IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2020-03-23 [signature]

DATE SIGNATURE

CASE NUMBER: 84074/19
DATE: 23 March 2020

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|---|---|
| COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICE | Applicant |
| V | |
| PUBLIC PROTECTOR | First Respondent |
| JACOB GEDLEYIHLEKISA ZUMA | Second Respondent |
| MMUSI MAIMANE | Third Respondent |
| ROYAL SECURITY CC | Fourth Respondent |

JUDGMENT

MABUSE J

[1] In this application the Applicant, the Commissioner for the South African Revenue Service ("the Commissioner") seeks the relief set out in part B of the notice of motion dated 7 November 2019. The said relief has been set out as follows:

*"Part B*

*5 Declaring that a South African Revenue Service official is permitted and required under the proviso of "just cause" contained in section 11(3) of the Public Protector Act 23 of 1994 read with section 69(1) of the Tax Administration Act 28 of 2011 to withhold taxpayer information (as defined in section 67(1)(a) of the latter Act), and that the Public Protector's subpoena powers do not extend to the taxpayers' information.*

*6 Further and alternative relief.*

*7 Directing such a respondent as may elect to oppose this application to pay (jointly and severally, the one paying and like to be absolved) the applicants' costs, including the costs of two counsel on the scale as between attorney and client; and that 15% of such costs be paid de bonis propiis by the first respondent."*

[2] Although five parties have been cited in this application, only two of the five parties are active participants in this application, the rest having chosen not to file any papers in the

matter. Those two are the Applicant, the Commissioner, and the First Respondent, the Public Protector. There was an attempt at the commencement of the hearing of the application to indirectly introduce the Second Respondent into the affray. This was done through the introduction into the proceedings of an affidavit deposed to by the said Second Respondent. I will deal with the said affidavit later in this judgment, its purpose and its effect. For purposes of brevity I shall refer to the South African Revenue Services as SARS; the Public Protector as the Public Protector; the Public Protector Act 23 of 1994 as the PPA and the Tax Administration Act 28 of 2011 as the TAA.

2.1 Section 11(3) of the PPA referred to above provides that:

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

2.2 Section 7(4)(a) of the PPA states that:

*"For the purpose of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her or to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such a person."*

2.3 Section 69(1) of the TAA on the other hand says the following:

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

2.4 Section 67(1)(a) of the TAA provides that:

*"(1) This chapter applies to-*

*(b) taxpayer information, which means any information provided by the taxpayer or obtained by SARS in respect of the taxpayer, including biometric information."*

Section 67 falls under The General Prohibition of Disclosure of the TAA.

[3]

3.1 I agree with counsel for the Commissioner that the real dispute between the Commissioner and the Public Protector in this application is whether SARS or its officials are by law permitted and required under the provisions of *"just cause"* as envisaged by the provisions of 11[3] of the PPA read with s 69[1] of the TAA to withhold taxpayer information as ordained in s 69[1] of the TAA; or whether the Public Protector's subpoena powers claim superiority over the confidential status of the taxpayer information under the TAA. To put it otherwise the substantive issue to be decided in this matter is - whether *"on a proper interpretation of the relevant and Constitutional and or legislative provisions, the applicant's refusal to provide the relevant information is unlawful."*

3.2 According to Adv D Mpofu SC, counsel for the First Respondent, the parties' battlefield is as follows:

*"To be perfectly clear the dispute in this matter concerns ... a battle between statutory or legislative obligations on the one hand and the constitutional obligation (and their values contained in the Constitution) and on such specific reference to s 1 and 2 thereof."*

3.3 The real issues of dispute between the parties in this application can be determined from the relief that the Commissioner seeks. Simply the question is when faced with the subpoena issued by the Public Protector in terms of s 7(4) (a) of the PPA against him, may the Commissioner refuse to comply with the said subpoena and rely on the provisions of s 67(1)(a) and 69(1) of the TAA?

3.4

3.4.1 The issue in dispute is as clear as crystal from the founding affidavit. In paragraph 4 of his founding affidavit the Commissioner states that:

*"The subpoena seeks to coerce the productions of information which the TAA prohibits all SARS officials, including myself, from disclosing. The TAA itself criminalises the disclosure of the taxpayer information and admits of only limited exceptions. The Public Protector is not an exempted authority to whom such information may be disclosed under TAA."*

3.4.2 In paragraph 20 of the founding affidavit the Commissioner states that:

*"SARS explained at the meeting that the 2018 subpoena attempted to elicit evidence which qualifies as taxpayer information under TAA. SARS further explained that the TAA precludes the production of such information and that the Public Protector is not one of them."*

3.4.3 More importantly paragraph 32 of the founding affidavit sets out the parameters of the issues in dispute. It states something of paramount

importance which is recorded in the letter dated 26 April 2019. It is the following paragraph:

*"Confidentiality of information is absolutely critical for every tax administration and we are often drawn into debates with Departments and Organs of State concerning what, when and to whom information in our possession can be released. Our primary duty is to collect the correct amount of tax through voluntary compliance and this is built through securing the public's trust and respect. Our ability and statutory obligations to keep information confidential is one pillar on which trust is built and another is the public's belief that SARS' officials exercise their powers fairly. SARS is therefore obliged to exercise excellence when dealing with access to information, so when we raise with your office concerns over information, we do so with the sole purpose of complying with our statutory obligations in a responsible manner."*

The Public Protector has not challenged this paragraph. Instead, she has admitted the allegations contained in it. The last but one paragraph of the said letter states as follows:

*"10.4 On 15 April 2019 we sent you a legal opinion obtained from Adv Maenetje SC and Adv Ferreira. You would recall that officials from both our offices were involved in this matter. This opinion does touch on the categories of information and it confirms that SARS is prohibited from providing you with taxpayer information without an order of a High Court. This was the difficulty that we raised with you when you subpoenaed the Acting Commissioner to personally appear before you to provide information concerning a specific taxpayer. We were able to resolve that legal question and a similar legal issue arises now concerning your subpoena issued to ex SARS officials. As the issue could have far*

*reaching consequences. SARS should be allowed the opportunity to take legal guidance without being vilified in the media for doing so."* (My own underlining).

In her answering affidavit the Public Protector simply noted the contents of the relevant paragraph. Of supreme importance arising from paragraph 10.4 *supra* is that, she had noted and was made fully aware that SARS was prohibited by the provisions of s 69(1) of the TAA from releasing taxpayer information to her by reason of confidentiality. Secondly, she was made aware and she noted that she could obtain a Court Order to access taxpayer information from SARS. The letter closed by proposing constructive engagement between the Public Protector and SARS. There are sufficient examples in the papers which demonstrate quite convincingly SARS approach. It is that approach that had to be investigated by the Public Protector and it is that approach that has irritated the Public Protector and with which the Public Protector disagrees.

