IN THE NORTH GAUTENG HIGH COURT PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO. 38293/2012

Reportable YES

Of interest to other judges NO.

Reviewed on 10/4/2014

JUDGE P.Z. EBERSOHN

11/4/2014

In the matter between:

JEANNE VAN DER MERWE **1St Applicant**

MEDIA 24 LIMITED **2Nd Applicant**

and

THE NATIONAL LOTTERIES BOARD **Respondent**

CORAM EBERSOHN AJ

HEARD ON 5 JUNE 2013

JUDGMENT HANDED DOWN ON 11 APRIL 2014

JUDGMENT

EBERSOHN AJ.

[1] The first applicant is a journalist in the employ of Media 24 Investigations, a unit within the second applicant. The second applicant is a company.

[2] The respondent is the National Lotteries Board (the "NLB") established in terms of section 2 of the Lotteries Act, No. 57 of 1997.

[3] The prayers in the notice of motion read as follows:

"1. Declaring that the conduct and decision of the Respondent refusing the Applicants' requests for access to information, dated 6 January 2012, 9 January 2012, 7 February 2012 and 15 February 2012, is in conflict with the provisions of the Promotion of Access to Information to Access to Information Act, 2 of 2000 ("PAIA") and therefore unlawful.

2. Setting aside the decisions of the Respondent referred to in paragraph 1 above.

3. Directing the Respondent to make the records requested available to the Applicants with immediate affect.

4. Directing the Respondent to pay the costs of this application.

5. Further and/or alternative relief."

[4] It is an application for relief in terms of section 78(2) read with section 82 of PAIA, and is related to an alleged refusal of access to records requested by the applicants from the respondent. Specifically, this application concerns requests for details of all staff employed by the NLB and certain other bodies, who have faced disciplinary action and particulars thereof; minutes of meetings of the NLB and of meetings held by the Distributing Agencies with certain other bodies during 2010 and 2011; the funding proposals and accounting of the spending of lottery money submitted with regard to awards made with regard to the Soccer World Cup during the 2010/2011 financial year; all requests for funding and the amounts requested by the African

National Congress relating to its centenary celebrations in 2012 and records which evidence support and expenditure on cultural programmes relating to the centenary celebratons.

[5] A further request was submitted seeking all legal opinions obtained with regard to applications and appeals of decision made by the Distributing Agencies for Arts, Culture, and National Heritage, Charity, Sport and Recreation and "Miscellaneous" in 2010 and 2011. The applicants abandoned this attempt.

[6] The applicants allege that the respondent failed to respond timeously or in some instances to respond at all, to the requests and the applicant therefore deemed the requests to have been refused in accordance with section 27 of PAIA and filed internal appeals in relation to each of the requests. No response as is required by section 77(3) of PAIA to any of the internal appeals was allegedly received and it was deemed in terms of section 77(7) of PAIA to have been refused and the applicants approached the court in terms of section 78 read with section 82 of PAIA. 'What is clear is that the issues between the parties have now chrystalised and the crisp issues for determination by this court are as follows:

a) How records may validly be redacted under PAIA and what PAIA requires of the party effecting the redaction;

b) Whether the Respondent's redaction of the minutes was justified by the reasons provided in the answering affidavit?

[7] The applicants specifically seek a declaration from this court that the conduct of the respondent in failing to give effect to the provisions of PAIA is unlawful and therefore

set it aside and an order be granted compelling the respondent to make the requested records available to the applicants with immediate effect.

[8] Before dealing with the exact requirements of redaction under the Act, PAIA should first be analysed and it be dealt with how it operates in relation to public bodies such as the respondent.

[9] Section 32(1) of the Constitution entrenches the right of access to information. It provides as follows:

> *"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."*

[10] The Supreme Court of Appeal ("the SCA") has recently articulated the purpose of the right of access to information in the following terms:

> *"Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state', of which Ngcobo J said the following in Brümmer v Minister for Social Development:*
>
> > *'The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.'"*
>
> *The President of RSA v M & G Media (570/10) [2010] ZASCA 177 (14 December 2010) at para 1).*

[11] As Currie and Klaaren note, the entrenchment of this right in the Constitution must be seen against the obsession with secrecy.

