RESEARCH ARTICLE

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TAXPAYER CONFIDENTIALITY VERSUS ACCESS TO INFORMATION, FREEDOM OF EXPRESSION, AND THE PUBLIC INTEREST IN THE TAX AFFAIRS OF A STATE PRESIDENT: *ARENA HOLDINGS PTY LTD T/A FINANCIAL MAIL & ANOTHER V SOUTH AFRICAN REVENUE SERVICE & OTHERS* – "A GIANT LEAP FOR MANKIND" OR THE OPENING OF ANOTHER "PANDORA'S BOX"?

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SUMMARY

It is trite that taxpayer information is confidential in South Africa, subject to a few narrow exceptions. In the judgments in *Arena Holdings Pty Ltd t/a Financial Mail & Another v South African Revenue Service & Others* (hereafter, the *Arena cases*), both the Gauteng Division, Pretoria and Constitutional Court considered the conflict between the taxpayer's constitutional right to privacy and the media's constitutional rights of access to information and freedom of expression after the press requested access to the tax records of a former president. In doing so, the courts were faced with many diverse contentions. This article analyses selected issues arising from these arguments in both courts, namely taxpayer confidentiality and the exceptions thereto, access to information and the extension of the public interest override, and the nature of the application and powers of the court in these unique circumstances. The analysis goes beyond the scope of

the *ratio decidendi* of the respective courts and provides *obiter* comments on practical questions raised in the affidavits and heads of argument filed before both courts. It finds that there is no precise precedent in South African tax law jurisprudence that is directly applicable to this exact scenario and considers the proposed extension of existing legislation.

Keywords: Taxpayer confidentiality, right to privacy, right to access to information, right to freedom of expression, public interest override, judicial review, inherent power, administrative action, constitutional review, substitution, remedies.

1. INTRODUCTION

> "Privacy may actually be an anomaly" – Vint Cerf.[1]

The private lives of prominent politicians such as state presidents are often under public scrutiny by the press.[2] Whether their consensual entry into the public arena justifies less privacy and increased scrutiny of their financial and tax affairs remains debatable. In South Africa, the privacy of every person's tax information is protected in secs. 67, 68, 69, 70, and 71 of the *Tax Administration Act*[3] (hereafter, the*TA Act*), unless the narrowly described exceptions to this rule apply. Similarly, secs. 34(1) and 35(1) of the *Promotion of Access to Information Act*[4] (hereafter, the *PAI Act*) prohibit access to another person's tax information if it is confidential or relates to tax collection involving a person other than the requestor of the information. The rights to privacy, access to information, and freedom of expression are also enshrined in the *Constitution of the Republic of South Africa*, 1996 (hereafter, the *Constitution*).[5]

The proper interpretation of these sections, in light of specific conflicting constitutional rights, was recently considered by the courts. The judgment of the Gauteng Division, Pretoria in *Arena Holdings Pty Ltd. t/a Financial Mail & Another v South African Revenue Service & Others*[6] (hereafter, *Arena Gauteng*) sparked many controversial debates in the media and among legal experts in South Africa.[7] At the core of these debates lies the same novel

1 Ferenstein "Google's Cerf says 'Privacy may be an anomaly'. Historically, he is right.", https://rebrand.ly/ssdcs91 (accessed on 19 July 2023).

2 Young 2018:191.

3 *Tax Administration Act* 28/2011.

4 *Promotion of Access to Information Act* 2/2000.

5 *Constitution of the Republic of South Africa*, 1996:secs. 14, 16, and 32 protect these specific rights.

6 *Arena Holdings Pty Ltd. t/a Financial Mail & Another v South African Revenue Service & Others* 2022 2 SA 485 (GP).

7 De Vos "Zuma tax judgement: When transparency trumps the need for privacy", https://rebrand.ly/bhmp9ok (accessed on 19 September 2023); Thakur "Zuma tax records ruling: Why the ensuing panic over taxpayer confidentiality is misconceived", https://rebrand.ly/ugfuzxi (accessed on 19 September 2023); Sehloho "Edward Kieswetter Concerned by Zuma tax ruling", https://rebrand.ly/0waajek (accessed on 19 September 2023); Fisher "Court granting access to Zuma tax records has implications for SARS-JZF", https://rebrand.ly/69uhrtf (accessed on 19 September 2023).

question faced by the court: Whether a taxpayer's confidentiality should be protected when the media requests the South African Revenue Service (hereafter, SARS) to grant them access to the tax information of a former president to publish reports about an alleged contravention of tax legislation. On 30 May 2023, in a narrow split of four against five judges, the majority judgment of the Constitutional Court in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others*[8] (hereafter, *Arena CC*) partially confirmed the judgment of the court *a quo*.[9]

These judgments are particularly significant in light of the publishing of the Pandora Papers in October 2021 by the International Consortium of Investigative Journalists (hereafter, the ICIJ).[10] The Pandora Papers (the largest publication of its kind to date) exposed approximately eleven million leaked documents implicating many prominent political leaders, high net-worth individuals, celebrities, and multinational companies worldwide in alleged tax evasion and/or avoidance, as well as income and capital shifting.[11] The ICIJ published similar information in the Paradise Papers and Panama Papers, and most recently, the Uber files in 2022.[12] Internationally, many other organisations and members of the media have also reported on the tax affairs of prominent public leaders and multinational companies.[13]

8 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2023 (ZACC) 13 Case no: CCT 365/21 (30 May 2023).

9 *Arena CC*:1-4.

10 ICIJ "Pandora Papers", https://www.icij.org/investigations/pandora-papers/ (accessed on 28 September 2022).

11 ICIJ "Pandora Papers", https://www.icij.org/investigations/pandora-papers/ (accessed on 28 September 2022).

12 Paradise paper reporting team, "Paradise papers: Apple's secret tax bolthole revealed", https://www.bbc.com/news/world-us-canada-41889787 (accessed on 1 March 2023); ICIJ "Panama papers: How the elite hide their wealth", https://panamapapers.investigativecenters.org/ (accessed on 20 January 2023); ICIJ "An ICIJ Investigation: The Uber Files", https://www.icij.org/investigations/uber-files/ (accessed on 25 February 2023).

13 Hopkins & Bowers "Revealed: how Nike stays one step ahead of the taxman", https://www.theguardian.com/news/2017/nov/06/nike-tax-paradise-papers (accessed on 1 March 2023); Barford & Holt "Google, Amazon, Starbucks: The rise of 'tax shaming'", https://www.bbc.com/news/magazine-20560359 (accessed on 1 March 2023); Campbell & Helleloid 2016:1, 24; Turner "Grounds for concern-Starbucks tax payments in Europe, the Middle East and Africa", https://www.taxwatchuk.org/starbucks_uk_tax_2018/ (accessed on 1 March 2023); Fitzgibbon "Nike fails to stop EU probe on Billions in alleged tax dodging", https://www.icij.org/investigations/paradise-papers/nike-fails-to-stop-eu-probe-on-billions-in-alleged-tax-dodging/ (accessed on 1 March 2023).

The exposure of tax evasion by public figures and prominent companies could lead to the proverbial opening of a Pandora's Box.[14] Harmful as well as "positive" consequences followed after the publication of the Pandora Papers,[15] as it led to various public protests, inquiries in over seventy countries, many arrests, the resignation of numerous prominent politicians, as well as campaigns against corruption in several states.[16] Exposing new possibilities and developing a new approach and/or mindset could also be perceived as enlightening, similar to the words spoken by Neil Armstrong during his historic landing on the moon, which he described as "…one small step for man, one giant leap for mankind".[17] The Pandora Papers raised international awareness of the conflict between the taxpayers' right to privacy and the press' rights to freedom of expression and access to information in cases of public interest. This conflict was also under scrutiny in the *Arena cases*.

This contribution investigates whether the judgments in the *Arena cases* could be described as "a giant leap [forward] for mankind" or the opening of a dangerous Pandora's Box. It does so by explaining the courts' judgments and the arguments of the parties raised in the affidavits and heads of argument filed before both courts. I analyse the chosen arguments from a practical, civil-procedure and tax-law perspective. This includes an analysis of taxpayer confidentiality and the exceptions thereto, access to taxpayer information and the public interest override, as well as the nature of the application and powers of the court to grant appropriate relief. It briefly mentions the *ratio decidendi* of the different courts but excludes a detailed analysis of constitutional law jurisprudence.[18] The article concludes with an analysis of whether the press may publish taxpayer information (in a similar fashion to the Pandora Papers) and the view of the author in answering the question posed at the beginning of this paragraph. I accordingly begin the discussion with an explanation of the judgment in *Arena Gauteng*.

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14 The phrase "Pandora's Box" originates from Greek mythology. It depicts how pain and hardship as well as weakness were imposed on human beings and usually refers to an issue that should not be interfered with, as it could lead to problems; Mirriam Webster Dictionary Blog "Pandora's Box", https://www.merriam-webster.com/dictionary/Pandora%27s%20box (accessed on 19 September 2023).

15 Sadek claims that an investigation revealed that her colleague and his fiancé were killed by persons implicated in the Pandora Papers and that many journalists were threatened; Sadek "Even one hour after we published we started to receive threats", https://www.icij.org/investigations/pandora-papers/even-one-hour-after-we-published-we-started-to-receive-threats/ (accessed on 1 March 2023).

16 ICIJ "Impact", https://www.icij.org/tags/impact/ (accessed on 28 September 2022).

17 This event drew much public interest, led to a renewed way of thinking, and inspired a new path of innovative scientific research, see Stamm "'One small step for man' or 'a man' or 'a small step'", https://airandspace.si.edu/stories/editorial/one-small-step-man-or-man#:man#~:text=The%20cascase%20also%20features%20Neil,one%20giant%20leap%20for%20mankind.%%22 (accessed on 29 September 2022).

18 This analysis is limited and does not include a detailed analysis of all possible legal issues that were raised or the nexus between taxpayer compliance and tax secrecy which is analysed by Fritz & Van Zyl 2022:586-598.

2. *ARENA HOLDINGS PTY LTD T/A FINANCIAL MAIL & ANOTHER V SOUTH AFRICAN REVENUE SERVICE & OTHERS* 2022 2 SA 485 (GP)

2.1 The factual basis and main arguments of the parties

Arena Holdings Pty Ltd t/a Financial Mail, the Amabhungane Centre for Investigative Journalism NPC, and Mr Warren Thompson (hereafter, the applicants) brought an application against SARS, Mr Jacob Zuma, the Minister of Justice and Correctional Services (hereafter, the Minister of Justice), the Minister of Finance, and the Information Regulator which challenged the constitutional validity of certain sections of the *TA Act* and the *PAI Act* that prevent the revelation of taxpayer information by SARS and the subsequent publication thereof.[19] The applicants lodged this application after SARS refused Mr Thompson's *PAI Act* request to disclose the tax information of Mr Zuma and refused a subsequent internal appeal (hereafter, refusal decision).[20] The applicants claimed that the disclosure of Mr Zuma's tax affairs during his term as state president would reveal that he was involved in "a substantial contravention of the law" and that the public interest in such a disclosure would outweigh the harm thereof.[21]

The alleged evidence of contravention of the law was available from sources in the public domain consisting of evidence led before commissions of enquiry as well as a book published by an investigative journalist.[22] The latter publication contains averments that Mr Zuma was not tax compliant in respect of the filing of returns, undeclared income, and fringe benefits related to improvements to his home at Nkandla. It was also averred that there is a high possibility that SARS would not take steps to collect the appropriate tax.[23] The applicants argued that there was uncontested "credible evidence" of Mr Zuma's non-compliance.[24] They further stated that disclosing the tax records could show whether Mr Zuma was tax compliant.[25] The applicants' main argument is that the alleged irregularity in the tax affairs of Mr Zuma warrants

