

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO: 1824/2021
Date heard: 17 February 2022
Date delivered: 12 April 2022**

In the matter between

STRUCTURED MEZZANINE INVESTMENTS (PTY) LTD First Applicant
JEAN PRIEUR DU PLESSIS Second Applicant

And

THE COMMISSIONER FOR THE SOUTH AFRICAN Respondent
REVENUE SERVICE

JUDGMENT

LOWE J:

INTRODUCTION

1. The application before me in this matter is interlocutory, I being required to consider only Part 2 of the application brought under Notice of Motion of 31 August 2021 which has three parts to it, Part 1 relating to condonation for the late delivery of Applicants' answering affidavit, Part 2 that the matter be heard in camera and that the court file be sealed to the public and, Part 3 relating to a striking out application.
2. The parties were in agreement that only Part 2, (that the matter be heard in camera and the court filed sealed from the public), was in issue before me.

3. The issue is discrete, and is fundamentally about the proper interpretation of the relevant legislation, though in argument Applicants sought to widen the argument as I shall set out hereafter.
4. For the above reason, it is important to set out what is in the papers relevant to this particular issue before doing anything else.

THE PAPERS

5. In the interlocutory application Applicants, in the founding affidavit by Second Applicant, deal with the in camera issue last. Applicants commence by referring to the "main application" being one to compel Applicants to comply with a request issued by Respondent on 6 February 2020 under the provisions of section 46 of the Tax Administration Act 28 of 2011 ("the TAA").
6. Applicants state that they are advised that the main application arises from an "unlawful investigation and for ulterior purpose" and secondly that it does not comply with the jurisdictional requirements under section 46 of the TAA. Whilst I need not consider this at all, the background was adverted to in argument by Applicants, accordingly I mention this briefly.
7. As to the so-called jurisdictional requirements of section 46 of the TAA, it is alleged that Respondent failed to prove that the documents listed in the request constitute "relevant material" as defined in section 1 of the TAA, this material being 57 loan agreements (listed in the request), in the context of section 46 read with section 1 of the TAA.
8. In my view the merits or demerits of this argument are, in the context of this application, not relevant to a consideration of the issues before me.

9. The first 102 paragraphs, and 34 of 39 pages of the interlocutory application relate predominantly to the two questions which are not before me, whilst paragraphs 103 to 109, on pages 34 to 36 thereof, relate to the issue relevant to the *in camera* proceedings and request to seal the court file.
10. In summary the allegations made are as follows:
 - 10.1 That the provisions of the TAA as to confidential Tax Payer Information is implicated (section 67(1)(b)) and that Respondent has breached its statutory duty to preserve the secrecy of same, which it may not disclose, in the context of section 67 and 69 of the TAA (this relates to the submission that the SARS founding affidavit in the main application is replete with confidential tax payer information);
 - 10.2 That there is little doubt that the proper parties involved within SARS would most likely not have granted any authorization to bring this application or would have at least undertaken to proactively ensure that the matter would be heard *in camera* and that the court papers would be kept private and confidential;
 - 10.3 That the main application is an abuse of the court process;
 - 10.4 That even if the issue of deposing to the main application falls within the scope of section 69(2)(a)(ii) of the TAA, (which is not conceded) the making public of the information by refusing to agree to an *in camera* hearing is not relevant to the SARS official's duties under a Tax Act, and there is "nothing in a Tax Act, necessitating *the public disclosure of confidential tax payer information*", it being said that the "offhand" dismissal "of the request to have the information kept confidential" is "particularly invidious and constitutes a reckless disregard for the constitutional duties that SARS undertakes...";

