

**HR**  
**HR**

**Tydskrif vir  
Hedendaagse  
Romeins-  
Hollandse Reg**

MEI 2024 • TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG • 137-258

Redakteur

Coenraad Visser B Com LLB LLM

Assistentredakteurs

Hermie Coetzee B Com LLB LLM LLD

Johann Knobel BLC LLD

Annelize Nienaber BHons LLM LLD

# Tax disputes: Closing the doors of the High Court to a “special case” – open justice as against the taxpayer’s right to privacy

C Meyer

*BCom Law LLB LLM LLD*

*Lecturer, Department of Mercantile Law, University of Pretoria*

## OPSOMMING

### **Belastinggeskille: Die deure van die Hooggeregshof gesluit vir ’n “spesiale saak” - oop geregtigheid teenoor die belastingbetaler se reg op privaatheid**

In Suid-Afrika is sittings van die Belastinghof nie oop vir die publiek nie, ingevolge artikel 124 van die Wet op Belastingadministrasie 28 van 2011. Daarbenewens maak artikel 132 van dié voorsiening daarvoor dat die Belastinghof se uitspraak gepubliseer moet word sonder om die identiteit van die belastingbetaler te openbaar. Verder geniet belastingbetalers die vertroulikheid van belastingbetalerinligting ingevolge hoofstuk 6 van dié Wet. Die vertroulikheid van belastingbetalerinligting word dikwels beskryf as die hoeksteen van enige belastingstelsel. Desnieteenstande vervat artikel 32 van die Wet op Hoër Hof 10 van 2013 die beginsel van oop geregtigheid ingevolge waarvan verrigtinge in enige Hoër Hof in ’n oop hof moet plaasvind, tensy daar ’n “spesiale geval” bestaan. Indien hierdie “spesiale geval” bewys word, kan die hof van die norm van openbare geregtigheid afwyk en toelaat dat die aangeleentheid agter geslote deure (*in camera*) aangehoor word. So ’n spesiale saak is nie deur die belastingbetaler in *Structured Mezzanine Investments (Pty) Ltd v CSARS* (1824/2021) [2022] ZAECGHC (12 April 2022) (of in die opvolgende appèlsaak) beredeneer nie. Die vraag bly dus staan: onder watter omstandighede sal ’n belastingverwante dispuut kwalifiseer as ’n “spesiale geval”? Verder, waar die belastingverwante geskille na Hoër Hofe vorder in die litigasieproses geld die beginsel van oop geregtigheid, ingevolge waarvan alle verhore in die Hoër Hofe toeganklik is vir Jan Publiek. Dit kan ’n beduidende verandering wees vir ’n belastingbetaler wie se identiteit en belastingbetalerinligting nie bekend gemaak is tydens die verhoor in die Belastinghof of in die gepubliseerde uitspraak nie (aangesien die Belastinghofverrigtinge *in camera* plaasvind), maar wat nou vind dat hierdie inligting en sy identiteit in die oop hof bekend gemaak word, soos wat die litigasieproses verder vorder. In hierdie artikel oorweeg ek wanneer daar ’n “spesiale geval” sal bestaan in geval van ’n belastingverwante geskil; indien dit wel bestaan, sal dit die Hoër Hof noop om sy deure te sluit vir die aanhoor van die dispuut. Troef die belastingbetaler se reg op privaatheid die beginsel van oop geregtigheid?

## 1 INTRODUCTION

In South Africa, hearings of the Tax Court are not open to the public.<sup>1</sup> The judgment of the Tax Court must be published without revealing the identity of

<sup>1</sup> S 124 of the Tax Administration Act 28 of 2011 (TAA).

the taxpayer.<sup>2</sup> Furthermore, taxpayers enjoy the confidentiality of taxpayer information in terms of chapter 6 of the same Act. The confidentiality of taxpayer information is often considered to be the cornerstone of any tax system.

Section 32 of the Superior Courts Act<sup>3</sup> reflects the principle of open justice according to which proceedings in any High Court must be conducted in open court, unless a “special case” exists. If such “special case” is proven, the court can deviate from the norm of open justice and allow the matter to be heard behind closed doors (*in camera*). Such a special case was not argued by the taxpayer in *Structured Mezzanine Investments (Pty) Ltd v Commissioner for the South African Revenue Services*<sup>4</sup> (or in the subsequent appeal<sup>5</sup>). So the question remains: under what circumstances would a tax related dispute qualify as a “special case”?

Further, where the tax related dispute progresses during the litigation process to the High Court, again the principle of open justice applies to render all High Court hearings accessible to the general public. This can represent a significant change for a taxpayer, who has not disclosed his identity and certain taxpayer information in the publication of the judgment of the Tax Court judgment but who now find that his identity and such information are disclosed in open court.

This article is divided into six sections. In the first section I consider what constitutes a “special case” for purposes of section 32 of the Superior Courts Act.<sup>6</sup> In the second section I consider some High Court tax disputes that have been heard *in camera*. In the third section I examine the situation where a tax dispute is heard in open court by way of appeal. In the fourth section I focus on the taxpayer’s right to privacy, generally. In the fifth section I consider the infringement of the relevant rights where either the matter is heard in open court (the taxpayer’s right to privacy) or where the matter is heard behind closed court doors (the principle of open justice). In the sixth section I consider various options open to taxpayers who wish to keep sensitive taxpayer information secret during proceedings in open court.

## 2 WHAT IS A “SPECIAL CASE” IN TERMS OF THE SUPERIOR COURTS ACT?

Section 34 of the Constitution<sup>7</sup> states: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” To give effect to this constitutional right, section 32 of the Superior Courts Act, in turn provides: “Save as otherwise provided for in this Act or any other law, all proceedings in any Superior Court, must, except in so far as any such court may *in special cases* otherwise direct, be carried on in open court” (emphasis added).

Section 32 is clear: the default position is that all proceedings in a Superior Court must be heard in open court, unless such court directs otherwise, where a

<sup>2</sup> S 132 of the TAA.

<sup>3</sup> Act 10 of 2013.

<sup>4</sup> (1824/2021) [2022] ZAECGHC (12 April 2022).

<sup>5</sup> *SMI (Pty) Ltd v Commissioner for the South African Revenue Services* (CA25/2023) [2023] ZAECGHC 115 (21 November 2023).

<sup>6</sup> *Structured Mezzanine Investments* paras 41 and 66.

<sup>7</sup> Constitution of the Republic of South Africa, 1996 (Constitution).

special case exists. Yet, a “special case” is not defined in the Act, and one must apply the interpretive principles and existing case law when dealing with the matter.

In *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd*,<sup>8</sup> Van Dijkhorst J held:<sup>9</sup>

“In my view the emphasis should not, on the one hand, fall on the right of the public to know (in so far as there may be one) or, on the other hand, on the right of the private individual not to be embarrassed, but on the proper administration of justice. *Should the administration of justice be rendered impracticable or materially hampered by the presence of the public, that would constitute a special case as envisaged by the statute.* There is no need, and it would be inadvisable, to define those circumstances which could be described as special. They will vary from case to case. They may occur where private rights only are involved or where the public has an interest. The decision as to whether a case is special should be left to the discretion of the presiding Judge, who will bear in mind that the general rule that all cases must be heard in open Court should not lightly be departed from.”

In this case, the applicants had requested that the matter be heard *in camera* based upon the fact that some of the information contained in the documents fell within the ambit of section 4 of the Protection of Information Act.<sup>10</sup> Stegmann AJ, who had granted the request for the matter to be heard *in camera*, was criticised by Van Dijkhorst J, because no clear case had been made out that exceptional circumstances existed for the court to depart from the general rule of open court. This was so is because none of the alleged protected information was set out in the application itself.<sup>11</sup> According to Dijkhorst J, Stegmann J had erred in ordering that the matter be heard *in camera*.<sup>12</sup>

In *Savoi v National Prosecuting Authority*,<sup>13</sup> Henriques J indicates that section 32 confers a discretion on the court which should be exercised in determining “special cases”. What constitutes a special case depends on the circumstances of each particular matter.

In *Botha v Die Minister van Wet en Orde*,<sup>14</sup> an application was brought at the start of the trial for the court proceedings to be conducted *in camera*. The application was denied and the court indicated that an order for a closed hearing does not merely affect procedure but is a fundamental departure from a deep-rooted tradition that our administration of justice is shared with the public.<sup>15</sup> The court further indicated that the term “special case” referred to special legislation, such as laws relating to children and state secrets, which serve distinct private and public interests that require confidentiality.<sup>16</sup> Given this statutory and common-law background, any application to close the doors to the public must be approached with caution.<sup>17</sup>

In *Financial Mail (Pty) Ltd v Registrar of Insurance*,<sup>18</sup> a unique case was presented where Marais J issued an order that an application be heard *in camera*

8 1984 4 SA 149 (T).

9 158 (emphasis added).

10 Act 85 of 1982.

11 *Cerebos Food Corporation* 159.

12 *Ibid.*

13 [2021] 2 All SA 578 (KZP).

14 1990 3 SA 937 (W).

15 940.

