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Taxpayer Confidentiality: Implications of The Tax Secrecy Provisions Regarding Illegal Miners

By

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This research is the culmination of two arduous years. It has been a difficult and lonely process that made me feel like dropping out every second day. I had no idea how I would see it through. Now that this odyssey has been completed, I realise that I did not need to know how I was going to get to the finish line. I just needed to know Who (God) would see me through. I hope whomever is reading this with the intention of embarking on such a journey (or any other academic/professional journey) will know this too whenever things seem unbearable and you do not see any way out but to quit.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1. Introduction and background

Illegal activities are not only detrimental to the societies in which they are carried out, they also affect the fiscus through lost revenue caused by the non-declaration of illegal income and other nefarious tax schemes perpetuated to defraud revenue authorities.[1]

Given that registered taxpayers are obliged to declare all receipts/accruals of income for purposes of tax assessments, a question arose (which has been dealt with extensively by courts the world over): whether receipts/income received by or accrued to a taxpayer carrying on illegal activities should be regarded as being 'received by' or 'accrued to' said taxpayer for determining his gross income for income tax purposes.[2]

It is important to note that the purpose of taxation is to levy the appropriate tax on income that is taxable, as per the tax statutes, not to punish criminal activities.[3] It is therefore asserted that two implications arise from this:

(i) The punishment of those who engage in illegal activities falls within the realm of criminal law; and

(ii) Individuals who derive their income from illegal activities are still liable to pay tax on their illegal income.

Therefore, it is submitted that a taxpayer's moral turpitude is not a litmus test for the taxability of income. In *James v United States,*[4] a case involving a union official who had embezzled money from his union and a related insurance company, the court held that income from illegal activities is taxable, notwithstanding the fact that the union

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[1] OECD "*Shining Light on The Shadow Economy: Opportunities and Threats*" at 19 (2017).

[2] Section 1 of the ITA defines 'gross income' as follows: '**gross income**' – "*in relation to any year or period of assessment, means – (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic.;* Examples of cases that dealt with taxability of illegal income in South Africa are *MP Finance Gorup CC (In Liquidation) v CSARS* 2007 (5) SA 521 (SCA*) and CIR v Delagoa Bay Cigarette Co Ltd* 1918 TPD 392.

[3] *Federal Commissioner of Taxation v La Rosa* [2003] FCAFC 125, paragraph 5; One prominent example is the case of US mobster Alphonse 'Al' Capone who was convicted of tax evasion for not declaring income derived from illegal proceeds (see https://www.forbes.com/sites/kellyphillipserb/2020/10/17/al-capone-convicted-on-this-day-in-1931-after-boasting-they-cant-collect-legal-taxes-from-illegal-money/?sh=5d28e17b1435).

[4] 366 U.S 213 (1961), pg. 366.

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official, as the recipient of embezzled monies, had a legal obligation to make restitution of the funds.

The taxation of income derived from illegal activities has also been the subject of consideration by South African courts over the years. The Tax Court in *IT 11282,*[5] citing various judicial precedents to support its conclusion, intimated that income received by taxpayers is subject to tax, notwithstanding the fact that said income could be tainted with illegality.[6] In the landmark case of *MP Finance Group CC (In Liquidation),*[7] the Supreme Court of Appeal ("SCA") clarified that the proceeds of unlawful activities and/or receipts are taxable, provided that the taxpayer had an intention to appropriate the proceeds for his own use and benefit.[8] This principle was initially laid down in *CIR v Delagoa Bay Cigarette Co.*[9] These court cases will be discussed in further detail in Chapter 2.

The SCA settled the question of whether receipts paid to an illegal pyramid scheme are considered to be "received" within the meaning of 'gross income' of the Income Tax Act 58 of 1962 ("ITA") in the affirmative. Notwithstanding, the issue regarding taxability of illegal income remains debateable. This is because *MP Finance* has not canvassed questions regarding whether the taxability of illegal income will apply generally to all illegal income or only in selected instances.[10] The South African Revenue Services ("SARS") has implied that there is a blanket taxability of illegal income.[11]

One of the questions this research sets out to answer in the next chapter is: Would the abovementioned principle apply to income that is derived by illegal miners in South Africa, also known in South Africa as the "zama-zamas" (which loosely translates

[5] *IT 11282* (2005) ZATC 5 (18 March 2005).
[6] *Commissioner of Taxes v G* 1981 (4) SA 167 (ZA) 168C-169H; ITC 1545, 54 SATC 464 (C) 474-5; ITC 1624, 59 SATC (T) 373 at 377-8; *Mann v Nash (Inspector of Taxes)* 1932 1 KB 752 at 757-8; *CIR v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A) 556-557; *Minister of Finance v Smith* 1927 AC 193 at 197-8; *Partridge v Mallandaine* (1886) 18 QBD 276; *Southern (Inspector of Taxes) v AB* 1933 1 KB 713 at 718-9; and *CIR v Delagoa Bay Cigarette Co* Ltd 1918 TPD 391 at 394 .
[7] 2007 (5) SA 521 (SCA).
[8] Paragraph 12.
[9] *CIR v Delagoa Bay Cigarette Co* Ltd 1918 TPD 391.
[10] LG Classen "*Legality and Income Tax – Is SARS 'entitled to' Levy Income Tax on Illegal amounts 'Received by' a Taxpayer*?" (2007) 19 *SA Merc LJ* at 553.
[11] SARS Interpretation Note no: 80 (2014) at 14.

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"taking a chance" and in some township dialects implies those who "try and try again").[12]

It first needs to be established what causes certain mining activities to be illegal, and secondly, the application of the general principles of tax and the principle set out in the *MP Finance* and *Delagoa Bay Cigarettes Co* decisions to determine the taxability of income earned by the zama-zamas.

1.1. Illegal mining in South Africa

Illegal artisanal mining activity/illegal mining is an unemployment and poverty driven illegal activity, perpetuated in remote mining communities of South Africa (i.e., Krugersdorp, Klerksdorp and Welkom).[13] This can be referred to as the mining of precious metals (i.e. gold) extraction activities, that are subsistence-based, labour-intensive by making use of rudimentary tools, with minimal technological mechanisation and which occur outside of the contours of the law.[14]

The practice of illegal mining contravenes the nation's mineral/mining laws as the prospection, mining, exploration or production of minerals or petroleum resources without a permit is proscribed by the requisite mining legislation.[15] Furthermore, mining or extractive activities may not be conducted without, *inter alia*, an approved environmental permit in line with environmental legislation.[16] A brief history of the zama-zamas and their illegal mining activities will be discussed in further detail in Chapter 2.

1.2. Taxability of income

It is trite that the first step of calculating a taxpayer's taxable income is to first determine the taxpayer's 'gross income'.[17] Section 1 of the ITA provides:

> **"'*Gross income'*,** *in relation to any year or period of assessment, means –*

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[12] K de Greef "*The Dystopian Underworld of South Africa's Illegal Gold Mines*" (2023) at 4; https://www.africanews.com/2023/06/23/south-africa-nearly-30-illegal-miners-found-dead//.
[13] JS Andrew '*Potential application of mediation to land use conflicts in small-scale mining*' (2003) 11 *Journal of Cleaner Production* 117.
[14] Buxton A "*Responding to the challenge of artisanal and small-scale mining. How can knowledge networks help?*"(2013) *International Institute for Environment and Development* at 4.
[15] Section 5A of the Minerals and Petroleum Resources Development Act 28 of 2000.
[16] Ibid.
[17] M Stiglingh et al *Silke: South African income tax* 2021 at 23.

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(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic." (Own emphasis added)

It is important to note that all of the requirements of the abovementioned definition of gross income must be met for an amount to qualify as 'gross income' for income tax purposes.

Therefore, for a South African tax resident,[18] receipts will be included in his gross income if it includes an amount, in cash or otherwise, received by or accrued to or in his favour in a specified period or year of assessment (excluding receipts and accruals of a capital nature).[19] For a non-resident,[20] receipts will be included in his gross income if it includes an amount, in cash or otherwise, received by or accrued to or in his favour in a specified period or year of assessment from a source within South Africa (excluding receipts and accruals of a capital nature).[21]

Chapter 2 below will include an expansion on the above principles and determine whether the taxability of illegal income (by including the illegal income in the taxpayer's gross income) extends to income derived from illegal mining.

1.3. Disclosure of income derived from illegal mining

As will be canvassed more fully in Chapter 3, South African tax statutes require taxpayers to make full disclosures regarding their taxable income. Non-disclosure of taxable income could not only lead to severe financial consequences such as penalties

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[18] A 'resident' for tax purposes is defined in section 1 of the ITA in terms of the physical presence test that is underpinned by 3 requirements, namely that an individual will be regarded as a tax resident in South Africa if the person is physically present in South Africa for a period(s) exceeding (i) 91 days in the current year of assessment; (ii) 91 days in total during each of the 5 years preceding the current year of assessment; and (iii) 915 days in total during those 5 preceding years of assessment. Residence can also be determined using the common law principle of Ordinarily Resident (see https://www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/tax-and-non-residents/).

[19] *Op Cit* note 13 at 28.

[20] Persons (including juristic) who are not tax residents in South Africa (see https://www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/tax-and-non-residents/).

[21] *Op Cit* note 13 at 28.

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and interest being levied by SARS, but could also result in criminal prosecution.[22] Non-disclosure for tax purposes in the case of the zama-zamas can be argued to be tax evasion, because it constitutes non-reporting of income for tax purposes, even though such income is derived from an illegal all-cash business.[23] This could potentially attract a fine or imprisonment of up to five years.[24] For completeness, tax evasion must be distinguished from tax avoidance. Tax evasion refers to illegal schemes deliberately (wilfully) undertaken by a taxpayer to free himself from a tax burden.[25] Common examples of tax evasion include a deliberate failure by a person carrying on a cash business to report the full amount of revenue received.[26] In contrast to tax evasion, tax avoidance entails a situation in which a taxpayer has arranged his affairs in a perfectly legal or lawful manner, with the result that he has either reduced his income or has no income on which tax is payable (provided that there is no provision in the legislation that prevents the specific avoidance or reduction of tax such as the Income Tax Act general anti-avoidance rules in sections 80A-L).[27] This right to tax avoidance was established in *IRC v Duke of Westminster*[28] where Lord Tomlin held as follows:

> "*Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax payers may be of his engenuity, he cannot be compelled to pay an increased tax*."[29]

In view thereof, ostensibly it can be argued that the zama-zamas are evading tax, as they operate an illegal cash business, whose receipts are not declared to SARS.

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[22] Section 234 of the Tax Administration Act sets out instances in which a person could be liable to a fine or imprisonment of up to two years, among those is the failure to submit a return or failure to disclose material facts to SARS in contravention of Tax Acts; Non-compliance with Tax Acts could result in the imposition of penalties (which incur monthly interest of up to 100%) in accordance with section 211 of the TAA.
[23] A P De Koker "*Silk on South African Tax*" (2022), at 1136.
[24] Section 235 of the Tax Administration Act.
[25] *CIR v Estate Kohler & Others* 1953 (2) SA 584 at 593H. Also see A.P De Koker & R.C Williams '*Silke on South African Income Tax'* (2021) at 1136.
[26] Ibid.
[27] *CIR v Conhage (Pty) Ltd* 1999 4 SA 1149 (SCA) 1155G-H. Also see *Silke on South African Income Tax* at 1135.
[28] (1936) 19 TC 490 (UKHL).
[29] At 520.

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1.4. Taxpayer rights and the Constitution

In our democratic society everyone has human rights as set out in the Bill of Rights, even criminals.[30] For example, in 1995 the state refused to impose the death penalty on someone who had been convicted on multiple counts of murder.[31] This was done to preserve said person's right to life and maintain the constitutional commitment to human rights.[32]

The Organisation for Economic Co-operation and Development ("OECD") has found that taxpayers enjoy numerous rights, *inter alia*, right to privacy, certainty, and the right to confidentiality of taxpayer information.[33] Although South Africa is not a member of the OECD, it does observe OECD policies/conventions and collaborates with the OECD on a wide range of policy issues i.e., fiscal policy and competition policy.[34] Furthermore, the OECD's position on taxpayers' right to privacy and secrecy is aligned with South Africa's constitutional imperatives.

In South Africa, taxpayers enjoy, amongst other rights, the right to privacy as per section 14 of the Constitution of the Republic of South Africa of 1996 (the "Constitution").

The secrecy of taxpayer information is governed by section 69(1) of the Tax Administration Act 28 of 2011 ("TAA"), which provides that current or former SARS officials must preserve the tax secrecy of the taxpayer's information and may not disclose taxpayer information outside of the realm of SARS. This exemplifies the sacrosanct nature of taxpayer information, which was also observed by the Constitutional Court ("CC") in *Public Protector v CSARS*[35] where it was held that the Public Protector's powers do not trump the prohibition of disclosure contained in section 69(1) of the TAA. The disclosure of taxpayer information, however, is subject to certain narrow exceptions such as disclosing information to the South African Police

[30] Sections 7 and 35 of the Constitution of the Republic of South Africa (enshrining the rights of arrested, detained and accused persons).
[31] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.
[32] Ibid.
[33] OECD "*Taxpayers' Rights and Obligations: A survey of the Legal Situation in OECD Countries*" 1990.
[34] A W Oguttu "*Curbing 'treaty shopping': the 'beneficial ownership' provision analysed from a South African perspective*" XL CILSA (2007) at 242; Also see https://www.oecd.org/southafrica/south-africa-andoecd.htm#:~:text=South%20Africa's%20participation%20in%20OECD%20activities&text=South%20Africa%20has%20adhered%20to,a%20Party%20in%20January%202023.
[35] *Public Protector v Commissioner of the South African Revenue Service and Others* 2022 (1) SA 340 (CC), at paragraph 51.

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Service ("SAPS") or National Prosecuting Authority ("NPA") if the information constitutes material information that would prove a tax offence.[36] Therefore, the zama-zamas could find solace in the fact that SARS would treat their tax information with utmost secrecy (should this research find that the secrecy provisions could apply to them as taxpayers).

In addition to the tax-related penalties and interest (canvassed above) that may be levied, disclosure of confidential taxpayer information (e.g., the source of the income) outside the sphere of SARS (i.e., through a court order) could potentially expose the zama-zamas to criminal prosecution for conducting illegal activities.[37] The link between declaring tax by illegal miners and prosecution of illegal miners for non-tax related matters can occur through the NPA investigating crimes such as money laundering as envisaged in section 4 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). POCA empowers the director of the NPA to request any person employed in government departments or statutory bodies to furnish the NPA with information that may reasonably be required for any investigation in terms of the POCA.[38]

As briefly stated above, there are narrow exceptions to the prohibition of disclosing taxpayer information, whereby taxpayer information may be shared with certain third parties or in certain instances, which will be discussed in further detail in Chapter 3.

Parallel to taxation, the pertinent question then is: Do the tax secrecy provisions in the TAA apply to the zama-zamas, whose information if disclosed, may reveal their criminal activities? If this taxpayer information is shared outside the realm of SARS (e.g., taxpayer information is shared with the NPA) is there an encroachment on their constitutional right to privacy, and if so, is a limitation of their right to privacy justified in terms of section 36 of the Constitution of South Africa? This will be address in detail in Chapter 4.

An important argument (often raised by SARS as will be seen in chapters 3 and 4) is that the edifice of the tax system is underpinned by maintaining confidentiality and

[36] Section 69(2) (a) – (d) of the Tax Administration Act.
[37] Section 69(2)(c) of the TAA; Also see J Hanzel '*Self-incrimination and the use of income tax returns in non-tax criminal prosecutions'* 30 Wash. & Lee L. Rev (1973) at 182.
[38] Section 71 of the POCA.

