**HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

*Reportable*

*Of interest to other Judges*

CASE NO: **A286/2015**

In the matter between:

**AFRIFORUM** Appellant

and

**EMADLANGENI MUNICIPALITY** Respondent

Heard: 9 March 2016

Delivered: 27 May 2016

Coram: Makgoka, Ranchod JJ *et* Canca AJ

**Summary:** Promotion of Access to Information (PAIA) – purpose and object of PAIA - request for access to records of a public body – proper approach to requests – public bodies should give effect to the objects of the Act.

Notice of appeal – contents thereof – in terms of rule 49(4) it is no longer a requirement to set out the grounds of appeal – the only requirements are that the notice state the part of the order being appealed, and the respect in which the variation of the order is sought.

Appeal – against dismissal of application to compel a public body to furnish records in terms of PAIA – Courts to adopt an interpretation which gives expression to the objects of PAIA and avoid too technical an approach.

Costs – award thereof in constitutional litigation - private party litigates against state – where private party unsuccessful – where private party successful – general principles restated.

**J U D G M E N T**

**MAKGOKA, J**

[1] This appeal, with leave of the court a quo, is against the whole judgment of a single judge of this division (Kubushi J) handed down on 20 February 2015. The court a quo dismissed the appellant's application to compel the respondent to furnish certain information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), read with the Municipal Regulations on Minimum Competency Levels (the regulations).

Legislative frame-work

[2] To facilitate a better understanding of the appellant's claim for access to information and the respondent's refusal, I deem it prudent to outline, at the outset, the legal basis and legislative framework for the claim. Section 32 of the Constitution of the Republic of South Africa, 1996 guarantees the right of access to information held by the state. It reads:

'(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

[3] In *Brümmer v Minister for Social Development and Others*[1] the Constitutional Court underscored the importance of this right in the following terms:

'The importance of this right too, 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'. . . . Apart from this, access to information is fundamental to the

[1] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC).

realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.'[2] (Footnotes omitted.)

[4] PAIA is the national legislation contemplated in section 32(2) of the Constitution. PAIA was enacted to give effect to the right of access to information. The Constitutional Court has held that where Parliament enacts legislation to give effect to the rights in the Constitution, a litigant must found her or his cause of action on such legislation, and not directly on the Constitution, unless it is alleged that the legislation in question is deficient in the remedies it provides.[3] As a result, PAIA is the principal legal source defining the right of access to information, and the promotion of access to information in South Africa is now almost entirely regulated by the PAIA because of the principle of subsidiarity. [4]

[5] The purpose of PAIA is two-fold: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to promote a society in which the citizens have effective access to enable them to more fully exercise and protect their rights. In the preamble to PAIA, it is recognized that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public bodies, which often lead to an abuse of power and human rights violations.

The parties

[6] The appellant is a non-governmental organization, registered as a non-profit company, with the aim of protecting the rights of 'minorities', with specific focus on the rights of Afrikaners.[5] The appellant's *locus standi* is not in issue. The respondent is a local municipality established in terms of Municipal Structures Act 117 of 1998, situated in Mpumalanga Province.

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[2] Paras 62-63.
[3] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC) paras 96 and 434-437. See also *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 51; *MEC for Education: Kwazulu-Natal and others v Pillay* 2008 (1) SA 474 (CC) para 40.
[4] De Vos P and Freedman W (eds) (Oxford University Press 2014) *South African constitutional law in context* 622.
[5] http:/www.afriforum.co.za

The appellant's request for access to the records

[7] The appeal has its genesis in a request by the appellant for access to the records of the respondent. The appellant submitted the request on 4 October 2013 in the prescribed manner. It requested documents indicating compliance with the regulations published in the Government Gazette on 15 June 2007,[6] in respect of some of the respondent's senior employees. In terms of those regulations, the accounting officers, the chief financial officers, the senior managers, the financial officers, heads of supply chain management units and the supply chain management managers employed by the respondent have to comply with certain prescribed minimum competency levels in respect of higher education qualifications, work-related experience, core managerial and occupational competences and be competent in the unit standards prescribed for competency areas, as set out in the tables forming part of the regulations.