16 *Ibid.*

17 *Ibid.*

18 [1966] 2 All SA 111 (W).

and the court proceedings be sealed. The court noted that, in civil matters, the court must decide if a specific occasion exist that constituted a special case which would justify departure from the virtually absolute rule that has existed in this country for more than half a century – the civil court never closes its doors to the public.<sup>19</sup> The petition involved the *Financial Mail*, a publication devoted to matters of public interest in the field of finance and investments. The newspaper publication had learnt of an application by the Registrar of Insurance to the court for the winding-up of a certain insurance provider. If the court had not taken the special case route to close its doors, the public would have learnt of the insurer's financial difficulties, and given the sensitive nature of the insurer's business ("it being an institution dependent on public confidence in its stability"<sup>20</sup>), such public knowledge would have led to the company's inevitable liquidation, no matter what the efforts its management and the Registrar could have taken to save it.<sup>21</sup> The court further pointed out that, unlike most commercial enterprises, the impact of the insurer's premature closing down would have harmed not only its shareholders but also other stakeholders (such as policy holders, and third parties with claims against the company under third-party insurance) if news of its financial difficulties were prematurely made public. Notably, this order was later rescinded and the court documents unsealed, as the insurer was eventually placed under judicial management, which rendered further secrecy unnecessary.

In *Du Preez v Du Preez: Standard Bank of South Africa Intervening*,<sup>22</sup> an application was brought before the court for the proceedings to be held *in camera*, in order not to jeopardise negotiations for the disposal of certain mineral rights. In considering the application (in terms of section 16 of the Supreme Court Act,<sup>23</sup> the predecessor of section 32 of the Superior Courts Act), Hiemstra J quoted from *Halsbury's laws of England*:<sup>24</sup>

"In general all cases, both civil and criminal, must be heard in open Court, *but in certain exceptional cases where the administration of justice would be rendered impracticable by the presence of the public, the Court may sit in camera*. Thus the Court may so sit, either throughout the whole or part of the hearing, whether it is necessary for the public's safety or whether the subject-matter of the suit would otherwise be destroyed for example, by the disclosure of a secret process or of a secret document, or where the Court is of the opinion that the witnesses are hindered in or prevented from giving evidence by the presence of the public."

The arguments for the respondent in this case seem to have been flawed, as he alleged that the "delicate negotiations" would collapse if they were aired in public, which would be to the detriment of his creditors. The applicants (one of his creditors and Standard Bank, an intervening creditor) viewed this prospect with equanimity and even pressed rather to have the matter settled swiftly in open court.<sup>25</sup> Accordingly, the request to hear the application for a final order of sequestration of the debtor's estate *in camera* was dismissed. Hiemstra J held

---

19 Para 114.

20 Para 115.

21 Para 114.

22 1976 1 SA 87 (W).

23 Act 59 of 1959.

24 *Du Preez* 88 (emphasis added).

25 *Ibid.*

that if the facts had been different and the interest of the state or the public had been involved, he would have considered "clearing the court".<sup>26</sup>

It is clear from the above case law that a special case will depend upon the facts of each specific matter, but that the general principle of open court hearings are not departed from lightly.<sup>27</sup> The test applied to confirm if a case is special or not is determined by the interest of justice<sup>28</sup> and the weighing of the competing rights.<sup>29</sup> Of the four abovementioned court cases, it was only in the *Financial Mail* case that it was held that a special case existed, and the proceedings were heard *in camera*, and the court documents sealed, as open court proceedings would have harmed the company and its stakeholders and rendered attempts to save the company futile.<sup>30</sup> In the other four cases, the applicants failed to convince the court that a special case existed.<sup>31</sup>

From a tax perspective, there is yet an instance to be publicly recorded where a "special case" has been successfully argued for a tax matter to be heard *in camera*.

Recently, in *Structured Mezzanine Investments*, the court commented on the striking absence of any reference to, or argument presented by the applicant (SMI) for, the application of the exception to the open justice principle as contained in section 32 of the Superior Courts Act.<sup>32</sup> Briefly, the South African Revenue Services (SARS) requested SMI to provide SARS with relevant material in terms of section 46 of the TAA.<sup>33</sup> SMI failed to do so. This led SARS to launch an application (the main application) to the High Court to compel SMI to provide the requested material.<sup>34</sup> In response to the main application, SMI brought an interlocutory application to request, *inter alia*, that the main application be heard *in camera*.<sup>35</sup> In the interlocutory application, SMI alleges that their confidential taxpayer information was implicated in SARS' main application and that SARS has breached its duty to preserve the secrecy of such confidential taxpayer information.<sup>36</sup> SMI argued, *inter alia*, that SARS' founding affidavit in the main application contained confidential taxpayer information,

<sup>26</sup> *Ibid.*

<sup>27</sup> *Economic Data Processing (Pty) Ltd v Pentreath* 1984 2 SA 605 (W).

<sup>28</sup> *Scott v Scott* 1913 AC 417.

<sup>29</sup> *Savoi* para 15.

<sup>30</sup> *Financial Mail* 115.

<sup>31</sup> I submit that Stegmann AJ in *Cerebos Food Corporation* had wrongly granted the *in camera* hearing, as the applicants had failed to show the existence of special circumstances.

<sup>32</sup> *Structured Mezzanine Investments* paras 13–15. SARS pointed out that, in terms of s 32, SMI had to satisfy the court that the exception to the open justice principle applies to the main application, which would justify a departure from the principle of open justice and the norms of High Court litigation (paras 56, 60).

<sup>33</sup> S 46(1) of the TAA provides that SARS may, for purposes of the administration of a tax statute, require a taxpayer to submit relevant material to SARS within a reasonable period. S 46(4) states that a taxpayer who receives such a request from SARS *must* submit the relevant material at the place, in the format, and within the specified time that such relevant material had been requested.

<sup>34</sup> *Structured Mezzanine Investments* para 4.

<sup>35</sup> The phrase "in camera" connotes a trial that takes place behind closed doors (*Classen Dictionary of Legal Words and Phrases* (2002) and that the court file must be sealed to the public (*Structured Mezzanine Investments* para 1).

<sup>36</sup> *Structured Mezzanine Investments* para 10.1.

which it may not disclose in terms of sections 67 and 69 of the TAA.<sup>37</sup> Yet, section 67(2) provides for certain exceptions, specifically that section 67(1) does not prohibit the disclosure of taxpayer information by a current or former SARS official in the performance of their duties to administer a tax Act, such as serving as a witness in civil and criminal proceedings under a tax Act, or where such information is already in the public domain. As the launch of SARS' main application constitutes civil proceedings and is in relation to the performance of its duties under the TAA, SARS may disclose the taxpayer information in terms of the TAA.<sup>38</sup> It was also established by the court that the confidential taxpayer information that SMI referred to in their interlocutory application was already in the public domain, which allowed SARS to share such information outside the realm of SARS officials, in terms of section 69(2)(a)(ii) of the TAA.<sup>39</sup>

As SMI had failed to establish a case for their matter to be heard *in camera*, and had failed to argue that theirs was a "special case",<sup>40</sup> SMI's interlocutory application failed and was dismissed with costs.<sup>41</sup> On appeal, the Full Bench noted that the appeal before it had no practical effect (was redundant), as the information that SMI was seeking to protect was already in the public domain – both the main and interlocutory applications had been heard in open court.<sup>42</sup>

### 3 HIGH COURT TAX CASES HEARD *IN CAMERA*

It is unfortunate that SMI did not argue special circumstances for the matter to be heard *in camera* in terms of section 32 of the Superior Courts Act. This would have given the court the opportunity to examine and rule on what would constitute a "special case" in a tax related matter. However, it is unlikely that, on the facts, an argument that the present case was a special case could have been sustained. I set out some of the reasons below and consider recent tax matters adjudicated *in camera* in the High Court.

In *L Taxpayer v Commissioner for the South African Revenue Service*,<sup>43</sup> the taxpayer's identity was redacted from the published judgment. Inexplicably, the taxpayer is described in such considerable detail in the judgment<sup>44</sup> that people "in the know" would be able to identify the taxpayer with relative ease. The judgment fails to flesh out any reasons for the matter being heard *in camera*, nor were any reasons provided in the previous Tax Court judgment regarding the matter proceeding to the High Court *in camera*.<sup>45</sup> Notably, no record of an interlocutory application to hear the proceedings *in camera* could be found. The matter dealt with the claiming of a deduction of an interest expense in terms of section 11(a) of the Income Tax Act<sup>46</sup> and gave no indication that it related to

<sup>37</sup> *Ibid.* S 67(1)(b) of the TAA contains a general prohibition against the disclosure of taxpayer information. S 69(1) states that a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to anyone who is not a SARS official.

<sup>38</sup> Paras 32, 35 and 54.

<sup>39</sup> Paras 47–50.

<sup>40</sup> Paras 69–70.

<sup>41</sup> Paras 72–74.

<sup>42</sup> *SMI* para 18. The appeal court further indicated that even if the taxpayer were to be compelled to produce information to SARS in terms of s 46 of the TAA, such information would not form part of the record and would fall to be protected by ch 6 of the TAA (para 20).

<sup>43</sup> [2018] 2 All SA 478 (WCC).

<sup>44</sup> Para 9.

<sup>45</sup> *ITC* 1895 79 SATC 179.

<sup>46</sup> Act 58 of 1962.

sensitive taxpayer information, which may have been a reason for the departure from the open court principle.

In *A Company v Commissioner for the South African Revenue Services*,<sup>47</sup> an application was brought to retain the legal privilege of invoices, which had been requested by SARS. Remarkably, based upon an agreement reached between the parties, the court was requested to hear the application *in camera*, which it agreed to do.<sup>48</sup>

In *Commissioner for the Inland Revenue Services v M*,<sup>49</sup> an appeal from the Tax Court was brought by SARS. The dispute related to whether undeclared receipts and deposits into the taxpayer's personal bank account and other accruals were income or the repayment of loans. The identity of the taxpayer was withheld, but details of a company he had established (and which was held by a trust of which he was sole beneficiary) and other transactional details were not withheld in the judgment. There is no mention in the judgment of the matter being heard *in camera*.

