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Tax & Exchange Control
ALERT

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The rights of access to information and freedom of expression vs the right to privacy: The minority's view made major

In last week's Tax and Exchange Control Alert we discussed the Constitutional Court's (CC) majority judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13 which was handed down on 30 May 2023. This week we take a closer look at the minority judgment. The minority held that the High Court's order to declare 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) unconstitutional to the extent that they preclude access to tax records by a person other than the taxpayer, evenwhere the requirements of, the "*public interest override*" are met, should not be confirmed.

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In last week's Tax and Exchange Control Alert we discussed the Constitutional Court's (CC) majority judgment in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13 which was handed down on 30 May 2023. This week we take a closer look at the minority judgment. The minority held that the High Court's order to declare 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) unconstitutional to the extent that they preclude access to tax records by a person other than the taxpayer, evenwhere the requirements of, the "*public interest override*" are met, should not be confirmed.

As noted in last week's Tax and Exchange Control Alert, the matter originates from a PAIA request that was made by Warren Thompson (the third applicant in the matter) to the South African Revenue Service (SARS) in terms of which the applicant requested access to former President Jacob Zuma's tax records. The application was premised on allegations that were made by Jacques Pauw in his book titled *The President's Keepers*. In terms of the application to SARS, it was averred that there was "*credible evidence*" that, while he was president, Zuma was not tax compliant.

In terms of the High Court application, which was brought pursuant to the unsuccessful PAIA applications, the applicants contended that there was credible evidence that former President Zuma:

- had evaded tax while he was president;
- had failed to disclose other sources of income he received; and
- did not pay tax on the fringe benefits he received.

The applicants argued that the prohibition to access information of a taxpayer contemplated in sections 35(1) and 46 of PAIA and Chapter 6 of the TAA was unconstitutional in so far as such access was in the interest of the public. Additionally, the applicants submitted that this prohibition was an unjustifiable limitation of their constitutional right to freedom of expression and right of access to information.

The majority judgment, written by Kollapen J, agreed with the above contention and confirmed the order handed down by the High Court to declare sections 35 and 46 of PAIA and sections 67 and 69 of the TAA unconstitutional.

The minority judgment, written by Mhlantla J, on the other hand, "*regrettably*" disagreed with the majority's judgment. Ultimately, the minority held that the limitation on the right of access to information (and by implication the right to freedom of expression) contained in sections 35 and 46 of PAIA and sections 67 and 69 of the TAA was

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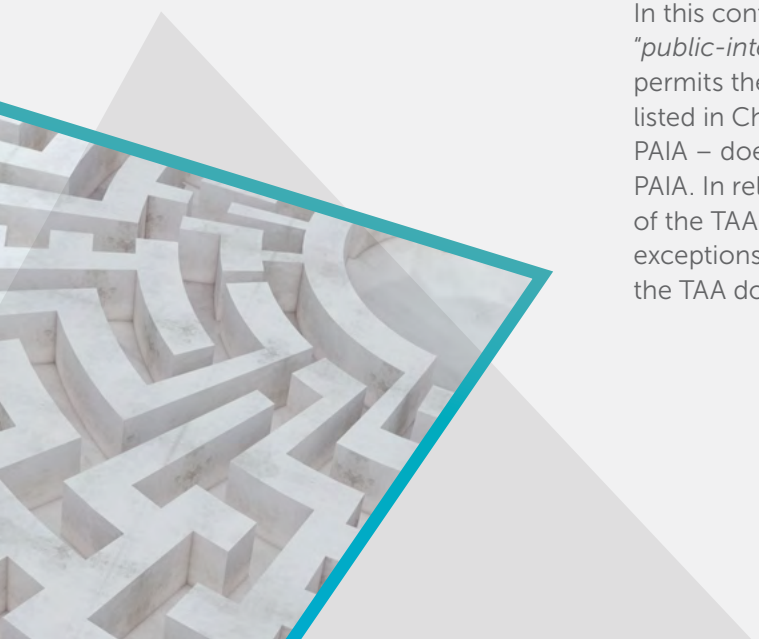

justifiable, and as such, the High Court's order of invalidity should not be confirmed. Considering the importance of the issues at hand and the close 5-4 split in support between the majority and minority decisions, we delve into the minority judgment in a bit more detail.

An analysis of the minority's basis for declining to confirm the order of unconstitutionality follows.