[8] The appellant's request was in two parts - (a) and (b) – requesting the following particulars, respectively:

(a) Documents indicating compliance with the Municipal Regulations on Minimum Competency Levels (see Annexure 'A')

(b) The report on the compliance with the prescribed minimum competency levels as envisaged in Chapter 7 section 14(4) of the Municipal Regulations on Minimum Competency Levels.

Annexure 'A' referred to in part (a) is a document titled 'Minimum Competency Levels for Accounting Officers' setting out the minimum competency requirements with regard to higher education qualification, work experience, core managerial and occupational competencies, financial and supply chain management competency areas.

*The respondent's response to the appellant's request*

[6] The regulations referred to above were published by the Minister of Finance, with the concurrence of the Minister for Provincial and Local Government, in terms of s 168 of the Local Government: Municipal Finance Management Act 58 of 2003.

[9] On 20 November 2013 the respondent responded to the appellant's request by informing the appellant that all officials employed by the municipality meet the minimum competency levels as required by the regulations, and that the appointments had been certified by the member of the executive council (the MEC) responsible for Local Government in the province. The respondent concluded on those grounds that there was no basis for the appellant's request.

*Internal appeal*

[10] Dissatisfied with the respondent's response, the appellant lodged an internal appeal with the respondent on 21 November 2013. In terms of s 77(3) of PAIA, the respondent was enjoined to decide the internal appeal as was reasonably possible, but in any event within 30 days after the internal appeal was received by the respondent's information officer. The respondent did not respond to the applicant's internal appeal. In terms of s 77(7) of PAIA, the respondent was deemed to have dismissed the appeal as it failed to give notice of its decision on the internal appeal.

The appellant's court application and the respondent's response

[11] As a result of the above, on 15 April 2014 the appellant launched an application in this division, seeking an order that the respondent be compelled to provide it with records it had requested. In an answering affidavit deposed to by the respondent's municipal manager, the respondent took a stance that the appellant's request in part (a) does not identify precisely the documents it required, as, according to the respondent, the appellant had simply put up as an annexure, schedules containing the minimum competency standards. According to the respondent, the nature of the request was 'so vague that it would entail producing and allowing the applicant to trawl through the personnel files of the individuals falling within the scope of the request.' This, the respondent contended, was an 'unacceptable invasion of the privacy of those individuals.'

[12] As regards part (b) of the request, the respondent said that it was equally vague in that it called for production of a 'report'. The respondent pointed out that in terms of regulation 14, two reports are to be prepared each financial year by the

respondent, and the respondent was therefore embarrassed in dealing with the request for a single report, without any specification as to the financial year in respect of which the report was sought. The respondent stated that it could not be expected of it to guess which report the appellant sought.

[13] The respondent contended, in the circumstances, that the appellant's request did not comply with s 18(2)(a)(i) which provides that the request should be made with sufficient particularity to enable an official of the public body concerned to identify the record requested. The respondent furthermore argued that the disclosure of the information requested would violate s 34(1) of PAIA, which provides for the mandatory protection of third parties who are natural persons. According to the respondent, the individuals to whom the appellant's request pertained, fell into the category of third parties.

[14] Reliance on s 34(1) is misplaced, and can be dismissed summarily. That section seeks to protect third parties, and not employees of the respondent. On the contrary, and quite pertinently, s 34(2)(f) provides that:

'A record may not be refused in terms of subsection (1) insofar as it consists of information-

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to-

(i) the fact that the individual is or was an official of that public body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual.'

<u>The judgment of the court a quo</u>

[15] The application was heard by the court a quo on 20 January 2015. Judgment was handed down on 20 February 2015. In its judgment, the court *a quo* rejected the respondent's argument that part (a) of the request was vague. The court observed that the regulations provide for the monitoring of certain specified officials of the respondent, who were clearly identified in annexure 'A'. The court a quo pointed out

that Annexure ‘A’ set out those employees very clearly. As such, the court concluded, the documents requested would only be in respect of the categories of the employees referred to in annexure ‘A’. The court went on to remark that on the mere reading of the annexure, it would have been easy for the respondent to ascertain which employees the applicant was referring to in the request.

