law enforcement officials have the right to seize any item or property during a search that they have a reasonable suspicion was used to commit an offence under the laws they are investigating.<sup>219</sup>

### **3.4.2 PUBLIC SAFETY RISK**

Public safety refers to the general public's protection.<sup>220</sup> Maslow has used a broader definition of public safety and said that one of the most fundamental needs that we have is safety.<sup>221</sup> Risk to the public refers to anything injurious to the safety or health of an entire community or neighbourhood or any considerable number of persons.<sup>222</sup> The primary purpose of public safety is to prevent and protect the public from dangerous circumstances affecting their safety such as crimes or disasters.<sup>223</sup>

If, during an audit, it appears that the taxpayer has committed a serious tax offence, the matter must be referred to the senior SARS official responsible for criminal investigations.<sup>224</sup>

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<sup>216</sup> S 2 Dumping Sea Control Act 73 of 1980.

<sup>217</sup> S 35 Dumping Sea Control Act 73 of 1980.

<sup>218</sup> S 63 TAA.

<sup>219</sup> Van As, HJ & Snijman, PJ "Challenges and possible solutions concerning the inspection/investigation dichotomy in the context of transnational organised fisheries crime: A South African perspective, FishFORCE Academy, Department of Public Law, Nelson Mandela University, South Africa, (2019) 140-150 @ 105.

<sup>220</sup> What is public safety, accessed on 02 October 2021, [www.austintexas.gov.za](http://www.austintexas.gov.za).

<sup>221</sup> Maslow AH, "A theory of human motivation" *Psychological Review* (1943)50 (4) 370-396.

<sup>222</sup> Law Insider, [www.lawinsider.com](http://www.lawinsider.com), accessed on 05 October 2021.

<sup>223</sup> Law Insider, [www.lawinsider.com](http://www.lawinsider.com), accessed on 05 October 2021.

<sup>224</sup> S 43(1) of the TAA.



Following a referral, any information acquired during an audit must be kept separate from any criminal inquiry and is not admissible in court.<sup>225</sup> In criminal proceedings, any pertinent information obtained prior to referral to a criminal investigation is admissible, and information gathered during an investigation is admissible in both criminal and civil actions.<sup>226</sup>

If, during an investigation, SARS find information proving that a serious offence relating to drugs and drug trafficking has been committed, they are obligated by statute to disclose the information to the SAPS. The Drug Trafficking Act ('DTA') creates an obligation that any information that may be considered necessary for the prevention and combating of a drug offence or economic offence in the Republic or elsewhere be disclosed.<sup>227</sup> Further, section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act ('POCDATRAA'),<sup>228</sup> a duty to report any person who is suspected of having committed or who has committed a terrorist offence to be reported to the SAPS. Any confidential information that is disclosed under both the POCDATRAA will be exempt from the secrecy provisions and therefore reasonable and justifiable.

SARS is not prohibited to disclose information when it is required to do so by specific legislation. The duty imposed on SARS to preserve secrecy is limited. In the case of *Receiver of Revenue, Lebowa v De Meyer*,<sup>229</sup> it was held that the court balance the need to protect confidentiality and privacy against the need to prevent corruption and maintain an honest government. The information must be disclosed in compelling circumstances where lawful disclosure outweighs the protection of privacy.

Thus, the disclosure of information by the Commissioner will infringe upon the taxpayers' right not to have the privacy of their communications violated. The violation in these circumstances is reasonable and justifiable in an open and democratic society and will therefore be a justifiable limitation on the right to privacy. Additionally, this disclosure should only occur when there are legitimately compelling reasons to do so and when the need to reveal information surpasses the right to privacy.

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<sup>225</sup> S 43(2) of the TAA.

<sup>226</sup> S 4(2) of the TAA.

<sup>227</sup> S 9 (a&b) DTA.

<sup>228</sup> POCDATRAA 33 of 2004.

<sup>229</sup> *Receiver of Revenue, Lebowa v De Meyer NO* (1993) 2 All SA 462 (A).

### 3.4.3 POWERS OF SARS IN TERMS OF SECTION 63 OF THE TAA

Section 63 of the TAA authorises warrantless searches of the taxpayers' premises and seizures of the taxpayers' property in certain circumstances. Bovijn states that the inclusion of warrantless search provisions is concerning, as senior SARS officials are given all the discretion and the protection afforded by the warrant is removed. This, therefore, allows for possible abuses.<sup>230</sup> When a search is conducted without a warrant, a senior official of SARS must be satisfied that

3.4.3.1 There is written consent from the owner of the property,

3.4.3.2 There are reasonable grounds to believe that:

- (i) there may be imminent removal or destruction of relevant material likely to be found on the premises,
- (ii) If SARS applies for a search warrant under section 59, a search warrant will be issued, and
- (iii) The delay in obtaining a warrant would defeat the object of the search and seizure.<sup>231</sup>

Section 1 of TAA defines relevant material as

'any information, document or thing that is foreseeably relevant for tax risk, assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed'.

The court in the matter of *Attieh v CSARS*,<sup>232</sup> the applicant brought an application seeking a review and setting aside of the decision by the respondent to seize their property. The applicant was found importing a vehicle into the South African borders without valid importing clearance documents after its valid export outside the country. The customs officials raised a suspicion that the property was being imported in the country illegally and therefore detained and seized the property. It was confirmed during investigations that there was sufficient grounds to raise suspicion or believe that the property was being imported illegally and therefore liable for forfeiture. The seizure was conducted in terms of section 87 (1) of the Custom and Excise Act,<sup>233</sup> 91 of 1964 (CEA). The section

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<sup>230</sup> S. Bovijn; L. van Schalkwyk "concerns regarding new search and seizure powers granted to the SARS in terms of the Tax Administration Act" (2012) Stellenbosch Law Review vol 23 (3) (514).

<sup>231</sup> S 63 (1)(b) TAA.

<sup>232</sup> *M R Attieh v Commissioner of South African Revenue Services* (33784/2019) (6 September 2022).

<sup>233</sup> Custom and Excise Act, 91 of 1964 (CEA).

provides that any items imported, exported, produced, removed or otherwise dealt with in violation of the provisions of the Act or in relation to which an offence has been committed, such goods or items shall be subject to forfeiture, regardless of where they are found and, in whose possession, they are found.<sup>234</sup> The section further states that an officer, magistrate or member of the SAPS may detain any ship, vehicle, plant, material or goods at any place in order to determine whether they are subject to forfeiture.<sup>235</sup>

The issue that the court had to decide on was whether the respondent exercised his discretion judiciously when taking the decision to seize the applicant's property and whether the penalties imposed by the respondent were fair and reasonable in the circumstances. The court dismissed the application and held that the respondent was obliged to exercise their discretion as per the prescripts of the law and are justified to have seized the property considering the facts and circumstances of this matter.<sup>236</sup>

The court went further and held that the decision was fair, reasonable and rational, and in line with the policy objectives, that is to deter and discourage avoidance of compliance with the CEA.<sup>237</sup> The court also held that the property was liable for seizure and forfeiture, because the applicant contravened the provisions of the CEA.<sup>238</sup>

There are concerns raised regarding the fact that the base used for warrantless search and seizures is based on the senior SARS official's own discretion which has not been subjected to the court's scrutiny.<sup>239</sup> Keulder states that-

‘the justification of warrantless searches is that it enables SARS to act straight away, thus preventing tax evaders from destroying or hiding evidence of their own evasion. If SARS were required first to obtain a warrant, tax evaders would have the opportunity to destroy relevant material’.<sup>240</sup>

McCabe states that section 63 facilitates SARS's information-gathering methods by enabling its officials to enter taxpayers' properties without a warrant in order to gather important tax information that SARS may not otherwise be aware of.<sup>241</sup> Section 63 allows for warrantless

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<sup>234</sup> Sec 87 (1) CEA.