- 10.5 That the public confidence in SARS, which is expected to exercise a bare minimum of respect for the right to privacy, is eroded by the public disclosure of tax payer information;
 - 10.6 That the prevailing practice directive in the Gauteng Tax Court is for all matters to be heard in camera so as to comply with the secrecy provisions;
 - 10.7 That there is in any event, what is referred to as, a disproportionate degree of disclosure to the public of the relevant tax payer's information.
11. The strong terminology used as to the violation by SARS of its duties, that the main application is an abuse of the court process and earlier that the main application constitutes an unlawful investigation, is repeated in the heads of argument, and is in unfortunate terms, as was pointed out by Respondent in argument, and is an issue which may well bear to be carefully dealt with further in the main application, though I refrain from doing so in this matter as it is not necessary and perhaps premature to pronounce hereupon any further.
 12. The important issue, is, however, that the main argument that the matter be heard in camera and the court file sealed, emanates from the submission that the information referred to in that application in the main affidavit is confidential in terms of the TAA, and that for the reasons set out more fully above this warrants an in camera hearing, and even if that is incorrect that the Respondent has abused or overlooked its constitutional duties, failing to show respect for the right to privacy and is also against the practice directives in the Gauteng Tax Court that all matters be heard in camera due to the secrecy provisions, the Tax Court being a specialized organ dealing with "precisely the same confidential tax payer information."
 13. What is notably absent is any reference to, or suggestion that, this matter is to be dealt with specially and differently, in terms of the provisions of section 32 of the Superior Courts Act 10 of 2013 which reads as follows:

"Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except insofar as any such Court may in special cases otherwise direct, be carried on in open court."

14. Indeed, in the Applicants' heads of argument there is not a single reference to section 32 of the Superior Court's Act, and no argument set up that failing the success of, or in any event whatever the result of the TAA argument, there was, or is, a "special case" to be made out for a hearing other than in open court in terms of section 32.
15. This was also not referred to in Applicants' main argument, but resorted to in reply, but without foundation in the papers let alone the heads of argument, to this specific issue.
16. In answer to the allegations in the founding papers in this regard Respondent dealt with the case put up in the founding papers, contending that Applicants' case was inconsistent with the principle of open justice. In reply Applicants took the matter no further simply contenting themselves with the allegation that SARS was not pursuing its lawful duties but was abusing the Court process, arguing that the reasons given in the main application could and should have been furnished in the normal course in the section 42 TAA audit process.
17. In my view, accordingly, it is simply not open to Applicants to now change their argument mid-stream, contending for a special case in terms of section 32 of the Superior Court Act, an issue not raised by Applicants at all on the papers.
18. Even were I incorrect in this, there are, in my view, no facts put up whatsoever that support an argument that this is a "special case" as envisaged in that section. The

subsection confers a discretion on the court to be exercised in special cases, what a special case may be depending on the circumstances of each particular case¹.

THE INTERPREATION OF STATUTES

19. The approach to statutory interpretation is formulated in *Cool Ideas 1186 CC v Hubbard*² where the following is stated:

"[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."³

20. "Purposive" interpretation means promoting the spirit, purport and objects of the Bill of Rights when interpreting legislation. That is whether particular legislation is capable of an interpretation which conforms to the fundamental values and principles of the Constitution⁴. It is aimed at testing the core values which underlie the fundamental rights in a democratic society based on human dignity, equality and freedom and supports an interpretation best supporting and protecting those values.

¹ *Cerebos Food Corporation Limited vs Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T) at 158H.

² 2014 (4) SA 474 (CC) at para 28.

³ Footnotes omitted. See also *Kwa-Zulu Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* (889/2018) [2019] ZASCA 116 (19 September 2019); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18].

⁴ Section 39 of the Constitution.

21. Context is essential, it requires attention to political history⁵ and a ringing and decisive break from the past⁶.
22. Constitutional validity must be achieved.