[12] Section 32 of the Constitution marks a decisive break with the past, by entitling everyone to information held by the state. Our courts have held that the effect of the right of access to information is that public authorities are no longer permitted to "play possum" with members of the public where the rights of the latter are at stake. The purpose of the right of access to information "*is to subordinate the organs of State . . . to a new regimen of openness and fair dealing with the public.*"

> *Currie & Klaaren The Commentary on the Promotion of Access to Information Act (2002) at p 2*
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> *Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) at 850C – cited with approval in MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA) at para 21*
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> *The President of RSA v M & G Media (570/10) [2010] ZASCA 177 (14 December 2010) at paras 9 – 11*

[13] Section 32(2) of the Constitution requires that national legislation be enacted to give effect to the right of access to information. PAIA is the national legislation enacted by Parliament in this regard.

[14] The preamble to PAIA states that its purpose is to –

> *"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights"*

[15] Section 9 of PAIA deals comprehensively with the objects of the Act. They are, amongst others, "*to give effect to the constitutional right of access to . . . any information held by the State*".

[16] PAIA deals with information held by public bodies differently from information held by private bodies. For public bodies, such as the NLB, the requester does not need to

explain why it seeks the information, let alone why it requires it for the exercise of its rights. Rather, section 11(1) of PAIA makes clear that a requester is entitled to the information requested from a public body as long as it has complied with the procedural requirements in PAIA and as long as none of the grounds of refusal are applicable.

> *"A requester must be given access to a record of a public body if the requester complies with the relevant procedural requirements and access to that record is not refused on any of the grounds set out in Chapter 4 of Part 2 of the Act."*

[17] The importance of access to information held by the state as a means to secure accountability and transparency justifies the approach adopted in section 32(1)(a) of the Bill of Rights and in PAIA: namely, that unless one of the specifically enumerated grounds of refusal obtains, citizens are entitled to information held by the state as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of state believes those reasons to be. Section 25(3) of PAIA provides for the situation in which a request for access to a record is refused:

> *"(3) If the request for access is refused, the notice in terms of subsection (1) (b) must-*
>
> *(a) state adequate reasons for the refusal, including the provisions of this Act relied upon;*
>
> *(b) exclude, from such reasons, any reference to the content of the record; and*
>
> *(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." (emphasis added)*

[18] Section 28 of PAIA provides

> *"(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which-*
>
> *(a) does not contain; and*

> *(b) can reasonably be severed from any part that contains,*
>
> *any such information must, despite any other provision of this Act, be disclosed.*
>
> *(2) If a request for access to-*
>
> *(a) a part of a record is granted; and*
>
> *(b) the other part of the record is refused,*
>
> *as contemplated in subsection (1), the provisions of section 25 (2), apply to paragraph (a) of this subsection and the provisions of section 25 (3) apply to paragraph (b) of this subsection." (emphasis added)*

[19] It is therefore crucial to determine whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case, if they do not, that is the end of the matter and the information sought must be disclosed. If the requester has complied with PAIA and the information does not fall within one of the grounds of exclusion there is no discretion on the part of the public body or the court to refuse access.

> *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at para 58*

[20] Thus, the NLB not only bears the onus of proving that the record sought falls within one of the grounds of refusal but it also has a duty to grant access if it fails to prove that the record sought falls within such grounds.

[21] The grounds of refusal must be interpreted as narrowly as possible, as Currie and Klaaren explain:

> *"The grounds of refusal are limitations of the right of access to information. They must accordingly be read as narrowly as possible, consistent with their purpose of protecting specific rights or compellingly important interests. Access to information is the norm and refusal to disclose information the exception."*
>
> *Currie & Klaaren The Commentary on the Promotion of Access to Information Act (2002) at p 105*

information in section 32(1) of the Constitution and the protection from disclosure of information in defined circumstances. Those circumstances are in turn divided into two categories, i.e. those where access to a record must be refused and those where access may be refused.

[22] The defined circumstances display also a concern not to hinder the internal deliberations of public bodies by compelling the disclosure of records related to such deliberations in every instance. Albeit that the NLB did not rely in its refusal on grounds intended to protect the internal deliberations of public bodies, the protection afforded internal deliberations of public bodies provide an interpretive context in which to consider the grounds upon which the NLB actually relied upon in refusing access. The NLB describes its functions in paragraph 6 of its answering affidavit. It then explains that since the end of 2011, which is a period covered by the request for access to its minutes, it has been engaged in a process to prepare for the issuing of the next licence after Gidani's licence expires on 31 May 2014. It states that it is reasonable to anticipate that Gidani will also apply for the next licence.

