

# Tax & Exchange Control

## ALERT

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#### A game changer for taxpayer confidentiality: The Constitutional Court decides in a narrow 5-4 split decision

While public interest litigation is a common occurrence in South Africa, it seldom involves the area of tax law. However, pursuant to the Constitutional Court's judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13, handed down on 30 May 2023, this might become a more regular occurrence and something the taxpayer and tax advisory community may see more of in future.

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While public interest litigation is a common occurrence in South Africa, it seldom involves the area of tax law. However, pursuant to the Constitutional Court's judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13, handed down on 30 May 2023, this might become a more regular occurrence and something the taxpayer and tax advisory community may see more of in future.

The judgment considered the constitutionality of blanket confidentiality of taxpayer information. More specifically, whether sections 35 and 46 of the Promotion of Access to Information Act 2 of 2000 (PAIA) and sections 67 and 69 the Tax Administration Act 28 of 2011 (TAA), are unconstitutional to the extent that they preclude access to tax records by a person other than the taxpayer, even in circumstances where the requirements of sections 46(a) and (b) of PAIA, the "*public interest override*", are met.

The High Court had decided that these provisions were unconstitutional – which we discussed in our [Tax and Exchange Control Alert](#) of 18 November 2021. The Constitutional Court (CC) was then required to decide whether to confirm the High Court's finding on the unconstitutionality, or not. At the same time, the South African Revenue

Service (SARS) and some of the other respondents appealed against parts of the High Court's order. Ultimately, in a narrowly split decision, five judges confirmed the High Court's finding on unconstitutionality, with the remaining four judges deciding that the High Court's decision should not be confirmed.

In this article, we discuss the majority decision. Given the importance and potential implications of the judgment, we will write separately about the minority judgment in future and compare the different approaches taken by the two groups.

### Background

The High Court application was brought pursuant to the third applicant, Warren Thompson, applying to SARS in 2019, in terms of PAIA, to gain access to former President Jacob Zuma's tax records,



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based on allegations made by Jacques Pauw in his book titled *The President's Keepers* and subsequently by several other people. It was alleged that there was "credible evidence" that former President Zuma was not tax compliant. SARS refused the PAIA application on the basis that that former President Zuma was entitled to confidentiality under sections 34(1) and 35(1) of PAIA, as well as section 69(1) of the TAA. The third applicant launched an internal appeal against SARS' refusal, which was also dismissed by SARS on the same grounds, resulting in the applicants launching the constitutional challenge in the High Court.

## The majority's assessment of the minority judgment

The majority judgment, written by Kollapen J, indicated that the minority judgment's finding that the impugned provisions of PAIA and TAA

pass the limitation test in section 36 of the Constitution of the Republic of South Africa, 1996 (Constitution) was based on the following substantive conclusions:

- The prohibition on disclosure of tax records is not absolute and this matter is thus distinguishable from the judgments in *Johncom Media Investments Ltd v M* [2009] (4) SA 7 (CC) and *Mail and Guardian Media Ltd v Chipu N.O* [2013] (6) SA 367 (CC).
- Taxpayer compliance is dependent on the assurance of confidentiality of taxpayer information, which is what the impugned provisions seek to do.
- The disclosure of taxpayer information may breach the confidentiality required by South Africa's international obligations arising out of bilateral and multilateral taxation agreements it has entered into.

- Extending the "public interest override" to taxpayer information would impact public figures and ordinary citizens alike and unduly impact the privacy interests of ordinary citizens who may warrant a higher level of privacy.
- There are less restrictive means to achieve the purpose and these include the various exceptions in the TAA as well as the right of an interested person to report a substantial contravention of the law to the investigative or prosecutorial authorities.

## The balancing of rights

The majority judgment explained that when interests of privacy and individual self-determination stand in conflict with the collective public interest and the values of openness and transparency, the conflict must be approached through the lens of the Bill of Rights by balancing those

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rights and interests, as contemplated by the limitation exercise in section 36 of the Constitution. In this particular instance, the balance was 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 noted by the majority that Chapter 4 of PAIA contains extensive provisions that provide for the mandatory protection of at least 11 categories of information from public disclosure, including:

- private personal information about individuals;
- trade secrets of private parties;
- military and security information that could cause prejudice to the country's defence and security or would reveal information supplied in confidence by another state or international organisation; and

- information containing confidential information or trade secrets of the state, the disclosure of which might jeopardise the country's economic interests or put public bodies at a disadvantage in contractual or other negotiations, and so forth.

