IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 5870/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

08/08/19
DATE

SIGNATURE

In the matter between:

AFRESH BRANDS CAPE (PROPRIETARY) LIMITED	First Applicant
AFRESH BRANDS KZN (PROPRIETARY) LIMITED	Second Applicant

and

THE NATIONAL HORSERACING AUTHORITY OF SOUTHERN AFRICA	First Respondent
AND THIRTEEN OTHER RESPONDENTS	

J U D G M E N T

MILTZ AJ:

1. This is an application for an order to procure a fully compliant response to the applicants' request for access to information that was made in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 ("*PAIA*").

The Parties

2. The first applicant is AFRESH BRANDS CAPE (PROPRIETARY) LIMITED and the second applicant is AFRESH BRANDS KZN (PROPRIETARY) LIMITED. I refer to the applicants collectively hereafter as *"Afresh Brands"* which is how they are referred to in the application.

3. Afresh Brands carries on business as manufacturers and wholesalers of premium quality animal feeds including horse feed. Afresh Brands manufactures horse feed in Cape Town and in Durban. Afresh Brands apparently supplies more than half of the horse feed sold in the Western Cape and KwaZulu-Natal.

4. The first respondent is THE NATIONAL HORSERACING AUTHORITY OF SOUTHERN AFRICA. The first respondent's objects include the promotion and maintenance of honourable practice and the elimination of malpractice that may arise in thoroughbred horseracing in Southern

Africa. The first respondent also has the object of regulating the sport of thoroughbred horseracing in Southern Africa.

5. The second to fourteenth respondents are horse trainers. They did not participate in the application.

6. The first respondent as the custodian of horseracing has an obligation to enforce its rules. To achieve this the constitution of the first respondent empowers it to constitute and appoint enquiry boards and impose penalties for any breach or contravention of the constitution or the rules.

7. The disciplinary function of the first respondent is an important function. The constitution and rules of the first respondent allow for persons subjected to enquiries to lead evidence, challenge evidence against them and be legally represented where appropriate. Afresh Brands is not subject to the first respondent's constitution and rules nor is Afresh Brands subject to enquiries of and by the first respondent.

Background

8. On approximately 18 September 2017 Afresh Brands learnt from two of the respondent trainers that the first respondent had recently notified them that two horses trained by them had tested positive for the

presence of caffeine in their blood/urine. The racehorses concerned were tested after races held during June and July 2017.

9. Because Afresh Brands supplies horse feed to the implicated trainers it was concerned by the caffeine positive tests on the horses.

10. The trainers concerned informed Afresh Brands that the horses that had tested positive for caffeine had consumed Afresh Brands' feed products before and during June and July 2017.

11. Frederick Labaschagne (*"Labaschagne"*) who is a director of Afresh Brands and its nutritionist immediately commenced an investigation due to the implications for Afresh Brands of any link to caffeine positive tests in horses.

12. According to the first respondent Labaschagne requested Dr Schalk de Kock (*"de Kock"*), the first respondent's laboratory director to test Afresh Brands' horse feed for caffeine.

13. On 22 September 2017 Afresh Brands provided twelve samples of horse feed to de Kock for testing for caffeine. The samples provided allegedly were extracted from samples of each batch of feed that Afresh Brands manufactured and retains for at least three months. The samples in question were said to be from the second applicant.

14. According to the first respondent the results of the testing of the twelve samples differed markedly from the results of the testing of the samples obtained directly from the trainers. The first respondent contended however that the 12 samples concerned could not be identified as linked to the samples of any batches obtained from the trainers.

15. Afresh Brands explained in the founding affidavit that when it makes a batch of feed for racehorses it does so in 600 kilogram quantities. The quantity of 600 kilograms is then broken down into smaller packages of deliverable size and each package bears the batch number of the particular batch. During the period 1 June 2017 to 19 July 2017 Afresh Brands assessed its production and identified 70 batch numbers representing ten different product lines.

16. On 3 October 2017 samples from each of the 70 batches of feed were delivered to the first respondent. Afresh Brands also retained a sample of each of the 70 batches of feed.

