

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 01011/12

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>Saldulker</i> 22 nd August 2012

In the matter between:

SA AIRLINK (PTY) LIMITED

Applicant

and

THE MPUMALANGA TOURISM AND PARKS AGENCY First Respondent

SHUKRAT MAKINDE N.O. Second Respondent

NTHABISENG MOTETE N.O. Third Respondent

COMAIR LIMITED Fourth Respondent

PRIMKOP AIRPORT MANAGEMENT (PTY) LIMITED Fifth Respondent

J U D G M E N T

SALDULKER J:

[1] The applicant, SA Airlink (Pty) Ltd is a privately owned airline operator that conducts commercial, domestic and regional air travel services. In this

application, it seeks, in terms of s 78(2)¹ of the Promotion of Access to Information Act 2 of 2000 (PAIA), the review of decisions made by the second and third respondents and an order declaring that the first respondent, Mpumalanga Tourism and Parks Agency (MTPA), provide the applicant with a copy of an agreement (the agreement) entered into between the first and fourth respondents (Comair), and further any agreements entered into between the Kruger Mpumalanga Airport or the fifth respondent (Primkop) in relation to fees payable by the fourth respondent, as well as all records of the first respondent in relation to its decision to enter into an agreement with a third party and the decision to select Comair as that third party.

[2] Neither Comair, nor the fifth respondent have opposed the relief sought.

[3] The MTPA is an organ of state and a public body as defined in section 1² of PAIA. It is a body created in terms of s 2 of The Mpumalanga Tourism and Parks Agency Act 5 of 2005. Its objectives include to "foster, promote and sustainably develop and market tourism".

¹ S 78(2) of PAIA provides: "A requester –

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
 (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal...

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph

(b) of the definition of "public body" in section 1 –

(i) to refuse a request for access; or (ii) ... or

(d) ...

may, by way of an application within 30 days apply to a court for appropriate relief in terms of section 82".

² Section 1 of PAIA defines "public body" as –

"(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when –

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;"

Background

[4] On or about 7 August 2009, an article was published in the Business Day newspaper, which reported that MTPA was “contracting with” Comair, for the provision of flights between O R Tambo International Airport and Kruger Mpumalanga International Airport. Consequently, the applicant became concerned about the propriety of MTPA’s actions, *inter alia*, for the following reasons. No tender had been issued for the provision of the services being provided by Comair, and that the agreement may result in the MTPA subsidising Comair in return for offering flights to the Kruger Mpumalanga International Airport. Furthermore the applicant had not received any such financial incentive to service the route and that, the MTPA’s actions “skewed” competition between Comair and the applicant in Comair’s favour, without MTPA having followed any ‘fair process’ before ‘favouring’ Comair.

[5] On 14 August 2009, the applicant requested a copy of the agreement between MTPA and Comair, from MTPA, in terms of s 18(1)³ of PAIA, including the documents drawn up in preparation for the conclusion of the agreement and any documents pertaining to the decision to conclude the agreement. In response to this request, the second respondent stated that there was no final agreement between the MTPA and Comair. The applicant

³ Section 18 provides:

“(1) A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.

(2) The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned –

(a) to provide sufficient particulars to enable an official of the public body concerned to identify –

(i) the record or records requested; and

(ii) the requester; ...”

then wrote to the second respondent indicating its desire to be considered for the provision of whatever service the MTPA was contemplating procuring from Comair, calling upon the MTPA to provide the applicant with the detail of these services, so that it could draft a proposal that could be considered by the MTPA, reminding MTPA of its right in terms of PAIA. There was no response from MTPA. Consequently another letter was addressed to the second respondent with the same foregoing request for access to the agreement concluded between MTPA and Comair.

[6] On 2 November 2009 the second respondent, on behalf of MTPA, responded to the letter and refused the applicant's request on the basis that the agreement sought was "*unknown to MTPA*", and that they were unable to assist with such a request as they did not have a copy of such a document. After a further exchange of correspondence, a meeting took place between the applicant's and MTPA's representatives. At this meeting it was admitted by Mr. Ndabeni, the then CEO of MTPA, that such an agreement existed and the details thereof would be announced in April 2010 at the Tourism Indaba.

