

Legal update 5 of 2022: Confidentiality of personal information

Introduction

This update focuses on whether the Protection of Personal Information Act (POPIA) makes provision for third parties sharing the personal information of an individual, if it is required by the law, for litigation purposes or by an order of the court. Below is a summary of and more details about the case.

Summary

Case: Divine Inspiration Trading 205 (Pty) Ltd v Gordon and Others: Western Cape High Court, Cape Town (case no: 22455/2019) Reported: 3 March 2021

- **The finding:** POPIA permits the processing of an individual's personal information if it is in compliance with an obligation of law or a court order and where the processing is necessary to pursue the legitimate interests of the responsible party or any third parties.

The law encourages full disclosure of documents for

purposes of litigation. While there is an interest in protecting privacy, there is also a public interest in finding out the truth.

- **Practical application:** Third parties, which include administrators and insurers, may be subpoenaed to provide the personal information or records of an individual for the purposes of litigation or by an obligation of law. In line with POPIA, this may be done even without the consent of that individual.

More details about the case

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The matter before the High Court (the Court) was as follows:

- The applicants sought an order against the second and third respondents, Ms G's general practitioner and psychiatrist (the medical practitioners) directing them to provide the applicants and the Court with all the medical records they held for Ms G.
- The applicants required these records for the purposes of action proceedings (main action) between the applicants and Ms G, dealing with her claim against the

applicants for injuries she sustained while visiting their premises on 2 October 2015.

- Ms G refused to provide this information herself, stating that the medical records were irrelevant for purposes of the main action and that providing these records would infringe on her right to privacy and dignity and her rights under POPIA.
- The above was the reason that the medical practitioners were subpoenaed to provide the medical records.
- The medical practitioners refused to comply with the subpoenas, stating that they were restricted from disclosing the medical records according to their

ethical duties held in Ethical Rules for Conduct for Practitioners Registered under the Health Professions Act (the HPA) and section 14 of the National Health Act (the NHA), but may do so in terms of subsection (2)(b) when “a court order or any law requires that disclosure”.

The Court granted the applicants’ request and found the following:

- Rule 38 of the Uniform Rules of Court required the receiver of a subpoena to hand the required documents to the registrar of the court, unless they claimed that the documents were privileged.
- The medical practitioners were acting in good faith. However, it was not sufficient to refuse to comply with the subpoenas and to justify to the registrar that the records were privileged. This was confirmed as follows in *Trust Sentrum (Kaaopstad) (Edms) Bpk and Another v Zevenberg and Another* 1989 (1) SA 145:

“... a person’s genuinely (but wrongly) held belief can never serve to avoid complying with what is effectively a summons to produce to the Registrar of the Court the information called for therein. He must satisfy the Registrar (or conceivably the Court) that his claim of privilege is not merely ‘bona fide’, but legally justified.”

- The question was whether rule 38 constituted “any law” as referred to in section 14(2)(b) of the NHA. The Court held that rule 38(1) was contemplated in line with the Supreme Court Act which provided that a party to civil proceedings may “procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of court”.
- The Court adopted the view followed in the *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) and *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) cases dealing with section 7 of the Promotion of Access to Information Act (PAIA). Section 7 prevents PAIA from having any impact on the law relating to the discovery or compulsion of evidence in civil and criminal proceedings. It was to allow requests for access to records for litigation and after litigation has commenced, to be regulated by the rules of the court governing such access in the course of litigation.

- The Court applied the principle above in this matter. It held that the reference to ‘any law’ in section 14(2)(b) of the NHA includes the rules and in particular rule 38 for present purposes. This meant that health practitioners, whose patients refused to consent for the disclosure of their medical records, cannot rely on section 14 when they were served with a subpoena under rule 38. It went without saying that ethical rules are subject to these principles.
- In dealing with whether section 11 of POPIA was applicable, the Court stated that it was known that medical records constituted personal information in line with section 1 of POPIA. The Court added that the medical practitioners were responsible parties as defined in POPIA and the obligation of law fell upon them, for purposes of the present matter.
- It further added that rule 38(3) permitted the data subject, being Ms G, to object to the processing of her personal information on reasonable grounds, unless provided for by legislation. The Court found that the exclusion of an obligation of law from subrule (3) was because the legislature never intended to exclude the processing of information where the law required such processing. Rule 38(1) constituted ‘law’ which imposed a duty on the medical practitioners to process Ms G’s medical records.
- Section 11 of POPIA provided for the processing of information in two instances: Where there was a legal obligation to do so imposed by law on the responsible party and where it was necessary in pursuance of the legitimate interests of the responsible party or third parties (the applicants) to whom the information was supplied.
- The Court further found that section 12(2)(d)(iii) of POPIA permitted the collection of data from a source other than the data subject for proceedings in any court or tribunal that had commenced or were reasonably contemplated.
- Additionally, section 15(3)(c)(iii) stipulated that once personal information had been processed, POPIA made provision for further processing to take place for purposes of the court or tribunal proceedings.

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