THE RELEVANT FACTS AND THE TAA

23. As already pointed out above, the main application was such as to compel First Applicant (as First Respondent therein) to comply with its obligation to respond to requests directed to it by SARS in terms of section 46 of the TAA.⁷ In bringing this application the deponent and Respondent were clearly acting in performance of their duties under the Tax Act.
24. Applicants had refused to provide the relevant information sought in terms of section 46 of the TAA which precipitated the launching of the main application⁸.
25. It is not contended in the main application that this matter is other than properly before this Court (though said to be an abuse of process), and for the purposes of these proceedings and the in camera application, the matter must proceed on that basis.
26. Chapter 6 of the TAA deals with the confidentiality aspects of tax payer information and tax administration, section 67 – 69 as appears below:

"67 General prohibition of disclosure

- (1) This Chapter applies to-

⁵ *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu-Natal v President of The Republic of South Africa and Others* 2000 (1) SA 661 (CC) [44]

⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) [8]

⁷ Second Applicant is Second Respondent therein in his capacity of First Applicant's representative tax Payer.

⁸ Applicants rebuffed the request for information relevant to an ongoing investigation by SARS

- (a) SARS confidential information as referred to in section 68 (1);
and
 - (b) **"taxpayer information"**, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.

- (2) An oath or solemn declaration undertaking to comply with the requirements of this Chapter in the prescribed form, must be taken before a magistrate, justice of the peace or commissioner of oaths by-
 - (a) a SARS official and the Tax Ombud, before commencing duties or exercising any powers under a tax Act; and
 - (b) a person referred to in section 70 who performs any function referred to in that section, before the disclosure described in that section may be made.

- (3) In the event of the disclosure of SARS confidential information or taxpayer information contrary to this Chapter, the person to whom it was so disclosed may not in any manner disclose, publish or make it known to any other person who is not a SARS official.

- (4) A person who receives information under section 68, 69, 70 or 71, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in those sections.

- (5) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary to counter or rebut false allegations or information disclosed by the taxpayer, the taxpayer's duly authorised representative or other person acting under the instructions of the taxpayer and published in the media or in any other manner.

68 SARS confidential information and disclosure

- (1) SARS confidential information means information relevant to the administration of a tax Act that is-
- (a) personal information about a current or former SARS official, whether deceased or not;
 - (b) information subject to legal professional privilege vested in SARS;
 - (c) information that was supplied in confidence by a third party to SARS the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source;
 - (d) information related to investigations and prosecutions described in section 39 of the Promotion of Access to Information Act;
 - (e) information related to the operations of SARS, including an opinion, advice, report, recommendation or an account of a consultation, discussion or deliberation that has occurred, if-
 - (i) the information was given, obtained or prepared by or for SARS for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; and
 - (ii) the disclosure of the information could reasonably be expected to frustrate the deliberative process in SARS or between SARS and other organs of state by-
 - (aa) inhibiting the candid communication of an opinion, advice, report or recommendation or conduct of a consultation, discussion or deliberation; or
 - (bb) frustrating the success of a policy or contemplated policy by the premature disclosure thereof;
 - (f) information about research being or to be carried out by or on behalf of SARS, the disclosure of which would be likely to prejudice the outcome of the research;
 - (g) information, the disclosure of which could reasonably be expected to prejudice the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic,

including a contemplated change or decision to change a tax or a duty, levy, penalty, interest and similar moneys imposed under a tax Act or the Customs and Excise Act;

[NB: Para. (g) has been substituted by s. 46 (1) of the Tax Administration Laws Amendment Act 23 of 2015, a provision which will be put into operation immediately after the Customs Control Act 31 of 2014 has taken effect. See PENDLEX.]

- (h) information supplied in confidence by or on behalf of another state or an international organisation to SARS;
- (i) a computer program, as defined in section 1 (1) of the Copyright Act, 1978 (Act 98 of 1978), owned by SARS;
- (j) information relating to the security of SARS buildings, property, structures or systems; and
- (k) information relating to the verification or audit selection procedure or method used by SARS, the disclosure of which could reasonably be expected to jeopardise the effectiveness thereof.

[Para. (k) added by s. 40 (c) of Act 39 of 2013 (wef 1 October 2012).]