<sup>235</sup> Sec 88 (1)(a-c) CEA.

<sup>236</sup> *MR Attieh, para 167.*

<sup>237</sup> *MR Attieh, para 168.*

<sup>238</sup> *MR Attieh, para 169.*

<sup>239</sup> S. Bovijn; L. van Schalkwyk “concerns regarding new search and seizure power granted to the SARS in terms of the Tax Administration Act” (2012) Stellenbosch Law Review vol 23 (3) (509).

<sup>240</sup> Keulder C, “What’s good for the goose is good for the Gander- Warrantless searches in terms of fiscal legislation” (2015) 132 South African Law Journal @ 820.

<sup>241</sup> McCabe B, “The investigatory powers of the Commissioner under the Income Tax Assessment Act and Individual Rights” *Revenue Law Journal* (3) 1,1-11 (1993).

searches with the written consent of the owner or person in control of the premises being searched,<sup>242</sup> or if a senior SARS official is reasonably satisfied with certain aspects.<sup>243</sup>

Section 63(4) of TAA also stipulates that before conducting a search at a dwelling-house or domestic premises, the occupant's consent must first be obtained. Consent is not required to search part of the dwelling that is used for trade purposes. It is submitted that such consent should comply with the requirements of valid consent.

Neethling states that the concept of *volenti non fit iniuria*, which asserts that a "willing person is not harmed," does not allow the performance of a search and seizure with the taxpayer's consent to be regarded as an unjustifiable restriction of the right to privacy.<sup>244</sup> Obtaining consent to search the premises can be objectively verified because it is in writing. It also does not involve the complexities associated with the reasonable grounds criteria. Therefore, since subjective discretion is required, the burden of proof may be less erroneous.<sup>245</sup>

There are three exceptions to the warrant requirements, according to Price, in order to prevent the violation of the right to privacy.<sup>246</sup> These exceptions include:

- (1) Where the taxpayer consents to the search,
- (2) Where there is demonstrable urgency, and
- (3) Where the inspection involves regulatory inspections of commercial premises.<sup>247</sup>

If a senior SARS official is satisfied that the reasonable grounds criteria set out in sections 63(i)-(iii) are met, then the warrantless search and seizure becomes valid. The reasonable grounds criteria assist SARS to use the provisions only in exceptional circumstances and not arbitrarily. In *Haynes v Commissioner of Inland Revenue Services*,<sup>248</sup> the court held that the objective facts must be taken into account in each case and the discretion must be exercised rationally. The discretion must not be used arbitrarily.<sup>249</sup>

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<sup>242</sup> S 63 (1)(a) TAA.

<sup>243</sup> S 63 (1)(b) TAA.

<sup>244</sup> Neethling J & Potgieter J, *Law of delict* (7<sup>th</sup> edition), lexis Nexis: Durban (2015) pg 108.

<sup>245</sup> Keulder C, "What is good for the goose is good for the Gander- warrantless searches in terms of fiscal Legislation" (2015) 132 *South African Law Journal* @ 839.

<sup>246</sup> Price A, "Search and seizure without a warrant" *Constitutional Law Review* vol VI 245, pg.248.

<sup>247</sup> Price A, "Search and seizure without a warrant" *Constitutional Law Review* vol VI 245.

<sup>248</sup> *Haynes v Commissioner of Inland Revenue Services* 2000 (6) BCLR 596 (Tk).

<sup>249</sup> *Haynes* 2000 (6) BCLR 596 (Tk) para 25.

Chapter 2 of the Criminal Procedure Act ("CPA") supports the authority granted to SARS authorities to confiscate any documents that they suspect are evidence in the commission of a severe criminal offence during audits. Chapter 2 of the CPA,<sup>250</sup> grants the state a general right to search property and seize specific items. The articles that can be seized are the following:

- (1) articles concerned with the commission of an offence,
- (2) articles that may afford evidence of the commission of an offence; and
- (3) articles intended to be used in the commission of an offence.<sup>251</sup>

The general rule is that a search and seizure must be authorised by a warrant.<sup>252</sup> Section 21 of the CPA further states judge or judicial officer presiding over a criminal proceeding may seize any article if it appears from information provided under oath that there are reasonable grounds for believing that any such document is in the possession or under the control of any person or upon any person or upon or at any premises within his area of jurisdiction, or if it appears that such a document will be required as evidence in such proceedings.<sup>253</sup>

In the matter of *Mkhutyukelwa v Minister of Police*,<sup>254</sup> the court held that

‘section 22(b)(1) of the CPA does not only require a police officer’s belief to be there but it requires that belief to be on reasonable grounds’.<sup>255</sup>

A warrantless search may be conducted with the consent of the person whose article is to be searched<sup>256</sup> and where a police officer believes that a warrant will be granted if applied for and that the delay in obtaining the warrant would defeat the purpose of the search.<sup>257</sup> In *Ndlovu v Minister of Police, Transkei*,<sup>258</sup> the court held that consent must be given freely and voluntarily.<sup>259</sup>

The facts upon which the SAPS rely to conduct operations of search and seizure must be objectively justifiable. The SAPS bears the onus to prove that reasonable grounds existed when

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<sup>250</sup> Criminal Procedure Act 57 of 1977

<sup>251</sup> S 20 of the CPA.

<sup>252</sup> S 21 of the CPA.

<sup>253</sup> S 70 (5) (a&b) TAA.

<sup>254</sup> *Mkhutyukelwa v Minister of Police* 2017 ZAECMHC 34 (8 August 2017).

<sup>255</sup> *Mkhutyukelwa* 2017 ZAECMHC 34 (8 August 2017) para 19.

<sup>256</sup> S 22 (a) of the CPA.

<sup>257</sup> S 22 (b) of the CPA.

<sup>258</sup> *Ndlovu v Minister of Police, Transkei* 1993 (2) SA 91 (Tk).

<sup>259</sup> *Ndlovu* 1993 (2) SA 91 (Tk) para.2.

conducting search and seizure operations.<sup>260</sup> In the absence of legitimate and reasonable grounds, section 22(b) of the CPA will be declared unconstitutional, because it would have unjustifiably violated the right to privacy and will not be allowed as evidence in terms section 35 of the Constitution.

In *Investigative Directorate: Serious Economic Offences v Hyundai Distributors (Pty) Ltd*,<sup>261</sup> the court held if there is no reasonable suspicion to believe an offence has been committed, the search and seizure would not be justified for the purposes of a preparatory investigation.

### 3.5 ACCESS TO INFORMATION

Accountability, responsiveness, and transparency are among the qualities that underpin our democracy.<sup>262</sup> Everyone has the right to access any information held by the state under section 32(1) of the Constitution. The Promotion of Access to Information Act 2 of 2000 (the "PAIA") is the national law that was enacted in accordance with section 32 of the Constitution and gives effect to the right of access to information.

PAIA aims to promote a culture of accountability and openness in both public and private organisations by giving effect to the right of access to information. The right to access information is protected by section 32 of the Constitution, which states that everyone has the right to access information kept by the government and any information held by a third party that is required for the exercise or protection of any rights.<sup>263</sup>

In *Arena Holdings (Pty) Ltd t/a Financial Mail v CSARS*,<sup>264</sup> the court stated that one can only rely directly on the right found in section 32(1) of the Constitution when the constitutionality of PAIA itself is questioned for failing to guarantee or enable the exercise of the right of access to information.<sup>265</sup>

Section 16(1) of the Constitution guarantees right to freedom of the press and other media, and the freedom to receive or disseminate information and ideas.<sup>266</sup> In *Independent Newspaper*

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<sup>260</sup> Kruger A, "Hiemstra's Criminal Procedure-Circumstances in which an article can be seized without a warrant" (2-12) (2020) Lexis Nexis, Durban, 17 July 2020.

