RESEARCH ARTICLE

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A TAXPAYER'S RIGHT TO FAIR ALTERNATIVE DISPUTE RESOLUTION

SUMMARY

By *GG* 48188, dated 10 March 2023, the Minister of Finance (hereafter, the Minister) repealed the rules published in *GG* 37819, dated 11 July 2014 (hereafter, the old rules). In accordance with sec. 103 of the *Tax Administration Act* 28 of 2011 (hereafter, the *TAA*), the Minister published 68 new rules (hereafter, the new rules) which came into immediate effect. They delineate procedures for the efficient resolution of disputes occurring within the framework of secs. 101 to 150 of the *TAA*. Rules 13 to 25 deal with alternative dispute resolution (hereafter, ADR), a voluntary process undertaken on a without prejudice basis outside the formal litigation mechanisms prescribed by sec. 107(1) of the *TAA*. The new rules, like the old rules, provide for a forum where ADR can occur through private engagement between taxpayers and the South African Revenue Service (hereafter, SARS), with or without the aid of a facilitator, concerning a dispute subject to a pending appeal lodged under the *TAA* with the specialist Tax Board or Tax Court. In accordance with the rule of law, taxpayers are entitled to procedurally and substantively fair resolution of tax disputes by way of ADR. However, while the new rules serves as the source of a taxpayer's entitlement to procedurally fair ADR, it is unclear as to the true source of a taxpayer's substantive right to a fair ADR process. Is the source the new rules, the *TAA*, or sec. 34 of the *Constitution of the Republic of South Africa,* 1996 (hereafter, the *Constitution*)? This article argues that sec. 34 cannot be the substantive law source of this right because its provisions, properly construed, apply to dispute resolution in courts, tribunals, and forums performing an adjudicative function after a fair public or private hearing. When ADR occurs through direct engagement between taxpayers and SARS without the aid of facilitators, then disputes are resolved by consensus through discussion and persuasion. Similarly, ADR through facilitated conciliation does not involve adjudication – facilitators make non-binding recommendations and do not make final decisions on disputed issues of fact and/or law. This article argues that the new rules are not the source of a substantive law right to fair ADR for tax administration purposes. This article shows that a right of this nature is implied into the *TAA* when its relevant provisions in Chapter 9 are properly interpreted. It is argued that the scope of this right is to be determined by interpreting the new rule 17 and sec. 107(5) of the *TAA* through the normative spirit of fairness contained in sec. 34 of the *Constitution*.

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1. INTRODUCTION

Revenue from taxation is critical for the economic well-being of South Africa (hereafter, SA).[1] Taxes collected keep the machinery of state fully functional.[2] In this context, the South African Revenue Service (hereafter, SARS), an organ of state created by statute,[3] performs a vital role in the public interest.[4] SARS administers and enforces every "tax Act" within its meaning as defined in the *Tax Administration Act* (hereafter, the *TAA*).[5] By fulfilling its obligations under sec. 2 of the *TAA* of collecting taxes efficiently and effectively, SARS ensures that SA's tax base is protected against undue erosion.[6] To adequately capacitate SARS to fulfil this critical role, the *TAA* confers substantial powers that gives SARS bite (such as, the information gathering powers of inspection, audit, verification, and criminal investigation).[7] The exercise of these statutory powers puts SARS on a potential collision course with taxpayers and their rights.

Secs. 104(1) and 107(1) of the *TAA* respectively confer on taxpayers a right to object[8] and appeal[9] a SARS "notice of assessment",[10] or a disputed

1 *Carlson Investments Shareblock (Pty) Ltd v CSARS* 2001 3 SA 201 (W):231.
2 *CSARS v Sunflower Distributors* CC 2015 JDR 2546 (GP):par. 4.
3 The *South African Revenue Service Act* 34/1997 (hereafter, the *SARS Act*):sec. 2.
4 *Pienaar Brothers (Pty) Ltd v CSARS* 2017 6 SA 435 (GP):par. 35.
5 *Tax Administration Act* 28/2011. Sec. 1 of the *TAA* defines 'tax Act' to mean "this Act or an Act, or portion of an Act, referred to in section 4 of the SARS Act, excluding customs and excise legislation".
6 Sec. 169 of the *TAA* reads: "(1) An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund. … (3) SARS is regarded as the creditor for the purposes of any recovery proceedings related to a tax debt." For purposes of the *TAA*, a tax liability to SARS is regarded as existing by operation of law – it is not dependent on the issuance of a formal tax assessment. See *Wiese v CSARS* 2024 ZASCA 111 (12 July 2024):par. 29.
7 *TAA*:Chapter 5. For the distinction between information gathering via an "audit" as opposed to a "verification", see *Forge Packaging (Pty) Ltd v CSARS* 85 SATC 357:par. 8.
8 A notice of objection is not a pleading – "An objection is part of the pre-litigation administrative process" (*CSARS v Free State Development Corporation* 2024 2 SA 282 (SCA):par. 8).
9 Taxpayers can appeal to a Tax Board or Tax Court, whichever has jurisdiction under secs. 109 or 117 of the *TAA*, respectively. Tax Board and Tax Court decisions are binding on litigants, but lack precedential value. See *CSARS v FP (Pty) Ltd* 84 SATC 321:par. 36. In an appeal, a taxpayer cannot exceed the grounds enumerated in a prior objection. See *CSARS v Free State Development Corporation*:par. 39. The appealability of a Tax Court decision is regulated by the same principles applied to determining if an appeal lies against High Court decision. See *CSARS v Free State Development Corporation*:paras. 6-11.
10 For the requirements of a valid "notice of assessment", see sec. 96 of the *TAA*.

SARS "decision"[11] which is susceptible to legal challenge.[12] In terms of sec. 105, taxpayers "may only dispute an assessment[13] or 'decision' as described in sec. 104 in proceedings under this Chapter, unless a High Court otherwise directs".[14] In terms of sec. 107(5),[15] pending a taxpayer's opposed appeal, a tax dispute[16] may, by mutual agreement, be referred to alternative dispute resolution (hereafter, ADR). In terms of sec. 107(6), legal proceedings in a taxpayer's appeal are suspended while an ADR procedure is ongoing.

The *TAA* does not prescribe the form of ADR, nor details its process, nor articulates the circumstances when ADR would be appropriate. To this end, secs. 103(1), read with (2) of the *TAA*, is instructive.[17] In terms thereof, Parliament delegated legislative authority to the Minister of Finance (hereafter, the Minister) to publish rules for ADR by public notice after "consultation"[18] with the Minister of Justice and Constitutional Development. In accordance

11 Sec. 104(2) of the *TAA* lists a *numerus clausus* of "decisions" against which an objection or appeal may be lodged. These are a decision not to extend the period for lodging an objection; a decision not to extend the period for lodging an appeal, and any other decision which may be objected to or appealed against under any "tax Act" as defined in sec. 1 of the *TAA*. See *AB v CSARS* 85 SATC 377. Decisions not susceptible to objection or appeal may be judicially reviewed. See *CSARS v Richard's Bay Coal Terminal (Pty) Ltd* 86 SATC 145:paras. 15-25.

12 Legal proceedings against SARS must be *bona fide* with a genuine desire to challenge the merits of an assessment or decision. It ought not to be vexatious, frivolous, or an abuse of judicial process (such as where the taxpayer aims to merely delay or frustrate SARS' efforts to recover tax lawfully due and payable to the fiscus). See *CSARS v Van der Merwe* 83 SATC 19:paras. 44-56.

13 Sec. 1 of the *TAA* defines 'assessment' to mean "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS". An assessment is not a pre-requisite for the existence of a tax liability. See *CSARS v Nyhonyha* 2023 6 SA 145 (SCA):par. 30.

14 For a discussion of the principles applicable to sec. 105, see *CSARS v Rappa Resources (Pty) Ltd* 2023 4 SA 488 (SCA):paras. 15-26; *Trustees of the CC Share Trust v CSARS* 86 SATC 84:paras. 33-52; *Erasmus v CSARS* 2024 1 All SA 153 (WCC):paras. 48-81.

15 Sec. 107(5) of the *TAA* reads: "By mutual agreement, SARS and the taxpayer making the appeal may attempt to resolve the dispute through alternative dispute resolution under procedures specified in the 'rules'."

16 Unless the context shows otherwise, 'dispute' bears its definitional meaning in the *TAA*: "a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law, which arises pursuant to the issue of an assessment or the making of a 'decision'" (sec. 142).

17 The relevant extracts of sec. 103 read: "(1) The Minister [of Finance] may, after consultation with the Minister of Justice and Constitutional Development, by public notice make 'rules' governing the procedures to lodge an objection and appeal against an assessment or 'decision', and the conduct and hearing of an appeal before a tax board or tax court. (2) The 'rules' may provide for alternative dispute resolution procedures under which SARS and the person aggrieved by an assessment or 'decision' may resolve a dispute. …"

18 For the legal nature of "consultation", see *Nu Africa Duty-Free Shops (Pty) Ltd v Minister of Finance* 2023 12 BCLR 1419 (CC):paras. 124-125.

with sec. 103, read with sec. 257(1) of the *TAA*,[19] all procedures for dispute resolution are, at present, regulated by *GG* 48188, dated 10 March 2023. In terms of this delegated legislation,[20] the rules published in *GG* 37819, dated 11 July 2014 (hereafter, the old rules) were replaced by 68 revised rules (hereafter, the new rules), which became law on 10 March 2023.[21]

2. STATEMENT OF THE PROBLEM IN ADR OCCURRING UNDER THE *TAA*

SARS is "a large and complex institution with extensive administrative responsibilities and high workloads".[22] Its functions are a facet of public administration governed by democratic values and principles enumerated in the *Constitution of the Republic of South Africa,* 1996 (hereafter, the *Constitution*).[23] To ensure compliance with the letter and spirit of the Bill of Rights (hereafter, the BoR), sec. 8(1) of the *Constitution* declares the BoR to be binding on, *inter alia*, all organs of state (such as SARS).[24] Sec. 237 declares that all constitutional duties "must be performed diligently and without delay". The strictness of this duty is reinforced by sec. 2 of the *Constitution* stipulating that conduct inconsistent with the *Constitution* is invalid and may be declared so. Any offending conduct would remain intact until it is set aside.[25]

19 In terms of sec. 257(1), the Minister of Finance is empowered to "make regulations regarding – (a) any ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper implementation or administration of this Act". For a useful exposition of the law governing the making of regulations, see *Minister of Finance v Afribusiness* NPC 2022 4 SA 363 (CC):paras. 38-43, 102-124.

20 Subordinate (or delegated) legislation enacted by any member of the executive branch of government, usually in the form of regulations or rules, is not inimical to the constitutional separation of powers principle. See *Nu Africa Duty-Free Shops (Pty) Ltd v Minister of Finance*:paras. 78-81.