- (2) A person who is a current or former SARS official-
 - (a) may not disclose SARS confidential information to a person who is not a SARS official;
 - (b) may not disclose SARS confidential information to a SARS official who is not authorised to have access to the information; and
 - (c) must take the precautions that may be required by the Commissioner to prevent a person referred to in paragraph (a) or (b) from obtaining access to the information.

- (3) A person who is a SARS official or former SARS official may disclose SARS confidential information if-
 - (a) the information is public information;
 - (b) authorised by the Commissioner;

- (c) disclosure is authorised under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;
- (d) access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act; or
- (e) required by order of a High Court.

69 Secrecy of taxpayer information and general disclosure

- (1) A person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official.
- (2) Subsection (1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official-
 - (a) 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;
 - (b) under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter;
 - (c) by order of a High Court; or
 - (d) if the information is public information.

[Para. (a) amended by s. 47 of Act 23 of 2015 (wef 8 January 2016).]
- (3) An application to the High Court for the order referred to in subsection (2) (c) requires prior notice to SARS of at least 15 business days unless the court, based on urgency, allows a shorter period.

- (4) SARS may oppose the application on the basis that the disclosure may seriously prejudice the taxpayer concerned or impair a civil or criminal tax investigation by SARS.
 - (5) The court may not grant the order unless satisfied that the following circumstances apply:
 - (a) the information cannot be obtained elsewhere;
 - (b) the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;
 - (c) the information is central to the case; and
 - (d) the information does not constitute biometric information.
 - (6) Subsection (1) does not prohibit the disclosure of information-
 - (a) to the taxpayer; or
 - (b) with the written consent of the taxpayer, to another person.
 - (7) Biometric information of a taxpayer may not be disclosed by SARS except under the circumstances described in subsection (2) (a) (i).
 - (8) The Commissioner may, despite the provisions of this section, disclose-
 - (a) the name and taxpayer reference number of a taxpayer;
 - (b) a list of-
 - (i) pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds as defined in section 1 (1) of the Income Tax Act; and
 - (ii) public benefit organisations approved for the purposes of sections 18A and 30 of the Income Tax Act;
- [Para. (b) substituted by s. 53 of Act 16 of 2016 (wef 19 January 2017).]
- (c) the name and tax practitioner registration number of a registered tax practitioner; and
 - (d) taxpayer information in an anonymised form.

[Sub-s. (8) amended by s. 41 (c) of Act 39 of 2013 (wef 1 October 2012) and substituted by s. 48 of Act 44 of 2014 (wef 1 October 2012).]"

27. It flows from the above that in summary chapter 6 applies, *inter alia*, to tax payer information (defined and described in section 67(1)) and "which means any information provided by a tax payer or obtained by SARS in respect of the tax payer, including biometric information". Section 67(4) requires a person who receives information under, amongst others, section 68 and 69 to preserve the secrecy of that information. That information may only be disclosed to another person if the disclosure is necessary to perform the functions specified in those sections.
28. It is important to pause at this stage and comment that the relief in the main application is to compel Applicants to comply with their obligation to respond to the request directed to them by SARS in terms of section 46 of the TAA "...by furnishing to SARS all the information requested in the section 46 request, free of redaction or alteration."
29. If the Court hearing the main application orders the tax payer to comply with SARS' section 46 request and to produce to SARS all the information requested therein, those documents when produced will be covered by the secrecy provisions in chapter 6. The result is that this application is not aimed at the disclosure of the documents sought by SARS but is aimed at the disclosure of the material utilised in the main application, to justify or provide the foundation for such application.
30. Section 68 is, in my view, properly interpreted in context, not directly relevant to this application going to SARS confidential information and not that of the tax payer.
31. Section 69 of the TAA, which must be read with section 67, relates to the secrecy of tax payer information. Section 69(1) provides that a SARS official must preserve the secrecy of tax payer information and may not disclose this to a person who is

not a SARS official. There are, in section 69(2), a series of exceptions to the above.