19 *Arena Holdings Pty Ltd. t/a Financial Mail & Another v SARS & Others* 2022 2 SA 485 (GP):489-490; Applicant's Notice of Motion Gauteng Division, Pretoria 2019:2-3.
20 Founding affidavit of Mr Thompson Gauteng Division, Pretoria 2019:17-22.
21 *Arena Gauteng*:489.
22 Pauw published "The Presidents Keepers" in 2017, see *Arena Gauteng*:492-493. These documents include a report of the Public Protector, titled "Secure in comfort", evidence led before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission) and evidence led before the Commission of Inquiry into Tax Administration and Governance by SARS (Nugent Commission), see Founding affidavit 2019:12-15.
23 *Arena Gauteng*:493; Founding affidavit of Mr Thompson Gauteng Division, Pretoria 2019:8-10.
24 *Arena Gauteng*:493; Founding affidavit 2019:17; see also Applicants' Heads of Argument Gauteng Division, Pretoria 2020:9.
25 Founding affidavit 2019:17.

a reliance on their constitutional rights of access to information and freedom of expression, which, if limited, justifies a challenge of the constitutionality of such a limitation.[26] This is based on the applicants' averment that secs. 34, 35, and 46 of the *PAI Act* and secs. 69 and 67 of the *TA Act* do not afford them a right to access taxpayer information or, if received, to report on it in the media, even if the information is in the public interest and exposes evidence of a substantial contravention of the law.[27]

In opposing the application, SARS averred that they could not deny or admit any allegations made against Mr Zuma and that these facts were not relevant to the adjudication of the matter.[28] SARS argued that, if they were to address the merits of the alleged evidence of transgression, they would undermine taxpayer confidentiality in contravention of sec. 69(1) of the *TA Act*.[29] They contended that this secrecy is required to ensure the proper functioning of the tax system[30] and that the disclosure of taxpayer information would breach many international instruments and tax treaties that have become part of domestic law.[31] SARS referred to the blanket prohibitions in secs. 34(1) and 35(1) of the *PAI Act* and argued that they were justified to refuse access if it would involve "unreasonable disclosure" or if the information requested relates to a person other than the specific requester asking for it.[32] SARS argued that secs. 69(2)(c), 67(5), 70, and 71 of the *TA Act* ensure that taxpayer information can be disclosed in specific narrow circumstances and that these provisions create an adequate balance between a taxpayer's right to privacy and the rights of access to information and freedom of expression.[33]

The Ministers opposed the application on a similar basis, by averring that the applicants had not established the unconstitutionality of secs. 67 and 69 of the *TA Act* nor justified the addition of a new exception to sec. 46 of the *PAI Act*.[34] Mr Zuma delivered no opposing affidavit in this application, nor did he or the Regulator take part in the adjudication of the matter.[35]

2.2 Questions for adjudication

The court was faced with several questions, the crux of which was whether the prevention of the disclosure and publication of taxpayer information and the taxpayer's constitutional right to privacy infringes on or limits the applicants' rights of access to information and freedom of expression that are enshrined

26 *Arena Gauteng*:493.
27 Applicants' Heads of Argument 2020:17-18.
28 *Arena Gauteng*:493.
29 Answering affidavit of Mr Kieswetter Gauteng Division, Pretoria 2019:7-8; *Arena Gauteng*:493.
30 Answering affidavit 2019:13-22.
31 *Arena Gauteng*:495.
32 *Arena Gauteng*:491.
33 *Arena Gauteng*:496.
34 Fourth Respondent's Heads of Argument Gauteng Division, Pretoria 2019:2, 16.
35 *Arena Gauteng*:490. The Regulator filed a notice to abide.

in the *Constitution*.[36] If it was found to limit these constitutional rights, the following questions were whether this limitation is justifiable in terms of the limitation clause in sec. 36 of the *Constitution* (limitation clause) or if the existing law struck a lawful balance between the respective rights. If the applicants were successful on the point of unconstitutionality, the court had to consider whether specific linguistic phrases should be read into the *TA Act* and the *PAI Act* to rectify the unconstitutional effect of the relevant provisions. The Minister of Finance's claim that the applicants had not shown that the court could substitute the refusal decision of SARS with its own decision also required adjudication.[37]

2.3 The analysis, application of the law, and court order

The court rejected SARS' argument that tax secrecy is required for the proper functioning of a tax administration, mentioning that certain foreign jurisdictions function well despite having less stringent tax secrecy regimes.[38] The court stated *obiter* that tax secrecy does not always ensure voluntary compliance but that avoiding penalties and other sanctions was a more likely motivation for taxpayers to comply voluntarily.[39]

The court emphasised that the applicants were not applying for the blanket removal of taxpayer secrecy but were requesting that the public interest override exception thereto in sec. 46 of the *PAIA,* be extended and applied to the tax information of Mr Zuma, and that his right to privacy be limited based on the requirements in sec. 46.[40] The ambit of the limitation clause was explained and applied, after which the court found that the blanket ban on the disclosure of information in secs. 35 of the *PAI Act* and 69 of the *TA Act* cause an unjustified limitation of the applicants' constitutional right of access to information. It found that a public interest override and the limitation of taxpayer confidentiality are justified in the specific circumstances and that a reading-in of this override is appropriate.[41] Without applying the judgements, the court referred to *Mail & Guardian Media Ltd and Others v Chipu NO and Others*[42] (hereafter, *Chipu*) and *Johncom Media Investments Ltd v M and Others*[43] (hereafter, *Johncom*), in which the Constitutional Court had struck down legislative provisions containing absolute prohibitions to access

36 *Arena Gauteng*:489; the *Constitution* 1996:secs. 14, 16, and 32 protect these specific rights.

37 *Arena Gauteng*:489.

38 *Arena Gauteng*:495-496, 499. The court rejected SARS' opposition, based on the comparative analysis of the tax privacy provisions in the UK, Canada, USA, Germany and New Zealand, and criticised SARS for not analysing jurisdictions where less stringent tax regimes applied.

39 *Arena Gauteng*:496-498.

40 *Arena Gauteng*:498.

41 *Arena Gauteng*:498-501.

42 *Mail & Guardian Media Ltd and Others v Chipu NO and Others* 2013 6 SA 367 (CC); 2013 11 BCLR 1259; 2013 (ZACC) 32.

43 *Johncom Media Investments Ltd v M and Others* 2009 4 SA 7 (CC) 2009 8 BCLR 751; 2009 (ZACC) 5.

sensitive information.[44] The argument that the disclosure of information based on a public interest override would breach international instruments and tax treaties was rejected.[45] As the matter and application of the public interest override to the specific facts was new and unique, the court found that it should substitute SARS' refusal decision with the court's decision and described the matter as an "exceptional case" as contemplated in sec. 8(1)c(ii)(aa) of the *Promotion of Administrative Justice Act* (hereafter, the *PAJ Act*).[46]

As a result, the court declared secs. 35 and 46 of the *PAI Act* unconstitutional and invalid to the extent that it prevents access to the tax records of a person other than the taxpayer as the requester, even when sec. 46(a) and (b) of the *PAI Act* are complied with.[47] Secs. 67 and 69 of the *TA Act* were declared unconstitutional and invalid as far as they prevent the granting of access to information in respect of tax records to a requester where the circumstances and requirements in sec. 46(a) and (b) of the *PAI Act* are complied with, and to the extent that they prevent a requester from distributing such information received subsequent to a *PAI Act* request. The declarations of invalidity were suspended for two years from the date of the order to allow parliament to make corrective amendments.[48] Pending such corrections, the court ordered the reading-in of specific phrases in secs. 46 of the *PAI Act* and 69(2) and 67(4) of the *TA Act*.[49] It set aside the refusal decision and ordered SARS to disclose the tax records and individual tax returns of Mr Zuma to the first and third applicants for the 2010-2018 years of assessment within ten days of the date of the order.[50] Davis J referred the findings of unconstitutionality, invalidity, parliamentary correction, and reading-in to the Constitutional Court for confirmation and ordered SARS, the Minister of Justice, and the Minister of Finance to pay the costs of the application jointly and severally.[51]

3. ARGUMENTS RAISED BEFORE THE COURT IN *ARENA CC*

In *Arena CC*, SARS and several of the respondents applied for leave to appeal directly to the Constitutional Court and the dismissal of the application for confirmation of the *Arena Gauteng* judgment.[52] I briefly highlight the new arguments raised in *Arena CC* that were not previously argued in *Arena Gauteng*.

44 *Arena Gauteng*:500.
45 *Arena Gauteng*:500-501.
46 *Arena Gauteng*:501; the *Promotion of Administrative Justice Act* 3/2000.
47 *Arena Gauteng*:501.
48 *Arena Gauteng*:501.
49 *Arena Gauteng*:501-502.
50 *Arena Gauteng*:502.
51 *Arena Gauteng*:502.
52 SARS' Application for Leave to Appeal, founding affidavit or Mr E Kieswetter Constitutional Court 2022:7; Applicant's Answering Affidavit to the First and Fourth Respondent's appeal Constitutional Court 2022:3.

Mr Zuma applied for condonation and joinder, stating as reasons that his attorneys had not been available, he was under medical parole, which required regular check-ups at state doctors and experienced financial constraints.[53] He argued that a refusal of condonation would violate his constitutional right of access to courts[54] and that the exercise hereof did not depend on his participation in the court *a quo*.[55] On the merits, he averred that the relief sought violated his constitutional rights to privacy and dignity.[56] He challenged the factual basis of the applicants' claim by averring that their flawed reliance on inadmissible hearsay evidence in the public domain did not constitute "credible evidence".[57] Mr Zuma explained the nature of the improvements at his Nkandla residence and argued that the Constitutional Court had found that these costs were not fringe benefits for tax purposes.[58] He added that nobody could address this issue in a lower court, as this would breach the *stare decisis* doctrine.[59] Mr Zuma alleged that Mr Pauw's publication transgressed the law (the privacy provisions of the *TA Act*) and argued that the applicants did not approach the court with "clean hands" when they relied on this illegally obtained evidence.[60] He thus stated that the court *a quo* erred when it ordered SARS to provide the applicants with his tax records and reiterated that, even if the legislation was found unconstitutional, they still had no right to access his tax information.[61] Mr Zuma's initial opposition was later abandoned before the court.[62]

The applicants stated that the relief granted *a quo* was appropriate as section 172(1)(b) of the *Constitution* authorised the court to make an order which is just and equitable and that parliament may still amend the legislation as they deem fit after confirmation of the order, provided the changes are not unconstitutional.[63] They argued that Mr Zuma's application was irregular because it contained no notice of motion but only a founding affidavit, it was filed late without proper reasons to justify condonation and that his failure to participate in the court *a quo* proceedings deprives him of his right to appeal.[64]

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53 Jacob Zuma's Application for leave to Appeal, Founding affidavit Constitutional Court 2022:par. 6.

54 The *Constitution* 1996:sec. 34.

55 Jacob Zuma's Heads of Argument Constitutional Court 2022:paras. 7-13; *Arena CC*:par. 28.

56 Jacob Zuma's Application 2022:paras. 7-13; *Arena CC*:par. 29.

57 Jacob Zuma's Application 2022:paras. 10-23, 32-46; *Arena CC*:par. 29.

58 Mr Zuma relied on the judgment in *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (ZACC) 11, where the court found that he had to repay a portion of the costs of these improvements, as determined by National Treasury.

59 Jacob Zuma's Application 2022:paras. 10-23.

60 Jacob Zuma's Heads of Argument 2022:paras. 71-91.

61 *Arena CC*:par.30.

62 *Arena CC*:par. 204.

