

REGULATORY

Jacob Zuma's medical records: off limits or fair game

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Jacob Zuma's medical records

Discussions around medical records have taken centre stage at former president Jacob Zuma's trial for corruption, fraud and racketeering emanating from the 1999 arms deal involving French company Thales. The trial has brought with it many twists and turns with the most recent being the issue of whether the prosecution is entitled to medical records.

The State issued subpoenas for Zuma's medical records to argue and demonstrate that the former president had not justified his absence from court.

Although the matter is still before the High Court, we consider the question of how far the State can go regarding access to Zuma's medical records and whether information related to those medical records may be publicised in the media in light of the Protection of Personal Information Act, No. 4 of 2013 ("POPIA").

The question seems to be simple; if you say you are medically unfit to appear at court or stand trial, then prove it. However, on a closer look, it is not quite as straightforward due to it being an issue that implicates the rights to privacy and dignity which are constitutionally recognised and given effect to by the National Health Act, No. 61 of 2003 ("National Health Act") and POPIA.

The National Health Act makes it clear that the medical records of a person are private and confidential. As such, any acquisition or sharing of information relating to a person's medical records, in principle, constitutes an infringement of the right to privacy.

The above issue was dealt with by the High Court in *Tshabalala Msimang v Makhanya 2008 (6) SA 509 (W)*. The late former Minister of Health Manto Tshabalala Msimang sought an order to secure the return of copies of her medical records from certain journalists and a newspaper publisher to the medical institution she had been treated at. She further requested the Court to interdict the newspaper from publishing or commenting on the medical records.

Confidential medical information

The Court acknowledged that confidential medical information invariably contains sensitive personal information. This was before POPIA was enacted which now clearly defines health related information as being special personal information that is afforded additional protection.

Although the journalists and newspaper publishers had evidently contravened the National Health Act and violated the right to privacy, the Court held that it was nonetheless in the public interest for them to comment on and publish information relating to the former minister's health status. Specifically, the Court stated that –

"[34] In a case where the information sought for publication is obtained by unlawful means, there may well be overriding considerations of public interest which would permit publication." [Emphasis added]

Section 7 of POPIA

The above is in line with Section 7 of POPIA which provides for an exclusion from the application of POPIA when processing personal information for journalistic, literary or artistic purposes to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression.

The Court in *Tshabalala Msimang v Makhanya* stated the following regarding public interest –

“[37] ...Public interest will naturally depend on the nature of the information conveyed and on the situation of the parties involved. Public interest is central to policy debates, politics, and democracy. While it is generally acclaimed that promoting the common well-being or general welfare is constructive, there is little, if any, consensus on what exactly constitutes the public interest.”

The above approach to public interest leaves us with matters that must be assessed on a case-by-case basis given the “it depends” position given to the question of what constitutes public interest in a given matter.

The Court continued to state that –

“[38] The public has the right to be informed of current news and events concerning the lives of public persons such as politicians and public officials. This right has been given express recognition in Section 16(1)(a) and (2) of the Constitution which protects the freedom of the press and other media and the freedom to receive and impart information and ideas. The public has the right to be informed not only on matters which have a direct effect on life, such as legislative enactments, and financial policy. This right may in appropriate circumstances extend to information about public figures.” [Emphasis added]

Consequently, the Court held that the journalists and newspaper should be allowed to comment on and publish information relating to the former minister's medical records:

“[50] This is case where the need for the truth, is in fact overwhelming. Indeed in this matter the personality involved as well as her status establishes her newsworthiness. Here, we are dealing with a person who enjoys a very high position in the eyes of the public and it is the very same public that craves attention in respect of the information that is in the hands of the Sunday Times. The overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records in relation to the first applicant, albeit that the medical records may have been unlawfully obtained.

In these circumstances, I am unable to accede to the requests of the applicants with regards to paragraphs 3 and 7 of their notice of motion which in effect would impose a form of censorship in relation to any future publication around the medical record.”
[Emphasis added]

Although the above case dealt with a situation where the issue was whether to allow the publication of a high ranking politician's health-related information, it is still instructive in respect of the issue of how public interest can be applied as an overriding factor when dealing with competing constitutional rights, particularly where privacy is involved.

National Health Act

The National Health Act allows for the disclosure of a person's private and confidential health information where a court order requires it. Albeit international jurisprudence which a South African court is not bound by, but may nonetheless consider in certain circumstances, the case of **MS v Sweden: ECHR 27 August 1997** provides some assistance regarding some reasons which may be advanced to justify a court-ordered disclosure of health information.

The applicant, in that case, having sustained an injury, objected to the disclosure of medical records to the Social Insurance Office to allow assessment of her compensation claim. The Court held that the object of the disclosure was proper in that it was to enable the Social Insurance Office to determine whether the conditions for granting compensation had been met.

The nation awaits the outcome of the Zuma trial. However, history does shed some light on the current impasse relating to health records. One aspect that is certain is that litigants may not hide behind the shroud of absolute privacy to keep their private and confidential medical information from being accessed, especially where they seek to rely on medical reasons to justify a failure to appear at court.

Read more about [POPIA: A Guide to the Protection of Personal Information Act of South Africa](#).

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