However, PAIA provides for mandatory or discretionary protection of these categories of information; section 46 provides for what has been termed a mandatory "*public interest override*" that obliges the disclosure of information that would otherwise have been the subject of protection. Section 46 states, in a nutshell, that the disclosure of these categories of information can take place if:


- the disclosure of the information would reveal evidence of a substantial contravention of, or failure to comply with the law, or an imminent and serious public safety or environmental risk; and
- the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

The majority judgment notes that a PAIA requester who seeks to successfully invoke the benefit of section 46 has "*formidable substantive and procedural hurdles to overcome*". Before being obliged to release the record requested, the information officer must be satisfied that the public interest in disclosure **clearly outweighs** the harm that the provision in question contemplates. The effect of the "*public interest override*" is 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. In addition to this, the third party in respect of whom the information relates, must be informed and given the opportunity to make representations before any decision is taken by the information officer.

## The section 35(1) insulation and the question of absoluteness

In this respect, the majority agrees with the conclusion of the minority that taxpayer records generally contain personal information





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submitted to the tax authorities as part of compliance with the tax obligations imposed by law. However, the majority indicated that the key question is whether such information should enjoy unqualified and absolute protection from public disclosure. As it stands, section 35(1) of PAIA is so wide and limitless that it extends protection to all information in the tax records held by the state, irrespective of its nature and regardless of whether those records or parts thereof justify a claim to protection. This is in contrast to the other 11 categories of information referred to above and means that taxpayer information is also immunized from the section 46 override that applies to all these other categories of information.

By way of example, although not at issue in this case, section 35 also protects the income tax information of companies from disclosure, including public companies and listed companies, even though certain information of listed companies would ordinarily be in the public domain.


Furthermore, section 35 applies to all tax statutes, including the Income Tax Act 58 of 1962, the Value-Added Tax Act 89 of 1991 and other tax statutes regarding the payment of mineral royalties, securities transfer tax, customs and excise, estate duty and transfer duty.

### The TAA and its exceptions

The prohibition on disclosure found in section 35(1) of PAIA is reinforced by sections 69(1), 67(3) and 67(4) of the TAA. However, the majority noted that the prohibitions contained in the TAA primarily relate to the administration of the tax system and the work of the organs of state and are not prohibitions on any general right of access to information.

Section 69(2) of the TAA states that a SARS official may disclose confidential information to a person other than another SARS official if it relates to disclosure to a court in respect of proceedings relating to the TAA or the South African Police Service and the National Director of Public

Prosecutions for the purpose of proving a tax offence. The exception in section 70 of the TAA relates to the disclosure of information to organs of state for particular purposes, including the South African Reserve Bank, the Financial Sector Conduct Authority and the National Credit Regulator. The majority judgment indicated that whereas the minority found that these exceptions in the TAA mean that the prohibition is not absolute, it disagreed with this finding as it was tantamount to importing the TAA exceptions into PAIA to support the conclusion that the section 35(1) prohibition in PAIA is not absolute. According to the majority judgment, the exceptions in the TAA are not a partial allowance of the constitutional right that the public has of access to information held by the state and do not afford any public right of access to information. These exceptions would exist regardless of whether we had section 32 of the Constitution, containing the right of access to information, and PAIA. As these



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exceptions do not advance the rights of access to information and freedom of expression, they cannot be seen as exceptions to the prohibition on the right of access to information.

Assessing the judgments in *Chipu* and *Johncom*, the majority firstly noted that in *Johncom*, the CC found that the absolute prohibition on publication of any particulars of a divorce action or any information that came to light during such an action, was unconstitutional. This was based on the view in that case that, amongst other things, there were less restrictive means available to achieve the purpose of the limitation. The majority then considered the CC's judgment in *Chipu*. Here, it was held that the absolute prohibition applicable to the confidentiality of asylum applications and information contained therein, was also unconstitutional and that a less restrictive way of achieving the limitation could be achieved by giving the Refugee Appeal Board

discretion to allow the media to attend its proceedings and impose conditions on reporting of those proceedings. Pursuant to this, the majority concluded that one must be careful not to elevate taxpayer confidentiality to some sacrosanct place where no exception to enable public access to it is possible, which in the majority's view is the effect of section 35 of PAIA, as a taxpayer is not at all subject to the "public interest" override. In addition, the majority disagreed with the minority's finding that this matter is distinguishable from *Johncom* and *Chipu*. It held that both cases dealt with vulnerable categories of people, that taxpayers cannot form a special category of persons that are entitled to an absolute level of protection from the disclosure of information that may reveal serious criminality and that both divorce proceedings and asylum proceedings were considered to be proceedings of a sensitive nature requiring privacy.