63 Applicant's Heads of Argument Constitutional Court 2022:31.

64 Applicant's Heads of Argument Constitutional Court 2022:42-44.

Additional arguments that SARS raised in *Arena CC* included the undesirability of allowing any requester to apply for tax records if the order is confirmed (even if they comply with the public interest override)[65] and the Marcel Principle (derived from English case law[66]), which requires a recipient of confidential information in the course of exercising a public duty to only use this information for the purpose for which it was obtained.[67]

The Minister of Finance argued that the court *a quo* erred by disregarding the evidence of Prof. Roeleveld, which he avers demonstrates that protecting taxpayer confidentiality encouraged compliance;[68] that an order for substitution was incorrect and contrary to case law,[69] and that it was not clear who is considered public[70] (politicians, celebrities or sports stars). This could lead to a high volume of information requests as the court *a quo* did not limit the type of requester.[71] This would require SARS to routinely examine all taxpayers' returns to determine if the public interest override might apply.[72]

The Minister of Justice agreed with the Minister of Finance,[73] while conceding that absolute prohibitions are generally unconstitutional; he added that the facts in *Johncom* and *Chipu* were distinguishable from the facts in *Arena Gauteng*. He averred that the applicants relied on hearsay evidence and that it is in the public interest to maintain taxpayer confidentiality.[74] He contended that widening the public interest override would discriminate between ordinary non-compliant citizens and prominent public figures.[75]

The Information Regulator filed a notice to abide and an explanatory affidavit containing her interpretation of the applicable law and asserted that the finding of the court a *quo* should be upheld.[76]

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65 SARS' Heads of Argument Constitutional Court 2022:19.

66 *Arena CC*:par. 24 fn 13, where the court refers to the English case of *Marcel v Commissioner of Police of the Metropolis* 1991 All ER (Ch) 851 as a "well established principle of the law of confidentiality".

67 *Arena CC*:par. 24.

68 Minister of Finance's Application for leave to appeal, Founding affidavit Constitutional Court 2022:par. 45.

69 Minister of Finance's Application 2022:paras. 61, 66-73.

70 This distinction between public officials and other taxpayers is described as unnecessary in the Minister of Finance's Application 2022:par. 39.

71 Minister of Finance's Application 2022:par. 39; *Arena CC*:par. 37.

72 Minister of Finance's Application 2022:par. 35; *Arena CC*:par. 38.

73 Minister of Justice's Replying Affidavit Constitutional Court 2022:paras. 5.2, 12; Minister of Justice's Heads of Argument Constitutional Court 2022:22.

74 Minister of Justice's Heads of Argument 2022:paras. 35, 44-47; *Arena CC*:paras. 31-32.

75 *Arena CC*:par. 33.

76 Information Regulator's Explanatory Affidavit Constitutional Court 2022:paras. 12, 36; *Arena CC*:paras. 40-41.

4. THE JUDGMENT OF THE CONSTITUTIONAL COURT IN *ARENA CC*

The controversy of this area of law is further illustrated by the divergence in opinion of the Constitutional Court judges. Five judges confirmed the order of unconstitutionality, while four judges delivered a dissenting judgment.[77]

4.1 The minority judgment

Mhlanthla J (with whom Madlanga J, Mbatha AJ and Tshiqi J concurred) did not endorse the order of unconstitutionality.[78] After an explanation of the facts, the arguments of the parties, the legislative framework, and a few preliminary comments,[79] the court observed that taxpayer confidentiality had been maintained over many years (even under the new Constitutional dispensation) and that taxpayers expect that their information will be kept secret.[80]

Although the parties were *at idem* that sec. 35(1) of the *PAI Act* limits the right of access to information,[81] the court found that this restriction is justifiable in terms of the limitation clause,[82] as it opined that there was no absolute ban on the disclosure of taxpayer information. It further held that confidentiality was required to ensure taxpayer compliance and that allowing disclosure of taxpayer information would contravene international agreements.[83]

Because sec. 46 of the *PAI Act* does not apply to public figures only, but to all persons, the court viewed an extension of the public interest override as discriminating between public persons and ordinary individuals. It could not only infringe on the privacy of normal individuals but was also described as possibly "detrimental to the reputations and societal standings of taxpayers".[84] The court stated that the mere presence of other exceptions to taxpayer confidentiality in the *TA Act* shows that the restriction on the disclosure of taxpayer information is not absolute[85] and that "…there is no rationale behind making taxpayer information available to the media as there is no equilibrium struck by elevating the interest of the public and the right to freedom of expression above that of privacy".[86]

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77 *Arena CC*:1-4, par. 63.

78 *Arena CC*:1-4, par. 63.

79 *Arena CC*:paras. 45-47, the court questioned whether the admissibility of evidence had been tested *a quo* and disagreed with the applicants' statement that there was no rational basis to protect taxpayer information yet allow disclosure of other personal information. It described it as speculative to question the rationality of the choice of the legislature not to include tax information in the sec. 46 exception and reiterated that the test is not one of rationality but of reasonableness.

80 *Arena CC*:paras. 56-59.

81 *Arena CC*:par. 60.

82 *Arena CC*:par. 127.

83 *Arena CC*:paras. 88, 89-93, 110, 127.

84 *Arena CC*:paras. 113, 127.

85 *Arena CC*:par. 112.

86 *Arena CC*:par. 107.

Consequently, the court found that the extension of the public interest override in the *PAI Act* was not necessary, as the existing exceptions to taxpayer confidentiality in the *TA Act* are sufficient and balanced.[87] It averred that less restrictive means were available as serious infringements of the law could be reported to the relevant authorities for investigation.[88]

4.2 The majority judgement

The court stated that this matter requires a balancing of rights for which there is no hierarchy or absolute standard.[89]

4.2.1 Substantive and procedural requirements for the disclosure of information

After listing the different categories of sensitive information that are protected from disclosure in Chapter 4 of the *PAI Act*,[90] the court explained the tempering of this protection by sec. 46 of the *PAI Act,* which requires mandatory disclosure in a "public interest override" mechanism.[91] The court described the circumstances to which sec. 46 applies[92] as threatening to society and an undermining of the values of the *Constitution* that is serious enough to justify an exception to the confidentiality of information that is usually protected.[93] The court confirmed that sec. 46 requires an information officer to conduct a "weighted exercise in the balancing of rights",[94] as he or she must be convinced that the public interest in disclosure is "quantitively" greater than the envisioned harm.[95] If applied correctly, the court viewed this section as safeguarding taxpayer secrecy, only allowing deviation in limited cases,[96] and

87 *Arena CC*:paras. 113, 127.

88 *Arena CC*:par. 127.

89 *Arena CC*:paras. 125, 129-135. The minority of the court also described the nature of the rights required such balancing, namely the right to privacy, right of access to information, and the right of freedom of expression with reference to case law in *Arena CC*:paras. 64-88.

90 *Arena CC*:par. 135. These include private personal information of individuals, private trade *Bernstein* at paras. 65-67. This dictum allows for a shrinking of personal space and privacy in a *Bernstein* at paras. 65-67. This dictum allows for a shrinking of personal space and privacy in a formation, military and security information, financial information of the state, research that might expose persons to disadvantage and more.

91 *Arena CC*:paras. 137-139.

92 Namely, that disclosure should reveal evidence of a "substantial contravention of the law or an imminent or serious public safety or environmental risk", *Arena CC*:par. 139.

93 *Arena CC*:paras. 139, 141.

94 *Arena CC*:par. 143.

95 *Arena CC*:par. 143.

96 *Arena CC*:par. 144.

aligning with the framework of privacy created by the Constitutional Court in *Bernstein v Bester NNO*[97] (hereafter *Bernstein*).[98]

The court also emphasised the procedural requirements in Part 4 of the *PAI Act,* which requires that notice be given to a third party in respect of whom the information is requested and allows submissions to an information officer before the decision is finalised.[99] If this party is aggrieved, further remedies such as an internal appeal, complaint to the Information Regulator, or application to the High Court are available, and the risk of overexposing information is mitigated by sec. 28 of the *PAI Act,* which allows severability of information.[100]

The court emphasised that these substantive and procedural requirements in the *PAI Act* enhanced the dependability of the mandatory disclosure regime to result in a balanced, careful decision.[101]

4.2.2 The absolute prohibition on access to taxpayer information in the *PAI Act*

The majority of the court agreed with the minority that private personal information is part of taxpayer information[102] but questioned whether this should be completely shielded from exposure.[103] The court pointed out that the wording of sec. 35(1) was boundless, as it applied to all state-held tax information, regardless of its nature, character or the question of whether its protection is justified.[104] In contrast, other protected information was carefully described in Chapter 4 of the *PAI Act*.[105] The court also referred to the definition of the term “revenue” in the *South African Revenue Services Act*[106] and concluded that sec. 35(1) protected information applies to information related to all tax acts and all types of tax information.[107] It found that these other tax statutes regulate activities that are not part of the most “inner sanctum” of a taxpayer’s private life, which the *Bernstein* case described as worthy of protection.[108]

97 *Bernstein v Bester NNO* 1996 (ZACC) 2; 1996 2 SA 751 (CC); 1996 (4) BCLR 449 at paras. 65-67.

98 *Arena CC*:par. 142 and specifically paras. 80-83, where the court referred to quotes from *Bernstein* at paras. 65-67. This dictum allows for a shrinking of personal space and privacy in a proportional manner as a person moves into the public domain of society.

99 *Arena CC*:par. 145.

100 *Arena CC*:paras. 140, 189-191.

101 *Arena CC*:par. 146.

102 *Arena CC*:par. 147.

103 *Arena CC*:par. 147.

104 *Arena CC*:par. 148.

105 *Arena CC*:par. 148.

106 *South African Revenue Services Act* 34/1997.

107 *Arena CC*:par. 150. These include the *Mineral and Petroleum Resources Royalty Act* 28/2008, the *Securities Transfer Tax Act* 25/2007, the Value-Added Tax Act 89/1991, the *Customs and Excise Act* 91/1964, the *Estate Duty Act* 45/1955, and the *Transfer Duty Act* 40/1949.

108 *Arena CC*:par. 150.

4.2.3 Taxpayer privacy and the exceptions thereto in the *TA Act*

After analysing the confidentiality of taxpayer information in secs. 69(1), 67(3), and 67(4) of the *TA Act*, the court described the applicants' constitutional challenge of these sections as ancillary to the success of the challenge to sec. 35(1) of the *PAI Act* as cautionary to prevent further impediments (in the *TAA*) that could prevent disclosure.[109] The court separated the respective purposes of the *PAI Act* and the *TA Act* by stating that the *PAI Act* gave effect to the constitutional right of access to information, while the *TA Act's* purpose was to ensure the effective functioning of the tax system and not to regulate access to information.[110] It remarked that aligning the disclosure of tax information under secs. 69 and 70 of the *TA Act* with the public interest was not an intended purpose of these provisions in the *TA Act*.[111]

The court considered the effect of the *TA Act* exceptions on the functioning of the *PAI Act* (specifically the proscription in sec. 35(1)) and reiterated that the exceptions to taxpayer confidentiality in the *TA Act* do not create a partial allowance of access to information held by the state for everyone (as is enshrined in sec. 32 of the *Constitution*).[112]

4.2.4 An absolute prohibition and the balancing of constitutional rights

The court referred to *Johncom* and *Chipu*, in which the Constitutional Court previously found an absolute prohibition unconstitutional in matters of public interest and stated that as sec. 35(1) of the *PAI Act* contained an absolute prohibition, it could not pass constitutional muster.[113] It regarded the absolute nature of the prohibition as an obstacle that prevents the balancing of competing constitutional rights, as sec. 35(1) is not subject to the public interest override in sec. 46, which contained less restrictive means to achieve the purpose of the *PAI Act*.[114] Due to this exclusion, no less restrictive alternatives exist to access tax information.[115] The court warned against the elevation of tax information to an untouchable level, as it saw no reason why the public interest override cannot apply to tax information.[116]

The court also stated that there would be no discrimination between ordinary persons and public figures if the public interest override is extended, as it applies to specific types of information in the public interest and not to a specific type of requestor or person.[117] The court stated that equality before

109 *Arena CC*:paras. 151-153.
110 *Arena CC*:par. 154.
111 *Arena CC*:paras. 155-157.
112 *Arena CC*:paras. 157-158.
113 *Arena CC*:paras. 163, 165-170, 174. The minority judgment found that the cases of *Johncom* and *Chipu* were distinguishable and could not be applied.
114 *Arena CC*:paras. 174-174, 195.
115 *Arena CC*:paras. 170-171. The minority was of the view that competing rights should be balanced.
116 *Arena CC*:par. 172.
117 *Arena CC*:par. 192.

the law would be enhanced as public persons and ordinary persons would be exposed to the same requirements that measured their conduct as opposed to their standing in society.[118]

4.2.5 Taxpayer compliance and comparative international law

Despite conceding that a democracy needed a proficient tax system, the court did not consider this a valid justification to restrict the right of access to information.[119] Even without the application of sec. 46 of the *PAI Act*, the *TA Act* created relative confidentiality through its exceptions, and a taxpayer could expect her or his information to be shared with several state organs.[120]

After analysing Prof. Roeleveld's report,[121] the court found that the public interest override constitutes a narrow exception that fits into the international framework, as absolute prohibitions were not universally applied.[122] It found that there was no basis in law or principle to claim that absolute taxpayer confidentiality is a pre-condition for taxpayer compliance and agreed with *Arena Gauteng* that taxpayers mostly comply, due to the serious financial and legal consequences of non-compliance.[123]

A comparison of the taxpayer secrecy regimes in various jurisdictions was found not to be of much value, as each jurisdiction has its own culture, written constitution, time periods, and unique localised conditions.[124] The court contextualised South Africa's history and mentioned that countries shape their laws in accordance with international norms and their own unique history and trajectory for the future.[125] It pointed out that the issue at hand required an analysis of the South African constitutional regime.[126]

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118 *Arena CC*:par. 192.

