**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**CASE NO. 27303/14**

In the matter between:

**SABINA MAPHURE MOGANE** Applicant

And

**KONRAD ROSEN N.O.** First Respondent

**NADYUA TREVUSH N.O.** Second Respondent

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**JUDGMENT**

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**VERMEULEN, AJ**

[1] The Applicant is the owner of a unit in a failed sectional title development known as *"the Kemptonian"* (*"the development"*). The development has failed in the sense that the financial affairs of its body corporate, appointed in terms of the Sectional Titles Act, No. 95 of 1986 (*"the Sectional Titles Act"*), were in such disarray that application was made for the appointment of the Respondents as administrators of the body corporate, in terms of Section 46(1) of that Act. In terms of the provisions of Section 46(3) of the Sectional Titles Act, the administrators have the powers and duties of the erstwhile body corporate of the development and exercise such powers to the exclusion of the body corporate.

[2] The general powers and duties of the body corporate, which are assumed by the administrators upon the latter's appointment, include the power to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building, land and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate.[1]

[3] The owners are required to make contributions to such fund for the purposes of satisfying any claims against the body corporate. The body corporate determines the amounts to be paid by the owners by levying contributions from them in

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[1] See section 37(1)(a) and (b) of the Sectional Titles Act, No. 95 of 1986 (*"the Sectional Titles Act"*)

proportion to the quotas of their respective sections. In general, the administrators have the same powers as the body corporate to control, manage and administer the common property for the benefit of all owners.[2] The aforesaid duties and functions of the body corporate lie at the heart of the legal relationship between it and the owners and are also definitive of the relationship between the administrators and the owners of units in the development, in the light of the fact that the administrators, upon their appointment, effectively displace the body corporate.

[4] The main objectives behind the appointment of the Respondents as joint administrators of the development were, of course, to restore the body corporate to solvency from the shambolic state to which its finances had been reduced at the time of the administrators' appointment, and to ensure that the new body corporate is this time properly empowered to withstand the seemingly entropic tendency of an organisational entity such as the body corporate, to revert to a state of chaos. All things being equal, the administrators' appointment would accordingly amount merely to a temporary stewardship of the affairs of the body corporate, to be renounced as soon as its affairs had been restored to normality.

[5] The appointment of the Respondents as administrators commenced on 16 February 2010, by order of this Court; on 9 September 2011 the aforesaid appointment was extended for 36 months effective from 17 February 2011 and on 18 February 2014 the appointment was again extended for a further period of 12 months. In terms of the original order granted in 2010, the administrators were entitled to be rewarded for their services at the rate of R400 per hour. This rate was

[2] See section 46(3) of the Sectional Titles Act.

increased to R500 per hour pursuant to the last order granted. The appointment of the Respondents as administrators, unless extended again, will accordingly lapse on 17 February 2015.

[6] In her founding affidavit, the Applicant states that she wrote a letter to the Respondents, addressed to their agents, Prime Property Investments on 10 April 2014, requesting the following information and/or documentation:-

> *"I would like the following information to be furnished to me in writing:-*
>
> 1. *the status of the debt which is owed to the Municipality in which judgment was obtained? Is there a payment plan that was reached? How much has been paid so far and how much is outstanding? Can I get a copy of the settlement agreement with the Municipality?*
> 2. *Whether the administrators (Respondents) have appointed service providers to render services like cleaning, security, plumbing, financial advice, legal services etc? If so how much is being paid for such service monthly?, and what method was used to ensure that the service providers are contracted at a competitive price bearing in mind the status of the finances which resulted in the Administrators being appointed?*
> 3. *The copies of the contracts or terms of services with the service provider mentioned in 2 above?*
> 4. *Whether there is a plan by the Administrators to hold a meeting with the owners of the units to address them on variety of issues pertaining to the Kemptonian building?*
> 5. *How much has been paid to date as salaries for the two Administrators, from the time they started to work to date?*
> 6. *Whether there is any skills transfer plan or programme that the Administrators has in order to capacitate the unit owners so as to be able to form and run a strong body corporate when the term of the Administrators come to an end?"*

[7] I have only quoted the part of the letter containing the actual request for information. In the unquoted concluding paragraph of the aforesaid letter, the Applicant stated that the requested information should be transmitted per telefax to a number stated in the aforesaid letter. In paragraph 10 of her founding affidavit, the

Applicant states that she believes that it is her right, as the owner of a unit, to protect her investment and therefore that she, like all other owners, has a right to know what the current expenses being incurred by the Respondents are and whether such expenses are documented.