17. On 5 October 2017 Afresh Brands independently submitted the 70 retained samples of the horse feed to the SGS Laboratory (*"SGS"*) for caffeine analysis. SGS is an independent laboratory. Afresh Brands instructed SGS at the time to extract ten *"statistically significant"* samples from the 70 samples and to test those samples for the presence of caffeine.

18. Although testing is a costly and time-consuming exercise it is not clear why only ten samples were tested by SGS. In any event Afresh Brands stated that it was notified by SGS that the tests of the ten samples were negative at least at a threshold level of 1mg/kg of caffeine concentration.

19. On the same day de Kock informed Labaschagne that the original twelve samples received from Afresh Brands had tested negative for the significant presence of caffeine but that the provenance of the twelve samples was unclear as they might not emanate from the same batches of horse feed that had been supplied to the trainers.

20. De Kock also informed Labaschagne that the results of the 74 further samples reflecting the batch numbers would resolve the question whether there was caffeine in Afresh Brands' horse feed.

21. On 7 November 2017 concerned about alleged rumours in the market that there was caffeine in Afresh Brands' horse feed products Labaschagne telephoned de Kock requesting official confirmation of the results to assist him to deal with the adverse rumours.

22. On 14 November 2017 Afresh Brands through its attorneys wrote to the first respondent. In doing so Afresh Brands' attorney informed the first

respondent that there was no known caffeine source in any of the raw material used by Afresh Brands in the manufacture of its animal feeds[1].

23. Afresh Brands contended that the results of the analyses received from SGS bore this out. It is difficult to understand why if this was so Afresh Brands did not quell the rumours immediately based on the results of its own testing. Obviously it could have defended its horse feed in the court of public opinion by relying on the SGS results that it had commissioned.

24. However rather than do so Afresh Brands demanded to be advised as a matter of urgency whether the first respondent's analyses were different to the analyses received from SGS in respect of the samples concerned. Afresh Brands also requested a copy of the analysis and an opportunity to respond in writing to any adverse allegation/s to be made against Afresh Brands prior to any public statements on the topic.

25. The legal basis for these demands is not clear. The first respondent was never obliged to test Afresh Brands' horse feed nor to consult Afresh Brands before publishing the results of the urine and blood tests undertaken on the horses that won or placed in races and subsequently tested positive for caffeine.

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[1] One would assume that Afresh Brands mindful of the stringent regulation of the horse racing industry periodically and perhaps even randomly tested and tests the raw materials that it uses in its horse feeds although this is not addressed in its affidavits.

26. Nevertheless on 15 November 2017 the first respondent informed Afresh Brands' attorneys that no such public statements would be made and the following day that the first respondent was preparing a report relating to the samples submitted to the first respondent by Afresh Brands.

27. The first respondent also agreed that the report would be submitted to Afresh Brands upon its completion and that Afresh Brands would be afforded an opportunity to respond to it before publication.

28. Afresh Brands later amplified its demands requiring that the report should set out the methodology used by the first respondent's laboratory. Again the legal basis for the imposition of such a demand is not clear. Afresh Brands was not entitled to prescribe to the first respondent how it should conduct its affairs and investigations or prepare any reports.

29. According to the first respondent, it later provided a detailed report of its testing of the samples to Afresh Brands ("*the detailed report*"). The first respondent nevertheless has maintained and still maintains that it provided the detailed report and other information without any obligation to do so.

30. The detailed report according to the first respondent included the details of the specimen extraction methodology, the chromatographic

analysis mobile phases and conditions, and the detection methodology with parameters.

31. The detailed report also reflected the calibration of the LCMS instrumentation employed, the preparation of stock solutions, of calibrators and of quality control specimens, all chromatograms of the samples, all the mass spectrum intensities of the samples, the compliant chromatographic and mass identification criteria for caffeine identification in each sample, the compliant chromatographic and mass identification criteria for caffeine quantification in each sample, the responses for each calibrator and quality control, the correlation for linearity and accuracy as determined by the calibrators and the triplicate quality controls, the analysis of the three analyses conducted on each sample for caffeine presence and concentration as a three times check and the correlation between the values for certainty of each result.