119 *Arena CC*:par. 175.

120 *Arena CC*:par. 177.

121 This report supported an appropriate equilibrium between transparency and privacy and required any hindrance with rights to be lawful.

122 *Arena CC*:paras. 179-182.

123 *Arena CC*:par. 184. The minority reasoned that the historical basis and rationale of taxpayer secrecy is still to ensure taxpayer confidence and compliance which remains relevant nowadays and relied on the courts' interpretation of this principle in *Silver v Silver* 1937 NPD 129 at 134-135, *Ontvanger van Inkomste, Lebowa v De Meyer N.O.* 1993 (4) SA 13 (A), and *Estate Dempers v Secretary for Inland Revenue* 1977 (3) SA 410 (A); [1977] 3 All SA 610 (A), as well as a detailed quote of the court's decision in the latter case, to justify the retention of taxpayer confidentiality.

124 See *Arena CC*:paras. 185-187, where the court referred to *Timothy Njoya v Attorney General* 2017 (eKLR) in which the Kenyan Court of Appeal overturned *Njoya v Attorney General* 2014 (eKLR) and found that the right to information is critical to the attainment of accountability and transparency in government and ordered disclosure of tax records of specific individuals insofar as it related to their "parliamentary salary allowances".

125 *Arena CC*:par. 188; the fact that Canada and the UK have absolute prohibitions on the disclosure of taxpayer information, and Sweden and Slovenia have complete transparency, were described as having no true impact on the South African position.

126 *Arena CC*:paras. 185-188.

4.2.6 Order

The court found secs. 35 and 46 of the *PAI Act* unconstitutional to the extent that access to information is prevented in circumstances where the requirements of sec. 46 of the *PAI Act* are complied with. The court also found secs. 67 and 69 of the *TA Act* unconstitutional to the extent that it prevents access to information and the further distribution of information that is obtained after a *PAI Act* request.[127]

The court referred the applicants' request for access to the tax records of Mr Zuma back to SARS for a new decision and granted the applicants one month from the date of the order to amend the initial request.[128] The order of reading-in was confirmed in the interim, and the matter was referred to parliament to amend the relevant sections and to allow public consultation on the legislative amendments within twenty-four months.[129] The court also made several orders as to costs.[130]

5. TAXPAYER CONFIDENTIALITY AND ACCESS TO TAX INFORMATION

5.1 The privacy of taxpayer information

The right to privacy in sec. 14 of the *Constitution*[131] also applies to taxpayer information.[132] Sec. 69(1) of the *TA Act* prohibits the disclosure of taxpayer information.[133] The *TA Act* disallows the further distribution of taxpayer information to anyone who is not a SARS official.[134] Sec. 67(3) of the *TA Act* specifically applies to "taxpayer information" that is disclosed in contravention of the *TA Act* ("illegally") and prohibits the person to whom it is disclosed from sharing it further in any manner by publication or by making it known to any

127 *Arena CC*:paras. 185-188, 205.

128 *Arena CC*:paras. 196, 205.

129 *Arena CC*:par. 205.

130 *Arena CC*:paras. 197-199, 205. The court found that Mr Zuma was entitled to participate in the proceedings in the Constitutional Court to protect his interest but that, as he did not oppose the confirmation application, no order of costs for or against him was necessary. The court ordered SARS and the Ministers of Finance and Justice to pay the applicants' costs of the confirmation application and each party was ordered to pay their own costs related to the respective appeals by the respondents.

131 For more on the scope and purpose of this right, see Albertyn *et al.* 2022:par. 9.2; Cheadle *et al.* 2022:paras. 9.2-9.3; *Bernstein and Others v Bester NO and Others* 1996 4 BCLR 449 (CC):par. 77.

132 *Tax Administration Act* 28/2011:sec. 69(1); De Koker & Williams 2022:par. 22.6; Croome 2010:124; Klue *et al.* 2023:par. 3.16; Fritz 2021:411; *Public Protector v CSARS* 2021 5 BCLR 522 (CC) 2020 28 (ZACC):par .8; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SE):458G; *Welz v Hall 1996* 4 SA 1073 (C):1076; *Sackstein NO v SARS* 2000 2 SA 250 (SE) 257; Moosa 2020:210.

133 Prior to the promulgation of the *TAA*, taxpayer secrecy was protected in sec. 4(1) of the *Income Tax Act* 58/1962.

134 Klue *et al.* 2023:par. 3.16.

another person besides a SARS official. Sec. 67(4) of the *TA Act* requires persons who receive "information" in terms of specific sections of the *TA Act* (68, 69, 70, and 71) ("legally") to preserve its secrecy and only divulge it to the extent that it is necessary to perform their functions, as described in the listed sections.

Access to tax information is prohibited in secs. 34(1) and 35(1) of the *PAI Act,* which respectively prohibit the disclosure of information if it would expose confidential information or relate to revenue collection in respect of a person other than that requestor.[135] The *PAI Act* is the national legislation that gives effect to the constitutional right of access to information.[136] The interaction between these sections of the *TA Act* and the *PAI Act* disallows the media to publish taxpayer information no matter how it was obtained, even though the media's right to freedom of expression is constitutionally enshrined.[137]

Interestingly, the *TA Act* uses the terms "information" and "taxpayer information" interchangeably, which I interpret as deliberate. "Information", as defined in the *TA Act*, "includes information generated, recorded, sent, received, stored, or displayed by any means" (disclosure hereof is prohibited in sec. 67(4)).[138] In contrast, "taxpayer information" is defined as "information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information" (disclosure and further publication hereof are prohibited in sec. 67(3)). These definitions, read with the sections explained earlier, create a rather stringent tax secrecy regime in which the type of protected information is very wide. The definition of "personal information" in sec. 1 of the *PAI Act* is equally wide, not exhaustive, and expressly includes financial information and correspondence.[139] The *Protection of Personal Information Act*[140] (hereafter, the *POPI Act*), which gives effect to the constitutional right to privacy, applies to an even wider scope of information than the *TA Act* or the *PAI Act* and specifically includes financial information in its definition of "personal information".[141]

In *Bernstein*, the Constitutional Court found that the right to privacy is not absolute but applies only to the intimate personal part of a person's life and becomes more diluted in proportion to a person's degree of interconnectedness or participation in the outside world.[142] In *Arena Gauteng,* the applicants relied

135 Croome & Olivier 2010:162-163; Klue *et al.* 2023:par. 3.23.

136 Albertyn *et al*. 2022:par. 26.3; *Constitution*:sec. 32 enshrines access to information.

137 *Constitution*:sec. 16.

138 *Tax Administration Act* 28/2011:sec. 1 definition of "information".

139 *Promotion of Access to Information Act*:sec. 1 subsec. (b) of the definition of "personal information".

140 *Protection of Personal Information Act* 4/2018.

141 *POPI Act* 4/2018:sec. 1; sec. 7(3) of the *POPI Act* contains an exclusion which allows the publication of personal information if it is in the public interest and complies with specific requirements.

142 *Bernstein and others v Bester NO and others* 1996 4 BCLR 449 (CC):par. 77; See *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others as Intervening Parties, Doctors for Life International Inc as* Amicus Curiae*) and related matters* 2018 (10) BCLR 1220 (CC); *Gaertner and Others v Minister of Finance and Others* 2014 (1) BCLR 38 (CC):49; see Cheadle *et al.* 2022:paras. 9.3, 9.6; Fritz 2021:414; Currie *et al.* 1999:256.

on *Bernstein* and later cases confirming it to motivate why their limitation of Mr Zuma's right to privacy is justified if they were granted the relief prayed for. In *Arena CC,* the court also relied heavily on the interpretation of privacy in *Bernstein* to justify its decision.[143] The definitions in the *TA Act*, the *PAI Act*, and the *POPI Act* do not differentiate between ordinary citizens and persons who hold prominent political positions such as a state president. Fritz, Currie, and De Waal point out that one could possibly argue that the application of the *volenti non fit iniuria* principle requires a person who voluntarily engages in public activity to accept that his or her privacy will be limited to an extent.[144]

In a tax context, prior to the promulgation of the *PAI Act* and the *TA Act*, the courts repeatedly confirmed that taxpayer information should not be disclosed when applying the now-repealed sec. 4 of the *Income Tax Act* (hereafter, *IT Act*).[145] More recently, in 2020, the Gauteng Division, Pretoria, confirmed in *Commissioner of South African Revenue Service v Public Protector and Others*[146] (hereafter, *CSARS v Public Protector*) that the Public Protector's power to subpoena in terms of the *Public Protector Act*[147] (hereafter, the *PP Act*) did not trump the proscription under the *TA Act* which protects taxpayer confidentiality.[148] This was confirmed by the Constitutional Court in *Public Protector v Commissioner for the South African Revenue Service and Others*[149] (hereafter, *Public Protector v CSARS*).[150] This court accepted that the Public Protector's right to subpoena in terms of sec. 7(4) of the *PP Act* emanated from sec. 182 of the *Constitution,* which conflicted with the taxpayer's right to privacy in sec. 14 of the *Constitution*, but rejected the argument that the specific power trumps the prohibition in sec. 69(1) of the *TA Act*, merely due to its origin.[151] The court further stated that, if the Public Protector was of the view that sec. 69(1) of the *TA Act* was unconstitutional, she should have launched

143 See par. 4.2.1 above. Ironically, while the court in *Arena CC* explained that comparative law is not instructive due to differing cultures, legislation and other circumstances. The interpretation of the concept privacy in *Bernstein* (upon which it relied heavily) was derived from German law. In a minority judgement in *Bernstein* Kriegler J (with Didcott concurring) disagreed with the majority's incorporation of this interpretation, as Germany did not have a separate right to privacy in its written Constitution and derived the meaning of privacy from previous German cases which had interpreted the content of the right to dignity, see *Bernstein*:paras. 77, 126, 130-133.

144 Fritz 2021:413; Currie & De Waal 2005:318.

145 The *Income Tax Act* 58/1962; see *Ontvanger van Inkomste Lebowa en 'n ander v De Meyer NO* 1993 4 SA 13 (A):14; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SE):458G; *Welz v Hall 1996* 4 SA 1073 (C):1076; *Sackstein NO v SARS* 2000 2 SA 250 (SE) 257; Croome 2010:159-160.