21 For a comparison between the new rules and the old rules, see Moosa 2023:660.

22 *CSARS v Dragon Freight (Pty) Ltd* 85 SATC 289:par. 34.

23 *F Taxpayer v CSARS* 85 SATC 1:par. 28. In *Van der Merwe v Taylor* 2008 1 SA 1 (CC):par. 72, Mokgoro J held: "In this constitutional era, where the Constitution envisages a public administration which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values. Section 195 reinforces these constitutional ideals."

24 In *Van der Merwe v Taylor*:par. 72, Mokgoro J held that the *Constitution* "aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past".

25 *SARB v Shuttleworth* 2015 5 SA 146 (CC):par. 32.

Sec. 8(1) of the *Constitution* also declares that the BoR "applies to all law". In this context, the word "law" bears its wider meaning as defined in the *Interpretation Act*.[26] Therefore, the BoR applies to the *TAA*. As a result, SARS is obliged to respect taxpayers' constitutional rights to the extent that any such right is contextually applicable for *TAA* purposes.[27]

Under sec. 33 of the *Constitution*, read with the *Promotion of Administrative Justice Act* (hereafter, the *PAJA*),[28] all taxpayers, both natural and juristic persons, have the right to just administrative action (*i.e.*, to lawful, reasonable, and procedurally fair administrative action).[29] All public power in SARS' hands is subject to constitutional control and the doctrine of legality.[30] Except to the extent that a taxpayer must resort to the remedies of objection and appeal in the *TAA*, taxpayers whose rights are materially and adversely affected by administrative action may, pursuant to sec. 6(1) of the *PAJA*, challenge SARS' offending conduct by review to a competent "court or a tribunal" (for

26 Sec. 2 of the *Interpretation Act* 33/1957 defines 'law' to mean "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law".

27 For example, a criminal investigation to ascertain whether a tax offence has been committed constitutes "administration of a tax Act" under sec. 3(2)(f) of the *TAA*. Accordingly, sec. 44(1) of the *TAA* stipulates: "During a criminal investigation, SARS must apply the information gathering powers in terms of this Chapter with due recognition of the taxpayer's constitutional rights as a suspect in a criminal investigation." In *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC):par. 47, it was emphasised that the *Constitution* guarantees human rights "for everyone, even suspected criminals". See also *S v Sebejan* 1997 1 SACR 626 (W); *S v Orrie* 2005 1 SACR 63 (C). Therefore, evidence obtained by SARS during a criminal investigation in violation of constitutional rights is potentially inadmissible as the accused taxpayer. See *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 1 SA 984 (CC); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO* 1997 2 SA 636 (W); *De Lange v Smuts NO* 1998 3 SA 785 (CC); ITC 1818 2007 69 SATC 98; *Kapa v S* 2023 1 SACR 583 (CC). See also Ally 2010:239. For analysis of the right to remain silent during an investigation, see *Bernstein v Bester NO* 1996 2 SA 751 (CC); *S v Manamela* 2000 3 SA 1 (CC):paras. 22-26, 35-51; *S v Thebus* 2003 6 SA 505 (CC):paras. 51-58.

28 *Promotion of Administrative Justice Act* 3/2000. In *Walele v City of Cape Town* 2008 6 SA 129 (CC):par. 51, the court affirmed that all statutes conferring administrative authority must be read subject to the *PAJA* enacted to give effect to the right to administrative justice in sec. 33 of the *Constitution*.

29 *Carlson Investments Shareblock (Pty) Ltd v CSARS*:221-222. In *CSARS v Brown* 2016 ZAECPEHC 17 (5 May 2016):paras. 50-51, Smith J held that a request under the *TAA* for "relevant material" is not administrative action because it entails a preliminary investigation that does not adversely affect a taxpayer's rights as required by sec. 5(1) of the *PAJA*.

30 *CSARS v Richard's Bay Coal Terminal (Pty) Ltd*:par. 20. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC):par. 29, Yakoob J held: "The exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution." For the test to determine if a power is public in nature, see *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 5 SA 457 (SCA):paras. 24, 38-40.

example, a Tax Court[31] or a High Court).[32] It is trite law that a judicial review of administrative action must be grounded in the *PAJA*, unless a taxpayer is able to rely on the principle of legality engrained in the rule of law, a founding value enumerated in sec. 1(*c*) of the *Constitution*. As discussed in Part 4, taxpayers may seek a review of objectionable administrative action by SARS concerning ADR occurring under the *TAA*, read with the new rules.

Overall, the new rules delineate procedures aimed at ensuring the proper functioning of the dispute resolution processes fleshed out in secs. 101 to 150 of the *TAA*. In particular, rules 13 to 25 regulate ADR, a voluntary process occurring outside the formal litigation mechanisms prescribed in sec. 107(1) of the *TAA*. ADR provides a forum for direct negotiations between SARS and taxpayers without the aid of facilitators, and for conciliation with the aid of duly appointed facilitators concerning disputes forming the subject of an ongoing appeal lodged under the *TAA*. These alternative processes are aimed at resolving disputes fairly, informally, expeditiously, and cost-effectively for the benefit of the *fiscus* and taxpayers alike.[33]

In SA's democratic order with the BoR, "the substantive enjoyment of rights has a high premium".[34] In a just and credible legal system, as in SA, the right to the fair resolution of all disputes lies at the heart of the rule of law; a fair hearing is a pre-requisite for a binding decision being made and an order being issued against any person.[35] To this end, sec. 34 of the *Constitution* is crucial. It reads: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

By virtue of sec. 7(2) of the *Constitution*, the right in sec. 34 applies vertically.[36] Therefore, taxpayers benefit therefrom during statutory dispute

31 A Tax Court has been labelled a "specialist tribunal" (*Metcash Trading Ltd v CSARS* 2001 1 SA 1109 (CC):paras. 33, 47; *Erasmus v CSARS*:par. 89), "specialist court" (*Forge Packaging (Pty) Ltd v CSARS*:par. 35), and a "court of revision" (*CSARS v Pretoria East Motors (Pty) Ltd* 2014 5 SA 231 (SCA):par. 2). A Tax Court is not a court of law. Accordingly, lay representation there is permitted. See *Poulter v CSARS* 2024 2 All SA 876 (WCC):par. 62. For a discussion of its legal nature, establishment, and operations, see *ITC* 1806 68 SATC 117 and *Poulter v CSARS*:paras. 34-53.

32 *CSARS v Richard's Bay Coal Terminal (Pty) Ltd*:par. 25; *CSARS v Dragon Freight (Pty) Ltd*:paras. 48-76. For a Tax Court's power of review, see *Erasmus v CSARS*:par. 45. In a review, some deference is shown to administrative action. See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd* 2015 5 SA 245 (CC):paras. 42-49.

33 In *Erasmus v CSARS*:par. 93, Sher J held: "Given the congested Court rolls and capacity constraints of the High Court, having the dispute resolved by way of the dispute resolution processes of the TAA will in fact be much quicker and more convenient for both the applicant and the Commissioner."

34 *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC):par. 44.

35 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC):par. 76.

36 Sec. 7(2) reads: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

resolution processes with SARS, but only so far as the right applies.[37] In accordance with sec. 8(4) of the *Constitution*, a juristic person who is a taxpayer (such as a company or close corporation) "is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".[38]

Therefore, a taxpayer's arsenal includes a fundamental right to have a tax or other civil dispute with SARS resolved decisively by application of relevant fiscal and non-fiscal laws through a substantively and procedurally fair adjudicative process managed by an autonomous and unbiased court, specialist tribunal or designated dispute resolution forum.[39]

In SA's adversarial justice system, sec. 34 sets rules of engagement.[40] It embraces the principles of natural justice founded on basic values underpinning the rule of law: fairness, equity, reasonableness, and equal justice for all.[41] Sec. 34 gives recognition to the importance of fairness in all forms of dispute resolution processes. This includes the right not to be compelled to give self-incriminating evidence.[42] Fairness and impartiality[43] on the part of a court, tribunal or forum "must be both subjectively present and objectively demonstrated to the informed and reasonable observer".[44] The democratic hygiene evidenced in sec. 34 – fairness, independence, and impartiality – finds its normative basis in the rule of law.[45]

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37 *First National Bank of SA t/a Wesbank v CSARS*; *First National Bank of SA t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC):paras. 116-118.

38 For a discussion of the meaning and scope of "juristic person" in sec. 8(4), see Moosa 2020:51.

39 *Metcash Trading Ltd v CSARS*:paras. 32-47; *First National Bank of SA t/a Wesbank v CSARS*; *FNB t/a Wesbank v Minister of Finance*:paras. 116-118; *CV v CSARS* 2020 ZAWCHC 140 (30 October 2020):par. 38; *CSARS v Virgin Mobile South Africa (Pty) Ltd* 2023 ZAGPPHC 685 (17 August 2023):paras. 27, 40.3.

40 In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC):par. 150, Sachs J emphasised that the rights in the BoR are "independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse". See also *Laugh It Off Promotions CC v SAB International (Finances) BV* 2006 1 SA 144 (CC):paras. 45-46.

41 Rules of natural justice apply regardless of whether a proceeding is judicial, quasi-judicial, or administrative in nature. See *South African Rules Board v Johannesburg City Council* 1991 4 All SA 722 (AD).

42 *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 5 SA 1 (CC):paras. 95-102.

43 In *S v Le Grange* 2009 2 SA 434 (SCA):par. 21, it was held: "Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."

44 *S v Le Grange*:par. 21. See also *S v Van Rooyen* 2002 5 SA 246 (CC):paras. 33-34.

45 *S v Van Rooyen*:par. 17.

Sec. 34 guarantees substantive and procedural fairness in dispute resolution.[46] Sec. 34 promotes justice by requiring compliance with, *inter alia*, *audi alteram partem* (*i.e.*, both sides must be heard);[47] the rule in *nemo judex in causa sua* (*i.e.*, no one may be a judge in his own cause);[48] the principle of equality of arms between disputants;[49] the benefit of representation;[50] a disputant's right to prior notice of an opposing party's case,[51] and adjudication by autonomous, impartial, and fair-minded arbiters of fact and law.[52] These guarantees in sec. 34 underpin the constitutional right of taxpayers to the fair resolution of disputes with SARS.[53] By protecting the right to fair administration of justice, sec. 34 fosters public trust and confidence in dispute resolution processes.[54]

During ADR occurring under the *TAA*, read with the new rules, taxpayers are entitled to fairness, from both a procedural and substantive perspective. This is uncontroversial. However, in legal practice, uncertainty exists as to the true source and scope of a taxpayer's substantive right to the fair resolution of a dispute through ADR. This problem is compounded by the uncertainty as to whether an ADR process (or procedure)[55] envisaged by sec. 107(5) of the *TAA* falls within the remit of sec. 34 of the *Constitution*. This uncertainty in important matters of law is inimical to the rule of law, a core constitutional value,[56] and must be addressed through an examination of the applicable legal *cum* constitutional framework.