32. Unfortunately the detailed report does not form part of the papers so it is not possible to analyse and consider the information therein. However the first respondent described the report as a comprehensive detailed report which is corroborated at least by the description of its contents in the answering affidavit.

33. On 4 December 2017 and before the first respondent's detailed report had been provided to Afresh Brands a meeting was held at which

Afresh Brands was informed by the first respondent that a number of the samples had tested positive for caffeine.

34. At the meeting a document reflecting the results of the testing of certain of the Afresh Brands' horse feed that it had provided for testing and particularly of the caffeine concentrations therein was handed to the Afresh Brands' representatives. The detailed report already referred to above was only provided to Afresh Brands later.

35. On 8 December 2017 Afresh Brands through its attorneys delivered a request for access to the record of the first respondent in terms of Section 53(1) of PAIA (*"the request"*).

36. The request was for a copy of the record, of images, of the soundtrack and transcription of the soundtrack and of the *"record"* in computer readable form relating to the extraction, examination and testing and reporting on the samples of Afresh Brands' horse feed. The form and content of the request apparently is in accordance with the statutory form required for such a request by PAIA.

37. The request is extensive and sought the production of at least twelve different categories or types of documents and information in respect of seventeen sample numbers set out in a schedule annexed to the request.

38. The rights sought to be exercised or protected were stated in an annexure to the request to be:

38.1. the right of Afresh Brands to its good reputation as an established supplier of horse feeds in South Africa;

38.2. the right of Afresh Brands of freedom of trade;

38.3. the right of Afresh Brands to just administrative action; and

38.4. the right of Afresh Brands to approach court for damages for any breach of its rights as well as the rights *"accorded by the (PAIA)"* to make an informed decision as to whether to do so or not.

39. The explanation why the record requested was required was said to be that:

39.1. the investigation of the first respondent and threatened publication to the effect that the first respondent amongst other things intended disqualifying a number of horses which had used Afresh Brands' horse feed and which had tested positive for high caffeine levels would damage Afresh Brands' reputation;

39.2. Afresh Brands trade would be negatively affected thereby as its clients would be dissuaded from purchasing Afresh Brands horse feed and other feeds produced by Afresh Brands;

39.3. to the extent that the first respondent had reached any decisions as to the cause of the caffeine contamination alleged such decisions comprised administrative action which would have been taken without observance of the right of *audi alteram partem* and infringed the rights of Afresh Brands to just administrative action.

40. It was also recorded in an annexure to the request that Afresh Brands had requested the first respondent not to publish the contemplated report and to afford it a right of reply.

41. Afresh Brands contended that it required the record to take advice, if necessary conduct its own investigations, and answer meaningfully to the allegations against it which it could not do without access to the records. This according to Afresh Brands was necessary to enable it to exercise its right of reply meaningfully.

42. Afresh Brands also sought to justify its request for the record on the basis that it required adequate information to investigate itself whether the testing conducted by the first respondent on its products was procedurally sound and had substantively yielded the correct results. It

contended that the documents requested were required for the exercise of these rights.

43. On 10 December 2017 the first respondent's erstwhile attorney provided the detailed report to Afresh Brands.

44. As already observed although there is a material dispute between Afresh Brands and the first respondent as to the nature, contents and status of the detailed report, the detailed report itself is not before court.

45. In the absence of the report I must accept the first respondent's version as to the substance of the detailed report which is summarised above[2].

46. The caffeine screening limits that were applied by the first respondent in its testing of the samples referred to in the report was 0.04 milligrams per kilogram, that is four parts per 100 000 000. The first respondent was testing the samples for the mere presence of caffeine in the horse feed. The testing was not concerned with any specific limit.

47. The first respondent reported nevertheless that the sensitivity of the tests that it conducted correlates with the prescribed methodology for the testing of horse feed in horse racing.

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[2] *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited* 1984 (3) SA 623 (A) at 634E-635C/D.