[8] In paragraph 12 of her founding affidavit she contends that she has a right to scrutinise the documents requested and to ask clarificatory questions where she does not understand, since the Respondents obtained the funds to administer the building from the owners of the units, like herself.

[9] She stated in her founding affidavit that she received no response to her aforesaid letter and that, in terms of Section 58 of the Promotion of Access to Information Act, No. 2 of 2000 (*"PAIA"*), the Respondents must be regarded as having refused the request.

[10] In paragraph 21 of the Applicant's founding affidavit it is contended that the information requested is in the public interest, as it is important to know the role played by people in the position of the Respondents, *"... who avail themselves as right people to be entrusted with the management of the funds of the unit owners, a fiduciary and privileged position"*.

[11] She complained, furthermore, that the Respondents *"have never had any open meeting since they were appointed*".

[12] In paragraph 24 of her founding affidavit she contended that, in the absence of *"an open meeting"* to discuss the finances, obligations, progress and challenges of

the development, the rights of the owners can only be guaranteed through the request in terms of the Act.

[13] In their answering affidavit, the Respondents contended that they did, in fact, respond to the request for information/documentation by way of an e-mail sent to the Applicant's work e-mail address, instead of to the fax number supplied by the Applicant. The Second Respondent, who deposed to the answering affidavit, stated that the e-mail address to which the aforesaid e-mail in response to the applicant's request for information was sent, is the e-mail address which the Respondents have on their records as belonging to the Applicant and to which they normally send e-mail communications addressed to the Applicant. I may add, at this point, that the Applicant, in her replying affidavit, denied having received the aforesaid e-mail and explained that her employer, SARS, had installed filtering software which would tend to divert e-mails as bulky as the one sent by the Respondents and that that is in all likelihood the reason why she never received the response as aforesaid. In argument, Mr Kela, who appeared for the Applicant, submitted that in failing to direct their response to the Applicant's letter to the clearly stated facsimile number specified therein for this purpose, blame for the non-receipt of their response lies with the Respondents and that, in these circumstances, they must be taken to have refused to supply the information sought, pursuant to the deeming provision in section 58 of PAIA. I am not certain that the conclusion contended for necessarily follows but, as I understood Mr Roux, who appeared for the Respondents, their position in any event effectively amounts to a refusal to comply with the request in its terms, at least insofar as the settlement agreement and the services agreements are

concerned, in as much as they contend that the request is not cognisable in terms of PAIA, alternatively, that the information sought has already been supplied.

[14] In their answering affidavit, the Respondents took certain points *in limine*, being that the application is defective in that the records requested in terms of PAIA have not been specified. This point was, to all intents and purposes, abandoned when it became clear that the Applicant was persisting with the application only insofar as it pertains to the request for a copy of a settlement agreement between the Respondents and the Kempton Park Municipality and for copies of such service agreements as may have been concluded with service providers by the Respondents. Accordingly, nothing further need be said about this point. It was further argued that the entire application constitutes an abuse of the Court process in that the Applicant had failed to follow the required procedures in terms of the Prescribed Management Rules promulgated in terms of Section 37(1)(q) of the Sectional Titles Act. In my view, this point is not a true point *in limine* and is, in reality, intertwined with the merits of the application. It was also argued as such. I shall deal with this point in the course of my assessment of the merits of the application.

[15] On the merits of the Applicant's request, the Respondents contended that they had in fact responded to the Applicant's request by way of a letter dated 6 May 2014, e-mailed to the e-mail address supplied by the Applicant for purposes of correspondence with the Respondents in general, in which letter each and every request of the Applicant was allegedly addressed.

[16] In addition, it was contended on behalf of the Respondents that the information requested by the Applicant is available in terms of the Sectional Titles Act and that the Applicant could have inspected all of the records of the Kemptonian Body Corporate in terms of the provisions of this Act.

