

## **A Catch-22 Situation: Bringing an Interim Application to Have a High Court Tax Dispute Heard Behind Closed Doors**

*SMI v CSARS* [2023] ZAECGHC 115

### **1 Introduction**

The phrase “a catch-22” situation was coined in the popular novel *Catch-22* by Joseph Heller to illustrate the absurd constraints put on soldiers during World War II. The character, Doc Daneeka, invokes the phrase to explain that pilots who request mental evaluations in order to be declared unfit (not sane enough) to fly an aircraft (to escape dangerous missions) are paradoxical, as the pilots had the rationality of mind to make the request for the medical evaluation in the first place (Heller *Catch-22* (1961) ch 5). The phrase typically refers to a contradictory situation where one cannot escape the relevant rules or regulations.

Such a paradoxical event occurred in *SMI v Commissioner for the South African Revenue Services* ([2023] ZAECGHC 115) (*SMI v CSARS HC*) where an interlocutory (interim) application was launched in the court *a quo* to avoid having the main application proceed in open court, but the interim application was, itself, heard in an open court – effectively disclosing the secret taxpayer information which the applicant was attempting to keep out of the public eye in the first place.

This note analyses the abovementioned judgment and provides suggestions on how taxpayers can avoid such a “catch-22” situation where an interim application is made to the court to have a tax dispute heard behind closed court doors (*in camera*; Classen RD *Dictionary of Legal Words and Phrases* (2002)) due to the sensitive nature of the taxpayer information.

### **2 Case facts**

Before addressing the facts as set out in the appeal case of *SMI v CSARS HC*, the facts as presented in the court *a quo*, *Structured Mezzanine Investments (Pty) Ltd v Commissioner for the South African Revenue Service* (85 SATC 436), are summarised.

#### **2.1 Facts in the court a quo**

The South African Revenue Services (SARS) requested the taxpayer, Structured Mezzanine Investments (Pty) Ltd (SMI), to provide SARS with

certain relevant material in terms of section 46 of the Tax Administration Act (28 of 2011) (TAA). Section 46(1) of the TAA provides that SARS may, for purposes of the administration of a tax act, require a taxpayer to submit relevant material to SARS within a reasonable period. In addition, section 46(4) of the TAA provides that a taxpayer who receives such a request from SARS must submit the relevant material at the specified place, in the specified format, and within the specified time it was requested.

SMI, however, failed to comply with SARS's request in this regard (par 6). This resulted in SARS launching the main application to the High Court, to compel SMI to provide the requested material (par 4). In response to the main application, SMI launched its own interlocutory application (an application to obtain an interim order pending the outcome of another proceeding or action) to the High Court. In its application, SMI requested that the main application be heard *in camera* and for the court file to be sealed (par 1). SMI's interlocutory application before the High Court is what gave rise to this judgment.

In their interlocutory application, SMI alleged that their confidential taxpayer information was implicated in SARS' main application and that SARS had breached its duty to preserve the secrecy of such confidential taxpayer information (par 10.1; "taxpayer information" is defined in section 69 of the TAA to mean "any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information"). SMI argued, amongst others, that SARS's founding affidavit in the main application contained confidential taxpayer information, which may not be disclosed in terms of sections 67 and 69 of the TAA (par 10.1).

The court *in casu* indicated that if the court in the main application ordered SMI to produce the relevant material requested by SARS, this information would be protected under the relevant sections of the TAA (ch 6 of the TAA; par 29). As such, SMI's application was, in the court's view, not aimed at protecting the requested documents (as this is already protected in terms of the TAA), but rather aimed at addressing the disclosure of information in SARS's main application (in SARS' founding affidavit) (par 29, 45).

Section 67(1)(b) of the TAA provides for a general prohibition of the disclosure of taxpayer information. Section 69(1) of the TAA provides that a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to anyone who is not a SARS official. Yet, section 67(2) provides for certain exceptions. For example, subsection (1) does not prohibit the disclosure of taxpayer information by a current or former SARS official in the performance of their duties to administer a tax act, such as serving as a witness in civil and criminal proceedings under a tax act, or where such information is already in the public domain.