[4] On 21 October 2019, much against the explanation contained in paragraph 10.4 of the Commissioner's letter dated 26 April 2019 and furthermore much against the advice of senior and junior counsel, the Public Protector, acting in terms of the provisions of the

said s 7(4) (a) of the PPA, issued a subpoena to the current Commissioner of SARS, the Applicant. The said subpoena stated, inter alia, as follows:

*"1. You are hereby required to appear in person before the Public Protector, at the Public Protector House, Hillcrest Office Park, 175 Lunnon Road, Hillcrest, PRETORIA on Wednesday 13 November 2019, at 11:00 am to give evidence or to produce any document(s) listed in paragraph 7 below, in your possession or under your control which has a bearing on the matter being investigated.*

*2. PLEASE TAKE NOTICE that at the hearing, you will be required to provide and explanation, give evidence and produce any relevant documentation which may be in your possession and/or under your control such as minutes of meetings, reports, and/or correspondence which may have a bearing on the investigation, including but not limited to the extent of your involvement and participation relating to the matters under investigation.*

*3. KINDLY TAKE NOTICE FURTHER that, in terms of section 7(8) of the Public Protector Act, you may be assisted (and not represented) during the interview by an Advocate or Attorney of your choice and that you will be entitled to peruse such documents and/or records as are reasonably necessary to refresh your memory.*

*4. PLEASE TAKE FURTHER NOTICE that Section 11(3) of the Public Protector Act provides that, "any person who, without just cause, refuses or fails to comply with a direction or request under section 7(4) or refuses to answer any question put to him or her under that section or gives to such a question an answer which to his or her knowledge is false or refuses to take the oath or to make affirmation at the request of the Public Protector in terms of Section 7(6), shall be guilty of an offence."*

5. *PLEASE NOTE THAT the Public Protector will not grant, without just cause, any request for postponement of your appearance or extension for submission of an affidavit or any document, unless such request is done in person, on the submission day or appearance day, before the Public Protector.*

6. *PLEASE NOTE FURTHER that Section 11(4) of the Public Protector Act provides that "any person convicted of an offence in terms of the Act shall be liable to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."*

It is this 2019 subpoena that constitutes the subject of this application.

## THE EVENTS THAT PRECEDED THE ISSUE OF THE SUBPOENA

[5] The events that led to the issue of the subpoena are common cause between the parties. Largely they are unchallenged and represent the evidence of the Commissioner and the First Respondent. It is common cause that the issue between the parties involves a legal dispute. Either on 17 or 18 October 2018 the Public Protector subpoenaed the then Acting Commissioner, Mark Kinghorn, to provide information. This subpoena may conveniently be referred to, for purposes of distinction, as the 2018 subpoena. This 2018 subpoena reflects that it was purportedly issued following a complaint lodged with the Public Protector by Mr Mmusi Maimane, the Third Respondent, against Mr Zuma, the Second Respondent. The said complaint was based on a book titled "The President's Keepers" by a certain author, Jacques Pauw. The book seemingly advanced the allegation that, "during the first month of his presidency in

2009 ... the former President ("Mr Zuma") earned a salary *"as an "employee"* of a company ("Royal Security CC"), the Fourth Respondent. As the 2019 subpoena reveals the quotation from the book suggests that in 2010 a SARS auditor *"was unable to determine whether tax had been deducted from Mr Zuma's salary and paid to SARS"* by Royal Security CC. What this essentially means is that, *inter alia*, the obligation of the third party, Royal Security CC, to deduct 'pay as you earn' tax was an issue. Indeed, the 2018 subpoena explicitly required the deduction of *"the Royal Security payroll reconciliation for the tax year 1 March 2009 to 28 February 2010"*.

MEETING BETWEEN SARS AND PUBLIC PROTECTOR'S OFFICIALS

[6] Following the 2018 subpoena, SARS attended at the Public Protector's Head Office on 5 November 2018. It was represented at this meeting by, inter alia, Mr Wayne Broughton. The office of the Public Protector was represented personally by the Public Protector and her team. At that meeting SARS explained that the 2018 subpoena attempted to elicit evidence which in terms of the TAA qualified as taxpayer information. Furthermore, SARS explained that the TAA precludes the production of such information and that the Public Protector was not one of the entities identified in Chapter 6 of the TAA. It is only in respect of the entities enumerated in the said Chapter 6 that the applicable taxpayer confidentiality prohibition may be relaxed under the TAA.

THE PUBLIC PROTECTOR REJECTS SARS EXPLANATION BUT AGREES TO OBTAIN LEGAL ADVICE

[7] Notwithstanding the said explanation, the Public Protector rejected SARS' explanation of how the TAA, especially s 69(1) thereof, operates. Thereupon, and in a genuine attempt to break the impasse between them, SARS accordingly invited the Public Protector to obtain a Court Order confirming her understanding of the law. The Public Protector refused to do so and raised financial constraints as a reason. She contended that her office was financially under resourced and thereby implied that it could not afford approaching this Court or even procuring legal advice vindicating her version. In response, SARS proposed that the parties should jointly seek legal advice and SARS undertook to fund the bill for such legal opinion. The Public Protector accepted the proposition.

[8] On 14 November 2018 the officials representing the Public Protector on one hand and SARS on the other hand met to finalise a joint brief to counsel. It was agreed between the Public Protector and SARS that Cliff Dekker Hofmeyer Attorneys (CDH) should be appointed jointly in order to instruct counsel. Although it is not so stated in the papers, I

must assume that the issue on which counsel's opinion was sought was also identified at this meeting.

APPOINTMENT OF COUNSEL AND IDENTIFICATION OF THE SUBJECT FOR LEGAL ADVICE

[9] On 6 December 2018 the officials from the Public Protector's office and SARS consulted with the instructing attorneys and requested the attorneys to recommend and instruct counsel. From a list of recommended counsel SARS and the Public Protector agreed to brief Adv Maenetje SC with Adv Ferreira, to provide them with a legal opinion on the topic that had been appropriately identified and selected by both parties. The topic jointly established by both parties and on which counsel's legal opinion was sought was:

*"... to advise whether there is any means by which the Public Protector and the South African Revenue Service ("SARS") can approach a Court for relief that would allow the Public Protector to subpoena tax information from SARS."*

In their report the two counsel pointed that:

*"2. We are instructed that SARS and the Public Protector are of the view that there is a conflict between:*

*2.1 the Public Protector Act 23 of 1994 ("PPA") which gives the Public Protector the power to obtain evidence which has a bearing on a matter being investigated; and*

*2.2 the Tax Administration Act 20 (sic) of 2011 ("TAA"), which prohibits the disclosure of SARS confidential information."*

There was therefore no doubt nor was there any dispute as to what counsel were expected to do.

[10] During March 2019 Adv Maenetje SC and Adv Ferreira duly produced their opinion dated March 2019. Their opinion correctly records on its cover sheet that the opinion had been prepared *"For the Public Protector and the South African Revenue Service"*. SARS accepted that it is in the public interest and in the interest of justice to produce the opinion.

[11] CDH provided SARS with counsel's opinion on 19 April 2019 under cover of a letter addressed to SARS, and in which CDH's own views were also recorded. That letter is attached to the founding affidavit and marked 'C'. It advised that *"after carefully consider[ing] your opinion and the relevant documentation and legislation, CDH can find no reasonable basis upon which to come to a contrary view from counsel."* It would appear that CDH had also been requested for its view on the topic referred to counsel for their opinion. CDH concluded that counsel's approach is consistent with what was established in the interpretative doctrine. SARS sent a copy of the opinion to the Public Protector on 15 April 2019 under cover of a letter of even date. That letter is attached to the founding affidavit and marked 'D'. The said letter stated, among others, as follows:

*"1. The Public Protector's subpoena dated 17 October 2018 and the subsequent discussions thereof on 05 November 2018 bear reference.*

*2. You will recall that when I appeared on 5 November 2018 we discussed the legal constraints I have as the acting commissioner and generally as the employee of SARS to disclose SARS confidential information and taxpayer information as defined in the Tax Administration Act, Act 28 of 2011 (the TAA) to a person who is not a SARS official. My letter dated 05 September 2018 explains the parameters within which I can disclose taxpayer information to a person who is not a SARS official.*

*3. In light of our discussions and taking account of the pressures on our respective people and financial resources, we resolved to jointly engage counsel with a view to legally guide us on the best possible way to assist each other to achieve our respective mandate without contravening the laws in terms of which we are regulated. To this end, I agreed that SARS would pay the costs to obtain legal counsels' advice.*

*4. Our officials, Aduwani Sigama and Ntsumbedzeni Nemasisi, as mandated by our respective officers, instructed the law firm, Cliff Dekker Hofmeyer, to brief Adv NH Maenetje SC and Adv NC Ferreira. On 09 April 2019, we received counsels' opinion dated 14 March 2019. A copy is attached hereto marked annexure "A" for your consideration. I wish to reiterate SARS' continued willingness to co-operate and assist the office to fulfil its mandate."*

As the then Commissioner's letter reflects SARS had engaged constructively and consistently with the Public Protector.