[17] In assessing the competing contentions of the parties it is necessary to determine, first, whether the Applicant's request for information and/or documentation is cognisable as a request for information in terms of PAIA. In terms of the provisions of Section 3 of PAIA, the Act applies to (a) a record of a public body, and (b) a record of a private body regardless of when the record came into existence. *"Record"* is defined in Section 1 of PAIA as *"any recorded information – (a) regardless of form or medium; (b) in the possession or under the control of that public or private body respectively, and (c) whether or not it was created by that public or private body respectively"*. The content of these provisions, as well as the general scheme of the Act, make it plain that what may be requested in terms of PAIA is a record of either a public or private body, to the extent that such record contains any recorded information. The concept controlling the scope of application of the Act, despite the title of the Act, is the concept of a *"record"*, not *"information"*.[3] This is not, in the main, what the Applicant's request relates to. The Applicant, in her aforesaid letter, save in the two respects detailed hereunder, requests explanations rather than records. The only documents which would qualify as records in terms of PAIA, are the copy of the settlement agreement with the

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[3] Currie and Klaaren; *The Promotion of Access to Information Act Commentary*, 2002, para. 4.1, p. 41; Sebastian Roling; *Transparency and Access to Information in South Africa, an Evaluation of the Promotion of Access to Information Act;* (unpublished dissertation for the LLM degree at the University of Cape Town, 2007), at p. 19.

Municipality (requested in terms of paragraph 1 of the letter) and the copies of the services contracts with service providers (referred to in paragraph 3 of the letter). The remainder of the information requested constitutes requests for explanations, for which the Act makes no provision. If PAIA had included unrecorded information within its sweep, this would plainly have rendered the operation of the Act unworkable. As far as its form is concerned, the Applicant's request for those records qualifying as such in terms of PAIA (*"the requested records"*), complies with the requirements as to the content of a request as prescribed by Section 53(2)(a) of PAIA.

[18] The next question, as far as the requested records are concerned, is whether the Respondents in their capacity as the joint administrators appointed in the place and stead of the body corporate, fall to be regarded as a *"public body"* as defined in PAIA. The reason for this enquiry is that, should the entity from whom the records are sought be a public body, the *"requester"* may have access to such record as a matter of right, unless a valid ground for refusal of access exists. If, on the other hand, access to the records of a private body is sought, the requester must establish that such record is required for the exercise or the protection of a right, before the issue as to the existence of a valid ground for refusal even arises. The question whether the body concerned is public or private, depends upon an analysis of the activity or function exercised by the body at the time when the request is made.[4] In terms of Section 1 of PAIA, a *"public body"* is defined as meaning:-

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[4] *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA) para 10.

> *"(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*
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> *(b) any other functionary or institution when –*
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> *(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;"*

[19] The Respondents are manifestly not a Department of State or administration in the National or Provincial sphere of Government nor are they a Municipality or a functionary or institution exercising a power or performing a duty in terms of the Constitution or a Provincial Constitution. In my view, none of the functions performed by the Respondents can reasonably be classified as public by nature, since the functionaries concerned are plainly not pursuing any public interest; on the contrary, the avowed objective by which their appointment as administrators is animated, is to restore the body corporate of a privately owned sectional title development to solvency. The same may be said in connection with the Respondents' powers which, regard being had to their source, nature, subject matter and the question whether these powers involves the discharge of a public duty,[5] are, likewise, plainly private by their nature. The Respondents' powers and functions, although derived from the provisions of the Sectional Titles Act, via their appointment by order of Court, are plainly limited in their application to this particular development. The *"control test"* in terms of which the issue as to the extent of State control of the body concerned, if any, is used to determine the

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5 See *Institute for a Democratic South Africa(IDASA) v ANC* 2005 (5) SA 39 (C) at paras. 26-27.

question yields the same result.[6] The reference, by the Applicant, to the fiduciary nature of the Respondents' office in this regard, can have no impact on this aspect of the Respondents' appointment.[7] It follows from the aforegoing that the status of the Respondents for purposes of PAIA is that they are a private body. The nature of the documents requested confirms the categorisation of the Respondents as a private body.

[20] The result of the aforegoing categorisation is that it becomes incumbent upon the Applicant to show that the records requested are required for the exercise or protection of any rights (*vide* Section 50(1)(a) of PAIA). The proper interpretation of the words *"required for"* has spawned a considerable number of decisions in various of the Provincial and Local divisions, both in terms of the Interim as well as the Final Constitution.[8] The leading decisions by the SCA are *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* 2001 (3) SA 1013 (SCA), *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA), *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA), *MEC for Roads and Public Works, Eastern Cape,*

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6 See *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatswayo* 2007 (6) SA 66 (SCA) at para. 9.