As the launch of SARS's main application constituted civil proceedings and was related to the performance of their duties under the TAA, SARS could disclose taxpayer information in accordance with the above section of the TAA (par 23, 32, 35, and 54). The court also established that the "confidential" taxpayer information that SMI was referring to in the main application was already in the public domain, therefore, allowing SARS to share such information outside the realm of SARS officials in terms of section 69(2)(a)(ii) of the TAA (par 47–50).

SARS, in its answer to the allegations in the founding papers, contended that SMI's interlocutory application was not consistent with the principle of open justice (par 16). In terms of this principle, all civil and criminal proceedings before a superior court (such as a High Court, Supreme Court of Appeal, or Constitutional Court) must be heard in a public open court. This ties in with the constitutionally protected right in terms of article 34 of the South African Bill of Rights:

"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." (Own emphasis added)

SARS contended further that SMI failed to produce proof of any statutory provision that mandates the main application's proceedings to be held *in camera* (par 52–53). SMI also failed to prove that the exception to the principle of open justice applied to their application before the High Court (par 60, 63, 64). This exception is found in section 32 of the Superior Courts Act 10 of 2013, which provides:

"Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, **except in so far as any such court may in special cases otherwise direct**, be carried on in open court." (Own emphasis added)

The High Court (court *a quo*) in this matter held that SMI failed to:

- a) establish a statutory basis for departing from the norm for hearings in the High Court in open court (par 53, 69);
- b) establish that this specific matter must be heard *in camera* in terms of the TAA (par 69); and
- c) advance an argument that it had a "special case" which would allow for the court to close the court doors to hear the matter (par 13, 14, 17, 18, 69).

Accordingly, SMI's application was dismissed with costs.

SMI was granted leave to appeal the matter to the full bench of the Eastern Cape Division (the appeal court) (see leave to appeal application *Structured Mezzanine Investments (Pty) Ltd v CSARS* (1824/2021) [2022] ZAECGHC 38 par 19).

## 2.2 *Facts in the appeal to the full bench of the High Court*

The appeal was heard before the full bench of the Eastern Cape Division of the High Court. The court confirmed that, in total, three sets of affidavits were filed in both the main application of SARS and in the secrecy (interlocutory) application brought by the taxpayer, SMI (par 10). These filed affidavits contained references to the relevant secret taxpayer information that SMI was seeking to keep out of open court. This is due to the fact that the affidavits containing the relevant taxpayer information were already in the public domain, as both matters (the main application and the

interlocutory application) had been instituted in open court and also formed part of the present appeal record (par 10). As such, from the date of the dismissal of SMI's initial interlocutory application in the court *a quo*, eighteen months prior, all the papers filed in both the main application and SMI's interlocutory application have been in the public domain ever since (par 10).

The court noted that SMI made no attempt to have their interlocutory application in the court *a quo* heard in camera, even though, in the court's view, it would have been possible to do so under appropriate circumstances (par 10).

In this regard, the full bench of the High Court found that the present appeal before it had no practical effect (it was redundant) because the secret information that SMI was seeking to protect was already in the public domain (par 11).

### **3 Judgment of the full bench of the High Court**

The full bench of the High Court dismissed SMI's appeal, due to the fact that SMI failed to show that any further taxpayer information, which is not already in the public domain, would emerge in the matter (par 21). In terms of section 16(2)(a)(i) of the Superior Courts Act:

"When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

As the taxpayer information that SMI was seeking to keep secret was already in the public domain, the court held that the application's effect was redundant, and the appeal was dismissed accordingly in terms of section 16(2)(a)(i) of the Superior Courts Act.

The full bench agreed with the court *a quo* that even if SMI was compelled under the main application to share the requested material with SARS, the specific taxpayer information shared with SARS would not form part of the court record and would still be protected in terms of the TAA's taxpayer confidentiality provisions (par 20).

