

Article

LEGAL ALERT

Constitutional Court Declares that where there is no Probable Cause Of Breach Of Tax Laws, Collection of Financial Information amounts to a Violation of the Right to Privacy: Jurisprudence on Protection of Special Personal Data in Uganda.

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Introduction

In Uganda, just like in many other countries, personal data is a valuable resource that individuals and organizations alike use to achieve various objectives. However, some types of personal data are considered special and require extra protection due to their sensitivity. This is particularly important when it comes to the right to privacy, which is enshrined in Uganda's constitution under Article 27 and various international legal instruments such as the African Union Convention on Cybersecurity and Personal Data Protection 2014 among others. This article will explore the concept of special personal data and the right to privacy in Uganda through the lens of the Constitutional Court's decision in Constitutional Petition No. 014 of 2018. The article will also discuss the effect of the decision to jurisprudence on the law governing personal data protection in Uganda.

Facts

On 9th March 2023, the Constitutional Court of Uganda issued a decision in **ABC Capital Bank Ltd & 30 Ors. v. Attorney General & Another [Constitutional Petition No. 014 of 2018]**. In the petition, the petitioners who were financial institutions (1st – 29th petitioner), a development bank created by statute (30th petitioner) and the Umbrella Association of all registered financial institutions in Uganda (31st petitioner).

The petitioners argued that on the 16th March 2018 and 18th March 2018, the 2nd Respondent, the Commissioner General of the Uganda Revenue Authority issued to the managing directors of the 1st – 29th Petitioners, a notice purportedly issued under Sections 41 and 42 of the Tax Procedures Code Act, 2014 (TPC Act), which provide as follows:

Section 41:

Access to premises, records and data storage devices

- (1) For the purposes of administering any provision of a tax law, the Commissioner—
 - a) shall have at all times and without prior notice, full and free access to—
 - i. any premises or place;
 - ii. any record, including a record in electronic format; or
 - iii. any data storage device;
- (7) This section has effect despite—
 - a) any law relating to privilege or the public interest with respect to access to premises or places, or the production of any property or record, including in electronic format; or
 - b) any contractual duty of confidentiality”

Section 42:

Notice to obtain information or evidence.

- (1) The Commissioner may, for the purpose of administering any provision of a tax law, require any person, by notice in writing, whether or not liable for tax—
 - a) to furnish, within the time specified in the notice, any information that may be stated in the notice; or
 - b) to attend at the time and place designated in the notice for the purpose of being examined by the Commissioner concerning the tax affairs of that person or any other person, and for that purpose the Commissioner may require the person to produce any record, including an electronic format, in the control of the person.
- (4) This section has effect despite—
 - a) any law relating to privilege or the public interest with respect to the giving of information or the production of any record, including in electronic format; or
 - b) any contractual duty of confidentiality.”

In the notices, the 2nd Respondent required each of the petitioners to furnish it with details of all bank accounts held by them for the two years period commencing 1st January 2016 to 31st December 2017. The details were to include but were not limited to the following; the account name, the account number, the name of the signatory, the type of account, a taxpayer identification number (TIN) where available, the national identification numbers or business registration numbers where applicable, total credits for each of the two years, total debits for each of the two years, current balance, account holders' telephone contacts and email addresses.

The petitioners argued that without prejudice to the duty of Ugandans to pay taxes and URA's mandate in the collection of the said taxes as per Article 17(g) of the Constitution of the Republic of Uganda, that Sections 41 and 42 of the TPC Act contravene and are inconsistent with the right to privacy enshrined in Article 27(2) of the Constitution in a manner that far exceeds what is necessary to accomplish the objective of tax collection.

The Constitutional Court allowed the petition in part and declared that notices issued by the 2nd Respondent impaired the right to privacy of all bank account holders of Uganda enshrined in Article 27(2) of the Constitution in a manner that far exceeds what is necessary to accomplish the objective of tax collection and is accordingly beyond what is acceptable and demonstrably justifiable in a free and Democratic society.

In making its decision, the court considered that whereas Sections 41 and 42 of the TPC 2014 clothe the Commissioner of the URA with power to access special personal data such as financial information of bankers in Uganda, such power can only be exercised in stances where there is an investigation into a possible breach of the tax law by a banker. The court reaffirmed that a blanket request to access such special personal data is unconstitutional because it arbitrarily violates bankers' right to privacy.

The extended arm of the court's decision intersects with the protection accorded to "financial information" under the Data Protection and Privacy Act, 2019 as explained below:

Legal Basis:

The right to privacy is recognized and protected under Article 27(2) which provides as follows:

27. *Right to privacy of person, home and other property.*
 - (1) *No person shall be subjected to –*
 - (a) *unlawful search of the person, home or other property of that person; or*
 - (b) *nlawful entry by others in the premises of that person.*
 - (2) *No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.*

In its decision, the Constitutional Court examined the controversy between Section 21(1) and 27(2) whereby the former only protects a person against unlawful searches and unlawful entry into a person's premises while the latter blanketly protects a person against any form of interference with their privacy. The Court interpreted Article 27 on the basis of the wording of the Constitution and it held that contextually, Article 27 is wholesomely concerned with unlawful searches and unlawful entries in premises and on that ground, it justified the powers of the Commissioner of the URA under Sections 41 and 42 of the TPC Act to the extent that such powers are exercised lawfully.