<sup>261</sup> *Investigative Directorate: Serious Economic Offences* 2001 (1) SA 545 (CC).

<sup>262</sup> S 1 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>263</sup> S 32 (1) (a&b) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>264</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail v CSARS* (88359/2019) (2021) ZAGPPHC (16 November 2021).

<sup>265</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail* (88359/2019) (2021) ZAGPPHC (16 November 2021) para 4.8.

<sup>266</sup> S16 (1) (a&b) of the Constitution of the Republic of South Africa Act 108 of 1996.

*(Pty) Ltd v Minister of Intelligence Services, Freedom of Expression Institute Intervening as Amicus Curiae In re: Masetlha v President of the Republic of South Africa*<sup>267</sup> the constitutional principle of open justice comes from a group of related constitutional rights which include the right to freedom of expression and right to a public trial which may be termed the right to open justice.<sup>268</sup>

When a requester has complied with all of the procedural conditions set forth by section 11(1) of the PAIA, the public body, such as SARS, must grant the requester access to the documents held by it. A request may be refused if it is reasonably believed that the safety of an individual could be endangered, the security system used for the protection of the public may be impaired or where the information relates to crime investigation methods, the security or international relations of the country.<sup>269</sup>

Section 34(1) of PAIA provides that access to a record may be refused if the record requested contains confidential information belonging to a third party and its disclosure would be regarded as unreasonable disclosure of such confidential information.

Chapter 6 of the TAA sets out circumstances where disclosure of SARS confidential information and taxpayer information would be prohibited. Current and former SARS officials are both required to maintain confidentiality and are not permitted to provide taxpayer information to any person who is not a SARS official.<sup>270</sup> If the taxpayer information is disclosed contrary to the prohibitions in chapter 6 of the TAA, 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.<sup>271</sup> There are a few exceptions in terms of which a SARS official is allowed to disclose information. Information that is already deemed public information can be disclosed as there can be no prejudice to a taxpayer disclosing what is already known or available to the public.<sup>272</sup>

In the matter of *Commissioner of Revenue Services v Public Protector*,<sup>273</sup> the court held that the powers given to the PP to subpoena witnesses to give evidence or produce documents may

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<sup>267</sup> *Independent Newspaper (Pty) Ltd v Minister of Intelligence Services, Freedom of Expression Institute Intervening as Amicus Curiae In re: Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC).

<sup>268</sup> *Independent Newspaper (Pty) Ltd* 2008 (5) SA 31 (CC) para 39.

<sup>269</sup> S 38 PAIA.

<sup>270</sup> S 69 of TAA.

<sup>271</sup> S 67 (3) TAA.

<sup>272</sup> S 67 (5) TAA.

<sup>273</sup> *Commissioner of Revenue Services v Public Protector* 2020 (4) SA 133 (GP).

not be used to force that witness to violate the law under which such witness operates. The court further stated that the specific provisions of the TAA take precedence over the general principles of the Public Protector Act 23 of 1994 (PPA).<sup>274</sup>

There must be just cause upon which taxpayer information is disclosed by SARS. SARS was prohibited by the provisions of section 69(1) TAA from complying with the PP's subpoena.<sup>275</sup> The court held that the PP should have sought an order from the court directing SARS to disclose the taxpayer's information and failed to request proper written authorisation from the taxpayer to access his taxpayer's information SARS was entitled under the principle of just cause to withhold taxpayer information in terms of section 67(1)(a) of the TAA and the PP's subpoena power do not extend to taxpayer's information.<sup>276</sup>

Section 35(1) of the PAIA reinforces the confidentiality provisions in Chapter 6 of the TAA. It states as follows:

'(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 34 of 1997). 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.'

The protection clearly covers a wide scope of information including taxpayer information, as defined in the TAA. The statutory protection for taxpayer information under the PAIA is rendered even more potent if one appreciates that PAIA's public interest override in section 46 of the PAIA does not apply to taxpayer information made to SARS in respect of a particular taxpayer, SARS must refuse this request in terms of section 35(1) PAIA, and it is irrelevant if the requester can show that the information would reveal evidence of a substantial contravention of, or failure to comply with the law."<sup>277</sup>

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<sup>274</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 20.

<sup>275</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 24.

<sup>276</sup> *Commissioner of Revenue Services* 2020 (4) SA 133 (GP) para 25.

<sup>277</sup> S 46 (1) PAIA.



In the Supreme Court of Appeal judgment, *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd*,<sup>278</sup> it was confirmed that the public interest override as contained in section 46 of the PAIA does not apply to the prohibition of disclosure of records in terms of section 35.<sup>279</sup>

Section 35 of PAIA imposes a blanket rule on SARS that it is not entitled to disclose taxpayer information to any requester under any circumstances. The ban in section 35 is unreasonable because it also prohibits the disclosure of information regarding information that would be regarded to be in the public interest to be reported by journalists. Further, any person that discloses information contravenes the provisions and commits a criminal offence. There are no exceptions provided and the public interest override does not apply to this category of records. Again, the blanket limitation on access to these records is a severe limitation on the rights of freedom of expression and access to information. It can therefore be concluded that the nature and extent of the limitation on the rights in respect of the disclosure prohibition and the PAIA access prohibition are severe.

PAIA allows individuals and organisations to request records from the state and private entities, such as documents and pictures. However, there are exceptions to when specific requests will be rejected. Information relating to state security,<sup>280</sup> or that protects the privacy of a third party, irrespective of whether such information will cause harm.<sup>281</sup> If it is determined that information must be kept secret because of national security, it can only be disclosed if the principle of public interest override is proven. The request may further be refused on the ground that the information relates to trade secrets of the business, financial or commercial information of a business which, if disclosed is likely to cause harm to the financial or commercial interest of a third party or business.<sup>282</sup>

Section 46 of PAIA is referred to as the ‘public interest override’ section. It provides for mandatory disclosure in the public interest. The public interest override provided by PAIA is only applicable to information that reveals evidence of a breach of law or serious risk to the

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<sup>278</sup> *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* (2013) JOL 30408 SCA.

<sup>279</sup> *Qoboshiyane NO* (2013) JOL 30408 SCA para 47.

<sup>280</sup> S 41 PAIA.

<sup>281</sup> S 34 PAIA.

<sup>282</sup> S 36 (a-c)(i-ii) PAIA.

environment or public safety,<sup>283</sup> and the public interest in the disclosure of the records clearly outweighs the harm contemplated in the provision in question.<sup>284</sup>

In *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO*,<sup>285</sup> the court held that although access to the requested record might be legitimately refused, the disclosure of the records would reveal a substantial contravention of the law or failure to comply with the law. The public interest override in terms of section 46 outweighed the harm to the interest protected by the exemptions.<sup>286</sup>

Similarly, the court considered and applied the public interest override in the matter of *M & G Media Ltd v President of the Republic of South Africa*,<sup>287</sup> M & G Media was refused access to a report prepared for Former President Mbeki by the office of the presidency. Rual J held that without disclosing details of the report, it is evident that it potentially reveals evidence of a substantial contravention or failure to comply with the law. The public interest outweighs any potential harm should the report be made public. The court ordered that M&G be granted access to the report.<sup>288</sup>

The court in the matter of *Arena Holdings (Pty) Ltd t/a Financial Mail v CSARS*,<sup>289</sup> considering that there was evidence in the public domain and that the taxpayer in issue had not refuted it, the applicant requested access to former President Jacob Zuma's tax records. This was because the applicant believed that throughout his administration, Zuma was not in compliance with tax laws. Taxpayer confidentiality primarily is provided for in section 35 of the PAIA, section 69 of the TAA, and section 14 of the Constitution.