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46 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 27.

47 *Minister of Water and Sanitation v Public Protector* 2019 ZAGPPHC 193 (31 May 2019):paras. 28-32; *Sibiya v RAF* 2023 ZASCA 171 (5 December 2023):paras. 14-15.

48 *Ngwathe Local Municipality v South African Local Government* 2015 ZALCJHB 55 (26 February 2015):paras. 14-16. See also Tax Ombud 2022:5.

49 *S v S* 2019 6 SA 1 (CC):paras 38-42; *BJM v WRM* 2023 ZAGPJHC 401 (26 April 2023):paras. 44-50.

50 *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC):par. 14; *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* 2004 25 ILJ 2311 (SCA); *S v Lusu* 2005 2 SACR 538 (EC):paras. 11-12; *Msiza v S* 2022 ZAGPPHC 216 (23 March 2022):par. 21. Tax Ombud 2022:8.

51 *Gamede v Public Protector* 2019 1 SA 491 (GP):paras. 51-53.

52 *S v Van Rooyen*:paras. 16-30; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:paras. 70-74.

53 Tax Ombud 2022:5. See also *CSARS v Virgin Mobile South Africa (Pty) Ltd*:par. 35.

54 Croome & Olivier (2015:348) endorse the view that sec. 34 is "another right of administrative justice". However, it is submitted that, whereas sec. 33 entrenches rights to fair administrative justice, sec. 34 of the *Constitution* entrenches rights to the fair administration of justice.

55 In this article, the terms 'ADR process' and 'ADR procedure' are used interchangeably. These terms refer to the ADR mechanism fashioned in the new rules for purposes of the *TAA*.

56 *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC):par. 28. For an application of rule of law in tax administration, see *Pienaar Brothers (Pty) Ltd v CSARS*:paras.40-107.

3. AIMS OF THE ARTICLE, ITS SIGNIFICANCE AND ROADMAP

This article aims to hypothesise an answer to the following question: What is the source and scope of a taxpayer's substantive (as distinct from a procedural) right to fairness during ADR occurring under the *TAA*? To the extent that this entails an investigation into whether sec. 34 of the *Constitution* applies to ADR envisaged by sec. 107(5) of the *TAA*, the issue at hand is a "constitutional matter".[57] A survey of published literature reveals that the question forming the nub of this research has not yet been the subject of a peer-reviewed article. Therefore, this study has the potential to make a meaningful contribution in its field at the intersection of tax administration law and constitutional law.

The ensuing discussion involves a critical analysis of the new rules in Part 4, as well as their interpretation and that of sec. 34 of the *Constitution* in Part 6, using the established modes of textual, contextual, purposive, and teleological interpretation discussed in Part 5. Part 4 lays a firm foundation, by providing a broad overview of the import and effect of the new rules 13 to 25. Against that backdrop, Part 5 outlines the rules of interpretation crystallised in case law show. The discussion in Part 5 shows that the rigidity of a purely textual approach has been jettisoned in favour of a holistic interpretive mode, in which context and purpose are also important, while still applying juridical logic.[58] The interpretive philosophy discussed in Part 5 is then used in Part 6 when the issue formulated, in this instance, is sought to be answered. In Part 7, the conclusion pulls together the thrust of the main submissions supporting the thesis advanced in this article.

4. THE NEW RULES FOR ADR IN TAX ADMINISTRATION – A BROAD OVERVIEW

Flowing from the rule of law is a duty on the State to provide mechanisms for the effective, fair, and orderly resolution of disputes.[59] Sec. 180 of the *Constitution* stipulates that "[n]ational legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution". Chapter 9 of the *TAA* must be viewed in this light. Secs. 107(1), 115(1), and 133(2) of the *TAA* regulate a taxpayer's right of access to a Tax Board, Tax Court, and ordinary civil courts for the hearing of tax appeals. In this way, the *TAA* ensures that tax dispute resolution is orderly through institutionalised mechanisms. This is foundational to the stability of a structured, organised, efficient, and effective tax administration system.[60]

57 Sec. 167(7) of the *Constitution* reads: "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution." See *Saboath General Traders (Pty) Ltd t/a Sausage Saloon v Mthatha Mall* 2024 5 BCLR 633 (CC):paras. 60-65 (per Zondo CJ).

58 *Competition Commission of SA v Irwin & Johnson* 2022 2 CPLR 26 (CAC):par. 63.

59 *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC):par. 38.

60 The rule of law requires the stability of an orderly society (*Barkhuizen v Napier* 2007 5 SA 323 (CC):par. 31), in which there are "peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help" (*Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC):par. 22).

Tax litigation through the aforementioned appeals process can be rigid, costly, and time-consuming. It is consistent with SA's constitutional values for sec. 107(5) of the *TAA* to create for disputants an alternative dispute resolution mechanism aimed at promoting quicker and cheaper resolution of their tax disputes.[61] In this setting, the ADR procedure offers a specialised, informal, and flexible forum for the expeditious resolution of a dispute forming the subject of a pending tax appeal, provided the taxpayer and SARS mutually agree to use the mechanism created.[62] Therefore, while taxpayers have a right to request ADR for disputes subject to an appeal, taxpayers do not, *per se*, have a right to ADR.

The rules regulate the procedure for dispute resolution in the Tax Board, Tax Court, and at ADR. When the new rules are viewed through the prism of the BoR in accordance with sec. 39(2) of the *Constitution* (discussed in part 5), then it becomes evident that the new rules promote three constitutional values in dispute resolution occurring under the *TAA*. First, to ensure that dispute resolution in all its forms, whether through a trial, hearing, negotiation, or conciliation, occurs fairly in a tribunal or forum having dignity and integrity.[63] Secondly, to ensure the expeditious and cost-effective resolution of tax disputes.[64] Thirdly, to further the administration of justice in the context, and for purposes, of Chapter 9 of the *TAA*.[65]

In accordance with sec. 107(5) of the *TAA*, rule 13(1) provides that a taxpayer can, in a notice of appeal, record a willingness to participate in ADR.[66] On receipt of a taxpayer's request for ADR, SARS is obliged to consider the request and inform the taxpayer within 30 days of SARS' decision "whether or not the matter is appropriate for alternative dispute resolution". This is a factual question in each instance. If a taxpayer fails to request ADR but SARS "is satisfied"[67] that the matter may be resolved through ADR, then rule 13(2)(*a*) provides that "SARS must inform the appellant accordingly by notice" and then, under rule 13(2)(*b*), the taxpayer must deliver a notice stating whether the taxpayer agrees thereto (or not).

A decision by SARS that a specific dispute is inappropriate for resolution through ADR is quintessentially "administrative action" within the scope of this

61 See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 197.

62 Rule 17(h) obliges facilitators to "attempt to bring the dispute to an expeditious conclusion".

63 For ADR purposes, rule 17(c) obliges facilitators to "promote, protect and give effect to the integrity, fairness and efficacy of the alternative dispute resolution process"; rule 17(e) stipulates that a facilitator is duty-bound to "conduct himself or herself with honesty, integrity and with courtesy to all parties".

64 *CV v CSARS*:par. 38.

65 In *CT v MT* 2020 3 SA 409 (WCC):par. 37, Rogers J (as he then was) held: "The rules of court as a whole are meant to result in expeditious adjudication." In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC):par. 32, it was held that "the primary function of the rules of courts is the attainment of justice".

66 Tax Ombud 2022:10 recognises that taxpayers are entitled to make certain requests (such as for ADR).

67 For the legal meaning of "satisfied" and test to be applied, see *ITC* 1470 52 SATC 88:92.

term, as defined in sec. 1 of the *PAJA*,[68] read with sub-par. (*b*) of the term "decision" (as defined).[69] A decision of this nature coupled with its consequent refusal by SARS to give "approval, consent or permission" for ADR is, it is submitted, a reviewable "decision of an administrative nature" under the *PAJA*.[70] SARS is an "organ of state" (as defined)[71] with "executive power".[72] In accordance with sec. 239 of the *Constitution*, SARS is "an institution exercising a public power or performing a public function in terms of any legislation".[73] The words "any legislation" in this constitutional context is couched sufficiently broad to encompass the *TAA* and the new rules. The latter is subordinate legislation supplemental to, and forming an integral part of the *TAA*.[74]

A decision by SARS that a tax dispute is inappropriate for ADR, and a concomitant refusal to grant "approval, consent or permission" for ADR is arguably administrative decisions that "materially and adversely" affects a taxpayer's rights to, first, reasonable administrative action and, secondly, to expeditious and cost-effective dispute resolution. These latter rights are implied statutory rights – they are the corollary of SARS' duties under secs. 2 and 3 of the *TAA*. In terms thereof, SARS is obliged to ensure, *inter alia*, that the administration of tax acts occurs "efficiently and effectively".

The new rules are silent on the factors which are to guide SARS' determination of whether ADR "is appropriate". When making this determination, SARS must take into account relevant considerations and ignore irrelevant ones.[75] To this end, guidance may be found in the *TAA* provisions which regulate the circumstances when settlement of a dispute "is inappropriate"[76] as compared to when it "is appropriate".[77] It is submitted that

68 The relevant part of the term 'administrative action' is defined in the *PAJA* to mean "any decision taken … by – (a) an organ of State, when … (ii) exercising a public power or performing a public function in terms of any legislation … which adversely affects the rights of any person and which has a direct, external legal effect. …'. For a discussion of the test determining whether conduct is "administrative", see *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA):paras. 20-25.

69 The relevant part of the term 'decision' is defined in the *PAJA* (sec. 1) to mean "any decision of an administrative nature made … under an empowering provision, including a decision related to … (b) … or refusing to give a certificate, direction, approval, consent or permission". For the definition of "empowering provision", see sec. 1 of the *PAJA*.

70 In *Capstone 556 (Pty) Ltd v CSARS*; *Kluh Investments (Pty) Ltd v CSARS* 2011 6 SA 65 (WCC):par. 48, SARS' decision to decline a taxpayer's request under the *TAA* for the suspension of the statutory pay-now, argue-later rule was held to be administrative in nature. For the test as to whether a SARS decision is reasonable, see *Africa Cash and Carry (Pty) Ltd v CSARS* 2020 2 SA 19 (SCA):par. 67.

71 Sec. 1 of the *PAJA* (see "organ of state").

72 *CSARS v Virgin Mobile South Africa (Pty) Ltd*:par. 40.2.

73 *Pearse v CSARS* 2012 ZAGPPHC 75 (4 May 2012):paras. 48-51.

74 Sec. 1 of the *TAA* defines "this Act" as including "the regulations and a public notice issued under this Act" (emphasis added).