[12] Counsel's legal advice concluded by the following statement:

*"32.1 There is no conflict between the Public Protector's subpoena powers and the TAA prohibition on disclosure of SARS confidential information and taxpayer information.*

*32.2 Properly interpreted, the Public Protector's subpoena powers do not include the power to compel disclosure of SARS confidential information and taxpayer information.*

*32.3 This does not undermine the effectiveness of the investigative powers of the Public Protector because the Public Protector may access such information by making an application to the High Court in terms of Section 69(2)(c) of the PPA (sic) or obtaining counsel from the taxpayer."*

[13] By way of a summary, the Public Protector was advised by Maenetje SC and Adv Ferreira that her powers to subpoena did not include the power to compel disclosure of SARS confidential information and taxpayer information. The lesson that the Public Protector should have learned from this advice is that if public power is given to a public body to use for certain purposes it may not wrongly use it to achieve other purposes. In Gauteng gambling Board & Another v MEC for Economic Development Gauteng Provincial Government 2013 (5) 24 SCA paragraph 46 the Court had the following to say:

*"More than six decades ago this Court in Van Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A) said the following:*

*'For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in fraudem legis, construing that term in the more restricted manner adopted by the majority of this Court in the case of Dadoo Ltd v Kurgersdorp Municipal Council (1920 AD 530) (see also Commissioner of Customs and Excise v Randles Bros & Hudson Ltd (1941 AD 369)). Such a use is mere simulatio or pretext .... And I should add that, of course, if the person*

*exercising the power avowedly, use it for some purpose other than that for which alone it has been given, he acts simply contra legem: where, however, he professes to use it for its legitimate purpose, while in fact using it for another, he acts in fraudem legis (D.1.3.29, as explained in Dadoo's case, and compare in re Marsden's Trust (supra)).'"*

The powers given the Public Protector to subpoena a witness to give evidence or to produce a document may not be invoked to coerce that witness to violate the law under which such a witness operates. Once she was given this advice, the Public Protector had a choice either to approach the Court in terms of s 69(2) (c) of the TAA or to approach the Second Respondent in terms of s 69(6)(b) of the TAA for his permission to obtain his taxpayer information from SARS. S 69(2)(c) of the TAA provides that:

*"2. Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former official –*

*(c) by order of Court."*

S 69(6)(b) provides that:

*"6. Subsection (1) does not prohibit the disclosure of information –*

*(a) ...*

*(b) with the written consent of the taxpayer or another person."*

THE PUBLIC PROTECTOR REJECTS SENIOR AND JUNIOR COUNSEL'S OPINION

[14] On 24 April 2019 the Public Protector responded to the opinion by way of a letter attached to the founding affidavit and marked 'E'. In her letter the Public Protector flatly rejected the independent legal advice of counsel and stated that:

> *"2. Whilst I appreciate and know the contents of the legal opinion which accompanied the letter under reply, I do not agree with the reasons and conclusion contained therein"*; and without much ado dismissed the *"reasonable conclusion"* of counsel jointly chosen by her office. These conclusions she referred to are contained in paragraph [12] *supra*. She persisted with her claim that she was entitled to access "taxpayer information" in the possession of SARS and stated furthermore that the TAA's exclusion of the Public Protector among other Chapter 9 institutions *"is intended [by Parliament] to create a "storm in a teacul(sic)"."* *"That being the case"*, her letter continued, *"the Public Protector had already embarked on the process of sourcing a second legal opinion from a different senior counsel."* These allegations are not in dispute. Now all of a sudden she has funds to secure the second senior counsel's opinion. She was *mala fide*. She failed to uphold the Constitution. She was prepared to litigate recklessly. She acted improperly in flagrant disobedience of the Constitution and the law.

[15] Incidentally SARS was not invited to participate in the latter briefing process on which the Public Protector already had embarked. It goes without saying that SARS did not

take part in the selection of the topic upon which the second senior counsel's opinion was sought. SARS was also not informed of the subject on which second counsel's opinion would be sought. The resulting opinion was not shared with SARS. Nor was SARS even favoured with any update on the Public Protector's unilateral process to procure advice diametrically different from the opinion procured jointly by SARS and the Public Protector. The Public Protector admits these allegations. The Public Protector litigated in bad faith. She attributes her dismal failure to furnish SARS with Adv Sikhakhane SC's opinion to an oversight emanating from her busy schedule. Despite the fact that the said opinion is dated 7 May 2019, the Public Protector only furnished a copy thereof to SARS with her answering affidavit. Assuming that she received it immediately after 7 May 2019, the Public Protector sat on the opinion for the rest of May, June, July, August, September, October and November 2019 without informing SARS about it. The Public Protector was again simply *mala fide* in failing timeously to share the second senior counsel's opinion with the Commissioner.

[16] The conduct of the Public Protector is inexcusable. To agree to seeking counsel's opinion on a matter; to taking part in the identification of counsel whose opinion on the matter would be sourced; to preside over the identification of the topic; to reject counsel's opinion and to seek Adv Sikhakhane SC's opinion without involving SARS is a

demonstration of negotiating, and acting, in bad faith. At the same time, it is indicative of the fact that the Public Protector did not genuinely take part in the process that led to the opinion of Adv Maenetje SC and Adv Ferreira to obtain objective and erudite opinion. She was not honest. She was opinionated already and only sought the two counsel's opinion to support her opinion. When such opinion did not do so she rejected it. This is demonstrated by the fact that she readily accepted the opinion expressed by Adv Sikhakhane SC. She did not reject the opinion of Adv Maenetje SC and Adv Ferreira because it was flawed, as she claimed in paragraph 31 of her answering affidavit, but did so because it did not resonate with her strongly held view nor did she accept gleefully the opinion of Adv Sikhakhane SC because it was correct. She only accepted it because it resonated with her opinion. The Public Protector had also failed to put a copy of the opinion of Adv Maenetje SC and Adv Ferreira before Adv Sikhakhane SC. Again in this respect she acted in bad faith. In rejecting the legal advice of Adv Maenetje SC and Adv Ferreira, the Public Protector had, in paragraph 31 of her answering affidavit, furnished reasons why she did so. She had stated that:

*"On the one hand I found the Maenetje SC opinion to be significantly deficient more perpetually in the glaring failure to take into account the provisions of the Constitution."*

The Public Protector's letter dated 24 April 2019 concluded by recording the Public Protector's arbitrary predetermination of the issue already prior to receiving any legal

opinion potentially supporting her view. At the same time the letter's conclusion also reflects the Public Protector's resolve that SARS' conduct constituted a breach and a violation of s 181(3) of the Constitution as well as s 7(4) of the PPA. On this basis the Public Protector's letter repeated her threat that: *"I must therefore reiterate that the consequences of failure to comply with my [the Public Protector's] directives will be pursued as contained in s 11(3) of the Public Protector Act"*. The allegations contained above are not disputed.