The applicant argued that the taxpayer's rights to privacy and confidentiality were superseded by the right to access information guaranteed by section 32 of the Constitution as well as section 16 of the PAIA, and that the media's duty to disseminate information that is in the public interest should not be constrained by a blanket ban on disclosure of information.<sup>290</sup> The court evaluated whether the blanket ban on disclosure of taxpayer information in terms of sections

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<sup>283</sup> S 46 (a)(i-ii) PAIA.

<sup>284</sup> S 46 (b) PAIA.

<sup>285</sup> *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO* 2012 (1) SA 158 (ECP).

<sup>286</sup> *Avusa Publishing Eastern Cape (Pty) Ltd* 2012 (1) SA 158 (ECP) para 46.

<sup>287</sup> *M & G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP).

<sup>288</sup> *M & G Media Ltd* 2013 (3) SA 591 (GNP) para 67.

<sup>289</sup> *Arena Holding's (Pty) Ltd t/a Financial Mail & Others v CSARS* (88359/2019) (2021) ZAGPPHC (16 November 2021).

<sup>290</sup> *Arena Holding's (Pty) Ltd t/a Financial Mail & Others v CSARS* (88359/2019) (2021) ZAGPPHC (16 November 2021), para 170.

35 of the PAIA and section 69 of the TAA were justifiable limitations of the right to access information and freedom of expression.

The court held that the blanket ban provided for in sections 35 and 69 of the PAIA restricted the right of access to information and was not justifiable in terms of section 36 of the Constitution. Moreover, “reading-in” of the public interest override provisions of section 46 of the PAIA is both justifiable and competent. The court further held that sections 67 and 69 of the TAA, as well as sections 36 and 45 of the PAIA, are invalid and unconstitutional to the degree that they prevent access to tax information by any other person other than the taxpayer.

The court seems to have interpreted the TAA confidentiality provisions as an absolute bar to the disclosure of information. The court specifically mentioned section 69 (1) and (2) TAA which provides for a general bar to the taxpayer information with certain exceptions. Botha,<sup>291</sup> states that the potential impact of changing the current confidentiality provisions must be taken in to consideration.<sup>292</sup> Further, states that it is understandable that taxpayers would have a legitimate concern that their information would easily be accessible to third parties and end up in the public domain.<sup>293</sup> The court having directed that the principle of public interest override be read-in the confidentiality provisions means that SARS will be allowed to reveal taxpayer information to anyone other than the taxpayer if it is in the interest of the public to do so, to also reveal information about public figures that is already within the public domain and disclose information that would reveal serious contraventions of law. All other taxpayer information remains confidential.

### **3.6 CONCLUSION**

It has been accepted by our courts that the Commissioner has the right to refuse to disclose taxpayers’ information. The right to privacy of taxpayers as protected by section 14 of the Constitution would be violated in cases where the Commissioner has released taxpayers' information unfairly and unreasonably. However, the right to privacy is not absolute and is

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<sup>291</sup> L, Botha “The end of taxpayer confidentiality? Gauteng Division hands down potentially groundbreaking judgement, Tax and Exchange Control Alert, 18 November 2021, pgs 5-7.

<sup>292</sup> L, Botha “The end of taxpayer confidentiality? Gauteng Division hands down potentially groundbreaking judgement, Tax and Exchange Control Alert, 18 November 2021, pgs 5.

<sup>293</sup> L, Botha “The end of taxpayer confidentiality? Gauteng Division hands down potentially groundbreaking judgement, Tax and Exchange Control Alert, 18 November 2021, pg.7.

limited by section 36 of the Constitution. The SARS officials are under certain circumstances and under empowering statutes entitled to disclose taxpayers' information.

This duty does not result in a breach of the confidentiality provisions of the TAA. It is crucial to follow the Constitution's guidelines while conducting searches and seizures to determine and confirm if a taxpayer has complied with the law and that a tax offence has not been committed. This implies that even if the search and seizure infringed upon the right to privacy, it must have been justified and reasonable.

The public interest override provisions are not provided for in the TAA and therefore the right of access to information as provided for in the Constitution is unjustifiably and unreasonably limited. It, therefore, in turn, limits the PAIA public override principle which allows for information of public interest and information already in the public domain to be published by the media. The provisions make a blanket ban on the disclosure of the information.

Both the TAA and PAIA must be amended in line with the Constitution to remove the blanket ban on the disclosure of information.

## CHAPTER 4

### REMEDIES FOR BREACH

#### 4.1 INTRODUCTION

This chapter discusses taxpayers' remedies in instances where a breach of the taxpayer's right to privacy has occurred as a result of the actions of SARS. Generally, disclosure of confidential information is actionable and unjustifiable unless there are reasonable grounds for justification, such as necessity. These exceptions have been discussed in chapter 3.

In the South African context, remedies are there to ensure that there is accountability under sections 1(d) and 195 of the Constitution. The Supreme Court of Appeal (SCA) emphasized the necessity of accountability in *Olitzki Property Holdings v State Tender Board*,<sup>294</sup> held that accountability is important to assist in obtaining and realising the South African constitutional vision of an open, responsive, and uncorrupted government.<sup>295</sup>

#### 4.2 PURPOSE AND FORMS OF REMEDIES

Du Plessis submits that the main purpose of constitutional remedies is to vindicate the Constitution and deter against future infringements.<sup>296</sup> In the case of *Fose v Minister of Safety and Security*,<sup>297</sup> the court held that remedies must be effective since without them, the constitutionally protected rights cannot be upheld or enhanced.<sup>298</sup>

De Waal states that constitutional remedies are forward-looking, community-oriented and structural.<sup>299</sup> The Constitutional Court in *Rail Commuters Action Group v Transnet t/a Metrorail*,<sup>300</sup> held that private law remedies seek to remedy the loss suffered rather than prevent it in the future. They have a retrospective application.<sup>301</sup> Consequently, they are not always

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<sup>294</sup> *Olitzki Property Holdings v State Tender Board* 2001 (3) 1247 SCA.

<sup>295</sup> *Olitzki Property Holdings* 2001 (3) 1247 SCA para 31.

<sup>296</sup> M Du Plessis, G Pinfolds & J Brickhill "Constitutional Litigation" Claremont, Juta (2013) pg 108.

<sup>297</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

<sup>298</sup> *Fose* 1997 (3) SA 786 (CC) para 96.

<sup>299</sup> Currie & De Waal (2013) 181.

<sup>300</sup> *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC)

<sup>301</sup> *Rail Commuters Action Group* 2005 (2) SA 359 (CC) para 80.

appropriate and suitable to enforce constitutional rights.<sup>302</sup> The following are remedies available to the taxpayer:

#### 4.2.1 RIGHT TO ACCESS TO COURTS

A taxpayer has the right to approach the court in terms of section 39 of the Constitution where he or she believes that the Commissioner has unjustifiably infringed his constitutional rights. Hoexter states that section 34 of the Constitution gives taxpayers an inherent right to petition the court for a remedy in cases which SARS has abused and overstepped its authority and powers.<sup>303</sup> Under both international law and constitutional law, the right is acknowledged and regarded by democratic governments around the world as a fundamental human right.<sup>304</sup> The right to justice is recognised under the Universal Declaration of Human Rights ('UDHR') and it is crucial to the protection and enforcement of fundamental human rights.<sup>305</sup> In *Chief Lesapo v North West Agricultural Bank*,<sup>306</sup> the court held that there is a connection between the rule of law and section 34 of the Constitution. It was further held that, having the right to access the courts inhibits people from taking the law in to their own hands, which is harmful to a legal system based on the rule of law.<sup>307</sup>

The Constitution of the Republic of Namibia (Namibian Constitution),<sup>308</sup> has similar provisions to that contained in section 36 of the Constitution. Article 21 of the Namibian Constitution provides those fundamental freedoms must be exercised in accordance with the law of Namibia and reasonable restrictions on the rights must be conferred. Further, Article 22 provides for the limitation upon fundamental rights and freedoms as follows:

*'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms is contemplated by this chapter is authorised, any law providing for such limitation shall:*

- (a) be of general application, shall not negate the essential content thereof and shall not be aimed at a particular individual,*
- (b) specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.'*

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<sup>302</sup> *Rail Commuters Action Group* 2005 (2) SA 359 (CC) para 80.