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secrecy of taxpayer information.[39] To this end, SARS promises to keep taxpayer information a secret, even for those taxpayers who derive income illegally.[40] It is important to note that this is not based on a gentlemen's agreement between SARS and taxpayers, it is a constitutional and statutory obligation enshrined in the Constitution and the TAA. With this, it is important to also bear in mind the fact that SARS officials must take an oath or solemn declaration undertaking to comply with the secrecy provisions in the TAA.[41] In addition, section 236 of the TAA criminalises a breach of section 69(1) of the TAA.

Taxpayer secrecy itself will be addressed in further detail in Chapter 3.

The above mechanism is essential for the effective working of South Africa's fiscal policy and has been recognised with approval by courts such as in *Arena Holdings v SARS*[42] and *Public Protector v CSARS*.[43] It stands to reason that there has been a balance struck between the protection of the secrecy of taxpayer information and the sharing thereof outside of the realm of SARS. This issue recently served in front of the Constitutional Court, where the court was tasked to determine the constitutional validity of a High Court order that ordered that taxpayer information must be shared with a third-party requestor in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") if it is in the public interest that such taxpayer information be shared.[44] The PAIA public interest override provision relevant for this research is enshrined in section 46(a) and (b) of the PAIA, which compels the information officer of a public body such as SARS to disclose a record (information) if the information would reveal evidence of, *inter alia*, an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question (section 69(1) of the TAA in this instance).

The mechanism behind PAIA's public interest override provision is also embedded in section 71 of the TAA which enables a senior SARS official, if ordered by a judge, to disclose information in criminal, public safety, or environmental risk matters. As will be

[39] G Palmer "*Keeping Taxpayer Information Secret*" (2021).
[40] SARS Media Release (can be found at https://www.sars.gov.za/media-release/tax-administration-act/#:~:text=A%20person%20who%20is%20a,is%20not%20a%20SARS%20official.)
[41] Section 67(2) of the Tax Administration Act.
[42] *Arena Holdings (Pty) t/a Financial Mail and Others v SARS and Others* 2023 (8) BCLR 905 (CC).
[43] *Public Protector v Commissioner of the South African Revenue Service and Others* 2022 (1) SA 340 (CC).
[44] *Arena Holdings (Pty) t/a Financial Mail and Others v SARS and Others* 2023 (8) BCLR 905 (CC).

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more evident below (along with the reason why), the public safety and environmental risk element will be the focal point of this research in determining if section 71 of the TAA and the PAIA public interest override provisions can be triggered in cases involving the zama-zamas.

The evidentiary burden of invoking the public interest override provisions is high, given the sacrosanct nature of taxpayer information.[45] This will be canvassed more fully in Chapters 3 and 4.

1.5. Problem statement

One of the issues plaguing tax administration in South Africa is the tension that occurs in which situation SARS may disclose taxpayer information and where such a breach of taxpayer confidentiality would outweigh societal harm contemplated in the PAIA and TAA. This not only erodes the trust of taxpayers in the tax system, but also encroaches on constitutional imperatives (i.e., right to privacy, right against self-incrimination).[46] This research will consider specifically in what scenarios can the taxpayer information of the zama-zamas be shared beyond the realm of SARS and the impact of such sharing of seemingly, secret taxpayer information.

1.6. Research question

1.6.1. The central question of this research is as follows: What are the implications of the TAA's secrecy provisions on illegal miners?

To ultimately answer this question, several sub-questions will have to be addressed, namely:

1.6.2. How does illegal mining affect South Africa, does it pose an imminent and serious public safety or environmental risk to South Africa?

1.6.3. Can the receipts/income received by or accrued to a taxpayer carrying on illegal mining be regarded as being "received by" or "accrued to" said taxpayer for determining his gross income for income tax purposes? And whether the general principles of determining "gross income" apply to income that is derived by illegal miners?

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[45] Ibid.

[46] *Arena Holdings (Pty) t/a Financial Mail and Others v SARS and Others* 2023 (8) BCLR 905 (CC), at par 48.

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1.6.4. Do the tax secrecy provisions in the TAA apply to the zama-zamas, whose information if disclosed, may reveal their criminal activities? If so, what are the exceptions under which this taxpayer information may be disclosed outside of SARS (i.e., when may/must SARS share taxpayer information outside the realm of SARS)?

1.6.5. If taxpayer information is shared outside the realm of SARS (e.g., with the NPA/SAPS), is there an infringement on the zama-zamas constitutional right to privacy, and is there a limitation of their right to privacy that is justified in terms of section 36 of the Constitution of South Africa?

1.6.6. What are the consequences if there were a breach of confidentiality by SARS pertaining to illegal miners' tax information?

1.6.7. How can the tension be remedied to ensure tax compliance by illegal miners?

1.7. Purpose of the research

This research aims to investigate whether illegal miners would be protected by the TAA's secrecy provisions and in what exceptional circumstances can their taxpayer information be shared with third parties. In addition, the research will also canvass whether it is in the public interest and general interests of justice for SARS to share confidential taxpayer information where illegal miners are concerned. The TAA does not provide express guidance on the thresholds in which the exceptions to confidentiality would apply – they merely set out the instances in which SARS must disclose taxpayer information (through a court order) and does not go a step further to define these exceptions. I will also consider the relevant provisions of PAIA, considering the recent Constitutional Court judgments of *Arena Holdings (Pty) t/a Financial Mail and Others v SARS and Others.*

1.8. Scope (limitation) of the research

This study is a fusion of concepts encompassing general principles of tax, tax administration, and tax and development. It will be limited to the analysis of the disclosure of tax information by illegal miners (as taxpayers) and the protection they seemingly have under the TAA, read with PAIA.

The study also canvasses potential constitutional breaches and whether said constitutional breaches are justifiable under the circumstances.

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1.9. Research Methodology

This research will be conducted by way of desktop research and analysis of tax statutes (particularly the ITA, TAA and PAIA), case precedents, journals, books, and miscellaneous material such as newspaper articles that have canvassed topics relating to the research question.

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CHAPTER 2: TAXING INCOME DERIVED FROM ILLEGAL MINING

2.1. Brief history on how zama-zamas came to be

The zama-zamas can partly be traced back to South Africa's mining industry's growing reliance on migrant labour.[47] This saw a spate of migrant workers (mostly comprising the Basotho nationals) coming to South Africa to work at mines as cheap and docile labour.[48]

Legislation played a key role in increasing the presence of the Basotho in mines as it sanctioned the employment of Basotho nationals in, *inter alia*, South Africa's mining and agriculture industries – employment by these migrants in more formal industries was proscribed.[49] Over the years, this was also intensified by Lesotho's job creation policy which was, and still is, premised on using labour migration as one of its tools to promote employment.[50]

South Africa's mining industry experienced a boom in the 1980s where it contributed approximately 21% to South Africa's GDP.[51] Because South Africa's (and the world's) precious metals (i.e., gold) are not infinite, over the years this contribution plummeted owing to shrinking reserves which, ultimately, made exploration no longer economically viable for mining houses.[52] This translated into the closure of mines that resulted in mass job losses.[53] This high unemployment rate, coupled with extreme poverty and a lack of alternative income-earning opportunities, cultivated the zama-zamas, remnants of formerly exploited miners, who have resorted to illegal mining to eke out a living.[54]

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[47] J Harington et al '*A century of migrant labour in the gold mines of South Africa*' Journal of the South African Institute of Mining and Metallurgy (2004) at 65.
[48] Ibid.
[49] Aliens Control Act No. 30 of 1963 (repealed).
[50] S Mokoena and S Balkaran "*An Exploration of Constraints for Free Movement of People in Africa: A case of Lesotho and South Africa*" African Journal of Public Affairs Vol 10 (2), at 119 (2018); Lesotho National Policy for Migration and Development 2013.
[51] P Ledwaba et al '*When Policy is not enough: Prospects and challenges of artisanal and small-scale mining in South Africa*' Journal of Sustainable Development, Law & Policy 7(1) 2015, at 3.
[52] Ibid.
[53] Report on *Mining Sector Employment Forecast to 2025*, prepared for the Human Sciences Research Council (2011), at 8.
[54] Ibid.

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2.2. Effects of the activities of the zama-zamas

The activities of the zama-zamas have come with elevated levels of violence in the neighbouring communities they operate in which is exemplified by gang/turf wars. The impact of illegal mining goes beyond violent turf wars; it also has economic, social, and environmental corrosive effects.[55]

2.2.1. Economic effects

Illegal mining cost the state millions of rands annually in lost tax revenue.[56] The loss is not only underscored by the zama-zamas not paying income tax, but also owing to money laundering ancillary to illegal mining.[57]

There is no single source that provides an estimate on the economic loss caused by illegal mining. However, rough estimates of the zama-zama's output suggest that lost gold production is approximately R14 billion annually.[58] This is because the zama-zamas have managed to gain access to active mines, causing significant financial losses in lost sales (resulting in loss of royalties) and production.[59]

Another cost of illegal mining includes damage to infrastructure (public and private) caused by vandalism or theft of infrastructure such as electric cables/copper wires to be used in their illegal operations (through illegal electricity generation).[60]

2.2.2. Social effects

The zama-zamas are mostly associated with criminal syndicates which often plague neighbouring communities (where illegal mines are situated) with violence and insecurity.[61] The lucrative nature of illegal mining has brought about an outbreak of violent turf wars, at times spilling over to neighbouring communities and leaving innocent civilians as collateral.[62]

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[55] A Martin '*Uncovered: The Dark World of the Zama-zamas'* (2019), at 2-4.
[56] https://www.miningweekly.com/article/south-africa-losing-out-on-billions-of-rands-sibanye-on-millions-owing-to-illegal-mining-2017-07-29.
[57] Ibid.
[58] *Op cit* note 52, at 2.
[59] Ibid.
[60] Ibid, At 1.
[61] *Op cit* note 12, at 6.
[62] https://www.timeslive.co.za/sunday-times-daily/news/2023-08-06-zama-zamas-targeted-in-soweto-tavern-massacre-linked-to-latest-murders/.

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Furthermore, neighbouring communities are subjected to forced child labour, extortion, murder, rape, and prostitution.[63] Not only do their operations pose a danger to neighbouring communities, but also to the zama-zamas themselves. A further risk posed by illegal mining includes fatalities of the zama-zamas in derelict mines because the requisite health and safety measures are not observed.[64] The zama-zamas also violate immigration laws through human trafficking that results in the proliferation of an influx of undocumented immigrants.[65] Furthermore, illegal miners disregard their own health and safety precautions in their activities and are therefore exposed to health risks including being trapped underground for days or become exposed to toxic levels of carbon monoxide and explosive methane which may cause brain damage in the long-term.[66]

2.2.3. Environmental effects

The zama-zamas operate beyond the contours of the regulatory framework which contemplates the protection of the environment. This is because one of the prerequisites of obtaining a mining license is that an applicant must ensure that his mining activities will not result in unacceptable ecological degradation or damage to the environment.[67] The fact that the zama-zamas conduct their mining operations illegally is indicative of the fact that their activities are not environmentally friendly. The use of mercury in illegal mining operations is one of the contributing factors to environmental degradation – as the zama-zamas make use of extremely environmentally unfriendly refining methods using mercury.[68] Mercury is an extremely toxic chemical that pollutes the environment and can lead to uncontrollable excavation of soil, such as soil erosion (which can also be caused by open pits). The nature of the negative impact illegal mining has on the environment is multidimensional, including negative impacts on the soil profile and destruction of the soil structure, water

[63] *Op cit* note 12, at 6.
[64] https://ewn.co.za/2023/07/03/zama-zama-survivor-describes-unforgettable-horrors-of-harmony-gold-mine-blast; and https://www.news24.com/news24/southafrica/news/eight-suspected-zama-zamas-suffocate-underground-as-heavy-rains-block-mine-exit-with-mud-20230109.
[65] *Op cit* note 12, 6-7.
[66] D Quinn et al '*Complications of carbon monoxide poisoning: A case discussion and review of literature'* The Primary Care Companion to the Journal of Clinical Psychiatry (2009), at 76.
[67] Section 23 of the Minerals and Petroleum Resources and Development Act 28 of 2000.
[68] https://www.mining-technology.com/features/lead-mercury-and-the-poisonous-legacy-of-mines-in-africa/.

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contamination, river siltation and pollution.[69] Mercury not only contaminates and degrades the environment, but it also poses severe health risks to human health, especially among the more vulnerable, such as children.[70]

At this point, it is established that not only are the operations of zama-zamas accompanied by gross human rights violations, imminent danger to national security, health, and human life, but also that illegal mining poses severe risks to the environment such as through deforestation, land degradation and pollution.

The relevance of the social and environmental impact of illegal mining will be canvassed in Chapter 3. In Chapter 1, it was established that the activities carried out by the zama-zamas are illegal. The research will now turn to consider the taxability of income derived from illegal mining.

2.3. Taxability of income derived from illegal mining

As canvassed above, for income to be taxable it must meet the requirements of 'gross income' as envisaged in Section 1 (definition section) of the ITA. The definition of 'gross income' is:

> '***Gross income'***, *in relation to any year or period of assessment, means –*
> *(i) in the case of any* <u>*resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident*</u>*; or*
> *(ii) in the* <u>*case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic*</u>*."* (Own emphasis added)

Sub-section (i) of the above definition implies that tax residents who receive or has income accruing to them in relation to a year of assessment will be liable for tax by virtue of them being tax residents of South Africa. It is important to note that South Africa has a residence-based tax system which has the effect that a resident's

[69] S Mutelo "*An Examination of the Environmental Impact of Illegal Mining Activities on Land in the Copperbelt Province of Zambia*" Journal of Contemporary African Philosophy Vol 4(3) (2023), pg. 23-24.
[70] United Nations '*Combating transnational organized crime and its links to illicit trafficking in precious metals and illegal mining, including by enhancing the security of supply chains of precious metals'* (2019), at 2.

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worldwide income will be subject to tax in South Africa.[71] On the other hand, as envisaged in sub-section (ii), persons who are non-residents in South Africa are liable for tax merely on the income they derive from a source within South Africa.[72] For example, a multinational company with business operations in South Africa or foreign employees who are seconded to work in South Africa.

The residence of a person (taxpayer) is essential in determining his/her tax liability.[73] In summation, when determining whether persons' income is taxable, all amounts (not of a capital nature) that are 'received by' or 'accrued to' said persons (regardless of where in the world they are generated) will constitute gross income.[74] For persons (natural or juristic) to be liable for tax purposes, SARS must have jurisdiction to tax them.

Since this research deals with the zama-zamas (natural persons), two tests are applicable, namely Ordinarily Resident Test and the Physical Presence Test.[75] Ordinarily Resident is a common law concept that is merely expressed in section 1 of the ITA, however it is not defined, whereas as the Physical Presence Test is expressly set out in the ITA's definition of a 'resident'.[76] Any person who is Ordinarily Resident during a certain year of assessment meets the requirements of the Physical Presence Test, and will be regarded as a resident for income tax purposes.[77]

In *Cohen v CIR,*[78] the court held that a person is Ordinarily Resident in a country if that country is one which he will naturally (and as a matter of course) return to after his wanderings.[79] To make a determination on whether a taxpayer is Ordinarily Resident in a country, one must not merely assess the taxpayer's actions in the particular year of assessment but also their mode of life before or even after the year in question.[80]

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[71] SARS Interpretation Note 3 (2) 20 June 2018, at page 1. Note, citizenship status is not akin to residency status for tax purposes as one can be a citizen of a foreign country but still tax resident in South Africa.
[72] Ibid.
[73] *Silke on Income Tax in South Africa* at page 23.
[74] D Meyerowitz *on income tax* (2008) 27.
[75] https://www.sars.gov.za/individuals/tax-during-all-life-stages-and-events/.
[76] Ibid.
[77] Ibid.
[78] *Cohen v CIR* 13 SATC 362 1946 AD 174.
[79] Supra note 58, at 366.
[80] Supra note 58, at 373.