7 In terms of section 40(1) of the Sectional Titles Act, a trustee stands in a fiduciary relationship to the body corporate. In terms of section 46(3) of the Act, an administrator appointed in terms of section 46(1) shall, to the exclusion of the body corporate, have the powers and duties of the body corporate (not the trustee), or such powers and duties as the Court may direct. The fiduciary relationship, if there is one, accordingly does not result from any provision of the Sectional Titles Act. But, the fact is that an administrator, by virtue of his or her office, administers funds belonging to the owners and, accordingly, occupies a position of trust in relation to the owners and occupiers of units in the development, who must necessarily place their confidence in the administrator. See *Robinson v Randfontein Gold Mining Co. Ltd* 1921 AD 168 at 178-188; *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] ZASCA 82 at para 14. The administrator, furthermore, administers funds which constitute *"trust property"*, as defined in section 1 of the Financial Institutions (Protection of Funds Act) No. 28 of 2001.

8 *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others* 2000 (3) SA 119 (C); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (8) BCLR 1048 (T); *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust and Another* 1999 (8) BCLR 908 (T; *Nortje and Another v Attorney-General of the Cape and Another* 1995 (2) BCLR 236 (C); *Van Huissteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1995 (9) BCLR 1191 (C) and *Van Niekerk v City Council of Pretoria* [1997] All SA 305 (T).

*and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) and *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA).

[21] In the *Clutchco*-decision, it was pointed out that the right of access to records reposing in the control of a private body is far from untrammelled and further, that the expression *"required for the exercise or protection of any … rights"* is also to be found in item 23(2)(a) of Schedule 6 to the Constitution, which was judicially considered in *Shabalala v Attorney-General Transvaal and Another* 1995 (1) SA 608 (T). In this decision Cloete, J. held that the word *"required"* is capable of a number of meanings ranging from *"desired"* through *"necessary"* to *"indispensable"* (see *Khala v Minister of Safety and Security* 1994 (3) SA 218 (W) at 224G – 225E). He held that *"required"* in Section 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than *"useful"* (see *S v Sefadi* 1995 (2) SACR 667 (D) at 671d) or *"relevant"* (see the *Khala* decision, *supra*, at 238D – F) or simply *"desired"*.

[22] In *Nortje and Another v Attorney-General Cape* 1995 (2) SA 460 (C) at 474G, Marais, J. held that *"required"* meant not *"needs"* but *"reasonably required"*.

[23] In *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T), it was emphasised that it is incumbent upon an applicant for information to *"lay a proper foundation for why that document is reasonably 'required' for the exercise or protection of his rights*".

[24] In *Cape Metropolitan Council v Metro Inspection Services (Western Cape), supra*, at 1013, Streicher, JA stated, at paragraph 28 *"… in order to make out a case*

*for access for information in terms of s 32, an applicant has to state what the right is he wishes to exercise or protect, what the information is that is required and how that information would assist him in exercising or protection that right".*

[25] The SCA in the *Clutchco*-decision came to the conclusion, at paragraph 13, that *"reasonably required"* in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. The Courts have been understandably reluctant to positively define the meaning of the word *"require"* in the context of the provisions of PAIA, because the question whether access to a particular record is required in a given case in order to exercise or protect a right is, in essence, a fact-driven enquiry, the resolution of which ultimately depends vitally upon the nature of the right asserted, the nature of the record sought and the other relevant facts of each matter.[9]

[26] In the present matter, the Applicant is the owner of a unit in the development which the Respondents have been appointed to administer temporarily, in the place and stead of the body corporate, of which the Applicant is a member *ex lege*.[10] By law,[11] the Respondents, having stepped into the shoes of the body corporate, are required to discharge their duties of administration in the interests of the owners and in administering the fund, established in terms of Section 36(1) of the Sectional Titles Act, the Respondents occupy a position of trust *vis-à-vis* the Applicant, to the same extent as the elected trustees would have occupied, had they not been discharged. This position carries with it a duty to account to the Applicant and all

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9 See, for instance, the *Unitas Hospital*-decision, *supra,* at para. 18.

10 See Section 36(1) of the Sectional Titles Act.

11 See, *inter alia*, Section 37(1)(r) of the Sectional Titles Act.

other owners/occupiers who contributed to the fund. The duty arises from the relationship of trust which necessarily exists between the administrators and the owners of units, as an incident of such relationship.[12] None of the Court orders in terms of which the Respondents were appointed as administrators vary or detract from this duty in any way.

