RESEARCH ARTICLE

S De Lange

Stellenbosch University, Faculty of Law, Department of Mercantile Law
ORCID: https://orcid.org/0000-0003-3939-5209

DOI: https://doi.org/10.38140/jjs.v48i2.7909

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2023:48(2):195-218

Date Published:
29 December 2023

SECRECY OF TAXPAYER INFORMATION AND THE DISCLOSURE THEREOF BY AN ORDER OF COURT IN TERMS OF THE *TAX ADMINISTRATION ACT* 28 OF 2011 AND THE *PROMOTION OF ACCESS TO INFORMATION ACT* 2 OF 2000

SUMMARY

The secrecy provisions of the *Tax Administration Act* 28 of 2011 (hereinafter, the *TA Act*) provide that taxpayer information may generally not be disclosed by the South African Revenue Service (hereinafter, SARS). One of the exceptions to the preservation of secrecy is when a court orders disclosure following an application regulated by secs. 69(2)(*c*), 69(3), 69(4), and 69(5) of the *TA Act*. This article considers this exception to taxpayer secrecy in terms of the *TA Act*, with a focus on the circumstances provided in sec. 69(5) of the *TA Act,* which must be met before the court may order disclosure. This is done by first considering the previous provisions relating to secrecy and the exception thereof by an order of court found in, for example, the *Income Tax Act* 58 of 1962, which applied before the commencement of the *TA Act*. The case law on the previous provisions and the more recent cases on the *TA Act* secrecy provisions are analysed. This article also considers the disclosure of taxpayer information by a court in terms of the *Promotion of Access to Information Act* 2 of 2000 (hereinafter, the *PAI Act*), in light of the recent finding by the Constitutional Court in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others*.[1] In this case, the majority of the court declared certain provisions of the *PAI Act* and the *TA Act* constitutionally invalid, which results in the mandatory disclosure of taxpayer information when it is in the public interest, as contemplated in sec. 46 of the *PAI Act*. The *PAI Act*, in addition to the *TA Act*, now allows for a court order to disclose information in terms of the public interest procedure if access was refused by SARS. This begs the question: What is the interaction between a *TA Act* court order to disclose taxpayer information and a *PAI Act* court order to disclose taxpayer information if the requirements of sec. 46 of the *PAI Act* are applicable and if access was refused by SARS?

1 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13.

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

1. INTRODUCTION

Chapter 6 of the *TA Act*[2] deals with the confidentiality of taxpayer information.[3] In general, taxpayer information may not be disclosed by SARS officials.[4]

The secrecy provisions are, however, not absolute and exceptions to the preservation of secrecy are found in a number of provisions in Ch. 6 of the *TA Act*.[5] This article focuses mainly on one of the exceptions to the secrecy of taxpayer information, namely when ordered by a court as provided for in sec. 69(2)(*c*) of the *TA Act*. Such a court order would then allow and require SARS to disclose taxpayer information which would, in the absence of the court order, be protected by the secrecy provisions.

Despite Ch. 6 of the *TA Act* being in force since 1 October 2012, no significant judgments have been reported on this chapter of the *TA Act* prior to 2020.[6] However, the provisions relating to the secrecy of taxpayer information have been before our courts (including the Constitutional Court) more recently in two separate legal battles, but all relating to the disclosure of the tax information of former president Jacob Gedleyihlekisa Zuma (hereinafter, Zuma).

1.1 Recent judgments

The following cases are collectively referred to as the first legal battle:

i. *Commissioner of the South Africa Revenue Service v Public Protector and Others* (hereinafter, the *Public Protector High Court case*);[7]

ii. *Public Protector v Commissioner for the South African Revenue Service and Others* (hereinafter, the *Public Protector Constitutional Court* case),[8] and

iii. *Public Protector South Africa v The Commissioner for the South African Revenue Service and Others.*[9]

---

2 *Tax Administration Act* 28/2011.

3 "Taxpayer information" is defined in sec. 67(1)(*b*) of the *TA Act* as any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.

4 See sec. 69(1) of the *TA Act*, ensured by secs. 67(2) and 253 of the *TA Act*.

5 For example, sec. 69(2) of the *TA Act*.

6 Even though the courts referred to certain provisions of Ch. 6 of the *TA Act* prior to 2020 in, for example, *Commissioner for the South African Revenue Service v Sassin* [2015] 4 All SA 756 (KZD) and *Reed v Minister of Finance and Others* 81 SATC 383, such cases did not substantively deal with the secrecy provisions in any detail.

7 *Commissioner of the South Africa Revenue Service v Public Protector and Others* [2020] 2 All SA 427 (GP).

8 *Public Protector v Commissioner for the South African Revenue Service* and Others 2021 5 BCLR 522 (CC).

9 *Public Protector South Africa v The Commissioner for the South African Revenue Service and Others* 2021 JDR 1601 (GP).

These cases dealt with the public protector requesting access to taxpayer information, which was denied.

The following cases are collectively referred to as the second legal battle:

i. *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service and Others* (hereinafter, the *Financial Mail High Court* case),[10] and

ii. *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* (hereinafter, the *Financial Mail Constitutional Court* case).[11]

In this second legal battle, the Constitutional Court recently confirmed the High Court order of constitutional invalidity of a number of secrecy provisions in both the *TA Act* and the *PAI A*ct.

Brief summaries of these cases are provided in sections 1.1.1 and 1.1.2 below, whereafter the relevance of these cases in the context of this article on the disclosure of taxpayer information by an order of court is addressed in section 1.2 below.

1.1.1 The three *Public Protector* cases

The first legal battle ended up in the Constitutional Court, after the High Court found that the public protector's power to *subpoena* during an investigation in terms of the *Public Protector Act* 23 of 1994 (hereinafter, the *Public Protector Act*) does not trump the prohibition of disclosure of taxpayer information in terms of the *TA Act*.[12] The High Court also found that SARS has just cause to withhold the taxpayer information in terms of sec. 11(3) of the *Public Protector Act*, read together with the *TA Act*'s secrecy provisions.[13]

Section 11(3) of the *Public Protector Act* provides that only a person who, without just cause, *inter alia*, refuses or fails to comply with a direction or request or refuses to answer any question put to him or her, shall be guilty of an offence. It was held by the High Court that SARS officials can and must withhold Zuma's taxpayer information from the public protector as they would do so in terms of "just cause" or with valid grounds,[14] as contemplated in sec. 11(3) of the *Public Protector Act*. The public protector was thus denied access to Zuma's taxpayer information and applied directly to the Constitutional Court for leave to appeal.

10 *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service and Others* 2021 JOL 51678 (GP).

11 *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13.

12 *Public Protector High Court*:par. 36.

13 *Public Protector High Court*:par. 54.

14 Based on sec. 69(1) of the *TA Act,* which provides that taxpayer secrecy must be preserved.

Leave to appeal directly to the Constitutional Court was refused in the *Public Protector Constitutional Court* case, except for the order relating to costs.[15] It was, held, *inter alia*, that there are no reasonable prospects of success of the appeal as the public protector did not bring a constitutional challenge to the validity of sec. 69(1) of the *TA Act*.[16] As such, no exceptional circumstances were established to allow for a direct appeal to the Constitutional Court in the interest of justice.[17]

It may be noted that the public protector, after the above judgment was handed down by the Constitutional Court, brought an application to the High Court for leave to appeal against the *Public Protector High Court* case, together with an application for condonation for the late filing of the application for leave to appeal.[18] Both applications for condonation and for leave to appeal were, however, dismissed.[19] The outcome of this legal battle thus remains as found in the *Public Protector High Court* case, in terms of which the secrecy of the taxpayer information was maintained in terms of sec. 69(1) of the *TA Act*.