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If an individual is not Ordinarily Resident in South Africa, he or she may still meet the requirements of the Physical Presence Test and will be deemed to be a resident for tax purposes.[81] For a person (taxpayer) to meet the requirements of the Physical Presence Test, that person must be physically present in South Africa for a period(s) exceeding:

I. 91 days in the current year of assessment.
II. 91 days during each of the 5 years of assessment preceding the current year of assessment; and
III. 915 days in aggregate during those 5 years of assessment preceding the current year.[82]

If all the above requirements are met, SARS will have the jurisdiction to tax the taxpayer as a resident, if his/her receipts form part of his/her gross income.

Now to turn to the essential elements of 'gross income' to ultimately determine whether income derived from illegal mining is taxable. As a starting point, for purposes of this research, the assumption is that the zama-zamas are tax residents and that their income is above the tax threshold and therefore places a responsibility on them to register for tax purposes should it be found that their income is taxable. If found to be liable, they will be subject to normal tax.[83]

The elements (to be discussed below) of gross income must all be satisfied for a person's income to be taxable. It is important to note the requirements envisaged in the definition of 'gross income' such as 'received or accrued' are not expressly defined in the ITA (or any tax statute). Therefore, judicial decisions that interpreted these requirements will be considered.

2.3.1. Total amount in cash or otherwise

In *Lategan,*[84] a taxpayer who owned a wine farm sold wine in that particular year of assessment. Payment of the amount was partly paid in cash, and the balance was paid in instalments in the subsequent year. The court considered whether the full

[81] SARS Interpretation Note 4 (4), 2014, at 2.
[82] Section 1 of the Income Tax Act 58 of 1962.
[83] Silke on Income Tax at page 22.
[84] *Lategan v CIR* (2 SATC 16) (1926 CPD 2013).

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amount was the 'total amount' for purposes of determining 'gross income' or merely the first payment that was received in cash. The court held that 'amount in cash or otherwise' is not limited to cash, it is wide enough to encompass anything of non-cash items which have a monetary value or an ascertainable monetary value.[85]

2.3.2. Received by or accrued to

An amount must either be 'received by' or must 'accrue to' taxpayers in a given year of assessment in order to be included in his/her gross income.

2.3.2.1. Received by

In *Geldenhuys*[86] a taxpayer (and farmer) obtained a usufruct over livestock (assets) by virtue of an execution of a mutual will which granted the surviving spouse the right to enjoy the fruits (i.e., income) of the joint estate for his or her lifetime, with the assets from the joint estate ultimately vesting in their children as heirs and bare dominium of the joint estate. The taxpayer sold (with permission from the heirs) a flock of livestock and reinvested the proceeds from the sale in a bond in her favour. The number of livestock sold by the taxpayer were less than the number of livestock at the time of her husband's death.

The court had to determine whether the amount received from the sale of the flock should be included in her gross income for tax purposes. The court held that since the taxpayer had only obtained a usufruct over the assets of the joint estate, she merely had the right of use of the flock, and since the number of sheep at the date of sale was lesser than at the date when she acquired the usufruct, there was no surplus sheep offspring to which she was entitled. Therefore, the proceeds of the sale belonged to her children as heirs of the estate. Although the taxpayer received the proceeds from the sale, she did not become entitled to the income, which was therefore not included in her gross income for tax purposes. Steyn J stated:

[85]*At page 18 of 2 SATC 16: Also see CIR v Butcher Bros (Pty) Ltd* (13 SATC 21) (1945 AD 301); and *CSARS v Brummeria Renaissance (Pty) Ltd* (2007 SCA).
[86] *Geldenhuys v CIR* 1947 (3) SA 256 (C), 14 SATC 419.

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> "*Though the usufructuary received the purchase price of the sheep she did not become entitled to the money, which remained the property of the remainderman. In my opinion, it never became part of her 'gross income'* …"[87]

The above case confirmed that income received by a taxpayer on his/her own behalf and for his/her own benefit is 'received by' the taxpayer for purposes of gross income and that income received on behalf of a third party must not be included in the taxpayer's gross income.[88]

2.3.2.2. Accrued to

The disjunctive in the definition of 'gross income' signify that not only amounts 'received' by taxpayers are included in gross income for tax purposes, but also the amounts that 'accrue' to taxpayers will be included in his/her gross income.[89] The ordinary definition of the word 'accrue' simply means "*to come into existence as a legally enforceable claim*".[90] The implication of this meaning is that a taxpayer has a vested right in the income that is owed to him/her and therefore becomes entitled to same.[91]

In *CIR v People's Stores,*[92] the taxpayer sold goods to its customers for cash and on credit. The credit sales were made under the taxpayer's six-months-to-pay revolving credit scheme. The court had to decide whether the instalments not yet payable and outstanding at the end of a particular year of assessment, accrued to the taxpayer and should be included in its gross income. The court, applying the principles that were established in the *Lategan* case (discussed above), held that an amount does not have to be due and payable to the taxpayer for it to accrue to the taxpayer. The taxpayer acquired a right during the year of assessment to claim payment of an amount in the future. Since the right vested in the taxpayer in the year of assessment, it accrued to the taxpayer in that year. And since the right can be turned into money (that is, it has

[87] 1947 (3) SA 256 (C), 14 SATC 419 at 434.
[88] See also *Pyott Ltd v CIR* (13 SATC 121) (1945 AD 128); and *CIR v Genn Co (Pty) Ltd* 1955 3 SA 293 (A) that have confirmed that that amounts received by a taxpayer on his/her own behalf for his/her own benefit are "received by" the taxpayer for purposes of gross income.
[89] Silke on Income Tax at 42.
[90] Merriam Webster Dictionary at https://www.merriam-webster.com/dictionary/accrue.
[91] Silke on Income Tax at 42.
[92] *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 52 SATC 9 1990 (2) SA 353(A).

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an ascertainable monetary value), the right qualifies as an 'amount' and should be included in 'gross income'.[93]

2.3.3. Receipts and accruals of a capital nature

The definition of 'gross income' in section 1(1) excludes receipts and accruals of a capital nature. Therefore, the distinction whether income is of a capital nature or not is essential as receipts or accruals of a capital nature do not form part of a taxpayer's gross income. However, receipts and accruals that are of a capital nature are not exempt from tax as they will be subject to Capital Gains Tax – which is tax that is levied on disposal of assets of a capital nature instead of revenue.[94] Capital Gains Tax is not of relevance for this research and will therefore not be discussed.

The ITA does not define the term 'capital'. The courts have grappled with the issue over the years as the determination of *"[w]hether a receipt or an accrual should be regarded as capital or revenue is probably the most common issue which arises in income tax litigation*".[95] The courts have laid down several guidelines that should be considered when determining the nature of income i.e., whether it is of a capital or revenue nature. Although a decisive test does not exist, the most considered factor is the intention of the taxpayer. This is exemplified in numerous cases whose principles are briefly canvassed below.

In *CSARS v Heron Heights*,[96] the court held that the intention of the taxpayer is of utmost importance in determining whether receipts or accruals are of a capital or revenue nature.[97] To this end, a taxpayer's profit-motive must be the driving force behind the activities that generate the income.[98]

Therefore, two questions are central in determining the nature of receipts or accruals, and both must be answered in the affirmative:

[93] *Supra* note 90, at 31-33.
[94] L Olivier "*Capital Versus Revenue: Some Guidance*" De Jure 2012 at 172.
[95] *WJ Fourie Beleggings* at paragraph 7.
[96] 64 SATC 433.
[97] Ibid. Also see L Olivier at 174.
[98] Ibid at par 47.

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1. Was the taxpayer objectively carrying on a profit-making scheme; and
2. Was it his/her intention to carry on a profit-making scheme?[99]

A profit-making scheme, for purposes of determining 'gross income', means a business or trade which is designed to produce profits.[100]

Given that the taxpayer's intention is central to determining whether the taxpayer is conducting a trade to produce a profit, an enquiry must be made into whether the taxpayer had crossed the Rubicon and gone over to a business or embarked upon a scheme to produce profit.[101]

Furthermore, to determine whether an amount is of an income, or a capital nature is a factual inquiry which must be determined on the facts of each case. In *Natal Estates* Holmes JA held:

> "*In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case*".[102]

A deduction can be made considering the facts of the case in question. The court in *Pick 'n Pay Employee Share Purchase Trust* held as follows:

> "…*conclusion that a trust is carrying on a business is an inference to be drawn from its facts*…"[103]

Therefore, from the totality of the facts, one should enquire whether it can be said that the taxpayer's activities had been carried out as a scheme for profit. However, it should be noted that a taxpayer may realise an asset to his/her benefit without it being a profit-making scheme. This was laid out in *CIR v Stott*[104] where the court held that "*Every*

[99] *Commissioner for Inland Revenue v Pick 'n Pay Employee Share Purchase Trust* 1992 (4) SA 39 (AD).
[100] *De Beers Holding (Pty) Ltd. v Commissioner For Inland Revenue* SCA 1 All SA 310 (A) (1985), paragraph 41.
[101] *Natal Estates Ltd v SIR* 1975 4 SA 177 (A), at 202-203.
[102] *Natal Estates Ltd v Secretary for Inland Revenue* 1975 (4) SA 177 (A).
[103] Supra note 78 at paragraph 46.
[104] *CIR v Stott* 3 SATC 253 263 (1922, AD. 42).

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person who invested his surplus funds in land or stock or any other asset was entitled to realise such asset to the best advantage and to accommodate the asset to the exigencies of the market which he was selling. The fact that he did so could not alter what was an investment of capital into a trade or business for earning profits".[105]

2.4. Taxation of illegal income

As a starting point here, it is important to note that the ITA makes no distinction between legal and illegal income but what is required is if a person meets the requirements of section 1, the amount is included in the gross income.[106]

To determine whether or not income from illegal activities is taxable, the definition of 'gross income' is the starting point since the ITA makes no reference to the taxation of income derived from illegal activities.

The above principles would also need to be considered when determining the taxability of illegal income. At this point of the research, the taxability of illegal income will be canvassed.

Considering tax litigation that dealt with the taxability of illegal income, one's view can be that, ostensibly, revenue authorities' (including SARS) stance on the taxability of illegal income is untethered and untainted by the source of said income. This is exemplified in several cases that dealt with the taxability of illegal income. Relevant for this research are the *CIR v Delagoa Bay Cigarette Co, Ltd*[107] and *MP Finance* cases.

For income to be taxable it must be 'received by' or 'accrue to' the taxpayer. Since the phrase 'accrued to' has been interpreted by courts to mean to be 'entitled to' or having an 'unconditional right' to the amount (*Lategan*; *People's Stores*), the consequence of this is that stolen money will not accrue to the thief as he will not be entitled to the money, and thus cannot be taxed on accrual.[108] Therefore, the basis on which courts

[105] At 261.
[106] RC Williams & C Louw *Income tax and capital gains in South Africa: law & practice* (2001) 74.
[107] 1918 TPD 391, 31 SATC 47.
[108] L Olivier '*The Taxability of Illegal Income'* 2008 TSAR at 814.

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determined the taxability of illegal income was by examining the phrase 'received by' and applying it accordingly.[109]

SA courts have inconsistently applied the meaning of the phrase 'received by'. This has enabled taxpayers to rely on the literal meaning of the phrase as held in *Geldenhuys* to argue that they were not entitled to the amounts as it was not received for their own benefit (see *Delagoa* etc. — discussed below).

For example, in *Commissioner of Taxes v G*[110] where a government official was entrusted with state funds earmarked for governmental use. He appropriated the funds for his own benefit and ended up being criminally charged and subsequently assessed by the revenue authority for tax on the stolen funds. The taxpayer argued that the funds were never his despite his intention to treat them as his own, and therefore the funds were never received by him as envisaged in definition of gross income (equivalent of SA's ITA definition). The court in applying the phrase 'received by' held as follows:

> "*I can see no warrant on the face of the statute for construing the word 'received' in any but its ordinary meaning. To extend it to cover unilateral taking such as theft, which in any event confers no right upon the taker to the things taken, would be to give the word a meaning that could not be justified on any rational construction of the Act as a whole. In short a thief takes, he does not receive…*"[111] (Own emphasis added)

In view of the above, the court found that the unilateral taking of amounts could not be said to fall within the confines of the phrase 'received by' for income tax purposes. The court cited *Geldenhuys* with approval thus entrenching the principle that taxpayers must be entitled to the amount for it to be received by him. Many cases followed this approach (such as *Delagoa*) as it was the *locus classicus* on the taxation of illegal income, until *MP Finance*.[112]

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[109] J Venter, W Uys & MC van Dyk '*MP Finance Group CC (In Liquidation) v C:SARS: Adding to the financial hardship of victims of illegal transactions'* (2015) 19 South African Business Review: Tax Stories: Special Edition, 1, 128.
[110] *Commissioner of Taxes v G* 1981 (4) SA 167.
[111] *Supra note 101,* at 169H-170A.
[112] See *ITC* 1624 (1996) 59 SATC 378; *ITC* 1792 (2005) 67 SATC 236.

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The factual matrix of *Delagoa* is as follows; a tobacco company operated an illegal lottery through its cigarette operations. The company (taxpayer) sold cigarettes at a higher-than-normal selling price (i.e., cigarettes worth sixpence was being sold for ten shillings), with the difference of the price being distributed to holders of lucky packs with coupons. Following a lucky draw and distribution of prizes to lucky winners, the company was prosecuted for operating an illegal lottery.

The court applied the principles canvassed above, particularly the phrases 'received by' or 'accrued to' or 'in favour of' a person in order to determine whether the illegal income constituted gross income for income tax purposes.[113] In its conclusion on the taxability of income derived from an illegal source, the court found that whether the taxpayer derived income from a legal or illegal business is immaterial for purposes of determining whether his income should be subject to income tax.[114] Therefore, the legal or illegal nature of the source of income was not decisive in determining whether the taxpayer was liable for income tax. In view of this, receipts and accruals derived from illegal activities will be included in the taxpayer's gross income.

The dispute whether the term 'received by' should be interpreted objectively or subjectively eventually came before the Supreme Court of Appeal (SCA) in the case of *MP Finance*.[115] The factual matrix of *MP Finance* is as follows; the taxpayer operated an illegal investment pyramid scheme through numerous entities. Like all pyramid schemes, the operators of the scheme (taxpayer) promised significant returns on their investment, with few receiving returns on their investment and some receiving less to no return on their investment. The taxpayer retained some of the invested money for his benefit. For the duration of the tax years (2000 to 2002) relevant for the case, the operators knew that the entities used to carry out the scheme were insolvent and fraudulent, and thus would be impossible to reimburse the investors as promised. By an order of the court, the various entities were consolidated into a single entity, being the taxpayer, for purposes of the relevant tax years assessments. The court had to determine whether the amounts invested in the illegal pyramid scheme qualified as the gross income of the taxpayer.

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[113] Silke, South African Income Tax at 51.
[114] Supra note 80, at 394.
[115] Ibid.