The prohibition is not absolute

It was the applicants' submission that there was an absolute prohibition on the disclosure of tax information of a taxpayer held by SARS to a PAIA requester other than the taxpayer. In this context, it was noted that the *"public-interest override"* – which permits the disclosure of information listed in Chapter 4 of Part 2 of PAIA – does not apply to section 35 of PAIA. In relation to sections 69 and 67 of the TAA, it was submitted that the exceptions contained in section 69 of the TAA do not include a PAIA request, and section 67 of the TAA prohibits the disclosure to a third party and prohibits the further disclosure of taxpayer information that has been obtained contrary to Chapter 6 of the TAA. It was, therefore, contended by the applicants that these prohibitions prevent the media from obtaining tax information from SARS, and from reporting on said tax information, *"even if the information contains conclusive evidence of corruption, malfeasance or other law-breaking"*.

In support of their submissions, the applicants argued that this matter was similar to information that was sought against analogous prohibitions on access to information 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).

The respondents, however, contended that the secrecy and confidentiality provisions are not absolute as they are subject to tightly controlled exceptions. The minority judgment agreed with this contention and noted that the very presence of these exceptions demonstrate that the limitation in question is not absolute.

The minority judgment noted that the *Johncom* and *Chipu* matters were distinguishable from the current matter because in both the prohibitions went beyond the purpose for which they existed.

Johncom and *Chipu* overview

Johncom concerned the general rule that courts are open to the public and the prohibition on the publication of the identity of parties to divorce proceedings. The CC in this matter held that section 12 of the Divorce Act 70 of 1979 (Divorce Act) unjustifiably infringed the right to freedom of expression as enshrined in section 16 of the Constitution. The court further held that the purpose of protecting the rights of divorcing parties and their children could be achieved by less restrictive means, and accordingly, the limitation occasioned by section 12 of the Divorce Act could not be justified.

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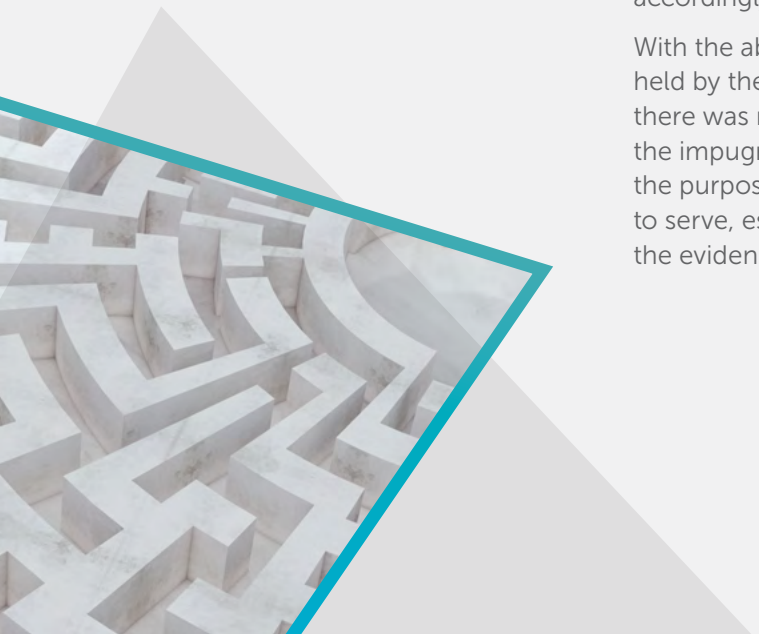

Chipu, on the other hand, dealt with the issue of whether the requirement of absolute confidentiality in proceedings before the Refugee Appeal Board was a justifiable limitation of the constitutional right to freedom of expression (which includes the freedom of the press and the freedom to receive and impart information or ideas). In this matter the CC held that, to the extent that section 21(5) of the Refugees Act 130 of 1998 does not confer a discretion upon the Refugee Appeal Board to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable and accordingly invalid.

With the above context in mind, it was held by the minority that in this matter there was no basis for concluding that the impugned prohibitions go beyond the purpose for which they are meant to serve, especially when considering the evidence relied upon by SARS in justification thereof. Although the applicants argued that the evidence proffered by SARS did not sufficiently establish the correlation between tax compliance and taxpayer information secrecy, the minority noted that the applicants erred in their attempt to demonstrate the perceived insufficiency of the evidence by failing to consider that in a constitutional challenge, a court weighs up "*legislative facts differently*".

As noted above, the minority held that the mere presence of exceptions demonstrates that the limitation in question is not absolute. In this regard, the minority judgment highlighted the fact that sections 70 and 71 of the TAA make provision for exceptions to the prohibition of disclosure of tax information. It held that the fact that the exceptions provided for in the TAA do not include the public or media houses was irrelevant and, therefore, the applicants' argument for absolute prohibition could not be sustained.