48. On 27 December 2017 Afresh Brands' attorney informed the first respondent's attorney that Afresh Brands using SGS had tested sixteen of the samples submitted to the first respondent, that the results were set out in the SGS certificates attached thereto and that same were at variance with the first respondent's testing results and markedly so in many instances.

49. On 19 January 2018 Afresh Brands received a letter from the attorney for the trainers threatening that in the event of the disqualification for caffeine in the blood/urine of any horses trained by the trainers the trainers would seek to hold Afresh Brands liable for any stakes that would have to be refunded as a consequence thereof[3].

50. The trainers' attorney contended that his clients regarded the horse feed supplied by Afresh Brands as *"the common denominator"* and said that independent tests conducted by FDA Laboratories *"conclusively proved feed contamination"* from the horse feed of Afresh Brands[4].

51. On 25 January 2018 Afresh Brands' attorney:

51.1. demanded from the first respondent that by 26 January 2018 the first respondent should undertake in writing that it would afford

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[3] If such an action ever is instituted Afresh Brands obviously will be able to defend same based on its own manufacturing, packaging and distribution protocols and methods and by relying on the SGS test results and any others that Afresh Brands might commission.

[4] Presumably the trainers will rely on the FDA tests if they ever are required to defend charges relating to the caffeine contamination of their horses or if they ever bring the threatened claim/s against Afresh Brands.

Afresh Brands ten days' notice of its intention to disqualify any of the horses implicated in the first respondent's testing; and

51.2. gave notice of Afresh Brands' intention to launch urgent proceedings if the undertaking was not provided.

52. The undertakings were not provided and an urgent application was served on the first respondent on or shortly after 14 February 2018. The notice of motion required amongst other things that the first respondent should file its answering affidavit by 23 February 2018 and that the matter would be placed on the urgent roll for hearing on 13 March 2018.

53. The hearing on that date would be of Part A of the notice of motion which contained the usual prayer for urgency and certain interdictory relief. An answering affidavit was not filed timeously but instead an order was made by agreement between the parties on 13 March 2018 that included a considerable portion of the relief sought as interim relief under Part A of the notice of motion.

54. The order so granted gave effect to the relief that was sought in Part A in that it obliged the first respondent to follow an agreed procedure involving the steps preparatory to convening an inquiry to consider alleged caffeine positive results in the affected horses. The first respondent also undertook in terms of the order if and when preparing

to convene an enquiry not to suggest that the caffeine positive tests performed on the affected horses was caused by their consumption of food manufactured by Afresh Brands.

55. The procedure for the hearing of Part B was also agreed in the order as follows:

55.1. the respondents' answering affidavit in respect of Part B would be delivered by 27 March 2018;

55.2. the applicants' replying affidavit in respect of Part B would be delivered by 10 April 2018;

55.3. the applicants' index and pagination of the court file and delivery of an index would occur by 17 April 2018;

55.4. the applicants' heads of argument would be filed by 24 April 2018;

55.5. the respondents' heads of argument would be filed by 7 May 2018; and

55.6. the application would be enrolled for hearing by convenience of the parties alternatively agreement with the Deputy Judge President for the allocation of a preferential date.

56. I relate the procedure for the hearing of Part B for the single reason that it has a bearing on the costs order that will be made. None of the parties complied with the terms of the agreed order made on 13 March 2018.

Subsequent Events

57. On 22 March 2018 the first respondent provided additional documentation to Afresh Brands. However Afresh Brands persisted in contending that not all documents requested had been provided and the first respondent served its answering affidavit on 31 October 2018.

58. On 28 February 2019 the first respondent addressed a further letter with additional documentation to Afresh Brands and on 15 March 2019 the first respondent served a supplementary answering affidavit.

59. The first respondent then served heads of argument, a practice note and chronology of events together with a list of authorities and set the application on the roll for hearing on 14 May 2019. On that date a further order was made by agreement that required:

59.1. Afresh Brands to deliver heads of argument, a list of authorities and chronology within 10 days of the granting thereof;

59.2. the first respondent to deliver its revised heads of argument (if any), list of authorities and chronology by 5 June 2019.