<sup>303</sup> C Hoexter, *The New Constitutional and Administrative Law*, vol 2, Administrative law, Claremont, Juta (2002) para 8.5,305.

<sup>304</sup> P Mhodi 'High court ruling recognises the right to access to courts', 15 February 2019, available at [http: www.sahrc.org.za](http://www.sahrc.org.za), accessed on 20 September 2021.

<sup>305</sup> Article 10 of the Universal Declaration of Human Rights of 1948.

<sup>306</sup> *Chief Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420(CC) 1429.

<sup>307</sup> *Chief Lesapo* 1999 (12) BCLR 1420(CC) 1429 para 11.

<sup>308</sup> Constitution of the Republic of Namibia Act 8 of 2014.

If SARS discloses confidential information in any way that conflicts with the TAA and violates the right to privacy, the taxpayer is entitled to approach the court under section 39 of the Constitution of the Republic of South Africa. Since the judgment in the Arena-case judicial oversight is no longer necessary. The person requesting information regarding the taxpayer, has to satisfy the requirements in terms of section 11(1) PAIA and can prove that there are no grounds for refusal of such disclosure, they cannot be legally challenged. The requester can also rely on the provisions of section 46 PAIA which is referred to as the public interest override section. It provides for mandatory disclosure of information in the public interest. The PAIA mandates that a court or tribunal must not review an administrative action until all internal remedies provided for by other legislation have been exhausted before approaching the court for review proceedings.<sup>309</sup> Therefore, the taxpayer may only in exceptional circumstances and on application approach the court before exhausting internal remedies.<sup>310</sup> In essence, if all the requirements in terms of PAIA are satisfied, the taxpayer's right to access the court is limited validly and in line with the Constitution. The requester will be entitled to the taxpayer's confidential information.

#### 4.2.2 INTERDICT

An interdict is an order of court ordering someone to either refrain (prohibitory interdict) or to do something (mandatory interdict). It can either be an interim or final interdict.<sup>311</sup> According to Jones and Buckle,<sup>312</sup> an interdict is a remedy used when someone needs to have their rights protected against wrongful interference or threat by another person. According to Neethling any persons whose personality interests are threatened may apply to the court for an interdict.<sup>313</sup>

The case of *Setlogelo v Setlogelo*<sup>314</sup> laid down the requirements of a final interdict as follows: there must be a clear right; an injury reasonably apprehended or committed; and the absence of another suitable remedy.<sup>315</sup> The Constitutional Court confirmed the test laid down in the Setlogelo case in the matter of *National Treasury v Opposition to Urban Tolling Alliance*,<sup>316</sup>

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<sup>309</sup> Sec 7(2)(a) PAIA.

<sup>310</sup> Sec 7(2)(b) PAIA.

<sup>311</sup> De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 363.

<sup>312</sup> Jones & Buckle, *Civil Practice in the Magistrates Court of South Africa*, 6<sup>th</sup> Edition, pg71.

<sup>313</sup> Neethling, J ; Potgieter, JM & Visser, PJ *Law of Delict*, 7<sup>th</sup> ed Lexis Nexis Durban 215 pg 237.

<sup>314</sup> *Setlogelo v Setlogelo* 1914 AD 221.

<sup>315</sup> *Setlogelo* 1914 AD 221 para 227.

<sup>316</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (1) BCLR 1148 (CC).

the court stated that the test already used to determine the granting of interdicts is still relevant and there is no need to adopt a new test.

The test must be applied in accordance with the democratic principles that underpin the Constitution. If an interdict is granted, it must be done in a manner that seeks to promote the object, spirit, and purports of the Constitution.<sup>317</sup>

### 4.2.3 DAMAGES

SARS is an organ of state created in terms of section 239 of the Constitution. In the case of *First National Bank t/a Wesbank v CSARS*,<sup>318</sup> the court held that SARS is subject to the Constitution.<sup>319</sup> With the adoption of the Constitution, South Africa has established itself as a democratic nation based on the principles of an open, responsible, and accountable government. The Constitutional Court in *Carmichelle v Minister of Safety and Security*,<sup>320</sup> it was held that the government must compensate members of the for losses they sustained as a result of official government officials' actions or omissions.

In the light of the *Carmichelle*-case, a taxpayer who suffers damage because of the negligent disclosure of information by SARS officials will be entitled to claim damages from SARS. This is so because SARS owes taxpayers a legal duty not to disclose their information negligently and without just cause.

Information will be considered to have been disclosed negligently by SARS if it is disclosed to any person who is not entitled to have access to such information and there has been a failure by SARS to take precautionary measures to prevent such disclosure.<sup>321</sup> In *Arena*- case, it was held that the public interest override does not apply to information held in terms of section 34 (1) and 35 (1) PAIA.<sup>322</sup> It was stated that information would be regarded to be negligently disclosed if such information if disclosed could reasonably endanger the safety of an individual, where it would impair the security of systems used to protect the public or where information

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<sup>317</sup> *National Treasury* 2012 (1) BCLR 1148 (CC) para 45.

<sup>318</sup> *First National Bank t/a Wesbank v CSARS* 2002 (4) SA 768 (CC).

<sup>319</sup> *First National Bank t/a Wesbank* 2002 (4) SA 768 (CC) para 252.

<sup>320</sup> *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 (CC).

<sup>321</sup> S 68 (2) (a-b) TAA.

<sup>322</sup> *Arena Holding's (Pty) Ltd t/a Financial Mail & Others v CSARS* (88359/2019) (2021) ZAGPPHC (16 November 2021), para 154-84.



relates to the investigation of a crime or the security and international relations of the country.<sup>323</sup>

Section 38 of the Constitution provides that the remedy for violation of the Bill of Rights must be appropriate. The meaning of appropriate relief was dealt with in *Sanderson v Attorney-General, Eastern Cape*,<sup>324</sup> which held that section 38 sanctions a flexible approach to remedies.<sup>325</sup> In *Hoffmann v South African Airways*<sup>326</sup> the court held that when determining an appropriate relief, the nature of the constitutional infringement must be analysed and struck effectively at its source.<sup>327</sup>

In *Ngomana v CEO of the SA Social Security Agency*,<sup>328</sup> the Western Cape High Court pointed out that

‘the purpose of constitutional damages is not primarily to compensate for financial prejudice or patrimonial loss; it is rather a means by which the courts may seek by surrogate relief to give expression to the fulfilment or realisation of a claimant’s abrogated constitutional rights by way of an award in monetary compensation’.<sup>329</sup>

A taxpayer may seek damages against the Commissioner as a result of a breach of his or her privacy. In *Government of the Republic of South Africa v Von Abo*,<sup>330</sup> the court held that before an award of damages is granted, it must be shown that there is a causal link between the loss incurred and the right breached.<sup>331</sup> In determining the fair and equitable damages the taxpayer is entitled to, the courts will consider the following circumstances:

- (i) Whether the information in question was already known or would have become known at a later stage;
- (ii) Whether the publication was limited or wide;
- (iii) The risk of further dissemination of the information;
- (iv) Whether the information is intimate; and

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<sup>323</sup> *Arena Holding’s (Pty) Ltd t/a Financial Mail & Others v CSARS* (88359/2019) (2021) ZAGPPHC (16 November 2021), para 160-165.