Although there have been a few *in camera* hearings of tax disputes in the High Court, there is no record in these judgments that the exception in section 32 of the Superior Courts Act was successfully argued, nor is it recorded in most of the judgments that an agreement between the parties to hear the matter *in camera* has been acknowledged and accepted by the court. Currently, there is no example of what constitutes a "special case" in tax matters in South Africa.

In the High Court, cases are heard *in camera* where an application for the matter to be heard such has been brought successfully. However, in *L Taxpayer*, the record does not show that such an application was made. Of course, drawing from the appeal judgment in *SMI*, such an interlocutory application may be heard *in camera*, in which case the record of such an application would be sealed anyway. Moreover, it is trite that a taxpayer and SARS may agree that certain taxpayer information may not be disclosed during the adjudication of the dispute on appeal in the High Court (such agreement would have to be disclosed to the court). Accordingly, where no court record exists to show that an application for a hearing *in camera* was brought, it is likely that either the application itself was heard *in camera* and sealed, or the taxpayer and SARS agreed to have the matter heard *in camera*, which agreement was acknowledged and approved by the court.<sup>50</sup> In the case of sealed orders, it remains a topic for speculation whether a special case was argued, and it remains unknown what constitutes a special case for tax matters.

In the absence of evidence, it appears that it is not a common practice to have the court depart from the principle of open justice to have a tax matter heard *in camera* where it had been argued to be a "special case".<sup>51</sup> This point was also

47 2014 4 SA 549 (WCC).

48 Para 13.

49 (A5036/2023) [2023] ZAGPJHC 769 (6 July 2023).

50 See the factual background in *Distell Limited v Commissioner for the South African Revenue Service* [2016] JOL 34234 (GP) where the practice of negotiating to have the matter heard *in camera* is explained.

51 Recent tax cases heard *in camera* in the High Court cases include *M*; *L Taxpayer*; *A Company*; *JMN v The Commissioner for the South African Revenue Service* (A3096/2019; 14001) [2021] ZAGPJHC 167 (30 April 2021); *C.V v Commissioner for the South African Revenue Service* (A322/2019) [2020] ZAWCHC 140 (30 October 2020).

raised in SMI's application for leave to appeal: "a compelling reason for granting leave in that there appeared to be a *lacuna* or at least an absence of authority on the question whether matters relating to tax and tax affairs, particularly matter regulated by the TAA and which matters are prosecuted in the High Court, should be heard *in camera* pursuant to the general principle of privacy of persons' tax affairs".<sup>52</sup>

In my view, to argue successfully for a High Court matter to be heard *in camera*, compelling evidence is required to show why the applicant should qualify as a "special case" in terms of section 32 of the Superior Courts Act. As discussed in paragraph 2 above, a special case will exist only if it is in the interest of the administration of justice to hold the proceedings *in camera* and the weighing of the competing rights favours the applicant.

As I mentioned earlier, *Structured Mezzanine Investments* arose from an application to the High Court, where the taxpayer was concerned about sensitive taxpayer information being in the public eye should the court hearing be in the open. Yet, a matter may also come before a Superior Court purely by means of the tax dispute litigation process. I shall accordingly next consider the situation where a taxpayer's dispute with SARS progresses beyond the Tax Court to a Higher Court, where hearings, as a rule, take place in open court.

#### 4 TAX MATTERS THAT ARE FORCED TO PROCEED TO A HIGHER COURT ON APPEAL

The Tax Court is a creature of statute, namely, of the TAA and the TAA Rules. That means it is subject to and can act only within the powers conferred upon it in terms of this statute.<sup>53</sup> A higher court, such as the full bench of the High Court or Supreme Court of Appeal, employs the principle of open justice, as illustrated in section 32 of the Superior Courts Act read with section 34 of the Constitution.

Section 124 of the TAA provides that for purposes of hearing an appeal, the Tax Court sittings are not public.<sup>54</sup> The Tax Court may also hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under chapter 9 (dispute resolution) of the TAA.<sup>55</sup> These hearings are also not public.

A judgment in an appeal before the Tax Court must be published for general information and in a form that does not disclose the identity of the taxpayer.<sup>56</sup>

<sup>52</sup> *Structured Mezzanine Investments* para 13.

<sup>53</sup> *Wingate-Pearse v Commissioner of the South African Revenue Service* 2017 1 SA 542 (SCA) para 5.

<sup>54</sup> SMI referred the High Court to the regulations pertaining to tax appeals before the Tax Court. The court observed that a proper interpretation of s 124(1) of the TAA, which mandates a sitting of the Tax Court to be held *in camera*, does not apply to the High Court. The court noted that one could not extend s 124 to apply also to the High Court, as it would be unjustified and unsustainable (para 42).

<sup>55</sup> S 117(2) of the TAA. This means that the Tax Court does not have jurisdiction to hear interlocutory applications relating to the confidentiality of information, which is contained in chap 6 of the Act. It is suggested by some professionals that if the Tax Court's jurisdiction were wider, a main application, like in *Structured Mezzanine Investments*, could have been heard by the Tax Court and the taxpayer could have enjoyed automatic confidentiality (*Visser A matter of confidentiality* 20 Jul 2022 <https://www.pressreader.com/south-africa/the-citizen-kzn/20220720/282067690666137> (accessed 17-10-2022)).

<sup>56</sup> S 132 of the TAA.

This means that in the published Tax Court judgment, the taxpayer's name is withheld and descriptions of the taxpayer and the taxpayer's business or transactions must be disguised in order not to reveal the taxpayer's identity inadvertently.<sup>57</sup>

If either the taxpayer or SARS is aggrieved by the Tax Court judgment, they may appeal the decision of the Tax Court.<sup>58</sup> An appeal against a decision of the Tax Court goes either to the full bench of the Provincial Division of the High Court, which has jurisdiction in the area in which the Tax Court sitting is held, or in certain circumstances, it can lie to the Supreme Court of Appeal, without an intermediate appeal to the Provincial Division.<sup>59</sup>

Once the decision of the Tax Court is appealed, the court record of the Tax Court is lodged with the appeal court; in most cases, the High Court. For sake of brevity, this discussion is limited to appeals heard in the High Court. The record includes all the documents that had been placed before the Tax Court in terms of the Rules.<sup>60</sup> Furthermore, documents that were submitted to the Tax Court but which do not relate to the matters in dispute, may be excluded from the record, with the consent of the parties.<sup>61</sup> It stands to reason that taxpayers must be aware that sensitive taxpayer information (which is not essential to the matter in dispute) may at this stage be removed from the court record, prior to the record going to the High Court, subject to the consent of the parties.

Section 140(2) provides taxpayers with a brief window during which to deliberate what information should be removed from the court record, in order to prevent it from becoming part of a High Court record open to the public. Practically, the subsection may not achieve much, as it is speculated that most taxpayers are unlikely to volunteer non-essential sensitive taxpayer information in a dispute with SARS. This is especially so if the information is not significant and critical to the taxpayer's case. As a result, if there is an appeal against the decision of the Tax Court, all the documentation is likely to be relevant for the appeal and would, therefore, have to form part of the court record.

An interesting consideration: A taxpayer who appeals a Tax Court decision must realise that it is inherent in the appeal to a Superior Court that he is moving to a new forum of adjudication where the default position is a hearing in public court, so that he will no longer enjoy the protection of section 124 of the TAA. There is a clear downwards shift of the taxpayer's level of confidentiality as the dispute moves from the Tax Court to the Superior Courts. Evidently, in such a scenario, the taxpayer appealing is, perhaps inadvertently, accepting and reconciling himself with the fact that some of his taxpayer information will now be made public.

<sup>57</sup> For example, in *ITC 853 (2011) 73 SATC*, the judgment describes the appellant thus: "Appellant, whose main trading activities were the mining and selling of diamonds from South Africa, had been listed as a public company on the Johannesburg Stock Exchange, the London Stock Exchange and the Swiss Exchange and its subsidiaries operated further diamond businesses." The matter was heard on 13 June 2011, prior to the TAA coming into effect on 1 October 2012. It is clear from the above extract that the Tax Court's description of the applicant was so effusive, that the court effectively failed to protect the identity of the taxpayer (De Beers Consolidated Mines Ltd) in the Tax Court sitting.

<sup>58</sup> S 133(1) of the TAA.

<sup>59</sup> S 133(2) of the TAA.

<sup>60</sup> S 140(1) of the TAA; rules 31–49 of the rules promulgated under s 103 of the TAA, published in GN 550 GG of 11 July 2014.

<sup>61</sup> S 140(2) of the TAA.

Can it be argued that where a taxpayer decides not to proceed with the dispute on appeal in order to avoid his private affairs being made public in open court it infringes on the taxpayer's right to be heard in court? I submit that it cannot. The taxpayer's dispute was heard by the Tax Court within the legal framework of the TAA which allows for proceedings *in camera*. Access to a court was granted.<sup>62</sup> If the taxpayer is unhappy with the judgment, the matter must proceed to open court (unless a court directs otherwise). Subject to leave to appeal being granted, the taxpayer is not precluded from having the matter adjudicated in a Superior Court.

By contrast, where SARS appeals a decision of the Tax Court, SARS does not have the proverbial "skin in the game" when it comes to taxpayer information being made public when the dispute proceeds to the High Court. Section 69(2)(a) of the TAA provides:

"Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official in the course of performance of duties under a tax Act or customs and excise legislation, *such as*:

- (i) to the South African Police Service or the National Prosecuting Authority, if the information relates to, and constitutes material information for the proving of, a tax offence;
- (ii) as a witness in civil or criminal proceedings under a tax Act; or
- (iii) the taxpayer information necessary to enable a person to provide such information as may be required by SARS from that person" (emphasis added).