60. Afresh Brands eventually delivered a replying affidavit on 21 May 2019.

61. The events and facts described above led to the parties' agreement that the only two live issues that remain for determination in the application are:

61.1. whether Afresh Brands is entitled to relief in respect of the PAIA request and if so on what terms; and

61.2. what should be done with the costs of the application including those relating to the interlocutory proceedings.

62. I will address each issue in turn below bearing in mind that *"Section 82 of PAIA casts the forms of relief that may be ordered in the widest terms, permitting 'any order that is just and equitable'."*[5].

The case for a fully compliant PAIA response

63. Before addressing the first respondent's response it is necessary to consider the request and more particularly Afresh Brands' case for the order that it persists in seeking.

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[5] *Manuel v Sahara Computers (Proprietary) Limited* 2019 GDR 0474 (GP), paragraph [86] at page 25.

64. Despite contending that it was not obliged to comply with the request events show that although the first respondent did so outside the period specified in section 56(1) of PAIA it decided to grant the request albeit not in conformance with the requirements of section 56(1) and (2) of PAIA.

65. This court, having considered the objects and requirements of PAIA has observed that in establishing that information is required for the exercise or protection of a right an applicant is required to satisfy two distinct requirements[6].

66. Firstly it must identify the right that it seeks to exercise or protect and show that *prima facie* it has established that it has such a right. The broadest possible interpretation must be given to what qualifies as a right for the purposes of the section[7].

67. Secondly it must demonstrate how the information will assist in exercising or protecting the right in question[8]. An applicant must establish a connection between the information requested and the right sought to be exercised or protected and must *"... lay a proper foundation for why that document is reasonably required for the exercise or protection of its rights."*

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6 *Manuel* (supra) para [28] at p10.

7 para [28(a)].

8 *Cape Metropolitan Council v Metro Inspection Services (WC) CC and Others* 2001 (3) SA 1013 (SCA) para [28] at p1026.

68. This requirement, which is *"accommodating, flexible and in its application fact bound, means that the information must be reasonably required in the circumstances."*[9].

69. I have already referred to the rights that Afresh Brands seeks to exercise or protect with reference to the request. These are said to be the rights to just administrative action, its good reputation, freedom of trade and the right to approach a court for damages for a breach of the rights.

70. The asserted rights when analysed divert attention from the real issue.

71. As already observed the first respondent is the regulatory body of the horseracing industry in Southern Africa. It is obliged to ensure that the horseracing industry as a whole is conducted in an honourable manner. It is obliged to enforce its rules and investigate and where appropriate sanction any breaches of its rules.

72. When complying with its obligations insofar as matters of investigation, discipline and where appropriate sanction of breaches of its rules are concerned the first respondent owes no duties in relation to the taking of administrative action to persons such as Afresh Brands with whom it has no relationship at all.

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[9] *Manuel*(supra) paras 10 to 11.

73. The first respondent has no jurisdiction over Afresh Brands which in turn has no standing in matters amongst and between the first respondent and the various players in the horseracing industry in respect of which and amongst whom reciprocal obligations, duties and rights including principles of natural justice may apply.

74. Accordingly it is not necessary to consider the further submissions on behalf of the first respondent in relation to the application or otherwise of PAJA (Promotion of Access to Administrative Justice Act 4 of 2000 (*"PAJA"*). In any event the first respondent's concessions in this regard as embodied in the March 2018 order render this issue moot.

75. The real issue that may arise in mitigation of any sanction to be imposed in disciplinary proceedings concerning trainers and/or breeders whose horses tested positive for caffeine is whether the horse feed supplied by Afresh Brands during the period concerned and to which the samples relate contained caffeine or not.

76. Afresh Brands has obtained test results that allegedly disclose that the feed samples concerned were not contaminated with caffeine. The first respondent's testing of the more than seventy samples supplied to it by Afresh Brands reflected different conclusions while the trainers' attorney contends that independent testing confirmed the presence of caffeine in samples of the horse feed consumed.