[27] The body corporate, furthermore, upon their reinstatement after the discharge of the administrators, will be liable for debts incurred by the administrators during their regime. The individual owners, such as the Applicant, can ultimately be held personally liable for debts owed by the body corporate, *pro rata* to their quotas. The existence of a duty to account is confirmed by the Management Rules, promulgated pursuant to the Sectional Titles Act, the provisions whereof determine the extent of the commensurate right on the part of the owners of units in a sectional title development as a body to an accounting, and the extent of the right of access to the books of account and records of the body corporate by each individual owner.[13]

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[12] Nov 72.6, 7; *Censura Forensis* 1.17.15 n. 9; *RHR* 1.16.8, 12; *Gr* 1.9.10, 11, 13; *Sande Decisiones Frisiae* 2.19. 13; *Lybrechts* 1.485; *Van der Linden* 1.5.3; *Holl Cons* 1.117; 2.323; *Utr Cons* 2.76 n 12; Voet 26.7.10; *Brunnemann*, on *Dig* xxvi, 7, 58. Most of the common law writers referred to above, deal with the relationship of trust and the fiduciary duty of a trustee arising therefrom in the context of the relationship between guardian and ward. Van Leeuwen, at Cf.1.4.24.8 also deals with the mandatary's duty of good faith. In *David Trust and others v Aegis Insurance Co Ltd and others* 2000 (3) SA 289 (SCA), in paragraph 20, the Court said:- *"The contract is one of mandate. The mandate given by each plaintiff to Katz Salber was to invest and administer funds entrusted to it by the plaintiff concerned and collected by it from the plaintiff's debtors. These funds were to be invested in a bank, in this case Investec and Trust bank respectively. It is one of the naturalia of each such contract, as it is of the contracts of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly, and with care and diligence and, secondly, to account to his principal for his actions …"*. The duty to account is one of the *naturalia* of every relationship of trust created by agreement. It exists also, for instance, in agency. *Vide* Kerr; The Law of Agency, 4th ed., p. 136.

[13] In terms of Rule 25, the duties and powers of the body corporate shall be exercised or performed by the Trustees, subject to such restrictions as may be imposed by the owners in general meeting. As far as the duty to account is concerned, Rule 35(1) obliges the Trustees to keep books of account and records which fairly reflect the financial position of the body corporate; Rule 36(1) requires the Trustees to prepare annual financial statements and an estimate of expenditure for each financial period of the body corporate, which must be placed before the annual general meeting. The annual

[28] Rule 35(2) of the Management Rules provides that, on the application of any owner, registered mortgagee or of the managing agent the trustees shall make all or any of the books of account and records available for inspection by such owner, mortgagee or managing agent. The Respondents, in paragraph 6.3 of the answering affidavit, contends that the Applicant's application for information in terms of PAIA constitutes an abuse, in that the Applicant has not followed *"the required procedures*" in terms of the aforesaid rule, *"which allows inspection (not copying) of the Kemptonian Body Corporate records"*. The fact of the matter is, however, that there are no prescribed procedures for an owner to enforce inspection of the books and records of the body corporate in terms of rule 35(2), other than to make application for such access. This, the Applicant has done.

[29] The use of the word *"inspection"* in Rule 35(2) of the Management Rules does not, in my view, mean that an owner is not entitled to take or request copies of the records inspected, as the Respondents would have it. To hold that the word *"inspection"* in the Rule should be taken literally so as to limit an owner requiring access to the books of account to commit such books to memory, or to attempt to copy the books in longhand would amount to an absurdity which does not conform to the object or purpose of the Rules. Such a construction would render the owner's right of access to the books of account and records of the body corporate illusory in most cases. The business records and books of account of a body corporate are, by their very nature, lengthy documents containing a plethora of figures comprehensible

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financial statements and estimates of expenditure must also be placed before each individual owner before the annual general meeting in terms of rule 36(1). In terms of rule 38(1) the trustees must, in addition, submit a trustees' report to the owners at the annual general meeting.

only to professionally qualified bookkeepers or accountants. Often, the only sensible way in which the true import of records of this type will be capable of ascertainment, will be to submit the books and records in issue for perusal and consideration by an accountant. In these circumstances, the only way in which the documents may sensibly be considered, is for the owner's accountant to accompany him on the inspection, or for copies of the books and records to be supplied to the owner so that he may have them scrutinised by an expert. The documents, moreover, are not the type of record that could be copied in any way other than by the photocopying process which, in my view, is the only manner in which reasonable content is to be given to the owner's right to inspect the books of account and records of a body corporate within the meaning of Rule 35(2) of the Management Rules, promulgated pursuant to the Sectional Titles Act.