32. Section 69(2)(a) *inter alia* provides that a disclosure of tax payer information by a person who is a current or former SARS official in the course of performance of duties under a Tax Act is not prohibited in the respects set out thereafter, the examples being given in section 69(2)(a) not being the only circumstances envisaged having regard to the use of the words "such as" in section 69(2)(a).
33. I emphasise that a distinction is drawn between "SARS confidential information" and "Tax payer information". There is thus a clear differentiation between tax payer information in respect of which the right to privacy applies and in respect of which stricter disclosure rules apply and SARS information which is confidential but with less strict disclosure rules.
34. Thus tax payer information is that referred to in section 67(1)(b) in short for this matter any information provided by the tax payer or obtained by SARS. That is clearly in my view an indication that most, if not all information that relates to a tax payer and a tax payer's affairs is tax payer information.
35. Further, and as already set out above, a SARS official must preserve the secrecy of tax payer information and may not disclose this to a person who is not a SARS official unless in the course of performance of duties under a Tax Act, such as, *inter alia*, section 69(2)(a)(iii) or the information is public information (s 69(1) and 69(2)(d)).
36. In this context chapter 5 of the TAA relates to the gathering of information in relation to a tax payer and is directly relevant to this matter having regard to section 46, SARS clearly acting in the course of performance of duties under a Tax Act.

37. Pausing for a moment to deal with a Tax Court, this is a court established by the TAA for the purposes of chapter 9 of the TAA, and has jurisdiction only over tax appeals lodged under section 107 of the TAA⁹. Section 107 applies to appeals against assessments or decisions as referred to in the TAA.
38. The Tax Court sitting for the purposes of hearing a tax appeal, lodged under section 107, is by virtue of section 124(1) not a public hearing, as stipulated in that subsection.
39. It must be accepted that tax appeals of such nature are not public hearings inasmuch as it was intended in the TAA to protect the confidentiality and right to privacy of the tax payer in such proceedings. This being so, the constitutional imperative in section 34 that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing is not violated but only having regard to the specific provisions of section 124(1) of the TAA.
40. On a proper interpretation of section 124(1) of the TAA this provision applies strictly and only to a Tax Court established in terms of section 116 of the TAA , which in turn must be read with section 117(1) having jurisdiction only over tax appeals as referred to in section 107 and as set out above.
41. The Law of South Africa (Joubert) 2nd Ed, replacement volume 22, Part 3: Tax Administration¹⁰ having stated the above, goes on to say "If the tax payer appealed to a higher court such appeal would be open to the public."
42. Whilst section 124(1) is such as to protect confidentiality and the tax payer's right to privacy, to cast this wider and to apply this to High Court proceedings to enforce the provisions of section 46 of the Act, is certainly not justified or sustainable.

⁹ See section 117 of the TAA

¹⁰ Paragraph 144

43. It follows that the TAA has no provision which in any way expressly conveys or confers confidentiality or privacy in respect of tax payer information in respect of High Court proceedings such as in this matter.
44. From the main application, it is abundantly clear that the said application relates to, and seeks only, the furnishing to SARS of the information requested in the section 46 request.
45. The in camera application states at paragraph 103 that:

“The Founding Affidavit is replete with references to confidential tax payer information.”
46. It continues at paragraph 106 to suggest that the deponent in the main application founding affidavit “has made public information which falls within the ambit of section 67(1)(b) of the TAA and is such a violation of his duties under section 69.”
47. The confidential tax payer information implicated is not referred to in any further detail in the founding affidavit, nor in the heads of argument for Applicants.
48. The founding affidavit refers to evidence described as an affidavit deposed to by Mr. Naidoo and an article that appeared in the Mail & Guardian on 27 July 2012.
49. The Mr. Naidoo affidavit was deposed to and filed in liquidation proceedings under case no 69839/2014, already in the public domain, and the M&G article was published in a national newspaper on 27 July 2012.
50. This information is thus already in the public domain. The heads of argument referred to “tax audits and information” and “business information”, but this takes it no further if reference is made back to the founding affidavit.