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The taxpayer argued that the amount did not qualify as gross income for tax purposes because it did not receive the income (for his own benefit) in line with the definition of 'gross income' and that it was legally obligated to refund the deposits to all investors.[116] The SCA held that fiscal consequences can flow from an illegal contract. Therefore, even though the taxpayer was legally obliged to refund deposits to investors, the taxpayer 'received' the deposits as envisaged in definition of 'gross income' because the taxpayer had the intention to retain the amounts for his own benefit.[117] The court followed a subjective approach that is premised on the taxpayer's intention to accept and retain receipts for his own benefit. The SCA found that amounts illegally and fraudulently taken by the operators of the pyramid scheme constitute amounts 'received by' the taxpayer within the ambit of the definition of gross income as per the ITA based on the taxpayer's intention to appropriate the funds for her own use. In reaching this conclusion, Howie P held:

> "*This Court's judgment in the matter of Fourie NO v Edeling NO cannot assist the CC. That dealt with the relationship between investor and scheme. This case is about the relationship between scheme and fiscus. Even if, as correctly stated in that matter, with respect, the scheme was legally obliged to repay an investor immediately on receipt, that was because of the legal principles applicable to the parties to an illegal contract, as between themselves. An illegal contract is not without all legal consequences; it can, indeed, have fiscal consequences. <u>The sole question as between scheme and fiscus is whether the amounts paid to the scheme in the tax years in issue came within the literal meaning of the Act. Unquestionably they did. They were accepted by the operators of the scheme with the intention of retaining them for their own benefit</u>. Notwithstanding that in law they were immediately repayable, they constituted receipts within the meaning of the Act. In other words it does not matter for present purposes that the scheme was not entitled, as against the investors, to retain their money. What matters is that what they took in was*

[116] Paragraph 5; Also see *Fourie v Edeling 2006 4 All SA 393* (SCA) relied on by the taxpayer in *MP Finance* in which determined the question whether refunds to investors were recoverable by the liquidators, and ultimately held that because the scheme was legally obligated to refund the deposits, there was no basis on which it could be said that the deposits were received within the meaning of 'gross income', and thus was not subject to income tax.
[117] *MP Finance*, paragraph 12.

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income received and duly taxable. The assessments were correctly raised."[118] (Own emphasis added)

Post-*MP Finance*, *COT v G*[119] no longer reflects the South African position as the SCA in *MP Finance* took a different approach, by finding that the unilateral appropriation of amounts was sufficient to conclude that the amount was 'received by' the taxpayer for purposes of income tax. The SCA followed a subjective approach premised on the taxpayer's intention to receive the amount for his own benefit. This view has found support by legal scholars who opine that the court in *COT v G* erred in finding that unilateral taking of amounts by the taxpayer could not form part of receipts for tax purposes.[120]

Considering the above, it is clear that South African courts have inconsistently applied approaches to determining the meaning of the phrase 'received by' in cases involving illegal income, following an objective approach in some instances, and a subjective approach in others. Courts like in the *Geldenhuys* matter that dealt with legal receipts of amount adopted an objective approach without mention of the taxpayer's subjective intention.[121] Muller, in my view, correctly observed that courts that dealt with issues involving illegal income have confused the concepts of accrual (objective approach) and beneficial receipt of income (subjective approach), and therefore, has resulted in the inconsistent approaches by courts (which can be attributed to an unclear policy formulation on taxing illegal income).[122]

It is contended that the deviation from an objective approach occurred owing to the consideration of the taxability of illegal income by courts. Since *MP Finance*, the intention of the taxpayer to receive amounts for his own benefit is the current legal metric to determine taxability of illegal income.[123] Notwithstanding, the SCA's failure to clarify the position by providing a definitive meaning of the phrase 'received by' has to some extent, not settled the position as the court did not provide guidance on the

[118] At paragraph 12.
[119] *Commissioner of Taxes v G* 1981 (4) SA 167.
[120] LG Classen '*Legality and Income Tax – Is SARS 'entitled to' Levy Income Tax on Illegal Amounts 'received by' a Taxpayer'* (2007) SA Merc LJ at 551.
[121] Ibid at 535.
[122] E Muller *The Taxation of Illegal Receipts: A Pyramid of Problems!: A discussion on ITC 1789 (Income Tax Court – Natal)*", Obiter (2007), at 181.
[123] *Supra* note 107 at 546.

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threshold of the literal meaning of the phrase 'received by'. Classen correctly opines that this will raise potential issues for future litigants as the court did not clarify what its literal approach/meaning entails with reference to the definition of 'gross income' in the ITA.[124]

Lastly, the SCA has not provided guidance on whether the principles it established in *MP Finance* will apply to all income derived from illegal activities or merely pyramid schemes/theft cases, which Classen correctly also observes.[125] Despite this, SARS' predisposition is that the principles laid out in *MP Finance* are considered to apply equally to other criminal activities and will thus tax that illegal income.[126]

Applying the above principles, the question whether income derived from illegal mining is taxable can be answered in the affirmative. This is because the illegal miners are either taxed as residents (some are foreigners who are physically present in South Africa for extended periods of time or are, per the Ordinarily Residence test, they are ordinarily resident in South Africa) or as non-residents (illegal immigrants that fail the residency tests, but who derive their income from a source within South Africa), who receive amounts (in cash) from carrying out illegal mining which are received by them on their own behalf and own benefit as a form of remuneration for illegally mining gold (and other precious metals) for criminal syndicates or their individual operations with the intent of profit-making.[127]

2.5. Conclusion

A brief history of the zama-zamas and their illegal mining activities was canvassed in this Chapter. It is found that the impact of illegal mining on the South African society is multifaceted. This is because, not only are the operations of the zama-zamas accompanied by gross human rights violations, but also pose an imminent danger to national security, health, and human life, but also that illegal mining poses severe risks to the environment such as through deforestation, land degradation and pollution.

In addition, income derived from illegal mining can be taxed if the elements of the definition of gross income are met. By applying the elements of the definition of 'gross

[124] Ibid at 550.
[125] Ibid, at 553.
[126] SARS Interpretation Note no: 80 (2014) at 14. **Note**: SARS guide is not binding, it is merely SARS' guide to how SARS interprets the Acts.
[127] https://www.miningreview.com/gold/south-africas-mining-industry-corrupt-lethal-and-criminal/.

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income', as well as observing principles established by courts on taxability of income and illegal income, it is concluded that income derived from illegal mining could be regarded as gross income which can be taxed by SARS. This is because the zama-zamas derive their income (for their own benefit) from being in South Africa and from a source (illegal mining for a profit-scheme) in South Africa, and thus can be taxed.

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CHAPTER 3: IMPLICATIONS OF THE TAA'S SECRECY PROVISIONS ON ILLEGAL MINERS

3.1. Introduction

In Chapter 2, it was established that illegal income derived by the zama-zamas can be taxed by SARS if all the elements of the 'gross income' definition are met. To meet this obligation, the zama-zamas would be required to fully disclose their tax information to SARS in a tax return. This requirement (the submission of a tax return) is a positive legal obligation mandating taxpayers to submit tax returns that are full and true.[128] In addition, one of the ways SARS can administer tax legislation is by obtaining full taxpayer information pertaining to, *inter alia*, anything that may affect the tax liability of a person in respect of a previous, current or future tax period(s).[129] The TAA, therefore, requires taxpayers to make full disclosures regarding their taxable income by submitting tax returns.

As canvassed in Chapter 1, non-disclosure of taxable income could not only lead to severe financial consequences such as penalties and interest being levied by the revenue authority,[130] but could also result in criminal prosecution as envisaged in section 234 of the TAA. Section 234 of the TAA will be triggered if a taxpayer wilfully or negligently, *inter alia*, fails to submit a tax return and/or pay tax to SARS as required by a tax Act.[131] Section 234 effectively, criminalises the failure to submit full and true tax returns.[132] In the case of the zama-zamas, non-disclosure could result in SARS imputing intent (wilfully) on them, and could ultimately render them guilty of tax

[128] Section 25(2) of the Tax Administration Act.
[129] Section 3(2)(a)(i) of the Tax Administration Act.
[130] Such as non-compliance penalties envisaged in section 210 of the TAA and penalties in respect thereof (see section 210(2)).
[131] Section 234(1)(a) – (g) and 234(2)(a) – (k) of the TAA.
[132] Section 234 of the Tax Administration Act sets out instances in which a person could be liable to a fine or imprisonment of up to two years, among those is the failure to submit a return or failure to disclose material facts to SARS in contravention of Tax Acts; Non-compliance with Tax Acts could result in the imposition of penalties (which incur monthly interest of up to 100%) in accordance with section 211 of the TAA. SARS intends amend section 234 to remove the word 'wilfully'. This will remove the subjective element (which is also a hurdle of proving intent). The effective of this is that section 234 of the TAA will also be triggered where the taxpayer was negligent – see *Memorandum on the Objects of the Tax Administration Laws Amendment Bill* (2020), pages 24-25.

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evasion, especially because the act of non-disclosure would constitute non-reporting of income generated from an (illegal) all-cash business.[133]

Sections 227 to 231 of the TAA provide for taxpayers to make voluntary disclosures (through the Voluntary Disclosure Programme (VDP)), including disclosures of their contraventions of the law. The VDP is available for taxpayers to voluntarily disclose tax information to SARS. The purpose of the VDP is to, *inter alia*, make it easy for taxpayers to comply with their tax obligations.[134] The VDP is also a mechanism for SARS to encourage taxpayers (who may be in default of their tax obligations) by willingly disclosing their tax affairs.[135] The zama-zamas can use this avenue (provided the VDP requirements such as 'full disclosure' are met) to come forward in order to avoid penalties and/or criminal prosecution for tax offences.[136]

This voluntary disclosure enables SARS to compromise on such a taxpayer's exposure to civil and criminal liability.[137] Given the fact that the income earned by the zama-zamas is derived from an illegal activity, it is reiterated that the compromise by SARS is predicated on full and true disclosure of material information by the taxpayer.[138]

It is important to note that the rules of tax confidentiality also apply to VDPs to ensure that tax secrecy is upheld.[139]

It is submitted that no criminal would willingly provide information that could potentially expose him or her to criminal prosecution for the conduct of illegal activities.[140] It is further submitted that a taxpayer who derives income from an illegal source, would

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[133] SARS' *Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No.58 of 1962)*, 2005, at page 3. To prove intent, there has to be an importation of criminal law concepts such as *dolus eventualis*. See: Is Poor Tax Compliance Akin to Culpable Homicide? - SA Institute of Taxation (thesait.org.za).

[134] SARS' *External Guide: Voluntary Disclosure Programme*, 2021, page 5.

[135] Ibid.

[136] Ibid, page 7.

[137] According to section 229 of the TAA, once a VDP agreement is concluded, SARS is precluded from pursuing criminal prosecution against a taxpayer for a 'default' (defined in section 225 of the TAA – default "*means the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission, or adoption resulted in an understatement*".

[138] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v SARS and Others* 2022 (2) SA 485 (GP), at 4.3

[139] Ibid, page 5.

[140] Section 69(2)(c) of the TAA; Also see J Hanzel '*Self-incrimination and the use of income tax returns in non-tax criminal prosecutions'* 30 Wash. & Lee L. Rev (1973) at 182.

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consider what protection is afforded to him if he makes full and true disclosure in his tax returns in order for him to comply.

3.1.1. Taxpayer secrecy regime

The TAA makes provision for a mechanism that exists to allay taxpayers' concerns pertaining to the disclosure of information. This is envisaged in section 69(1) of the TAA which provides:

> "***Secrecy of taxpayer information and general disclosure.***-*(1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official*". (Own emphasis added)

Section 69(1) must be read with Section 67(3) of the TAA which prohibits public disclosure of taxpayer information, namely, taxpayer information obtained by SARS, including biometric information. As stated in Chapter 1, this prohibition comes with a criminal sanction for disclosure and a requirement that SARS officials take an oath to protect taxpayer confidentiality.[141]

This concretises the foundation of the relationship of trust (or social contract) between SARS and taxpayers.

The TAA secrecy provisions are bolstered by the interface with the PAIA which affords taxpayers an extra layer of protection in the form of section 35 of the PAIA which (before being declared unconstitutional in *Arena Holdings* as will be discussed in Chapter 4) provided SARS with an unyielding ground to refuse PAIA requests for access to any records enclosing information held or obtained by SARS for purposes of enforcing statutory mandates regarding revenue collection.[142] Section 35 of the PAIA provides that:

> "***35 Mandatory protection of certain records of South African Revenue Service***
>
> *(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*

[141] This must also be read in line with 67(1)(b) which defines taxpayer information as "any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.
[142] Section 35 of the PAIA.

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obtained or is held by that Service for the purposes of enforcing legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997(Act No. 34 of 1997).

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information about the requester or the person on whose behalf the request is made". (Own emphasis added)

Section 35 of PAIA is wide enough to encompass taxpayer information.[143]

This layer of statutory protection under the PAIA was, pre-*Arena Holdings*, even more immutable when the public interest override provisions envisaged in section 46 of the PAIA did not apply to taxpayer information.[144] The section specifically does not include section 35 of the PAIA and therefore its public interest override provisions did not apply to any requests for tax records. In other words, pre-*Arena Holdings,* there was a blanket ban in section 35 of PAIA against any request made to SARS relating to taxpayer information as there was no public interest override applicable to section 35 related requests.

Section 46 of the PAIA envisages a mandatory disclosure of information, in the event that:

"***46 Mandatory disclosure in public interest***

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

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

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

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question." (Own emphasis added)

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[143] *Arena Holdings* (High Court decision), at para 4.12.
[144] Ibid, paragraph 4.16.

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The implications of this section (pre-*Arena Holdings*) was that if a PAIA request was made to access information held by SARS in respect of a particular taxpayer (i.e., the zama-zamas), SARS was obligated to refuse this request in terms of section 35 of the PAIA, notwithstanding the fact that the requester can demonstrate that the information would reveal evidence of a substantial contravention of a law/imminent risk to public safety or the environment.

This relationship between SARS and taxpayers (full disclosure and guaranteed secrecy) impacts on a taxpayer's right to privacy, which concerns the right to confidentiality of all taxpayer information held by SARS.[145] SARS is therefore legally obligated to uphold the confidentiality of taxpayer information. The insertion of the word 'must' in the nomenclature used in section 69(1) ('*must preserve the secrecy of taxpayer information*') places a positive obligation on SARS to preserve taxpayer secrecy.[146] The importance of the duty on SARS to preserve taxpayer secrecy is accentuated by its application in perpetuity in that it applies to current and former SARS officials (including individuals contracted by SARS).[147]

In addition, to comprehending the gravity of this obligation on SARS officials, it is important for one to be cognisant of the fact that SARS officials must take an oath or solemn declaration undertaking to comply with the secrecy provisions in the TAA.[148] Furthermore, a contravention of section 69(1) amounts to a criminal offence in terms of section 236 of the TAA. This criminalisation of wrongful disclosure of taxpayer information indicates, *inter alia*, an effort by the Legislature's intent to promote taxpayer confidence in the tax administration system and in the SARS.[149] Lastly, a plain reading of section 69(1) of the TAA transcends SARS officials' time at SARS. In other words, not only current SARS employees are bound by section 69(1), former employees of SARS are also bound by a sworn oath to actively protect and preserve the secrecy of taxpayer information as per section 69(1).

[145] https://www.sars.gov.za/media-release/tax-administration-act/.
[146] It is important to note that there are exceptions from the general prohibition against disclosing taxpayer information. These exceptions are listed in s69(2) of the TAA, which will be dealt with in further detail in paragraph 3.2.
[147] F Moosa "*Protecting Taxpayer Information From the Public Protector – A 'Just Cause'?*" (2020) 6(2) JCCL&P at 208.
[148] Section 67(2) of the Tax Administration Act.
[149] Supra note 125, at 210 – 211.