[17] In the first place, as pointed out earlier, the Adv Sikhakhane SC's opinion was only disclosed to the Applicant in the answering affidavit. This was an example of litigating carelessly. For the first time in the answering affidavit, the Public Protector was of the view that:

*"I have found Maenetje SC's opinion to be significantly deficient, more perpetually in its glaring failure to take into account the provisions of the Constitution."*

The Public Protector attempted to criticize the opinion of Adv Maenetje SC. The criticism of the Adv Maenetje SC's and Adv Ferreira's opinion is not supported in any way by any analysis whatsoever of the opinion. Although she undertook to conduct a more detailed comparative and critical analysis of the two opinions during legal argument, this was, for inexplicable reasons, not done. Consequently, the Public

Protector's case on this crucial point was wholly not pleaded. The precise questions upon which Adv Sikhakhane SC's opinion was sought were the following:

1. *whether the Public Protector can subpoena taxpayer information from SARS;*

2. *whether the Public Protector is precluded from subpoenaing or obtaining taxpayer information from SARS in terms of the TAA vis-a-vis powers to do so in terms of the PPA; and,*

3. *whether there are any other means available to the Public Protector to obtain the taxpayer information from SARS.*

[18] In his report, Adv Sikhakhane SC stated that:

*"33. As I have already referred to above, in a case of Economic Freedom Fighters, the Constitutional Court considered whether or not the powers of the Public Protectors can be limited by national legislation.*

*34. At paragraph 57 of the case the Court held that:*

*'Since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector."*

*35. It follows, in my view, that the power of compelling the provisions of information to the Public Protector overrides the secrecy provision of the TAA. It is therefore trite law that the TAA cannot have the power of watering down the Constitutional powers of the Public Protector to conduct an investigation into any particular state organ."*

In conclusion he stated that:

*"37. The powers of the Public Protector can only be limited by the Constitution. The Constitution is a superior law to the TAA and the Public Protector may accordingly subpoena taxpayer records from SARS if such is in pursuance of her investigation."* This is the view that the Public Protector preferred.

[19] The Public Protector is an advocate herself. She clearly had read and understood the opinion of Adv Maenetje SC and Adv Ferreira. She let a golden opportunity slip through her fingers ad she could never retrieve it. There is an old adage that says; "*He who lets an opportunity to pass, he shall never find, for an opportunity once past is bald behind*". In rejecting that opinion, the Public Protector overlooked the dispositive Constitutional Court judgment that was referred to in that opinion of Adv Maenetje SC of Ex Parte Speaker of the Kwa-Zulu Natal Provincial Legislature: in re: Certification of The Constitution of the Province of Kwa-Zulu Natal 1966 (4) SA 1099 (CC). In paragraph 15 of his report Adv Maenetje SC had referred to paragraph [24] of the said judgment which stated that:

*"It is important to stress that we are here dealing with the concept of inconsistency as it is to be applied to provisions in a provincial bill of rights which fall within the provincial legislatures competence but which operate in the field also covered by Chapter 3 of the Interim Constitution. For purposes of s 1(60) there is a different and even more fundamental type of inconsistency, namely where the provincial legislature purports to embody in its constitution, whether in its bill of rights or elsewhere, matters in respect whereof it has no power to legislate pursuant to the provisions of s 126 or any other provision of the Interim Constitution. For purposes of the present*

*inquiry as the inconsistency we are of the view that provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand at the same time or they cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey it without disobeying the other. There is no principle or practical reason why such provisions cannot operate together harmoniously in the same field."*

Adv Maenetje SC advised that the conclusion reached in paragraph [24], as quoted above, accords with the general principles of statutory construction. He advised furthermore that the specific provisions of the TAA take precedence over the general principles of the PPA.

[20] It is not the Public Protector's case that the Constitutional Court stated the law incorrectly in the said paragraph [24] nor is it her case that the law as set out in the said judgment is not binding on the Public Protector. Furthermore, it is not the Public Protector's case that Adv Maenetje SC and Adv Ferreira misunderstood the law as set out in that paragraph; and lastly, it is not the Public Protector's case that the judgment in that case has been set aside or it is distinguishable.

[21] The Public Protector's letter dated 24 April 2019 was preceded by a press statement issued on the previous day. The statement related to a different investigation demonstrating the wider effect of the conflicting legal conclusions for which the Public

Protector and SARS contended. A copy of the said media statement, attached to the founding affidavit as annexure 'F', reflects the Public Protector's persistence in subpoenaing *"records in question directly from SARS"*, and applying *"particularly contempt proceedings"*. The Public Protector specifically cited in her press statement ss 7(4), 7(6) and 11(4) of the PPA. In doing so she directly quoted potentially the criminative R40,000 criminal penalty and 12 months' prison sentence to which the latter provision refers.

[22] On 26 April 2019 SARS responded to the Public Protector and in its response referred to her 23 April 2019 press statement. In the said letter SARS:

1. relayed its commitment to treat the Public Protector's Office with the respect it constitutionally enjoyed and SARS' efforts to reverse what Mr Kinghorns' letter had described as *"calamitous maladministration"*;
2. referred to the public perceptions regarding SARS' efficient and non-partisan tax administration, tax compliance levels, and tax collection acumen;
3. explained further that SARS officials operate under oath of secrecy, preserved the secrecy of SARS' confidential information and taxpayer information and that a breach of these obligations constituted a criminal offence;

4. further clarified the concepts *taxpayer information* and SARS' *confidential information* and advised that they should not be confused; and,

5. referred further to media queries regarding Public Protector's threatened contempt proceedings against SARS and the strenuous efforts to rebuild SARS' reputation and integrity for the benefit of the country and the people residing there. It ended up by pointing out that regrettably the Public Protector's position and public statements undermined SARS' efforts.

Here it is important to point out that no action was taken further by the Public Protector on the 2018 subpoena. It seems that it died its natural death.

**SARS' VIEW**

[23] SARS' view is that the Public Protector issued the subpoena of 21 October 2019 to coerce the production by SARS of information which the TAA prohibits all SARS' officials and former officials from disclosing. In fact, the TAA criminalises disclosure of the taxpayers' information and makes very limited exceptions. The Public Protector is, according to SARS, not an exempted authority to whom such information may be disclosed under the TAA. It is SARS' case that this was explained to the Public Protector in previous correspondence between SARS and the Public Protector. This is correct. The quintessential example of such correspondence in which SARS explained

the legal position to the Public Protector is the SARS' letter dated 26 April 2019, attached to the founding affidavit 'G'. Moreover, attached to the said letter was a copy of the legal opinion by Adv Maenetje SC and Adv Ferreira which confirmed that SARS was prohibited from providing the Public Protector with taxpayer information. The Public Protector acted recklessly by issuing the 2019 subpoena much against advices from counsel, the Commissioner and the attorneys, without any attempt on her side to verify such advices.

