

HOW DOES POPIA APPLY TO LITIGATION PROCEEDINGS?

1. OVERVIEW

One of the general exclusions for POPIA (as set out in section 6(1)(c)) is that POPIA does not apply to 'judicial functions of a court'. In one of our 'tricky areas', we have asked how far or to what this exclusion would extend. We ventured that it was likely that the exclusions would be given a very restricted interpretation and that practices such as the publication of personal information in court processes would have to be measured against the principles in POPIA to ensure a legal basis for the processing of personal information.



Photo: Pixabay

1. THIS HAS VERY MUCH BEEN THE CASE ...

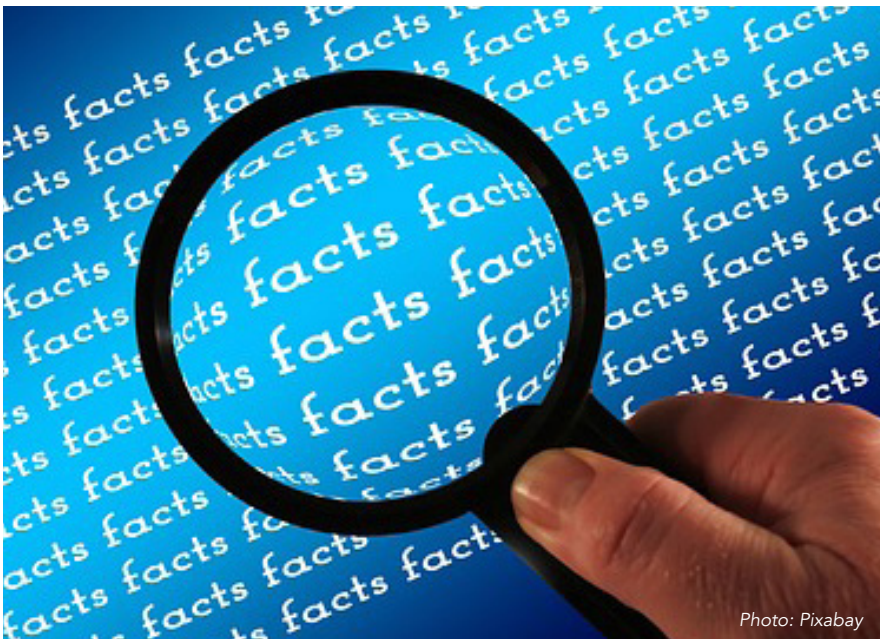
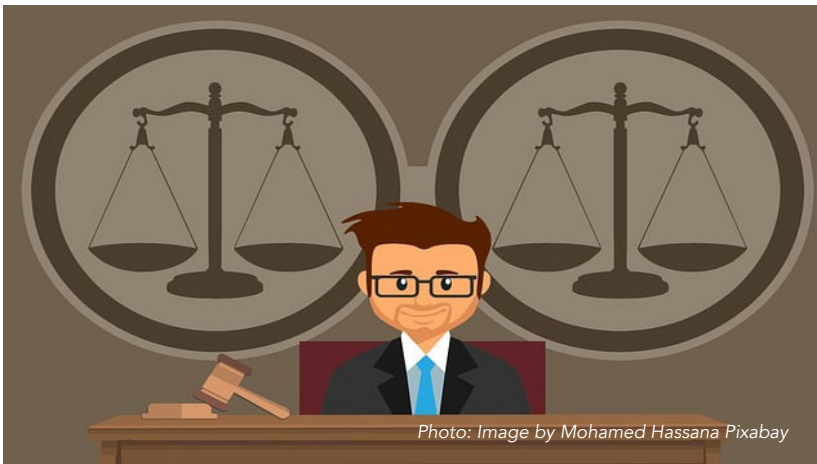


Photo: Pixabay

In the period between the POPIA commencement date and the POPIA effective date, there was the court case of [*Divine Inspiration Trading 205 \(Pty\) Ltd v Gordon and Others*](#).¹ Here, the question of whether POPIA applied or not to subpoena proceedings was not dismissed immediately on the basis that POPIA does not apply to the 'judicial functions of a court'. Instead, the judge applied the principles of POPIA to the situation at hand and justified the processing activity under these.

¹ (22455/2019) [2021] ZAWCHC 38; 2021 (4) SA 206 (WCC) (3 March 2021).



2.1. WHAT WERE THE FACTS?

In this case, the applicants sought an order declaring that the second and third respondents (the first respondent's medical doctors) must disclose the first respondent's medical records, reports and x-rays.² The applicants required the medical records, reports and x-rays for use in other litigation proceedings they were involved in against the first respondent. The first respondent opposed the disclosure of her medical records, reports and x-rays because the:

- discovery of the medical records would infringe on her right to dignity and privacy; and
- medical record disclosure would impinge on her rights under POPIA.³

Before this application, a subpoena had been served on the second and third respondents for them to disclose the medical records, reports and x-rays. However, the respondents had taken legal counsel and refused to comply with the subpoena because they could only do so if they had the first respondent's consent.⁴

2.2 WHAT WAS THE ISSUE?

The judge had to consider if disclosing the medical records would constitute a breach of POPIA.⁵

2.3 WHAT DID THE JUDGE DECIDE?

The judge held that the disclosure did not constitute a breach of POPIA.

2.4. WHAT WERE THE JUDGE'S REASONS?

The judge made several points relevant to the decision as a whole, but the following reasons are the most salient for our discussion here. The judge specifically held that:

'There is another compelling reason why the first respondent's reliance on POPI is bad in law. Section 12(2)(d)(iii) permits the collection of data from a source other than the data subject "for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated." Furthermore, section 15(3)(c)(iii) provided:

"(3) The further processing of personal information is not incompatible with the purpose of collection if—
 (c) further processing is necessary—
 (iii) for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated; ..."

In other words, once personal information has been collected, POPI makes provision for the further processing thereof for purposes of proceedings of any court or tribunal proceedings.⁶

Clearly the legislature never intended POPI to be in conflict with the rules relating to discovery or the procurement of evidence for trial by way of subpoenas under rule 38, and the first respondent's reliance on provisions of POPI in her objection to the release of her medical records held by the second and third respondents to the applicants must fail.⁷

² *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at para 1.

³ *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at para 5.

⁴ *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at para 11.

⁵ *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at paras 38–39.

⁶ *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at paras 38–39.

⁷ *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* at paras 38–39.

3. WHAT DOES THIS MEAN GOING FORWARD?

It is clear from the findings in this case and the pre-POPIA decision of [Februarie v Eskom Finance Company](#)⁸ that refusing to disclose personal information in relation to litigation or court proceedings on the basis that it will infringe your POPIA rights will not necessarily hold water. However, the approach the court is likely to take based on the precedent above is to apply the principles of POPIA to the situation at hand and assess whether the processing activity is justified under these.



4. FURTHER READING



Photo: Adobe stock

You can read more about exclusion to POPIA's application in [Chapter 3](#). You can read more about the further processing of personal information in [Chapter 12](#). There is also a UK judgment which contemplated a similar issue and came to a similar conclusion, though based on a slightly different reasoning.

⁸ (3196/19) [2019] ZAWCHC 145 (28 August 2019).