### **4 Discussion of the case**

From the above judgment, it is clear that the taxpayer found themselves in a proverbial "catch-22 situation" with their initial interlocutory application brought before the court *a quo*: The taxpayer wanted to have SARS' main application heard behind closed doors in order to protect certain secret taxpayer information revealed in filed papers, yet, in order to achieve this the taxpayer had to bring their own interlocutory (interim) application, which was, as a default position, heard in open court.

This significantly defeated the purpose of SMI's interlocutory application, as their own application placed certain taxpayer information (the same information that SMI wanted to keep secret) in the public domain. The interlocutory application was heard in open court. This means that the application's court hearing was open for the public to attend; the judgment was published, and the court records were made available to the public.

The full bench in the appeal matter indicated that (par 10):

“all the papers filed in the main application and in the secrecy application were in the public domain and they have been in the public domain ever since. The secrecy application itself was heard in open court and no attempt was made for it to be heard *in camera*. Such a step, it seems to me, would in appropriate circumstances have been possible.”

Some of the challenges faced by SMI in this matter are now considered.

#### 4 1 *The timing of the interlocutory application*

It stands to reason that the timing of SMI's interlocutory application was ineffective. This is based on the fact that various affidavits had already been filed in SARS's main application, where SMI contended that confidential taxpayer information was revealed. This was perhaps the main flaw in SMI's interlocutory application, and not merely the fact that it was heard in open court.

The flawed timing of SMI's interlocutory application is further examined by referring to another recent tax-related High Court case matter in paragraph 4.4.2 below.

#### 4 2 *The confidential taxpayer information sought to be kept secret by SMI formed part of their interlocutory application*

SMI made no attempt to have their interlocutory application heard *in camera* (par 10). This is the initial issue faced by SMI in *CSARS v Structured Mezzanine Investment (Pty) Ltd* ([2024] 4 All SA 773 (ECG)) and what gives rise to SMI's "catch-22 situation": The default position for SMI's interlocutory application is that such an application must be heard in open court. It is unclear why SMI did not attempt to have their interlocutory application heard *in camera*, as their application itself also contained the relevant affidavits that allegedly contained confidential taxpayer information (see court *a quo* judgment par 10.1).

In *Cerebos Food Corporation Ltd v Diverse Foods SA Pty Ltd* (1984 (4) SA 149 (T)) (*Cerebos*), the court recognised that such a default position presents issues in practice:

“The decision as to whether a case is special should be left to the discretion of the deciding Judge, who will bear in mind that the general rule will not lightly be departed from. A practical difficulty does, however, present itself in that in cases where it is intended that the matter be heard *in camera*, theoretically a decision can only be reached after debate in open Court. The procedure renders the order, should it be granted, ineffective.”

The court in *Cerebos* proposed that South Africa adopt a process similar to the English rule of practice, which allows counsel to present the court with a certificate stating that, in their professional opinion, the matter involves special circumstances justifying it to be heard *in camera*. Upon receipt of this

certificate, the court then closes the court doors before the commencement of the application.

This suggestion may offer a possible solution, given the catch-22 situation created for a taxpayer who has sensitive taxpayer information form part of their interlocutory application that, by default, has to be heard in open court. It seems superfluous that in order to obtain a court order to protect certain taxpayer information, the default position is to argue such an application in open court (*LAWSA X Access to Court* (2011) par 466).

#### 4 3 “Special case” in terms of section 32 of the Superior Courts Act 10 of 2013

Eksteen J points out in the appeal matter that if SMI had attempted to hear the interlocutory application *in camera*, it would, in appropriate circumstances, have been possible (par 21). The court, unfortunately, did not expand on when such appropriate circumstances would exist, but made reference to two cases in this regard: *Cerebos* and *Botha v Die Minister van Wet en Orde* (1990 (3) SA 937 (W) par 944D–E (*Botha*)). In both these cases, a “special case” was argued in terms of section 32 of the Superior Courts Act.