77. In terms of rule 73 of the rules of the National Horseracing Authority of Southern Africa and in terms particularly of rule 73.2.4 thereof the trainer and/or owner of a horse shall be guilty of an offence if a specimen taken from that horse, when it is on a racecourse having participated in a race, contains a prohibited substance. One of the prohibited substances that the first respondent screens for is caffeine.

78. Once a pre-defined residue limit of caffeine is found in a horse's urine, the trainer and/or owner is guilty of an offense. The source or cause of the caffeine in the horse's urine is irrelevant and liability in terms of the rules is strict. Therefore the first respondent has no interest in the source of the caffeine.

79. In the course of time and if trainers and/or owners are found guilty of an offence based on the strict liability that attaches to caffeine in the horse's blood or urine then fingers may be pointed at Afresh Brands as being the source of the contamination of the horse feed consumed.

80. However as observed above Afresh Brands has conducted its own testing of the samples with SGS. Afresh Brands also will be provided with information of the testing and reports undertaken for the trainers and will also have regard to the detailed report prepared for the first respondent which it received on 10 December 2017 or earlier but has yet to analyse or consider. Afresh Brands will also be permitted to

participate in any enquiries where it will surely have an opportunity to challenge the adverse test results that one presumes the trainers and breeders will present.

81. It is quite conceivable that an owner or trainer might receive a lesser penalty if it is found at an enquiry in due course that the cause of the caffeine contaminated blood or urine of a horse that won or was placed in a race was Afresh Brands' contaminated horse feed.

82. Such a finding obviously could result in damage or harm to the business and reputation of Afresh Brands.

83. But the rights of Afresh Brands in such circumstances will depend on whether Afresh Brands did or did not supply caffeine contaminated feed to the trainers and breeders.

84. The first respondent's test procedures and results may feature therein but will not impact on any right of Afresh Brands to show that its horse feed was not the cause of the results of the tests.

85. During the course of argument and in attempting to grapple with the difficult question of determining in the absence of the relevant documentation whether or not the first respondent had complied sufficiently with Afresh Brands' PAIA request, Afresh Brands'

representatives were unable to point me to the respects in which the responses were inadequate.

86. Instead it was argued that Afresh Brands had been *"drip-fed"* the documentation requested, that the approach adopted in the production of the documents by the first respondent was contradictory and that the formalities required for a PAIA response in terms of Section 56 had not been complied with.

87. The standpoint of Afresh Brands in this regard did little to satisfy me that any undisclosed part of the records requested by Afresh Brands is required for the exercise or protection of any of the rights relied upon. This is the case even if I am wrong and a right relied on by Afresh Brands indeed was established.

88. In the circumstances I am not satisfied that the order sought by Afresh Brands for a further response to the PAIA request is required to enable Afresh Brands to protect or exercise its rights.

89. Therefore I am not inclined to make an order whether as formulated in prayer 5 of the notice of motion, that is, directing the first respondent to comply fully with Afresh Brands' written request or to order the first respondent to deliver a *"PAIA compliant response"* as suggested in Afresh Brands' heads of argument.

90. The discretion conferred on a court that permits the granting of any order that is just and equitable would mean that a court is entitled in considering the substance of a response to a PAIA request to address the matter from the perspective of substance over form. The court ought not to ignore the sufficiency of responses even though they may not comply with the formalities required by PAIA.

91. It would be absurd to ignore a response that is full and complete but not provided, for example formally under the affidavit of the head of the private institution.

92. The first respondent manifestly ought to have complied as strictly as possible with the formal requirements for its response and should not ignore the statutory requirements therefor. However its departures are at least partially excused by the fact that the documents were provided without prejudice to its rights as referred to more fully below.

93. Almost at the outset, albeit after the commencement of the application, the first respondent in writing suggested that rather than file the answering affidavit in accordance with the agreed timeline Afresh Brands should assess the documents provided in response to the PAIA request and ascertain whether it was satisfied that they were adequate for the purposes of protecting its rights as contended for in the request.