Taxpayer compliance and the assurance of confidentiality

It is trite that the South African tax system is largely premised on voluntary compliance. 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 the disclosure of any criminal conduct that they may be engaged in and any income from it. As such, the respondents submitted that the impugned provisions serve to preserve taxpayers' secrets and ensure taxpayers' voluntary compliance. SARS, therefore, submitted that the extension of the override provision in section 46 would not only undermine the assurance given to taxpayers that SARS will keep their secrets, but would also undermine taxpayers' confidence in SARS.

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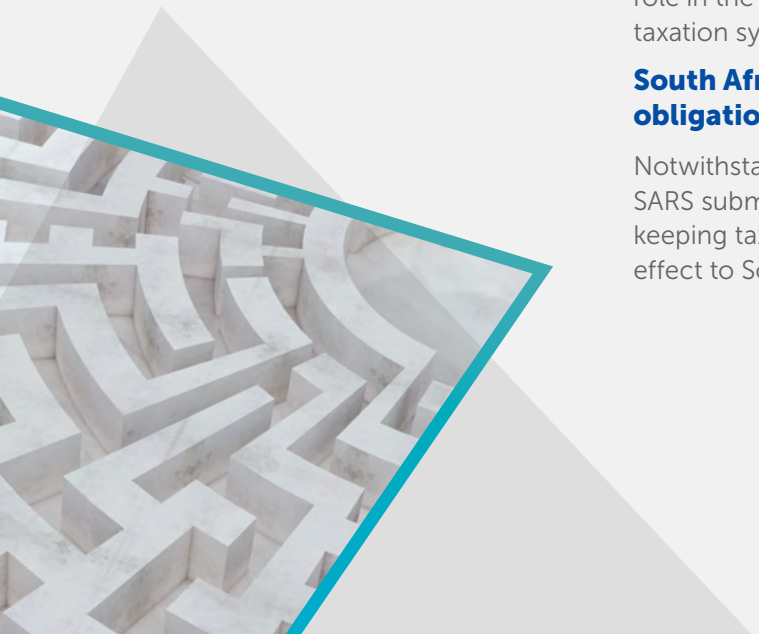

The minority judgment agreed with the submissions raised by SARS in this regard. The minority judgment noted that the connection between taxpayer compliance and tax secrecy has been recognised for years in our legal order and has been equally recognised and accepted by our courts for countless years. According to the minority judgment, the historical justification for taxpayer information secrecy continues to be of relevance today. The minority held that taxpayer information secrecy is central to efficient tax administration. As such, the limitation of the right of access to information, as well as the right to freedom of expression, serves a vital role in the sustained and unhampered taxation system.

South Africa's international obligations

Notwithstanding the aforementioned, SARS submitted that the policy of keeping taxpayers' secrets gives effect to South Africa's obligations under international law. It was the respondents' view that the relief sought by the applicants would breach South Africa's international obligations as contemplated in the various treaties and agreements to which South Africa is a party, and could result in the ostracization of South Africa from the international network for the exchange of taxpayer information.

The minority judgment was, again, in agreement with the respondent's contentions insofar as they related to South Africa's international obligations. Another factor that was raised in the minority judgment was that the general practice of maintaining taxpayer secrecy has also been adopted and sustained in various other jurisdictions. The minority used jurisdictions such as the UK and Canada as examples to drive the point home.

It was, therefore, held that the limitation is not only aimed at preserving taxpayer privacy and tax compliance, but also at ensuring South Africa's compliance with its international law obligations. If access to tax records is granted to the public, it would constitute a manifest breach of these objectives.

Public interest override and ordinary citizens

In terms of the application, the remedy that was sought by the applicants included (but was not limited to) (i) the extension of the *"public–interest override"* as contemplated in section 46 of PAIA to section 35 of PAIA and, (ii) the reading-in of an exception into section 69(2) of the TAA to permit disclosure of taxpayer information where access has been granted under PAIA. The applicants contended that the proposed remedy would not violate South Africa's international obligations as suggested by SARS as it would only apply to the disclosure of information held by SARS where it has been gathered domestically.

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In response, SARS contended that the relief sought by the applicants would not only violate individuals' right to privacy, under section 14 of the Constitution, but also the Marcel principle. The *Marcel* principle is a well-established principle of the law of confidentiality which states that where information of a personal or confidential nature is obtained in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from who it was received or to who it relates not to use it for other other purposes. In this regard, SARS noted that the relief sought by the applicants would enable a PAIA requester to freely disseminate tax information to any person, without constraint. SARS further submitted that if taxpayer information were to be made subject to disclosure to the media and the public under section 46 of PAIA, this would be an undue limitation of taxpayers' rights to privacy.