75 Sec. 6(2)(e)(iii) of the *PAJA*.

76 Sec. 145 of the *TAA*.

77 Sec. 146 of the *TAA*.

fairness, equity, and the best interests of the state and taxpayer alike ought to guide the decision as to whether ADR "is appropriate" in any case. Every matter would have to be considered on its own surrounding facts. Relevant considerations ought to include, *inter alia*, the probable duration of the appeal and potential cost of litigation for the state as compared to the *quantum* of tax disputed on appeal and SARS' prospects of success in court;[78] the nature and complexity of the disputed issues in the appeal;[79] whether pursuing the appeal *via* the courts is more advantageous for the state to promote tax compliance;[80] whether pursuing ADR would promote efficient and effective tax administration by SARS and be a better use of its resources;[81] the potential prejudice to the taxpayer if ADR is refused; any countervailing or compelling public interest in pursuing the appeal in court rather than resolution through ADR,[82] and any other relevant ground advanced by the taxpayer in support of the request for ADR.

The new rules also lack a provision entitling taxpayers to request reasons for a SARS decision rejecting ADR. The new rules lack a provision regulating the procedure for challenging a decision by SARS rejecting ADR. In an era of justification, the absence of accountability for a decision taken by SARS is a serious deficiency in the new rules which shows a lack of adequate infusion of democratic values and principles in tax administration envisioned by sec. 195 of the *Constitution*. Without an enforceable obligation on SARS to give reasons, the right of taxpayers to just administrative action and to enjoy the benefits of the *audi alteram partem* rule is violated. This may undermine the confidence of taxpayers in the ADR mechanism, a result to be avoided.[83]

The *PAJA* provides taxpayers with justiciable remedies.[84] These include the right to request written reasons for SARS' decision to declare a particular dispute inappropriate for ADR and, concomitantly, its refusal to authorise ADR.[85] Taxpayers can seek review of such administrative decision by application to a Tax Court or to the High Court.[86]

Irrespective of whether ADR occurs under rule 13(1) or (2), taxpayers are, under rule 13(3), deemed to have consented to its terms. The terms are geared to ensuring fair play during an ADR process. These include that participation of both parties is "with full reservation of their respective rights in terms of the procedures referred to in the other Parts of these rules" (rule 14(1)); that the ADR proceeding "will not be one of record" (rule 22(3)),[87] and that the ADR "is subject to the confidentiality provisions of Chapter 6 [of the *TAA*]" (rule

78 Sec. 146(b) of the *TAA*.
79 Sec. 146(c) of the *TAA*.
80 Sec. 145(c) of the *TAA*.
81 Sec. 146(a) of the *TAA*.
82 Sec. 145(b) of the *TAA*.
83 For the importance of giving reasons for an administrative decision, see *Trustees of the CC Share Trust v CSARS*:paras. 28-30.
84 *CSARS v Richard's Bay Coal Terminal (Pty) Ltd*:paras. 19-21.
85 Sec. 5 of the *PAJA*.
86 Sec. 6 of the *PAJA*. See the case authorities cited in fn. 32 above.
87 Rule 20(2) prohibits an ADR proceeding from being recorded electronically.

22(3)(*a*)).[88] Consequently, in accordance with rule 14(2), read with rule 22(3)(*b*), "any representations made or documents submitted in the course of the alternative dispute resolution proceedings will be without prejudice".[89]

Rule 15, read with rule 25, regulates the timing of ADR. Their provisions promote expediency. Rule 15(3) stipulates that the parties "must finalise" the ADR process within a finite 90-day period computed from its commencement date prescribed in rule 15(1).[90] In terms of rule 25(1), the ADR process terminates automatically on the day succeeding the lapsing of the prescribed 90 days, unless the parties agree to an extension of time. In terms of sec. 107(6) of the *TAA*, ADR suspends the taxpayer's appeal. Consequently, rule 15(2) stipulates that ADR "interrupts" all time periods prescribed in the new rules for a taxpayer's appeal.

Rule 16(2) stipulates that "[a] facilitator is only required to facilitate the proceedings if the parties so agree". Therefore, taxpayers and SARS can elect not to appoint a facilitator. If so, then rule 19(2)(*a*) provides that they must within 30 days from the commencement of the ADR period prescribed in rule 15(1), "determine a place, date and time" at which they will convene a meeting.[91] Rule 19(2)(*b*) stipulates that, if required, each party may notify the other, in writing, "which written submissions or any other document should be furnished or exchanged and when the submissions or documents are required".

88 Chapter 6 protects the privacy of 'taxpayer information' within the meaning of this term as defined in sec. 1 of the *TAA*. For a discussion of the confidentiality regime, see *Public Protector v CSARS* 2022 1 SA 340 (CC):paras. 14-28; *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* 2023 5 SA 319 (CC):paras. 123-195. See also Moosa 2020:190. Rule 22(2) provides that a facilitator who is not a 'SARS official' as defined in sec. 1 of the *TAA* will be regarded as such for purposes of Chapter 6. In so doing, rule 22(2) advances the protection of a taxpayer's right to confidentiality of information disclosed during ADR. As a result, rule 22 promotes taxpayer confidence in ADR as a trustworthy mechanism for dispute resolution.

89 Rule 22(3)(c) bolsters the confidentiality shield around disclosures made during ADR, by rendering any document disclosed and representations made during ADR to be inadmissible in all subsequent legal proceedings, except (i) where disclosure is made with the knowledge and consent of the party who made the representation or tendered the document concerned; or (ii) if the representation made or document concerned is already known to, or in the possession of, the party who seeks to disclose it; or (iii) if such representation or document is obtained by the party otherwise than during ADR, or (iv) if a senior SARS official is satisfied that the representation made or document disclosed is fraudulent.

90 Rule 15(1) provides that ADR commences on the date when consent is recorded under rule 13(1) or (2).

91 Rule 20(3) permits a taxpayer's participation in person, by telephone, or by video conference. If a taxpayer does not attend an ADR proceeding, then a facilitator may, under rule 20(4), permit the taxpayer to be represented by a person of the taxpayer's choice, but then "only in exceptional circumstances". For the test of "exceptional circumstances", see *CSARS v Rappa Resources (Pty) Ltd*:par. 22.

When ADR takes place pursuant to rule 19(2), then, it is submitted, the process takes the form of a negotiation.[92] This entails the parties managing their own dispute and engaging with one another directly in an attempt to resolve their dispute on mutually acceptable terms through dialogue coupled with submissions on matters of fact and/or law and employing the art of persuasion. This aligns with the express language used in rule 23(1).

In terms thereof, a dispute "may be resolved by agreement whereby a party accepts, either in whole or in part, the other party's interpretation of the facts or the law applicable to those facts or both". As such, rule 23(1) envisages agreement by acquiescence. If agreement is reached, then the prescribed procedure in rules 23(2) and (3) must be followed to ensure that the agreement is binding in law and implemented on a practical level. Rules 23(2)(*d*) and 24(2)(*e*) provide that an agreement or settlement "may be made an order of court either with the consent of both parties, or on application to the tax court by a party". Any such order can then be enforced in the same way as a judgment or order pursuant to an appeal. This is part of the administration of justice regulated by the *TAA*, as read with the new rules for ADR.[93]

In terms of rule 24(1), if the parties are unable to resolve their dispute by agreement, then they can undertake ADR in the form of a settlement negotiation pursuant to part F of Chapter 9 in the *TAA*. A settlement involves resolution of a dispute through compromise of a tax liability, culminating in an agreement being reached *inter partes*.[94] Ordinarily, formal settlement discussions can occur at any time outside of an appeal contemplated by sec. 107(1) of the *TAA*. However, when it occurs under rule 24(1), then the special procedure prescribed in rules 24(2) and (3) must be met. This serves to ensure that any resolution of the dispute is binding on SARS and that the settlement terms are implemented.

If, on the other hand, the parties agree to use a facilitator, then rule 16(3) stipulates that a senior SARS official[95] "must appoint" a facilitator within 15 days from the commencement of the ADR period. A senior SARS official must give notice of a facilitator's appointment to the taxpayer and relevant SARS official to whom a taxpayer's appeal is allocated. Since the parties do not identify a suitable facilitator and make such appointment jointly, ADR with the

92 Faris 1995:53-54. The crucial element of a negotiation as a form of ADR "is continuity until terminated by agreement or failure to settle" (Msando 2019:18). These features are embraced by rule 23(1), read with rule 25(1).

93 See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 25. In *President of the RSA v Modderklip Boerdery (Pty) Ltd*:par. 40, it was held: "The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders."

94 Haupt 2015:1016. See also secs. 145 and 146 of the *TAA*.

95 Sec. 6(3) of the *TAA* reads: "Powers and duties required by this Act to be exercised by a senior SARS official must be exercised by— (a) the Commissioner; (b) a SARS official who has specific written authority from the Commissioner to do so; or (c) a SARS official occupying a post designated by the Commissioner for this purpose."

aid of a facilitator is not formulated in the mould of mediation.[96] This view is reinforced by new rule 16(1)(*b*), unlike its predecessor, not obliging facilitators to have prior training in mediation, nor requiring proven skills or competencies in conflict management, or in dispute resolution.

Rule 16(4) prohibits the removal of a facilitator after the ADR process commences, except in the narrowly prescribed instances catered for in rule 16(4). In terms thereof, a facilitator may be removed at the facilitator's own request (rule 16(4)(*a*)); by the disputants' consent (rule 16(4)(*b*)); at the request of either disputant in circumstances where the relevant senior SARS official is satisfied that the facilitator is guilty of misconduct, or is incapacitated, or there has been incompetence or non-compliance by the facilitator with any of the duties imposed by rule 17 (rule 16(4)(*c*)), or a conflict of interest exists as contemplated by rule 18 (rule 16(4)(*d*)). By regulating the removal of facilitators in narrowly defined circumstances, rule 16(4) promotes a degree of independence for facilitators when performing their functions.

Rule 16(1)(*a*) provides that a facilitator "may be a SARS official".[97] This is enabled by rule 18(1) stipulating that a person is not disqualified from being a facilitator "solely on account of his or her … employment by SARS".[98] Rule 16(1)(*b*) contains the eligibility requirements for appointment as facilitator, namely an appointee "must be a person of good standing who has appropriate experience in the field of tax". Using a linguistic mode of interpretation (see Part 5 below), the word "must" has the same effect as 'shall' – it indicates the peremptoriness of the requirement concerned so that compliance therewith is mandatory. Non-compliance would potentially lead to invalidity. However, in accordance with the *Kirland* rule,[99] any appointment made in contravention of

96 For a contrary view, see Yokwana 2023:9. Msando (2019:16) usefully defines mediation as a voluntary forum for informal, principled negotiations facilitated by a neutral intermediary appointed by agreement between the disputants for their mutual benefit, and which mediator possesses specialised skills or expertise, has the requisite training and sufficient knowledge and/or experience to be able to guide the disputants to abandon their rights-position in favour of an interest-position which would, in so doing, unlock the potential for them to actually resolve the dispute on mutually agreeable terms.