In *Botha*, an application was brought at the start of the trial to have the matter held behind closed court doors. The application was denied because closing the court doors would fundamentally depart from the deep-rooted tradition that the administration of justice is available to the public (*supra* 462). The court further indicated that a “special case” relates to specific legislation dealing with children and state security and that, given the common law approach, the closing of court doors must be approached with caution (*supra* 463).

In *Cerebos*, the argument was presented in the application to have the matter heard *in camera* that some of the documents fell within the ambit of section 4 of the Protection of Information Act (85 of 1982). The application was granted but was subsequently criticised by Van Dijkhorst J, as the applicants did not set out exceptional circumstances for departing from the default position of hearing the matter in open court, since none of the “alleged” protected information was set out in the application (*supra* 159).

To date, there are no publicly available examples of a tax dispute where a taxpayer has successfully argued that their matter constituted a “special case” to be heard *in camera*. In addition, noticeably, the principle of open justice is one not lightly departed from (*Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T); *Economic Data Processing (Pty) Ltd v Pentreath* 1984 (2) SA 605 (W); *Cerebos supra*).

This means that there exists uncertainty about what a taxpayer would have to prove in order to convince the court to depart from the default position of open court hearings and to conclude that the taxpayer’s matter qualifies as a “special case”. If a case is successfully made out by a taxpayer to have a tax dispute heard *in camera*, the judgment would be unpublished and the court record sealed, leaving the general public unaware of what arguments a taxpayer presented to convince the court that a “special case” exists.

Unfortunately, SMI did not present any arguments in either the court *a quo* or the appeal court that theirs is a “special case” as set out in section 32 of the Superior Courts Act. As there is no previous publicly recorded example of a tax dispute where a “special case” was successfully argued, one is left with the question: if SMI had argued the existence of a “special case” in their interlocutory application, based on the sensitive taxpayer information involved (and assuming none of it was yet in the public domain), on what grounds would such an argument have been successful?

#### 4 4 *Grounds for departure from the principle of open justice*

##### 4 4 1 The principle of open justice

The court in *Structured Mezzanine Investments (Pty) Ltd v CSARS* (*supra* par 56) indicated:

“This must be seen against what was referred to in argument as the ‘principle of open justice’ being that all court proceedings and records by default are open to public scrutiny at all times. Whilst this may be departed from in special cases **there must be a proper basis and justification therefor[e]**.” (Own emphasis added)

As mentioned, the principle of open justice is not lightly departed from, and the taxpayer would have to present compelling arguments for the court to order that the matter be heard *in camera*, as opposed to being heard in open court. This is illustrated by the following non-tax-related cases, where a “special case” under section 32 of the Superior Courts Act was argued to close the court’s doors.

In the matter of *Du Preez v Du Preez: Standard Bank of South Africa Intervening* (1976 (1) SA 87 (W)) (*Du Preez v Du Preez*), the court heard an application for the matter to be heard *in camera*. The matter dealt with sensitive negotiations regarding mining rights. Yet, the court held that there were not sufficient grounds for the departure from the principle of open justice. The court referred to *Halsbury, Law of England* (page 88):

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

In *City of Cape Town v South African National Roads Authority* (2015 (3) SA 386 (SCA)), the court emphasised that open hearings must take place in public, even if it is painful, humiliating, or deterrent to both the disputing parties and witnesses (par 12, 22). The court *in casu* further highlighted that openness, not secrecy, was the default position of the Constitution and that any deviations from this norm would have to be justified (par 12, 22).

A rare case where a special case was successfully argued is seen in *Financial Mail (Pty) Ltd v Registrar of Insurance* (1966 (2) SA 219 (W)). Here, the court granted the order that the matter be heard *in camera* and the court files sealed because the public's premature knowledge of the insurance company's financial difficulties would have led to its inevitable liquidation (and would have had far-reaching consequences for many stakeholders), despite the Registrar and the company's efforts to save the company (*supra* 114). Noticeably, this order was later rescinded and the court documents unsealed, as the insurer was eventually placed under judicial management, which rendered further secrecy unnecessary.

