

Hand over the tax records! Section 35 and 46 of PAIA unconstitutional

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On 30 May 2023, the Constitutional Court handed down its ruling in the matter of *Arena Holdings (Pty) Ltd and Others v SARS and Others* ("**Arena Holdings v SARS**")^[1] and declared, *inter alia*, that sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") are unconstitutional insofar as they preclude a person's access to the tax records of another.^[2]

The majority judgment (penned by Kollapen JJ) agreed that section 35 of PAIA imposes an absolute prohibition on disclosure of taxpayer information to a person other than the taxpayer. While recognising that certain limitations of rights are permissible under our Constitution, the majority held that section 35, read with section 46, of PAIA is unconstitutional insofar as it unjustifiably limits the right of access to information and the right to freedom of expression as provided in the Constitution.

The purpose of PAIA is to give effect to the constitutional right of access to any information held by a public or private body or person, where such information is required for the exercise or protection of any right. Simultaneously, access to information in terms of PAIA cannot be granted on an unlimited basis, and PAIA accordingly provides a list of grounds on which a request for access to a record may/must be refused, including the mandatory protection of certain records held by SARS.^[3]

Background

The inception of the matter lies in one Mr Thompson's (an employee of Arena Holdings (Pty) Ltd)) PAIA request to the South African Revenue Service ("**SARS**") to gain access to Mr Jacob Zuma's ("**Mr Zuma**") tax records for the 2010 to 2018 financial years.^[4] The basis of the request was the allegation(s) that Mr Zuma had not been tax compliant during his tenure as President; and as such, disclosure of Mr Zuma's tax information (as held by SARS) could reveal substantial contravention of the law and would be in the public interest.^[5] SARS refused to disclose the documents requested on the grounds of Mr Zuma's entitlement to confidentiality, as derived from section 34 (i.e. the mandatory protection of the privacy of a third party who is a natural person) and section 35 (i.e. mandatory protection of certain records by SARS) of PAIA.^[6]

In the litigious proceedings that ensued following SARS' refusal to disclose the requested information, the High Court of South Africa, Gauteng Division, Pretoria ("**High Court**") declared that the statutory prohibition of the disclosure of taxpayer's information held by SARS (i.e. section 35, read with section 46, of PAIA) is unconstitutional; and directed SARS to grant the access to Mr Zuma's tax records, as requested by the applicant.^[7]

Pursuant to its order of constitutional invalidity, the High Court granted a reading-in relief in terms of which it provided a public-interest override clause into the impugned provisions. The effect of the override clause is to permit the disclosure of tax information to anyone other than the tax payer, provided such disclosure satisfies the requirements of section 46 of PAIA (i.e. constitutes a mandatory disclosure in the public interest).^[8]

A balancing act: confidentiality v public interest

In handing down their judgments, the Justices of the Constitutional Court emphasised the importance of the right to privacy, the right of access to information and the right to freedom of expression. And acknowledged that while these constitutional rights serve different functions, they achieve legitimate and interconnected interests at both the individual and societal levels. For the avoidance of any doubt, the Constitutional Court

reiterated that it is PAIA, and not or any other legislation, that is the national legislation contemplated by the general constitutional right of access to information.

In argument, SARS contended that PAIA's mandatory protection of tax records serves to protect taxpayer confidentiality, while maintaining tax compliance; thus striking a reasonable balance between the right to privacy and the right to access information. In SARS' view, an extension of the section 46 public-interest override to tax information will substantially undermine taxpayers' confidence in SARS, as well as tax compliance. The majority in the Constitutional Court disagreed with SARS' position on the basis that the current formulation of section 35 protects **all** taxpayer information – irrespective of whether such information warrants such protection or not; and thus failing to strike the necessary balance between competing rights. Conversely, the Constitutional Court found that an extension of PAIA's section 46 public-interest override clause to taxpayer information would strike the necessary balance between rights. In the words of Kollapen J, *"the public-interest override provides a high-level of confidentiality while [simultaneously] providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest."*

Conclusion

The Constitutional Court confirmed the High Court's declaration of constitutional invalidity in respect of sections 35 and 46 of PAIA. The aforementioned declarations of constitutional invalidity are suspended for a period of 24 months to enable Parliament to remedy such invalidity.

The Constitutional Court's judgment in the matter of Arena Holdings v SARS is an important reminder insofar as the balancing of competing rights is concerned. In the context of the right of access to information vis-à-vis the right to privacy, J Kollapen's majority judgement re-iterates how the balancing of such rights should always be informed by reference to the continuum of privacy: *"the scope of one's personal space shrinks as one moves away from the inner sanctum of one's life to the communal space that comes with living in society. In those circumstances, the claim to individual autonomy (and the right to privacy that attaches to it) must be moderated against the public interest."*

Footnotes

- [1] CCT 365/21.
- [2] Promotion of Access to Information Act 2 of 2000, section 46(a) and (b).
- [3] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023.
- [4] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023; Promotion of Access to Information Act 2 of 2000, section 11.
- [5] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023.
- [6] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023.
- [7] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023.
- [8] [CCT 365-21 Arena Holdings \(Pty\) Ltd and Others v SARS and Others](#), accessed 30 May 2023.



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