97 In this context, 'SARS official' bears its technical meaning as defined in sec. 1 of the *TAA*, namely an employee of SARS, the Commissioner of SARS, and anyone contracted by SARS "for purposes of the administration of a tax Act and who carries out the provisions of a tax Act under the control, direction or supervision of the Commissioner".

98 Sec. 7 of the *TAA* reads: "The Commissioner or a SARS official may not exercise a power or become involved in a matter pertaining to the administration of a tax Act, if— (a) the power or matter relates to a taxpayer in respect of which the Commissioner or the official has or had, in the previous three years, a personal, family, social, business, professional, employment or financial relationship presenting a conflict of interest; or (b) other circumstances present a conflict of interest, that will reasonably be regarded as giving rise to bias."

99 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 3 SA 481 (CC):par. 90. The Kirland rule is also known as the Oudekraal principle. See *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers NO* 2020 4 SA 375 (CC):par. 1.

rule 16(1)(*b*) remains valid until it is set aside. Until then, all procedural rulings made by a facilitator would be legally enforceable.

The appointment of a SARS official as facilitator creates tension between the dual roles of the appointee: on the one hand, in his capacity as a SARS official, the appointee must, under the *TAA*, ensure that an outstanding tax debt is recovered; on the other hand, as facilitator, he is obliged to be objective, independent, and fair-minded toward a taxpayer. Accordingly, the appointment of a SARS official as facilitator runs counter to the spirit of the salutary rule that justice must be done and should manifestly be seen to be done.[100] In accordance with the *nemo judex in causa sua* principle of natural justice (see Part 2 above), a SARS official ought not to be a facilitator. On this basis, taxpayers would be justified in perceiving an ADR proceeding facilitated by a SARS official as skewed in SARS' favour. Such perception is, at least, as dangerous as the presence of actual bias on a facilitator's part and would dent taxpayers' trust and confidence in ADR as a fair process fostering the resolution of tax disputes. This is because a reasonable apprehension of bias in SARS' favour would ensue. In cases where this occurs, the efficacy of ADR as a tool for doing justice in dispute resolution within tax administration would be undermined.

A taxpayer aggrieved by a decision to appoint a SARS official as facilitator may deal with this situation as follows. First, a taxpayer may withdraw from the ADR process. Secondly, a taxpayer may request that SARS consent to the removal of the facilitator (rule 16(4)(*b*)) and that ADR then occur without a facilitator or with a different facilitator. Thirdly, if SARS does not consent to the removal of the facilitator and the taxpayer wishes to pursue ADR with a facilitator who is not a SARS official, then the taxpayer may seek judicial review of the appointment of the relevant SARS official as facilitator.

A decision to appoint a particular SARS official as facilitator is, it is submitted, "administrative action" under the *PAJA* which is susceptible to review.[101] Such a decision directly and adversely affects, first, the right of affected taxpayers to lawful and reasonable decision-making by SARS and, secondly, the right of affected taxpayers to fair ADR facilitated by an impartial person sufficiently independent of SARS.

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100 *Glencore Operations South Africa Proprietary Limited Coal Division v Minister of Mineral Resources* 2016 ZALCJHB 31 (3 February 2016):par. 98.

101 *Metcash Trading Ltd v CSARS*:paras. 40-42. To this end, it has been held: "What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not" (*President of the RSA v South African Rugby Football Union* 2000 1 SA 1 (CC):par. 141). An administrative decision must be judged with reference to the reasons given for it at the time of its making, and those reasons cannot be supplemented afterwards. See *Gordhan v Public Protector* 2020 ZAGPPHC 777 (17 December 2020):par. 52. If more than one reason is given and any of the reasons is found to be invalid, then the whole decision is reviewable and may be set aside. See *Gordhan v Public Protector*:par. 139; *Westinghouse Electric Belgium SA v Eskom Holdings* 2016 3 SA 1 (SCA):paras. 44-45.

Rule 16(1)(*b*) stipulates twin requirements for qualification to be appointed as a facilitator, namely the appointee "must be a person of good standing" and "has appropriate experience in the field of tax". Under the repealed rule 16(1)(*b*), a facilitator was required to be "a person of good standing of a tax, legal, arbitration, mediation or accounting profession". It is submitted that, in the context of the new rule 16(1)(*b*), the "of good standing" requirement envisages a person with utmost honesty and integrity, akin to the "fit and proper" person standard applicable to legal practitioners under the *Legal Practice Act*.[102] This interpretation accords with the duties of facilitators to ensure that dispute resolution through ADR is fair and equitable (rule 17(*b*)), and that facilitators protect, promote, and give effect to the fairness of the dispute resolution process (rule 17(*c*)). Like rules of court, the new rules do not create substantive law rights.[103] Accordingly, it is submitted that the duties imposed by rule 17 can, at best, only create a right to procedural fairness during ADR.

Furthermore, under the repealed rule 16(1), facilitators were appointed from a list established by a senior SARS official. Since the new rules lack a comparable provision, it is unclear as to how facilitators are to be identified for appointment. Once appointed, a facilitator must convene a consultation with the parties. In terms of rule 19(1), a facilitator must, within 20 days of his appointment, notify the parties of the time, date, and place for their meeting.

Under rule 19(1)(*b*), a facilitator should, if necessary, inform each party as to written submissions or other documents to be submitted or exchanged, and the timing thereof. Rule 19(3) confers discretion ("may") of a judicial nature on facilitators to "summarily terminate the proceedings without prior notice" if any of the requirements in rule 19(3)(*a*) to (*d*) are met (such as, if any party fails to attend the meeting at the designated time and place;[104] or any party fails to comply with a request made under rule 19(1)(*b*);[105] or a facilitator opines that the dispute cannot be resolved through ADR,[106] or if "any other appropriate reason" exists for termination of the ADR process).[107] This discretion must be exercised judicially and in a manner that best promotes the speedy resolution of a particular dispute, rather than hinder its finalisation.

102 *Legal Practice Act* 28/2014.
103 *CT v MT*:par. 19.
104 Rule 19(3)(a).
105 Rule 19(3)(b).
106 Rule 19(3)(c).
107 Rule 19(3)(d). A facilitator must exercise discretion judicially. This means that he must not misdirect himself as to the relevant facts and applicable law. If a wrong legal standard is applied, then the discretion was not properly exercised. See *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma*:par. 53.

The position of a facilitator is a creature of the new rules. As such, a facilitator has no inherent jurisdiction.[108] Facilitators derive their authority, functions, and powers exclusively from the new rules. Unlike with other creatures of statute whose powers may be extended by agreement between disputants (for example, magistrates operating under the *Magistrates' Court Act*),[109] no provision is made in the new rules for taxpayers and SARS to extend a facilitator's powers by mutual agreement. Rule 19(1) confers on a facilitator a finite list of narrowly defined powers to make binding decisions on procedural matters.[110] As with the old rules, the new rules also do not permit facilitators to authoritatively resolve a dispute by determining its outcome on merits.

Facilitated ADR under the new rules is akin to conciliation,[111] and is not akin to arbitration.[112] At best, rule 21(1) provides that the parties and the facilitator "may agree at the commencement of the proceedings that, if no agreement or settlement is ultimately reached between the parties, the facilitator may make a written recommendation at the conclusion of the proceedings". In the absence of such agreement, a facilitator is powerless to make any recommendation. Although non-binding on the parties, a facilitator's recommendation carries the potential to have serious implications on the question of a party's liability for costs in the pending appeal. This is because rule 21(3) provides that a written recommendation is admissible during subsequent legal proceedings if "it is required by the tax court for purposes of deciding costs under s 130 of the Act".

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108 See *Wingate-Pearse v CSARS* 2017 1 SA 542 (SCA):par. 6. For a useful discussion of the rules governing the interpretation of a provision regulating the authority of persons in charge of an ADR proceeding, see *Dis-Chem Pharmacies Ltd v Dainfern Square (Pty) Ltd* 2024 4 SA 489 (SCA).

109 *Magistrates' Court Act* 32/1944.

110 Rule 19(1) empowers a facilitator to make decisions related to (a) the date, time and place of the ADR meeting, and (b) the nature of any written submissions or documents to be furnished by, or exchanged between, the parties, and the date for doing so. Rule 19(3) empowers a facilitator to summarily terminate the ADR proceedings without prior notice if, for example, "(a) a party fails to attend a meeting" or "(d) for any other appropriate reason". Absence *per se* ought not to lead to termination, but absence without a valid reason may lead to termination. The catch-all provision in (d) is stated so broadly that it confers virtually untrammeled power on a facilitator to consider any reason he deems fit ("appropriate"). To be valid, the reason to terminate must be contextually apt. If not, the decision to terminate may be reviewed.

111 In the present context, 'conciliation' refers to a voluntary, informal process of engagement between disputants managed by a conciliator, in circumstances where the disputants seek to resolve their dispute out of court on terms mutually agreeable to them.

112 In the present context, 'arbitration' refers to the formal process of dispute resolution envisaged in the *Arbitration Act* 42/1965, namely the process in which an arbitrator is appointed by agreement between the disputants and the arbitrator is then empowered to hear evidence with a view to determining the outcome of the parties' dispute on its merits by issuing a binding arbitral award.

5. PHILOSOPHY FOR CONSTRUING THE *CONSTITUTION*, THE *TAA*, AND ADR RULES

Neither the *TAA*, the new rules, nor the *Constitution* expressly confer on taxpayers a substantive right to fair dispute resolution during ADR. Accordingly, their provisions are to be interpreted to determine if such a right forms part of their architecture and, if so, the scope (or content) thereof.

The process of interpretation is exclusively a question of law.[113] It is a unitary exercise that does not occur in stages.[114] In *Road Traffic Management Corporation v Waymark (Pty) Ltd*,[115] interpretation was explained to be an objective process of attributing meaning to words that consists of a simultaneous consideration of the language used in the light of the ordinary rules of grammar and syntax;[116] the context in which the relevant text appears,[117] and the purpose to which a provision is directed.[118] The considerations of

113 *International Business Machines v Commissioner of Customs and Excise* 1985 4 SA 852 (A):874A.

114 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA):par. 19.

115 *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 5 SA 29 (CC):par. 29. For a useful summary of the interpretive principles, see *Chisuse v Director-General, Department of Home Affairs* 2020 6 SA 14 (CC):paras 47-59; *Minister of Police v Fidelity Security Services* 2022 2 SACR 519 (CC):par. 34.

116 Grammatical interpretation entails textual analysis and ascribing meaning to words based on their legal traditions and linguistic usages in ordinary parlance. An understanding of the import of a text does not involve a selection of dictionary meanings favouring a certain result. See *Association of Amusement & Novelty Machine Operators v Minister of Justice* 1980 2 SA 636 (A):660; *S v Zuma* 1995 2 SA 642 (CC):paras. 14-15. Grammar, syntax, and dictionary meanings are not decisive – they are "merely principal (initial) tools rather than determinative tyrants" (*South African Police Service v Public Servants Association* 2007 3 SA 521 (CC):par. 17).