[24] The impugned subpoena explicitly cites s 11(3) of the PPA and states that:

*"No postponement"* or *"extension"* will be *"granted"* unless the postponement therefor is made in person on the day. It is exclusively in this context that the said subpoena itself contemplates the potential existence of *"just cause"*. This is a concept that finds its origin in s 11(3) of the PPA. It is as clear as crystal that the Public Protector already has taken the position that s 69(1) does not constitute *"just cause"*. That stance by the Public Protector is unsustainable, completely puzzling, disregards the law completely, and is reckless. It compels SARS to act contrary to the letter of the TAA. And to make matters worse the Public Protector is not without a remedy. It is surprising why the Public Protector, much against the legal advice and the law; and the determined refusal by SARS to provide it with any information or document, insists on being provided with

the taxpayer information. In my view, by persisting with the issuing of the subpoena, despite the explanation by the Commissioner that he was manacled by the provisions of s 69 of the TAA from disclosing such taxpayer information; ignoring legal advice from senior and junior counsel tell us something about the Public Protector. All these factors demonstrate clearly that the Public Protector either misunderstood the law or if she understood it, she simply ignored it. That shows the proclivity of the Public Protector's to operate out of the bounds of the law. She has an inexplicable deep rooted recalcitrance to accept advice from senior and junior counsel. The Public Protector acted unreasonably, arbitrarily and in bad faith when she issued the 2019 subpoena.

WITHOUT "JUST CAUSE" AS SET OUT IN S 11(3) OF THE PPA

[25] The issue in this matter is not complex. It is the following: *"In the circumstances of this case what does the phrase "just cause" as envisaged in s 11(3) of the PPA mean?"* In my view, it means simply *"valid grounds"* or *"reasonable grounds"* or *"valid reasons"*. In the absence of valid reason no person may refuse or fail to comply with the direction or request under s 7(4) or refuse to answer any question put to him or her by the Public Protector. It also means that a person who has *"just cause"* or, to put it otherwise, who is prevented by the law from disclosing any information has a *"valid reason"* or reasonable grounds to refuse to co-operate with the Public Protector. In this case SARS

was prevented by the provisions of s 69(1) from complying with the Public Protector's 2019 subpoena. Accordingly, there was no *"valid grounds"* or *"just cause"* on the basis of which the Public Protector issued the impugned subpoena. It is unlawful and falls to be set aside with costs.

[26] I was referred by counsel for the Commissioner to the judgment of **Mankayi v Anglo Gold Ashanti Ltd 2011 (3) SA 237 (CC)** at paragraph 70, about the interpretation of legislation. Relying on **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 CC**, the Constitutional Court stated in Mankayi that:

*"While the language cannot always have perspicuous meaning, the elementary rule and starting point in an interpretative exercise entails a demonstration of the plain meaning of words in the relevant statutory provision to be construed."*

More importantly in this matter is the fact that both SARS and the Public Protector correctly accepted the fact that the information requested in the impugned subpoena, constituted "*taxpayer information*", as contemplated in s 67(1)(b) of the TAA, which defines taxpayer information as:

*"Any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information."*

[27] SARS and the Public Protector, without doubt, accept that SARS officials, currently and former, are indeed legally obliged under the TAA to treat the *"taxpayer information"* with the utmost confidentiality it deserves and not to disclose it. As pointed out in paragraph [24] *supra*, the problem that the Public Protector has is whether the said legal obligation imposed by s 69(1) of the TAA constitutes *"just cause"*. In Malachi v Cape Dance Academy International (Pty) Ltd 2010 (6) SA 1 CC at para 29 the Court stated that:

*"In De Lange v Smuts (cited as De Lange v Smuts N.O. and Others 1998 (3) SA 789 CC) Ackerman J has the following to say:*

> *"It is not possible to attempt, in advance, a comprehensive definition of what constitutes "just cause" for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case-by-case basis. Suffice it to say that the concept "just cause" must be grounded upon and considered with the values expressed in s 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole."*

[28] Having had a look at the said s 1 of the 1996 Constitution, I am of the view that the only subsection that is applicable in this matter is s 1(c) that deals with the *"supremacy of the Constitution and the law."* In terms of s 1(c), *"just cause"* means something done in terms of the Constitution and the law. Accordingly, one will have *"just cause"* if one is obliged by the Constitution or the law to do or not to do something. One has *"just cause"* if the underlying reason for doing or not doing something is based on or is in consonant

with the Constitution or the law. The *"just cause"* issue came again for consideration in Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party) 2008 (3) SA 355 (SCA) at p. 365 paras [38] and [39], which dealt with arrest to found jurisdiction. Howie P, as he then was, found that s 12(1)(a) of the Constitution was infringed where there was an absence of *"just cause"* or fair trial. He addressed *"just cause"* as follows:

*"In assessing whether establishing jurisdiction for purposes of a civil claim can be "just cause" it is necessary, first, to consider whether arresting the defendant can enable the giving of an effective judgment. There is a crucial difference between attaching property and arresting a person ... But more importantly the property attached will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution. Arrest, purely by itself, achieve neither. Security or payment will only be forthcoming if the defendant chooses to offer one or other in order to avoid arrest and ensure liberty. It is therefore not the arrest which might render any subsequent judgment effective but the defendant's coerced response.*

*The importance of an arrest itself to bring about effectiveness is illustrated by the result that would ensure were the arrested defendant do nothing either before, or in answer to, judgment for the plaintiff. Pending judgment there is no legal mechanism to enforce security or payment and failure to pay the judgment debt does not expose the defendant to civil imprisonment. Consequently, the prevention of liberty does not in itself serve to attain effectiveness."*

[29] Counsel for the Commissioner included, in the Constitutional values as codified in s 1 of the Constitution, subsection (1)(a) that deals with *"human dignity and achievement of*

*equality and the advancement of human rights and freedoms."* He submitted that human rights and freedoms engaged in subpoenaing taxpayer information include the right to privacy. This, he continued with his submission, is reflected in the founding affidavit where the Commissioner made the statement referred to in par. 3.4.3 *supra*. It is also confirmed by international and comparative law. In elaboration of his submission, counsel for the Commissioner referred the Court to Valderama *et al*. For instance, s 39(2) of the Constitution enjoins the Courts:

*"When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."*

Mr Gauntlet also submitted that the supremacy of the Constitution and the rule of law, require that *"just cause"* be interpreted to give effect to the rule of law. If a rule of law contained in an act of parliament prohibits the production of subpoenaed information, it is an inevitable Constitutional conclusion that *"just cause"* exists for withholding such information. A ground founded in law enacted by the Parliament which imposes a prohibition on disclosure self-evidently suffices in law as a valid reason for non-disclosure. A person who acts in terms of the law cannot be said to have acted unlawfully.