1.1.2 The two *Financial Mail* cases

The second legal battle resulted in a confirmation order by the Constitutional Court of the High Court order that parts of secs. 67 and 69 of the *TA Act*, as well as parts of secs. 35 and 46 of the *PAI Act* are constitutionally invalid. Section 35 of the *PAI Act* provides for the mandatory protection of certain records of SARS in the sense that the information officer of SARS must refuse access to a record of SARS if it contains certain information. This provision essentially ensures taxpayers' secrecy, in line with sec. 69(1) of the *TA Act*.

Further, sec. 46 of the *PAI Act* allows for the mandatory disclosure of records in the public interest, despite the protection of those records in terms of certain other provisions in the *PAI Act*. However, before the *Financial Mail* cases, sec. 35 of the *PAI Act* was not listed as a provision that could be overridden by the so-called "public interest exception" of sec. 46 of the *PAI Act*.

It was argued by the media that the fact that such a public interest exception to taxpayers' secrecy is not available, is an unjustifiable limitation of the constitutional rights to freedom of speech and access to information.[20] Section

15 *Public Protector Constitutional Court*:paras. 13 and 28. The Constitutional Court set aside the order of the High Court relating to costs (*Public Protector Constitutional Court*:par. 41), but a further discussion thereof is not relevant for purposes of this article.

16 *Public Protector Constitutional Court*:par. 27. It should have been argued that sec. 69(1) of the *TA Act*, which does not allow for an exception to the secrecy of taxpayer information for the public protector, is unconstitutional on this basis.

17 *Public Protector Constitutional Court*:paras. 16 and 19-27.

18 *Public Protector South Africa v The Commissioner for the South African Revenue Service and Others* 2021 JDR 1601 (GP).

19 *Public Protector South Africa v The Commissioner for the South African Revenue Service and Others*:par. 32. As this case makes no further contributions for purposes of this article, it is not further addressed.

20 *Financial Mail High Court*:par. 6.2; *Financial Mail Constitutional Court*:par. 19.

36 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter, the *Constitution*) on the limitation of rights was applied by the courts to determine whether these rights could be justifiably limited by the secrecy provisions of the *TA Act*, as well as sec. 35 of the *PAI Act*, read together with sec. 46 of the *PAI Act*, which did not allow for the exception of disclosure in the public interest.[21]

The Constitutional Court confirmed that the exclusion of the public interest disclosure in terms of sec. 46 of the *PAI Act* is an unjustifiable limitation to, at least, the constitutional right of access to information in an open and democratic society based on human dignity, equality, and freedom.[22] The result is that sec. 35 of the *PAI Act* should be subject to sec. 46 of the *PAI Act* and that an additional exception to taxpayers' secrecy should apply in the event that the provisions of sec. 46 of the *PAI Act* are met.[23] The Constitutional Court did, however, not grant the media access to Zuma's taxpayer information, as the High Court ordered.[24] Rather, the Constitutional Court ordered that the media's request should be referred "back to SARS to deal with afresh in the light of this judgment".[25] SARS should thus now be offered an opportunity to consider the media's request for access to the taxpayer information after the declaration of constitutional invalidity and subsequent reading-in.

1.2 Rationale for this article

In light of these recent judgments, in which the courts considered the exceptions to the secrecy of taxpayer information in general, this article considers one specific exception to the prohibition of the disclosure of taxpayer information in more detail, namely when disclosure is ordered by a court. This exception is included in sec. 69(2)(*c*) of the *TA Act,* which provides that the taxpayer information secrecy provision of sec. 69(1) does not prohibit the disclosure of taxpayer information by a person who is a current or former SARS official by order of a High Court. Section 69(5) of the *TA Act* contains a list of circumstances which must be met before the court may grant such an order. This article aims to analyse these circumstances as this has not yet been done by the courts to any significant extent.

---

21 *Financial Mail Constitutional Court*:par. 62.

22 *Financial Mail High Court*:paras. 8.10-8.14; *Financial Mail Constitutional Court*:par. 195.

23 In this regard, the order of constitutional invalidity of the High Court was confirmed, but the declarations of invalidity are suspended for 24 months to enable Parliament to address the constitutional invalidity (*Financial Mail Constitutional Court*:par. 205). It was further held that sec. 35(1) shall be read into sec. 46 of the *PAI Act* and that a new exception is read into sec. 69(2) of the *TA Act* which allows for access to taxpayer information "where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act 2 of 2000" (*Financial Mail Constitutional Court*:par. 205). This reading-in applies in the interim, pending "any measures Parliament might take to address the constitutional invalidity" (*Financial Mail Constitutional Court*:par. 205).

24 *Financial Mail High Court*:par. 11.

25 *Financial Mail Constitutional Court*:par. 202.

Although the recent judgments referred to above all made reference to the exception to secrecy by an order of court, the respective cases were not actual applications to the court in terms of sec. 69(2)(*c*) of the *TA Act* for the disclosure of the taxpayer information.[26] It is, however, submitted that the cases are relevant for the purposes of this article for the following reasons. In the *Public Protector High Court* case (where SARS applied for a declaratory order that it was permitted and required to withhold the taxpayer information),[27] the public protector brought a "conditional counter-application to be granted taxpayer information on the strength of the court order"[28] in the event that her argument on the *subpoena* powers failed. The High Court dismissed the counter-application on procedural grounds and did not order access to the taxpayer information in terms of sec. 69(2)(*c*) of the *TA Act*,[29] nor consider the substance of the application in much detail. Nevertheless, some comments were made relating to the substantive aspects of such an application to court, which are addressed further in this article. In both the *Public Protector High Court* case and the *Public Protector Constitutional Court* case, the courts referred to sec. 69(2)(c) of the *TA Act* as a possible alternative for the public protector to access the required taxpayer information, namely by way of a court order instead of by means of a *subpoena*.[30]

Taking the circumstances of sec. 69(5) of the *TA Act* into account, the *Public Protector High Court* case and the *Public Protector Constitutional Court* case will be discussed further in this article with the aim of determining whether the court would, in fact, have been able to grant such an order, had there been no procedural defects in the public protector's conditional counter-application.

The *Financial Mail* cases also briefly referred to sec. 69(2)(*c*) of the *TA Act*, but the relevance of these cases for purposes of this article is the fact that a new exception to secrecy was created in terms of the *PAI Act*. This article lastly aims to investigate the interaction between a court order in terms of sec. 69(2)(*c*) of the *TA Act* and a court order in terms of the *PAI Act* if the requirements of the public interest exception apply.

In order to achieve these aims, this article first considers the disclosure of taxpayer information by an order of court in terms of the *TA Act* in section 2 below. The relevant *TA Act* provisions are analysed in light of the secrecy provisions applicable before the *TA Act* came into effect. Thereafter, in section 3, this article analyses the disclosure of taxpayer information by an order of court in terms of the *PAI Act* after which conclusions are reached in section 4 of this article.

---

26 The only exception to this is the "conditional counter-application" in the *Public Protector High Court* case discussed further in this section 1.2.

27 *Public Protector High Court*:par. 1.

28 *Public Protector High Court*:par. 40.

29 *Public Protector High Court*:paras. 40-46. It may be noted that the Constitutional Court refused leave to appeal against the High Court dismissal of the public protector's counter-application based on the lack of jurisdiction (as there was no constitutional issue) (*Public Protector Constitutional Court*:paras. 12-13). As such, the Constitutional Court made no further reference to the circumstances of sec. 69(5) of the *TA Act*.

30 *Public Protector High Court*:paras. 40-46; *Public Protector Constitutional Court*:par. 18.