[7] During May 2010, Comair and the Member of the Executive Council for Economic Development, Environmental and Tourism in Mpumalanga, Mr. Jabu Mahlangu (the MEC), announced the conclusion of an agreement between Comair and MTPA. Save to record that the agreement was intended to increase tourism airlift capacity "*through the provision of cost competitive and sustainable flights*" from Kruger Mpumalanga International Airport, and that it was a "*partnership*" that would enable Comair to provide six flights a

week to the airport, the announcement did not contain the terms of the agreement sought.

[8] On or about 3 June 2011, the applicant addressed a new request to MTPA for records in its possession, in terms of s 18 of PAIA, which included *inter alia* the following:

8.1 The terms of the agreement between Comair and MTPA referred to in the announcement by the MEC on 4 May 2010;

8.2 Any agreements to which the Kruger Mpumalanga International Airport (or Primkop), was a party in relation to fees payable by Comair for air travel services, including landing fees, parking fees and passenger service charges; and

8.3 All records of the MTPA in relation to the decision to enter into an agreement with a third party and the decision to select Comair as that third party.

[9] On 30 June 2011, the second respondent wrote to the applicant indicating that the MTPA's Chief Executive Officer and Information Officer, Mr Ndabeni, had considered the applicant's request and refused it in terms of ss 7, 36, 37, 42, 43 and 44, of PAIA, and that an appeal could be lodged in terms

of s 25(3)(c)⁴ of PAIA. The applicant was also informed that *"the contracts, commercial information of third parties and the rights of the parties are protected information in terms of the Promotion of Access to Information Act 2 of 2000."*

[10] On 20 July 2011, the applicant noted an appeal against this decision. On 14 October 2011, the third respondent Ms Nthabiseng Motete, who had taken over from Mr Ndabeni as MTPA's Chief Executive and Information Officer, indicated to the applicant that she had considered the appeal and refused it. The primary reason for the third respondent's refusal was the objection by Comair that it will suffer prejudice should the contract be released, as it contained a confidentiality clause, and that *"providing access to this contract will be a breach of the confidentiality clause in the agreement and could lead to a claim of damages against"* MTPA. There were additional reasons. The contract contained commercial information of Comair who was a competitor of the applicant, and that if access was granted to the applicant, it *"will disadvantage and prejudice the future supply of information"* to MTPA by Comair. This commercial information of third parties is protected in terms of s 36⁵ of PAIA. Furthermore, the third respondent indicated that the contract was

⁴ Sec 25(3)(c) provides as follows: "If the request for access is refused, the notice in terms of subsection (1)(b) must – (c) state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal or application, as the case may be".

⁵ S 36 of PAIA provides: "(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains –

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected –

a “marketing agreement” between the two organisations to advance MTPA’s tourism mandate and that the contract requested for does not contain information that is already within the public arena.

[11] The applicant contends that as MTPA is an organ of state and a public body, it is obliged in terms of s 11 of PAIA⁶ to provide the applicant with the records unless it is able to prove that a valid ground for refusal in terms of PAIA exists. S 32 of the Constitution⁷ confers a right on every person to “any information held by the State”. S 11 of PAIA gives effect to the right in s 32 of the Constitution by providing that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA for access and no ground for refusal of access under PAIA exists⁸.

-
- (i) to put that third party at a disadvantage in contractual or other negotiations; or
 - (ii) to prejudice that third party in commercial competition.
 - (2) A record may not be refused in terms of subsection (1) insofar as it consists of information –
 - (a) already publicly available;
 - (b) about a third party, who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned”.

⁶Section 11 of PAIA deals with right of access to records of public bodies and provides that:
 “(1) A requester must be given access to a record of a public body if –
 (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
 (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part”.

⁷ Section 32 of The Constitution of The Republic of South Africa Act 108 of 1996 provides:
 1 Everyone has the right of access to–
 (a) any information held by the state; and
 (b) any information that is held by another person and that is required for the exercise or protection of any rights.

⁸ In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [59] it was held that: “...Once a requester has complied with the procedural requirements for access and overcome the refusal grounds in ch 4, he or she must be given access. Section 11 makes that clear. Not only that, s 11(3) makes it equally plain that the requester’s reasons are not relevant”. As was stated in *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at [9]: “The disclosure of information is the rule and exemption from disclosure is the exception”.