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An analysis of cases that engage the TAA's secrecy provisions indicates that SARS upholds this strict legal duty (to protect taxpayer confidentiality) with vigour in its protection of taxpayer secrecy, giving taxpayers the confidence that SARS will fight to protect this right without fear, favour, or prejudice.[150] This is exemplified by its arguments raised in the *Public Protector* and *Arena Holdings* cases (to be discussed below). In the *Public Protector* case, where SARS upheld the duty to preserve taxpayer secrecy, despite the threat of a potential criminal sanction as per section 11(3) of the Public Protector Act 23 of 1994 ("PPA").

The *Public Protector v CSARS & Others*[151] case dealt with the Public Protector's power to subpoena taxpayer information under section 7(4) of the PPA, and whether the SARS Commissioner was entitled to withhold taxpayer information in terms of the "just cause" provisions envisaged in section 11(3) of the PPA read with section 69(1) of the TAA.

It is important to note that this matter stemmed from a complaint by a South African politician (then leader of the Democratic Alliance, Mr. Mmusi Maimane) who laid a complaint with the Public Protector based on allegations that former President Jacob Zuma was on a private company's payroll while serving as President and failed to disclose income tax on the alleged income that was received.[152]

Section 11(3) of the PPA provides as follows:

> "*… 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.*" (Own emphasis added)

For completeness, section 7(4) of the PPA provides that:

> "*For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before*

[150] Examples such as the *Public Protector* (where SARS refused disclosure upon request for information by the Public Protector – a powerful state institution) and Arena Holdings (where SARS refused disclosure upon request by media houses) cases.
[151] (2020) CC 28.
[152] Ibid, paragraph 2.

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him or her 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 person".

SARS, in advancing a "just cause" argument for its refusal to disclose taxpayer information, argued that it is required by law to respect the privacy vested in taxpayer information.[153]

The court opined that the issue lay on the meaning of the term "just cause" in section 11(3) of the PPA.[154] The court held that "just cause" simply means "valid grounds" or "reasonable grounds" or "valid reasons" to not comply with the Public Protector's *subpoena*.[155] Accordingly, SARS had a valid reason for not complying to disclose a taxpayer's information because its refusal was predicated on an obligation to uphold taxpayer confidentiality for the benefit of all the taxpayers.[156]

3.1.2. Rationale for taxpayer secrecy

In *Sackstein NO v SARS,*[157] the court held:

> *"[t]he purpose of both [Income Tax and Value-Added Tax] Acts, and therefore also of the secrecy provisions, is the optimum collection of the State's revenue. The underlying idea is that this objective will be promoted by the free flow of information between taxpayer and tax collector. To that end, the secrecy provisions are designed to afford the taxpayer the assurance that information conveyed by him to the Commissioner will not fall into the hands of other persons or government departments*."[158] (Own emphasis added)

Considering the above, taxpayer secrecy is underpinned by two rationales, namely, the public policy intent to encourage frank and full disclosure to SARS through ensuring taxpayer confidentiality (which hinges on protecting taxpayers' constitutional right to privacy); and to ensure optimal revenue collection. This is also echoed in SARS' Short Guide to the Tax Administration Act which provides that the intention

[153] SARS Heads of Arguments, at paragraph 29.
[154] Supra note 14, paragraph 9.
[155] Supra note 14, paragraph 29.
[156] Supra note 14, paragraph 39.
[157] *Sackstein NO v SARS* 2000 (2) SA 250 (SE).
[158] Ibid, at 257.

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behind the secrecy provisions is to encourage taxpayers to abide by tax legislation by registering and making full disclosure of their income and for ensuring optimal revenue collection for the benefit of the fiscus.[159]

Regard must also be had to the Explanatory Memorandum that accompanied the Tax Administration Bill (2011) when determining the rationale behind taxpayer secrecy.

The Explanatory Memorandum provides as follows:

> "*The information protection laws of most countries are based on the basic principle that personal information should not be used for purposes incompatible with the purpose for which it was collected. In South Africa a citizen's right to privacy is entrenched in a constitution that regulates the right to protection of privacy. Taxpayers have a right to expect that any information provided by them is treated in confidence and used for tax purposes only and that their affairs will not be disclosed to third parties, including other organs of state. This form of data protection is reinforced by the mandatory protection of SARS' records by section 35(1) of the Promotion of Access to Information Act, 2000, and further underpinned by case law wherein strict requirements are laid down before a court will order disclosure of tax information.*
>
> *However, in several developed jurisdictions it is recognised that it is important that tax information is available to other organs of state within proper limits. Specifically, it is recognised that in the context of law enforcement:*
>
> *(a) Where certain information is likely to be of value to a criminal investigation, it is in the public interest that tax information is available to law enforcement agencies within certain limits.*
>
> *(b) Such limited disclosure will ensure that there is a potential for information flow in two directions, i.e. between a revenue authority and law enforcement agencies and vice versa.*"[160]

[159] At paragraph 6.2 of the *SARS' Short Guide to the Tax Administration Act*. It is important to note that SARS' Guides and Interpretation Notes are not binding.
[160] Explanatory Memorandum accompanying the Tax Administration Bill, 2011 at paragraph 2.2.6 page 188.

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It is submitted that the implication of the Explanatory Memorandum lends credence to the two-fold rationale underpinning taxpayer secrecy, namely, taxpayer confidentiality and for purposes of revenue collection.

As canvassed in Chapter 1, the edifice of the tax system is underpinned by maintaining confidentiality and secrecy of taxpayer information. This was also expressed by the Constitutional Court's ("CC") minority judgment (in *Arena Holdings*) when it held that tax secrecy is the cornerstone of tax administration which promotes taxpayer confidence in SARS and compliance.[161] In addition, the CC's minority judgment held that there is a connection between taxpayer compliance and tax secrecy,[162] thus implying that a breach of secrecy could impact tax compliance.

The majority judgment agreed that tax secrecy is essential for efficient tax administration.[163] However, it disagreed with the minority on the abovementioned point, stating that tax secrecy and tax compliance have no proven connection, and that compliance by taxpayers can still be ensured through other means given the powers at SARS' disposal.[164] This will be canvassed in Chapter 4 below.

The majority ruling finds support in this research. This is because there is no proven *nexus* between taxpayer confidentiality and tax compliance, if anything, the argument is theoretical.[165] This view is also held by Fritz and Van Zyl who, in my view, correctly opine that the argument that non-disclosure of taxpayer information encourages tax compliance lacks merit as it is not supported by scientific research.[166] Furthermore, the argument against the disclosure for tax compliance loses traction because there are already exceptions for disclosure in the TAA (discussed below) which defeat the argument that tax secrecy results in compliance. In addition, and as discussed above, taxpayers are legally bound to comply with tax legislation which obliges them to make full and true disclosure, failing which could result in criminal penalties and fines.

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[161] *Arena Holdings* CC, paragraphs 84-87.
[162] Ibid, paragraphs 86-88.
[163] *Arena Holdings* CC, paragraph 175.
[164] Ibid, paragraphs 183-184.
[165] S Wallace "*Confidentiality and Taxpayer Compliance*" National Tax Journal, Vol LVIII, No.3 (2005) at 438.
[166] C. Fritz & S. P. van Zyl, "*Tax Administration, Confidentiality of Information, the Promotion of Access to Information Act 2 of 2000, and Public Figures: Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021)*" (2022) 85:4 THRHR 586, at 593-594.

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The implication of TAA's secrecy provisions on the zama-zamas is that it would apply to them since they have been enacted for the benefit of all taxpayers. It is submitted that the ambit of section 69(1) is wide enough to cover taxpayers who derive income from an illegal source – the same way 'gross income' as envisaged in the ITA (and as has been found by courts and applied by SARS) includes illegal receipts. Furthermore, section 4 of the TAA provides that the TAA applies to every person who is liable to comply with a provision of a tax Act. Since it has been demonstrated above that the zama-zamas would be liable for income tax on the illegal income, and thus bound by the ITA, the TAA will apply to the zama-zamas.

In view of the above, the zama-zamas can be assured that their taxpayer information will be protected by SARS, which has a legal obligation to protect taxpayer information. The lengths SARS is willing to go to protect taxpayer information (i.e., under threats of criminal sanctions as in the *Public Protector* case) inspires confidence in SARS' emphasis on the importance of the protection of confidential taxpayer information. Furthermore, the oath and criminal sanction for wrongful disclosure should demonstrate the weight placed on the sanctity of the right to protect taxpayer information. Lastly, SARS upholds this obligation despite the perceived loss of public trust in SARS stemming from the public frenzy that SARS protects criminals and hides behind secrecy provisions, with some going as far as labelling it the "South African Robbers Society".[167]

As was alluded to in Chapter 1, it is important to note that the purpose of revenue authorities like SARS is to collect tax revenue,[168] and not to catch and/or punish criminals. As stated in Chapter 1, revenue authorities like SARS cannot be used a means to catch alleged criminals in instances where criminal justice institutions fail to punish alleged criminals through criminal law mechanisms. A prominent example of this is when notorious gangster, Al Capone, was convicted on tax related crimes when the criminal justice system failed to convict him for his many other crimes.[169]

[167] https://www.moneyweb.co.za/mymoney/moneyweb-tax/in-a-watershed-judgment-sars-ordered-to-disclose-zumas-tax-records/.
[168] In line section 2 and 3 of the TAA.
[169] Al Capone's *Income Tax Evasion and the Taxation of illegal Income*: see http://taxwar.net/capone-illegal-income-tax.html.

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3.2. Extent of the protection against disclosure of taxpayer information

The general rule is that all SARS officials (past and present) must preserve the secrecy of taxpayer information. This guaranteed legislative (and constitutional right to privacy[170]) protection of taxpayer secrecy is not unbridled and has exceptions. This is because SARS may disclose taxpayer information to persons who are not SARS officials in imminently narrow circumstances.

Firstly, section 69(2) of the TAA makes provision for instances in which SARS may disclose taxpayer information to, *inter alia*, the South African Police Services (SAPS), NPA and if disclosure was sanctioned by a court through a court order.

Secondly, section 70 of the TAA allows SARS to disclose taxpayer information to entities such as the South African Reserve Bank.[171]

Thirdly, and central to this research, section 71 of the TAA allows SARS to disclose taxpayer information in criminal, public safety, or instances where there is an environmental risk. Section 71 provides as follows:

> "***71. Disclosure in criminal, public safety or environmental matters.****-(1) If so ordered by a judge under this section, a senior SARS official must disclose the information described in subsection (2) to-*
>
> *(a) the National Commissioner of the South African Police Service, referred to in section 6 (1) of the South African Police Service Act, 1995 (Act No. 68 of 1995); or*
>
> *(b) the National Director of Public Prosecutions, referred to in section 5 (2) (a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).*
>
> *(2) Subsection (1) applies to information which may reveal evidence-*
>
> *(a) <u>that an offence (other than a tax offence) has been or may be committed in respect of which a court may impose a sentence of imprisonment exceeding five years</u>;*
>
> *(b) that may be relevant to the investigation or prosecution of the offence; or*

[170] Section 14 of the Constitution protects the right to privacy.
[171] Section 70(3)(a) of the TAA.

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(c) *of an imminent and serious public safety or environmental risk*." (Own emphasis added)

Axiomatically, section 46 of the PAIA (to be canvassed in Chapter 4) contains similar wording to section 71 and states:

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

(a) *the disclosure of the record would reveal evidence of —*

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

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

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.*" (Own emphasis added)

It is important to note that pre-*Arena Holdings*, section 69(2) of the TAA and section 46 of the PAIA had an irreconcilable tension. This is because (as discussed above) section 69(2) of the TAA makes provision for exceptions in which disclosure of taxpayer information may be allowed in instances such as when ordered by a court. Conversely, the PAIA (sections 35 and 46) added a layer of statutory protection for taxpayers which had the effect of providing for a blanket prohibition on disclosure of taxpayer information, notwithstanding the fact that the disclosure would be in the public's interest (as discussed above). This creates a conflict and a likely dilemma for SARS officials. This is because if a SARS official discloses taxpayer information in terms of a court order, the official may be in contravention of the PAIA, and if the SARS official does not disclose taxpayer information as ordered by a court, the official is in contravention of the court order. This conflict was addressed by the CC in *Arena Holdings* through a reading-in of an additional exception for disclosure, which makes provision for a disclosure of taxpayer information in terms of the PAIA. Currently, the TAA and PAIA are aligned in that the PAIA no longer has a blanket prohibition against disclosing taxpayer information.[172] This will be discussed in Chapter 4 below.

[172] *Arena Holdings* CC, paragraph 205 (4)(b).

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In Chapter 2, the risks posed by illegal mining activities were set out, among others, public safety risks emanating from violent turf wars, trafficking, health risks due to the use of mercury, and environmental risks such as air/water pollution and degradation of the environment (i.e., sand erosion/siltation).

The TAA does not define nor set out what it means for SARS to be able to disclose information when it may reveal evidence "*of an imminent and serious public safety or environmental risk*". The courts (High Court and Constitutional Court) in *Arena Holdings* perennially dealt with the phrase as it was central in determining the invocation of the public interest override provisions in that case. The courts, however, did not provide guidance on the interpretation of the phrase. The CC merely expressed that a serious and imminent environmental or health risk poses a high level of threat to the public.[173]

Therefore, it is submitted that the scope and ambit of these provisions in the TAA and PAIA have not yet been fully interpreted or applied by courts. Since the courts and the TAA do not provide sufficient guidance on what an imminent and serious public safety or environmental risk entails, the literal meaning of the words as well as the context will be used to determine the meaning for purposes of this research.

What is essential as a starting point would be to determine the intention of the legislature when it enacted section 71 of the TAA. The cardinal rule of this is to ascertain the legislature's policy in enacting this section and interpreting it in a way that would align with the policy aspirations.[174] This can be done by way of ascertaining the true meaning of the provisions through a literal approach, and by venturing beyond the contours of the ordinary syntax of the provisions by considering the context in which it was enacted.

With the literal approach, the true meaning of section 71 of the TAA can be deduced in the words used by the legislature.[175] To this end, a logical and grammatical construction must be used in interpreting the provisions in question.[176] This was

[173] *Arena Holdings* (CC), paragraph 141.
[174] *Glen Anil Development Corporation v SIR* 37 SATC at 19.
[175] Linda van Schalkwyk and Bernard Geldenhuys '*Section* 80A(c)(*ii) of the Income Tax Act and the Interpretation of Tax Statutes in South Africa*' (2009) Meditari, Accountancy Research 167-185 at 170 Vol.17 Issue 2.
[176] D Meyerowitz, *Meyerowitz on Income Tax* (2006-2007) 3.5 para 3.10.

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echoed in *New Union Goldfield*[177] where it was intimated that the words must be read in consideration of their ordinary and natural sense bearing in mind the context of the provisions in question. On the other hand, the contextual approach seeks to assign meaning to a statutory provision in view of the policy aspirations/purpose it seeks to achieve, and context is determined to establish said purpose.[178] It is submitted that the latter embodies the constitutional ethos espoused in section 39(2) of the Constitution[179] which states that when interpreting/developing law, adjudicative bodies must promote the spirit, purport and objects of the Bill of Rights.

It is further submitted that the SCA in *Bothma-Batho*[180] endorsed a constitutional approach premised on considering all relevant and admissible context and endorsed a unitary exercise that focuses on both the text of a statutory provision and its context (also considering the circumstances around a provision coming into existence). In *Endumeni*,[181] the SCA reiterated that the contextual approach is the correct method for statutory interpretation because seeking to ascertain the true meaning of texts devoid of their context and purpose is an unhelpful exercise.[182]

In view of the above, it is argued that section 71 of the TAA must be interpreted by following a unitary approach, in line with constitutional principles. This, as it will be argued below, will provide some direction on when section 71, having regard to an imminent and serious public safety or environmental risk, can be invoked to lift the veil of tax secrecy where the zama-zamas are concerned.