2. DISCLOSURE OF TAXPAYER INFORMATION BY AN ORDER OF COURT IN TERMS OF THE *TA ACT*

2.1 Requirements in terms of the *TA Act*

Several provisions in the *TA Act* regulate the application referred to in sec. 69(2)(*c*) of the *TA Act*.[31] Most importantly, for purposes of this article, the *TA Act* provides in sec. 69(5) that the court may not grant the order, unless satisfied that the following circumstances apply:

a. the information cannot be obtained elsewhere;

b. the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results;

c. the information is central to the case; and

d. the information does not constitute biometric information.

Before analysing the *TA Act* provisions relating to the disclosure of taxpayer information by an order of court in more detail, specifically the circumstances that must apply before a court may grant an order, it is necessary to provide some background thereto. This background relates to the secrecy provisions applicable before the commencement of the *TA Act* provisions on 1 October 2012, which will provide guidance when the current position in terms of the *TA Act* is discussed thereafter.

2.2 Brief history of the position prior to the *TA Act*

Prior to 1 October 2012, the secrecy provisions were found in, for example, sec. 4 of the *Income Tax Act* 58 of 1962 (hereinafter, the *IT Act*) and sec. 6 of the *Value-Added Tax Act* 89 of 1991 (hereinafter, the *VAT Act*) (collectively referred to as "the previous provisions").[32] Although the wording of the previous provisions was slightly different when compared to each other, the crux of both sections was the preservation of secrecy and the prohibition of disclosure except by, *inter alia,* an order of a competent court. The fact that a court can grant an exception to secrecy is thus not new in terms of the *TA Act*, and numerous cases have dealt with requests in terms of the previous provisions for court orders to force SARS officials to disclose taxpayer information of a person other than the applicant. This has been described as the relaxation of the secrecy provisions by the exercise of a judicial discretion.[33] The previous provisions only referred to "a competent court", which is now clearly limited to a High Court only in terms of the *TA Act*.

The rationale for the preservation of secrecy in terms of sec. 4 of the *IT Act* is explained in *Welz and Another v Hall and Others* (hereinafter, *Welz v Hall*) to encourage taxpayers to make full disclosure to the revenue authority, knowing

31 See the procedural aspects relating to the application in secs. 69(3) and 69(4) of the *TA Act*.

32 For purposes of this article, the focus will be on the *IT Act* provisions and its case law relating to secrecy.

33 *Ontvanger van Inkomste, Lebowa en 'n Ander v De Meyer* NO 55 SATC 321:325.

that their information will be kept confidential and to avoid a disruption at the offices of the revenue authority.[34] This rationale was recently referred to again in the *Public Protector High Court* case in the context of the secrecy of taxpayer information in terms of the *TA Act*,[35] but the Constitutional Court has now taken a different stance on it.[36] It was held in the *Financial Mail Constitutional Court* case that it could not be accepted "either on the evidence or as a matter of inherent probabilities, that most taxpayers only comply (or only comply fully) with the law because of a guarantee of absolute confidentiality".[37]

Despite the fact that the previous provisions had no described circumstances such as those currently found in sec. 69(5)(*a*) to (*d*) of the *TA Act* before a court may grant an order, the court in *Welz v Hall* formulated so-called guidelines for when a court would consider an application in terms of sec. 4 of the *IT Act*. These guidelines can be summarised as follows, and are referred to again in section 2.3 below when the circumstances listed in sec. 69(5)(*a*) to (*d*) of the *TA Act* are discussed.

First, a court will be less likely to grant an order for the disclosure of the information if the information can be obtained somewhere else.[38] Secondly, the information that is requested from the revenue authority by the applicant must be central to the applicant's case.[39] Thirdly, whether the taxpayer, whose information is sought, agrees thereto or not is irrelevant as the disruption of

34 *Welz v Hall* 59 SATC 49:54-55.

35 *Public Protector High Court*:par. 44.

36 Similarly, it has also been stated in the *Financial Mail High Court* case that "there is no direct or factual evidence that taxpayers in South African (*sic*) rather make disclosure of their affairs because of the secrecy provisions as opposed to the coercion of the penalties and sanctions which follow upon nondisclosure" (*Financial Mail High Court*:par. 8.6). A further discussion on the merits of or the rationale for secrecy is, however, excluded from the scope of this article. For a more detailed discussion on whether the confidentiality provisions play such a vital role in the context of tax compliance, see Fritz & Van Zyl 2022:586-598.

37 *Financial Mail Constitutional Court*:par. 184.

38 *Welz v Hall*:55, where this first guideline is formulated as follows: "A court will be most reluctant to order disclosure of information if such information can be obtained elsewhere. A revenue official is a witness of last resort. There are procedures for procuring evidence for trial; foremost among these are discovery and inspection, and subpoena. The mechanisms within the realms of discovery and inspection ensure that full discovery is made. Mechanisms to ensure the presence of witnesses at court see to it that necessary documents are brought to court. It is only when these procedures have, through no fault of an applicant, yielded disappointing results that a court would ordinarily think of exercising its power in terms of s 4(1) of the Act."

39 *Welz v Hall*:55, where this second guideline is formulated as follows: "The information sought from the *fiscus* must be central to the applicant's case. I cannot conceive of a court making an order under s 4(1) where the information would serve only to establish peripheral issues. Moreover, the litigant's need must be pressing. It would not ordinarily, in my view, be sufficiently so if information from the Revenue was wanted merely to confirm or bolster some other less than satisfactory evidence."

the revenue authority is also a factor to be taken into account.[40] Fourthly, the court should attempt to balance the competing interests of the applicant who requests the information, the taxpayer whose information is sought and the revenue authority.[41] Fifthly, a judge may determine the parameters of the questioning of the revenue officials,[42] and lastly, the most important consideration is the nature of the litigation, as other aspects come into play if the information is requested for a criminal trial.[43]

It is clear from the reported judgments on sec. 4 of the *IT Act*, as illustrated below, that the applications to court for the disclosure of taxpayer information were brought in various divergent scenarios. For example, in *Welz v Hall*, where the abovementioned guidelines were formulated, the parties were litigants in a defamation case. Information was requested from the revenue authority in order to prove in the defamation case that the statements, which were alleged to be defamatory, were true and in the public interest.[44] In the Appellate Division case of *Ontvanger van Inkomste, Lebowa en 'n Ander v De Meyer* NO (hereinafter, *Lebowa*) the court mentioned that sec. 4 of the *IT Act* usually applied in the context where the preservation of secrecy, on the one hand, has to be weighed up against the interest of a litigant who requires access to the protected information to serve as evidence in a case,[45] of which *Welz v Hall* would be an example.

---

40 *Welz v Hall*:56, where this third guideline is formulated as follows: "The attitude of a respondent to an application such as this would not necessarily dictate the outcome. A respondent who consents to the release of information might yet run foul of the cardinal rule that the time of revenue officials is not to be taken up by disputes between private citizens unless a strong case therefor is made out."

41 *Welz v Hall*:56, where this fourth guideline is formulated as follows: "The court attempts to balance the competing interests of the litigants and the Revenue. As inevitably happens in a balancing process, each party is likely to achieve less than he might have desired. There is not necessarily an all or nothing solution. In return for having an official of the Receiver of Revenue testifying to anything at all, the parties adverse to the interests of the taxpayer may have to rest content with not examining him as freely as would have been their right otherwise."

42 *Welz v Hall*:56, where this fifth guideline is formulated as follows: "I would think that the process of oral examination of a witness is too fluid to be regulated by detailed rules made in advance. A presiding Judge may lay down the parameters within which it seems to him proper that questioning should take place, but the ruling is necessarily interlocutory. The questions themselves would have to be carefully monitored and the Judge would have to be ready to uphold an objection against the propriety of any question at any stage. If necessary the parameters might have to be revised. In every case no more than absolutely minimum inroads into secret material will be allowed."