117 Contextual interpretation involves ascribing a meaning to words which is reconcilable with their setting and surrounds in the text concerned and in the legal instrument read holistically. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC):par. 90; *Standard General Ins v Commissioner for Customs and Excise* 2005 2 SA 166 (SCA):par. 25. In *Aktiebolaget Hassle v Triomed (Pty) Ltd* 2003 1 SA 155 (SCA):par. 1, it was held that, in matters of law and interpretation generally, "context is everything". The notion that "context is everything is not a licence to contend for meanings unmoored in the text and its structure" (*Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 1 SA 100 (SCA):par. 51).

118 Purposive interpretation gives effect to a meaning for words which, in the circumstances, is best suited to advance the fulfilment of the aims sought to be achieved by the instrument in which the words appear. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC):paras. 21-26; *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 5 SA 1 (SCA):par. 19; *Dube v Zikalala* 2017 4 All SA 365 (KZP).

text, context and purpose apply universally to the interpretation of primary and secondary sources of law, including the *Constitution*, the *TAA*, and the new rules.[119]

Context is fact- or circumstance-specific. Differences in the origins of the *Constitution*, the *TAA,* and the new rules provide different contexts for their respective interpretation. As regards the *TAA* and the subordinate (ministerial) legislation housing the new rules, the following extract is instructive as to the legally relevant contextual considerations:[120]

> In the first instance there is the injunction in s 39(2) of the Constitution that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. Third, where legislation flows from a commission of enquiry, or the establishment of a specialised drafting committee, reference to their reports is permissible and may provide helpful context. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.

As regards the new rules 13 to 25 (see Part 4), a purposive interpretation thereof entails understanding how their words and sentences fit into the larger structure or scheme of the new rules read holistically, and how they best give effect to the underlying aims of the *TAA*. Consequently, rules 13 to 25 are to be interpreted in a manner consistent with their aims in sec. 107(5) of the *TAA*; in a manner which best promotes achievement of the broader aims of the *TAA* stated in sec. 2 thereof as read with the statute holistically, and in a way which best enables rules 13 to 25 to efficiently and effectively fulfil their intended role.[121]

The *TAA*'s preamble records that the statute intends "... to provide for dispute resolution; … and to provide for matters connected therewith". To this end, Chapter 9 contains multiple provisions related to dispute resolution, including sec. 107 permitting dispute resolution through a Tax Court, Tax Board, and ADR. Sec. 103 empowers the Minister to make rules to regulate their processes. The new rules are geared to achieving the purpose of Chapter 9 of the *TAA* which is to ensure the efficient and effective resolution of tax disputes.

Accordingly, the genesis of the new rules for ADR is located in the heartland of Chapter 9 of the *TAA*. The subject of Chapter 9 appears from the chapter heading, "dispute resolution". Both the subject matter and heading of Chapter

119 See *CSARS v Bosch* 2015 2 SA 174 (SCA):par. 9.
120 *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA):par. 17.
121 *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC):par. 211.

9 form part of the *TAA*'s internal context.[122] Chapter 9 provides the backdrop and, therefore, the context for ADR rules 13 to 25.[123] Since these rules are integral to the achievement of the *TAA*'s aims related to dispute resolution, the *TAA* as a whole, and Chapter 9 particularly, is relevant external contextual material for interpretive purposes as concerns the new rules.[124]

Another relevant contextual consideration is the procedural role of rules 13 to 25.[125] They confer certain procedural rights only (not substantive ones). Sec. 2(*b*) of the *TAA* expressly mentions the conferral of taxpayer rights as part of the statute's underlying aims. A purposive interpretation of the ADR rules must underscore the promotion, protection, and fulfilment of the taxpayer procedural rights conferred for purposes of achieving the aim in sec. 107(5) of the *TAA*. Acknowledging this context and purpose aids in elucidating the meaning of the texts in ADR rules 13 to 25.[126]

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122 Other internal contextual material having an important gravitational pull for interpretive purposes include the format, structure, and content of a text, as well as its scope and subject matter (see *CSARS v United Manganese of Kalahari (Pty) Ltd*:par. 17). See also *AfriForum v University of the Free State* 2018 2 SA 185 (CC):par. 43. An instrument's subject matter, also referred to as its "pith and substance" (*OUTA v Minister of Transport* 2024 1 SA 21 (CC):par. 48), may comprise more than one topic (see OUTA v Minister of Transport:paras. 69, 87).

123 *Telkom SA SOC Ltd v CSARS* 2020 4 SA 480 (SCA):paras. 10-17.

124 Since a liberal approach is taken to contextualising legislation, consideration must be given to relevant external *indiciae* (such as a statute's social concerns, legislative history, the mischief it aims to address (if any), and any unrepealed statutes dealing with the same subject or which are *in pari* material). See *Commander v Collector of Customs* 1920 AD 510:522. This latter consideration is based on the principle that statutes are part of a single, harmonious legal system and ought to be construed together. See *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society* 2020 2 SA 325 (CC):par. 42.

125 See *S v Makwanyane* 1995 3 SA 391 (CC):par. 13.

126 The grammatical interpretation principles have three "interrelated riders" (*Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC):par. 28), namely provisions are to be interpreted purposively, contextually, and consistently with the *Constitution*. In *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society*:par. 18, an instructive guideline was issued regarding grammatical interpretation: "First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, 'promotes the spirit, purport and objects of the Bill of Rights', then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes."

The triad of text, context, and purpose cannot be used mechanically.[127] The words and concepts used in rules 13 to 25, and their relationship to the external world, "are not self-defining".[128] The inter-connectedness between their words and concepts, as well as the place of these rules in the scheme of dispute resolution under the *TAA* "constitutes the enterprise by recourse to which a coherent and salient interpretation is determined".[129]

Interpreters must show respect for any text being construed.[130] An interpreter's own value-system, intellectual philosophy, and subjective preferences play no role because this would transgresses the permissible limits of interpretation.[131] When having regard to relevant external contextual material for interpretive purposes, due consideration must be given to the principle that interpretation involves a greater emphasis on objectivism by virtue that the rule of law requires a "statutory [or other law] text should speak for itself".[132]

In accordance with established principles, ascertaining the Minister's intention when crafting the new rules is irrelevant for interpretive purposes.[133] The *Constitution* changed the context of all law, legal reasoning, and decision-making.[134] Sec. 39 requires interpreters to have a transformed mindset from

127 *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd*:par. 25. If a law-text is susceptible to more than one plausible interpretation, then a sensible meaning must be preferred over one causing insensible or unbusinesslike results, or that undermines the attainment of the legislature's goals. The meaning chosen ought to be the one which, in the circumstances, best achieves those objectives. See *Natal Joint Municipal Pension Fund v Endumeni Municipality*:par. 18; *Makate v Vodacom Ltd* 2016 4 SA 121 (CC):par 89.

128 *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd*:par. 50.

129 *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd*:par. 25.

130 Textual respect is a key interpretive principle. The result of textual disrespect "is not interpretation but divination" (*S v Zuma*:par. 18). See also *AM Moolla Group Ltd v CSARS* 2003 JOL 10840 (SCA):par. 20; *Kubyana v Standard Bank of SA Ltd* 2014 3 SA 56 (CC):par. 18.

131 *Silverback Technologies CC v CSARS* 2023 4 All SA 629 (SCA):par. 18.

132 *Choisy-Le-Roi Owners (Pty) Ltd v Municipality of Stellenbosch* 2022 5 SA 461 (WCC):par. 38. *In casu*, Binns-Ward J held: "The rule of law would be undermined if persons bound by a statute were expected to dig into its drafting history to find out whether it really bears the meaning that its language conveys or if government were able, relying on its drafting history, to apply it in a manner inconsistent with the language of the promulgated instrument." (par. 38)

133 *Mansingh v General Council of the Bar* 2014 2 SA 26 (CC):par. 27.

134 *Holomisa v Argus Newspapers Ltd* 1996 1 All SA 478 (W):486.

that which transcended interpretation during apartheid.[135] Secs. 39(1)[136] and (2)[137] impose a mandatory normative philosophy that gives interpreters no discretion.[138] Whereas sec. 39(1) guides the interpretation of the BoR, sec. 39(2) guides the interpretation of "any legislation". The word "any" extends the ambit of "legislation" to include primary and delegated legislation.[139] The commanding texture and tone of sec. 39(2) necessitates an interpretation of the legislation containing the new rules for ADR in a way that does not unduly limit a right entrenched in the BoR, but rather preserves the core (or substance) of any applicable fundamental right and, as such, best promotes respect for the democratic values infused into dispute resolution by way of the *BoR* through sec. 34 entrenched therein (such as fairness, equity, and justice).[140] In so doing, sec. 39 infuses the spirit of the BoR into the new rules and ensures that their "shape and colour"[141] may be informed by, *inter alia*, the values imbricated in sec. 34 of the *Constitution* (discussed in Part 6), so far as it is contextually relevant.[142]

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135 During apartheid, courts applied a strict, literal approach (or 'golden' rule) to interpretation. Its cardinal aim was ascertaining the fiction of parliamentary intent and to give effect thereto by stamping a particular meaning with the legislature's ascertained imprimatur. See *Treatment Action Campaign v Rath* 2008 4 All SA 360 (C):paras. 36-40.

136 Sec. 39(1) reads: "(1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." In accordance with sec. 39(1), constitutional rights are interpreted liberally, thereby resulting in their net being cast widely. By affording rights in the BoR a wide berth, its guarantees are able to play a transformative role.

137 For present purposes, the relevant part of sec. 39(2) reads: "When interpreting any legislation … every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." For the effect of 'every', see *Arprint Ltd v Gerber Goldschmidt (SA) Ltd* 1983 1 SA 254 (A):261. The "spirit, purport and objects of the Bill of Rights" is "to be found in the matrix and totality of rights and values embodied in the Bill of Rights", and "in the protection of specific rights" entrenched therein, when appropriate to do so. See *Fraser v ABSA Bank Ltd* 2007 3 SA 484 (CC):par. 47. For a discussion of sec. 39(2), see *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC):paras. 64-70.

138 *Phumela Gaming and Leisure Ltd v Grundlingh* 2007 6 SA 350 (CC):paras. 26-27.

139 The word 'any' is an indefinite term – unless the context indicates otherwise, 'any' is a word of wide import and unqualified generality. See *CIR v Ocean Manufacturing Ltd* 1990 3 SA 610 (A):618.

140 *Media 24 Ltd v National Prosecuting Authority: In re S v Mahlangu* 2011 2 SACR 321 (GNP):327-334; *Arendnes Sweefspoor CC v Botha* 2013 5 SA 399 (SCA):par. 19; *Makate v Vodacom Ltd*:par 89. The value-based interpretive mode enjoined by sec. 39 is not a licence to ignore the language of a law-text in favour of a "generalized resort to constitutional values" (*Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA):par. 39).