51. The replying affidavit takes the matter little further beyond very general statements, which appear to rely on the allegation that SARS is not pursuing its lawful duties and is abusing the Court process, "in ventilating some of its reasons for the request when it should have done so in the normal course of the section 42 audit process" these resort to the argument that tax payer information itself, whatever its nature, requires an in camera hearing nothing more being identified.
52. This, however, perhaps begs the question, the argument for Applicants being essentially that all proceedings to enforce the production of section 46 documents, are such as to be proceedings to be held in camera, notwithstanding that they fall outside the provisions of section 124 of the TAA¹¹.
53. This, insofar as I can see, has no statutory basis in the TAA at all, notwithstanding my acceptance of the concept of tax payer information as being any information provided by a tax payer or obtained by SARS in respect of the tax payer (whether confidential or not).
54. Having regard to section 69(1) of the TAA the secrecy of that information, whether confidential or not, is an obligation falling on a person who is a current or former SARS official. This does not however, apply to that official who discloses tax payer information in the course of performance of the duties of that official under a Tax Act¹², or that which is in the public domain.

¹¹ Applicants reference to Commissioner: South African Revenue Service v Public Protector 2020 (4) SA 133 (GP) takes the matter no further as it does not deal with in camera hearings – it deals with the Public Protector's allegation that she was entitled to access to Mr. Zuma's tax record in breach of chapter 6 of the TAA. In my view this being a different question the judgment refusing the demand for access does not detract from the principal of open justice.

¹² Section 69(2)(a) and in this matter section 67(2)(a)(iii) the duty of the official in a section 46 application requiring the disclosure of such Tax Payer information as is necessary to lay the foundation for such application, alternatively, simply in the course of performance of the official's duties to obtain such information.

55. It is herein that lies Applicants' main difficulty, it being accepted that it was open to SARS to seek the enforcement of a section 46 demand for documents and information in the High Court, nor is the contrary argued.
56. This must be seen against what was referred to in argument as the "principle of open justice" being that all court proceedings and records by default are open to public scrutiny at all times. Whilst this may be departed from in special cases there must be a proper basis and justification therefor.
57. In **City of Cape Town v South African National Roads Authority Ltd and Others**¹³ the Supreme Court of Appeal referring to the principle of open justice, that is that courts must be open to the public, pointed out that this was venerable and constitutionally entrenched. The Court went on to hold that openness and not secrecy was the default position under the Constitution this involving a cluster of related constitutional rights including those of freedom of expression and the right to a public trial with the foundation of constitutional values of accountability, responsiveness and openness applying to the judiciary as much as to other branches of government. The court held that deviations from the norm had to be justified.
58. The court found that the principle of open justice was one of the most pervasive axioms of the administration of 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.
59. Referring to section 32 of the Superior Courts Act the following was said:

¹³ 2015(3) SA 386 (SCA) at paragraph [12] and [22] (SANRAL)

"[18] As a general rule, litigants are prejudiced when their proceedings are not held in public. That is not to say that litigants may not sometimes wish to keep their litigation private or that there may not be situations where a court may justifiably depart from the default rule that court proceedings are public. But it will be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule, to be inaccessible and unpublishable. For, it may be said that the right to public courts, which is one of long standing, does not belong only to the litigants in any given matter, but to the public at large. Open justice is, moreover, required by s 32 of the Superior Courts Act 10 of 2013, which provides:

'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except insofar as any such court may in special cases otherwise direct, be carried on in open court.'"¹⁴

60. In argument, Respondent submitted that the crux of the matter was that a tax payer had to satisfy a Court that the main application, in this matter, is an exception to the principle of open justice and justifies a departure from the norms of High Court litigation.
61. This Court, of course, in terms of section 173 of the Constitution has the inherent power to regulate its own process but this is a power which is to be exercised with caution and sparingly taking into account the interest of justice in a manner consistent with the Constitution as set out in *SANRAL* (supra)¹⁵.
62. Read with section 32 of the Superior Court's Act which stipulates that all matters be heard in open court, and as I have already said that only in special cases and

¹⁴ The reference by Applicants to Commissioner, South African Revenue Services v Public Protector 2020 (4) SA 133 (GP) does not deal with hearings in camera. The case turned around the Public Protector's assertion that she was entitled to access to certain tax records in breach of chapter 6 of the TAA.