146 *Commissioner of South African Revenue Service v Public Protector and Others* 2020 3 SA 133 (GP).

147 *Public Protector Act* 23/1994.

148 *Commissioner of South African Revenue Service v Public Protector and Others* 2020 3 SA 133 (GP):paras. 25, 28, 36-37. For a detailed analysis of this case, see Moosa 2020:190-211.

149 2021 5 BCLR 522 (CC) 2020 (ZACC) 28.

150 *Public Protector v CSARS*:paras. 51-52.

151 *Public Protector v CSARS*:paras. 14-15, 20; The *Constitution*: sec. 182.

a direct constitutional challenge based on sec. 172(1) of the *Constitution*.[152] As the premise upon which these cases were decided differs from that in the *Arena cases,* which considered conflicting constitutional rights, I am of the view that the *Public Protector cases* cannot be cited as authority to support the argument that taxpayer confidentiality should be protected at all costs, even when there are allegations of offences in the public domain that might warrant exposure.[153]

5.2 Exceptions to taxpayer confidentiality

The *TA Act* creates exceptions to taxpayer confidentiality that are needed to enforce tax legislation and provide for the sharing of information by a SARS official as a witness to perform certain duties, and further allows disclosure between state organs and listed entities to enable them to perform their respective mandates.[154] Sec. 69(2) of the *TA Act* allows disclosure by a SARS official or former SARS official in the course of their duties under a tax act or customs and excise act or in terms of another act which allows disclosure of this information, by an order of a high court or if the information is public information. Secs. 69(3)-(5) of the *TA Act* further regulate the conditions under which the High Court may order disclosure based on the exceptions contained in sec. 69(2) of the *TA Act*. A taxpayer may obtain his or her own information and may consent to the disclosure of his or her information to a third party.[155] If a taxpayer does not so consent, sec. 67(3) of the *TA Act* prevents all persons who obtain taxpayer information from distributing it, and only the Commissioner is permitted to publish information on tax offenders.[156]

In the past, the provincial divisions of the high court consistently found that the application of these exceptions is confined to very specific narrow circumstances and that taxpayer information should not be disclosed lightly.[157] This was affirmed by the then Appellate Division in *Ontvanger van Inkomste, Lebowa, en 'n Ander v De Meyer NO*[158] (hereafter, *Ontvanger*). *Welz v Hall*[159] (hereafter, *Welz*) applied *Ontvanger* when the Cape High Court (as it then was) refused a party access to taxpayer information held by SARS in defamation litigation between two other parties and explained the two reasons. First, public policy requires taxpayers to be encouraged to make a full disclosure, even if they are involved in illegal affairs which could be undermined if the disclosure is ordered. Secondly, as a subsidiary reason, the court stated that

152 *Public Protector v CSARS*:par. 26.

153 For another view, see Fritz and Van Zyl 2022:594-595.

154 *Tax Administration Act* 28/2011:secs. 69(2)(a), 70, 71. Disclosure may also be ordered by a judge in chambers in specific circumstances listed in sec. 71; Klue *et al.* 2023:par. 3.16.

155 *Tax Administration Act* 28/2011:secs. 69(5) and 69(6).

156 *Tax Administration Act* 28/2011:sec. 74.

157 *Ontvanger van Inkomste, Lebowa, en 'n Ander v De Meyer NO* 1993 4 SA 13 (A):26A-C; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SE):458; *Welz v Hall* 1996 4 SA1073 (C):1076I-G; *Sackstein NO v SARS* 2000 2 SA 250 (SE):257; Croome 2010:159.

158 *Ontvanger van Inkomste, Lebowa, en 'n Ander v De Meyer NO* 1993 4 SA 13 (A).

159 *Welz v Hall* 1996 (4) SA 1073 (C).

it could cause administrative disruption to SARS if any litigant could obtain financial information upon request.[160]

These decisions, in which disclosure of taxpayer information was refused, pre-date the promulgation of the *Constitution*, the *PAI Act*, and the *TA Act* and are based on a previous version of the privacy provisions in the now repealed sec. 4 of the *IT Act,* which differed from the current privacy provisions in the *TA Act*. Similarly, *Sackstein NO v SARS*[161] (which applied both *Ontvanger* and *Welz*), although decided post-1996, but prior to the promulgation of the *PAI Act* and the *TA Act*, did not apply any provisions of the *Constitution* and was only based on sec. 4 of the *IT Act*.[162] These precedents should be considered with caution in current times, as the legislation, case law, common law, public policy and societal perspectives have changed drastically since the year 2000 (*Sackstein*). These changing views are also evident from the majority judgment in *Arena CC,* where the court stated that the *Constitution* cannot be used as a shield to hide transgressions of the law.[163] The Constitutional Court also provided commendable clarity in separating the purpose of the *PAI Act* and the *TA Act* when stating that the fact that an exception is allowed under the *TA Act* does not mean that the information is accessible under the *PAI Act*, which contained an (unconstitutional) absolute prohibition to access tax information.[164]

5.2.1 Consent as an exception to taxpayer confidentiality

Taxpayer information may be disclosed to a third party if a specific taxpayer agrees to it in writing.[165] In *Public Protector v CSARS*,[166] the Constitutional Court stated *obiter* that the Public Protector could have requested Mr Zuma's written consent to access his tax records.[167] The evidence before the High Court in *CSARS v Public Protector*[168] included the following social media comment (tweet):[169]

160 *Welz*:1076I-G; Croome 2010:160.
161 *Sackstein NO v SARS* 2000 2 SA 250 (SE).
162 *Sackstein NO v SARS* 2000 2 SA 250 (SE):257-261.
163 *Arena CC*:par. 183.
164 See par. 4.2.3 above.
165 *TA Act* 28/2011:sec. 69(6)(b); Croome 2010:161.
166 *Public Protector v CSARS* 2020 (ZACC) 28.
167 *Public Protector v Commissioner for the South African Revenue Service and Others*:par. 26.
168 *CSARS v Public Protector* 2020 3 SA 133 (GP).
169 Mr Zuma allegedly confirmed on affidavit before the court in the Public Protector matter that the tweet is his; Founding affidavit of Mr Thompson Gauteng North High Court 2019:57.

This tweet was also part of the applicant's evidence in *Arena Gauteng,*[170] and Mr Zuma allegedly confirmed on affidavit in another litigation matter that this specific tweet was his own.[171] On affidavit in *Arena Gauteng,* SARS refused to comment, stating that they were convinced that Mr Zuma would address the "tweet" formally as a respondent in the matter and added that he had not granted SARS formal permission to disclose his tax returns.[172] Whether this "tweet" constitutes written consent is debatable, as the wording of sec. 69(6)(b) of the *TA Act* refers to "with the written consent of the taxpayer" without stating where, what, how, or to whom consent should be given. I do not think that it can be construed as granting the applicants written consent in the *Arena cases,* as it was made in a different context, time, and matter. It is a pity that the court, in *Arena Gauteng*, was silent on the value of this evidence, but since the applicant's version was uncontested, this silence was appropriate. Mr Zuma did not address or explain this tweet in his affidavit filed in *Arena CC*, nor was it mentioned in this judgment.

In March 2023, President Cyril Ramaphosa made history when he became the first president of South Africa to grant SARS permission to make a public statement confirming his tax-compliant status.[173] This was done in response to a third-party notice sent to the President by SARS after the Democratic Alliance lodged a *PAI Act* request to access his tax records based on the public interest in allegations in the media that insinuated that he was not tax-

170 Founding affidavit of Mr Thompson Gauteng North High Court 2019:44-45.
171 See Applicants' Heads of Argument Gauteng Division, Pretoria 2020:57, where this affidavit deposed to in another litigation matter was included in the evidence before the court in *Arena Gauteng*.
172 Answering affidavit of Mr Kieswetter Gauteng North High Court 2019:47.
173 SARS "Mr Matamela Cyril Ramaphosa and the public officers for Ntaba Nyoni Estate and Ntaba Nyoni feedlot provide consent to SARS to make a public statement on their tax compliance status", https://www.sars.gov.za/media-release/mr-cyril-ramaphosa-provides-consent-to-sars-on-tax-compliance-status/ (accessed on 8 March 2023).

compliant.[174] In reaction, the SARS Commissioner, Mr Edward Kieswetter, publicly confirmed that the President was tax-compliant and encouraged more politicians to follow the President's example to illustrate their commitment to transparency.[175]

Public interest, opinion, and policy are pliable and change with the times. The two reasons for the *Welz* decision, namely public policy and the possibility of disruption in the office of SARS, apply differently in the context of a changed society over twenty-five years later. The "public policy" reasoning (that privacy would encourage disclosure, even if taxpayers are involved in illegal affairs) in *Welz* and the courts' changed view thereof was aptly described in *Arena CC* as follows: "The dishonest taxpayer, who is not afraid of the potential financial and criminal consequences of evasion, is unlikely to be lured to make candid disclosure by a guarantee of secrecy".[176]

If the SARS Commissioner himself invites high-profile politicians and community leaders to share tax information, any resultant additional administrative burden (used as a second reason to protect taxpayer privacy in *Welz*) is consensual. SARS' continued opposition to *Arena CC* in 2022 might indicate that their policies are more sophisticated and nuanced. Their policy on taxpayer confidentiality in future might still differ if a specific taxpayer is non-compliant, and media reports could jeopardise their collection processes, negotiations with taxpayers, and/or investigations, if any.

5.3 The possible extension of section 46 of the *PAI Act*

The crux of the question faced by the courts in the *Arena cases* was whether a new exception to taxpayer confidentiality and access to taxpayer information could be added by including taxpayer information (access to which is prohibited in sec. 35(1) of the *PAI Act*) in sec. 46 of the *PAI Act* (and amending the relevant sections of the *TA Act*), which contains the public interest override.[177] Sec. 46 reads as follows:

174 Thukwana "President Cyril Ramaphosa is tax compliant says SARS", https://www.moneyweb.co.za/news/economy/president-cyril-ramaphosa-is-tax-compliant-says-sars/ (accessed on 12 March 2023).

175 SARS "Mr Matamela Cyril Ramaphosa and the public officers for Ntaba Nyoni Estate and Ntaba Nyoni feedlot provide consent to SARS to make a public statement on their tax compliance status", https://www.sars.gov.za/media-release/mr-cyril-ramaphosa-provides-consent-to-sars-on-tax-compliance-status/ (accessed on 8 March 2023).

176 *Arena CC*:par. 184.

177 Klue *et al.* 2023:par. 3.23.

> **46 Mandatory disclosure in public interest:**
>
> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in s 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b). 39(1) (a) or (b), 40, 42(1)(a) or (b), 42(1) or (3),43(1) or (2), 44(1) or (2) or (45) if —
>
> *(a)* the disclosure of the record would reveal evidence of —
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) an imminent and serious public safety or environmental risk; and
>
> *(b)* the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

The wording of the section does not require a requestor to prove that there was a failure to comply with the law or a substantial contravention of the law but that the alleged evidence (*in casu* in the possession of SARS) would reveal that there was, which is somewhat circular. It is, however, clear that secs. 34(1) and 35(1) of the *PAI Act* (which contain a blanket prohibition on access to information, as explained earlier) are not included in the sections that are listed in sec. 46 of the *PAI Act,* to which this exception applies. What is required in sec. 46 of the *PAI Act* is information that would shed light on alleged transgressions of the law or public safety risks (not proof that the law was indeed transgressed, as this remains within the ambit of the criminal courts to find) and public interest that outweighs the potential harm. It is speculative in nature.