[30] In *Khunou and Others v Fihrer & Son* 1982 (3) SA 353 (W) at 359H – 360A, in the context of Rules 35 and 37 of the Uniform Rules of Court, similar reasoning was adopted to dispense with a broadly similar contention in terms of which it was sought to restrict the right to require copies of discovered documents to be exchanged pursuant to Rules 35 and 37 of the Uniform Rules of Court. The Court, in that case, pointed out that an overly literal interpretation of the Rules of Court should be guarded against, and that, on the contrary, the Rules should be widely construed in consonance with the complex commercial life of the day, where a photocopying machine had become as indispensable as a typewriter and almost as ubiquitous.

[31] In the meantime, since the *Khunou*-decision was reported, we have passed into the 21st century; the previously ubiquitous typewriter has itself been reduced to a

rare and quaint relic of the past, whilst commercial life is certainly no less complex today than it was at the time when this decision was reported. Indeed, we are currently firmly ensconced in the so-called *"information age"*, where information is instantaneously replicated and transmitted worldwide via the internet and the so-called *"social media*" in less than the blink of an eye. This phenomenon tends to render information to which an applicant is entitled in terms of PAIA time-sensitive, in the sense that undue delay in the production of access thereto may well render the information ultimately useless.[14]

[32] The duty to account involves a duty to keep the accounts up to date, to allow the inspection of the books and to give information when necessary.[15] In *Mead v Clarke*[16], in regard to the duty to keep accounts up to date and to allow the inspection of books, it was held:-

> *"it was the plain duty of the defendant [the agent], once he has accepted the mandate, to perform his work in connection with the plaintiff's [the principal's] affairs in such a manner that the plaintiff, at any time he demanded, could obtain a full and accurate statement of accounts from the defendant, a statement that would enable him to ascertain with precision the exact dealings of the defendant with his affairs."*

[33] In *Martin v Scorgie*[17], De Villiers, J. agreed with the view expressed in Bowstead on *Agency* (10th ed., p. 98) and described it as a principle of our law also, that a broker as agent must give his principal full and accurate information of what

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14 Roling, op. cit. pp. 1-2
15 Kerr, op. cit., p. 153.
16 1922 EDL 49 at 51.
17 1950 (4) SA 344 at 347.

he has done in carrying out the mandate and full and accurate information of the contract concluded by him.[18]

[34] The extent of the duty to furnish an account is also well illustrated by Millin, J. in *Hansa v Dinbro Trust (Pty) Ltd*[19]. In this case, the Court also dealt with a broker/principal relationship and expressed the agent's duty to account in the following terms:- *"He has at all* [reasonable] *times to be ready with correct accounts of his dealings and transactions. He has got to keep accounts. It is not sufficient for him to say 'here are my books and here are my vouchers'. You are at liberty to go through them and make up an account for yourself"*.

[35] In *Jacobsohn v Simon and Pienaar*[20], at a time when an action was pending between the principal and his agent, the principal sought access to the agent's books and vouchers relative to a transaction which the agent had effected on behalf of the principal. The agent sought to deny the principal access on the basis that the principal had at his disposal the discovery machinery in terms of the rules. The Court held that the agent's obligation to permit inspection is a continuing one resting on an agent throughout the agency and even thereafter. The Court observed that, no doubt, the corresponding right must be exercised reasonably and at convenient times, but that the principal's right of access is not affected by the fact that access to the documents sought could be obtained by way of an alternative remedy, such as the rules relating to discovery.

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18 The latest edition of Bowstead at my disposal, being the 20th edition, in article 51, p. 283, confirms the position as stated in Martin v Scorgie, *supra.*

19 1949 (2) SA 513 (T) at 517.

20 1938 TPD 116 at 118.

[36] The decisions referred to above each refer to different aspects of the duty to account which saddles an agent in relation to his principal. The Respondents in the present matter are, of course, not strictly speaking agents of the body corporate. Inasmuch as the administrators, upon their appointment as such, replace the body corporate and fulfil their functions to the exclusion of the body corporate, they can not be regarded as such. The nature of the office of an administrator appointed in terms of section 46(1) of the Sectional Titles Act is, in my view, more closely analogous to that of a mandatory, whose mandate is derived from the provisions of the Sectional Titles Act and/or the Court order in terms of which he was appointed.