#### 4 4 2 Risk of reputational damage or commercial prejudice as grounds for a tax dispute to be heard *in camera*

In the recent case of *Commissioner for the South African Revenue Service v J Company* (87 SATC 176) (*CSARS v J Company*), the court withheld the taxpayer's name and certain taxpayer information in the High Court judgment. Similar to the facts in *CSARS v SMI*, SARS had requested the taxpayer (J Company) to produce certain relevant information in terms of section 46 of the TAA (par 1). The taxpayer complied to a degree by supplying the information, but in a heavily redacted form (par 2). SARS launched an application to the High Court to compel the taxpayer to produce the unredacted documents that SARS had initially requested (par 2).

The taxpayer *in casu* approached the court with an interlocutory application to have the main application heard *in camera*, prior to the hearing of SARS's main application (par 3). The taxpayer's application to have the main application heard *in camera* was granted.

Unfortunately, the presiding judge in the main application did not elaborate on which grounds this interlocutory application was granted and only indicated that the taxpayer contended that the disclosure of its identity and the nature of the dispute is likely to impair its reputation as a provider of advisory services to its clients (par 3). It is therefore uncertain if J Company successfully argued in their interlocutory application that their matter was a "special case" in terms of section 32 of the Superior Courts Act. It is assumed that this is the case, as there is no other statutory provision that would allow for the departure from the default open court position.

SARS argued *in casu* that there was no reason that the principle of open justice should "yield to the respondent's desire to have its name kept from the public record" (par 56). SARS indicated that in appropriate circumstances where it is justified, there may be a departure from the default position of open court hearings, such as matters involving children, State security or commercial confidentiality (par 56; also see *City of Cape Town v South African National Roads Authority Ltd supra*). However, according to SARS, the taxpayer did not produce sufficient arguments to justify the departure from the default open court position (par 56).

Kusevitsky J agreed with SARS (to an extent) by pointing out that J Company did not provide persuasive arguments for its continued anonymity

in the matter (i.e., no proper justification was presented to continue with the taxpayer's anonymity as granted in terms of the interlocutory application):

"The Respondent has not really provid[ed] any persuading arguments to its continued anonymity."

In contrast, Kusevitsky J then continued to state there is no reason for the court to depart from what had already been ordered in the interim application (par 56). Kusevitsky J pointed out that, in her personal view, given the nature of the information sought, there may be potential for commercial prejudice if the commercial veil is lifted and the taxpayer's identity is revealed (par 56).

This judgment indicates that a taxpayer may approach the court prior to the hearing of a main application to request that certain taxpayer information be withheld in order to protect the taxpayer's identity. This in itself presents a positive solution to the conundrum that SMI faced; if they had brought their interlocutory application in a timely manner before the main application had been heard in court, the secret taxpayer information would not have been in the public domain and could have been redacted from the court file. This is, nevertheless, subject thereto, SMI having presented proper arguments to justify the departure from the open justice principle.

In a newspaper article the CEO of the South African Institute of Tax Professionals (SAIT), Professor Keith Engel, when asked about the SMI matter, indicated that in his view, arguing that a tax dispute be heard *in camera*, purely based on reputational damage "won't fly" (Visser "A Matter of Confidentiality" (20 July 2023) <https://www.pressreader.com/south-africa/the-citizen-kzn/20220720/282067690666137> (accessed 2025-10-12)). The author agrees and, as such, in her view, the abovementioned case of *CSARS v J Company* should not be construed as providing taxpayers "easy access" for a dispute being held behind closed doors if there isn't a proper justification for the departure from the default position of open court hearings.