In *Arena Gauteng* and the majority judgment in *Arena CC,* the court accepted the version of the applicants to decide whether the requirements in sec. 46 of the *PAI Act* had been met. The question of whether the information in the possession of SARS could reveal evidence of non-compliance with the law was uncontested in *Arena Gauteng*. The minority in *Arena CC* questioned whether the admissibility requirements of this evidence were met.[178]

The Minister of Finance argued in *Arena CC* that the court in *Arena Gauteng* did not provide guidelines on the interpretation of the phrase "public interest" nor list the circumstances under which the public interest will outweigh the contemplated harm.[179] This is so, as it merely applied the principles to the facts and explained the weighing up as it was done. In *Arena CC,* the court stated that an information officer should perform a balancing of rights and that the public interest should "quantitively outweigh" the contemplated harm.[180] There were no further detailed guidelines to indicate what the phrase "public interest" entails, or how serious the safety or environmental risks or transgressions of the law should be to warrant disclosure. This might have been a missed opportunity, but perhaps this is apt, as future litigants could

178 See par. 4.1 above.
179 Minister of Finance's Heads of Argument Constitutional Court 2022:41.
180 See par. 4.2.2 above.

be constrained by such guidelines for a concept that is difficult to define with precision. As the exercise requires a comparison and is a matter of degree, I prefer a contextual case-by-case analysis, as the facts in each instance will determine what is to be considered. The court clarified in *Arena CC* that the conduct of all will be subject to the same scrutiny and that the emphasis in sec. 46 of the *PAI Act* is on conduct and the type of information as opposed to a classification of the type of requestor or type of taxpayer.[181] I agree with the majority of the court that this enhances equality before the law, which is appropriate. *Arena CC* confirmed that a person involved in activities of this nature is not acting within the confines of the innermost private part of his or her life, as described in *Bernstein* and stated that the "Constitution and the protection it affords in the pursuit of liberty and freedom were never intended to be used as an impermeable shield to protect an individual from scrutiny in respect of conduct that represents a threat to society".[182]

6. THE NATURE OF THE RELIEF AND POWERS OF THE COURT

6.1 The procedural basis of the application

In both *Arena cases,* the relief claimed was based on constitutional grounds. It would not have been possible to apply for review or appeal, as it seems that the administrative decision by SARS not to disclose tax information was legally sound. The question was rather whether the law regulating this decision is constitutional.

In *Arena Gauteng,* the applicants did not and could not base their application on the *PAJ Act* as *PAI Act* decisions are excluded from the definition of the phrase "administrative action" in sec. 1 of the *PAJ Act* as part of a list of disqualified types of decisions.[183] The common law understanding of the phrase "administrative action" is much wider than the defined meaning of this term in the *PAJ Act*.[184] Quinot warns (although in a slightly different context) of the problematic increased formalism in judicial review applications, which can constrain the courts if there is a formalistic and excessively conceptual analysis of the meaning of "administrative action".[185] Hoexter notes that this limiting definition reintroduced conceptualism in administrative law, which forced judges to engage in often undesirable technical reasoning as opposed to the otherwise enlightening trend of transformative adjudication in constitutional matters. Quinot refers to many cases in which members of all the courts, including the Constitutional Court, have disagreed on the meaning

181 See par. 4.2.2 above.

182 *Arena CC*:par. 183.

183 Croome 2010:209-211.

184 Hoexter 2006:306-307, where she also criticizes the limiting effect of the definition of "decision" in *PAJA* as unduly complex and limiting; Hoexter 2008:288. For an analysis of the *PAJ Act* and judicial review, see Henrico 2018:288-307.

185 Quinot 2010:652-653. This view is supported by Hoexter 2008:288.

of "administrative action".[186] The common law meaning of this term should not be disregarded even in the face of the adversity caused by dissenting judgments, as dissent and debate often create innovation. I consider the approach expressed by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*[187] that the meaning of this phrase should be determined on a case-by-case basis appropriate.[188]

Administrative decisions that fall outside the scope of the *PAJ Act* may still be subject to judicial review in terms of the common law principle of legality.[189] In *Container Logistics Commissioner of Customs and Excise v Container Logistics* (*Pty*) *Ltd*; *Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight,*[190] the court distinguished between judicial review under common law and under the *Constitution*. The court reiterated that constitutional review considers the constitutional legality of administrative action, and the question in each matter is whether the action is consistent with the *Constitution* using the *Constitution* itself as the only measure.[191] Similarly, the Supreme Court of Appeal emphasised that, even if the exercise of public power is not administrative action, it must comply with the *Constitution*.[192]

6.2 Unconstitutionality and invalidity of legislative provisions

When deciding on an appropriate remedy, the approach of the South African courts is generally "flexible, context-sensitive, pragmatic … and unencumbered by technicalities".[193] Sec. 172 of the *Constitution* contains a two-stage approach to remedies. First, a court that has found legislation or conduct unconstitutional on the merits has no discretion and is obliged to declare it unconstitutional and invalid to the extent of its unconstitutionality. Secondly, a court may make "any order which is just and equitable" which affords the court with a very wide discretion to consider the practical impact of the order on those to whom it applies. Thirdly, a decision is made whether further relief is necessary to determine the after-effects following an order of unconstitutionality and invalidity.[194]

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186 Quinot 2010:652. See also Hoexter 2008:288-289, 295 who warns against a formalistic approach in reason and judicial adjudication in administrative law matters.

187 *President of the Republic of South Africa v South African Rugby Football Union* 2002 1 SA 1 (CC).

188 *President of the Republic of South Africa v South African Rugby Football Union* 2002 1 SA 1 (CC):par. 143; Quinot 2010:652.

189 Klue *et al.* 2023:par. 3.4.

190 *Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA).

191 *Container Logistics Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA):par. 20.

192 *Democratic Alliance v Acting Director of Public Prosecutions* 2012 SA 486(SCA):496A and 501B confirmed *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA); Klue *et al.* 2023:par. 3.25.

193 Bleazard *et al.* 2021:273.

194 *Constitution:*secs. 172(1)(a) and (b); Bleazard et al. 2021:273.

Only the High Court, the Supreme Court of Appeal, and the Constitutional Court may order an Act of Parliament unconstitutional, and only the Constitutional Court may confirm this finding.[195] Once the legislative provisions were found to be unconstitutional, the court in *Arena Gauteng* had to decide how to rectify this to provide a remedy in favour of the successful litigants within the ambit of its powers. In both courts, the applicants relied on the Constitutional Court's finding in *S v Bhulwana*[196] that a successful litigant should be granted the relief they seek and that similar relief should be available to future litigants who find themselves in a similar situation.[197] The order in *Arena CC* granted relief to the specific parties, which allowed them to adjust their *PAI Act* request and approach SARS for a decision and, through the reading-in order, made similar relief available to future information requestors and/or litigants.[198]

6.3 The reading in of phrases into the *TA Act* and the *PAI Act*

It was common cause in the *Arena cases* that there was no existing remedy in the current legislative framework to allow the media access to taxpayer information and publish it,[199] unless one could be created by reading phrases into the legislative provisions that were found unconstitutional. SARS argued, in both courts, that an immediate order of reading-in is not appropriate as parliament might wish to prescribe a more balanced, specific, practical, and predictable test.[200] This is a valid point. However, as the Constitutional Court stated in *C and Others v Department of Health and Social Development, Gauteng and Others*[201] (relied on in both courts by the Minister of Finance), reading-in does not afford the court the final word on legislative provisions. It merely starts a deliberation between the legislature and the courts, as the power of parliament to amend legislation reaches far beyond the relief granted in a specific matter.[202] When reading in can provide an effective remedy, it is usually preferable to grant it as opposed to a suspensive order with interim relief. The court added that this preference is not strict.[203] The Minister, however, contradicted his own argument in *Arena CC* by stating that the

195 *Constitution*:sec. 172(2)(a).

196 *S v Bhulwana* 1996 1 SA 388 (CC); Applicants' Heads of Argument Gauteng Division, Pretoria 2020:50.

197 *S v Bhulwana* 1996 1 SA 388 (CC):par. 32.

198 *Arena CC*:par. 204.

199 For a contrary view, see Fritz and Van Zyl 2022:595, who opine that there were other avenues available to the applicants in terms of existing legislation.

200 SARS' Heads of Argument Gauteng Division, Pretoria 2019:paras. 94-97; SARS Heads of Argument 2022:paras. 119-122.

201 *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 2 SA 208 (CC); Minister of Finance Heads of Argument Gauteng Division, Pretoria 2019:par 80; Minister of Finance Heads of Argument Constitutional Court 2022:paras. 97-98.

202 *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 2 SA 208 (CC):paras. 46 & 57.

203 *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 2 SA 208 (CC):para. 46.

reading-in order in *Arena Gauteng* made a "final instructive pronouncement on when taxpayer information should be disclosed".[204] I disagree. Although the Constitutional Court confirmed the reading-in order, parliament may still amend the legislation as it sees fit. Even after such amendment, every information officer will have to consider each specific *PAI Act* request and sec. 46 of the *PAI Act*. This may or may not result in the disclosure of tax information, depending on the specific circumstances of each request. This individual enquiry must be done every time, irrespective of the judgments in the *Arena cases*. I share the view expressed by the majority in *Arena CC* that there are sufficient substantial and procedural safeguards in the *PAI Act* that still protect taxpayer confidentiality.[205]

Du Plessis explains that a court may order severance[206] and reading in based on sec. 172(1)(b) of the *Constitution,* which permits "any order that is just and equitable".[207] He confirms that this section enables a court to extend the ambit of a legislative provision so that it is saved from constitutional invalidity.[208] The Supreme Court of Appeal and the Constitutional Court have also confirmed that when reading in is ordered, the read-in part must be so as to give effect to the "ostensible legislative intention" or make the legislation workable.[209] This is the effect of reading in as ordered in *Arena CC*. The addition of sec. 35(1) of the *PAI Act* to the listed sections to which sec. 46 of the *PAI Act* applies would result in taxpayer information being disclosed to a *PAI Act* requestor if the requirements in the latter section are met. I consider this appropriate, as it aligns with the overall "ostensible" purpose of the *PAI Act* to promote access to information. However, the proposed addition of a new subsec. (bA) to sec. 69(2) of the *TA Act* is not truly necessary as sec. 69(2)(b) of the *TA Act* already provides that the disclosure of taxpayer information is permitted "under any other Act which expressly provides for the disclosure of the information despite the provisions in this Chapter". The *PAI Act* qualifies as such an "other *Act*". It is only necessary to amend the provisions of the *PAI Act* to allow access to tax information to align the interaction between the two Acts.

The third reading-in order adds the phrase "unless the information has been received in terms of the Promotion of Access to Information Act" to sec. 67(4) of the *TA Act*. This aligns with the *TA Act* and the *PAI Act*. Although the read-in phrase does not contain a specific reference to sec. 46 of the *PAI Act,* the practical effect is the same. As the further distribution of "information" (defined widely to include communication and records in possession of SARS) is prohibited under the current sec. 67(4) of the *TA Act,* the reading in will enable a successful *PAI Act* requestor to disclose "information" to a person other than a SARS official, which could include publication. As the applicants

204 Minister of Finance's Heads of Argument Constitutional Court 2022:par. 105.

205 See par 4.2.1 above.

206 Severance refers to separating the invalid part of the legislation from the rest of the provisions that pass constitutional muster.

207 Du Plessis 2011:95; the *Constitution*: sec. 172(2).

208 Du Plessis 2011:95.

209 *Palvie v Motale Bus Service (Pty) Ltd* 1993 4 SA 742 (A):749C; *Rennie NO v Gordon NNO* 1988 1 SA 1 (A):21E; *Bernstein v Bester*:par. 105.

did not request an amendment to sec. 67(3) of the *TA Act,* which prohibits the disclosure of "tax information" (information supplied to SARS by the taxpayer, including biometric information) obtained contrary to the *TA Act*, the courts could not and appropriately did not address this section.

The reading in affords future persons in a similar situation as the applicants with a remedy until parliament amends the legislation. Although *Arena CC* confirmed this order, the media will still not be able to simply publish taxpayer information but will still have to follow the procedures of the *PAI Act* and can only further share information that is legitimately received after a successful *PAI Act* request. This indicates a cautious approach by both the applicants and the courts. It does, however, not limit the nature of the type of requestor or type of information that may be disseminated once received. As the order to read in was made pending the correction of the legislation by Parliament within two years, its effect remains temporary, which in my view, does not amount to judicial overreach or transgression of the doctrine of separation of powers.