According to the general rules of statutory interpretation, the phrase "such as" indicates that this not a closed list, but the items listed serve as examples where SARS may share taxpayer information outside the SARS orbit, provided that it is shared by a current or former SARS official in the course of his performance of duties under a tax Act or customs and excise legislation.<sup>63</sup> If this interpretation is correct, one can assume that, in terms of SARS' duty to collect taxes,<sup>64</sup> SARS may from time to time be required to engage in legal proceedings to enforce such tax collections.<sup>65</sup> In my view, in terms of section 69(2) of the TAA, therefore, SARS may in the process of collecting taxes (which may involve legal proceedings and or tax disputes) make known certain taxpayer information during litigation.

This creates a conundrum for the taxpayer: Should he proceed with the dispute by opposing the SARS appeal? If he does, he effectively accepts that the protection

<sup>62</sup> See *Metcash Trading Limited v Commissioner for the South African Revenue Service* 2001 1 SA 1109 (CC) paras 47–48; *Singh v Commissioner for the South African Revenue Service* 2003 4 SA 520 (SCA).

<sup>63</sup> Botha *Statutory interpretation: An introduction for students* 6 ed (2022) 184–186. Also note that subsequent to the judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* 2023 5 SA 319 (CC), under certain circumstances taxpayer information made be made public if the requirements of s 46 (the public interest override) are met. Kollapen J, writing for the majority, agrees with the High Court that text should be read into s 69(2) of the TAA to allow for requests made for taxpayer information in terms of s 46 of the Promotion of Access to Information Act 2 of 2000 (PAIA) and allow the further dissemination of information obtained as a result of a PAIA request (para 201). It would accordingly be counterintuitive for the Constitutional Court to extend the circumstances under which taxpayer information made be shared outside the SARS orbit and at the same time apply a restrictive interpretation to the list in s 69(2) of the TAA.

<sup>64</sup> S 3(2)(e) of the TAA.

<sup>65</sup> S 11 of the TAA.

of his taxpayer information under the TAA will now be limited, in that certain taxpayer information pertaining to his case will now be made public in open court? Alternatively, the taxpayer may choose to protect his taxpayer information in order to keep it out of the public eye, by not opposing the appeal but rather by settling the matter with SARS outside of court.<sup>66</sup> Is there an alternative recourse for the taxpayer? I expand upon these alternatives in paragraph 7 below.

## 5 CONFIDENTIALITY OF TAXPAYER INFORMATION AND THE TAXPAYER'S GENERAL RIGHT TO PRIVACY

The recent constitutional court hearing of *Arena Holdings*,<sup>67</sup> involving the publication of the tax records of former president Jacob Zuma has brought taxpayer privacy and the confidentiality provisions in the TAA into the spotlight. The case illustrated that it is unconstitutional to have a “blanket ban” on the sharing of taxpayer information, and that, under certain circumstances where it is proven to be in the public interest, taxpayer information may be shared with third parties, and the taxpayer's right may justifiably be limited.<sup>68</sup>

The right to privacy is a constitutionally protected right in section 14 of the Constitution of the Republic of South Africa.<sup>69</sup> But no right is absolute. Like all other constitutionally entrenched rights, the right to privacy may be restricted in terms of the so-called limitation clause.<sup>70</sup> In terms this provision, a right entrenched in the Bill of Rights, such as the right to privacy, may be limited or infringed by a law of general application, provided that any such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom, and equality, and taking into account those factors listed in section 36(1)(a)–(e).<sup>71</sup>

Chapter 6 of the TAA gives effect to the constitutional right to privacy in respect of taxpayer information.<sup>72</sup> This chapter regulates, amongst others, the secrecy of taxpayer information and accordingly includes the general prohibition against the disclosure of such information.<sup>73</sup> Current and former SARS officials

<sup>66</sup> Ss 144–147 of the TAA; *Distell* paras 4.14–4.19.

<sup>67</sup> The judgment of the Constitutional Court in *Arena Holdings* was handed down on 30 May 2023. The majority of the Constitutional Court judges held that taxpayers do not have an iron clad right to the confidentiality of taxpayer information. For this reason, the wording of s 35 of the PAIA is unconstitutional (it provided for an absolute ban on sharing taxpayer information). The court used the constitutional remedy of reading-in to cure the unconstitutionality.

<sup>68</sup> *Arena Holdings* 192–195. The court held in the majority judgment (para 161) that a near absolute ban exists for sharing of taxpayer information in terms of s 35 of the PAIA and such information may not be shared by a SARS information officer, regardless of whether the same information had been the subject of limited disclosure under the exceptions in the TAA (para 161). The court held that there should be a “public interest override” in the PAIA for taxpayer information, and the TAA will now also refer to taxpayer information made available in terms of the PAIA.

<sup>69</sup> S 14 of the Constitution. For a discussion, see Cheadle *et al South African constitutional law: The Bill of Rights* (2002) 9-6.

<sup>70</sup> S 36 of the Constitution. See also *Arena Holdings* paras 8.9–8.10.

<sup>71</sup> S 36(1) of the Constitution.

<sup>72</sup> Ss 67–74 of the TAA.

<sup>73</sup> S 69 of the TAA. For example, the Public Protector's powers to *subpoena* documents do not trump the prohibition of the disclosure of taxpayer information in terms of s 69(1) of the TAA (*Public Protector v Commissioner for the South African Revenue Service* 2022 1 SA 340 (CC)).

must preserve the confidentiality of taxpayer information and may not disclose taxpayer information to anyone who is not a SARS official, subject to certain exceptions.<sup>74</sup>

The term “taxpayer information” is defined as “any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information”.<sup>75</sup> This definition provides a broad legal framework of what constitutes taxpayer information. Needless to say, taxpayer information, generally, consists of extremely sensitive data which SARS must handle with due care to ensure that confidence in the tax system is maintained and to ensure that SARS complies with their legal obligations.<sup>76</sup> However, there are circumstances where taxpayer information may be shared outside of SARS. This is where taxpayers become concerned about their taxpayer information becoming public.

## 6 IS THERE AN INFRINGEMENT OF THE RIGHTS OF THE TAXPAYER?

When a court considers if a “special case” exists for a matter to be heard *in camera*, it was held by the pre-constitutional courts that the emphasis is on proper administrative justice.<sup>77</sup> This test implies that if the administration of justice will be hampered by the presence of the public, the matter would be regarded as a special case to be heard *in camera*.<sup>78</sup> However, Wallis submits that this approach rejects privacy and human dignity, and ignores the public interest in court proceedings.<sup>79</sup> This approach is accordingly no longer viable, given the constitutional guarantees of privacy and human dignity, and the constitutional values underpinning the open court principle. Given these constitutionally protected rights, I believe that the correct approach would be to weigh these competing rights (including the open court principle) in order to find a balance between these competing rights.<sup>80</sup>

### 6.1 Infringement of the taxpayer’s right to privacy

Where SARS is the party appealing the decision by the Tax Court, there is a potential infringement of a taxpayer’s right to privacy, as the dispute will now be heard in open court at the instance of SARS. Now that the dispute is heard in an open court, certain confidential matters such as his identity, tax compliance status, business model, trade secrets, and the like are revealed to the public in open court, and in the unsealed court records. Section 14 of the Constitution provides the following with regard to the right to privacy:

74 S 69(2) of the TAA. The term “SARS official” is defined to connote the Commissioner, an employee of SARS, or a person contracted or engaged by SARS, other than an external legal representative, for purposes of the administration of a tax statute, and who carries out the provisions of a tax statute under the control, direction, or supervision of the Commissioner (s 1 *sv* “SARS official” of the TAA).

75 S 67(1)(b) of the TAA.

76 SARS officials take an oath to maintain the secrecy of taxpayer information (s 67(2) of the TAA).

77 *Cerebos Food Corporation; Du Preez; Financial Mail (Pty) Ltd v Registrar of Insurance* [1966] 2 All SA 111 (W).

78 *Cerebos Food Corporation*.

79 Wallis para 466.

80 *Ibid.*

“Everyone has the right to privacy, which includes the right not to have –

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.”

It has been held by the Constitutional Court that this list is not exhaustive but rather illustrative.<sup>81</sup> It is, therefore, important for purposes of this discussion to establish and conceptualise taxpayer's privacy within the subset of the confidentiality of taxpayer information. “Taxpayer information” is defined as “any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information”.<sup>82</sup> As such, the right to privacy that is potentially infringed relates to the taxpayer's right to confidentiality of personal taxpayer information. This may include the taxpayer's identity, or, in the case of a corporate taxpayer, sensitive taxpayer information that would best not be made public, such as trade secrets, confidential documents, or secret recipes.<sup>83</sup> Thus, while the taxpayer's privacy, broadly, may be impacted by the case moving to a Superior Court, the concern is rather about the secret taxpayer information that is now made public (the public has access to it) where the Tax Court documents in their unanonymised and unredacted form is filed with the Registrar of the relevant court.

