



CONSTITUTIONAL COURT OF SOUTH AFRICA

Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others

CCT 365/21

Date of hearing: 23 August 2023

Date of Judgment: 30 May 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 30 May 2023, the Constitutional Court handed down judgment in an application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria (High Court).

The application was brought by three applicants: Arena Holdings (Pty) Ltd, a private company that owns various media houses; AmaBhungane Centre for Investigative Journalism NPC, a non-profit company engaged in public interest investigative journalism; and Mr Warren Thompson, a financial journalist, who was employed by Arena at the time of the High Court application. The respondents include: the South African Revenue Service (SARS); Mr Jacob Gedleyihlekisa Zuma (Mr Zuma), the former President of the Republic of South Africa; the Minister of Justice and Correctional Services; the Minister of Finance; and the Information Regulator as the authority tasked with the monitoring and enforcement of the Promotion of Access to Information Act (PAIA).

The matter concerned the constitutionality of sections 67 and 69 of the Tax Administration Act (TAA) and sections 35 and 46 of PAIA. The High Court declared sections 35 and 46 of PAIA unconstitutional and invalid, to the extent that they preclude access to tax records by a person other than the taxpayer (a requester), even in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met. The matter centred on whether the order granted by the High Court should be confirmed.

Early in 2019, Mr Thompson made an application to SARS, in terms of PAIA, to gain access to Mr Zuma's tax records. The application was premised on allegations made by Mr Jacques Pauw in his book titled *The President's Keepers* and several other persons. It was averred that there was "credible evidence" that, while he was President, Mr Zuma was not tax compliant. SARS refused Mr Thompson's application on the basis that Mr Zuma was entitled to confidentiality under sections 34(1) and 35(1) of PAIA as well as section 69(1) of the TAA. Mr Thompson launched an internal appeal against SARS' refusal. SARS dismissed the appeal on the same grounds. Following SARS' refusal, the applicants launched an application in the High Court.

The applicants launched a constitutional challenge in the High Court requesting it to determine whether tax information held by the state receives absolute protection from disclosure under PAIA. In their application, the applicants challenged the constitutional validity of the statutory prohibition of the disclosure of a taxpayer's information held by SARS, in circumstances where such disclosure would reveal evidence of a substantial contravention of the law and would be in the public interest. The High Court granted judgment in the applicants favour and held that the notion proffered by SARS and the Ministers that voluntary disclosure and taxpayer compliance is inextricably linked to or dependent on the taxpayer secrecy regime is not a universal truth. The High Court held that the assertion of the right to privacy and secrecy relied on by SARS and the Ministers did not fulfil the limitation test as set out in section 36 of Constitution. Therefore, the limitations on the access to information were not justified. The High Court found that the argument that public interest overrides the limitation of taxpayer confidentiality was justified. The Court held that the blanket prohibitions of disclosure of taxpayer information contained in section 35 of PAIA and section 69 of the TAA unjustifiably limit the right of access to information provided for in section 32 of the Constitution. It concluded that a "reading-in" of the "public-interest override" provisions contained in section 46 of PAIA was justified and competent. The High Court thus declared the impugned provisions invalid and unconstitutional. It issued an interim reading-in. After making the declaration of invalidity, the Court granted the application for the release of Mr Zuma's tax records.

The applicants accordingly approached this Court to confirm the declaration of invalidity made by the High Court. In this Court, the applicants submitted that there is an absolute prohibition on disclosure of tax information of a taxpayer held by SARS to a PAIA requester other than the taxpayer concerned. They contended that these prohibitions prevent the media from obtaining tax information, through PAIA or in any other way, from SARS, and from reporting on any tax information the media has managed to obtain, "even if the information contains conclusive evidence of corruption, malfeasance or other law-breaking". The applicants argued that the impugned provisions are unconstitutional to the extent that they limit the right of access to information, under section 32(1) of the Constitution, in that taxpayer information is information held by the state, access to which has been unexceptionally precluded. They also submitted that the right to freedom of expression, under section 16 of the Constitution, is implicated in that the media is prevented from lawfully obtaining tax information and from reporting on it. The applicants submitted that the limitation of the rights in section 16 and 32(1) of the Constitution is not justifiable under section 36 of the Constitution. They contended that the impugned

prohibitions are not justifiable, as they are not necessary to protect the privacy of taxpayers or for taxpayer compliance.