[12] In terms of s 18 of PAIA, if a request for access to a record of a public body is made in the prescribed manner the information officer must, as soon as reasonably possible⁹, after the request was received, decide whether to grant the request. If a request is refused, then the requester may lodge an internal appeal, with the relevant authority. The relevant authority must decide the appeal as soon as reasonably possible, but in any event within 30 days after the appeal is received.¹⁰

[13] However, if the appeal is unsuccessful, or the requester does not have a right of appeal, then the requester may approach a court for appropriate relief in relation to the request. Section 81(2) of PAIA expressly states that the burden of establishing that the refusal of access is justified under PAIA, rests on the party refusing access. This burden must be discharged on a balance of probabilities.¹¹

⁹ Section 25 of PAIA provides:

"The information officer to whom a request for access is made or transferred, must..., as soon as reasonably possible, but in any event within 30 days, after the request is received -
 (a) decide in accordance with this Act whether to grant the request; and
 (b) notify the requester of the decision and, if the requester stated, as contemplated in section 18 (2) (e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible".

¹⁰ Section 77 of PAIA provides inter alia that...

"(3) The relevant authority must decide on the internal appeal -
 (a) as soon as reasonably possible, but in any event within 30 days after the internal appeal is received by the information officer of the body..."

¹¹ See also *President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)* at [13] deals with the statutory framework that regulates proceedings under PAIA. "Court proceedings under PAIA are governed by ss 78 – 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the State or any other party refusing access."

[14] It must be borne in mind that it is the second respondent who has deposed to an answering affidavit on behalf of the first and the third respondents. A perusal of this affidavit indicates conflicting averments in regard to their knowledge of the agreement. Although the respondents concede that an agreement was concluded between the first and fourth respondents which contained commercial information and that the fourth respondent refused to consent to the disclosure, they also, in the same affidavit, disavow knowledge of the agreement, stating "*there was no agreement that was entered into between the first and fourth respondents that I am aware of*".

[15] Furthermore, although the second respondent neither took the decision to refuse the application nor determined the appeal, she has deemed it fit, in several instances to provide supplementary reasons to justify the refusal of the application and the appeal, in regard to a decision that she did not take.

[16] The second respondent also raises ss 36(1)(b)¹² and 36(c)(ii) of PAIA, and states that "*where the commercial or financial interest of the fourth respondent are at play, or where it may be prejudiced in commercial competition, then a request may be refused*", and that the disclosure would harm future relations between the first and fourth respondents, and that "*the harm which would be caused to the fourth respondent would be, and this should be self-evident, that the applicant being a direct competitor would have*

¹² See fn 5 supra

access to a slew of information which could be used to harm its commercial or financial interests”.

[17] A further ground is also raised in the affidavit to the effect that the “information sought was already in the public domain”. This is contrary to what was said in the letter of 14 October 2011 that the contract requested “*does not contain information that is already within the public arena*”. Thus new reasons have been advanced by the second respondent who seeks to rely on the provisions of section 44¹³ in its answering affidavit, in defence of the third respondent’s refusal¹⁴. According to the second respondent, s 44 confers a discretion on an information officer to refuse access to records of recommendations or reports of internal deliberations that occurred for the purpose of taking a decision. In my view such discretion can only be exercised on a proper consideration of the facts. The third respondent has not provided any reasons for exercising her discretion in the manner that she did.

[18] Significantly, the grounds on which the application was declined initially are as follows:

¹³ S 44 of Promotion of Access to Information Act 2 of 2000 provides:

“(1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body -

(a) if the record contains -

(i) an opinion, advice, report or recommendation obtained or prepared; or

(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or”

¹⁴ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) at [23].

Cf. *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [24].

18.1 The agreement contains commercial information relating to third parties, which rights of the parties are protected in terms of the Act.

18.2 It was justified by the provisions of sections 7¹⁵, 36¹⁶, 37¹⁷, 42¹⁸, 43¹⁹ and 44²⁰ of the Promotion of Access to Information Act of 2000 (*"the Act"*).