The minority judgment seemed to agree with this contention as it noted that what was being sought by the applicants was a *"drastic measure that may have grave consequences to a taxpayer"*.

The minority expressed the concern that that although the facts in the current matter related to a public figure, section 46 of PAIA does not make the status of a public figure a precondition of the applicability of the test. Therefore, if the *"public-interest override"* were to be extended as proposed, the provision would be indiscriminately applicable to ordinary civilians or private individuals where their 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. The minority was therefore not convinced that the relief sought justified the possible challenge to the privacy interests of individuals and the possible detrimental effect the proposed extension could have to the reputations and societal standings of taxpayers. The minority also raised the point that if the proposed remedy were implemented that it would require tax administrators to make a judgment call as to whether PAIA requesters and their reasons for filing a request have satisfied the requirements of the *"public-interest override"*. It was the minority's view that there are less restrictive ways to achieve the purpose being sought by the applicants.

Less restrictive means

The minority judgment highlights the fact that the current legal framework already has measures in place to allow for a balance to be struck between access to taxpayers' information and maintaining taxpayer secrecy. In this regard, the minority judgment notes that the TAA contains numerous exceptions in terms of which a taxpayer's information may be disclosed. It was noted by the

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court that for purposes of addressing substantial contravention of the law, a report could always be filed with the relevant authorities – namely, SARS itself, the National Prosecuting Authority and/or the South African Police Service.

Comment

Is the minority judgment correct in saying that the court's judgment will have "*grave consequences*" for taxpayers? The majority may be correct in stating that a PAIA requester who seeks to successfully invoke the benefit of section 46 will face "*formidable substantive and procedural hurdles*" before a request can be granted by SARS. Whilst one appreciates the valid concerns raised by the minority judgment regarding the potentially excessive disclosure of taxpayer information, the majority judgment went some way to explaining how the disclosure of taxpayer information pursuant to the application of the "*public interest override*" can be limited to only serve the purpose intended by the provision. The majority's reference to the severance and redaction provisions in PAIA (section 28) is crucial in this regard. Whilst SARS will ultimately go through the process set out in PAIA when considering a PAIA request and have to consider whether the requirements of the "*public interest override*", it can still disclose the record requested, with parts of it severed or redacted.

Fundamentally, it seems that the majority's finding is premised on the fact that the starting point in assessing the constitutional challenge is the provisions of PAIA, whereas the minority seemed to rely on the provisions of the TAA to justify its outcome. Considering that PAIA gives effect to the right of access to information in the Constitution, there is substantial merit to the argument that PAIA should be the starting point in analysing the issue at hand. Whereas one could argue that the TAA protects the constitutional right to privacy, the gist of the majority judgment is that access to information and freedom of expression must trump privacy, but only to the extent provided for by the "*public interest override*". It is also arguable that the judgment is a good example of constitutional subsidiarity, the principle that legislation must give effect to constitutional rights unless the legislation is inconsistent with the Constitution.

What about SARS audits?

An important practical question is this – what happens if SARS considers a PAIA request and finds that the "*public interest override*" requirements are met, if it has not audited that taxpayer based on the information sought? Take for example part (a) of section 46 of PAIA, namely the requirement that the disclosure of the record

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would reveal evidence of a substantial contravention of or failure to comply with the law. Section 40 of the TAA states that SARS may select a person for inspection, verification or audit on the basis of any consideration relevant for the proper administration of a tax Act, including on a random or risk assessment basis. While SARS is a large organisation it is known that SARS' resources (and experienced staff) had been declining for a number years and are in the process of increasing, also pursuant to the Nugent Commission findings. Will SARS initiate an audit out of fear that they may have missed something from a tax perspective, before the information is disclosed to the PAIA requester?

It is entirely possible that SARS may not have audited someone in respect of the information that is being sought in terms of the PAIA request, as the information requested is not relevant for the purposes of determining tax compliance or a risk or random assessment done did not reveal such risk. It is also possible that no such audit took place, due to SARS' limited resources compared to the sheer number of returns, for numerous taxes, it has to consider and assess each year. In the PAIA request context, SARS will need to assess whether there is a contravention of any law, which goes broader than tax laws. An interesting issue that comes to mind is cases involving the tax treatment of illegal income (see for example *MP Finance Group CC v Commissioner for South African Revenue Service* [2007] SCA 71 (RSA).

Ultimately, the proof of the pudding is going to be in the eating and it remains to be seen how the disclosure of taxpayer information pursuant to PAIA requests to which section 46 apply, will affect taxpayers.

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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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