141 *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC):par. 51.

142 *Cool Ideas 1186 CC v Hubbard*:par. 150. See also Tran-nam & Walpole 2012:470.

6. A SUBSTANTIVE RIGHT TO FAIR ADR: SOURCE AND SCOPE

6.1 Is sec. 34 of the *Constitution* the source?

Based on the discussion above in Part 2, read with Part 4, it is evident that, during dispute resolution through ADR, taxpayers have a procedural and substantive right to fairness. While the procedural rights are, as discussed in Part 5, sourced in the new rules, the problem entails identifying the true source of a taxpayer's substantive right to fairness during ADR. An affirmative answer to the question in the sub-heading of this Part would give rise to a further question: Does a refusal by SARS to consent to ADR limit a taxpayer's right under sec. 34 of the *Constitution* in a manner that passes muster under sec. 36 of the *Constitution*?[143] Therefore, the main issue discussed in this Part has real significance in legal practice.

Sec. 34 of the *Constitution* guarantees the right of access to courts, tribunals, and forums for the purpose of resolving "any dispute that can be resolved by the application of law". By virtue hereof, sec. 34 benefits taxpayers for purposes of appeals to be adjudicated by a Tax Board, Tax Court, or any ordinary civil court as envisioned by secs. 107(1), 115(1), and 133(2) of the *TAA*.[144] In the context of tax administration, sec. 34 is closely associated with the administrative justice rights of taxpayers entrenched in sec. 33 of the *Constitution*. Sec. 34 ensures that meaningful expression is given to sec. 33 by review proceedings envisaged in the *PAJA*.[145] However, "any dispute" in sec. 34 does not encompass every legal dispute.[146] Therefore, sec. 34 does not apply to criminal proceedings instituted against taxpayers.[147]

Are ADR proceedings envisaged by sec. 107(5) of the *TAA* excluded from the remit of sec. 34? Interpreting the phrase "fair public hearing" in sec. 34 is a useful starting point to answer this question. A strict, literal interpretation thereof would confine the operation of sec. 34 to civil disputes litigated in courts,

143 As this secondary issue falls beyond this article's remit, it is not examined in this instance.

144 For the right of access to courts in regional and international instruments, see *Nedbank Ltd v Thobejane and similar matters* 2019 1 SA 594 (GP):paras. 56-64.

145 The right in sec. 34 must be viewed alongside any other right with which it forms "a web of mutually supporting rights" (*Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC):par. 27). Sec. 34 "forms part of a three piece composite of rights being sections 34, 33 and 32 and is referred to as a leverage right allowing litigants to leverage their other substantive rights. These are thus predominately [although not exclusively] procedural guarantees rather than rights to specific entitlements" (*Nedbank Ltd v Gquirana NO* 2019 6 SA 139 (ECG):par. 44).

146 The guarantees in sec. 34 of the *Constitution* do not include the rights to the choice of procedure or forum where the rights therein are to be exercised. See *Mukaddam v Pioneer Foods (Pty) Ltd*:par. 28. The right in sec. 34 is limited by statute (such as those disputed claims hit by the *Prescription Act* 68/1969). See *Le Roux v Johannes G Coetzee en Seuns* 2024 4 SA 1 (CC):paras. 29-34.

147 *S v Pennington* 1997 4 SA 1076 (CC):par. 46.

tribunals, and other forums to which the public have access as observers of the administration of justice. Such a narrow construction would have the undesirable effect of rendering sec. 34 inapplicable to proceedings in a Tax Court, Tax Board, and at ADR envisaged by the *TAA* because proceedings there are closed to the public.[148] As such, their proceedings may be construed as offensive to sec. 34 of the *Constitution*.

The reference in sec. 34 to a "public hearing" entrenches the 'open justice' principle, an incident of the constitutional values of openness, accountability, and the rule of law.[149] In this regard, it has been held that "[t]he glare of public scrutiny makes it far less likely that the courts [and, by extension, tribunals and forums] will act unfairly".[150] Therefore, by virtue of sec. 34 of the *Constitution*, read with sec. 32 of the *Superior Courts Act* (hereafter, the *SC Act*),[151] the default position in SA is that all litigants have a right to public civil trials or hearings, and the general public have a right of access to places where they occur (such as in courtrooms).[152]

However, the right in sec. 34 is not absolute – it does not have impregnable walls.[153] Therefore, in practice, the 'open justice' principle has, in appropriate instances, been relaxed, either by statute, order of court, or consensus *inter partes*[154] without sec. 34 being violated unconstitutionally.[155] For this reason, sec. 34 remains applicable to private arbitrations, to which the public have no access,[156] and to *in camera* proceedings (such as in a domestic violence court,[157] in a Children's Court,[158] and in a Tax Court).[159] Accordingly, a private ADR proceeding taking place under the new rules is not inconsistent with sec. 34 of the *Constitution*.

148 For example, sec. 124(1) of the *TAA* reads: "The tax court sittings for purposes of hearing an appeal under section 107 are not public." However, sec. 124(2) permits public access to the Tax Court if "exceptional circumstances" is shown to exist. For a discussion of the requirements in sec. 124(2), see *Structured Mezzanine Investments (Pty) Ltd v CSARS* 2022 ZAECGHC 38 (12 April 2022).

149 *Centre for Child Law v Media 24 Ltd* 2020 4 SA 319 (CC):paras. 92-93.

150 *City of Cape Town v South African National Roads Authority Ltd* 2015 3 SA 386 (SCA):par. 17; *Sibiya v RAF*:par. 13.

151 *Superior Courts Act* 10/2013.

152 *City of Cape Town v South African National Roads Authority Ltd*:paras. 16-18.

153 *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS*:par. 129.

154 Litigants can waive certain constitutional rights (such as to a public hearing). See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 79.

155 See *Savoi v National Prosecuting Authority* 2024 5 BCLR 653 (CC) for the procedural rules regulating an *in camera* 'judicial peek' of documents claimed to be protected by legal privilege.

156 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:paras. 64, 70.

157 Sec. 11 of the *Domestic Violence Act* 116/1998 (hereafter, the *DV Act*). The right to fairness in sec. 34 is not violated by the *DV Act*. See *Omar v Government of RSA* 2006 2 SA 289 (CC):paras 35-38.

158 Sec. 56 of the *Children's Act* 38/2005.

159 *Metcash Trading Ltd v CSARS*:par. 47.

The cardinal issue, for purposes of sec. 34, is whether, in terms of sec. 107(5) of the *TAA*, read with the new procedural rules, ADR involves a "hearing" at "another independent and impartial … forum" aimed at deciding a dispute through the application of relevant laws. Based on the special procedure prescribed for ADR (see Part 4 above), as amplified by the reasons advanced below in this Part, the answer to this question ought to be 'No'.

Sec. 34 entrenches the right to have a legal dispute "decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".[160] This extract must be interpreted in light of the triad of its express wording; sec. 34's purpose and role in the administration of justice, and the values of fairness, equity, and justice underpinning the rule of law required to be considered in accordance with sec. 39(1) of the *Constitution*. Having regard to all these considerations, it is submitted that sec. 34 envisages the resolution of civil disputes by arbiters "independent" of the disputants and "impartial" in the execution of their adjudicative functions. Sec. 34 demands that disputes falling within its net be "decided" by the application of relevant laws after a public or private "hearing" is conducted through a legal process which is both substantively and procedurally "fair".

For present purposes, the following considerations are instructive when evaluating whether ADR under the *TAA* involves dispute resolution, to which sec. 34 of the *Constitution* applies. First, when ADR takes the form of direct engagement between taxpayers and SARS, then disputes are resolved by consensus through discussion and persuasion – not by third party adjudication. Secondly, ADR taking the form of facilitated conciliation also does not involve dispute resolution by adjudication. Except in relation to certain procedural matters, a facilitator is not empowered to make any binding decision on disputed issues of fact or law. At best, facilitators may make non-binding recommendations that do not resolve ("decide") a dispute, but merely serve as a guide to the disputants. Thirdly, unlike dispute resolution processes to which sec. 34 of the *Constitution* is aimed, ADR under the *TAA* is a process that occurs on a without-prejudice basis and may not yield a decisive outcome or resolution to a tax dispute. In terms of sec. 107(5) of the *TAA*, ADR is no more than an "attempt to resolve" a dispute forming the subject of a pending appeal.[161] Fourthly, although submissions may be made at ADR by taxpayers and SARS,[162] no testimony or other evidence is led to prove or disprove either party's case.

160 For example, the CCMA, Tax Court, National Credit Regulator, and the National Consumer Tribunal.

161 In terms of sec. 105 of the *TAA*, a taxpayer may only dispute an assessment or a SARS decision envisaged by sec. 104 by way of the process of objection and appeal (not by ADR).

162 Rule 19(1)(b).

Consequently, it is submitted that ADR occurring under the auspices of the *TAA* is not encompassed by sec. 34 of the *Constitution*.[163] The logical implication hereof is that taxpayers cannot complain of a violation of a sec. 34 right when, for example,, SARS refuses to consent to ADR, or when a SARS employee is appointed as facilitator to a tax dispute in which SARS has an interest.[164] This state of affairs does not, however, render the ADR process crafted in the new rules to be inherently unfair and, concomitantly, constitutionally unfit for its intended purpose, because ADR is fashioned as a voluntary process for taxpayers and SARS alike.

Any taxpayer aggrieved by perceived unfairness during ADR is, as of right, entitled to terminate the ADR procedure at any time, or may disengage from the process altogether, or may refuse settlement of the dispute. In any such event, upon the lifting of the suspension pertaining to the taxpayer's pending appeal, it may then be prosecuted further in accordance with the provisions of Chapter 9 of the *TAA*. In this way, a taxpayer's fundamental right in sec. 34 of the *Constitution* remains respected and protected *ex lege*. Sec. 34 "is about being afforded an opportunity for a legal dispute to be determined fairly and in accordance with the court process".[165] Taxpayers retain access to this opportunity throughout ADR and after it terminates. This ensures that the promotion of fairness is not illusory but is practical and effective.[166]

6.2 Is the new rules or the *TAA* the source?

Even if the key research finding in Part 6.1 is determined to be wrong in law, then, owing to the principle of subsidiarity applied in constitutional law,[167] it must still be determined whether taxpayers have a substantive law right to fair ADR originating from a another source (such as the new rules or the *TAA*). This issue is investigated in this Part.

163 The view expressed in this instance must not be understood as laying down a general rule that all forms of alternative dispute resolution fall outside the scope of sec. 34 of the *Constitution*. Indeed, arbitration occurring under the *Arbitration Act* 42/1965 and *Labour Relations Act* 66/1995 is an alternative dispute resolution mechanism. Sec. 34 applies thereto. See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 64; *Nedbank Ltd v Gquirana NO*:par. 43.