I would, however, suggest that parliament re-write both secs. 67(3) and 67(4) of the *TA Act* to properly contextualise the new public interest override exception as the temporary reading-in order above relates to sec. 67(4) of the *TA Act* only and "information" which differs from "taxpayer information" as defined. Sec. 67(4) of the *TA Act* does not expressly refer to further distribution or publication. By contrast, sec. 67(3) disallows the further dissemination or publication of illegally obtained "taxpayer information". It might be a matter of semantics, but it seems that the legislature did not contemplate the possibility of publishing legally obtained "taxpayer information". It is uncertain whether an information officer faced with a *PAI Act* request in terms of sec. 46 will notice this technical difference, as it is rather formalistic. Commendably, the courts did not engage in extensive legislative re-writing, nor would it have been appropriate if it did.

6.4 Setting aside administrative decisions

The corrective principle in administrative law affords the court the discretion to rectify the effect of an order of unconstitutionality and set aside irregular administrative action.[210] Practically, this usually refers to the setting aside of an administrative decision that was declared invalid.[211] A court may then decide to refer the decision back to the original decision maker, unless such a referral would be unjust or inequitable in the specific circumstances.[212] Bleazard, Budlender and Finn describe these principles in the context of what they term "irregular administrative action" and state that "the reach and effect of this corrective principle still remains uncertain and largely untested".[213] The administrative decision by SARS *in casu* was, however, not necessarily irregular nor *prima facie* illegal, but the legislation regulating the

210 Bleazard *et al.* 2021:277; Cahchalia 2015:116.
211 Bleazard *et al.* 2021:277; Cahchalia 2015:116.
212 Bleazard *et al.* 2021:277; Cahchalia 2015:116.
213 Bleazard C *et al.* 2021:277; Cahchalia 2015:116.

refusal decision was *ex post facto* declared unconstitutional and invalid to the extent of its unconstitutionality. The court in *Arena Gauteng* took a bold step in finding that a "lawful" decision, at the time of making it, should be set aside based on a later finding of unconstitutionality. The argument is slightly more complex and nuanced, as unconstitutionality was probably not foreseeable by SARS at the time of decision-making, as taxpayer confidentiality was mostly consistently protected by the courts prior to *Arena Gauteng*. This part of the order was also confirmed in *Arena CC,* as the court's order requires SARS to consider the matter afresh and make a new decision.

6.5 Substitution of administrative decisions

In both *Arena cases*, the Minister of Finance relied on *Trencon* to argue that the court in *Arena Gauteng* could not order substitution and averred that the applicants had not shown that substitution was justified.[214]

Although a court may, in terms of both the common law and the *PAJ Act,* order substitution of the original decision of an administrator with its own in "exceptional cases", it is traditionally accepted in common law that a court will be reluctant to assume this decision-making power.[215] This is considered an extraordinary remedy in judicial review, as the constitutional separation of powers and functional distinction between reviews and appeals requires caution. The Supreme Court of Appeal has emphasised that it is mostly proper to remit the matter to the original decision maker and that substitution should be ordered cautiously, in exceptional situations and only if the court is convinced that the decision should not be made by the original administrator.[216]

There is no limitation on the possible situations in which a court may justify an order of substitution.[217] The *PAJ Act* does not contain a definition of the phrase "exceptional cases" nor guidelines to determine its meaning, nor is this codified in the *Constitution*. Several authors and the courts have used the following four factors as instructive to justify that substitution may be ordered: the court is as equally qualified as the original administrator to make the decision; the outcome of the decision is an unavoidable conclusion, and remittal will waste time; more delays would lead to unwarranted prejudice for the applicants or another person, and the initial decision maker showed partiality or such a level of ineptness that it is unjust to request an applicant to

214 Joint Practice Note Gauteng Division, Pretoria 2021:2-3; Minister of Finance's Application for leave to appeal, Founding affidavit Constitutional Court 2022:paras. 61, 66-73.

215 Bleazard *et al.* 2021:237 & 288.

216 Cachalia 2015:116-117; Bleazard *C and Others v Department of Health and Social Development, Gauteng and Others Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 4 SA 67 (SCA):paras. 28-29; Bleazard *et al.* 2021: 288.

217 Bleazard *et al.* 2021:288.

succumb to its jurisdiction again.[218] These factors were applied and confirmed in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited*[219] (hereafter, *Trencon*), in which the court examined the line of cases applicable to these specific factors in the context of a *PAJ Act* review.[220] There is academic divergence on the impact of *Trencon.* Bleazard, Budlender and Finn explain that the Constitutional Court, in *Trencon*, suggested a two-step exercise to apply the above four factors, which first entails a determination of institutional competence to order substitution (the first two factors) and secondly, requires that the other factors be considered bearing fairness in mind.[221] In contrast, Cachalia avers that the court was not clear about the interaction between the factors, the evidentiary weight, and cumulative consideration.[222] Kohn admits some unclear parts but opines that *Trencon* improved the achievement of balance between the need to find a level of certainty and flexibility as well as the need to balance judicial timidity with judicial excess.[223]

The court is, however, granted a very wide discretion based on the just and equitable criteria in sec. 172 of *the Constitution,* which subjects law and conduct to a form of constitutional review.[224] When considering an appropriate remedy, the court in *Arena Gauteng*, in referring to the *PAJ Act*, stated that "the case and the novelty thereof constitute an 'exceptional case' as contemplated in s 8(1)*(c)*(ii)*(aa)* of PAJA".[225] This section provides that a court may grant any just and equitable order, set aside administrative action, and, in exceptional cases, substitute or change the administrative action or correct a defect that results from it. The description as an exceptional case is linguistically on point. This does not automatically cause the matter to fall within the ambit of sec. 8 of the *PAJ Act*.[226] Whether novelty alone justifies an order of substitution as an exceptional case in judicial review applications is an entirely different question. I am not convinced that it does. However, in circumstances where

218 Bleazard *et al.* 2021:288 refer to Baxter who originally categorised these factors and the confirmation thereof by Hoexter and the initial acceptance of these factors by the courts in *University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 3 SA 124 (C):131D–J, and *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 5 SA 51 (C):64G; Cachalia 2015:117.

219 *Trencon*:20-29.

220 *Trencon*:20-29.

221 Bleazard *et al.* 2021:289.

222 Cachalia 2015:134.

223 Kohn 2015:92.

224 Du Plessis 2011:92.

225 In the version of the judgement that is reported in the law report (2022 2 SA 501 (GP): 501:par. 10.6) the section is referred to as a section in the *PAI Act*, while the original judgement correctly indicates this section as one contained in the *PAJ Act*. The version in the law report must be a typing error as there is no such a section in the *PAI Act;* see the original file of the *Arena Gauteng* judgement http://www.saflii.org/za/cases/ZAGPPHC/2021/779.html (accessed on 14 August 2023).

226 Fritz & Van Zyl 2022:597 opine with reference to the *PAJ Act* that the court in *Arena Gauteng* "could not have relied on the powers provided for in section 8 of the *PAJA* as the current matter did not fall within the scope of *PAJA*". This view was also expressed by the minority judgement in *Arena CC*.

the administrative decision made by SARS was correct both procedurally and legally, no alternative foreseeable outcome existed, remittal would have been futile, the court in *Arena Gauteng* thus had no choice but to substitute the decision of SARS with its own. On the one hand, it was bound by Constitutional Court precedent to provide a remedy,[227] and, on the other hand, it was bound by the *Constitution* itself to refer the order to the Constitutional Court for confirmation. However, as *Arena Gauteng* was not an application for the judicial review of an (incorrect) administrative decision, but an application based on constitutional rights, a court has very wide powers to make any order which is just and equitable, and this could include substitution.

I am of the view that the court was not necessarily in an equally qualified position as SARS to make the decision, as it was not in possession of the documents and records that SARS had of Mr Zuma's tax affairs. Sec. 80(1) of the *PAI Act* allows a court to take a "judicial peek" at the information subject to a *PAI Act* appeal. From the written documents, it is not clear why the court did not take this peek as was suggested by the applicants in their heads of arguments prior to *Arena Gauteng*.[228]

In *Arena CC,* however, the parties agreed that the order of substitution should not have been made, and the court referred the matter back to SARS for a new decision and allowed the applicants to adjust their initial information request for purposes of this new decision.[229]

6.6 The practical effect of the order to hand over tax records

Sec. 172(b) of the *Constitution* authorises a court that makes an order of constitutional invalidity to grant temporary relief to a party pending the decision of the Constitutional Court, or the court may adjourn the proceedings until the Constitutional Court decides whether the legislation is constitutionally valid or not.[230] The court in *Arena Gauteng* opted to read in, rectify the law, substitute the decision of SARS, and interdict Mr Zuma to hand his tax records over within ten days of the court's order. One could argue that this temporary relief could not have been executed, unless the unconstitutionality and reading-in order were confirmed, which, in turn, informed this relief. Yet, the court could also not leave the applicants without a remedy after being successful in their claim. Circular arguments in all directions could ensue. I am of the view that this relief was not practically possible (yet) and could not apply prior to the outcome of the constitutional court's decision, as prior to such

227 See *S v Bhulwana*:par 6.1 above.

228 Applicants' Heads of Argument Gauteng Division, Pretoria 2020:58. See *Minister of State Security v Makwakwa and Others* (64148/2021) 2022 (ZAGPPHC) 769 (5 October 2022), in which the court took a judicial peek and granted an interdict which prohibited publication of information by the media and did not allow a reliance on the *PAI Act*, as the court considered it to be potentially harmful information.

229 See par. 4.2.6 above.

230 *Constitution*:sec. 172(2)(b); *Promotion of Access to information Act* 2/2000:sec. 82 also authorises a court to grant interim relief such as an interdict in a *PAI Act* appeal.

confirmation, the order had no force.[231] The execution of this part of the order was interrupted by an application for leave to appeal, which SARS lodged timeously. An order of the court is suspended from the date of the filing of an application for leave to appeal.[232] Prior to the judgement in *Arena CC,* the court's order in *Arena Gauteng* had no force.[233] Interestingly, the applicants did not specifically ask for their interim relief to include an order to authorise the immediate publication of the tax information of Mr Zuma. As a result, no order was made in this regard. One may guess that their legal advisors most probably foresaw the circular nature of the relief in this matter or simply chose to adopt a conservative approach. In *Arena CC,* the question of subsequent publication was also not addressed in detail.

7. CONCLUSION

Information exposed by the press could shed light on corruption, the misallocation of funds, ill-gotten excessive wealth, and tax compliance. Tax transparency, openness, and proof of compliance could also improve confidence in public institutions and revenue authorities. I am of the view that it certainly is in the public interest to expose this kind of information. In the Pandora Papers, incriminating information was mostly found by the ICIJ through thorough independent investigations, without *prima facie* awareness of its existence. In South Africa, the proverbial opening of another "Pandora's Box" by directly publishing tax information, whether obtained legally or illegally from another source, is still not permitted and constitutes a criminal offence, unless the taxpayer consents.[234] After the decision in *Arena CC,* publication of tax information in future will only be possible after a successful *PAI Act* request was made or (if such a request was unsuccessful) when a court orders it on appeal or review in compliance with the requirements of sec. 46 of the *PAI Act*. The consequences of the *Arena cases* are thus very narrow in scope and will only apply until parliament amends the legislation.

The South African media have previously called for the relaxation of the tax secrecy provisions contained in legislation.[235] In principle, I agree that tax legislation should ultimately be amended to allow more transparency in tax affairs and the publication of taxpayer information. President Cyril Ramaphosa's recent consent to allow publication of his tax-compliant status

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231 *Constitution*:secs. 167(5) and 172(2)(a).