[30] Counsel for the Commissioner pointed out in his heads of argument that similarly established and binding South African precedents confirm that the concept *"just cause"* includes at the very least *"lawful cause"*. In this regard he placed reliance on S v Lovell 1972 (3) SA 760 A at 762 D – 763 B, where the concept *"just cause"* came up for consideration. In the said judgment, the Appellant, after an application for exemption from military training had been refused, had been charged with, and convicted of, without *"just cause"*, failing to report for military training in contravention of s 126 of Act 44 of 1957. In dealing with the concept *"just cause"* within the meaning of the said s 126 of the Act, the Court stated that:

*"The essence of the submission advanced on behalf of the appellant is that, in the present context, "just cause" is a wider concept than "lawful cause", and includes within its ambit religious convictions such as those deposed to by the appellant. "Just cause" ("grondige rede" in the signed text) is not defined in the Act. Similar, though differently worded, exculpatory expressions are to be found elsewhere in the Act ("e.g. "without lawful excuse" (sec 63(f)); "without good and sufficient cause" (sec 14 (b) of the First Schedule to the Act")); but, occurring as they do in different context, the secure of little, if any, assistance in determining the meaning of "just cause" in s 126. It may well be that, depending upon the context, the adjective "just" sometimes has a wider connotation than "lawful". Such a possibility was (contrary to the view which had been expressed in the Court below) adumbrated by the Court in S. v Weinberg, 1966 (4) SA 660 at page 665 H, in relation to the words "just excuse" occurring in s 212(1) of the Code. In a very similar context, the Appellate Division of Rhodesia decided that "just" is a word of wider import than "lawful", and that the difference between the words is "the difference which existed in England between the law and equity."* Thus an excuse sanctioned by existing rules of law is

encompassed by the narrower concept "lawful excuse". An official is excused if a competing legal obligation imposed by an existing rule of law requires nondisclosure.

[31] Mr Mpofu argued vociferously that "*just cause*" was not an issue in this matter and that it was irrelevant for the purposes of determining the crucial issues involved herein. He also put up no argument at all on *"just cause"*. In my view he missed the point. There is therefore no argument to gainsay the Applicant's counsel's argument in relation to *"just cause"*. The Public Protector did not even dispute the law as stated by counsel for the Commissioner.

[32] Relying on what was stated by Chief Justice Mogoeng Mogoeng in paragraph [57] of the judgment of Economic Freedom Fighters v Speaker of National Assembly and Others 2016 (2) SA 580 (CC), Adv Mpofu SC, submitted that the dispute in this matter concerned a battle between statutory or legislative obligations, on the one hand, and the Constitutional obligations and values contained in the constitution, on the other hand. In his argument, he was buoyed by the following paragraph:

*"[57] Our Constitution is the supreme law of the Republic. It is not subject to any law, including National Legislation, unless otherwise provided by the Constitution itself."*

In brief, he seemed to argue that because the Public Protector derived her powers to investigate any conduct in State affairs from the Constitution, her power to subpoena witnesses or witnesses to produce documents in terms of s 7(4)(a) of the PPA trumped the provisions of s 69(1) of the TAA. This issue whether there was any inconsistency between the provisions of the Constitution and the PPA on one side and of the TAA on the other side was appropriately dealt with in the legal opinion by Adv Maenetje SC and Adv Ferreira. The authority on which they relied was on the point. No other version exists.

[33] It is clear that the source of his argument was the approach of the Public Protector as set out in paragraph 32 of her answering affidavit. There she states that:

*"32. Some of the main legal principles which informed the Public Protector's view and stance in these applications include:*

*32.1 the supremacy of the Constitution;*

*32.2 the principle that legislation ought to be interpreted so as not to offend the values and rights enshrined in the Constitution;*

*32.3 other relevant rules of statutory and Constitutional interpretation;*

*32.4 the principle that no legislation can trump the contrary provisions of the Constitution;*

*32.5 Stare decisis or doctrine of precedence."*

[34] The core of the Public Protector's contention is that the Public Protector's powers trump all the other laws. The Public Protector is established by the provisions of s 181(1)(a) of the Constitution to strengthen the constitutional democracy of the Republic. In terms of the provisions of s 181(2) the Public Protector is independent and answerable only to the Constitution and the law.

[35] S 182 of the Constitution sets out the powers or functions of the Public Protector. It provides that:

*"182(1) The Public Protector has the power as required by national legislation –*

*(a) to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*

*(b) to report on that conduct; and*

*(c) to take appropriate remedial action."*

This is the constitutional power that the Public Protector enjoys. It is founded in the Constitution. It is to investigate, to report and to take appropriate remedial action. The Public Protector has additional powers conferred on her by national legislation. These powers are conferred on her by the provisions of s182 (2) of the Constitution which provide that:

*"The Public Protector has additional powers and functions prescribed by national legislation."*

A quintessential example of this national legislation that confers more powers and functions on the Public Protector is the PPA. The Constitution cannot cater for all the powers and functions of the Public Protector. If it was so it would have to cater not only for all the other Chapter 9 Institutions but all the other national legislations. It would be an enormous compendium. One of such powers that the Public Protector has in terms of the PPA is that she has the legal authority, in terms of s 7(3), *inter alia*, to direct any person to produce any document in his or her possession or under her control. In his opinion Adv Sikhakhane SC stated that:

*"The powers of the Public Protector can only be limited by the Constitution. The Constitution is the superior law to the TAA and the Public Protector may accordingly subpoena taxpayer records from SARS if such is in pursuance of her investigation."*

This statement is not entirely true. For instance, in Public Protector v South African Reserve Bank 2019 (6) SA 253 CC at paragraph [155] the Constitutional Court confirmed that the Public Protector, like all public litigants, must respect the law. It had the following to say:

*"The Public Protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution principal agents, to respect the law, to fulfil procedural requirements and to treat respectfully when dealing with rights."*

[36] The Public Protector is required to act in accordance with the law. Her powers of subpoena, which emanate from the PPA and not from the Constitution, are accordingly subject to the law. They therefore do not trump the provisions of s 69(1) of the TAA or *"just cause"* as set out in s 11(3) of the PPA. The presence of the phrase *"just cause"* in s 11(3) of the PPA is evidence enough that her powers are not limitless. The provisions of the law that empower the Public Protector to issue subpoenas are contained in the PPA and not in the Constitution. When the Public Protector issues a subpoena she does so by virtue of the powers conferred on her by national legislation. This therefore means that in the absence of such powers she must ensure that she complies with the provisions of s 2 of the Constitution. It is therefore a Constitutional obligation on the Public Protector to make sure that in all her conduct she complies with the Constitution and the law and that no conduct of hers offends the Constitution and the law. She does not have more powers than what the Constitution and national legislation confer on her. She is not at large to upstage the Constitution. We know of no law that gives her unfettered powers to ignore the Constitution and national law, in particular the TAA. One of the requirements she had to satisfy for her appointment as the Public Protector was that she had to be an advocate. There was a reason for this requirement and that reason was that the expectations were high that she would understand the law and

would apply it in her daily conduct. She would not adopt the *devil-may-care* attitude in the face of the law, advice and genuine legal opinion.

[37] It is of paramount importance to point out that the Constitution itself requires that the Public Protector's powers be regulated by national legislation. This is clear from the provisions of s182(1) of the Constitution. In Economic Freedom Fighters v Speaker of National Assembly the Constitutional confirmed that the Public Protector's powers should be regulated by national legislation. The Chief Justice held that:

*"a. The PPA is national legislation contemplated by the Constitution.*

*b. The Constitutional drafters were aware of the pre-existent provisions of the PPA which already conferred on the Public Protector additional powers not conferred by the Constitution itself.*

*c. The PPA provides details on the exercise of the Public Protector's powers including specifically the power to issue subpoenas, and*

*d. The PPA either added to or regulated the Public Protector's powers harmoniously with section 182 of the Constitution."*

In the face of the aforegoing, the Public Protector cannot contend that her empowering PPA is unconstitutional. She cannot put up any other argument or any other extraordinary construction of the PPA by resorting to the Constitution.