The court also examined the controversy about the scope of Article 27 which alludes to the term “... other property” and whether such ‘other property’ includes financial information of bankers. In holding that financial information of a banker is the property of such a banker, the court made reference to the case of *Harold Bernstein and Others Vs. L. Von Weilligh Bester*¹ in which the Court illustrated the breach of the right to privacy at Common Law and included the disclosure of private facts and information which is acquired by a wrongful act of intrusion or contrary to the existence of a confidential relationship.

Going by this finding of the court, it is therefore true that the privacy of a banker’s financial information is protected under Article 27 of the Constitution of Uganda.

Additionally, the Data Protection and Privacy Act, 2019 (DPPA) was enacted to give effect to the constitutional provisions on the right to privacy and data protection.

The DPPA defines personal data under Section 2 as any information that relates to an identified or identifiable individual. Such information includes the nationality, age, marital status of the person, educational level, occupation, identification number, or any other information which is in the possession of, or is likely to come into the possession of the data controller and includes an expression of opinion about the individual. The DPPA further classifies certain types of personal data as special personal data under Section 9 of the DPPA.

Section 9:

Prohibition on collection and processing of special personal data.

“Section 9(1) it provides that:

“A person shall not collect or process personal data which relates to the religious or philosophical beliefs, political opinion, sexual life, **financial information**, health status or medical records of an individual.”(the application of this provision is discussed in the subsequent paragraphs)

The difference between personal data and special personal data, therefore, is that the law has considered some personal information (data) to be more sensitive than other sets of personal data. The law goes ahead to accord special protection to special personal data due to its sensitivity.

Impact of the constitutional court decision

The Constitutional Court in partly allowing the petition declared that financial information of a banker cannot be obtained by the Uganda Revenue Authority (URA) except in instances where there is an investigation into a possible breach of the tax law by a banker.

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1 No. CCT 23/95 at paragraph 68 – 69

This decision, therefore, becomes a precedent on the interpretation and application of Sections 41 and 42 of the TPC Act in the following ways:

1. It confirms that the said provisions of the TPC Act are not unconstitutional.
2. It explains that the information sought under the said provisions must be preceded by an investigation into a possible breach of the tax law by a banker.

This decision shall also impact the growth of jurisprudence on the interpretation of Section 9 of the DPPA which provides for the prohibition on collection and processing of special personal data in the following ways:

1. By upholding the need for an investigation into a possible breach of the tax law before collecting or processing personal data, this decision indirectly endorses the prohibition on the collection and processing of special personal data without the consent of the data subjects or legal justification.
2. The decision also endorses the exceptions to the prohibition on the collection and processing of special personal data which include instances where the collection or processing of the data is in the exercise or performance of a right or an obligation conferred or imposed by law on an employer or where the information is given freely and with the consent of the data subject as per Section 9(3) of the DPPA.

Section 9 (3) of the DPPA provides that:

- “(3) A data collector, data processor and data controller may collect or process personal data specified under subsection (1) where-*
- (a) the collection or processing of the data is in the exercise or performance of a right or an obligation conferred or imposed by law on an employer;*
 - (b) the information is given freely and with the consent of the data subject; ...”*

Whereas the Constitutional Court decision makes no reference to the above provision of the PDPA, This alert has illustrated that the law recognizes lawful avenues to access a person’s personal data with or without their consent.



Why Banker's Financial Information is Special Personal Data:



Bankers have a legal and professional obligation to maintain the confidentiality of their clients' financial information. This duty of confidentiality is an essential aspect of the banking industry, and it is based on several legal principles and case law decisions. One of the most important cases that established the duty of confidentiality of a banker is the case of **Tournier v. National Provincial and Union Bank of England**.²

In this case, the court held that a banker had a duty of confidentiality to his clients, and that duty was founded on the implied terms of the contract between the banker and the client. The Court stated that the duty of confidentiality was an essential part of the relationship between a bank and its client, and that it was necessary to protect the privacy and interests of the banking clients.

In addition to these legal protections, the ethical standards of the banking profession require bankers to maintain the confidentiality of their clients' financial information. Breaching this obligation can result in disciplinary action, including the revocation of their license to practice.

² [1924] 1 KB 461.

Special Circumstances for Disclosure

Notwithstanding the legal and ethical protections of financial information of a banker, there may be situations where the URA may require such information to enforce tax laws or to investigate suspected tax evasion. In such cases, the URA may seek a court order or a warrant to access the information. However, the URA must demonstrate to the court that it has exhausted all other means of obtaining the information for example asking the owner of the information to avail it to them. URA also has to demonstrate that the information is relevant to its investigation, and that the disclosure is necessary for the performance of its functions.

Conclusion:

Whereas the Constitutional Court limited itself to determining whether the notices issued by the respondents to the petitioners were in violation of the right to privacy of the bank account owners, which it rightly declared so, the extended arm of this decision endorses the veracity of Section 9 of the DPPA which accords financial information (data) of a banker special protection. The decision further aligns itself with the Data Protection and Privacy Act, 2019 (DPPA) when it only allows the petition in part on grounds that the wording of Sections 41 and 42 TPC envisage a tax investigation and not a blanket investigation before special personal data such as banking information can be collected or processed without the owner's consent.

Therefore, any disclosure of special personal data such as banking information must be done in compliance with the legal and ethical obligations including those that govern the banking profession and Personal Data Protection, and the URA must demonstrate the necessity and proportionality of the disclosure before it can obtain such information in the future.

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