[37] Van Zyl, J. in *Totalisator Agency Board OFS v Livanos* 1987 (3) SA 283 (W) at 290J-292E, pointed out that the essential difference between an agent and a mandatory is the fact that the mandatary does not represent the mandator and that, in the result, the mandator does not become a party to any contractual relationship concluded by the mandatary with a third party during the execution of the mandate.[21]

[38] But that which the mandatary, the agent and the person in a position of trust have in common, is a duty to account to the mandator/principal/beneficiary; this duty, in my view, also saddles the respondents, because the essential attributes of their office are such that it necessarily attracts such a duty.

[39] The settlement agreement between the Respondents and the Municipality, which presumably regulate the terms upon which the body corporate's debt to the Municipality in respect of the arrears for municipal charges became repayable, is

[21] See *Digest* 17.1.20*pr.*

manifestly a material part of the records of the respondents' administration of the affairs of the body corporate and constitutes an important milestone in the Respondents' administration as such. The service agreements with service providers to the body corporate fall within the same ambit. Both categories of document form part of the business records of the body corporate, which the Applicant is entitled to inspect in terms of Rule 35(2) of the Management Rules and to which she enjoys a right of access in terms of the duty to account arising from the trust between the Respondents and each contributor to the fund administered by them. At the very least, access to these records would contribute to affording the Applicant with an understanding of the composition of material portions of the expenditure incurred in relation to the Respondents' administration of the affairs of the body corporate of this development. The said records are therefore required to exercise a right vesting in the Applicant.

[40] The Respondents do not dispute the Applicant's complaint that the Respondents have never convened a meeting of owners and/or occupiers of units, as provided for in Rule 51 of the Management Rules, promulgated pursuant to the Sectional Titles Act. On the contrary, the Respondents' managing agent, in paragraph 4 of its response to the Applicant's request for information, stated with equanimity that the terms of the order pursuant to which the the Respondents were appointed as administrators of the affairs of the body corporate do not require them to hold meetings with the owners and/or occupiers. This may be so, but the Respondents' failure to do so nevertheless detracts materially from the transparency of their management and control of the affairs of the defunct body corporate.

[41] As pointed out above, the Respondents were appointed in 2010 already; this means that for the best part of four years, the owners and/or occupiers of the development have been denied the facility of interacting with the Respondents as a properly constituted body. The benefits of interaction between the owners and/or occupiers with the Respondents on an organised basis at a duly constituted general meeting of the owners/occupiers are indisputable. It is only when the owners/occupiers are allowed to interact with the Respondents as a duly constituted body, that the owners' grievances or concerns can properly be aired, and that questions can be directed to the Respondents for their comment to the general body of owners/occupiers. The letters addressed at the discretion of the Respondents to the individual owners/occupiers, whilst no doubt constituting a useful means of communication, are nevertheless no proper substitute for interaction between the Respondents and the owners of the units at a duly constituted general meeting. Absent interaction with the owners as a body in general meeting, the Respondents not only retain total control over the flow of information to the owners, but also conduct their administration of the Body Corporate in total isolation from the views of the owners as a body. This is not conducive to transparency in the Respondents' administration of the affairs of the body corporate; on the contrary, it leaves the owners as a body out in the cold, as it were, where the decisions of the Respondents are presented to the owners as a *fait accompli*. Such a regime is not the one envisaged in terms of the Sectional Titles Act, nor is it consonant with the constitutional values envisaged in Section 1 of the Constitution. It is, accordingly,

precisely the sort of situation which falls within the purview of the objects of PAIA, and which is sought to be addressed by the provisions of the Act.

[42] The Respondents' contention that each and every enquiry by the Applicant was addressed in the Respondents' answering e-mail is not correct. The request in paragraph 1 of the Applicant's letter, for a copy of the settlement agreement between the Respondents and the Kempton Park Municipality was not responded to by the Respondents. Neither did the Respondents respond to the request for copies of such service agreements as must be in existence, for instance, with the managing agent of the Respondents.