43 *Welz v Hall*:56, where this sixth guideline is formulated as follows: "Although this point comes last, it is probably the most important. The nature of the litigation is crucial. If a taxpayer were to be subjected to some penalty because of the disclosure of fiscal information, a court would, in my view, not make an order for disclosure. This would apply for example in a criminal trial where, as far as I have been able to ascertain, the State has never even attempted to invoke this section in order to obtain evidence of an admission by an accused to the *fiscus*."

44 *Welz v Hall*:54.

45 *Ontvanger van Inkomste, Lebowa en 'n Ander v De Meyer* NO 55 SATC 321:326.

However, it is clear from the reported cases on sec. 4 of the *IT Act* (including *Lebowa*) that court orders for access to taxpayer information were also granted in other circumstances. For example, in *Lebowa*, taxpayer information was requested by a commission of inquiry. The court granted the request for taxpayer information in this scenario in order for the commission of inquiry to complete its mandate of investigating corruption and maladministration.[46] The Appellate Division in *Lebowa* emphasised that this was not a case of litigating parties, but that the disclosure was necessary in the public interest.[47]

Another example of a different scenario is *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* (hereinafter, *Jeeva*) where taxpayer information was requested (and the order was granted) in respect of companies in liquidation, of which the applicants were former directors, in order for the applicants to prepare themselves for an enquiry in terms of the *Companies Act* 61 of 1973.[48] The court emphasised that civil proceedings were not yet instituted,[49] but that the applicants were entitled to access information held by the revenue authority "for the exercise or protection of their rights while they are subjected to interrogation at an enquiry to be held under ss 417 and 418 of the Companies Act".[50]

It is clear from these scenarios that *Welz v Hall* had litigants and a court case separate from the court application for the access to taxpayer information, which has been described by the court as a category of applications for "orders requiring such information to be disclosed in suits between private individuals".[51] On the other hand, two examples of *Lebowa* and *Jeeva* have no litigating parties, nor was a court case involved (yet). The relevance hereof will become clear in section 2.3 below when the circumstances of sec. 69(5)*(a)* to (*d*) of the *TA Act* are addressed, some of which indicate that the application to court for the disclosure of taxpayer information, in terms of the *TA Act,* only applies in the context of litigation.

As the *TA Act* provisions for the exception to secrecy by a court order are now more detailed in comparison to the previous provisions, specifically the regulated circumstances in sec. 69(5)(*a*) to (*d*) of the *TA Act*, a closer analysis thereof is required and it begs the question: Based on the granting of orders under the previous provisions as seen in case law, would the same outcome be achievable in terms of the current provisions in the *TA Act* or do the *TA Act* requirements (for example, the circumstances in sec. 69(5)(*a*) to (*d*) of the *TA Act*) limit the court's power to grant an order?

46 *Lebowa*:327.
47 *Lebowa*:326, where the Appellate Division states that it agrees with this view of the court *a quo*.
48 *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 (SE):444.
49 *Jeeva*:442.
50 *Jeeva*:442.
51 *Silver v Silver* 1937 NPD 129:134, which dealt with a request for information in a dispute between spouses.

2.3 Circumstances when the court may grant an order for disclosure in terms of the *TA Act*

In terms of sec. 69(5)(*a)* to (*d*) of the *TA Act*, the court may not grant the order to disclose taxpayer information unless satisfied that a number of circumstances apply. The use of the conjunction "and" between the circumstance in (*c*) and (*d*) indicates that all four circumstances must apply before the court may grant the order.

In the *Financial Mail High Court* case, the court held that the circumstances of sec. 69(5)(*a*) to (*d*) of the *TA Act* limit the granting of a court order in terms of sec. 69(2)(*c*) of the *TA Act*. Although not explicitly stated by the court, this limitation probably refers to the fact that some of the circumstances, especially the circumstances of par. (*b*) and (*c*) of sec. 69(5) of the *TA Act* as further discussed in sections 2.3.2 and 2.3.3 below, limit the application for a court order for the disclosure of taxpayer information "in the course and for the purpose of judicial proceedings".[52] This would typically be the *Welz v Hall* scenario referred to above, with litigants and a court case separate from the court application for the access to taxpayer information.

These circumstances have, to date, been considered by our courts to a very limited extent,[53] but it seems that the legislature formulated at least some of the circumstances based on what was described as the guidelines in *Welz v Hall* referred to in section 2.2 above.[54] Arendse, Williams and Klue also state that strict requirements have been laid down by case law, presumably with reference to *Welz v Hall*, before the exception to secrecy in terms of a court order will be granted and that "[M]ost of these requirements have now been included in Tax Administration Act" (*sic*).[55] It is submitted, in accordance with the latest approach to the interpretation of legislation,[56] that these guidelines and their explanation from *Welz v Hall* can assist when interpreting the circumstances listed in sec. 69(5)(*a*) to (*d*) of the *TA Act*. An analysis of each circumstance now follows in sections 2.3.1 to 2.3.4 below.

52 Arendse *et al.* 2009:par. 3.16.

53 See section 2.3.1 below regarding the circumstance of whether the information can be obtained elsewhere, as considered in the *Public Protector High Court* case.

54 It is interesting to note that, despite the fact that some of the guidelines from the *Welz v Hall* case are now incorporated into the circumstances of sec. 69(5) of the *TA Act*, none of the reported judgments on the secrecy of taxpayer information, after the *Welz v Hall* case, specifically referred to or applied these six guidelines. *Lebowa* and *Jeeva* were both held prior to the *Welz v Hall* case.

55 Arendse *et al.* 2009:par. 11.1.

56 This is described in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593:par. 18 as follows: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production."

2.3.1 The information cannot be obtained elsewhere

This first circumstance of sec. 69(5) of the *TA Act* for granting the order to disclose taxpayer information, namely that the information cannot be obtained elsewhere, was considered in the *Public Protector High Court* case in the context of the public protector's conditional counter-application referred to in section 1.2 above. The High Court dismissed the counter-application and thus did not order access to the taxpayer information.[57] Despite dismissing the counter-application on procedural grounds, the High Court states that it would in any event not have granted the counter-application as the public protector did not argue, with reference to sec. 69(5)(*a*) of the *TA Act*, that the information could not be obtained elsewhere.[58]

According to the court, the information could be obtained, with the consent of the taxpayer, from the taxpayer's bookkeeper or auditors, and the public protector's failure to obtain the taxpayer's consent to access the information from the bookkeepers or auditors was not explained.[59] This seems to indicate that it is a requirement in terms of sec. 69(5)(*a*) of the *TA Act* to show to the court that the applicant first exhausted the option of obtaining consent from the taxpayer to access the required taxpayer information (arguably from SARS in terms of sec. 69(6)(*b*) or from someone else such as a bookkeeper or auditor), in order to establish that the information cannot be obtained elsewhere.

No other reported judgments exist on the meaning of sec. 69(5)(*a*) of the *TA Act*, but the first guideline from *Welz v Hall* can shed some further light on the requirement that the information cannot be obtained elsewhere. In this regard, the court said in *Welz v Hall* that it "will be most reluctant to order disclosure of information if such information can be obtained elsewhere".[60] The reluctancy referred to by the court is now stricter in terms of sec. 69(5)(*a*) of the *TA Act* as the court may not grant the order unless satisfied that the information cannot be obtained elsewhere. The court, therefore, no longer has a discretion if the information can be obtained elsewhere. *Welz v Hall* further explained the first guideline as a "revenue official is a witness of last resort".[61] This indicates that other mechanisms to obtain the information (in addition to the taxpayer's consent) must be exhausted first prior to an application to court. This links sec. 69(5)(*a*) of the *TA Act* to the second circumstance in sec. 69(5)(*b*) of the *TA Act*, namely that the primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results. It is submitted that the circumstances in sec. 69(5)(*a*) and (*b*) of the *TA Act* should, therefore, be considered together.