It is submitted further that if J Company did not present proper justification for the departure from the open justice principle and if it was a formal plea before the court, it is the duty of the court hearing the main application to re-assess the interim order granted and redact it if required (see the redaction of secrecy application granted in *Financial Mail (Pty) Ltd v Registrar of Insurance* when it was no longer necessary).

The fact that J Company did not present any persuasive arguments for the continuity of their anonymity could be, in my mind, indicative that perhaps they also did not provide proper justification for the application to be granted in their initial application. Kusevitsky J opines that the taxpayer presented an argument in the initial interlocutory application of a "potential for commercial prejudice". The question then arises: why would J Company not proffer the same arguments for keeping the interim order in place to continue addressing such potential commercial prejudice? Was this even an argument presented by J Company in their initial application, or is it merely conjecture by the judge?

Purely relying on a potential risk of reputational damage or commercial prejudice is therefore, to the author's mind, not sufficient justification for the departure of the open justice principle (see e.g., *Prinsloo v RCP Media Ltd t/a Rapport* (2003 (4) SA 456 (T)) where an application to have the dispute heard *in camera* was denied, despite the matter dealing with personal intimate details).

## 5 Concluding remarks

In the author's view, SMI correctly brought an interlocutory application to the court to request that the matter be held *in camera*, but the timing of the application was flawed. Secondly, SMI did not apply to have its own application heard *in camera*. The information that SMI aimed to protect from the public was placed in the public domain through the pre-court procedures in SARS's main application and the open court hearing of SMI's interlocutory application. The author therefore agrees with the full bench of the High Court that the application appears to have no practical effect or result (s 16(2)(a)(i) of the Superior Courts Act).

The catch-22 effect, in this case, is clear: Where an interlocutory application is brought to request that a matter be heard *in camera*, the default position is that such an application must be heard in open court (thereby, if the relevant confidential taxpayer information forms part of the application, as in SMI's case, it places the sensitive taxpayer information in the public domain). However, since the sensitive taxpayer information was already in the public domain, SMI paradoxically contributed to the dismissal of their application by placing the confidential taxpayer information there themselves.

Under normal circumstances, where the relevant sensitive taxpayer information is not yet in the public domain, it is submitted that a carefully worded interlocutory application to have the main application heard *in camera* may be successful, even if the interlocutory application is heard in open court. The application would have to set out clear grounds and reasons for why the main matter must be heard *in camera*, without essentially sharing the actual secret taxpayer information with the open court. It is submitted that this could in itself be a difficult task. The interlocutory application would further have to set out clear reasons why the hearing of the matter in public would hinder the administration of justice (*Du Preez v Du Preez supra*).

Practically, one may find that the court will not grant the interlocutory application, unless the court itself has been given sufficient information (which may include the actual sensitive taxpayer information) in order to conclude whether or not it will close the court doors based on the fact that, in the court's view, a "special case" exists (see *Rappa Resources (Pty) Ltd v Commissioner of the South African Revenue Service* (21/21045) [2021] ZAGPJHC 555).

As seen in *Cerebos*, Van Dijkhorst J criticised the granting of the interim order to have the matter heard *in camera* as none of the "alleged" protected information was set out in the actual application. In *Rappa Resources (Pty) Ltd v CSARS*, SARS requested that the matter be heard *in camera* due to the risk of alerting other taxpayers to the suspect scheme SARS was

investigating. However, SARS failed to provide sufficient evidence to the court explaining why the public hearing of the dispute would negatively impact an ongoing SARS investigation, and SARS's request to close the court doors was denied (par 19). If that is the case, the catch-22 situation remains: To convince the court that the matter must be heard *in camera*, significant details about the sensitive taxpayer information, or potentially the information itself, may have to be shared in the interlocutory application in open court.

Perhaps the abovementioned "salutary practice" found in English courts should be adopted in South Africa as proposed by the court in *Cerebos*, to address the exemplified "catch-22" faced by SMI. The court in *Cerebos* likened this type of certificate, which contains the expression of counsel's opinion and the necessary supporting allegations, to the existing certificate of urgency required from counsel in matters of an urgent nature (151).

