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The High Court of Tanzania

FINDS UNCERTAINITIES AND AMBIGUITY IN

The Personal Data Protection Act

An in-depth an analysis of Miscellaneous Civil Cause No. 18 of 2023

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INTRODUCTION

The High Court of Tanzania on 08th day of May 2024 issued a decision which emanates from a constitutional petition instituted by Tito Magoti via Miscellaneous Civil Cause No. 18 of 2023 between Tito Magoti versus Honourable Attorney General.

The petitioner in this case sought the court among other things to declare provisions of Sections 8(1) (2) (3), 11(1), 14(5), 19, 20, 22(3), 23(c) (d) (e) (f), 26, 30, 33(2), 34 of the Personal Data Protection Act (PDPA), are Unconstitutional for offending the provisions of Article 12(1) (2), 13(1) (2) (6) (a), 16(1), 21(2) and 29(1) of the Constitution of the United Republic of Tanzania, the provisions of Section 8(1) (2) (3), 11(1), 14(5), 19, 20, 22(3), 23(c) (d) (e) (f), 26, 30, 33(2), 34 of the Personal Data Protection Act, be declared unconstitutional and expunged from the statute immediately without allowing the government to amend the same.

JUDICIAL ARTICULATION OF THE PROVISIONS OF PDPA

After hearing of the petition the High Court presided by Honourable Kagomba ,J, Agatho,J, and Bwegoge,J, found some uncertainties, vagueness and ambiguity in the Act and made decision thereto as follows;

The High Court finds uncertainty on Section 22(3) of the Personal Data Protection Act,2022 which provides for prohibition of collecting personal data by unlawful means without a clear meaning of what amounts to unlawful means and what is the implication of collecting personal data unlawfully, where the court held that;

"Although we viewed that the impugned provision as saving the interest of the Petition as a data subject because ***it bars the data controller from collecting personal data by unlawful means, these unlawful means will certainly vary from field to other, the PDPA therefore ought to have disclosed them****. Undisputedly, the law allows collection of personal data with data subject's consent or under the exceptions. Thus, collection or processing of data may be for lawful purpose, but what happens if the said data was collected by the so-called unlawful means? What is the implication? Clarity is essential here. Indeed, ambiguity arises because the unlawful means are unknown. For the foregoing reason,* ***we find merit in the allegation that the absence of definition for unlawful means creates ambiguity, vagueness and open for abuse****".*

On the other hand, the High Court took time to look at whether the provisions of Section 23 (3) (c) (d) (e) of the PDPA is unconstitutional? In answering this issue, the court stated that;

There are several key points to be underscored. First, the impugned provision provides for exception to the requirement of consent of the data subject in collection and processing of personal data. Considering that the PDPA applies to different fields/sectors, services, etc., the exceptions have been crafted in general terms without providing the procedures as these were reserved for regulations and guidelines. As correctly submitted by the Respondent's State Attorney, the procedures are not one size fits all. They differ depending on the field to be applied. The procedure for education institutions cannot be like those prescribed for health care services. However, they are all gearing towards protecting data subjects' privacy. There are minimum standards set by the PDPA such as the data processing principles. See Section 5 of the PDPA.

Section 23(1) of PDPA stipulates that personal data cannot be processed without data subject's consent. However, the impugned provisions (Section 23(3)) state that a data controller is not obliged to comply with subsection (1) where:
(a) compliance is not reasonably practicable in the circumstances of the particular case;
(b) non-compliance is necessary for compliance with other written laws; or
(c) compliance would prejudice the lawful purpose of the collection.

The above circumstances constitute limitations to the general rule to protection of privacy. It is in this understanding that the Petitioner challenged it. His attack though is based on their vagueness and ambiguous nature. But we understand that the impugned Section is saved by Article 30(2) of the CURT and other international conventions such as Article 19(2) and (3) of the ICCPR and Article 27 ACHPR that recognize limitations or restrictions against the fundamental rights. In our jurisdiction, the case of Ndyanabo (supra) recognized the application of limitations.
The limitations ought to comply with the three-step test:
1. The limitation must be prescribed by the law.
2. The limitation must be necessary.
3. The means chosen is proportionate to intended objective.

If we subject the above test to the impugned provision, it becomes clear that the limitation is provided by the law, that is the PDPA. Moreover, as to the limitation to be necessary starting with Section 23(3)(c) illustration will suffice.
The impugned provision provides that compliance is not reasonably practicable in the circumstances of the particular case.

In our consideration, this provision does not disclose the circumstances under which compliance is not reasonably practicable.

We are left to speculate about these circumstances. An example that comes close is in emergency situation where there is say a car accident, or fire outbreak. To rescue the victims by giving emergency assistance may be difficult if one must obtain their consent to process their personal data. A person may die in such a situation while first responders are searching or waiting for his or her consent. It may also be impractical if the person is unconscious and requires quick medical attention. It is unclear though why the PDPA did not clearly exemplify or enumerate even in general terms these circumstances.

Regarding Section 23(3)(e) of the PDPA, again here the prescription is that compliance would prejudice the lawful purpose of the collection. We think this too is a vague provision as examples of law purposes are missing. We ask ourselves; does it mean where there is execution of a contract in which a data subject is a party? Another lawful purpose is, for instance, in compliance with tax administration law or criminal investigation. But surprisingly these examples have not been mentioned in the law.

Therefore, clarity is lacking in the impugned provision. As to whether the means adopted is proportionate to the objective, that is controversial as herein above observed. However, the procedures of controlling data collection may vary from one field and another. It may be difficult to list or contemplate all the situations. Nevertheless, it is not impossible to do so. If the circumstances were clear in the law, there would not be any vagueness.

After the above discussion of this issue the court concluded that;

"It is our considered view that if the envisioned circumstances could not be mentioned in the main Act, but they could be found in the regulations. And the Act should have made that clear. Frankly, the Act contains data processing principles. But the details of the circumstances envisioned may be found in the regulations or in the guidelines. Yet, and in totality, therefore, save for Section 23(3)(d) the impugned provisions, ***we hold that Section 23(3)(c)(e) of the Act is ambiguous, unclear and without prescribed procedures."***

Lastly, the Court ordered the Respondent (i.e Honourable Attorney General) within one year starting from the date of this judgement to make necessary amendments on the provision of Sections 22(3) and 23(3)(c) (e) of the PDPA with a view of providing certainty as to what acts or omission shall be regarded as unlawful. Failure to do so these provisions will be struck out of the statute book. This is geared towards upholding fundamental rights and freedoms as enshrined under the Articles of the CURT.

CONCLUSION

Generally, this is the great move for the purpose of ensuring personal data protection in the United Republic of Tanzania conforms with the Constitution of our country by insisting on the importance of creating a conducive and friendly environment for proper construction and interpretation of the Act without leaving any ambiguity, vagueness or uncertainty in law particularly on this sensitive issue of personal data protection.

In addition to the above, the court insisted on the principle of legal certainty/ clarity which requires that the law must be clear, precise and unambiguous, and its legal implications foreseeable, meaning that the law must be worded in a way that it is clearly understandable by all persons who are subject to it.

The testing of constitutional remits and conformity of the PDPA marks a bold step to its practicality and will surely go a long way in securing personal data and information of citizens of the United Republic of Tanzania.

Disclaimer:
This analysis is based on our interpretation of the court pronouncements in Miscellaneous **Civil Cause No. 18 of 2023** and the background set out in enacting the law and therefore its construction is equally confined to those limits and not otherwise.

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