¹⁵ Paragraph [22] with reference to the authorities therein.

after a court so directs may be held in camera, those special cases must be justified on the facts and on application before the Court.

63. As I have already adverted to above, it does not seem to me, that this case is made out in any way in the application, which rather relies on the alleged application of the provisions of chapter 6 of the TAA read in context.
64. Applicants' difficulty in this matter is simply that unless they are able to point to specific statutory authority entitling the Court to order that the matter be held in camera, and in that regard there is none to which I have been directed, the only alternative is to seek to have recourse to a special case having special circumstances as referred to in section 32 of the Superior Court's Act – patently not a basis for this application nor the issue raised therein.
65. As pointed out in argument by Respondent the default position is one of openness.¹⁶
66. In this matter what is placed before me in the application seems to be limited to mostly unspecified tax payer information beyond that to which I have already referred above.
67. Applicants' reference to Currie and de Waal: The Bill of Rights Handbook 6th Ed at page 742 in support of the submission that the principle of open justice is subject to two prominent exceptions involving children and tax hearings, is misplaced in respect of the paragraph referred to. The reference is to "taxation hearings" and is patently a reference to section 124 of the TAA no more.
68. As already pointed out above with reference to LAWSA the Tax Court is not the same as the High Court, the Tax Court deriving its powers from the statute and

¹⁶ Independent Newspaper (Pty) Ltd v Minister for Intelligent Services 2008 (5) SA 31 (CC) at [45] and [55].

operating within the confines of the TAA, further appeal from the Tax Court to the High Court losing the protection conferred by section 124.

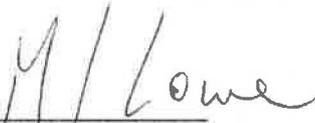
CONCLUSION

69. In the result, the Applicants have, in my view, failed to establish any statutory basis in general terms for hearings in the High Court, in matters such as these, to be held in camera; nor did they establish a case in terms of the TAA for this specific matter on its own facts to be held in camera; nor did they establish a case or basis, on the papers, for an application on consideration of the provisions of section 32 of the Superior Court's Act, being dispensed with as a special case – such a case not being advanced in the first instance.
70. Even if I am incorrect in the latter aspect, on the papers, and on the facts adverted to, and as referred to above, I consider Applicants to have failed to make out any basis for my finding this to be a special case justifying a hearing in camera in terms of section 32.
71. In the result the relief sought in Part 2 of the interlocutory application, that the proceedings be held in camera and the court file sealed, must fail, the application to be dismissed.
72. As to costs, in my view, Respondent has been substantially successful, and there is no reason as to why costs should not follow the result.
73. Further, the appointment of two counsel by Respondent cannot be said to be other than a wise and reasonable precaution, inasmuch as the relief sought by Applicants has extremely important and far reaching consequences for litigation between SARS and others in the future, in the High Court, and warranted careful attention from two counsel.

ORDER

74. The following order will issue:

It is ordered that Part 2 of the interlocutory application under case no 1824/2021, that the matter be heard in camera and that the court file be sealed to the public, is dismissed with costs including the costs of two counsel.


M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicants: Mr. Erasmus, Adv. H. Bakker
Instructed by: De Jager Lordan Attorneys

Appearing on behalf of the Respondent: Adv. Sholto-Douglas
Instructed by: Huxtable Attorneys, Owen Huxtable