### The purpose of the limitation

The majority agreed with the minority that there is a need for an efficient tax administration system in a functioning democracy. Taxpayers who comply with their tax obligations are essential for a healthy fiscus and are entitled to a measure of confidentiality in the tax information they submit. However, the majority disagreed with the minority that this is a legitimate purpose for limiting the right of access to such information. Considering the exceptions in the TAA, the majority judgment expressed the view that the confidentiality provided for in the TAA is relative confidentiality, even without the section 46 override in PAIA, meaning that SARS' argument for absolute confidentiality to advance the purpose of taxpayer compliance loses traction. With reference to an expert report written by Prof. Jennifer Roeleveld, the majority held that there was no



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evidence to support the conclusion that absolute confidentiality is a pre-condition for taxpayer compliance. It seems to agree with the report's description of the conceptual approach to the question of taxpayer confidentiality, that it is characterized by the underpinnings of transparency and confidentiality, and that there should be a legitimate balance.

The majority thus stated that the idea of absolute provisions, either in terms of openness or in terms of confidentiality, is not the uniform standard in terms of South Africa's jurisprudence or internationally. It notes that the applicants did not seek absolute transparency but merely that the public interest override also apply to taxpayer information, which in the court's view is consistent with the conceptual framework that Roeleveld used to preface her report. It thus concluded that there is no basis in principle or in terms of any evidence that absolute confidentiality is required to achieve taxpayer compliance and rejected the language

used by SARS of a "*compact*" between SARS and taxpayers regarding confidentiality. Furthermore, the majority rejected SARS' reliance on a Kenyan tribunal's decision that protected taxpayer secrecy, as it was overturned by the Kenyan Court of Appeal, that held that disclosure of certain taxpayer information in certain contexts should be allowed, as the Kenyan Constitution attempts to "*fashion an open and free country where governance is democratic and accountable to the 'wananchi', the citizenry*". It also held that comparing the South African dispensation to those of the UK and Canada, which have absolute prohibitions, and those of Sweden and Slovenia, which provide for disclosure, is not relevant. The question is whether section 35(1) of PAIA is consistent with South Africa's constitutional framework.

Regarding the risk of disclosure of personal taxpayer information, the majority held that considering the contents of the override provision in section 46 of PAIA, this would not

be an issue. Furthermore, any risk of disclosure could also be effectively managed by the severability provisions in section 28 of PAIA, which provide for the severing or redacting of a record to overcome any risk posed by over-disclosure. Furthermore, the majority disagreed with the minority's finding that there would be a risk in high-profile public figures and ordinary citizens being equally exposed to the risk of the disclosure of personal information, as the override is not directed at a category of individuals but rather information that is in the public interest.

### The effect of applying the section 46 override and conclusion

Viewed in its entirety, the majority held that the effect of applying the override would be:

- Confidentiality would continue to be the default position.
- The override would only apply in limited and closely defined circumstances, with a relatively high bar to lift confidentiality.

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- Section 28 of PAIA could be invoked to deal with severability and ensure that the parameters of what is disclosed are properly managed.
- The third-party notice procedure would enable the taxpayer to make representations and be heard before a decision on disclosure is taken.
- An aggrieved party would have recourse to internal appeal mechanisms and the courts if necessary.

As such, the majority concluded that the limitation in section 35(1) of PAIA is unconstitutional and therefore, that section 46 of PAIA and sections 67(4) and 69(2) of the TAA are unconstitutional to the extent found by the High Court. The order of constitutional invalidity of the High Court was thus confirmed.

## Remedy

The majority decided that the finding of unconstitutionality should be suspended for 24 months, to allow Parliament to address the constitutional invalidity that was found to exist. Pending these measures, it read in certain words and provisions into section 46 of PAIA and sections 69(2) and 67(4) of the TAA, so that the public interest override applies to requests for taxpayer information.

In addition, the majority agreed with the submissions by the parties that the request under PAIA for former President Zuma's tax returns be referred back to SARS for consideration afresh in light of the CC's order.

## Comment

The importance and significance of the judgment is apparent from the fact that on the same day the judgment was delivered, SARS issued a media statement stating, amongst other things, that it is considering the application of the judgment in full. Its media statement notes that the judgment does not set aside the tax confidentiality provisions in the TAA and sets a high threshold to meet when access is requested to a taxpayer's tax records.

We will discuss the minority judgment and the other potential implications of the CC's judgment in future, but despite the 5-4 split, it is important to appreciate that the finding of the majority applies and that the landscape on taxpayer confidentiality has most certainly changed.

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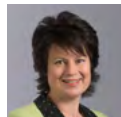
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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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