57 *Public Protector High Court*:paras. 40-46.
58 *Public Protector High Court*:par. 44.
59 *Public Protector High Court*:par. 44.
60 *Welz v Hall*:55.
61 *Welz v Hall*:55.

2.3.2 The primary mechanisms for procuring evidence under an Act or rule of court will yield or yielded no or disappointing results

The circumstances of sec. 69(5)(*a*) and (*b*), although linked, can also seem to be contradictory. It can be asked why, if the first circumstance requires that the information cannot be obtained elsewhere, the second circumstance requires that other means of obtaining evidence must first be exhausted prior to the application to court. Is it possible to procure evidence (from someone or somewhere other than SARS) under an Act or rule of court, in terms of the second circumstance, if the information cannot be obtained elsewhere (*i.e.*, the information can only be accessed from SARS), in terms of the first circumstance?

It is suggested that one way to interpret these two circumstances together is as follows: The applicant should show that the primary mechanisms for procuring evidence under an Act or rule of court were either not available or applicable, or were used but were unsuccessful and as such, the information cannot be obtained elsewhere (which does not mean that the information is not available elsewhere, but rather that an attempt was made and it could not be obtained elsewhere). Although the *TA Act* does not prescribe any hierarchy or order of the circumstances (*i.e.*, that (*a*) must be satisfied before (*b*)), it is submitted, in this regard, that the order of the two circumstances listed in sec. 69(5)(*a*) and (*b*) of the *TA Act* should at least change places for a more logical interaction between these two circumstances. This would then result in a situation where the information cannot be obtained elsewhere (the current circumstance in (*a*)) *after* the primary mechanisms for procuring evidence under an Act or rule of court were used (the circumstance in (*b*)).

The circumstance in sec. 69(5)(*b*) of the *TA Act* refers to the fact that the primary mechanisms for procuring evidence *will yield or yielded* no or disappointing results (own emphasis). This means that either the results were already disappointing, or they will be, which suggests that it is not necessary to actually exhaust the other mechanisms or procedures that are available if it can be shown that they will in any event not yield any or disappointing results.

The first guideline from *Welz v Hall* was whether the information can be obtained elsewhere (in line with the first circumstance in sec. 69(5) of the *TA Act* discussed in section 2.3.1 above). The court further explains this first guideline as follows, which again indicates the link between the first and second circumstance in sec. 69(5) of the *TA Act*:[62]

> There are procedures for procuring evidence for trial; foremost among these are discovery and inspection, and subpoena. The mechanisms within the realms of discovery and inspection ensure that full discovery is made. Mechanisms to ensure the presence of witnesses at court see to it that necessary documents are brought to court. It is only when these procedures have, through no fault of an applicant, yielded disappointing results that a court would ordinarily think of exercising its power in terms of s 4(1) of the Act.

62 *Welz v Hall*:55.

The additional caveat that was added by the court in *Welz v Hall*, which is not included in the second circumstance of sec. 69(5) of the *TA Act*, is that the disappointing results happened "through no fault of an applicant". It is further clear from the above quote, as well as arguably from the circumstance in sec. 69(5)(*b*) of the *TA Act*, that this is aimed at an applicant for a court order to access taxpayer information from SARS, if that information is required as evidence in an underlying court case between the parties. In *Welz v Hall,* the information was required in order to prove certain aspects in a defamation matter between the parties. This means that there should be some sort of a litigation matter between the applicant for the court order in terms of sec. 69(2)(*c*) of the *TA Act* and the taxpayer whose information is requested from SARS. However, as mentioned in section 2.2 above, some of the scenarios in which the information was requested and granted in terms of the previous provisions (for example, *Lebowa* and *Jeeva*) had no litigating parties or a court case. If sec. 69(5)(*b*) of the *TA Act* had to be applied to such a scenario, court rules would not be applicable. The remaining question is then, in light of the reference to "procuring evidence under an Act" in sec. 69(5)(*b*) of the *TA Act*, whether any other legislative provisions exist which provide for the procurement of evidence in scenarios where the parties are not litigating and where rules of court are consequently not relevant.

For example, when the public protector is investigating the tax affairs of a taxpayer and requesting access to taxpayer information with a court order in terms of sec. 69(2)(*c*) of the *TA Act*, the public protector would arguably have to show, in terms of sec. 69(5)(*b*) of the *TA Act*, that the primary mechanisms for procuring evidence under an Act will yield or yielded no or disappointing results (on the assumption that rules of court are not applicable to such an investigation). It is clear from the *Public Protector High Court* and *Public Protector Constitutional Court* cases that the *subpoena* powers, in terms of the *Public Protector Act*, would not be available as a mechanism for procuring taxpayer information in such an investigation. However, sec. 46 of the *PAI Act*, as amended by the court in the *Financial Mail Constitutional Court* case, could apply if its requirements are met to access taxpayer information if the disclosure would be in the public interest.

The question would then be whether sec. 46 of the *PAI Act* is a primary mechanism, as contemplated in sec. 69(5)(*b*) of the *TA Act*. If the answer is yes, it will be regarded as a prerequisite to follow the request for access to information procedure in terms of sec. 46 of the *PAI Act*, if the circumstances of this section are applicable on the facts. Further, the outcome should be that the information officer of SARS declines the request for access to the taxpayer information in order to satisfy the circumstance of sec. 69(5)(*b*) of the *TA Act*. In other words, this other mechanism in terms of the *PAI Act* to access the information must have been attempted and been unsuccessful (in the sense that it yielded no or disappointing results) prior to an application to court in terms of sec. 69(2)(*c*) of the *TA Act*. It is, however, not clear to what extent the *PAI Act* provisions, which allow for further mechanisms should a request for access to information be refused, should be pursued (as further discussed in section 3 below) to conclude that it yielded no or disappointing results, before

an application can be brought to court for an order in terms of sec. 69(2)(*c*) of the *TA Act*. In other words, if a request for access to taxpayer information is brought to SARS in terms of sec. 46 of the *PAI Act*, and denied, would this have satisfied the circumstance of sec. 69(5)(*b*) of the *TA Act*, or are further steps in terms of the *PAI Act* required to be exhausted before it can be said that the primary mechanisms for procuring evidence under an Act yielded no or disappointing results?

The preceding paragraph explains the circumstance of sec. 69(5)(*b*) of the *TA Act* in the context of an example where there is no litigation and where the rules of court are accordingly not applicable. However, there could possibly be a primary mechanism for procuring evidence under an Act that is applicable in such a scenario. This would apply in limited circumstances where the requirements of the public interest exception of sec. 46 of the *PAI Act* can be met, for example, when the media requires information as evidence for an article about a public figure. However, if there is no litigation, if the public interest exception in terms of the *PAI Act* does not apply, and if there are no other primary mechanisms for procuring evidence, the court must conclude that it is not possible to grant an order in this context as sec. 69(5)(*b*) of the *TA Act* cannot be met.

2.3.3 The information is central to the case

The third circumstance requires that the taxpayer information must be central to the case. Together with the circumstance of sec. 69(5)(*b*) of the *TA Act*, this circumstance of sec. 69(5)(*c*) of the *TA Act* that the information must be central to the "case" also seems to be aimed at an application for a court order in terms of sec. 69(2)(*c*) of the *TA Act* where there is an underlying court case for which the taxpayer information is required, *i.e.* the person who is requesting access to the information and the taxpayer are involved in court litigation.