94. The proposal was never taken up. Even when informed in a letter on 28 February 2019 that the first respondent had produced a table having reviewed the PAIA request, the response and documentation provided and any potential omissions, Afresh Brands preferred to maintain the position that the responses were inadequate without explaining or even attempting to identify the respects in which this was so and the reasons why the documentation that had been provided was inadequate.

Costs

95. That leaves the question of costs. There are three sets of costs that need to be considered.

96. The first are those relating to Part A and the urgent application that were held over by agreement in the order of 13 March 2018.

97. *Ex facie* the contents of the order that was agreed without reservation of rights or otherwise, on the application of the applicable principles which achieved some measure of relief and accordingly success for Afresh Brands, these costs should be paid by the first respondent[10].

98. For the reasons set out above I do not intend to grant an order in respect of the PAIA relief whether in the terms sought by Afresh Brands or at all.

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10 *Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15.

99. Unlike the case pertaining to Part A of the application I find no evidence in the papers of any concession of an entitlement on the part of Afresh Brands to the documentation sought and provided by the first respondent.

100. On the contrary the contents of the first respondent's letter of 22 March 2018 clearly show that documents that were provided were provided on the basis that the first respondent did not agree with the grounds on which Afresh Brands asserted its rights and that the first respondent's rights were expressly reserved.

101. The first respondent's letter of 28 February 2019 might be considered to suggest a concession of an entitlement on the part of Afresh Brands to the documentation that had been provided previously and that accompanied the letter. The first respondent has maintained its original stance throughout which is that it has provided whatever information has been requested without any concession that Afresh Brands was entitled to any.

102. At the end of the day an award of costs is a discretionary matter.

103. Neither party complied with the agreed order of court of 13 March 2018 in which time limits were specified for the further conduct of the application.

104. Although there may be good reasons therefor the fact of the matter is that there should be a weighing of the respective rights and obligations of the parties in the greater context of the matter.

105. Afresh Brands is concerned about its reputation and should want its reputation to be cleared expeditiously.

106. The first respondent has a statutory duty to protect the integrity of the horse racing industry and should also do so expeditiously.

107. The parties have been dilatory in different respects. Afresh Brands has failed to present its case with a proper assessment of the documentation it has received and contends that it requires and has not made out a case to identify the information that it alleges has not been provided or explained why it requires any further information, let alone how such information will enable it to protect any right.

108. Afresh Brands also failed to pursue the application originally launched urgently with any alacrity and in accordance with the agreed timetable in the order of 13 March 2018.

109. The first respondent also has been dilatory possibly in not heeding the formal requirements of PAIA in providing its responses to the request and in providing information on a piecemeal basis. Nevertheless the

first respondent has obliged Afresh Brands in a manner that was intended to avoid litigation.

110. Although the first respondent also did not heed the time limits specified in the agreed order of 13 March 2018 its failure to do in seeking to avoid further litigation should not be criticised.

111. Therefore the usual rule should apply and Afresh Brands as the unsuccessful applicant should bear the costs associated with Part B of the application.

112. There will be no order for the costs of the interlocutory application which would not have been necessary had the parties complied with the terms of the agreed order of 13 March 2018.

Order

113. In the premises I make the following order:

113.1. the order sought in prayer 5 of the notice of motion is refused and there will be no other order in respect of the relief sought in part B of the Notice of Motion save in respect of costs;

113.2. the first respondent is ordered to pay the applicants' costs in respect of Part A of the application including the wasted costs

occasioned by the postponement of the application on 13 March 2018, such costs to include the costs of two counsel where two counsel have been employed;

113.3. the applicants are ordered to pay the first respondent's costs in respect of Part B of the application, such costs to include the costs of two counsel where two counsel have been employed;

113.4. there is no order for costs in respect of the interlocutory application.

I. MILTZ
ACTING JUDGE OF THE HIGH COURT, JOHANNESBURG

Counsel for the Applicant:	S Kirk Cohen SC and N Ord
Instructed by:	Liversage Attorneys c/o Fluxmans
Counsel for the Respondent:	G.J Nel SC and C.T. Picas
Instructed by:	Fasken Inc
Date of hearing:	29 July 2019
Date of Judgment:	08 August 2019