3.2.1. "Imminent"

The Meriam Webster dictionary defines it as something that is "*ready to take place*" or "*happening soon*".[183] The Oxford Learners Dictionary defines the word 'imminent' as "*(especially of something unpleasant) likely to happen very soon*".[184] The Cambridge Dictionary has a similar meaning. In the realm of criminal law, imminence pertains to

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[177] *New Union Goldfield Ltd v Ltd* 1950 (3) SA 392 (A) at 404.
[178] WA Joubert and JA Faris *The Law of South Africa* (2001) 285 and 297.
[179] Constitution of the Republic of South Africa, 1996.
[180] *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).
[181] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[182] Ibid, para 25 and 26.
[183] https://www.merriam-webster.com/.
[184] https://www.oxfordlearnersdictionaries.com/.

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conditions in which it can be reasonably concluded that someone is about to be harmed or killed.[185]

3.2.2. *"Serious"*

The Cambridge dictionary defines it as being "*severe in effect*".[186]

3.2.3. *"Public safety risk"*

The law insider dictionary defines it as *"anything which is injurious to the safety or health of an entire community or neighbourhood, or any considerable number of persons"*.[187]

3.2.4. *"Environmental risk"*

The Oxford dictionary defines it as "*Any source of harm or danger in the environment, for example from natural hazards, pollution, or depletion of natural resources*."[188] This also refers to risk stemming from economic activity that poses a danger to the environment or the ecosystem.[189]

Applying the above meanings, *"…imminent and serious public safety or environmental risk*" in this context would mean a risk/hazard, which is likely to happen very soon, and will be severely injurious to the safety/health of a community and the environment.

The context under which the Legislator enacted section 71 is unclear. However, considering the importance of the tax secrecy regime it is submitted that the Legislature envisaged disclosure of taxpayer information to occur under extraordinary circumstances such as when it would be in the public interest to do so.

Therefore, SARS can obtain a court order as per section 71 of the TAA to enable it to disclose taxpayer information (i.e., to the relevant state organs) if said information may reveal evidence of an imminent and serious public safety or environmental risk that poses a high level of threat to the public/populace. The implication of section 71 of the TAA is that SARS has the discretion to determine whether the information at its disposal would warrant lifting the veil of tax secrecy if it will be in the public interest. In

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[185] https://dictionary.cambridge.org/.
[186] Ibid.
[187] https://www.lawinsider.com/dictionary/. Also see Maslow AH "*A theory of human motivation*" Psychological Review (1943) 50 (4) at 370 – 396.
[188] Oxford dictionary at https://www.oxfordreference.com/.
[189] Boachie E '*Environmental Risk: FDI and tax reforms: why we must worry*' Department of Finance, University of Ghana Business School, Accra, Ghana (2020), page 5.

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this case, the SARS official disclosing the taxpayer information will not be committing a criminal offence as he/she will be exercising the narrow exceptions that permit the disclosure of taxpayer information. Further, the SARS could also invoke section 31(4) of the National Environmental Management Act 14 of 2009 (NEMA) which protects persons who, in good faith, disclose information they believe, at the time of disclosure, to possibly reveal evidence of an environmental risk.

This not only erodes the trust of taxpayers in the tax system, but also encroaches on constitutional imperatives (i.e., right to privacy, right against self-incrimination).[190] The interaction between taxpayer confidentiality and constitutional imperatives will be canvassed in Chapter 4 below.

3.3. Conclusion

Given that the zama-zamas derive their income from an illegal source, they may be reluctant to disclose their tax affairs to SARS to shield themselves from potential criminal prosecution. However, the tax secrecy provisions which prohibit wrongful disclosure of taxpayer information exist to allay these concerns. The rationale of tax secrecy is two-fold, to encourage full and frank disclosure by taxpayers (with guaranteed confidentiality) as well to enable optimal revenue collection by SARS.

This prohibition against disclosure is layered because SARS officials are mandated to take an oath, as well as the accompanying criminal sanction for wrongful disclosure. This exemplifies the sacrosanct nature of tax secrecy.

The layered secrecy provisions are bolstered by the interface with the PAIA which affords taxpayers an extra layer of protection in the form of section 35 of the PAIA which (before being declared unconstitutional in *Arena Holdings* as will be seen in the next chapter) provided SARS with an unyielding ground to refuse PAIA requests for access to any records enclosing information held or obtained by SARS for purposes of enforcing statutory mandates regarding revenue collection. This layer of statutory protection under the PAIA was, pre-*Arena Holdings*, even more immutable when the public interest override provisions envisaged in section 46 of the PAIA did not apply to taxpayer information.

[190] *Arena Holdings (Pty) t/a Financial Mail and Others v SARS and Others* 2023 (8) BCLR 905 (CC), at par 48.

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SARS is therefore legally obligated to uphold the confidentiality of taxpayer information. SARS upholds this strict legal duty (to protect taxpayer confidentiality) with vigour in its protection of taxpayer secrecy, giving taxpayers the confidence that SARS will fight to protect this right without fear, favour, or prejudice even against institutions such as the Public Protector. The implications of TAA's secrecy provisions on the zama-zamas is that it would apply to them and offer them some protection against wrongful disclosure of their tax information.

Despite the privacy protection offered to taxpayers, it is found that this statutory protection is not absolute as there are exceptions that enable SARS to disclose taxpayer information, such as when there are substantial contraventions of laws or when disclosure would reveal an imminent and serious public safety or environmental risk. Whatever apparent protection the zama-zamas may have under the tax secrecy provisions, they are not fully protected because sections 71 of the TAA and section 46 of the PAIA make provision for a framework where the veil of tax secrecy can be lifted in cases where disclosure would reveal a serious risk to public safety or the environment. This exception could potentially expose the zama-zamas to having their tax affairs disclosed given the nature of their operations and their corrosive effect on the society and environment. This could not only erode the trust of taxpayers in the tax system (SARS), but could also encroach on constitutional imperatives (i.e., right to privacy). The interaction between the secrecy provisions and the Constitution are canvassed in Chapter 4 below.

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CHAPTER 4: INTERACTION BETWEEN THE TAX SECRECY REGIME AND THE CONSTITUTION

4.1. Introduction and background

Chapter 3 dealt with taxpayer confidentiality envisaged in section 69 (read with section 67(3)) of the TAA and how the tax secrecy regime is a long-standing public policy which has been observed by courts for over a century. It was established that taxpayer confidentiality would also apply to the zama-zamas, thus rendering the protection espoused in the tax secrecy provisions to also extend to them. Section 1 of the Constitution states that South Africa's democracy is premised on values such as accountability, responsiveness, and openness. On the other hand, transparency continues to be a major trend in taxation globally, which incidentally pushes the boundaries of taxpayer confidentiality.[191]

Despite the privacy protection offered to taxpayers, this statutory protection is not absolute as there are exceptions that enable SARS to disclose taxpayer information, such as when there are substantial contraventions of laws or when disclosure would reveal an imminent and serious public safety or environmental risk.[192] In other words, when the disclosure will be in the public interest.

SARS fulfilling its statutory obligation to preserve taxpayer secrecy is also underpinned by the right to privacy espoused in section 14 of the Constitution. Section 14 states that:

> "*Everyone has the right to privacy, which includes the right not to have—*
>
> (a) *their person or home searched;*
>
> (b) *their property searched;*

---

[191] The IBFD Yearbook on Taxpayers' Rights (2019), at pg. 15. Although it falls outside the scope of this research, it is important to note that taxpayer information can, in certain instances, also be shared between revenue authorities (e.g., SARS and revenue authorities of other countries) through automatic exchange of taxpayer information between participating countries. For purposes of this research, it could be possible if the relevant zama-zama is an immigrant. In this case, SARS could share the taxpayer information with the revenue authority in which said taxpayer is a tax resident, and thus be assessed in that country/penalised e.g., for tax evasion etc. This could potentially infringe the taxpayer's right to privacy (see https://www.sars.gov.za/businesses-and-employers/third-party-data-submission-platform/automatic-exchange-of-information/)

[192] For example, section 71 of the TAA and section 46 of the PAIA.

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(c) their possessions seized; or

(d) the privacy of their communications infringed."

As was shown in Chapter 3, it is submitted that the disclosure of taxpayer information by SARS would infringe on the zama-zamas' right to privacy. The zama-zama's taxpayer privacy must therefore also be viewed through the prism of the right to privacy. It is submitted that the disclosure would not only infringe on the taxpayer's right to privacy, but also compromise the taxpayers' right against self-incrimination which is enshrined in section 35 of the Constitution.

To limit the scope of this research, this chapter will only focus on the taxpayers' right to privacy as this is aligned with the courts' approach in *Arena Holdings*.

Therefore, the protection of the taxpayers' right to privacy by SARS through exercising the tax secrecy regime may encroach on other fundamental rights enclosed in the Constitution, such as the right to access information as per section 32 of the Constitution. The information to be accessed for purposes of this research, is the right to access taxpayer information, namely, the zama-zamas' tax information.

Section 195 of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution such as accountability and transparency that must be fostered by providing the public with timely, accessible, and accurate information.

4.2. Nature of the conflicting rights

Both the rights to privacy and access to information have been canvassed by courts, particularly their importance in a democratic South Africa.

4.2.1 *Right to privacy*

The scope of the right to privacy was laid out by the CC in *Bernstein v Bester*[193] where Ackerman J intimated as follows:

> "*The truism that no right is to be considered absolute implies that from the outset of interpretation each right is already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the*

[193] *Bernstein v Bester* 1996 (2) SA 751 (CC).

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> *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 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*."[194]

The implication of the above quote on the zama-zamas (taxpayers) is that as they enter the realm of communal relations by conducting (illegal) business, the weight of their right to privacy decreases as it clashes with conflicting rights of the community. It is submitted that this is exacerbated by the zama-zamas conducting activities which have detrimental consequences for the society and the environment (as canvassed in chapter 2). Illegal mining impacts communities and the country, and therefore, the protection of the zama-zamas' privacy lessens when weighed against the rights of the community as a whole.

4.2.2 *Right to access information*

Since accountability and transparency are among values that underpin South Africa's democracy, these can be effected by, *inter alia*, the right to access information (held by state organs/departments such as SARS) as enshrined in section 32 of the Constitution. The PAIA was enacted to give effect to the right to access information.[195]

The PAIA's preamble proclaims that PAIA was enacted to "*foster a culture of transparency and accountability in public and private bodies by giving effect to the right to access information*".

The CC has iterated that the right to access information gives effect to the founding values of South Africa's democracy by stating:

> "*It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. For without access to information, the ability of citizens to make*

[194] Supra note 163, at paragraph 67.
[195] PAIA preamble.

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responsible political decisions and participate meaningfully in public life is undermined."[196]

4.3. Balancing exercise of conflicting rights

It is not unorthodox that modern democracies such as South Africa are characterised by the challenge of competing rights (especially owing to its diverse society).[197] It is therefore, common that the individual right to privacy will conflict with the communal interests/public interest.[198] The right to taxpayers' privacy conflicts with the right to access information – as the access to taxpayer information implies the disclosure of said information.[199]

In this instance, the zama-zamas' right to privacy limit the right to access information, and by extension, may prevent the disclosure of information that would not only reveal an imminent public safety or environmental risk, but also reveal gross human rights violations that stem from illegal mining. The consequences of illegal mining were canvassed in Chapter 2, especially the social and environmental effects such as forced labour, killings of innocent civilians who are caught in the crossfire of violent turf wars, health effects from mercury and degradation of the environment. Illegal mining activities, therefore, have an impact on the right to life,[200] dignity,[201] right against forced labour,[202] environmental rights,[203] and right to health among others.[204]

Constitutional rights are not absolute and are subject to limitations contained in section 36 of the Constitution.[205] Rights must be weighed against the state's representation of communal interests.[206] To this end, there is no predetermined hierarchy of rights that society can resort to in resolving a tension between rights.[207] Therefore, this conflict

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[196] *President of the Republic of South Africa & Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at paragraph 10.
[197] *Arena Holdings* CC, para 129.
[198] Ibid.
[199] I.M Valderrana et al "*The rule of law and the effective protection of taxpayers' rights in developing countries*" WU International Taxation Research Paper Series (2017) no: 2017 – 10, at page 8.
[200] Section 11 of the Constitution which guarantees the right to life.
[201] Section 10 of the Constitution which guarantees the right to dignity.
[202] Section 13 of the Constitution which guarantees the right against, inter alia, forced labour.
[203] Section 24 of the Constitution which guarantees the right to an environment that is not harmful to the health or wellbeing of persons.
[204] South African Human Rights Commission '*Report of the SAHR Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa'* (2015) at 21.
[205] Section 7(3) of the Constitution.
[206] *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BG paragraph 566G-567H.
[207] *Arena Holdings* CC, paragraph 129.

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can be resolved through the prism of the Bill of Rights by balancing the rights by using the mechanism envisaged in the limitations clause as contemplated in section 36 of the Bill of Rights. Section 36 provides that:

> "(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.*
>
> *(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights*."

Therefore, the disclosure of taxpayer information will require a balance to be struck between competing rights. This is what the courts were called upon to do in *Arena Holdings* which set the legal position regarding the disclosure of taxpayer information.

The description of this balancing exercise was set out by the CC in *Makwanyane* as follows:

> "*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*

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> *inherent in the requirement of proportionality, which calls for the balancing of different interests*."[208]

It is important to note that the above was expressed in relation to the limitation clause that was envisaged in the Interim Constitution of South Africa.[209] The balancing exercise required for the limitation clause (especially regarding weighing competing values) was further reiterated in the new democratic South Africa in *Manamela*[210] where the CC held:

> "*Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable*."[211]

Although the factors are not exhaustive, the essence of the limitation inquiry is two-fold: firstly, whether conduct or statute violates a right i.e., right to privacy; secondly, if there is a violation (limitation), whether said violation is justified or reasonable in terms of section 36.[212] For a right to be limited as per section 36, the limitation must be in terms of law of general application.[213] All limitations that are considered to be unreasonable and unjustifiable are prohibited and regarded as unlawful. Therefore, for a limitation to pass constitutional muster, it must be "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*".[214]

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[208] S v *Makwanyane* 1995 (3) SA 391 (CC) paragraph104.
[209] Constitution of the Republic of South Africa, Act 200 of 1993.
[210] *S v Manamela & Another (DG of Justice Intervening)* 2000 (3) SA 1 (CC).
[211] Supra note 179, at paragraph 33.
[212] Supra note 163, at paragraph 75. Also see BJ Croome "*Taxpayers' Rights in South Africa*" (2010), at 66.
[213] Section 36(1) of the Constitution.
[214] Ibid.

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The limitation analysis was canvassed by the CC in various cases (some quoted above). However, of relevance for this research and the most apposite, given that it dealt with the disclosure of taxpayer information (and set the legal position for same) is the *Arena Holdings* case. Even in this case, there was a tension of constitutional rights to privacy and right to access information; and the need for a balance to be struck between these constitutional rights.[215]

4.3.1 *Arena Holdings: High Court*

The factual matrix in *Arena Holdings* was as follows:

In 2019, an investigative journalist made a request to SARS in terms of PAIA to access the tax records of former President Zuma. The request was prefaced on allusions in Mr. Jacques Pauw's book (titled that *The President's Keepers*) of the existence of credible evidence that former President Zuma was a tax delinquent while in office.[216]

SARS refused the request for access to tax records on the premise that former President Zuma was entitled to confidentiality as per sections 34(1) and 35(1) of the PAIA, read with section 69 of the TAA.[217] The matter ultimately went to the High Court.