[43] It is necessary to refer also to the provisions of Section 6(b) of PAIA, in terms of which it is provided that nothing in the Act prevents the giving of access to a record of a private body in terms of any legislation referred to in Part 2 of the Schedule. Part 2 of the Schedule only contains a reference to the National Environment Management Act, No. 107 of 1998. The Minister has not complied with his duty in terms of Section 86 (1) of PAIA, within 12 months of the promulgation of Section 6, to produce a Bill in Parliament, proposing the amendment of Parts 1 and 2 of the Schedule, to include the provisions of legislation which provide for or promote access to a record of either a public or a private body, as the case may be.

[44] In terms of Section 86(2) of PAIA, until the amendment of the Act contemplated in sub-Section (1) takes effect, access may be given in terms of any other legislation not referred to in the Schedule which provides for access to a record of a public or private body in a manner which is not materially more onerous than the

manner in which access may be obtained in terms of Part 2 or 3 of this Act, respectively.

[45] The only apparent difference between access to the records sought in terms of the Sectional Titles Act and access to the same records in terms of PAIA, is that the provisions of Rule 35(2) of the Management Rules, Annexure 8 to the Act, *prima facie* entitle an inspection only of the documents therein referred to, rather than a right to obtain copies of such documents, which latter form of access would be the usual one granted to a requester in terms of PAIA. As I have already pointed out, however, the right to inspect documents in terms of Rule 35(2) of the Management Rules must, upon a proper construction, be taken to include the right to obtain copies of the documents so inspected. If I am correct in this regard, the difference between the regimes of access provided for in terms of the two Acts is apparent rather than real and access may have been given in terms of the Management Rules. However, because of the Respondents' view that some or the other process specific to the Management Rules is required before access to documents may be granted in terms of such Rules, or because of their view that the Management Rules allow an inspection only and not the copying of documents they, in effect, declined access to the documents altogether. They did so by opposing the Applicant's application for access in terms of PAIA and by rendering the Applicant's access to the documents in terms of the Management Rules subject to restrictions which they had no right to impose. If this were not the case, they could have tendered copies of the documents sought in terms of the Management Rules, which they did not do; the form of access

they tendered was an inspection without the right to take copies, which falls short of that which the Applicant is entitled to in terms of PAIA.

[46] If I am wrong in my conclusion that the right to inspect documents in terms of Rule 35(2) of the Management Rules includes the right to receive copies of such records, then the provisions of the Management Rules in terms of which access to documents may be granted are indeed more onerous than the equivalent provisions in terms of PAIA. In either event, the Applicant must be held to be entitled to access to the remaining documentation sought by her in terms of PAIA.

[47] The Respondents, furthermore, contended that there is a judgment against the Applicant for outstanding arrear levies and other charges, which is currently on appeal. It was submitted in the heads of argument filed on behalf of the Respondents that the records sought by the Applicant pertains to and forms the basis of the appeal and that the application falls to be dismissed on this basis, in terms of Section 7 of PAIA. Even if the stated premises, if established, would justify the dismissal of the application (about which I express no view), the fact is that there is no mention in the affidavits of such a defence, and no evidence is proffered in sustenance thereof. The defence can accordingly not be sustained.

[48] I am accordingly at large to grant any order that is just and equitable as provided for in Section 82 of PAIA.

In my view, the following would be such:

1. The decision by the Respondents not to grant the Applicant access to the settlement agreement between the Respondents and the Kempton Park

Municipality relating to the indebtedness of the body corporate of the Kemptonian sectional title development to the Municipality, and such written service agreements as are in existence between any service provider to the body corporate of the Kemptonian and the Respondents is hereby set aside.

2. The Respondents are ordered to provide the Applicant with copies of the aforesaid documents within 5 (FIVE) days of the service on them of this order.

3. The Respondents shall pay the Applicant's costs.

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**VERMEULEN, AJ**

**TO:**
**THE REGISTRAR OF THE HIGH COURT**
**JOHANNESBURG**

**Date of Hearing: 9 December 2014**

**Date of Judgment: 04 February 2014**

**APPEARANCES:**

**ADV D Z KELA**

**Instructed by:**
**MKHIZE ATTORNEYS**
For the Applicant
Suite 305 E, Killarney Office Towers
Killarney Mall

60 Rivonia Road
Killarney
Tel.: (011) 486-0290
Fax: 086 566 7910
Ref.: N Mkhize
**ADV C ROUX**

**Instructed by**:
**ARNOLD JOSEPH ATTORNEYS**
For the Respondents
3rd Floor, 16 Baker Street
Rosebank
Tel: (011) 447-2376
Fax: (011) 447-6313
Ref.: A Joseph/mjp/15827