When one considers the right to privacy, there can be no justifiable limitation of an individual's most inner personal sphere of life.<sup>84</sup> However, a person has his privacy attenuated as he moves into communal relations, and business and social activities, in which contexts his right to privacy becomes subject to limitation.<sup>85</sup> There is, therefore, a clear boundary to the right to privacy. The more activities and interactions take place between the individual and society, the more subject the right may become to limitation in appropriate circumstances. In the present context, I submit that the Superior Courts Act crosses this boundary with its requirement of public hearings in that taxpayer information is made public when a tax dispute proceeds from the Tax Court to a Superior Court.<sup>86</sup>

In *Bernstein*, it was also raised that the party seeking the suppression of the evidence must establish both that he has a subjective expectation of privacy and that the society has recognised that expectation as objectively reasonable.<sup>87</sup> Ackermann J stated that the intrusion of privacy did not appear to extend to carrying on business affairs. However, section 8(4) of the Constitution specifically

81 *R v Debele* 1956 4 SA 570 (A) 575B–575H; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC).

82 S 67(1)(b) of the TAA.

83 See, for example, *Distell*.

84 *Bernstein v Bester NO* 1996 2 SA 751 (CC) paras 77, 67 and 69.

85 *Ibid*; *Gaertner v Minister of Finance* 2014 1 BCLR 38 (CC) para 67; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 18; *Croome Taxpayers' Rights in South Africa* (2010) 123; *Cheadle et al* para 9.2.1.

86 While a contextual and purposive interpretation of the Superior Courts Act requires cognisance of the secrecy provisions in the TAA, the TAA provides that appeals to the Superior Courts are to be heard in open court (s 133). There are no special rules for these proceedings to be heard *in camera* simply because of the secrecy provisions in the TAA.

87 *Bernstein* para 75.

provides that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.<sup>88</sup> It is well known that certain business related information is open to the public by statutory fiat, such as accounting records and financial statements.<sup>89</sup> Still, some information of the juristic person remains confidential, such as secret recipes,<sup>90</sup> trade secrets,<sup>91</sup> and business negotiations,<sup>92</sup> and accordingly falls within the constitutional protection of the right to privacy.

## 6.2 Infringement of the principle of open justice

In terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. In *Savoi*, Steyn J stated the obvious – that since 1994 the open court principle is constitutionally entrenched in section 34.<sup>93</sup>

Given our background of human rights violations during the apartheid era, it is important to understand why the principle of open justice is so important in a South African context. The hearings of the Truth and Reconciliation Committee revealed that security forces targeted the legal opposition of the apartheid regime, sometimes using extra-legal methods such as brutality and “bush justice”.<sup>94</sup> Other revelations showed the abuse of the legal system, especially in terms of the role of the Attorney-Generals. In Bozalek’s submission to the Truth and Reconciliation Committee, for example, it came to light that during the apartheid years in a series of arson trials, the prosecutor would add a juvenile accused to the list of accused, solely in order to have the trial held *in camera*, shielding the identities and evidence of State witnesses (the juvenile accused would be acquitted at the end of the State’s evidence, as no evidence implicated him).<sup>95</sup> The justice system was strongly influenced by the political agendas of the time, so that many accused did not receive fair trials, and the judiciary did not operate entirely

<sup>88</sup> See also *Hyundai Motor Distributors* para 18; *Croome* para 17 (“But what is clear is that the right to privacy is applicable, where appropriate, to a juristic person”).

<sup>89</sup> Ss 28–31 of the Companies Act 71 of 2008.

<sup>90</sup> *Distell*.

<sup>91</sup> *SDCV v Director-General of Security* (2021) 284 FCR 357 366–367: “revelation of the secret would destroy its value to the person seeking the court’s protection”.

<sup>92</sup> See *Financial Mail (Pty) Ltd v Sage Holdings Ltd* [1993] 2 All SA 109 (A) 119–120: “Here the information in question related to sensitive and confidential information concerning Sage’s internal affairs and delicate business negotiations being conducted by it and no good reason was advanced by the appellants as to why the public should have been informed about all this or why indeed the appellants should have been permitted to use this information as the springboard for what is generally a fairly hostile article concerning Sage and its financial affairs.”

<sup>93</sup> *Savoi* para 14.

<sup>94</sup> Dyzenhaus *Judging the judges, judging ourselves: Truth, reconciliation and the apartheid legal order* (2003) 7. Also see the Truth And Reconciliation Commission (TRC) *Final Report* vol 1 paras 58, 147. Bush or mob justice still occurs today, where citizens may distrust the criminal justice system and decide to take matters into their own hands (“Bush justice in Downton Joburg” *City Press* (2005) <https://discover.sabinet-co-za.uplib.idm.oclc.org/document/4138223> (accessed 12-12-2023); “The root cause of mob justice” (2023) <https://www.iol.co.za/news/politics/the-root-causes-of-mob-justice-fce6e8d2-9627-456d-a131-3165c27886cf> (accessed 12-12-2023).

<sup>95</sup> Dyzenhaus 125–126.

independently.<sup>96</sup> Against this background, it is clear that the constitutionally protected right of access to court, and for the court hearing to be public in open court, is necessary to ensure a fair and transparent court process.

In *Structured Mezzanine Investments*<sup>97</sup> reference is made to *City of Cape Town v South African National Roads Authority Ltd*,<sup>98</sup> where the Supreme Court of Appeal stated that the principle of open justice is venerable and constitutionally entrenched.<sup>99</sup> The court here referred to an address given by McLachlin CJ on openness and the rule of law, who explained why the principle of open justice is so important:

“Open justice serves three important functions:

- (1) it assists in the search for truth and plays an important role in educating the public by permitting access to and dissemination of accurate information;
- (2) it ensures and enhances judicial accountability, deterring misconduct by judges, police officers and prosecutors; and
- (3) it performs a therapeutic function by permitting the community to see that justice is done.

In these ways, the open courts principle works to preserve public confidence in the administration of justice, which is essential to the rule of law.”<sup>100</sup>

It is clear from the above that open justice plays a significant role in, *inter alia*, enhancing judicial accountability of the courts and ensuring that justice is done. It gives the public confidence in the administration of justice performed by the courts, as the public has open access to these proceedings. Seeing justice done in the courts gives the public confidence in the judicial process, so that the community accepts the legitimacy of the process. Also, open justice fosters judicial excellence.<sup>101</sup>

Section 34 of the Constitution confers on the disputing party (here, the taxpayer) the right to have his dispute resolved by the application of law in a fair and open hearing before a court. Accordingly, the constitutional right affected if a matter is heard *in camera*, is the party's right to an open hearing (the principle of open justice).

In my view, implicitly, the principle of open justice encompassed in section 34 also awards a right (although not a constitutionally protected human right) to the public to attend such court hearings. This is an ancillary aim of the section, as the point of open court is to have the public attend the hearing and see justice being done.

<sup>96</sup> TRC *Final Report* vol 4 para 26.

<sup>97</sup> Para 57.

<sup>98</sup> 2015 3 SA 386 (SCA).

<sup>99</sup> Paras 12 and 22. In *Structured Mezzanine Investments*, with reference to *City of Cape Town*, highlighted the following:

“The court found that the principle of open justice was one of the most pervasive axioms of the administration of the common law systems. This included the hearing of a case in public even if painful, humiliating or deterrent both to parties and witnesses. The court found that this was now constitutionally protected in terms of section 34 of the Constitution.”

<sup>100</sup> McLachlin “Openness and the rule of law”, an address to the Annual International Rule of Law Lecture on 8 January 2014 <https://www.barcouncil.org.uk/uploads/assets/f73b28da-a633-4eb2-b9834a15dea0ec80/jan82014-12ptruleoflaw-annualinternationalruleoflawlecture.pdf> (accessed 27-09-2022).

<sup>101</sup> *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as amicus curiae) O'Connell v The State* 2007 4 SA 611 (CC).

In *South African Broadcasting Corp Ltd v National Director of Public Prosecutions*<sup>102</sup> the court held:

“Courts should in principle welcome public exposure of their work in the courtroom, subject, of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the Judiciary as much as to other branches of government. *These values underpin both the right to a fair trial and the right to a public hearing (ie the principle of open courtrooms)*. The public is entitled to know exactly how the Judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.”

In *Botha v Die Minister van Wet en Orde*,<sup>103</sup> the court stated that a court of law is a body of state which serves the public. To maintain public confidence in the administration of justice, the court must, as far as possible, function in such a way that the public can judge if the judiciary is performing its task properly.<sup>104</sup>

As mentioned earlier, although public court hearings are the default position, there are notable exceptions to the principle of open justice, such as matters involving children and taxation.<sup>105</sup> In a dispute involving a minor child, for example, the best interest of the child, entrenched in section 28 of the Constitution, outweighs the principle of open justice, which renders it a justified limitation of the public’s and litigant’s right of access to an open court hearing.<sup>106</sup>

In *Independent Newspapers (Freedom of Expression Institute as amicus curiae) v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa*,<sup>107</sup> Moseneke DCJ held:

“It may be added that the right to an open court hearing and the right to report on it *does not automatically mean that court proceedings must necessarily be open in all circumstances*. There may be instances where the interests of justice in a court hearing dictate that oral evidence of a minor or of certain classes of rape survivors or confidential material related to police crime investigation methods or to national security be heard *in camera*. In each case, the court will have to *weigh the competing rights or interests carefully* with the view to ensuring that *the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain*. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.”

The European Convention on Human Rights and Fundamental Freedoms<sup>108</sup> provides guidance on the limitation of publicity rights in that the public and press may be excluded from trials in the interest of morals, public order, or national security in a democratic society where the interests of juveniles or the protection

102 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 32 (emphasis added).

103 1990 3 SA 937 (W).

104 463.

