



SARS INTERPRETATION UPDATE AND CASES

Session 4

Tax Practice on the Move Series

YOUR KEY TO THE TAX COMMUNITY

About The Presenter



Keitumetse Sesana is the Tax Technical Specialist at the South African Institute of Taxation.

She holds a BCom (Law), LLB and Master of Law (Tax Law). Keitumetse is currently a registered SARS practitioner and holds the designation of Master Tax Practitioner.

Keitumetse has substantial tax advisory experience in international corporate tax matters and related matters. After gaining this experience at one of the “Big Four”, Keitumetse joined the South African Institute of Taxation and is presently mandated to manage stakeholder relations by driving and facilitating meaningful engagement with Government departments regarding legislative design and policy on the varying areas of taxation.

She also actively curates and manages tax technical content on legislative interpretation that is presented to tax practitioners for purposes of their Continuous Professional Development

About the Expert Guest Speaker

Dr Julia Choate



Dr Julia Choate is a senior associate in the Bowmans Cape Town office Tax Practice. She has a specific interest in tax dispute resolution and tax administration and has been involved in litigating and settling several large income tax and customs and excise disputes. Dr Choate has a particular interest in the application of Constitutional and administrative law principles to tax administration and disputes.

Dr Choate regularly advises on a wide range of tax issues for both South African and multinational groups, including types of acquisition funding, and the establishment of a business presence in South Africa. She also regularly advises on employee incentive schemes and analyses the tax consequences of such schemes.

She has an LLB , a Postgraduate Diploma in Tax (awarded with Distinction) and a PhD in Tax Law (specializing in Tax Administration) from the University of Cape Town.

AGENDA

- Discussion of the *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* case
- Expert corner discussion with Dr Choate regarding the potential implications of this case
- Question and Answer session

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

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

- **Applicants in this matter**

- 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.

- **Respondents in this matter**

- SARS;
- Mr Zuma;
- Minister of Justice and Correctional Services;
- Minister of Finance; and the
- the Information Regulator as the authority tasked with the monitoring and enforcement of the Promotion of Access to Information Act (PAIA).

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

What was this case about?

- The constitutionality of sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000
- The constitutionality of sections 67 and 69 of the Tax Administration Act 28 of 2011
- In reaching its judgement, the CC also had to delicately balance the Constitutionally guaranteed rights such as the right to access to information, the right to freedom of expression and the right to privacy against the provisions of section 36 of the Constitution (“Limitation of Rights”)
- This matter was also centred on the question whether the order granted by the High Court of South Africa, Gauteng Division, Pretoria in the matter reported on 16 December 2021, that declared section 35 and section 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, should be confirmed.

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Background facts

- In 2019, the third applicant made an application to SARS, in terms of PAIA, to gain access to Mr Zuma's tax records.
- On 19 March 2019, SARS refused the third applicant'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.

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High Court litigation history

- 25 November 2019 – 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.
- The applicants contended that there was credible evidence that Mr Zuma:
 - (a) had evaded tax while he was President;
 - (b) had failed to disclose other sources of income he received; and
 - (c) did not pay tax on the fringe benefits he received.
- The applicants submitted that there is credible evidence in that book that Mr Zuma was not tax compliant. And the only way to determine that he was compliant was to peruse and verify this by the tax information SARS refused the applicants to access.
- Relief sought
 - (a) a declaration that PAIA and the TAA are unconstitutional to the extent that they do not permit access to a taxpayer's tax information under PAIA by a requester other than the taxpayer concerned, even if it is clearly in the public interest that this information should be disclosed;
 - (b) reading-in relief that would extend the limited public interest exception in PAIA; and
 - (c) an order granting access to Mr Zuma's tax records.

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High Court findings

- 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 the Constitution - the limitations on the access to information are 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.

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Constitutional Court Minority Judgment

- 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.
- 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.
- 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 taxpayers 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

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Constitutional Court Majority Judgment

- 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.
- It 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.
- 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.
- It further 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 prohibitions contained in the TAA, 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.
- 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.

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Constitutional Court Majority Judgment

- The majority 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.
- 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.
- 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
- 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.
- The 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
- A specific order, that the request for Mr Zuma’s tax records be referred back to SARS to be considered afresh.

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Litigation in the Constitutional Court

Applicants' arguments

- The applicants approached the court for a confirmation application
- The applicants submitted that the absolute prohibition on disclosure of tax information of a taxpayer held by SARS to a PAIA requester (such as the media) 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 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.
- The impugned prohibitions are not justifiable, as they are not necessary to protect the privacy of taxpayers or for taxpayer compliance.

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Litigation in the Constitutional Court

SARS' arguments

- 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
- 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.
- 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.

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Litigation in the Constitutional Court

Mr Zuma's arguments

- The applicants' case was based on hearsay and did not cross the admissibility threshold.
- The relief sought by the applicants infringed on his rights to privacy and dignity.

Minister of Justice and Correctional Services' arguments

- 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.

The Regulator's argument

- 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.

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Litigation in the Constitutional Court

Minister of Finance arguments

- 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.
- 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”*.

Expert Guest Insights

Expert Guest Speaker insights

1. What are your overall thoughts about the outcome of the case?

LEGAL QUESTIONS

2. At the outset, **what is the significance of the applicants approaching the apex court in this matter?**
3. For the benefit of the audience, can you **please explain (on a high-level) basis what the PAIA is all about?** In your response, **please elaborate on what section 34(1) and 35(1) of the PAIA relate to and how section 46 of PAIA interacts with these provisions?**
4. For the benefit of the audience, kindly also explain **what the provisions of section 67 and 69 of the TAA essentially entail?**
5. Section 36 (limitations of rights) of the Constitution played a significant role in this case, can you please, on a high-level basis **explain what this section means and what this section entails in relation to one's rights (as outlined in the Constitution).**
6. The courts approach the concept of “reading in” very cautiously, so as to not interfere with a separate arm of state being the legislature. But in this instance, the court has read in certain provisions into both the PAIA and the TAA. **What do you make of this and what does this signify?**

Expert Guest Speaker insights

QUESTIONS RELATING TO THE POTENTIAL IMPACT OF THE JUDGMENT

7. 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, which require that a balance be struck between these competing rights. **Do you foresee any danger in the manner in which this will be interpreted by persons seeking to access the tax records of another entity?**
8. In your experience, what are the circumstances under which a person/ entity can request the tax records of another taxpayer? Do you have an example of this?
9. The CC confirmed the order of the High Court but has suspended the declaration of invalidity for a period of 24 months so as to enable Parliament to address the constitutional invalidity found to exist. Parliament will probably consider the Court order. **When Parliament indeed changes the legislation, what will the implications be for tax advisors and practitioners?**
10. The matter has been referred back to SARS, and in his media statement the CSARS has reiterated that taxpayer confidentiality remains a priority for SARS, but this begs the questions, **do you think SARS will challenge this order, and do you think they would succeed?**

Questions?



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