[23] In paragraph 10 of its answering affidavit, the NLB goes on to describe the matters that it deals with in its meetings, which include:

a) matters related to compliance by Gidani with the requirements and conditions of licence and any relevant agreement;

b) the financial and other commercial affairs of the lottery operator, in this case Gidani;

c) allegations and counter-allegations of impropriety in relation to the operatio of the National Lottery and the distribution of lottery funds, some of which ultimately prove to be wrongly made;

d) internal staffing matters;

e) matters related to the issuing of the next Licence, including matters of policy;

f) the distribution of lottery funds as contemplated in the Lotteries Act, 57 of 1997 ('the Act').

[24] The NLB further states the following in its answering affidavit:

> '11. Information that is supplied by Gidani to the NLB in connection with the operation of the National Lottery, and which is usually considered in the meetings of the NLB, is provided on a confidential basis. This information covers financial, commercial and technical information that Gidani supplies to the NLB.
>
> 12. I am not in a position to describe the information I refer to in paragraphs 10 and 11 above in more detail without thereby disclosing it to the applicants. The disclosure of this information would be likely to cause harm to the commercial and financial interests of Gidani and could place it at a disadvantage or prejudice it as a contender for the next Licence, which the NLB is currently preparing for. The disclosure of the information would, in particular, advantage other parties to the detriment of Gidani in contesting for the next Licence.
>
> 13. Allegations and counter-allegations of impropriety, especially those that are investigated and ultimately prove unfounded, or where only aspects of broad allegations prove to have some merit and to warrant specific actions, would harm the third parties against whom they were made if they were simply disclosed through the disclosure of the minutes of the NLB. This is significant as such a disclosure would occur in circumstances where the third parties concerned are not parties to this application and will not have an opportunity to be heard in response to allegations made against them.
>
> 14. Internal staffing matters, which may involve complaints against particular staff members of the NLB, including senior officials, are by definition confidential. Often negative reports are made to the NLB about its employees. These are discussed in meetings of the NLB. The reports are investigated, and where warranted disciplinary action is taken. The minutes of the NLB in question will reflect some of these reports that are made against employees, but prior to their investigation and any outcome of disciplinary action where such action is taken. It would be extremely damaging to the individual employees for the NLB to disclose such reports or discussions of allegations not yet proven against employees, as recorded in its minutes. It would place the individual employees, irrespective of their positions, at a distinct disadvantage in employment (contract) or other contractual negotiations regarding their current or future employment, especially the latter. Causing such likely prejudice to employees is not warranted at all. It will adversely affect their livelihood.'

[25] The NLB further describes what it considers a serious security breach, in which the applicant allegedly acted in an improper manner but, significantly, failed to bring to the attention of this Court in its founding affidavit despite making allegations regarding its interest in security breaches at the NLB.

[26] Save for a general statement that 'any averment contained in the answering affidavit that is not explicitly admitted herein is denied', (replying affidavit para 4 p 127) the applicants do not specifically place the allegations in paragraphs 6 to 14 of the NLB's answering affidavit in dispute. The applicants only resort to legal argument in their replying affidavit as to why the allegations do not meet the requirements of PAIA, which is contested.

[27] On the *Plascon Evans* rule, (P*lascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 633 (A) at 634H-I and 635A-C) subject to the qualifications sounded in *President of RSA v M & G Media* 2012 (2) SA 50 (CC) paras 32-36, the application must be decided on the facts alleged in paragraphs 6 to 14 of the NLB's answering affidavit.

[28] The NLB explains in paragraph 23 of the answering affidavit that minutes of the meetings of the NLB for 2010 and 2011 will be provided in their entirety or with portions redacted and that the reasons for this, i.e. the redaction, will be given in response to the allegations made in the founding affidavit.

[29] The thirty-two minutes of the NLB for the period 2010 and 2011 are then dealt with in paragraph 37 of the NLB's answering affidavit. The NLB states that the redacted portions of the minutes deal with the matters that are set out in paragraphs 10 to 14 of

its answering affidavit and that it relies on section 36(1) of PAIA. It is common cause that the relevant provision is section 36(1)(b) and (c) of PAIA.