232 *Superior Courts Act*:sec. 18(1); *Uniform Rules of Court* 2020:rules 49(11) and (12); *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others* 2022 (4) SA 401 (CC):par. 13; Klue *et al.* 2023:par. 3.4. In terms of rule 49(12), a court may direct that the automatic suspension be uplifted if a party so requests.

233 For a contrary view, see Fritz & Van Zyl 2022:596-597 who argue that pending the amendment of Chapter 6 of the *TA Act*, and "in the meantime while this judgment stands" they advise SARS to apply for a declaratory order to clarify whether the public interest override applies in each specific situation.

234 *Tax Administration Act* 28/2011:sec. 67(4) read with sec. 236.

235 Croome 2010:165.

is a very small step in the right direction. Strengthening the fight against corruption by encouraging accountability and transparency in tax affairs is necessary in a democracy. This was reiterated by Davis J in *Arena Gauteng*:

> I find the following observation by Cora Hoexter in *Administrative Law in South Africa* 2 ed at 98 (albeit in a slightly different context) to be apposite: 'The claim [is] that free access to official (stateheld) information is a prerequisite for public accountability and an essential feature for participatory democracy.'[236]

Similarly, in *Arena CC,* the court emphasised that the Constitutional Court had repeatedly confirmed the importance of freedom of expression and quoted *Economic Freedom Fighters v Minister of Justice and Correctional Services*[237] as an example when it described "freedom of expression as the lifeblood of a genuine constitutional democracy that keeps it fairly vibrant, stable and peaceful".[238] The court was also constantly mindful of the interpretation of the right to privacy in *Bernstein* and balanced this with freedom of expression and the right of access to information, as it confirmed that, as a person moved into the public sphere of life, his or her privacy becomes more limited.[239]

In my view, the slight extension of the public interest override exception to allow access to tax information and allowing its subsequent publication if the requirements of the *PAI Act* are met, is only the start. In many other jurisdictions, tax transparency is given preference above the privacy of tax information.[240] Immediately allowing the direct publication of tax information by the media in South Africa could open Pandora's Box, which might be too much too soon in the context of this country's current socio-economic and political climate. There is immense value in developing the law to align with and balance public policy and the interests of society. In this context, the courageous yet cautious judgments in the *Arena* cases can be described as "one small [controversial and complex] step for man" in the direction towards "one giant leap for mankind". It remains to be seen whether the legislature will take a similar or bigger step.

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236 *Arena Gauteng*:500.

237 *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2020 (ZACC) 25; 2021 2 SA 1 (CC); 2021 2 BCLR 118 (CC):par. 1.

238 *Arena CC*:par.132.

239 See par 5.1 above.

240 See, for example, the Nordic countries such as Sweden, Finland, and Norway; Doyle & Scrutton "Privacy, What Privacy? Many Nordic tax records are a phone call away", https://www.reuters.com/article/us-panama-tax-nordics-idUSKCN0X91QE (accessed on 14 August 2023). See the decision of the Kenyan Court in the *Nyoja* case fn 123 above; this list is not exhaustive.

BIBLIOGRAPHY

ALBERTYN C, CACHALIA F, CHEADLE H, CORDER H, DAVIS D, GLAZEWSKI J, HAYSOM N, LAGRANGE R, MADUNA P, NUGENT R, SLOTH-NIELSEN J, STEENKAMP A & VAN BUEREN G
2022. *South African constitutional law: The Bill of Rights*. Durban: LexisNexis.

BARFORD V & HOLT G
2013. "Google, Amazon, Starbucks: The rise of 'tax shaming'". *BBC News Magazine*. https://www.bbc.com/news/magazine-20560359 (accessed on 1 March 2023).

BLEAZARD J, BUDLENDER S & FINN M
2021. Remedies in judicial review proceedings. In Quinot *et al.* 2021:271-321.

CACHALIA R
2015. Clarifying the exceptional circumstances test in Trencon: An opportunity missed. *Constitutional Court Review* 7(1):115-134. https://doi.org/10.2989/CCR/2015.0006

CAMPBELL K & HELLELOID D
2016. Starbucks: Social responsibility and tax avoidance. University of North Dakota Scholarly Commons. *Management Faculty Publications* (9):1-27. https://commons.und.edu/man-fac/1 (accessed on 1 March 2023).

CHEADLE MH, DAVIS DM & HAYSOM NRL
2022. *South African constitutional law: The Bill of Rights*. Durban: LexisNexis.

CROOME BJ
2010. *Taxpayer's rights in South Africa*. Cape Town: Juta.

CROOME BJ & OLIVIER L
2010. *Tax administration*. Cape Town: Juta.

CURRIE I & DE WAAL J
2005. *The Bills of Rights handbook*. 5th edition. Cape Town: Juta.

CURRIE I, DE WAAL J & ERASMUS G
1999. *The Bills of Rights handbook*. 2nd edition. Cape Town: Juta.

DE KOKER AP & WILLIAMS RC
2022. *Silke on South African income tax*. Durban: LexisNexis.

DE VOS P
2021. "Zuma tax judgement: When transparency trumps the need for privacy". https://www.dailymaverick.co.za/opinionista/2021-11-19-zuma-tax-judgment-when-transparency-trumps-the-need-forprivacy/?utm_term=Autofeed&utm_medium=Social&utm_source=Facebook#Echobox=1637278102 (accessed on 19 September 2023).

DOYLE A & SCRUTTON A
2016. "Privacy, what privacy? Many Nordic tax records are a phone call away". https://www.reuters.com/article/us-panama-tax-nordics-idUSKCN0X91 QE (accessed on 14 August 2023).

DU PLESSIS L

2011. The status and role of legislation in South Africa as a constitutional democracy: Some exploratory observations. *Potchefstroom Electronic Review* (14):92-102. https://doi.org/10.4314/pelj.v14i4.4

FERENSTEIN G

2013. "Google's Cerf says "Privacy may be an anomaly". Historically, he is right". https://techcrunch.com/2013/11/20/googles-cerf-says-privacy-may-be-an-anomaly-historically-hes-right/ (accessed on 19 July 2023).

FISHER S

2021. "Court granting access to Zuma tax records has implications for SARS-JZF". https://ewn.co.za/2021/11/18/court-granting-access-to-zuma-tax-records-has-implications-for-sars-jzf (accessed on 19 September 2023).

FITZGIBBON W

2021. "Nike fails to stop EU probe on billions in alleged tax dodging" ICIJ 15 July 2021. https://www.icij.org/investigations/paradise-papers/nike-fails-to-stop-eu-probe-on-billions-in-alleged-tax-dodging/ (accessed on 1 March 2023).

FRITZ C

2021. South African taxpayers' right to privacy in cross-border exchange of tax information. *Constitutional Court Review* (11):411-432. https://doi.org/10.2989/CCR.2021.0015

FRITZ C & VAN ZYL SP

2022. Tax administration, confidentiality of information, the *Promotion of Access to Information Act* 2 of 2000, and public figures. *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* (88359/2019) 120211 (ZAGPPHC) (16 November 2021). *Tydskrif vir Hedendaagse Romeins Hollandse-Reg* (85):586-597.

HENRICO R

2018. Subverting the *Promotion of Administrative Justice Act* in judicial review: The cause of much uncertainty in South African administrative law. *Tydskrif vir Suid-Afrikaanse Reg* (2):288-307.

HOEXTER C

2006. 'Administrative action' in the courts. *Acta Juridica* (1):303-324.

2008. Judicial policy revisited: Transformative adjudication in administrative law. *South African Journal of Human Rights* (24):281-299. https://doi.org/10.1080/19962126.2008.11864956

HOPKINS N & BOWERS S

2017. "Revealed: How Nike stays one step ahead of the taxman". *The Guardian*. https://www.theguardian.com/news/2017/nov/06/nike-tax-paradise-papers (accessed on 1 March 2023).

INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS

2016. "An ICIJ investigation: The Panama Papers: Exposing the rogue offshore finance industry". https://www.icij.org/investigations/panama-papers/ (accessed on 25 February 2023).

INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS

2022. "An ICIJ investigation: The Uber Files". https://www.icij.org/investigations/uber-files/ (accessed on 25 February 2023).

INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS
2021. "Impact". https://www.icij.org/tags/impact/ (accessed on 28 September 2022).

INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS
n.d. "Pandora Papers". https://www.icij.org/investigations/pandora-papers/ (accessed on 28 September 2022).

INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS
n.d. "Panama papers: How the elite hide their wealth". https://panamapapers.investigativecenters.org/ (accessed on 20 January 2023).

KLUE S, ARENDSE J & WILLIAMS RC
2023. *Silke on tax administration*. Durban: LexisNexis.

KOHN L
2015. The test for exceptional circumstances where an order of substitution is sought: An analysis of Trencon against the backdrop of the separation of powers. *Constitutional Court Review* 7(1):91-114. https://doi.org/10.2989/CCR/2015.0005

MERRIAM-WEBSTER DICTIONARY BLOG
2023. "Pandora's Box". https://www.merriamwebster.com/dictionary/Pandora%27s%20 box (accessed on 19 September 2023).

MOOSA F
2020. Protecting taxpayer information from the public protector – A "just cause". *Journal of Corporate and Commercial Law & Practice* (6):192-211. https://doi.org/10.47348/JCCL/V6/i2a7

PARADISE PAPERS REPORTING TEAM BBC PANORAMA
2017. "Paradise papers: Apple's secret tax bolthole revealed". https://www.bbc.com/news/world-us-canada-41889787 (accessed on 1 March 2023).

QUINOT G
2010. New procedures for the judicial review of administrative action. *South African Public Law* (25):645-665.

QUINOT G, ANTHONY A, BLEAZARD J, BUDLENDER A, CHACHALIA R, CORDER H, FINN M, KIDD M, MADONSELA T & MAREE P
2021. *Administrative justice in South Africa: An introduction*. 2nd edition. Cape Town: Oxford University Press Southern Africa.

SADEK N
2022. "Even one hour after we published we started to receive threats". https://www.icij.org/investigations/pandora-papers/even-one-hour-after-we-published-we-started-to-receive-threats/ (accessed on 1 March 2023).

SEHLOHO M
2021. "Edward Kieswetter concerned by Zuma tax ruling". https://www.702.co.za/articles/432683/edward-kieswetter-concerned-by-zuma-tax-ruling (accessed 19 September 2023).

SOUTH AFRICAN REVENUE SERVICE
2023. "Mr Matamela Cyril Ramaphosa and the public officers for Ntaba Nyoni Estate and Ntaba Nyoni feedlot provide consent to SARS to make a public statement on their tax compliance status". https://www.sars.gov.za/media-release/mr-cyril-ramaphosa-provides-consent-to-sars-on-tax-compliance-status/ (accessed on 8 March 2023).

STAMM A
2019. "'One small step for man' or 'a man' or 'a small step'". https://airandspace.si.edu/stories/editorial/one-small-step-man-or-man#:~:text=The%20case%20also%20features%20Neil,one%20giant%20leap%20for%20mankind.%22 (accessed on 29 September 2022).

THAKUR C
2021. Zuma tax records ruling: Why the ensuing panic over taxpayer confidentiality is misconceived". https://www.dailymaverick.co.za/article/2021-11-21-zuma-tax-records-ruling-why-the-ensuing-panic-over-taxpayer-confidentiality-is-misconceived/ (accessed on 19 September 2023).

THUKWANA N
2023. "President Cyril Ramaphosa is tax compliant, says SARS" https://www.moneyweb.co.za/news/economy/president-cyril-ramaphosa-is-tax-compliant-says-sars/ (accessed on 12 March 2023).

TURNER G
2019. "Grounds for concern – Starbucks tax payments in Europe, the Middle East and Africa". https://www.taxwatchuk.org/starbucks_uk_tax_2018/ (accessed 1 March 2023).

YOUNG SP
2018. Politicians' privacy. *Ramon Llull Journal of Applied Ethics* (9):191-210.