105 Currie & De Waal *The Human Rights Handbook* 5 ed (2005) 742. SMI attempted to rely on these authors in the court *a quo* to support their argument that tax hearings are exempt from the principle of open justice. However, the court pointed out correctly that the tax hearings referred to by Currie and De Waal relate to proceedings in the Tax Court pursuant to s 124 of the TAA. SMI’s attempted reliance on these authors’ statement was thus misplaced (*Structured Mezzanine Investments* para 67).

106 S 28(2) of the Constitution; *Centre for Child Law v Media 24 Ltd* 2020 4 SA 319 (CC).

107 2008 5 SA 31 (CC) para 45 (emphasis added).

108 Council of Europe Treaty Series 005, Council of Europe, 1950.

of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.<sup>109</sup>

If a tax matter is to be heard *in camera*, the taxpayer's right to privacy must be proven to outweigh the taxpayer's constitutional right to a public hearing (which ensures the accountability of the justice system) and, implicitly, the right of the public to attend a public hearing. It stands to reason, when considering the importance of open justice, that only in exceptional circumstances will a court depart from this principle to hear a matter *in camera*.

Here is the crux of the dilemma: two constitutional rights – the right to privacy and the right to access to the courts (in terms of open justice) – are at odds. Specifically, both rights are held by the same person, the taxpayer. If the taxpayer's court hearing is held *in camera* to protect his confidential taxpayer information (usually at the behest of the taxpayer himself), there is an infringement of that taxpayer's right to open justice – an open court hearing. The taxpayer may be at ease with giving up his right to an open court hearing in favour of protecting his identity and certain taxpayer information. Nevertheless, such infringement of a taxpayer's right must still be considered and weighed by the courts, even if the taxpayer is more than willing to have that right infringed upon in order to protect another right.

This is due to the fact that by implication, if a Superior Court hearing occurs behind closed doors, its impact stretches beyond just the taxpayer in that it may damage judicial accountability. Furthermore, it implicitly deprives the public of their right to witness justice being done in terms of the principle of open justice.

In rare circumstances, it may be SARS applying to the High Court for the tax dispute to be heard *in camera*. In *Rappa Resources (Pty) Ltd v Commissioner for the South African Revenue Service*,<sup>110</sup> SARS requested that its answering affidavit, or portions of it, be kept confidential, and that the matter be heard *in camera*. After hearing comprehensive argument, the court granted SARS' request by way of an interim order, and ordered that until a final decision was made on the issue, all the papers should remain confidential. SARS wanted to keep certain of the taxpayer information confidential, as it set out the details of a suspected scheme that SARS was investigating. SARS indicated to the court that it wished to “avoid any harm that may be caused by the publication of its suspicions which may alert other participants in the alleged schemes, and also to avoid publication of taxpayer details”.<sup>111</sup> In reaching its decision, the court considered the potential prejudice to the taxpayer (who had argued that SARS had an ulterior purpose to request confidential proceedings)<sup>112</sup> if the matter were to proceed *in camera*, as well as SARS' own request to have certain information withheld from publication, as well as the identity of certain taxpayers. Yet it

109 Art 6(1).

110 *Rappa Resources (Pty) Ltd v CSARS* (20/18875) [2020] ZAGPPHC (5 November 2020).

111 Para 14.

112 Rappa argued that hearing the matter *in camera* would not be in the interest of justice. The alleged “ulterior purpose” argued by the taxpayer was that SARS did not want the public to know that it is not paying VAT refunds, in order to fund a shortfall in SARS' revenue collection. The court held that the allegations of SARS having an ulterior purpose had no merit (para 16).

appears that in an attempt to ensure confidentiality of certain information, SARS failed to present a formal application to the court for the order being sought. SARS further failed to present evidence of any prejudice that may be caused to its investigations if the information became public.<sup>113</sup> As a result of a lack of information, a formal application, and sufficient evidence presented by SARS, the request to preserve the confidentiality of the answering (and replying) affidavits was dismissed with costs.

This is indicative that even if a state entity such as SARS, and not the taxpayer, wishes to have the court doors closed to avoid information being made public about a scheme that SARS is investigating, the principle of open justice is not departed from lightly. The person seeking an order that the matter be heard *in camera* must present the court with sufficient evidence to allow the court to weigh the right of the taxpayer to an open and fair trial (and the public's access to the court) against the right to the privacy of taxpayer information (to allow SARS to continue with their investigation without pre-maturely alerting participants of the scheme as a result of the public court hearing and the publication of the court records). If there is not sufficient evidence presented to the court in the application for the departure from the principle of the open justice, the application will not be successful.

### 6.3 The reasonable and justifiable limitation of rights in terms of section 36

A law of general application may limit a right entrenched in the Bill of Rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality.<sup>114</sup> The limitation of the right must also prove to be necessary.<sup>115</sup> Factors considered in the limitation of the right include:

- “(a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”<sup>116</sup>

The taxpayer shoulders the burden of proof to show that there is a breach of his fundamental right.<sup>117</sup> In *Manamela*, the court held that the general rule is that the more invasive and severe the impact of a measure on a fundamental right, the more persuasive and compelling its justification has to be.<sup>118</sup>

A limitation of a right in terms of section 36 of the Constitution is subject to a two-stage analysis. In the first instance, it has to be determined whether the right in question is infringed. Once established a right has been infringed, then, secondly, the analysis considers the justification of the limitation of such a right.

The first stage of the analysis requires a determination of the boundary of the relevant right.<sup>119</sup> As illustrated earlier, the sphere of privacy becomes smaller as a person moves into and interacts with society.<sup>120</sup> If a taxpayer is involved in a

113 *Rappa Resources* para 19.

114 S 36(1) of the Constitution. See also *S v Zuma* 1995 4 BCLR 401 (CC) 414, with reference to *R v Oakes* (1986) 26 DLR (4th) 200.

115 *Cheadle et al* 31-3.

116 S 36(1) of the Constitution.

117 *S v Manamela (Director-General of Justice intervening)* 2000 3 SA 1 (CC) para 32.

118 Para 69.

119 *Cheadle et al* 31-3.

dispute before a Superior Court, he cannot have a reasonable expectation to have the hearing take place behind closed doors to protect his privacy at all costs.<sup>121</sup>

In my view this right to privacy – the right not have taxpayer information disclosed – is justifiably limited, specifically in terms of section 32 of the Superior Courts Act, which requires all hearings to be in open court, unless special circumstances exist. This is based on the fact that the principle of open justice is not lightly departed from, and as such, taxpayer information that had previously enjoyed the protection of section 124 of the TAA when the matter was before the Tax Court, will not enjoy the same protection in the Superior Courts. Accordingly, section 34 of the Bill of Rights (which encompasses the principle of open justice) read with section 32 of the Superior Courts Act effectively limits upon this constitutional right to privacy.

Nevertheless, this first stage of the analysis in respect of the right to privacy cannot be divorced from an investigation of the constitutional right of access to the courts. A Superior Court may, under special circumstances, depart from the general principle of open justice to hear a matter *in camera*, which provides a legislative basis for deviation from the default position of the right to open access to the court (in the form of a “special case” in terms of section 32 of the Superior Courts Act). Although the exception does not deprive the taxpayer of access to the court, it deprives the taxpayer of a public hearing (open justice), and implicitly deprives the public of their right to public court hearings. Accordingly, there is an infringement upon this constitutional right of the taxpayer (openness and transparency of his court hearing) where a matter is heard *in camera* in a Superior Court. Moreover, as pointed out, these exceptions go against the fundamental principles of open justice – those very principles in which the taxpayer has an interest as a member of society at large.

Thus, in the first stage of the analysis, and as highlighted in the discussion above, there is a clear infringement of a constitutional right if a matter proceeds to open court (the taxpayer's right to privacy is infringed upon), or alternatively, if a High Court matter is held *in camera* (the taxpayer's right to an open and fair court hearing is infringed upon, and the principle of open justice is affected negatively).

The second stage of the analysis requires a determination if the limitation can be justified and considered to be a reasonable limitation of the right concerned.<sup>122</sup> A proportionality test is generally conducted to determine whether the limitation is reasonable and justifiable in an open and democratic society.<sup>123</sup> When examining the limitation of a right, one must consider, firstly, the nature of the right and the balance between the importance of the right relative to the importance and purpose of infringing law.<sup>124</sup> Other considerations highlighted in *Makwanyane* include the purpose for limiting the right, the importance of such purpose to society, the extent of the limitation, and whether the desired purpose of the limitation can be achieved through less damaging means.<sup>125</sup>

120 *Bernstein* paras 77, 67 and 69.

121 *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456 (T).

122 *Cheadle et al* 30-3.

123 Rautenbach “Proportionality and the limitation clauses of the South African Bill of Rights” (2008) 17(6) *PER/PELJ* 2229 2240.

124 *S v Makwanyane* 1995 3 SA 391 (CC); *Cheadle et al* 30-9.

125 104. For more examples of the operation of the limitation clause in s 36 of the Constitution, see *Metcash Trading Ltd v Commissioner for the South African Revenue*

As such, as all constitutionally protected rights have equal value, the rights must be reconciled by “recognizing a limitation upon the exercise of one right, to the extent that it is necessary to do so in order to accommodate the exercise of the other according to what is required by the particular circumstances and within the constraints that are imposed by s 36”.<sup>126</sup> In deciding the proportionality, then, a balance should be struck where weight is assigned to the relevant right and the limiting legislation.

It is clear that the purpose of the limitation of the right to privacy is to give power to the object of the Superior Courts Act – to allow society access to open courtrooms, as “open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate”.<sup>127</sup> Yacoob J warns in *Shinga* that “[c]losed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based”.<sup>128</sup>

The right to privacy itself becomes more prone to justifiable limitation as the individual moves and operates in society,<sup>129</sup> which means that, in order to maintain “the foundational constitutional values of accountability, responsiveness and openness”,<sup>130</sup> there is, therefore, generally, a justified limitation of the right to privacy in matters heard before the Superior Courts.