<sup>324</sup> *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

<sup>325</sup> *Sanderson* 1998 (2) SA 38 (CC) para 38.

<sup>326</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

<sup>327</sup> *Hoffmann* 2001 (1) SA 1 (CC) para 42.

<sup>328</sup> *Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172.

<sup>329</sup> *Ngomana* 2010 ZAWCHC 172 para 39.

<sup>330</sup> *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 SCA

<sup>331</sup> *Government of the Republic of South Africa* 2011 (5) SA 262 SCA para 33.

(v) The mental stress suffered by the taxpayer as a result of the invasion of privacy.<sup>332</sup>

The recognition of damages for non-patrimonial loss by our courts remains uncertain. In the case of *Komape v Minister of Basic Education*,<sup>333</sup> the claimants sought an order for damages from the court based on the breach of constitutional rights.

The SCA declined to impose the award for constitutional damages and held that if a such judgment is granted, it would be punitive in nature and consideration must be had to the given fact that the family's injuries were being compensated.<sup>334</sup>

### 4.3 CONCLUSION

The relationship between the Commissioner and taxpayers is not voluntary and is thus created by statute.<sup>335</sup> The law makes it mandatory for the Commissioner and the taxpayer to have a relationship. The taxpayer will be entitled to remedial action in circumstances where his rights have been infringed, such infringement is unreasonable and unjustifiable, and the taxpayer's confidential information is disclosed by SARS unreasonably to their detriment.

SARS is obligated by law to disclose information that would reveal evidence of a serious contravention of the law or failure by the taxpayer to comply with the law. In the circumstance where SARS establishes that the taxpayer is carrying on illegal activities, such information must be disclosed to the NPA/ SAPS for criminal investigations. The information must be disclosed notwithstanding the secrecy provisions contained in the Act.

If SARS discloses information as required by the law, a remedial action such as a prohibitory interdict will frustrate justice if granted by the courts. An interdict in its nature has a preventative function. The courts are required not to grant remedial actions that will frustrate the attainment of justice. Taxpayers require cost-effective and appropriate remedies to give effect to their rights against the Commissioner. The Commissioner must treat taxpayers fairly and provide effective remedies to resolve disputes. There must also be a balance that is struck between taxpayers' rights and the degree of enforcement to ensure compliance with the law.

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<sup>332</sup> *Government of the Republic of South Africa* 2011 (5) SA 262 SCA para 28z.

<sup>333</sup> *Komape v Minister of Basic Education* 745/2018 & 1051/2018.

<sup>334</sup> *Komape* 745/2018 & 1051/2018 para 67.

<sup>335</sup> Bentley D "The Taxpayers 'Charter: More than a mission statement' 4 *Taxation in Australia* Red Edition 5 (June 1996) para 2 pg 16.

## CHAPTER 5

### RECOMMENDATIONS AND CONCLUSIONS

As a recommendation, it is submitted that the TAA's confidentiality clause and PAIA's section 35 are unlawful restrictions to the right to privacy and access to information. The nature and extent of the limitation on these rights are severe and intrusive. The TAA must be amended to codify the right of third parties to publish information in the public interest.

Concerning the PAIA, the blanket ban on the disclosure of the information is also severe and unconstitutional as it relates to the public interest override principle. Therefore, the section must also be amended. Further, an in-depth investigation must be conducted to clarify the powers and duties of SARS officials upon finding relevant information that relates to the disclosure of information related to environmental risk.

The other issue that needs to be investigated is under which circumstances the TAA supersedes other enabling environmental statutes. The Act gives SARS officials a "blank cheque" when it comes to the powers they are given. Further, the Act phrases sections in a "discretionary" manner which leaves the application of the provisions in the hands of SARS officials, who are required to use their discretion in enforcing those provisions. Further, if the powers are broadly phrased, they may be considered to be inconsistent with the Constitution.

The Constitution is the supreme law of the Republic and, therefore, the rights contained therein need to be upheld. The common law and the Constitution both protect the right to privacy. For a taxpayer to bring a successful delictual action at common law, the unlawful and intentional infringement of the right must be proven. The defences available at common-law will, however, suffice in negating liability for a delictual action. On this basis, if SARS can prove that the defence available at common law is present for breach of privacy, then the taxpayer will be unsuccessful in bringing the application for a delictual claim.

The Constitution guarantees everyone the right to privacy.<sup>336</sup> Despite this guarantee, the rights are not absolute and limited by section 36 of the Constitution. The section outlines circumstances under which the limitation will be regarded as lawful and justifiable in an open

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<sup>336</sup> S 14 of the Constitution of the Republic of South Africa Act 108 of 1996.

democratic society. When considering the right to privacy, the disclosure of information by SARS may be considered reasonable and justifiable under certain circumstances.

SARS employees and everyone contracted by SARS have a general duty to preserve the secrecy of taxpayers' information and not to disclose to any other person not employed by SARS. If the secrecy provisions are contravened, this would be and would expose SARS officials and SARS to criminal prosecution and civil liability. The secrecy provisions are not absolute, and SARS is not prohibited to disclose the information if specific legislation requires it to do so.

The rationale underpinning the tax secrecy regime has been discussed and it is concluded that in South Africa, the protection is based on taxpayer privacy rights and the justification that confidentiality encourages full disclosure. The legal provisions which protect taxpayer confidentiality restrict other important rights in our democratic society.

In particular, the TAA and NEMA disclosure provisions restrict the right to privacy. The challenge is to properly balance the protection of taxpayer confidentiality with the countervailing rights, which protect the right to privacy. The limitation clause under the Constitution provides a framework for the balancing of such rights.

The duty and obligation to protect human rights lies with the government which has the right to change any laws that infringe upon these human rights. This was confirmed in the *First National Bank of South Africa Limited t/a Wesbank v Commissioner of the South African Revenue Services*,<sup>337</sup> it was held that

'no matter how indispensable fiscal statutory provisions were for the economic well-being of the country, they were not immune to the discipline of the Constitution and had to conform with its normative standards'.<sup>338</sup>

Although there will occasionally be violations of taxpayer rights, the TAA is not always unlawful. The Constitutional Court in the matter of *Van Rooyen v The State*<sup>339</sup> remarked as

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<sup>337</sup> *First National Bank of South Africa Limited t/a Wesbank v Commissioner of the South African Revenue Services* 2002 (4) SA 768

<sup>338</sup> *First National Bank of South Africa Limited t/a Wesbank* 2002 (4) SA 768, para 252.

<sup>338</sup> *Van Rooyen and Others v The State (General Council of South Africa intervening)* 2002 (5) SA 246 (CC).

<sup>338</sup> *Van Rooyen and Others* 2002 (5) SA 246 (CC) para 37.

<sup>339</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v CSARS and Others*, (88359/2019) (2021) ZAGPPHC (16 November 2021).

follows on this point any power granted to a functionary by the law or by the Constitution itself is capable of being abused. The possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.<sup>340</sup>

The court in the matter of *Arena Holdings (Pty) Ltd t/a Financial Mail v CSARS*,<sup>341</sup> went against the judgment in the matter of Van Rooyen stating that the provisions of the TAA and PAIA are unconstitutional and should be amended. Their limitations are severe, unjustifiable, and invalid in an open and democratic society. Considering the Arena judgment, empowering statutes must always be in line with the constitutional principles and will be declared invalid and unconstitutional if they are unreasonably limiting taxpayers' rights.