[30] The applicants do not challenge the constitutional validity of section 36(1)(b) and (c). If its requirements are met on the facts pleaded, the redactions are justified.

[31] Section 36(1)(b) and (c) of PAIA provides as follows:

> '**36 Mandatory protection of commercial information of third party**
>
> (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) ...
>
> (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 –
>
> (i) to put that third party at a disadvantage in contractual or other negotiations; or
>
> (ii) to prejudice that third party in commercial competition.'

[32] The first important feature of section 36(1)(b) and (c) is that it constitutes a mandatory ground of refusal, over which the NLB has no discretion if facts exist for its application. In other words, if facts exist, the refusal of disclosure is required by PAIA. (Currie and Klaaren *The Promotion of Access to Information Act Commentary* at 99). Access can be granted only if there is written consent for that from a third party to which the information belongs or relates. (Section 47 of PAIA).

[33] Failure by a public body to follow the third party procedure in terms of sections 47 to 49 of PAIA does not automatically entitle a requester to access the records that fall within the provisions of section 36(1) of PAIA. On the contrary, it is plain from section

49(1) and (2) of PAIA that the public body makes the final decision whether or not to grant access, giving due regard to:

a. any representations that might have been made by a third party; or

b. the fact that a third party did not have the opportunity to make representations in terms of section 48 of PAIA.

[34]Thus the alleged failure by the NLB to follow the third party procedure in this case is not dispositive of whether or not the applicants should be granted access to the minutes of the NLB for the relevant periods in their entirety.

[35] The second important feature of the section is that the possibility of harm occurring as a result of disclosure does not have to be proved as a fact on a balance of probabilities, i.e. that harm will in fact occur.

[36] All that is required is that the harm contemplated in the section 'would be likely' and/or 'could reasonably be expected' to occur. These tests would be met if the harm could be expected as probable because reasonable grounds exist for that expectation. (*Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 42)

[37] It is plain that the NLB alleges that the redacted portions of the minutes contain the information described in paragraph 10 of its answering affidavit, and further that:

a) such information as supplied by Gidani and considered at its (NLB's) meetings, which covers financial, commercial and technical information, is supplied on a confidential basis to the NLB;

b) the disclosure of such information is likely to cause harm to the commercial and financial interests of Gidani and could place it at a disadvantage or prejudice it as a contender for the next Licence, which the NLB is currently preparing for; in particular such disclosure could advantage other parties to the detriment of Gidani in contesting for the next Licence;

c) the disclosure of allegations and counter-allegations of impropriety, especially those that are investigated and ultimately prove unfounded, or where only aspects of broad allegations prove to have some merit and to warrant specific actions, would harm the third parties against whom they were made;

d) internal staffing matters, which may involve complaints against particular staff members of the NLB, including senior officials, are by definition confidential;

e) it would be extremely damaging to the individual employees for the NLB to disclose reports or discussions of allegations not yet proven against employees, as recorded in the minutes; and would place the individual employees, irrespective of their positions, at a distinct disadvantage in employment (contract) or other contractual or commercial negotiations regarding their current or future employment.

[38] On the facts there is sufficient evidence that the redacted portions of the minutes contain matters that fall within the ambit of section 36(1)(b) and (c) of PAIA; and there is a reasonable basis to expect that the harm contemplated in the section is likely or could reasonably be expected to occur.

[39] It is relevant to the likelihood of harm that the applicants clearly intend to publish what is revealed in the minutes of the NLB.(answering affidavit para 28 p 66. This is not addressed in reply). The NLB does not merely make vague and generalised statements as the applicants contend. In contrast, the level of particularity that the applicants insist upon would require the NLB to address the grounds of refusal in a manner that discloses the contents of the redacted portions of the minutes. PAIA does not require nor permit such an approach. (Section 25 (3) (b)). This is not addressed in reply. The NLB explains that it is not in a position to describe the redacted information without disclosing it to the applicants. The Constitutional Court acknowledged this type of predicament on the part of a public body in the *M & G Media* case, for which the public body is not to blame. *President of RSA v M & G Media* 2012 (2) SA 50 (CC):

> '[25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. <u>If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge this burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame</u>.') (Emphasis added)

[40] Criticisms in the past as to how the portions have been redacted lose sight of the fact that what section 28 of PAIA requires is severance where it is practically

reasonable. Severance would be unreasonable if the disclosure of what remains would, *inter alia*, provide clues to the contents of the deleted portions. (Currie and Klaaren *The Promotion of Access to Information Act Commentary* at 91.) The NLB has redacted portions of the minutes apparently in such a way as not to provide such clues, and this ought not to be condemned.