In the context of parties in litigation, the second guideline from *Welz v Hall* that "the information sought from the *fiscus* must be central to the applicant's case"[63] is in line with sec. 69(5)(*c*) of the *TA Act*. The court further explains this second guideline as follows, which could similarly apply to the circumstance of sec. 69(5)(*c*) of the *TA Act*:

> I cannot conceive of a court making an order under s 4(1) where the information would serve only to establish peripheral issues. Moreover, the litigant's need must be pressing. It would not ordinarily, in my view, be sufficiently so if information from the Revenue was wanted merely to confirm or bolster some other less than satisfactory evidence.[64]

As the circumstance of sec. 69(5)(*c*) of the *TA Act* was practically *verbatim* copied from the second guideline in *Welz v Hall*, it is submitted that "case" refers to a court case of parties engaged in litigation.

63 *Welz v Hall*:55.
64 *Welz v Hall*:55.

Regarding the central role that the information must play, the court in *Silver v Silver*, in the context of a court order for the disclosure of information in a divorce matter, stated that it would be insufficient for granting an order, even if an applicant "might obtain some evidence which would assist him in establishing his contentions".[65] The information must, therefore, be crucial or indispensable to the case, but what is the position if there is no court case?

Although it is stated in section 2.3.2 above that the media would be able to meet the second circumstance when it requires information as evidence for an article about a public figure (by first making use of sec. 46 of the *PAI Act* to access the information), it would not be able to meet this third circumstance as there would be no "case" between the media and the public figure.[66] The same would apply in other scenarios where the parties are not litigating. The media's further obstacle to publish an article would be sec. 67(4) of the *TA Act*, which provides that a person (in this instance, the media) who receives information under, among others, sec. 69, must preserve the secrecy of the information and may only disclose the information to another person if the disclosure is necessary to perform the functions specified in the relevant sections. The exception to secrecy in terms of sec. 69(2)(*c*) of the *TA Act* is, therefore, not a suitable option for the media to access taxpayer information for purposes of an article.

It is stated in Warren Thompson's founding affidavit in the *Financial Mail High Court* case, with reference to this circumstance that the information is central to the case, that the disclosure by a court order in terms of sec. 69(2)(*c*) of the *TA Act* appears to apply only "if there is existing litigation in the High Court and the taxpayer information is needed for the litigation to proceed".[67] Similarly, in the *Financial Mail High Court* case, the court states that the exceptions to secrecy are "narrowly circumscribed" in the *TA Act*, with reference specifically to the circumstance of sec. 69(5)(*c*) of the *TA Act* when an application is brought in terms of the exception of sec. 69(2)(*c*) of the *TA*

65 *Welz v Hall*:135.

66 In this regard, Fritz and Van Zyl 2022:586-598 argue that "the court cannot order the disclosure of taxpayer information to third parties to enable them to collect evidence to build a case. Instead, a case must be pending, and the said information must be central to the adjudication of that case." Furthermore, they argue that the case can be between the applicant (*e.g.* the media) and someone other than the taxpayer, for example, if the media would "seek to hold the SARS, the SAPS, and the NPA responsible for the failure to take action and/or prosecute the taxpayer for tax offences". Therefore, there is an argument that "the case", for which the taxpayer information is requested, can be interpreted as a case before the court either between the applicant and the taxpayer (the *Welz v Hall* example) or a case between the applicant and someone other than the taxpayer. In both scenarios, however, the person who requests access to the information must need it for a case before the court.

67 The founding affidavit of Warren Thompson in the High Court matter between *Arena Holdings (Pty) Ltd t/a Arena Holdings and Others and South African Revenue Service and Others*, signed on 24 November 2019:par. 68.3.

Act.[68] Furthermore, the court states that "a court may only grant a disclosure order if the information "'is central' to a case before it",[69] which shows that there must a case before the court, in the litigation sense. This is presumably also one of the reasons why an application by the media in the *Financial Mail High Court* case was not brought in terms of sec. 69(2)(*c*) of the *TA Act* as the applicant was not engaged in litigation for which the information was required and would thus not have been able to show that "the information is central to the case".

Finally, one of the disclosures in terms of the *TA Act* to which the court refers in the *Financial Mail Constitutional Court* case is that "disclosure may be made under the order of a court in relation to proceedings before it and provided the information is central to the case".[70] Although the matter before the Constitutional Court was not an application in terms of sec. 69(2)(*c*) of the *TA Act*, and the statements in this regard can thus be seen as *obiter dicta,* the court's view is clearly that this exception to secrecy would apply only when other proceedings are also before the court for which the information is required.

Similar to what was said above in the context of sec. 69(5)(*b*) of the *TA Act*, if the circumstance of sec. 69(5)(*c*) of the *TA Act* is aimed at parties in litigation, the court must conclude that it is not possible to grant an order if there is no "case". This does, however, beg the question why both the *Public Protector High Court* and *Public Protector Constitutional Court* cases suggest that the public protector could have obtained a court order for the disclosure of the taxpayer information in terms of sec. 69(2)(*c*) of the *TA Act*,[71] despite the fact that there was no case, at least not in the litigation sense, between the public protector and the taxpayer in the investigation conducted by the public protector for which the information was required. It would not have been possible for the public protector to satisfy the court that all the circumstances of sec. 69(5) of the *TA Act* are met. This suggests that such a scenario where there is no existing litigation and where there is, as such, no case, was not contemplated as being a context in which sec. 69(2)(*c*) of the *TA Act*, read together with the circumstances of sec. 69(5) of the *TA Act*, should find application.

2.3.4 The information does not constitute biometric information

Lastly, a court may not grant an order for the disclosure of taxpayer information if such information constitutes "biometric information", as defined in sec. 1 of the *TA Act*. There was no similar guideline relating to biometric information formulated by the court in *Welz v Hall*. However, this circumstance can be

68 *Financial Mail High Court*:par. 7.7. Croome 2015:206 also states that the court may only grant the order "when the narrow grounds listed" are applicable.

69 *Financial Mail High Court*:par. 7.7.

70 *Financial Mail Constitutional Court*:par. 155.

71 See *Public Protector High Court*:paras. 13 and 45. Making use of sec. 69(2)(*c*) of the *TA Act* was also advised in the opinion of counsel (par. 12). See *Public Protector Constitutional Court*:par. 18.

justified, due to the utmost personal nature of biometric information. The disclosure of biometric information is extremely limited in terms of the other exceptions provided for in the *TA Act* in the context of a "tax offence" as defined in sec. 1 of the *TA Act*.[72]

This circumstance is not addressed in further detail in this article as it does not differentiate between parties that are litigating and parties that are not, at least not in a civil context.

2.4 Conclusion on disclosure of taxpayer information by an order of court in terms of the *TA Act*

The guidelines (or at least most of them) that were formulated by the court in *Welz v Hall* are similar to the first three circumstances that are currently found in sec. 69(5) of the *TA Act*. The difference, however, is that the circumstances of sec. 69(5) of the *TA Act* apply to any court order that is applied for in terms of sec. 69(2)(*c*) of the *TA Act*, whereas the guidelines from *Welz v Hall* were formulated in the context of court litigation and were not generally applicable to all the applications that were granted in terms of the previous provisions. As illustrated earlier, in other cases that were decided under the previous provisions such as *Lebowa* and *Jeeva*, there were no litigating parties nor was another court case involved. The result is thus now that the scope for court orders in terms of the *TA Act* for the disclosure of taxpayer information is narrower when compared to a court order in terms of the previous provisions. Such a limited scope for these court orders is aligned with the purpose of the secrecy provisions, namely, to ensure that taxpayer information remains confidential, with limited exceptions thereto.