[19] MTPA did not dispute in the refusal decision that such an agreement existed. It refused access to the agreement on the basis set out in the letter of 30 June 2011. Comair, in its letter of objection dated 15 August 2011, objected to the disclosure of the record on the basis that the information sought is *"highly sensitive and of a commercial nature"* and that disclosure of it would prejudice commercial competition between the airlines because it includes price sensitive information. Yet in this application, Comair did not file

¹⁵ S 7.(1) "This Act does not apply to a record of a public body or a private body if –

(a) that record is requested for the purpose of criminal or civil proceedings;
(b) so requested after the commencement of such criminal or civil proceedings, as the case may be," ...

¹⁶ S 36 – See fn 5 and para [21] of this judgment.

¹⁷ S 37 – See para [21] of this judgment

¹⁸ S 42(1) provides: "The information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests of financial welfare of [the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic" ...

S 42(3) Subject to subsection (5), the information officer of a public body may refuse a request for access to a record of the body if the record –

(a) contains trade secrets of the State or a public body;
(b) contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body;

(c) contains information, the disclosure of which could reasonably be expected –

(i) to put a public body at a disadvantage in contractual or other negotiations; or
(ii) to prejudice a public body in commercial competition" ...

¹⁹ S 43(1) provides: "The information officer of a public body must refuse a request for access to a record of the body if the record contains information about research being or to be carried out by or on behalf of a third party, the disclosure of which would be likely to expose –

(a) the third party;

(b) a person that is or will be carrying out the research on behalf of the third party; or

(c) the subject matter of the research, to serious disadvantage".

²⁰ S 44 – See para [17] of this judgment: see fn 13.

any affidavits in answer to this application, nor did it oppose the relief sought by the applicant.

[20] Both the foregoing initial refusal and the objection from Comair appear to be based on the existence of an agreement, which must have been in MTPA's possession, and MTPA is obliged to provide access to it, regardless of whether it is a party to it.

[21] In regard to its principal objection the third respondent relies on s 37(1)(a) of PAIA which provides that a public body must refuse a request for access to a record if the disclosure of the record "*would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement*"²¹. The third respondent also relied on the provisions of section 36 of PAIA. That section provides that the information officer of a public body must refuse a request for access to a record of the body if the record contains *inter alia* commercial information of a third party "*the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party*".

[22] The overriding principle in relation to this "disclosure" clause is that a public body is obliged to conduct its operations transparently and accountably. In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [55], it was held that "*Once it enters into a commercial*

²¹ *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [51].

agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails ... Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause²².

[23] The *onus* is on MTPA to justify the refusal of any request made to it, with reference to the provisions of the Act. The respondents have not shown that it is probable that the disclosure even of confidential information would cause harm to Comair's commercial interests, particularly in light of the fact that Comair no longer operates on the route to which the agreement applies. A party relying on this provision must show that harm is not simply possible, but probable. In the circumstances, the third respondent has not put up any reasons that justify the refusal of access to the records. Furthermore, Comair will not, therefore, suffer any damages should there be such disclosure, as it is bound by its decision not to oppose this application.

[24] Merely because the agreement contains a confidentiality clause cannot shield the agreement from disclosure. The respondents have also not explained why a breach of this clause could also result in a successful claim for damages. The second and third respondents have asserted that the agreement is "*simply a marketing agreement*". Thus, it is inconceivable that it

²² *Transnet, supra* at [55]-[56].

contains “a *slew*” of sensitive information, the disclosure of which would result in commercial harm to Comair.

[25] I find that the respondents have not made out any basis to refuse access to the records, and the third respondent’s decision must be set aside on this basis. The applicant has clearly exhausted its remedies under s 78(1)²³ of the Act. The respondents have not, in my view, justified the refusal of the applicant’s request. No valid grounds for refusing the applicant’s request for records exist. Accordingly I find that the applicant is entitled to the records it seeks in terms of s 82 of PAIA²⁴ and that no valid ground exists for its refusal. The third respondent is ordered to produce copies of those records within 30 days of this order, on payment of the fees prescribed in PAIA.

[26] Insofar as the agreement between the fourth and fifth respondents is concerned, the second respondent states that it is not the custodian of the agreement and is unaware of any such agreement being concluded. It is not clear whether a copy of such agreement is in fact in the possession of the first respondent. In the result, the first respondent is ordered to produce the

²³ Section 78 (1) provides: “A requester or third party referred to in section 74 may apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74”...