The SARS's information-gathering procedures are crucial and essential, because they enable SARS officials to perform their duties properly. As a result, SARS's audit and inspection powers are justifiable and reasonable infringements of the right to privacy. The search and seizure are also justifiable, only if they are conducted reasonably. Additionally, they must be conducted only in exceptional circumstances. Under both the TAA and CPA, warrantless search and seizures can only be allowed in exceptional circumstances and provided it is to ensure that SARS exercises its power effectively.

As much as the right to privacy is important, a degree of invasion of the taxpayer's right to privacy cannot be avoided. There are instances where SARS will be allowed to infringe on the right by disclosing confidential information without breaching the right. However, this process should not be left unregulated and unchecked. Provisions for a requirement of a warrant must always be found in laws that authorise invasions into private spheres of individuals. The reality is that it is not always possible to obtain a warrant. There will always be exceptional circumstances that allow for searches and seizures to proceed without first obtaining a warrant or if it is obtained, will render the administration of justice into disrepute. These cases should be limited and extremely exceptional.

A taxpayer is entitled to remedies when his rights have been unjustifiably infringed by SARS. The remedies seek to put the taxpayer in the same position he would have been in had his

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<sup>340</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v CSARS*, (88359/2019) (2021) ZAGPPHC (16 November 2021) para 11.

<sup>341</sup> *Arena Holdings (Pty) Ltd t/a Financial Mail and Others*, (88359/2019) (2021) ZAGPPHC (16 November 2021) para 11.

privacy not been infringed. As discussed in chapter 4, there are various remedies that the court can award to the taxpayer including interdict and damages.

In deciding which remedy to award to the taxpayer, the court must decide whether the remedy sought is appropriate as determined by the provisions of section 38 of the Constitution. If it is found to be appropriate, then it can be awarded to the taxpayer.

## **BIBLIOGRAPHY**

### **LEGISLATION**

Additional Protocol of the American Convention of Human Rights in the Area of Economic

African Charter on Human and People's Rights

American Restatement of the Law of Torts 1939

Atmospheric Pollution Prevention Act 45 of 1965

Canadian Charter on Rights and Freedoms.

Constitution of the Republic of Namibia, 2014

Constitution of the Kingdom of Netherlands, 2008

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 57 of 1977

Custom and Excise Act 91 of 1964

Declaration (1972) II ILM 1416

Declaration of the United Nations Conference on the Human Environment, 1972 Stockholm

Drug Trafficking Act 140 of 1992

Dumping Sea Control Act 73 of 1980

Financial Intelligence Center Act 38 of 2001

Income Tax Act 58 of 1962

Interim Constitution Act 200 of 1993

The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, amended by the 2010 Protocol

National Environmental Management Act 107 of 1998

Prevention of Organised Crime Act 121 of 1998

Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

Tax Administration Act 28 of 2011

The American Convention on Human Rights 1969

The European Convention for Protection of Human Rights and Fundamental Freedoms 1950

The Universal Declaration of Human Rights of 1948

## **CASE LAW**

*Arena Holdings (Pty) Ltd t/a Financial Mail and Others v CSARS and Others* (88359/2019) (2021) ZAGPPHC (16 November 2021)

*Attieh MR and Others v CSARS and Others* (33784/2019)(06 September 2022).

*Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO* 2012 (1) SA 158 (ECP)

*Bernstein and Others v Bester N.O and Others* 1996 (2) SA751 (CC)

*Bowers, Attorney General of Georgia v Hardwick* 478 US 186 (1985)

*BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* (2004) 5 SA 124 WLD

*C v Minister of Correctional Services* 1996 (4) SA 292 (T)

*Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC)

*Chief Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420(CC) 1429

*Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC)

*Commissioner of Revenue Services v Public Protector and Others* 2020 (4) SA 133 (GP)

*Company Secretary of Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance* (69/2014), 2014 ZASCA 184

*COT v CW (Pvt) Ltd* 1990 (2) SA 245 (ZS) 265 D

*De Foord v Town Council of Cape Town* 1898 SC 399

*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC)

*Ex Parte Chairperson of the Constitutional Assembly in re: Certification of the Republic of South Africa* 1996 (4) SA 744 (CC)



*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)

*First National Bank Ltd t/a Wesbank v CSARS and Another* 2002 (4) SA 768 (CC)

*Financial Mail (Pty) Ltd and others v Sage Holdings Ltd and Another* 1991 (2) SA 11 (W)

*Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 SCA

*Haynes v Commissioner of Inland Revenue Services* 2000 (6) BCLR 596 (Tk)

*Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC)

*Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E)

*Hoffmann v South African Airways* 2001 (1) SA 1 (CC)

*HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T)

*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC)

*Independent Newspaper (Pty) Ltd v Minister of Intelligence Services, Freedom of Expression Institute Intervening as Amicus Curiae In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC)

*Komape v Minister of Basic Education* 745/2018 & 1051/2018

*Marshall v CSARS* (CCT208/17)(2018) ZAAC 11.

*M & G Media Ltd v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP)

*Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders and Others* 2005 (3) SA 280

*Mkhutyukelwa v Minister of Police* 2017 ZAECMHC 34 (8 August 2017)

*National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR (CC)

*National Director of Public Prosecutions v Seevnarayan* 66 SATC 15

*National Media Ltd v Jooste* 1996 (3) SA 262 (A)

*Ndlovu v Minister of Police, Transkei & Others* 1993 (2) SA 91 (Tk)

*Ndlovu and Others v S* (2021) 1 All SA 538 (ECG)

*Ngomana v CEO of the SA Social Security Agency* 2010 ZAWCHC 172

*NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC)

*Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BG

*National Treasury v Opposition to Urban Tolling Alliance* 2012 (1) BCLR 1148 (CC)

*Olitzki Property Holdings v State Tender Board and Another* 2001 (3) 1247 SCA

*O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 224

*Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* (2013) JOL 30408 SCA

*R v Umfaan* 1908 T.S. 62

*Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC)

*Receiver of Revenue, Lebowa and Another v De Meyer NO* (1993) 2 All SA 462 (A)

*Rolls-Royce Ltd v Jeffrey* (1962) 1 All E.R.801

*Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)

*Saltman Engineering Co Ltd et al v Campbell Engineering Co Ltd* (1948) 65 R.P.C 203

*Setlogelo v Setlogelo* 1914 AD 221

*S v Makwanyane* 1995 (3) SA 391 (CC)

*S v Manamela* 2000 (3) SA 1 (CC)

*Shabalala v The Attorney General of the Transvaal and Others* 1995 (12) BCLR 1593 (C)

*Silver v Silver* 1937 NDP 129

*Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR)

*United Democratic Movement v President of the Republic of South Africa* 2002 (11) BCLR 1179 (CC)

*University of Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A)

*Van Rooyen and Others v The State and Others (General Council of South Africa intervening)* 2002 (5) SA (CC)

*Wainwright v Home Office* 2003 UKHL 53, 31

## **BOOKS**

Croome, B & Croome, J *Streetsmart Taxpayers, A practical guide to your rights in South Africa* (1<sup>st</sup> ed Juta & Co Ltd Cape Town 2017)

Croome, B *Taxpayers' Rights in South Africa* (1<sup>st</sup> ed Juta & Co Ltd Cape Town 2010)

Currie, I & De Waal, B *The Bill of Rights Handbook* (Juta & Co Cape Town 2013)

De Ville, J R, *Judicial Review of Administrative Action in South Africa*, (revised 1st edition (2005) Butterworths: Durban)