In considering the justified limitation of the right to an open court hearing, one must consider if it is in the best interest of a party that the matter be heard *in camera*. For example, in the case of rape survivors, oral evidence given by a minor child, or cases involving national security, the matter should proceed *in camera*, as there is a justified limitation to the public’s right to open court hearings in order to protect a person’s identity or confidential material.<sup>131</sup>

The last test in the justification analysis is whether or not there are less restrictive means to achieve the purpose of an Act.<sup>132</sup> For example, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate*,<sup>133</sup> the court had to consider if there was a justified limitation of privacy in the event of the search of home and property, coupled with a restraint order, and the confiscation of assets

---

*Service* 2001 1 SA 1109 (CC); *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 769 (CC).

126 *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] 3 All SA 318 (SCA) para 9.

127 *Shinga* para 26.

128 Para 25.

129 From a taxpayer’s perspective, this means that a taxpayer is tasked with filing relevant tax returns. Sometimes, these submissions may result in a dispute with SARS. This means that taxpayers will have to utilise the legal framework provided in the TAA when there is a dispute with SARS. By engaging in a tax dispute with SARS, the taxpayer’s matter may be exposed to the Tax Court/Tax Board or even the Superior Courts, such as the High Court, the Supreme Court of Appeal, or the Constitutional Court. This is how a taxpayer operates in society and, as highlighted in *Bernstein*, shows how the taxpayer “moves within communal relations and activities”; the taxpayer’s sphere of privacy becomes smaller, of course, in this scenario.

130 *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) paras 31–32.

131 *Masetlha* para 45.

132 *Cheadle et al* 30-16.

133 *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 2 BCLR 151 (C).

in terms of the Proceeds of Crime Act<sup>134</sup> in a drug related crime fighting investigation. Van Zyl J conducted a proportionality test in this judgment and found that the measures of restraint and confiscation are equitable, morally justifiable and not overbroad, oppressive or draconian in nature.<sup>135</sup> It was held that the limitation of the respondent's right to privacy was reasonably necessary to achieve the objects of the Act and, thus, justified and proportionate.<sup>136</sup>

However, in *Mistry v Interim National Medical and Dental Council of South Africa*,<sup>137</sup> the court held that warrantless search and seizure breaches the right to privacy as the invasion is disproportionate to the purpose and, therefore, invalid. Even in the case of *Gaertner*,<sup>138</sup> where the court considered the nature and extent of the limitation of the right to privacy, the court found that there were less restrictive means to achieve the purpose of the Act.

Applying the test to tax disputes in Superior Courts, I submit that, in certain circumstances, it would be a valid option for the court to protect certain taxpayer information from unwarranted disclosure in the judgment, as opposed to having the entire court hearing conducted *in camera*. This would mean, for example, that a taxpayer's identity is withheld, or sensitive confidential information is withheld from the public. In this scenario, the public has the benefit of witnessing the judicial process, the principle of open justice is not adversely affected, and sensitive taxpayer information is protected. For example, in *SMI*, Eksteen J held:<sup>139</sup>

“Moreover, the appellants do not require a hearing *in camera* nor that the file be sealed from the public in order to protect disclosure of the appellants' identity. That may be achieved by simply not reflecting the identity in the judgment of the court.”

It is clear from these cases, as highlighted by Cheadle *et al*,<sup>140</sup> that proportionality relates to the manner in which a right is limited, not to whether it should be limited at all. Cheadle *et al* further point out that the principle of proportionality can be invoked only once a court is satisfied that the purpose of the limiting law justifies the limitation of the right, to balance the purpose of the limiting law with the rationality and extent of the limitation of the right.<sup>141</sup>

In *Prinsloo*, an application for a hearing *in camera* was denied, even though the matter dealt with “intimate personal details”. The court held:

“The general rule is that court hearings must be public, but the court has a discretion to order the hearing of cases *in camera* in special cases. *The general rule should not lightly be departed from*, and in the court's opinion, the applicant's case was not special.”<sup>142</sup>

As shown above, it appears that, generally, the constitutional right that outweighs the other is the right to open and public court hearings. Only in very limited situations would the taxpayer's right to privacy outweigh the principle of open justice, simply because of the importance of public hearings to the functioning

134 Act 76 of 1996.

135 *Bathgate* paras 90–91.

136 Para 133.

137 *Mistry v Interim National Medical and Dental Council of South Africa* 1998 7 BCLR 880 (CC) para 23.

138 Paras 72–74.

139 *SMI* para 19.

140 Cheadle *et al* 30-9.

141 *Ibid*.

142 *Prinsloo* 462.

of the judiciary, which encompasses the foundational constitutional values of accountability, responsiveness, and openness.<sup>143</sup> There is, generally, a justified limitation of a taxpayer's right to privacy in favour of hearing a matter in open court. However, as provided for in the Superior Courts Act, in the event of a "special case", the court may depart from the principle of open justice and hear a matter *in camera*.

## 7 WHAT OPTIONS ARE AVAILABLE TO THE TAXPAYER?

The question now arises as to what options a taxpayer may consider when involved in litigation proceedings in court, and where the taxpayer has extremely sensitive taxpayer information, which is not suited for the public domain? The list of actions discussed below is not exhaustive, but aims to highlight some options available to the taxpayer.

### 7.1 An interlocutory application

In *Structured Mezzanine Investments*, the taxpayer, SMI, brought an interlocutory application, which failed, as discussed above.

The interlocutory application is arguably the correct mechanism, and it is a valid option for taxpayers to bring an application to the High Court to have a tax matter heard *in camera*, and to have the court file sealed. An interlocutory application is made to obtain an interim order pending the outcome of another proceeding or action.<sup>144</sup>

In *Structured Mezzanine Investments*, SMI, in their interlocutory application, failed to argue that theirs was a "special case" and thus a suitable deviation from the principle of open court. In addition, SMI's own interlocutory application was heard in open court, effectively defeating the purpose of their own application as it placed the sensitive taxpayer information they were wanting to protect in the public domain.<sup>145</sup> If the "special case" argument had been presented by SMI, the court would have had to consider what actually constitutes a "special case", and how would a taxpayer set out to prove that the information is so sensitive that publication of it would result in an unjustifiable infringement on his right to privacy? It goes without saying that appropriate evidence is required to warrant overriding the principle of open justice.<sup>146</sup> The South African courts are yet to provide guidelines as to what constitutes a "special case" for tax matters.

### 7.2 Settlement out of court

Alternatively, the taxpayer may, under certain circumstances, have the option to settle the dispute with SARS outside the court<sup>147</sup> to avoid proceeding to court and having their sensitive taxpayer information made public.

If this option is available, it places the taxpayer on the proverbial back foot as SARS may be given the upper hand in settlement negotiations. This is the result of the fact that SARS is acting within their rights to share taxpayer information in civil court matters and they may be aware that a taxpayer could be compelled

143 *SABC v NDPP* 2007 1 SA 523 (CC) para 32.

144 Classen *Dictionary of Legal Words and Phrases* (2022). Also see rule 6(11) of the Uniform Rules of Court.

145 *SMI* para 10.

146 *Manamela* para 32.

147 Ch 9 part F of the TAA deals with the settlement of tax disputes.

to go to great lengths to keep the matter and their sensitive taxpayer information out of court. This means that potentially SARS could push harder during the settlement negotiations. SARS may also argue that the matter is inappropriate for settlement if it is in the public interest to have judicial clarification on the issue,<sup>148</sup> or where pursuing the matter through the courts will significantly promote future taxpayer compliance.<sup>149</sup>

Walsh cautions that the court must not, in considering the application to have the matter heard *in camera*, negate the taxpayer's willingness to pursue the tax dispute in order to avoid revealing his identity, or sensitive taxpayer information.<sup>150</sup> She admits that it is unlikely that a taxpayer would forego a tax claim against the Commissioner, as it is the taxpayer's own money at stake. But there would be a balance of interests as a taxpayer may surrender their taxes claimed up to a certain amount, in order to avoid disclosing sensitive taxpayer information in an open court.<sup>151</sup> Moreover, so she argues, both the government and the public have interests in encouraging taxpayers to bring their tax disputes to the Tax Court: the public can see how taxes are collected, and how government calculates the tax burden, whilst government benefits from an accurately administered tax system.<sup>152</sup>

Walsh points out the following regarding the balancing of the taxpayer's rights and the rights of the public:

"Taxpayers should not be forced to choose between maintaining financial privacy protections and challenging tax deficiencies in Tax Court, and the public should not be deprived of the benefit of seeing tax disputes resolved. Therefore, courts deciding issues of anonymity in tax proceedings should consider that permitting the taxpayer anonymity might actually advance public interest."<sup>153</sup>

### 7.3 Reaching an agreement with SARS

In my view, perhaps the best option, would be to attempt to negotiate an agreement with SARS to have the matter heard *in camera*, *in toto* or in part.<sup>154</sup> Such an agreement to have the matter heard *in camera* must still be approved by the court, whilst a withholding of the taxpayer's identity or masking certain facts is another possibility.