[38] The point raised and argued by Mr Mpofu that the provisions of the Constitution trump the provisions of the TAA fell apart once he conceded that if he were the Commissioner and faced with the same situation as the current Commissioner he would have refused to furnish the Public Protector with the information requested in the subpoena under scrutiny. His point was that the Commissioner and the Public Protector could resolve the impasse by using purposive interpretation of the TAA. He argued that if the Commissioner had used purposive interpretation he would have been able to assist the Public Protector. He could not sustain the point. The provisions of the TAA are very clear and need no other interpretation. The Commissioner has sworn to secrecy. He has no duty in law to furnish the Public Protector with the information and documents that she has subpoenaed. This was explained to the Public Protector.

[39] Several factors in this matter are common cause. One of those factors is that the Commissioner instituted this application in the public interest and that not only SARS but also the entire tax base stands to benefit from an authoritative pronouncement on this legal dispute between SARS and the Public Protector. Such pronouncement would bind both SARS and the Public Protector and each of them has a direct and substantial interest in such precedent which would guide them in the lawful exercise of public power without impeding each other's competence. There is the fundamental issue of taxpayer

confidentiality which the Commissioner is by law compelled to uphold for the benefit of all the taxpayers. This benefit is not limited to the Second Respondent. If one casts a final look at the path that led to the Public Protector issuing the subpoena on 21 October 2019 the conclusion is inescapable that the Public Protector was irrational, unreasonable, acted unlawfully and had very little regard to the Constitution and the law. It is therefore the duty of this court to hold the scales evenly between the Public Protector and the Commissioner and to declare invalid any practice which in the absence of the authority of an act of Parliament results in one Chapter 9 Institution trying to coerce the other Chapter 9 Institutions to act in contravention of the Constitution and the law. Any legal confrontation between the Chapter 9 institutions must be avoided at all costs and civil means to resolve their disputes, if any, should be fashioned out.

THE COUNTER-APPLICATION

[40] The answering affidavit incorporates what the Public Protector calls a conditional counter application to be granted taxpayer information on the strength of the Court Order as contemplated by the applicable legislation. The counter application was brought about because of what was perceived to be the concerns of the taxpayer. The taxpayer is the Second Respondent. It was again stated in the answering affidavit that the conduct of the Commissioner in refusing or failing to furnish the Public Protector with the

information or documents required in the impugned subpoena falls foul of s 11(3) of the PPA as it is not excusable on the basis of the *"just cause"* defence qualification.

[41] With regard to the counter application, the Commissioner contends that it is formally and substantially defective inasmuch as it does not satisfy the requirements of Rule 6(7) or Rule 6(11) of the Uniform Rules of Court. The argument raised by the Commissioner against the said counter application is that it does not have any notice of motion. S 6(7) of the Uniform Rules of Court provides that:

*"6(7)(a) Any party to any application proceedings may bring a counter application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action."*

Rule 6(11) of the Uniform Rules of Court provides that:

*"(11) Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge."*

In court, Mr Mpofu cited the following paragraph from Erasmus Superior Court Practice 2nd Edition, page D1-80:

*"A counter application need not be served by the sheriff since there is already an attorney on record for the applicant (respondent in reconvention) and a notice of motion is unnecessary."*

[42] Firstly, considering that the Commissioner was not the only party in the circumstances, it was fatal for the Public Protector to fail to bring a counter application without a proper notice of motion. It is not known whether a copy of the counter application was served on the Fourth Respondent. The possibility exists that if the relief sought in the counter application was specifically spelt out in the notice of motion, the Fourth Respondent might have had a different approach to the counter application. As no notice in respect of the relief sought in the counter application was served on the Fourth Respondent, or as there is no allegation in the papers before the Court that the counter application was served on the Fourth Respondent, granting the relief so sought would have meant granting the relief that directly and adversely affected the Fourth Respondent's rights. Such a relief cannot be implemented without prejudice to the Fourth Respondent. The Public Protector has also been warned by the Constitutional Court in paragraph [155] of the Public Protector v. South African Bank judgment supra that she is under a *"higher duty ... to respect the law; to fulfil procedural requirements and to treat respectfully when dealing with right."*

[43] Secondly, no case has been made out by the Public Protector for the relief that he seeks in the answering affidavit. The Public Protector relies entirely on the "Tweets" supposedly sent by the Second Respondent as a basis for seeking the relief that she sets out in the counter application. This is clear from the statement that:

*"She was advised and it will be argued that the aforementioned and recently adopted position of the taxpayer introduces a significant and game changing factor into the issues for adjudication herein, more particularly in that the requirement of written consent of the taxpayer has been fully and/or substantially met with concomitant effect of blunting the operation of s 69(1)."*

This is all that the Public Protector relied on for her counter application – unsubstantiated "tweets". There was no proof of the authenticity of the tweets. She regarded them as the taxpayer's written consent in terms of s 69(6)(b) of the TAA. She was wrong, for they are not, without much ado, admissible as evidence. In the absence of admissible evidence that the tweets originated from the Second Respondent, which, in my view, was the cornerstone of the counter application, the counter application has not been substantiated and is doomed to failure.

[44] Even if the Court were to decide the counter application in the favour of the Public Protector and assume that it was a proper application in terms of s 69(2)(c) of the TAA,

the Court would still have a good reason to refuse to grant the order sought in the counter application. Firstly, s 69(6) (a) of the TAA provides that:

*"The Court may not grant the order unless satisfied that the following circumstances apply:*

*(a) the information cannot be obtained somewhere."*

There is no allegation by the Public Protector anywhere in her papers that she was unable to obtain the information elsewhere. It was pointed out to Mr Mpofu that if the Public Protector seriously wanted the Second Respondent's taxpayer information, she could have approached the taxpayer's bookkeeper or auditors with the taxpayer's consent. The taxpayer's information in the possession of the Commissioner is not only always information that was obtained from the taxpayer. Some of it might have come from other sources. Therefore, the Commissioner was not at large to disclose such information. In this regard, the Commissioner's case enjoys the unqualified support of the well-established law of Welz and Another v. Hall and Others 1996 (4) SA 1073 CPD at page 1076G where the Court had the following to say:

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

*The legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily*

*be defeated it was said in Greenspan v R 1944 SR 149 at 155-6, orders were freely made for disclosure of those communications. These dicta were referred to by the Appellate Division in R v Kassim 1950 (4) SA 522 at 526G, without dissent*". See also Sackstein NO v South African Revenue Service and Others 2000 (2) SA 250 SECLD. The Court continued at pages 1077F-1078H to lay subsidiary guidelines for any person who seeks information from the Commissioner.

[45] The Public Protector did not explain why she did not obtain the Second Respondent's consent in order to access his taxpayer's information either from his auditors or taxpayers or in terms of s 69(2)(c). She had an opportunity to do so. She failed to do so. She was advised to apply to Court for the proper order. She still failed to do so.

[46] In conclusion this Court finds that the Public Protector has not made out a good case for the counter claim. The counter claim can therefore not succeed.

THE SECOND RESPONDENT'S AFFIDAVIT

[47] As pointed out in paragraph 2 *supra*, there was an attempt to hand in an affidavit made by the Second Respondent. This affidavit was styled *"SECOND RESPONDENT'S EXPLANATORY AFFIDAVIT"*. It was accompanied by a letter dated 5 March 2020 from Mr LD Mantsha of Lungisana Mantsha Attorneys. This letter was addressed to *"Attention Ms Naude, the clerk of Judge Mabuse"*. In line number 1 the letter stated that:

*"... we advise that we act on behalf of the Second Respondent."* These attorneys were not on record for any party before. This is in practice not how an attorney puts himself or herself on record. The proper procedure is not to write a letter to a Judge's Clerk or to the other side but to deliver a proper notice of appointment as attorney of record. They did not deliver any such notice of appointment as attorneys of record. This affidavit of the Second Respondent was delivered out of turn, without leave of the Court. It was not accompanied by any explanation why it was filed so late, out of turn and what its purpose was. It goes without saying that it caught the Commissioner on the hop. He would have been unable to deal with it at that late stage. Mr Mantsha did not apply for condonation for the late filing of the affidavit.