GE Devenish *A Commentary on the South African Bill of Rights (1999)* 145

Jones & Buckle, *Civil Practice in the Magistrates Court of South Africa* (6<sup>th</sup> Ed, ed Juta & Co Ltd Cape Town 2010)

McCabe B, "The investigatory powers of the Commissioner under the Income Tax Assessment Act and Individual Rights" *Revenue Law Journal* (3) 1,1-11 (1993)

McKinnon, C *Toward a feminist theory of the state* (Cambridge Mass Harvard University Press 1989)

Mc-Quoid-Mason, DJ *The Law of Privacy in South Africa* (1<sup>st</sup> ed Juta & Co Ltd Cape Town 1978)

Meyerson, D *Rights limited: freedom of expression, religion and the South African Constitution* (Juta & Co Ltd Cape Town 1997)

MM Loubser, A Mukheibir, R Midley, D Perumal & L Niesing *The Law of Delict in South Africa*, Oxford, University Press 2010

Neethling, J; Potgieter, JM & Visser, PJ *Law of Delict* (7<sup>th</sup> ed Lexis Nexis Durban 2015)

Neethling, J; Potgieter, JM & Visser, PJ *Neethling's Law of Personality* (2<sup>nd</sup> ed Lexis Nexis Durban 2005)

De Vos P, Freedman & Brandt D, *South African Constitutional Law in context*, Oxford University Press, Southern Africa, 2014

## **JOURNAL ARTICLES**

Allan, K, Applying PAIA: Legal, political and contextual issues.” In paper wars: access to Information in South Africa, Johannesburg Wits University Press, 2009, pg144-200

Alexy R ‘Reasonableness of the law in Bogiovanni G, Sartor C, Valentini G (ed), reasonableness and law, Dordrecht Heidelberg London New York: Springer 2009

Bentley D “The Taxpayers ‘Charter: More than a mission statement’4 Taxation in Australia Red Edition (5 June 1996)

Boachie, E, Environmental risk, FDI and tax reforms, why must we worry, Department of Finance, University of Ghana Business School, Accra, Ghana,21/12/2020

Botha, L “The end of taxpayer confidentiality? Gauteng Division hands down potentially groundbreaking judgement, Tax and Exchange Control Alert, 18 November 2021, pgs 5-7.

Blank, JD ‘In defense of individual tax privacy’ (2011) 61(2) *Emory Law Centre* 272.

CAJM Kortmaan & PPT Borend'Eert "Constitutional law of the Netherlands: An Introduction (Kluwer Law International, Amsterdam, 2007)

Croome, B 'Constitutional law and taxpayers' rights in South Africa-an overview' (2002) *Acta Juridica*

Cormick M 'Rethoric and the rule of law, Oxford, OUP, 2005, 173

C Fried "Privacy" (1968) 77 Yale Law Journal 483

De Villiers C and Van Staden, C Shareholders' corporate environmental disclosure needs, vol.14, number 4, July 2010, South African Journal of Economic and Management Sciences

Hambre, A 'Tax confidentiality: "A comparative study and impact assessment of global interest, Ombre University 2015

Hatfield, M 'Privacy in taxation' (2017) *Florida State University Law Review*

Hopkins K, 'Constitutional rights and the question of waiver: How fundamental are fundamental rights? (2001) 16 (1) SAPL 122

J Burchell, 'Personality rights and freedom of expression (the modern actio injuriarum)' Juta (1999) 37

R N Jones, An environmental risk assessment/ management framework for climate impact assessments. *Natural Hazards*, 2001, 197-230

Keulder C, "What's good for the goose is good for the Gander- Warrantless searches in terms of fiscal legislation" (2015) 132 South African Law Journal

Knight, A 'Privacy planning' (2016) *Without prejudice*

Kruger A, “Hiemstra’s Criminal Procedure-Circumstances in which an article can be seized without a warrant” (2-12) (2020) Lexis Nexis, Durban, 17 July 2020

LAWSA First Reissue vol 5, part 3. Loi P ‘The reasonableness and proportionality principle in labour law’ Law Department, University of Cagliari, Italy

Loper J “Evaluating existing state and local tax codes from an “environmental tax” perspective: the case of energy related taxes, *12 Pace Environmental Law Review* 61 (1994)

Maslow AH, “A theory of human motivation” *Psychological Review* (1943)50 (4) 370-396

McQuoid-Mason, D ‘Invasion of privacy: common law v constitutional delict-does it make a difference’ (2000) *Acta Juridica* 227–246

Nortje W "Warrantless Search and Seizures by the South African Police Service:  
Weighing up the Right to Privacy versus the Prevention of Crime" *PER / PELJ*2021(24)

Palmer G, ‘Keeping taxpayer information secret’ (2021) *Without Prejudice*

Parent, WA “Recent work on the concept of privacy” 1983 *American Philosophy Quarterly* 341-55.

Pilkington M ‘Damages as a remedy for infringement of the Canadian Charter of Rights and freedoms’ *Canadian Bar Review*, vol 62, number 4 (1984) 517-576

Peekhaus, W, South Africa’s promotion of access to information act: an analysis of relevant jurisprudence, *Journal of Information Policy*, 2014 vol 4 (2014) 570-596, pg 589

Posner, R ‘The right to privacy’ (1978) 12 *Georgia Law Review* 399–400

Price A, “Search and seizure without a warrant” *Constitutional Law Review* vol VI 245

Rautenbach IM ‘The limitation of rights in terms of provisions of the Bill of Rights other than the general limitation clause: A few examples’ (2001) 4 *TSAR* 617

- Ruebhausen M & Brim O G "Privacy and Behavioural Research" (1965) 65 Columbia Law Report
- Roos, A 'Data Protection: explaining the international backdrop and evaluating the current South African position' (2007) *SALJ* 400–433
- Schwartz, P 'The future of tax privacy' (2008) 61(4) *National Tax Journal* 896
- Silke, J 'Taxpayers and the Constitution: A Battle Already Lost' (2002) *Acta Juridica* 282
- Van As, HJ & Snijman, PJ "Challenges and possible solutions concerning the inspection/investigation dichotomy in the context of transnational organised fisheries crime: A South African perspective, FishFORCE Academy, Department of Public Law, Nelson Mandela University, South Africa, (2019) 140-150
- Van der Bank, CM 'The right to privacy-South African and comparative perspective' (2012) 1 *European Journal of Business and Social Sciences* 77–86
- Van Schalkwyk, L 'Constitutionality and the. Income Tax Act- Revisited' (2004) 12 *Meditari Accountancy Research* 185–201
- R. Wacks, 'The Protection of Privacy' (1980)
- Warren, SD & Brandeis, LD 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193
- Woolman, S 'Out of order? Out of balance? The limitation clause of the final Constitution (1997) 13 *South African Journal of Human Rights* 102

## **WEBSITES**

- Erasmus, DN 'The Tax Administration Act, Taxpayer's rights and SARS audits' 31 January 2013, available at <http://www.thesait.org.za>, accessed on 29 December 2020
- Jonson, B 'Privacy no longer a societal norm, says Facebook Founder' *The Guardian* 10 January 2010, available at <http://www.theguardian.com>, accessed on 17 April 2021
- Glossary of Tax Terms, available at <http://www.oecd.org.za>, accessed on 18 August 2021

P Mhodi 'High court ruling recognises the right to access to courts', 15 February 2019,  
available at <http://www.sahrc.org.za>, accessed on 20 September 2021

SARS Short guide to the Tax Administration Act 28 of 2011, version 3, 29 March 2018, p.35,  
available on <http://www.sars.gov.za> , accessed on 21 September 2021

What is public safety, available at <http://www.austintexas.gov.za>, accessed on 02 October 2021