The thrust of the media houses' arguments was that the prohibition to access taxpayer information based on the TAA's secrecy provisions is unconstitutional and that access is in the public's interest, and thus the public interest override provision should enable them to access the requested taxpayer information.[218] The media houses further argued that the secrecy provisions regarding the disclosure of a taxpayer information create an impenetrable access barrier to taxpayer information through the PAIA and TAA.[219] In other words, the relevant provisions in the PAIA and TAA create an absolute prohibition to access tax information which ultimately prohibits the media houses from reporting on any taxpayer information obtained, notwithstanding the fact that said taxpayer information could contain conclusive evidence of malfeasance (by a person who held public office) that could be in the public's interest.

[215] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v SARS and Others* 2022 (2) SA 485 (GP), at 1.
[216] *Arena Holdings* CC, paragraphs 6-7.
[217] Ibid.
[218] Ibid.
[219] *Arena Holdings* CC, paragraph 17.

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The nub of SARS' arguments was that the relief sought by the media houses encroached on taxpayers' right to privacy as envisaged in section 14 of the Constitution in that the relief sought would enable the media houses to disseminate the taxpayer's information with no constraints.[220]

Furthermore, SARS argued that the secrecy provisions do not render an absolute prohibition of tax information as it provides for regulated exceptions for access which strikes a fair and reasonable balance between the right to privacy and the right to access information. According to SARS, taxpayers are obliged to make full disclosure of their tax affairs, "*essentially stripping them of the privilege against self-incrimination*".[221] Therefore, SARS argued that the secrecy provisions aim to preserve taxpayers' secrets and that overriding the secrecy provisions would breach the taxpayers' trust in SARS in so far as their tax affairs are concerned.[222] Lastly, and for completeness, SARS argued that the policy of honouring taxpayer privacy gives effect to South Africa's obligations under international law. Central to this argument, is that the secrecy provisions ensure voluntary tax compliance on the part of the taxpayer community.[223]

In balancing the relevant rights, the High Court (HC) held that despite the extensive protection granted by the secrecy provisions, the exception should extend to instances where there is a strong public interest in disclosing taxpayer information.[224] To reach this conclusion, the HC held as follows:

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

[220] *Arena Holdings* CC, paragraph 22.
[221] Ibid.
[222] *Arena Holdings* CC, paragraph 24.
[223] *Arena Holdings* CC, paragraph 26.
[224] *Arena Holdings* HC, paragraphs 8.11 – 9.

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> *personal privacy of those in whose affairs the public have a legitimate interest (such as members of the Executive), I find that the limitations on the access to information are not justified. The corollary is that I find that the public interest override encroachment or limitation of taxpayer confidentiality is, on the other hand justified*."[225] (Own emphasis added)

To this end, the HC concluded that the prohibition of the disclosure of taxpayer information contained in section 69 of the TAA (read with 35 of the PAIA) limit the right to access information as envisaged in section 32 of the Constitution, and that this limitation was not justifiable in terms of section 36 of the Constitution.[226]

The HC ordered that sections 35 and 46 of the PAIA are unconstitutional and invalid to the extent that they preclude access to tax records even in circumstances where the requirements of the public interest override provisions are met.[227]

The HC further ordered that sections 67 and 69 of the TAA are unconstitutional and invalid to the extent that they preclude access to information being granted to a requestor in respect of tax records in circumstances where the public interest override provisions are met; and to the extent that they preclude a requester from further disseminating information obtained as a result of a PAIA request.[228] To align the secrecy provisions with the spirit and values of the Constitution, a reading-in of the public interest override provisions contained in section 46 of the PAIA was adopted to apply as a measure to lift the veil of tax secrecy.[229]

4.3.2 *Arena Holdings: Constitutional Court*

The CC was also encumbered with this matter as it was tasked to confirm the HC's orders of constitutional invalidity. The factual matrix and arguments by parties will not be iterated as they have been canvassed above.

The CC's judgment was split in two parts, namely the majority ruling in favour of the HC's decision and the minority ruling in favour of SARS. It is submitted that although the majority ruling set the legal position regarding the disclosure of taxpayer

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[225] *Arena Holdings* HC, paragraph 8.14.
[226] *Arena Holdings* HC, paragraph 10.1 – 10.2.
[227] *Arena Holdings* HC, paragraph 1 of the HC Order.
[228] *Arena Holdings* HC, paragraph 2 of the HC Order.
[229] *Arena Holdings* HC, paragraph 10.3.

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information, the minority ruling has some notable reasoning that required further clarification by the majority. This will be discussed below.

4.3.2.1 *Majority judgment*

The court agreed with the HC and found that TAA's secrecy provisions are unconstitutional.[230] In furtherance of this finding, the court intimated that the limitations on disclosing taxpayer information (as envisaged in the secrecy provisions, read with section 35 of the PAIA) are stringent, unreasonable, and ultimately unjustifiable owing to their substantial checks and balances which render the prohibition in the secrecy provisions absolute.[231]

The court further found that the mantle of taxpayer confidentiality can be lifted in narrowly defined circumstances through the invocation of the public interest override provisions in instances such as unlawful contraventions that pose a serious risk to the public such as serious health or environmental risks.[232] The court further held that the application of the public interest override provisions to taxpayer information held by SARS would enable a narrow incursion into the taxpayer's right to privacy while lessening the encroachment into the rights to access information and freedom of expression.[233] The public-interest override therefore, brings about a balance of maintaining taxpayer confidentiality; and maintains a high threshold for the lifting of confidentiality in the interest of the public.

Also, of importance to note, is that the majority ruling rejected SARS' argument that absolute taxpayer confidentiality is essential to ensure that taxpayers make full and truthful disclosures. This is because full disclosure by taxpayers can be ensured through other means (such as criminal sanctions for false disclosures) and that SARS can already disclose taxpayer information to the other state organs such as the NPA or SAPS in some instances contained in the TAA i.e., section 71.

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[230] *Arena Holdings* CC, paragraph 196.
[231] *Arena Holdings* CC, paragraph 195.
[232] *Arena Holdings* CC, paragraph 192.
[233] *Arena Holdings* CC, paragraphs 182-184.

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4.3.2.2 *Minority judgment*

The minority ruling iterated that the secrecy provisions promote taxpayer confidence in SARS and contain adequate parameters for striking a balance between the right to access taxpayer information and maintaining taxpayer secrecy.[234]

The minority ruling was also of the view that extending the public-interest override provisions to apply to taxpayer information held by SARS would impact public figures and ordinary private individuals alike in the disclosure of taxpayer information where it may reveal evidence of serious criminality or an imminent risk to the environment, health and/or safety of the public.[235] The minority opined that this would pose a challenge to the privacy interest of those individuals and the proposed remedy could be detrimental to the reputations and societal standings of taxpayers.[236] Lastly, the minority ruling cautioned that extending the public interest override provisions would raise questions about the nature and extent of the judgment calls that would have to be made by SARS regarding whether a PAIA requester and his/her reasons for requesting access to taxpayer information will satisfy the requirements of the public interest override provisions.[237]

4.4. Legal position on disclosure of taxpayer information and its implications on illegal miners

The *Arena Holdings* case has established the legal position regarding the disclosure of taxpayer information. The legal position currently is that taxpayer confidentiality is not sacrosanct enough to render it impenetrable – and information may now be accessed in certain limited instances, if it is in the public's interest. As taxpayers move from the sanctum of their personal lives to the public sphere, their right to privacy shrinks and must be moderated against the public's interests.[238]

The consequence of this legal position on the zama-zamas is that their right to privacy (as guaranteed by the tax secrecy regime) must yield to constitutional imperatives in the context where public interest considerations trump taxpayer privacy i.e., when their

[234] *Arena Holdings* CC, paragraph 113.
[235] *Arena Holdings* CC, paragraph 112.
[236] Ibid.
[237] Ibid.
[238] *Bernstein*, paragraph 65.

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information will reveal an imminent serious risk to public safety/health or an environmental risk. The application of the PAIA's public interest override and section 71 of the TAA means that the veil of tax secrecy could be lifted, especially since the activities of the zama-zamas are illegal and accompanied by serious risks to public health and the environment. It is such instances that pose significant risks to the public that would warrant the lifting of the veil of taxpayer confidentiality.

Section 39 of the Constitution states:

> "*39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) …; and*
>
> *(c) ….*
>
> *(2) 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*." (own emphasis)

The interpretation of the public interest override provisions and section 71 of the TAA (including section 69(2) of the TAA, following a reading-in by the CC which has the effect of making provision for a disclosure made in terms of the PAIA[239]) must be aligned with the objects of the Bill of Rights. It is contended that it would be difficult to argue for an interpretation of the provisions underlying the secrecy regime that would render them compatible with the Constitution (be it by SARS as protectors of taxpayer information or the zama-zamas themselves arguing against a violation of their privacy). This is because withholding the zama-zamas' tax information will not only limit the right to access information when it would be in the public interest to do so but could also ensure that their activities continue to pose a risk to the public and environment unabated.

On the one hand, the public interest override provisions enable persons beyond SARS to access taxpayer information when it is in the public's interest to do so. This can be inferred from the CC's iteration that it found it difficult to conceive any reasonable basis

[239] *Arena Holdings* CC, paragraph 205 (4)(b).

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to hold that taxpayer information cannot be subject to the public interest override provisions in circumstances where the override is potentially available to justify the disclosure of information that may relate to the life and safety of individuals, and security interests of the country.[240] This assertion must be viewed under the context of the factual matrix, being that news outlets were seeking to enforce their constitutional rights by seeking access to a taxpayer's information.

On the other hand, section 71 of the TAA enables SARS to disclose information. The provisions of section 71 mirror those of the PAIA public interest override. Despite ruling that taxpayer information can be disclosed when it is in the public's interest to do so, the CC did not comment on the parallels or the possible relationship between the two provisions. It is contended that a plain reading of the two provisions creates two separate avenues for disclosure of information (albeit for similar reasons i.e., environmental risk). As stated above, the PAIA's public interest override provisions can be used by people outside of SARS i.e., media. Section 71 of the TAA is merely one of the avenues for SARS to exercise a discretion in determining whether it should disclose taxpayer information as set out therein, subject to a court order. It is therefore argued that the existence of section 71 of the TAA not only enables SARS to disclose the zama-zamas' information, but also strikes a balance between the administration of a tax statute and taxpayers' privacy because a court needs to sanction the disclosure of the zama-zamas' information as the core of their activities do not relate to a tax offence (i.e., information would reveal a criminal offence or risk to the environment). SARS' discretion is curtailed by the judicial oversight to ensure that SARS does not disclose the zama-zamas' information arbitrarily.

In *Mistry*,[241] the CC set out guidelines that must be followed when determining whether there is a reasonable expectation of privacy regarding information privacy, *inter alia*, whether a person provided the information for a particular purpose, which upon receipt of the information, is now being used for another purpose.[242] Bearing this in mind (i.e., whether the information used is for a purpose for which it was obtained by SARS – which is to administer tax legislation), SARS cannot, of its own accord, disclose

[240] *Arena Holdings* CC, paragraph 172.
[241] *Mistry v Interim National Medical & Dental Council and Others* (1998) CC 10 SA 1127.
[242] Supra note 212, paragraph 27.

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information that does not relate to administering tax legislation i.e., tax offences.[243] The CC echoed similar sentiments when it intimated that the disclosure exceptions envisaged in the TAA (except section 71) relate to work of state organs in investigating, prosecuting and adjudicating tax cases.[244] However given the other avenue (section 46 of the PAIA), SARS can still share tax information of the zama-zamas (e.g., with the NPA/SAPS) if the public interest override provisions are triggered. In other words, it need not be a tax related offence that triggers information sharing by SARS as information may be shared if it could reveal serious criminality and risk to public safety, provided that the public interest override provisions are met. Owing to the above, there is now harmony between the TAA and PAIA in that PAIA no longer provides a framework for a blanket prohibition on disclosure of taxpayer information.

4.5. Application of the limitation exercise on taxpayers' (zama-zamas) right to privacy

Section 36 of the Constitution has been outlined above. Of importance to be iterated however, is that the current legal position on the disclosure of taxpayer information is that the veil of tax secrecy can be pierced if the disclosure of taxpayer information will be in the public interest.

The definition of 'public interest' is too broad in that it covers most instances that negatively impact communal interests.[245] However, adopting a heuristic approach in analysing the construction of the PAIA's public interest override and section 71 of the TAA, one can conclude that the provisions afford one a narrower interpretation which makes it cumbersome to satisfy the requisite thresholds.[246] This is because for disclosure to be exempted, it must be shown that it would reveal evidence of a "*substantial contravention of the law or an imminent and serious public safety or environmental risk*". The CC alluded to cumbersome requirements for disclosure when it held that the public interest override provisions do not remove the cloak of confidentiality but sets a relatively high bar for the lifting of confidentiality.[247]

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[243] C Fritz "*South African Taxpayers' Right to Privacy in Cross-Border Exchange of Tax Information*" Constitutional Court Review (2021) Vol 11, page 415.
[244] *Arena Holdings* CC, paragraph 156.
[245] K Allen "*Applying PAIA: Legal, Political and Contextual Issues*" Paper Wars (2009), at page 165.
[246] *Arena Holdings CC*, paragraph 181.
[247] *Arena Holdings* CC, paragraph 139.

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In view of the above, the disclosure of taxpayer information cannot be actioned without just cause or due process which requires a nuanced and context-specific form of balancing interests i.e., between the withholding of taxpayer information which is worthy of protection from disclosure, and the mandatory disclosure of information which could be in the public interest.[248]

The balancing exercise will culminate in a limitation of constitutional rights – which will only pass constitutional muster if it is found by courts that, considering the nature and importance of the right and the extent to which it is limited (i.e., disclosure of taxpayer information), such limitation will be justified in relation to the purpose, importance and effect of the provision which results in the limitation, considering the availability of less restrictive means to achieve this purpose.[249]

As seen above, the CC in *Makwanyane* and *Manamela* intimated that a limitation of rights should be reasonable and proportional. It is important to note that there is no single standard to determine reasonableness.[250] Reasonableness would require a decision maker to consider all relevant factors, and a balance must be struck in accordance with the rights' relative weight and importance.[251] The balancing act is centred on proportionality, which must have an outcome that is justifiable in an open and democratic society based on human dignity, equality and freedom.[252] Therefore, for the limitation of the zama-zamas' right to privacy to be considered reasonable, the consideration must be made in line with constitutional imperatives such as human dignity, equality and freedom.

The purpose of the confidentiality of taxpayer information aids in tax administration, same is universally accepted.[253] However, in balancing taxpayers' (zama-zamas) right to privacy and access to such information that may reveal serious criminality and harm to the public and/or environment (and other constitutional imperatives), the right to access information will outweigh the right to privacy because it will be in the public interest. The interference with the zama-zamas' right to privacy will be legitimate and

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[248] Ibid.
[249] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paragraph 31.
[250]Ibid.
[251] R Alexy "*Reasonableness of the law in Bogiovanni G, Sartor C, Valentini G (ed), reasonableness & law*" Dordrecht Heidelberg London, New York: Springer (2009) at 7.
[252] I.M Rautenbach *"Proportionality and the Limitation Clauses of the South African Bill of Rights*" PELJ 2014 (17) 6, at 2250
[253] *Arena Holdings* CC, paragraph 175.