[41] Even if it is found that one or other of the categories of information redacted does not fall within the ambit of section 36(1)(b) or (c), this would only justify the disclosure of those portions of the minutes that are not exempted from disclosure, but not all the other portions that fall within the ambit of the section.

[42] The applicants made their request for the relevant minutes of the NLB on 9 January 2012. The NLB declined the request in a letter dated 7 February 2012, within the time permitted by PAIA, on the grounds addressed above.

[43] It is plain from the provisions of PAIA that the NLB is a public body as contemplated in section 1(b) of PAIA, to which there is no obligation to have a mechanism in place for internal appeals against refusals of access. Although the applicants deny this, they do not point to any provision of PAIA that imposes such an obligation. Their contention is merely that they could not be faulted for attempting to appeal against the refusal of access because the NLB's PAIA manual provides for internal appeal.

[44] The NLB in its answering affidavit does not fault the applicants for lodging an internal appeal. It merely contests the allegation that it failed to comply with obligations imposed upon it by PAIA, when such obligations do not exist. This issue is, in any event, not determinative of the question whether or not the applicants should get access to the relevant minutes of the NLB in their entirety.

[45] By way of background, the applicants claim that they are interested in following recent stories relating to security breaches, questionable funding decisions and poor management of the NLB. Nothing of assistance can be derived from this general allegation.

[46] The applicants have failed to take the court into their confidence regarding conduct that the NLB considers improper, and which related to the one serious security breach that they were aware of when they launched the application. They ought to have done so over such a serious matter.

[47] The applicants have been given all the records of Distribution Agencies for Arts, Culture and National Heritage; Charities; and Sports and Recreation for 2010 and 2011 and funding proposals and all accounting of the spending of lottery money submitted with regard to awards made to the LOC (Local Organising Committee of the Soccer World Cup) for 2010 and 2011.

[48] The applicants have been informed, and have not contradicted, that there are no records evidencing requests for funding to the African National Congress connected with its centenary celebrations.

[49] Funding decisions under the Act are made by the Distribution Agencies referred to in paragraph **Error! Reference source not found.** above. This is in terms of sections 26 to 31 of the Act. The records in this regard for 2010 and 2011 that the applicants requested were furnished to them.

[50] The applicants have failed to provide any reasonable detail regarding the generalised allegation of 'poor management of the NLB' despite the NLB saying in its answering affidavit that it is unable to respond properly to such broad and generalised

allegations. Instead of providing some detail so that the NLB could respond and not be tarnished without the ability to respond, the applicants merely argue that the NLB confuses its right of access to information. There is no merit in this contention.

[51] Any party is entitled to a fair opportunity to respond to allegations that have such great propensity for reputational harm and are aired in a public forum. The applicants cannot brush off the NLB's complaint on the basis that the allegations are irrelevant because they do not have to justify their request for access. They made the allegations believing them to be true and relevant to the proceedings that they have launched.

[52] Section 46 provides as follows:

> '**46 Mandatory disclosure in public interest**
>
> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section ... 36(1) ..., if –
>
> (a) the disclosure of the record would reveal evidence of –
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) an imminent and serious public safety or environmental risk; and
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

[53] The two requirements under subsections (a) and (b) must be met; and the enquiry depends on the facts of the particular case. (*M Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* (864/2011) [2012] 166 ZASCA paras 10 and 14.)

[54] There is no evidence that the disclosure of the minutes would reveal evidence of a substantial contravention of the law; or failure to comply with the law.

[55] There is also no evidence that the public interest in the disclosure of the contents of the redacted portions of the minutes clearly outweigh the harm contemplated in section 36(1).

[56] It is clear that the application should be dismissed with costs for the reasons advanced above.

[57] The following order is made:

The application is dismissed with costs.

P.Z. EBERSOHN AJ

ACTING JUDGE OF THE HIGH COURT

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