Ultimately, what could SMI have done differently to have been successful with their application to have the matter heard *in camera*? First, as seen in *CSARS v J Company*, such an application should have been brought prior to the main application being heard in an open court (the default position). Appropriate timing of the application could therefore have provided SMI with an opportunity to argue why the main application (and perhaps their own interlocutory application) should have been heard behind closed court doors and why the court file should have also been sealed. This could have avoided the "catch-22" effect of putting their own taxpayer information in the public domain, which effectively rendered their interlocutory application redundant.

Nevertheless, hypothetically, even if this first hurdle had been overcome (the application was brought timeously), the second hurdle remains: What sufficient grounds could SMI have provided in their interlocutory application to convince the court to close the court doors to hear the applications regarding a tax dispute?

As highlighted in *Structured Mezzanine (Pty) Ltd v CSARS*, there is no statutory provision that mandates that the main application's proceedings in the High Court must be held *in camera*, as opposed to the open justice principle (par 52–53). As such, the only statutory provision that SMI could have relied upon is section 32 of the Superior Courts Act (i.e., arguing there is a "special case").

It should be contended on this basis that *CSARS v J Company* does not provide adequate guidance as to what constitutes sufficient grounds for departing from the open justice principle in a tax matter. It is implicit that if a tax dispute progresses to the Supreme Court, any disputing taxpayer would rather avoid their name and taxpayer information being made public during the court proceedings, if possible. This could be based on various factors, but it is argued that taxpayers would want to avoid the reputational damage or potential commercial risk of being seen to be embroiled in a public tax dispute with SARS.

However, this is, in itself, in the author's view, not sufficient justification for the departure from the principle of open justice. It appears, however, that the

indication of a potential commercial risk of damage was sufficient reason for the court in *CSARS v J Company*, in the judge's opinion, as the lifting of the corporate veil could have caused the taxpayer reputational risk (par 56).

If this argument is upheld as correct, it is submitted that all disputing taxpayers could approach the court to have their tax disputes held behind closed doors, solely due to the potential risk of reputational damage they might suffer if the matter were heard in open court. This is impractical, as each application must be assessed by the court on its own merits, bearing in mind that the principle of open justice is not lightly departed from.

Although, in the same breath, the High Court in *CSARS v J Company* indicates that the interim application granted should not be construed to provide "blanket non-disclosure" for all tax-related matters (par 3). Yet, the court implied that it supports the view that an argument for reputational risk is sufficient grounds to have the taxpayers' identity and certain taxpayer information withheld in a tax dispute in the Supreme Court.

The author's closing submission is that even if SMI brought their interlocutory application timeously (and there was no taxpayer information already in the public domain), SMI would still have faced the difficult task of convincing the court that their dispute qualified as a "special case" under the Superior Courts Act.

Since there is no example of a tax case that addresses it as a special case, SMI would have had to convince the court on its own merits. Nevertheless, as seen from the abovementioned (non-tax related) court cases where a "special case" was argued, only in very distinct situations would such an application be granted, given the important principle of open justice.

In SMI's application for leave to appeal, the court acknowledged that there is an absence of authority on the question of whether matters relating to tax and tax affairs, which are adjudicated in the High Court, should be heard *in camera*, pursuant to the general principle of privacy of persons' tax affairs (*Structured Mezzanine Investments (Pty) Ltd v CSARS supra* par 13).

These types of *in camera* applications are not unheard of, and if the interlocutory application itself is heard *in camera*, we as the public would not have access to the judgment or open court files. The court missed an opportunity in *SMI v CSARS HC* to set a benchmark for tax cases and to have this on record, due to SMI's failure to present such an argument to the court. One may speculate that the successful closed interlocutory applications all presented a benchmark for arguing a "special case"; however, with these court files being sealed and the judgment being handed down behind closed doors, there is no record thereof, and we remain uncertain of what would constitute a "special case" for tax disputes.

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