On the other hand, SARS submitted that the regime created by the TAA and PAIA was established after extensive consultation and careful consideration of other tax regimes, and it strikes a fair and reasonable balance between the right to privacy and the right of access to information. According to SARS, taxpayers are not only encouraged, but are compelled, to make full and frank disclosure of their personal information and secrets to SARS, including disclosure of their own criminal conduct. Taxpayers are essentially stripped of their privilege against self-incrimination. SARS submitted that the impugned provisions serve to preserve taxpayers' secrets and that the extension of the override provision in section 46 will materially undermine the assurance given to taxpayers that SARS will keep their secrets and undermine taxpayers' confidence in SARS. It argued that the impugned provisions of the TAA were not absolute as they were subject to narrowly circumscribed and tightly controlled exceptions. SARS contended that the relief sought by the applicants violated the right to privacy, under section 14 of the Constitution, as well as the *Marcel* principle, in that the relief would enable a PAIA requester to freely disseminate tax information to any person, without constraint. SARS submitted that this incursion into the right to privacy and the *Marcel* principle was not justified by the applicants.

Mr Zuma sought leave to appeal against the orders that SARS should disclose his tax records to the applicants. He submitted that the applicants largely relied on the allegations of non-compliance made in *The President's Keepers*. According to Mr Zuma, the book did not disclose any facts that would demonstrate credible evidence that he violated his tax obligations in that: there are no allegations of specific amounts paid to him that were not subject to tax; the allegations that he was not tax-compliant emanated from unnamed and undisclosed sources; the amount of tax alleged to be owed by him is not specified; and the author of the book has not been called to testify about the allegations. Thus, the applicants' case was based on hearsay and did not cross the admissibility threshold. Mr Zuma submitted that the relief sought by the applicants infringed on his rights to privacy and dignity.

The Minister of Justice accepted that this matter implicates the right of access to information; however, he submitted that this right was not absolute and was subject to the limitations imposed by section 36 of the Constitution. The Minister submitted that maintaining the confidentiality of taxpayer information was in the public interest. He contended that the proposed extended "public-interest override" was both speculative and discriminatory – as between ordinary non-compliant citizens and prominent figures. Consequently, the Minister of Justice sought a dismissal of the confirmation application.

Like SARS, the Minister of finance submitted that the confidentiality regime created by the impugned provisions of the TAA passed constitutional muster in that it struck a fair balance between the rights of a taxpayer to privacy, SARS' duty to effectively collect taxes and South Africa's international obligations, on the one hand, and the public's right to access information, on the other. The Minister submitted that the High Court failed to take cognisance of public policy considerations, in that the confidentiality of information is

critical for effective tax administration and the subsistence of the voluntary compliance policy. The Minister of Finance argued that the proposed “public-interest override” was too broad in that the applicants and any other party could “decide on a whim whose tax records they seek and cloak their request for those tax records under the vague umbrella of public interest”. The Minister further advanced an argument that once the tax information had been released, SARS would not have any control over what is done with it.

The Regulator had filed a notice to abide by the proceedings. It submitted that any law that prohibited the disclosure of a record of a public or private body without reasonable and justifiable limitation as well as without grounds for refusal of access to records as contained in PAIA was materially inconsistent with the objects of PAIA. The Regulator contended that section 35 of PAIA provided SARS with the absolute right of refusal of access to records they held, which is contrary to the factors under which the right of access to information can be limited.

The first judgment (minority), penned by Mhlantla J (Madlanga J, Mbatha AJ and Tshiqi J concurring), disagreed with the second judgment (majority) on the question of whether the order granted by the High Court which declared sections 35 and 46 PAIA, and sections 67 and 69 of the TAA, unconstitutional and invalid, to the extent that they preclude access to tax records by a person other than the taxpayer (a requester) even in circumstances where the requirements set out in subsections 46(a) and (b) of PAIA are met, should be confirmed. The minority judgment would not have confirmed the order of constitutional invalidity. It reasoned that in balancing the right to access information and the right to privacy, the limitation on access and disclosure of taxpayer information by anyone other than the taxpayer concerned was justifiable. Further that the current framework of the TAA already provided measures that may be resorted to for purposes of striking a balance between the access to taxpayer information and maintaining taxpayer secrecy.

Moreover, the minority held that if the ambit of the “public-interest override” was to be extended, it would not only be applicable to public figures, but also to citizens and ordinary tax payers whose tax records could potentially prove “a substantial contravention of, or failure to comply with, the law” or “an imminent and serious public safety or environmental risk” and where their disclosure would potentially be in the public interest. This posed a challenge to the privacy interests of those individuals and the confirmation order would be detrimental to the reputations and societal standings of taxpayers.

On the substitution order, the minority held that the High Court prematurely granted the order requiring SARS to supply the applicants with Mr Zuma’s tax records, as no decision had been taken by SARS after the order of constitutional invalidity was made. It set aside the substitution order with costs.