164 It is beyond this article's scope to investigate whether any of the new rules limit any fundamental right enjoyed by taxpayers and then to examine whether any such limitation passes muster. For the relevant principles applicable in such context, see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC); *Huang v CSARS*: In re *CSARS v Huang* 2015 1 SA 602 (GP).

165 *Eke v Parsons* 2016 3 SA 37 (CC):par. 48.

166 See *Airey v Ireland* 1979 2 EHRR 305:par. 24.

167 In *My Vote Counts NPC v Speaker of the National Assembly*:par. 46, Cameron J explained subsidiarity as referring to "a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail".

6.2.1 The new rules

A taxpayer exercising the right of appeal conferred by sec. 107(1) of the *TAA* must follow the defined procedures for litigation in the Tax Board or Tax Court, as the case may be. The new rules regulate the form and process of these tribunals. Similarly, if a taxpayer and SARS agree to ADR, as envisaged by sec. 107(5) of the *TAA*, then the form and procedure thereof is regulated by the new rules 13 to 25. Although the new rules form part of the *TAA*, they stand on their own footing as subordinate legislation in the mould of regulations.[168] As such, the provisions of the new rules are to be examined to determine if they affect the substantive law by conferring on taxpayers a right to fair ADR. For the reasons advanced in this instance, it is submitted that they do not.

The new rules serve the same purpose as the rules regulating court procedures referred to in secs. 29(1) and 30(1) of the *SC Act*: they are aimed at the attainment of justice through procedural fairness.[169] The new rules regulate the procedures applicable to proceedings in the Tax Board, Tax Court, and at ADR. The new rules have the same status as the High Court Uniform Rules, the Supreme Court of Appeal rules, and the Constitutional Court rules, all of which are subordinate legislation[170] used to regulate, *inter alia*, tax appeals prosecuted through the hierarchy of the dispute resolution structures designated for this purpose by secs. 107(1), 115(1), and 133(2) of the *TAA*, read with secs. 16 and 29(3) of the *SC Act*.[171]

All rules of court envisioned by secs. 29(1) and 30(1) of the *SC Act* and the rules enacted under secs. 103(1) and (2) of the *TAA* (see fn. 17) are "concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law."[172] Consequently, the new rules 13 to 25, like their predecessor, deal with the procedure for the enforcement of substantive rights sourced elsewhere. The new rules do not themselves confer any substantive law right to fair ADR for dispute resolution purposes occurring under the *TAA*. At most, the new rules 13 to 25 assist in creating certainty of the form which ADR may take; define the procedures to be followed when initiating and conducting ADR envisioned by sec. 107(5) of the *TAA*, and confer procedural rights (such as to legal representation in narrowly defined circumstances).

168 In *CT v MT*:par. 12, Rogers J (as he then was) recorded: "The Uniform Rules [of court] are akin to regulations." For the reviewability of impugned ministerial rules and regulations under the *PAJA*, see *Nu Africa Duty-Free Shops (Pty) Ltd v Minister of Finance*:paras. 125-133.

169 *Giddey NO v JC Barnard & Partners* 2007 5 SA 525 (CC):par 16.

170 *Computer Brilliance CC v Swanepoel* 2005 4 SA 433 (T):par. 36.

171 Court rules "confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought" (*Mukaddam v Pioneer Foods (Pty) Ltd*:par. 31).

172 *CT v MT*:par. 19.

In the circumstances, the question as to the source of a substantive law right to fair ADR must be answered with reference to the substantive law governing tax dispute resolution discussed in this instance, namely the *TAA*. For this reason, attention is now turned thereto.

6.2.2 The *TAA*

Sec. 2 of the *TAA* records that this statute's underlying objectives include "to ensure the effective and efficient collection of tax by … (*b*) prescribing the rights and obligations of taxpayers and other persons to whom this Act applies; … and (*d*) generally giving effect to the objects and purpose of tax administration". Consistent with the aim in sec. 2(*d*), Chapter 9 of the *TAA* (secs. 101 to 150) deals with the subject of "dispute resolution", a key aspect of any credible tax administration system.

To that end, and in a manner consistent with sec. 2(*b*), taxpayers benefit from a suite of substantive and procedural rights prescribed by the *TAA*, as well as various procedural rights prescribed by the new rules. The corollary of the conferral of rights is a duty on SARS and its officials to respect them. Sec. 4(1) of the *TAA* imposes this obligation. It stipulates that "[t]his Act … binds SARS". In this context, reference to "[t]his Act" extends to include the new rules.[173] For present purposes, the key question to be answered is whether the *TAA* confers on taxpayers a substantive law right to *fair* ADR. It is submitted 'Yes'.

A substantive law right of the kind envisaged in this instance is grafted onto the landscape of the *TAA* by necessary implication when relevant provisions of Chapter 9 of the *TAA* and the new rule 17 are analysed and interpreted through the prism of the BoR, as required by sec. 39(2) of the *Constitution*.[174] In this regard, the following considerations are instructive. First, sec. 146 of the *TAA* contains the clearest indication that Parliament intends dispute resolution within the *TAA*'s framework to occur with due regard for substantive fairness as engendered in sec. 34 of the *Constitution* – not mere procedural fairness. In terms of sec. 146(*a*), settlement of a dispute by the Commissioner of SARS must be done on a "fair and equitable" basis, having regard to, *inter alia*, "overall fairness" to both taxpayers and SARS. Secondly, rule 17 imposes obligations on facilitators that promote ADR occurring in a manner that is both respectful of the dignity of taxpayers and procedurally as well as substantively fair as required by law, the rule of law, and the norms in sec. 34 of the *Constitution*. For interpretive purposes, the new rules form part of the *TAA*'s legal framework – they operate in tandem as part of a single, harmonious

173 See the definition of "this Act" in fn. 74.

174 By constitutional values transcending the process of interpretation, sec. 39(2) establishes what Sachs J, in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC):par. 46, referred to as the "never again" principle (*i.e.* never again will the rights of people to freedom and democracy be deprived or permitted to be taken away).

system of law in the sphere of tax administration.[175] Rule 17 obliges facilitators to act in accordance with the new rules "and the law"[176] – this includes the *Constitution*: to "seek a fair, equitable and legal resolution of the dispute";[177] to "promote, protect and give effect to the integrity, fairness and efficacy of the alternative dispute resolution process"[178] – this accords with basic values central to the rule of law, and to "act independent and impartial"[179] – this is consistent with the democratic hygiene in sec. 34 of the *Constitution*.

The right to a procedurally fair hearing embodied in sec. 34 of the *Constitution* includes access to legal representation. This is a cornerstone of fairness under the rule of law.[180] However, this entitlement is not absolute.[181] The right to legal representation may be limited by laws that pass muster under sec. 36 of the *Constitution*. Moreover, South African courts have not recognised a free-standing right to legal representation in *fora* other than courts of law.[182] Consequently, the absence of an automatic right under the new rules for taxpayers to be legally represented at ADR does not *per se* render ADR proceedings automatically unfair.

The analysis and interpretation of rule 17 and sec. 146 of the *TAA* undertaken in this instance demonstrate that the prescribed ADR procedure is infused with the rule of law ethos and culture underpinning the BoR and sec. 34 of the *Constitution*. In this way, an ADR process envisaged by sec. 107(5) of the *TAA* and regulated by the new rules enacted pursuant to sec. 103(2) of the *TAA* takes its "shape and colour"[183] from the democratic values and principles deeply imbricated in the *Constitution*.[184]

175 See *Independent Institute of Education (Pty) Ltd v KwaZulu Natal Law Society*:par. 42.

176 Rule 17(a). For the definition of "law" in this context, see fn. 26.

177 Rule 17(b) works differently to sec. 34 of the *Constitution*. The latter guarantees due process and fair justice – not a correct result or fair outcome. See *Eke v Parsons*:par. 48. Indeed, there is no equity about the levying of tax. See *Cactus Investments (Pty) Ltd v CIR* 1999 1 All SA 345 (SCA):349.

178 Rule 17(c).

179 Rule 17(d). By a parity of reasoning with the generally accepted principles of judicial independence (see *S v Van Rooyen*:par. 19), the requirement of independence under rule 17 entails the complete liberty of facilitators to resolve a tax dispute. No person, including another facilitator, should interfere or attempt to interfere with the way in which a facilitator conducts the ADR process and makes his or her recommendation. Unlike judicial independence under sec. 34 of the *Constitution*, rule 17 does not require institutional independence to protect facilitators against external interference.

180 *Mohlomi v Minister of Defence*:par. 14.

181 *Msiza v S*:par. 21.

182 *Speaker of the National Assembly v Public Protector*; *Democratic Alliance v Public Protector* 2022 3 SA 1 (CC):par. 43.

183 *My Vote Counts NPC v Speaker of the National Assembly*:par. 51.

184 *Cool Ideas 1186 CC v Hubbard*:par. 150.

7. CONCLUSION

This article shows that fairness is a critical ingredient for the validity of administrative action by SARS, and for the valid resolution of disputes between taxpayers and SARS through the processes legislated by the *TAA*, whether in the form of litigation or informal ADR. This article shows further that fairness is a central constitutional theme in three entrenched fundamental rights to which taxpayers are entitled, and which are relevant to dispute resolution under the *TAA*, namely to fair administrative action (sec. 33); to the fair resolution of tax appeals and other civil disputes (sec. 34), and to a fair criminal trial (sec. 35(3)).

Accordingly, this article demonstrates that, although sec. 34 of the *Constitution* does not apply to ADR proceedings occurring under the aegis of the new rules, the democratic values entrenched in sec. 34 are, in accordance with sec. 39(2), infused into the architecture of the ADR procedure envisaged by sec. 107(5) of the *TAA*.[185] However, fairness is a complex concept whose contours are not capable of precise delineation through an easy, all-encompassing definition.[186] For this reason, this article does not propose a comprehensive definition of fairness in the context of ADR occurring under the *TAA*. Suffice it to say that, in the context of ADR occurring pursuant to the *TAA*, read with the new rules, the scope of fairness involves both procedural fairness and substantive fairness, and a taxpayer's rights thereto must at all times be respected and protected by law, as shown in this article.

The new rules for ADR are still largely in their infancy. Therefore, the jury remains out as to whether they embed sufficient hallmarks of an equitable standard of fairness to sustain the conclusion that the defined ADR procedure in the new rules is fit for its intended goal of bringing about the resolution of a dispute in an efficient, effective, dignified, and credible way.

185 In terms of sec. 2 of the *Constitution*, all rules having the force of law must be constitutionally compliant.

186 Private persons are entitled to define fairness for purposes of dispute resolution occurring in the private sphere. See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*:par. 71. Nothing precludes the legislature from defining the outer or inner limits of fairness for ADR purposes under the *TAA*.

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