Following a purposive interpretation, the exceptions to secrecy should be restrictively or narrowly interpreted. However, in order to ensure that the constitutional right of, for example, access to courts in terms of sec. 34 of the *Constitution* is not infringed upon, a litigant should at least be able to make use of sec. 69(2)*(c)* of the *TA Act* if access to protected taxpayer information is required to serve as evidence in a case.[73] As such, the current *TA Act* circumstances allow for access at least when the taxpayer information requested is central to the case, in order to meet the constitutional right to a fair hearing.

72 *TA Act*:sec. 69(7).

73 With reference to sec. 34 of the *Constitution*, another argument can also be made in respect of the limited scope for a court order in terms of sec. 69(2)(*c*) of the *TA Act*, specifically in light of the circumstances in (*b*) and (*c*) of sec. 69(5) of the *TA Act*. Although a further analysis hereof falls beyond the scope of this article, it can be asked: Is the right of access to court limited if a person cannot bring a case to the court without the protected taxpayer information, and if the circumstances of sec. 69(5) of the *TA Act* cannot be met, to access such protected taxpayer information? If the answer is 'yes', is this limitation reasonable and justifiable in terms of sec. 36 of the *Constitution*? In this regard, see fn. 66.

Despite this conclusion that the scope for court orders in terms of the *TA Act* is now narrower, the fact that the disclosure of taxpayer information is now also possible in terms of the *PAI Act*, after the *Financial Mail Constitutional Court* case, has opened another avenue to approach the courts for access to taxpayer information beyond the *TA Act*.

3. DISCLOSURE OF TAXPAYER INFORMATION BY AN ORDER OF COURT IN TERMS OF THE *PAI ACT*

3.1. Introduction

The Constitutional Court recently found that the public interest exception of sec. 46 of the *PAI Act* also applies to sec. 35 of the *PAI Act* (see section 1.1.2 above for a brief discussion of the *Financial Mail* cases).[74] The order in the *Financial Mail Constitutional Court* case also includes that sec. 69(2) of the *TA Act,* which provides for the exceptions to secrecy, shall be read as if it contained an additional subsection which provides that the disclosure of taxpayer information is not prohibited by SARS where access has been granted for the disclosure of the information in terms of the *PAI Act*.[75]

While a detailed analysis of the *PAI Act* falls beyond the scope of this article, a few brief comments regarding the procedure in terms of the *PAI Act* to access information are made to illustrate how taxpayer information can be accessed by an order of court in terms of the *PAI Act* when the requirements of sec. 46 of the *PAI Act* are met.

3.2 The *PAI Act* procedures to access taxpayer information

The right of access to records of public bodies (such as SARS)[76] is regulated by sec. 11(1) of the *PAI Act* which provides that a requester must be given access to a record of a public body if that requester complies with all the procedural requirements of the *PAI Act* relating to a request for access to that record and access to that record is not refused in terms of any ground for refusal contemplated in Ch. 4 of Part 2 of the *PAI Act*. Section 35 of the *PAI Act* provides for such a ground of refusal as certain SARS records are mandatorily protected, which is in line with the general secrecy provision of sec. 69(1) of the *TA Act*. Section 46 of the *PAI Act*, however, allows for exceptions to certain mandatory protections.

Following the *Financial Mail Constitutional Court* case, sec. 46 of the *PAI Act* is now also applicable to sec. 35 of the *PAI Act* and is thus a manner to request access to taxpayer information from SARS. If a request for access to information is brought to an information officer in terms of sec. 46 of the *PAI Act*, and this request is refused, a number of mechanisms are available in terms of the *PAI Act*. For example, sec. 74 of the *PAI Act* provides for an internal appeal

74 *Financial Mail Constitutional Court*:par. 205.
75 *Financial Mail Constitutional Court*:par. 205.
76 *PAI Act*:sec. 2(3) confirms that SARS is a public body for purposes of the *PAI Act*.

and sec. 77A of the *PAI Act* allows for complaints to the information regulator established in terms of the *Protection of Personal Information Act* 4 of 2013. Thereafter (or even immediately after the request for access to information was refused, if the right to internal appeal or a complaint to the information regulator is not applicable),[77] secs. 78 and 82 of the *PAI Act* read together allow that an application can be brought to court for an order that is just and equitable. As sec. 82(*b*) of the *PAI Act* allows the court to order the information officer of a public body to take such action as the court considers necessary, the court may order that SARS makes the information, to which access was initially refused in terms of sec. 46 of the *PAI Act*, available to the person who requested the information.[78]

It is, therefore, concluded that a person who requests access to taxpayer information held by SARS in terms of sec. 46 of the *PAI Act* will also be able to approach the court for an order to access the information and achieve an outcome that would be similar to an order in terms of sec. 69(2)(*c*) of the *TA Act*. However, a court order in terms of the *PAI Act* would not be subject to, for example, the circumstances that are listed in sec. 69(5) of the *TA Act.* Accordingly, the problematic aspects thereof that were discussed in section 2.3 above, relating to some of those circumstances when the parties are not litigating, will not arise when an application is brought to the court in terms of the *PAI Act*.

What is, however, an important distinction between a court order in terms of the *PAI Act* and a court order in terms of sec. 69(2)(*c*) of the *TA Act* is the application of sec. 67(4) of the *TA Act.* It would make no sense for the media, for example, to make use of the *TA Act* for applying for a court order as sec. 67(4) of the *TA Act* would require the media to preserve secrecy of the information obtained and would thus not be able to publish an article thereon. However, the Constitutional Court has now ordered that sec. 67(4) of the *TA Act* should be read as if this prohibition is not applicable to information received in terms of the *PAI Act*.[79]

Therefore, the *PAI Act* route to access taxpayer information is more favourable to the extent that the limitation of sec. 67(4) of the *TA Act* does not apply, and that the circumstances of sec. 69(5) of the *TA Act* are not required to be met. However, despite not being subject to the requirements of the *TA Act*, the requirements of sec. 46 of the *PAI Act* must be met.

77 *PAI Act*:secs. 78(2)(*a*), 78(2)(*c*), and 78(2)(*e*).

78 *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 3 SA 315 (SCA):par. 10 confirms that the court is allowed to grant an order for access to the information that was refused under sec. 46 of the *PAI Act*.

79 *Financial Mail Constitutional Court*:par. 205.

3.3 The requirements of sec. 46 of the *PAI Act* in the context of tax

Section 46 of the *PAI Act* provides that a request for access to a record (including taxpayer information) must be granted by SARS if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with the law or an imminent and serious public safety or environmental risk.[80] In addition thereto, the public interest in the disclosure of the record must clearly outweigh the harm contemplated in the provision in question.[81] It has been held, on the one hand, that sec. 46 of the *PAI Act* is a two-part test, meaning that if a record reveals evidence of, for example, a substantial contravention of the law, it does not mean that the disclosure thereof is automatically in the public interest.[82] On the other hand, it was stated in the *Financial Mail Constitutional Court* case that the considerations of serious criminality, imminent environmental risks or health risks "are, objectively, sufficiently serious in the public interest to warrant lifting the cloak of confidentiality that would otherwise vest in information worthy of protection by virtue of private or public considerations",[83] which seems to indicate that it is not necessarily a two-part test. However, despite this statement, the court continued to state that the second part of sec. 46 of the *PAI Act* is "an exercise that requires that the public interest must quantitatively outweigh the harm contemplated",[84] which illustrates that a weighting exercise is still required, although the requirements of sec. 46(a) of the *PAI Act* are met.