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pass constitutional muster in this instance. This view is held bearing in mind that the protections espoused in the Constitution are not intended to be used as an impermeable shield to protect individuals from scrutiny in respect of conduct that poses a threat to communities, especially those located near illegal mining sites.[254] Therefore, the zama-zamas as taxpayers, are entitled to protection under the secrecy regime. However, they are not entitled to an absolute level of protection from disclosure of their tax information that may reveal serious criminality and serious risks to the public safety or environmental risk. The CC has guarded against elevating taxpayer confidentiality to a sacrosanct place where no exception to enable public access (when in the public interest) is possible.[255]

Therefore, the zama-zamas' tax information not only can be shared with state organs such as SAPS and the NPA, but it can also be shared with the public as the PAIA's public interest override provisions and *Arena Holdings* have created this avenue that arguably elevates public interests above taxpayer secrecy in instances where disclosure would be in the public's interest. The consequence of *Arena Holdings* opens up the zama-zamas to disclosure of their tax information to a wider class of people than state institutions.

Considering the above, it is contended that the limitation of the zama-zamas' right to privacy meets the reasonable and just criteria, given that the limitation is for a legitimate purpose because it is in the public interest. This is because the disclosure of the information will likely reveal the contravention of laws, serious risks to public health and safety, and risk to the environment. This will not only reveal the foregoing but may reveal the violation of numerous other rights i.e., to life, which on a balance (as traversed above) will outweigh the zama-zamas' right to privacy in an open and democratic South Africa. This is because the zama-zamas (as taxpayers) do not form a "*special category of persons that are entitled to absolute level of protection from the disclosure of information that may reveal their serious criminality*" (and by extension, the ancillary risks of their activities).[256]

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[254] *Arena Holdings* CC, paragraph 183.
[255] *Arena Holdings* CC, at paragraph 172.
[256] *Arena Holdings* CC, paragraph 169.

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The PAIA's public interest override provisions and section 71 of the TAA strikes a balance between the administration of tax statutes, and right to privacy as the default position still guarantees confidentiality. The foregoing provisions provide a mechanism that is not only less restrictive (on other constitutional rights i.e., right to access information) than an absolute prohibition (pre-*Arena*) but is one that is narrowly constructed with substantial checks and balances that ensures a high threshold for one to overcome in his/her quest to access taxpayer information. Therefore, the evidentiary burden of invoking the public interest override remains high, given the sacrosanct nature of taxpayer information.[257]

It is important to note that the CC, however, did not provide guidance as to what the phrase "*imminent and serious public safety or environmental risk"* means. However, the CC maintained that the confidentiality would continue to be the default position.[258] The lack of clarity on the phrase will cause contentious issues regarding the nature and extent of the required threshold to satisfy the requirements of section 71 of the TAA (and by extension the PAIA "public interest override" provisions).

Lastly, constitutional imperatives not only trump taxpayer confidentiality in South Africa. Other jurisdictions have adopted the same stance (owing to the superiority of their Constitutions). An apt example is Kenya, whose Court of Appeal held that taxpayer information may be disclosed if it is in line with constitutional imperatives such as the attainment of a transparent and accountable government, owing to Kenya's deliberate effort to fashion an open and free country where governance is democratic and accountable to the 'wananchi', the citizenry.[259]

This was clarified by the CC in *Arena Holdings*, thus setting the legal position that taxpayer information must yield to public interest and constitutional imperatives if disclosure of taxpayer information will reveal serious criminality or serious risk to the populace/society.

Taxpayers' right to privacy is then balanced against the right to access information. The disclosure of taxpayer information would restrict the zama-zamas' right to privacy. On the other hand, disclosure prohibitions also restrict constitutional rights such as the

[257] Ibid.
[258] *Arena Holdings* CC, paragraph 193(a).
[259] *Njoya v Attorney General* [2014] eKLR, paragraph 24.

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right to access information, which is an important countervailing right in this instance as it is essential for openness and transparency by state organs such as SARS. Considering the public interest considerations (and bearing in mind *Arena Holdings*, TAA's section 71 and the PAIA's "public interest override" provisions), the right to access information would trump the right to taxpayer privacy because disclosure of zama-zamas tax information will be reasonable and justified in an open, free, and democratic South Africa.

4.6. Conclusion

The protection of the taxpayers' right to privacy by SARS through exercising the tax secrecy regime may encroach on other fundamental rights enclosed in the Constitution, such as the right to access information as per section 32 of the Constitution. This is because the zama-zamas right to privacy limit the right to access information, and by extension, may prevent the disclosure of information that would not only reveal an imminent public safety or environmental risk, but also reveal gross human rights violations that stem from illegal mining.

It has been established that constitutional rights are not absolute and are subject to limitations contained in section 36 of the Constitution. A conflict of rights can be resolved through the prism of the Bill of Rights by balancing said rights by using the mechanism envisaged in the limitations clause as contemplated in section 36 of the Bill of Rights. The essence of the limitation inquiry is two-fold: firstly, whether conduct or statute violates a right i.e., right to privacy; secondly, if there is a violation (limitation), whether said violation is justified or reasonable in terms of section 36. The purpose of the confidentiality of taxpayer information aids in tax administration (and maybe compliance as well). However, in balancing taxpayers' (zama-zamas) right to privacy and access to such information that may reveal serious criminality and harm to the public and/or environment (and other constitutional imperatives), the right to access information will outweigh the right to privacy because it will be in the public interest. Through the application of *Arena Holdings*, it is found that interference with the zama-zamas' right to privacy will be legitimate and pass constitutional muster in this instance. This view is held bearing in mind that the protections espoused in the Constitution are not intended to be used as an impermeable shield used to protect individuals from scrutiny in respect of conduct that poses a threat to communities,

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especially those located near illegal mining sites. Therefore, the zama-zamas as taxpayers are entitled to protection under the secrecy regime, however, they are not entitled to an absolute level of protection from disclosure of their tax information that may reveal serious criminality and serious risks to the public safety or environmental risk.

This is in line with the current legal position regarding the disclosure of taxpayer information which was established in *Arena Holdings*. The legal position currently is that taxpayer confidentiality is not sacrosanct enough to render it impenetrable – and information may now be accessed in certain limited instances, such as when it is in the public's interest. This is because as taxpayers move from the sanctum of their personal lives to the public sphere, their right to privacy shrinks and must be moderated against the public's interests. The consequence of this legal position on the zama-zamas is that their right to privacy (as guaranteed by the tax secrecy regime) must yield to constitutional imperatives in the context where public interest considerations trump taxpayer privacy i.e., when their information will reveal an imminent serious risk to public safety/health or an environmental risk. The application of the PAIA's public interest override provisions and section 71 of the TAA means that the veil of tax secrecy could be lifted, especially since the activities of the zama-zamas are illegal and accompanied by serious risks to public health and the environment.

Considering the above, it is contended that the limitation of the zama-zamas' right to privacy meets the reasonable and just criteria, given that the limitation is for a legitimate purpose because it is in the public interest as the disclosure of the information will likely reveal the contravention of laws, serious risks to public health and safety, and risk to the environment. This will not only reveal the foregoing but may reveal the violation of numerous other rights i.e., to life, which on a balance will outweigh the zama-zamas' right to privacy in an open and democratic South Africa. The PAIA's public interest override provisions and section 71 of the TAA strikes a balance between the administration of tax statutes, and right to privacy as the default position still guarantees confidentiality. However, the evidentiary burden of invoking the public interest override provisions is high, given the sacrosanct nature of taxpayer information.

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CHAPTER 5: CONCLUDING REMARKS AND RECOMMENDATION

5.1. Concluding remarks

This research report deals with the implications of the tax secrecy provisions on illegal miners – also known as the 'zama-zamas'. As a starting point, zama-zamas' activities are traversed as well as the illegality stemming from their activities. This is followed by a brief history of the zama-zamas and the effect their illegal mining activities has on communities and the society as a whole. It is found that the impact of illegal mining on the South African society is multifaceted, involving serious risks to neighbouring communities through crime, trafficking, health risks from the use of mercury and risks to the environment.

It is further found that income derived from illegal mining can be taxed if all the elements of the definition of gross income are met. By applying the elements of the definition of 'gross income', as well as observing principles established by courts on taxability of income and illegal income, it is found that income derived from illegal mining can be regarded as gross income for tax purposes, and which can be taxed by SARS. This is also because the zama-zamas derive their income (for their own benefit) from being in South Africa and from a source (illegal mining for a profit-scheme) in South Africa. Therefore, the zama-zamas would be considered as taxpayers which will be bound by tax statutes such as the ITA and TAA.

Due to the above, it is found that the TAA provisions will apply to the zama-zamas. Of relevance for this research are the TAA's tax secrecy provisions which prohibit SARS (SARS's officials, past and present, including contractors) from disclosing taxpayer information. The confidentiality protection afforded by the secrecy provisions is layered by virtue of the requirement on SARS officials to take an oath to protect taxpayer confidentiality, the criminal sanctions against disclosure and the PAIA interface (in section 35 of the PAIA) which enables SARS to refuse a request for information relating to tax records notwithstanding that access may be in the public interest (it is important to note this position changed post-*Arena Holdings*). Therefore, the zama-zamas are protected by the TAA secrecy provisions, also by vurtue of their constitutional right to privacy. SARS has respected the sanctity of taxpayer confidentiality and has guarded same despite the possibility of criminal sanctions for

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failing to disclose taxpayer information – as was demonstrated in the *Public Protector* case. This is to ensure that there is no erosion of trust in SARS by the taxpayer, and to also encourage full and frank disclosure which is essential for tax administration.

This protection, however, is not absolute. This is because the TAA's section 71 and the PAIA's public interest override provisions in section 46 (post-*Arena Holdings*) provide a framework for the disclosure of taxpayer information if the disclosure will reveal serious criminality or an imminent serious risk to public safety or an environmental risk. In other words, the tax information could be disclosed if it is in the public interest to do so. This was clarified by the CC in *Arena Holdings*, thus setting the legal position that taxpayer information must yield to public interest and constitutional imperatives if disclosure of taxpayer information will reveal serious criminality or serious risk to the populace/society.

Therefore, tax information belonging to the zama-zamas may likely be disclosed outside the sphere of SARS, given the consequences of their activities. Not only would it reveal serious criminality, risk to public safety or the environment, but could also assist bodies like SAPS to make headways in identifying kingpins who may be behind the scourge that is the zama-zamas – it could be rent-seeking politicians and the public (especially voters and environmental organisations) would have the right to know such information.

It is further found that the disclosure of taxpayer information would restrict the zama-zamas' right to privacy (which is constitutionally protected). On the other hand, disclosure prohibitions (to protect taxpayer privacy) also restrict constitutional rights such as the right to access information, which is an important countervailing right in this instance as it is essential for openness and transparency (especially from state organs such as SARS).

In addition, the protection of constitutional rights is not absolute as they can be limited in terms of section 36 of the Constitution. This is done by optimally balancing the protection of taxpayer confidentiality with the countervailing right to access information, which encompasses the public's right to know information that is in the public interest. The limitation provisions in section 36 of the Constitution provide a framework for conducting this balancing exercise between rights. In view of this, the right to taxpayer privacy is weighed against the right to access information to

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determine whether an encroachment could be reasonable and justified in an open and democratic South Africa.

It is submitted that although the rationale behind taxpayer confidentiality, to enhance taxpayer compliance and encourage full and frank disclosure, this does not warrant an absolute protection against disclosure because taxpayer information should be disclosed if it will reveal serious criminality and risk to the public or the environment. In this case, disclosure will be reasonable and justified in an open, free, and democratic South Africa. Therefore, it is concluded that absolute protection is not warranted as there are less restrictive means to protect taxpayer information through TAA's section 71 exception and the PAIA public interest override provisions which strikes a balance between protecting taxpayer confidentiality, the administration of tax and public interests. Notwithstanding these provisions, taxpayer confidentiality remains the default position, however, with an available avenue for piercing the veil of tax secrecy when it is in the public interest to do so. The CC in *Arena Holdings* intimated that triggering the the public interest override provisions (by implication section 71 of the TAA as well) will have a cumbersome threshold and with strict checks and balances before disclosure can be granted.

Arguments could be made that the fact that there is no guarantee of absolute protection against disclosure of taxpayer information could erode the trust in SARS by taxpayers, ultimately impacting taxpayer compliance. This debate was had by the majority and minority rulings in *Arena Holdings*, with the majority holding that confidentiality and compliance do not have much of a correlation, with the minority holding otherwise. The majority ruling finds support in this research. This is because there is no proven *nexus* between taxpayer confidentiality and tax compliance, if anything, the argument is theoretical.[260] Furthermore, the argument against disclosure for tax compliance loses traction because there are already exceptions for disclosure in the TAA which defeat the argument for absolute protection of taxpayer information. In addition, taxpayers are legally bound to comply with tax legislation which obliges them to make full and true disclosure, failing which could result in criminal penalties and fines. Furthermore, the CC should be commended for guarding against elevating

[260] S Wallace "*Confidentiality and Taxpayer Compliance*" National Tax Journal, Vol LVIII, No.3 (2005) at 438.

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taxpayer confidentiality to a sacrosanct place where no exception to enable public access (when in the public interest) is possible.

Lastly, when dealing with the zama-zamas who violate laws daily, compliance is not guaranteed. As the CC correctly pointed in *Arena Holdings* that "*the dishonest taxpayer, who is not afraid of the potential financial and criminal consequences of evasion, is unlikely to be lured to make candid disclosure by a guarantee of secrecy*".[261]

As discussed above, disclosure of taxpayer information in this instance may result in a tension between SARS and the zama-zamas. It is contended that this possible tension between the zama-zamas (as taxpayers) and SARS could be allayed by, *inter alia*, formalising small-scale artisanal mining which would not only have extensive economic benefits (especially for surrounding communities) but could also increase the tax revenue and lessen the crime that is ancillary to illegal mining.[262] This contention may, in future, occasion a further study on formalising small-scale artisanal mining as it does not form part of the scope of this research.

5.2. Recommendation

Section 71 of the TAA provides that:

> "*If so ordered by a judge under this section, a senior SARS official must disclose the information described in subsection (2) to-*
>
> *(a) …; or*
>
> *(b) ….*
>
> *(2) Subsection (1) applies to information which may reveal evidence-*
>
> *(a) <u>that an offence (other than a tax offence) has been or may be committed in respect of which a court may impose a sentence of imprisonment exceeding five years</u>;*
>
> *(b) that may be relevant to the investigation or prosecution of the offence; or*

[261] *Arena Holdings*, CC paragraph 154.
[262] Beech, W., "*Formalise the Zama-Zama?*" (2017).

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(c) of an imminent and serious public safety or environmental risk…"
(Own emphasis added)

As discussed in the preceding Chapters, section 71 of the TAA has some resemblance to the PAIA public interest override provisions, especially the provisions that provide for "*an imminent and serious public safety or environmental risk*". It is submitted that the rationale behind both provisions lean heavily towards public interest (especially since public interest considerations have gained traction in a democratic South Africa – as exemplified in *Arena Holdings*).

The CC has not provided guidance on the definition/meaning of these words, and same will remain a contentious issue especially given the fact that there is sparse research on section 71 of the TAA. It is recommended that the TAA must be amended to include meanings of the words/phrases in section 71 to provide guidance to future litigants who may seek to rely on or contest section 71 of the TAA. As is, it sets a relatively high bar for lifting confidentiality with no guidance on the scope/extent of its application. Clearly defining the words/providing guidance would make for legal certainty on the application of section 71 of the TAA (and by extension, the public interest override provisions envisaged in section 46 of the PAIA.

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