The majority judgment, penned by Kollapen J (Baqwa AJ, Majiedt J, Mathopo J and Rogers J concurring) agreed with the minority judgment that the matter engaged the Constitutional Court’s jurisdiction and that leave to appeal should be granted. It, however, disagreed with the conclusion that the prohibition on access to taxpayer records found in section 35(1), read with section 46 of PAIA, was not absolute. It concluded that the

impugned provisions did not pass constitutional muster as they did not meet the limitation test in section 36 of the Constitution.

The majority judgment emphasised the importance of the rights to privacy, access to information and freedom of expression and held that these rights achieved different but legitimate and interconnected individual and societal interests. It held that the case was about the balance to be struck between these competing rights. Specifically, how that balance was managed between the right to privacy in respect of taxpayer records against the communal interest and the claimed right to access those records when they provide evidence of serious criminality or a risk to public health or safety.

It was held that, although Chapter 4 of PAIA contained extensive provisions that provided for the mandatory protection of various categories of information from public disclosure, the section 46 mandatory “public-interest override” obliged the disclosure of information that would otherwise have been the subject of protection. The majority held that the effect of the “public-interest override” was to continue to maintain a high level of confidentiality while providing a carefully crafted, limited, restrained and relatively onerous basis for the lifting of confidentiality in the public interest. This Court held that section 35(1) of PAIA protected all taxpayer information irrespective of whether its character warranted protection. Taxpayer information was totally immunised from the section 46 override that applied to all other categories of information that enjoy protection in terms of Chapter 4 of PAIA. The prohibition on disclosure found in section 35(1) of PAIA was held to be reinforced by the provisions of section 69(1) of the TAA as well as those of section 67(3) and (4). The Court, however, held that PAIA was the national legislation contemplated in section 32 of the Constitution to give effect to a general right of access to information. The TAA was not the legislation that provided for a right of access to information. The prohibitions contained therein, particularly those reflected in section 67(3) and (4) and section 69, primarily related to the administration of the tax system and the work of other organs of state – they were not prohibitions on any general right of access to information.

The majority held that, although the TAA provided for some exceptions to the general prohibition (such as providing information to a court in respect of proceedings related to the TAA or the South African Police Service and the National Director of Public Prosecution for the purpose of proving a tax offence) they related to the work of state organs and courts in investigating, prosecuting and adjudicating tax cases and related matters. Disclosure under sections 69 and 70 was not public disclosure which would be aligned with the public interest. The majority judgment disagreed with the minority judgment’s contention that these exceptions mean that the prohibition was not absolute. The majority held that the difficulty with that proposition was that it impermissibly sought to import the TAA exceptions into PAIA to support the conclusion that the prohibition in section 35(1) of PAIA is not absolute. This Court held that they were all exclusively TAA exceptions. They were standalone exceptions, solely relevant to the operation of the TAA, and disclosure could only be made to the entities described therein. This Court held that given that the TAA exceptions were totally disconnected from the operation of PAIA, there could be no basis to suggest that those exceptions had the effect of rendering the prohibition on disclosure found in section 35(1) anything other than absolute.

This Court held that arising from its judgments in *Johncom* and *Chipu* and the conclusion that the prohibition in section 35(1) is absolute, it must follow that the prohibition could not withstand constitutional scrutiny. The purpose of the limitation, as being necessary to achieve taxpayer compliance, does not pass the limitation test. Some limitations may be justified, but no case had been advanced for an absolute limitation.

This Court accordingly found that the limitation in section 35(1) was absolute and could not be said to be reasonable and justifiable in an open and democratic society. The section 46 override provided a mechanism that was not only less restrictive than an absolute prohibition, but was one that is narrowly constructed with substantial checks and balances. It held that sections 35(1) and 46 of PAIA as well as sections 67(4) and 69(2) of the TAA were unconstitutional to the extent found by the High Court.

This Court confirmed the order of the High Court. It suspended the declaration of invalidity for a period of 24 months, to enable Parliament to address the constitutional invalidity found to exist. It further ordered a reading-in of the words “35(1)” to section 46 of PAIA and the reading-in of an additional subsection to the TAA. The read in subsection (bA) provides “where access has been granted for the disclosure of the information in terms of the Promotion of Access to Information Act 2 of 2000”. Varied relief was granted in respect of the different applications for leave to appeal, with the specific order, that the request for Mr Zuma’s tax records be referred back to SARS to be considered afresh. Lastly, on the issue of costs, this Court ordered that the costs in respect of the confirmation proceedings be paid by SARS, the Minister of Justice and the Minister of Finance, while the costs in respect of the various appeal applications were to be borne by each respective party.