It is submitted that, in a tax context, the disclosure of taxpayer information would seldomly reveal evidence of an imminent and serious public safety or environmental risk. Therefore, sec. 46 of the *PAI Act* would more likely apply if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with the law. In this regard, it has been held that the word "substantial" does not require anything more than a contravention of, or failure to comply with the law as a contravention or failure remains a contravention or failure, irrespective of whether it is substantial or minor.[85]

In addition, the public interest in the disclosure of the record must clearly outweigh the harm contemplated in the provision in question. The harm that is contemplated in this regard, that will follow from the disclosure,[86] is a breach of the right to privacy.[87] It has been held that "neither the legitimate expectations

80 *PAI Act*:sec. 46(*a*).
81 *PAI Act*:sec. 46(*b*).
82 *De Lange and Another v Eskom Holdings Ltd and Others* [2012] 1 All SA 543 (GSJ):par. 138.
83 *Financial Mail Constitutional Court*:par. 141.
84 *Financial Mail Constitutional Court*:par. 143.
85 *Centre for Social Accountability v Secretary of Parliament and Others* 2011 JOL 27518 (ECG):par. 93.
86 *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 3 SA 315 (SCA):par. 13.
87 *Centre for Social Accountability v Secretary of Parliament and Others* 2011 JOL 27518 (ECG):par. 87.

of society nor the public interest are concerned with trivial group interests, idle gossip or immaterial issues of public interests"[88] and that the public must have an interest in the material, which is more than "material which is interesting to the public".[89] The typical example of where this occurs is where taxpayers have a public interest in the spending of public money by members of parliament, which has been held not to be a case of "idle gossip, or public curiosity about what in truth are trivialities",[90] and where it would be possible to show that the public interest in the disclosure of the record outweighs the harm that follows from the disclosure.

It is clear from the requirements of sec. 46 of the *PAI Act* that taxpayer information will not easily be accessible. It has been commented on sec. 46 of the *PAI Act* that "these conditions set the bar high, so that the public interest override will seldom be invoked, but it nevertheless amounts to an important safety net".[91] More specifically in the context of tax, the Constitutional Court held that its effect is still to maintain secrecy, but at the same time, it provides "a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest".[92]

Therefore, although the *PAI Act* offers another avenue to request a court order for access to taxpayer information held by SARS, in terms of which the *TA Act* requirements are not applicable, it is not necessarily an easier route as the requirements of sec. 46 of the *PAI Act* will only apply in limited circumstances.

4. CONCLUSION

It has been shown in this article that the current requirements of the *TA Act* for a court order to access taxpayer information from SARS limit the court's power to grant the order in comparison to the previous provisions. This applies, for example, when the person who requests access to taxpayer information held by SARS and the taxpayer, about whom the information is requested, are not engaged in litigation, for which the information is required. In this regard, it is welcomed that an additional avenue was created in terms of which taxpayer information can now be accessed through the *PAI Act* where the fact that the parties are not engaged in litigation does not play a role.[93] Furthermore,

88 *Centre for Social Accountability v Secretary of Parliament and Others*:par. 103.

89 *Centre for Social Accountability v Secretary of Parliament and Others*:par. 103, with reference to *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA):1212 in a different context.

90 *Centre for Social Accountability v Secretary of Parliament and Others* 2011 JOL 27518 (ECG):par. 102, with reference to the English case of *Corporate Officer of the House of Commons v Information Commissioner and Others* [2009] 3 All ER 403:par. 15.

91 Tushnet *et al.* 2013:224.

92 *Financial Mail Constitutional Court*:par. 144.

93 In this regard, I do not agree with the argument of Fritz and Van Zyl 2022:586-598 that "there was already an avenue open to the applicants" in the *Financial Mail High Court* case, with reference to sec. 69(2)(c) of the *TA Act*. It would be ineffective to have an avenue (such as being able to apply to court), if it is not possible to meet the circumstances that are required for the court to grant the

due to the expansion of sec. 67(4) of the *TA Act*, the *PAI Act* route is even more favorable.

However, the application of sec. 46 of the *PAI Act* has also been shown to be very limited. The *Financial Mail Constitutional Court* case specifically dealt with a former president's taxpayer information. It was also stated in Warren Thompson's founding affidavit in the *Financial Mail High Court* case that the relief sought, namely that the public interest exception of sec. 46 of the *PAI Act* should also apply to taxpayer information, "would leave the current confidentiality regime undisturbed for the vast majority of taxpayers. Only public figures – and particularly senior public figures – might lose some confidentiality, and even then only if the robust requirements in the public-interest override are met".[94] However, the Constitutional Court remarked, in line with the equality principle, that "when the public interest justifies the disclosure of their personal information, it should not matter whether they are high-profile people or ordinary citizens".[95]

The identity of the taxpayer should thus not play a role when applying sec. 46 of the *PAI Act*, but the scope of this avenue to access taxpayer information with an order of court through sec. 46 of the *PAI Act* is still extremely limited. A situation such as, for example, *Jeeva*, where an order for access to information held by SARS was granted under the previous provisions, which would not have met the circumstances of sec. 69(5)(*a)* to (*d*) of the *TA Act,* would probably also not have met the requirements of the public interest exception of sec. 46 of the *PAI Act*. The current position to access taxpayer information held by SARS with a court order, even with the application of the public interest exception of sec. 46 of the *PAI Act* applicable to taxpayer information, is, therefore, still more strict when compared to the previous position in terms of the *IT Act* and the *VAT Act,* as the additional avenue for access to information in terms of the *PAI Act* will only assist an applicant in limited circumstances. In cases such as *Lebowa,* held under the previous provisions, it was already clear that the disclosure of taxpayer information is necessary in the public interest in certain circumstances. It would not have been possible for the court to grant the order in terms of sec. 69(2)(*c*) of the *TA Act* on the facts of *Lebowa*, whereas a request for access in terms of sec. 46 of the *PAI Act* would have been more likely to succeed.

---

order. Fritz and Van Zyl acknowledge that "a case must be before the court", and this was not present on the facts of the *Financial Mail High Court* case. Hence, it would not be possible to meet the circumstance of sec. 69(5)(*c*) of the *TA Act*. Furthermore, requiring an applicant to follow the route of applying to court in terms of sec. 69(2)(*c*) of the *TA Act* by default, without the *PAI Act* alternative, requires that the court must be approached (with the cost and time implications associated therewith). This is not necessarily true if a request is made in terms of sec. 46 of the *PAI Act* to access the information through the public interest override. Lastly, sec. 67(4) of the *TA Act* would be problematic for the applicants in terms of a *TA Act* application.

94 Founding affidavit of Warren Thompson in the High Court matter between *Arena Holdings (Pty) Ltd t/a Arena Holdings and Others and South African Revenue Service and Others*, signed on 24 November 2019:par. 96.

95 *Financial Mail Constitutional Court*:par. 192.

Therefore, although the public interest exception of sec. 46 of the *PAI Act* may only find application in limited circumstances, it is concluded that it is welcomed, due to the difficulties encountered with the requirements for a court order to access taxpayer information and further disclose that information in terms of the *TA Act*.

BIBLIOGRAPHY

ARENDSE J, WILLIAMS R & KLUE S
2009. *Silke on tax administration*. Durban: LexisNexis.

CROOME B
2015. *Tax administration*. Cape Town: Juta.

FRITZ C & VAN ZYL SP
2022. Tax administration, confidentiality of information, the Promotion of Access to Information Act 2 of 2000, and public figures – Arena Holdings (Pty) Ltd t/a Financial Mail v SARS (88359/2019) [2021] (ZAGPPHC) (16 November 2021) *Journal of Contemporary Roman-Dutch Law* 85(4):586-598.

TUSHNET M, FLEINER, T & SAUNDERS C (EDS.)
2013. *Routledge handbook of constitutional law*. Oxford: Routledge. https://doi.org/10.4324/9780203072578