Alternatively, the taxpayer can seek to reach an agreement with SARS that some sensitive information will be masked in the court proceedings.<sup>155</sup>

Walsh argues that there is no discernable risk of prejudice to the opposing party (here, SARS) if a matter is heard *in camera*, or, in my view, certain sensitive information is masked, as SARS already knows the identity of the taxpayer and has the required taxpayer information.<sup>156</sup> The taxpayer just wishes to

148 S 145(b) of the TAA.

149 S 145(c) of the TAA.

150 Walsh "The Anonymous Taxpayer: What the Tax Court Failed to Reveal in Anonymous v. Commissioner" (2008) 61 *Tax Lawyer* 1016.

151 *Idem* 1017.

152 *Idem* 1018.

153 *Idem* 1017. This related to an American Tax Court case, which is generally heard in open court.

154 See, for example, *A Company* 13.

155 *Distell* para 4.26: "On 13 August 2009 Distell initially requested that Amarula be added to the appeal but as "Product X" and that the papers be secured at the registrar and the matter be heard *in camera*."

156 See Walsh 1018.

withhold such sensitive taxpayer information from the general public.<sup>157</sup> Where there is an agreement to mask certain sensitive information or withhold the taxpayer's information, it still allows the public to attend the court hearing (the hearing still takes place in open court), but sensitive information like trade secrets or secret recipes will be protected.

## 8 CONCLUSION

As a "special case" was not argued before the court in *Structured Mezzanine Investments* or in (*SMI*), or any of the Tax Court cases canvassed above, the question remains – what constitutes a "special case" in terms of section 32 of the Superior Courts Act in order for a court to hear a tax dispute *in camera*?

Some tax practitioners have aired their views in the local media following the *Structured Mezzanine Investments* judgment. They argued that the "special case" exception may have been successful in this application, if *SMI* had proved to the court that the taxpayer information related to commercially sensitive information, or that the information related to third parties who were parties to the loan agreements which SARS requested from the taxpayer.<sup>158</sup>

In my view, it would not be as straightforward to constitute a special case for hearing the matter *in camera*, as there would have to be truly exceptional circumstances for a Superior Court to depart from a public hearing. It is clear from the non-tax related court cases discussed in paragraph 2 that each case must be considered on its own merits to establish if it is a special case that justifies the departure from the general norm of an open court. In such a matter the courts will consider if "the administration of justice would be rendered impracticable by the presence of the public"<sup>159</sup> and the "weighing of competing rights".<sup>160</sup>

There are currently no examples of a taxpayer in South Africa having successfully argued for a tax matter to be heard *in camera* in a Superior Court on the basis that his was a "special case".

In *City of Cape Town v South African National Roads Authority Ltd*, the court emphasized that open hearings must take place in public, even if it is painful, humiliating or deterrent both to parties and witnesses.<sup>161</sup> In *Prinsloo*, not even reported sexual predilections could persuade the court to hear the matter *in camera*.<sup>162</sup> In a newspaper article, the chief executive of the South African Institute for Tax Professionals, Professor Keith Engel, was quoted as saying that arguing that proceedings should be held *in camera* merely because of potential reputational risk "won't fly".<sup>163</sup>

The question, therefore, remains: From a tax perspective, what constitutes sufficiently sensitive taxpayer information to the extent that it would warrant a matter to be considered a special case accordingly to be heard *in camera*?

<sup>157</sup> *Ibid.* See also *SMI* para 19.

<sup>158</sup> Visser *A matter of confidentiality* 20 Jul 2022 *The Citizen* <https://www.pressreader.com/south-africa/the-citizen-kzn/20220720/282067690666137> (accessed 17-10-2022).

<sup>159</sup> *Du Preez* 88.

<sup>160</sup> *Savoi* para 15.

<sup>161</sup> Paras 12 and 22.

<sup>162</sup> *Prinsloo* 462.

<sup>163</sup> Visser *A matter of confidentiality* 20 Jul 2022 *The Citizen* <https://www.pressreader.com/south-africa/the-citizen-kzn/20220720/282067690666137> (accessed 17-10-2022).

In the case of a company, which itself cannot endure physical harm, I would argue that highly sensitive information that would be exceedingly detrimental to the taxpayer or the taxpayer's business if revealed to the public, for example, trade secrets,<sup>164</sup> a secret recipe, and/or the particular business model of the taxpayer, may found a "special case".

In *Financial Mail*, for example, an open court hearing would have been detrimental to the insurance company which was doing everything in its power along with the Registrar to address its financial difficulties. Premature news of its financial difficulties would most likely have led to the company's liquidation, despite the efforts by the company and the Registrar to salvage the company.

The ripple effect on communities dependent on the taxpayer may also play a convincing role.

Yet, in *Distell*, where the secret Amarula recipe was in issue, the court ruled that Distell's actions to protect the Amarula recipe and brand by trying to exclude the Amarula brand from open court litigation were not reason enough to grant condonation for a late filing of leave to appeal.<sup>165</sup> One can argue that this judgment gives the impression that even the protection of a brand image or secret recipe *per se* is unlikely to constitute sufficiently sensitive information. Here the ingredients of Amarula were shared with the public but not the actual recipe. Can one argue that the sharing of the ingredients was sensitive information that should have been withheld by the court? Perhaps. However, generally, the sharing of a secret recipe itself would be more damaging than merely sharing the ingredients. In *Distell*, the list of ingredients still proved to have some damaging effects, as it became known to the public that the product Amarula (which is promoted as tasting of marula fruit) contains no actual marula fruit; it was merely a wine-based product. It stands to reason that evidence of the sensitivity of the taxpayer information and the perceived prejudice or harm to the taxpayer's privacy must be presented to the court.

Even in *Du Preez*, delicate negotiations regarding the disposal of mining rights were not sufficient grounds for the court to order that a special case exists. One may question whether if the collapse of such negotiations would be harmful to the state, or if the state itself was a party to the matter, that would constitute a "special case", given Hiemstra J's *ratio decidendi*.

If that is the case, I believe that taxpayers may find it difficult to prove a "special case" successfully, especially with the current lack of authority on the matter regarding tax-related matters. The taxpayer would, in my opinion, have to provide evidence to support the argument that the harm and prejudice that will be suffered by the taxpayer outweighs the general principle of open justice, and that an open court hearing will hinder the administration of justice for the taxpayer. It would take a considerable weight of evidence to convince the court to close its doors in order to protect some item of the taxpayer information.

In *Structured Mezzanine Investments*, the application for leave to appeal was granted based on the grounds presented by SMI – there is an absence of authority on the question whether matters relating to tax and tax affairs, which are adjudicated in the High Court, should be heard *in camera*, pursuant to the general principle of the privacy of a person's tax affairs.

<sup>164</sup> See Croome 125–126.

<sup>165</sup> *Distell Limited v Commissioner for the South African Revenue Service* [2016] JOL 34234 (GP) paras 4.23, 6, and 30.

As discussed earlier, SMI did not argue a special case in terms of section 32 of the Superior Courts Act. Even if the taxpayer information was not in the public domain and SMI had argued a special case, I believe that the chances of success would have been unlikely, given that the open justice principle is not lightly departed from.

The appeal court, however, indicated that SMI does not require a hearing *in camera*, nor the sealing of the court file in order to protect the appellant's identity.<sup>166</sup> To protect the taxpayer's identity, his identity would simply not be reflected in the judgment. This seems to present a different recourse for a taxpayer who is mindful of his identity being made public in open court as the tax dispute progresses to a High Court. For SMI, their sensitive taxpayer information did not relate to the taxpayer's identity, but rather to secret taxpayer information contained in affidavits in the main and interlocutory applications.<sup>167</sup>

Tax dispute matters that are heard before the court inevitably involves sensitive and personal taxpayer information, as the case concerns the taxpayer's finances, which, if given the choice, most taxpayers would want to keep away from the public eye. However, when engaging in tax litigation, a taxpayer must accept that it is highly likely that certain taxpayer information will become public when the dispute is taken on appeal to the High Court, Supreme Court of Appeal, or even the Constitutional Court.<sup>168</sup>

A more perplexing situation arises where the taxpayer does not launch the appeal to the High Court, but where SARS appeals to the High Court. In these cases, a taxpayer is effectively forced to move outside the confines and protection of the secrecy of taxpayer information in terms of section 124 of the TAA. This is where an infringement of the taxpayer's constitutional rights may occur. As noted by Walsh, the taxpayer should not be placed in a position where they must choose between maintaining the privacy of their taxpayer information and challenging tax deficiencies in court.<sup>169</sup> Rather, it is in the interest of the public (and in the administration of justice) to have the matter heard, even if it means that the taxpayer's information must be protected in some form or other.

Nevertheless, with reference to the existing tax cases that have been heard *in camera* in the High Court, I suggest that the preferred and perhaps most cost-effective option for protecting taxpayer information is where SARS and the taxpayer agree to have certain taxpayer information withheld or masked. In this instance, the taxpayer doesn't have the burden of proof of convincing the court that a "special case" exists, nor the added costs of bringing such an application.

However, where no such agreement is reached, or where SARS refuses to enter into such an agreement, the taxpayer would either have to negotiate to settle the matter with SARS or bring an appropriate interlocutory application to the court to have the matter heard *in camera*.<sup>170</sup>

---

<sup>166</sup> *SMI* para 19.

<sup>167</sup> Para 10.

<sup>168</sup> *Bernstein* paras 77, 67 and 69.

<sup>169</sup> See Walsh 1017.

<sup>170</sup> The decision by SARS not to enter into such an agreement with a taxpayer would fall within the realm of pre-trial negotiations, and would accordingly, in my opinion, not be subject to review in terms of the PAJA read with ss 104 and 105 of the TAA. SARS is not empowered by the TAA to use its discretion to enter into such an agreement, and the decision is not subject to objection or appeal. A full discussion of this matter falls outside the ambit of this article.