²⁴ Section 82 of PAIA provides:

The court hearing an application may grant any order that is just and equitable, including orders -


- (a) confirming, amending or setting aside the decision which is the subject of the application concerned;
- (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;
- (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or
- (d) as to costs.

agreement if it is in its possession, and if not, for its Chief Executive Officer, to state so under oath, and that affidavit is to be provided to the applicant within 30 days of this judgment being handed down.

[27] As regards costs, it is clear that the first, second and third respondents have not simply abided by the decision of the court, but have opposed this application and authorised the second respondent to file an answering affidavit on their behalf, in support of the decision to refuse access to the information, in circumstances where Comair, which was allegedly the party that objected to the disclosure, does not oppose this application. It is just and equitable that in these circumstances that the first, second and the third respondents pay the costs of the application, jointly and severally.

[28] In the circumstances, I grant an order as set out in the terms of the draft order "X" provided to me by the applicant.

[29] The draft order "X" is made an order of court.



H SULDULKER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	ADV M A WESLEY
INSTRUCTED BY	CLIFFE DEKKER HOFMEYR INC
COUNSEL FOR THE FIRST TO THIRD RESPONDENTS	ADV M A LENNOX
INSTRUCTED BY	AJAY MAKKA INC ATTORNEYS
DATE OF HEARING	11 APRIL 2012
DATE OF JUDGMENT	22 AUGUST 2012

X
22/8/2012
[Signature]

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**

CASE NO: 12/01011

In the matter between:

SA AIRLINK (PTY) LTD

Applicant

and

THE MPUMALANGA TOURISM AND PARKS AGENCY

First Respondent

SHUKRAT MAKINDE NO

Second Respondent

NTHABISENG MOTETE NO

Third Respondent

COMAIR LIMITED

Fourth Respondent


PRIMKOP AIRPORT MANAGEMENT (PTY) LIMITED

Fifth Respondent

DRAFT ORDER

Having considered the papers filed of record, and having heard counsel, it is ordered that:

1. The decision of the third respondent recorded in her letter dated 14 October 2011, a copy of which is attached to the founding affidavit marked "FA5", is set aside;


22/8/2012

2. The applicant is entitled to the following records from the first respondent, in terms of the Promotion of Access to Information Act 2 of 2000 ("the Act"):
 - 2.1. The agreement between the first and fourth respondents referred to in the announcement by the Member of the Executive Council for Economic Development, Environment and Tourism in Mpumalanga, Mr Jabu Mahlangu on 4 May 2010, a copy of which announcement is annexure **FA12** to the founding affidavit;
 - 2.2. Any agreements to which the Kruger Mpumalanga International Airport (or the fifth respondent, being the company that manages that airport) was party in relation to fees payable by the fourth respondent for air travel services, including landing fees, parking fees and passenger service charges; and
 - 2.3. All records of the first respondent in relation to the decision to enter into an agreement with a third party and the decision to select the fourth respondent as that third party;
3. The third respondent is to provide to the applicant copies of the records set out in paragraph 2 above, within 30 days of this order and on payment of the fees prescribed in the Act.
4. Insofar as the first respondent does not have in its possession the records set out in paragraph 2.2 above, the third respondent is, within 30 days of this order, to provide the applicant with an affidavit:
 - 4.1. Confirming that the records are not in the possession of the first respondent or any of its officials;

X
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- 4.2. Confirming that the third respondent has searched for the records, or instructed any other official of the first respondent to do so;
- 4.3. Setting out the steps taken by the third respondent, or any other official of the first respondent, to search for the records, including the precise details of the procedures and processes undertaken, and in particular the dates when the searches were undertaken and the identity of the persons who undertook the searches;
- 4.4. Confirming that the third respondent has approached the previous Chief Executive Officer of the first respondent, Mr Charles Ndabeni, and requested that he assist in locating the records at the first respondent and setting out his response to that request;
- 4.5. Insofar as the records were in the possession of the first respondent but are no longer, setting out when the first respondent lost possession of the records and why and how possession was lost.
5. The first to third respondents are to pay the costs of this application jointly and severally, the one paying the others to be absolved.

BY ORDER OF COURT