[48] This affidavit, if allowed, would have been to the disadvantage of the Commissioner. For these reasons and other reasons unknown to the Court, Adv Mpofu SC was nonchalant about it. He cared less whether the Court accepted or rejected it. According to him it served no purpose. For three reasons the affidavit has to be rejected, firstly, it was not properly before the Court; secondly, it was filed late, and thirdly and lastly, no purpose in the eyes of Adv Mpofu SC and of the Court would have been served by allowing it into evidence. This affidavit is therefore inadmissible.

[49] Now I turn to the issue of costs. The award of costs in any litigation depends on the discretion of the Court. It is trite law that the general rule with regards to costs is that costs are awarded to the successful party. Sometimes this is put in the following manner "costs follow the event". In order to obtain the order of costs that the Commissioner seeks in prayer 7 of his Notice of Motion, against the Public Protector, it is of paramount importance that she be notified, preferably but not necessarily, in the notice of motion, so that she may be afforded an opportunity to furnish reasons why such an order should not be granted against her. This is done in terms of the *audi alteram rule* which means that everyone is entitled to present his case. *In casu*, the Commissioner acted appropriately inasmuch as he notified the Public Protector in his notice of motion that at the hearing of this application he would apply to the Court for an order of costs in terms of which "15% of such costs be paid *de bonis propiis* by the First Respondent." "It is settled law that it is not necessary that there be formal notice of the request for a special cost order. The absence of a prayer for a personal costs order against a public official does not necessarily preclude the granting of such order. It is sufficient that the party against whom this order is sought is informed that the order will be asked for and has an opportunity to advance reasons why the order should not be

granted. See in this regard the Public Protector v The South African Reserve Bank par [165].

[50] The starting point, in my view, with regards to the order of costs is paragraph [155] of the judgment of the Public Protector v The South African Reserve Bank *supra* which states that:

*"The Public Protector falls into the category of a public litigant. A high duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights."*

The Public Protector is a public litigant. It is expected of her to always act with a high degree of perfection; that she will at all times act with care and respect for the Constitution and the law; that she should never show any gross disregard for her professional responsibilities or act inappropriately and in an egregious manner. She should never act *mala fide* or in bad faith or exhibit any gross negligence in her conduct. The Public Protector is therefore enjoined by the Constitution to observe the highest standard of conduct in litigation.

[51] Under certain circumstances public officials, like the Public Protector, who acts in a representative capacity may be ordered to pay the costs out of their own pockets. Some of such circumstances are where the Public Protector exhibits gross disregard for her

personal responsibilities; where she acts inappropriately and in an egregious manner; or if she is guilty of bad faith or gross negligence in conducting litigation. The judgment of Black Sash Trust v Minister of Social Development [2017] ZA CC 20: 2017 (9) BCLR 1089 (CC) "Black Sash II affirms the principle that public officials may be ordered to pay the costs out of their own pockets if they are guilty of bad faith and negligence. The source of that power is in the Constitution itself which mandates Courts to upholds and enforce the Constitution. It is apparent from Black Sash II that the object of costs *de bonis propiis* is to vindicate the Constitution. See South African Social Security Agency v Minister of Social Development Empowers [28] ZACC 26 paragraph [38]. A public official who acts improperly and in flagrant disregard of the Constitutional norms may also be ordered to pay costs *de bonis propiis*. See in this regard Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 SCA at page 77. Counsel for the Commissioner submits that the Public Protector should be ordered to pay 15% of the costs *de bonis propiis*. He mentioned eight reasons in support of his submission. Some of those reasons are as follows, that:

51.1 the Public Protector sought the second senior counsel's opinion on a different topic. In this way she acted with bad faith;

51.2 she failed to put a copy of the legal opinion of senior and junior counsel before the second senior counsel. Again, this was an instance where the Public Protector acted *mala fide*;

51.3 she was advised to obtain a Court Order in order to gain access to the "taxpayer's information". This advice was based on the provisions of the TAA. She failed to take advice and in the process acted with gross disregard for her professional responsibilities;

51.4 she sought advice from senior counsel without involving the Commissioner. She litigated in bad faith;

51.5 she insisted that the Commissioner should comply with the subpoena despite being advised that it would be unlawful in terms of the TAA for the Commissioner to do so. In this manner she litigated recklessly, failed to uphold the Constitution and the law. She was, in my view, improperly and in flagrant disobedience to the Constitutional norms;

51.6 she abused her powers. She used her powers to subpoena for wrong reasons;

51.7 she had been advised to seek clarity from the Court about the extent of her powers vis-à-vis the provisions of the TAA but she failed to do so. Again acting unprofessionally in the circumstances;

51.8 for no valid reasons at all she insisted that she was entitled to the information she had asked the Commissioner to furnish her with. She thereby overlooked advices, failed to observe national legislation and had this wrong impression that she had unlimited powers. She failed in this regard to uphold the Constitution;

51.9 she failed to seek a proper written confirmation of the Second Respondent to access his taxpayer information. This arose obviously from her failure to study the TAA, to follow the advice and from the fact that she wrongly thought that her powers in terms of s7(4)(a) of the PPA could trump the provisions of the TAA. She also failed to acquaint herself with the provisions of the TAA. Whereas an advocate she should and could have done so. She failed dismally short of the high standard expected of an advocate.

[52] On the other hand, it was argued by Adv Mpofu SC that because the issue involved in this matter turned on legal issues, the Public Protector should not be made to pay the 15% of the costs *de bonis propiis*. I have set out above the circumstances under which

the Public Protector may be ordered to pay the costs *de bonis propiis*. Accordingly, the nature of issues involved is not material. What is of paramount importance at this stage is whether such circumstances that support an order of costs *de bonis propiis* against the Public Protector do exists. In my view they do exist and no valid reason has been furnished why this Court may make such an order.

[53] In conclusion, this Court is satisfied that the Commissioner has made out a good case for the relief that he seeks and that the counter application on the other hand lacks merit.

[54] The following order is accordingly made:

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

2. It is furthermore hereby declared that the Public Protector's subpoena powers do not extend to the taxpayer information;

3. The First Respondent's counter claim is hereby dismissed, with costs;

4. The First Respondent is hereby ordered to pay the costs of this application.

5. The First Respondent is hereby ordered to pay *de bonis propiis* 15% of the Applicant's taxed costs.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

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|---|---|
| Counsel for the Applicant: | Adv J Gauntlett (SC) |
| | Adv. F Pelser |
| Instructed by: | Da Silva Attorneys |
| | C/o Gildenhuys Malatji Inc |
| Counsel for the First Respondent: | Adv D Mpofu (SC) |
| | Adv T Motloenya |
| | Adv F Ngqele |
| Instructed by: | Seanego Attorneys Inc |
| | C/o SV Nagkabgy Attirbets |
| Dates heard: | 6 March 2020 |
| Date of Judgment: | 23 March 2020 |