[16] For that reason, so the court concluded, it was not required of the appellant to have specified the employees by name. However, with regard to the remedy, the court was disinclined to order the appellant to be given access to the requested documents, on the basis that the request was ‘cumbersome and cannot be easily furnished’. The court seemed to seek reliance on s 45 for this conclusion. I shall revert to this aspect later in the judgment. With regard to part (b) the court *a quo* accepted the respondent’s contention that the request was vague for failing to specify the report which was sought by the appellant. On the above considerations, the court a quo dismissed the appellant’s application with costs.

The notice of appeal

[17] In its notice of appeal, the appellant stated that the court a quo erred in concluding that the request for information was cumbersome and could not be easily furnished. The appellant argued that because the respondent was required to perform the task of compiling consolidated reports on a regular basis, the court should have found that it was not cumbersome to comply with the appellant’s request. The appellant also stated that the ground on which the application was dismissed, namely that the request was cumbersome, was never advanced by the respondent when the request was initially rejected, and should have been ignored by the court a quo. As to the finding that part (b) of the request lacked sufficient particularity, the appellant stated that the court should have found that the most recent report was required, and allowed the application.

*The respondent’s attack on the notice of appeal*

[18] The respondent took issue with the appellant’s notice of appeal. Initially, it was contended that the notice did not comply with the provisions of rule 49(3) of the

Uniform Rules of Court, in that the grounds of appeal were not fully set out. That rule provided in peremptory terms, for the notice of appeal to state whether the whole or only part of the judgment was appealed against. If only part of such judgment was appealed against, it had to be stated which part, and also specify the finding of fact and/or ruling appealed against and the grounds upon which the appeal was founded.

[19] Obviously, the contention in respect of rule 49(3) was made in ignorance of the amendment to the rules, which came into effect on 16 August 2013, in terms of which rule 49(3) was replaced by rule 49(4). The latter does not contain the requirements of the repealed rule 49(3). Its only two requirements are that the notice of appeal must state:

(a) what part of the judgment or order is appealed against; and

(b) the particular aspect in which the variation of the judgment or order is sought.

[20] In his supplementary written argument, and during oral argument, Mr *Ramano*, counsel for the respondent, graciously accepted that the new rule 49(4) did not require of the appellant to set out in detail, the grounds of appeal as was required in terms of rule 49(3). On that basis, counsel expressly accepted that the appellant's notice of appeal complied with the provisions of rule 49(4)(a). In my view, this concession was correctly made. In *Body Corporate of the Bel Aire Scheme v Sure Guard*[7] this Court observed that rule 49(4) is worded similar to rule 7(3) of the Supreme Court of Appeal rules, the essence of which was stated in *Leeuw v First National Bank*[8] as follows:

'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to 'any matter flowing fairly from the record'. The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked…'

[21] In my view, these remarks are apposite. In *Body Corporate of Bel Aire*, above, the full court held at para 23 that, like in the Supreme Court of Appeal, it was no

[7] *Body Corporate of the Bel Aire Scheme N.O. SS 1821/2006 v Sure Guard CC* 2015 JDR 1021 (GP).
[8] *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA).

longer necessary for an appellant in a full court appeal to state the grounds of appeal in the notice.

*The respondent's argument with regard to rule 49(4)(b)*

[22] Mr *Ramano*, having accepted that the notice of appeal complied with sub-rule 49(4)(a), contended, however, that the notice fell short of the requirements of rule 49(4)(b). It would be recalled that this sub-rule requires the appellant to state in the notice of appeal 'the particular aspect in which the variation of the judgment or order is sought.' Counsel argued that the notice did not state this. It appears to me that counsel conflates the requirements of sub-rules (a) and (b). The former requires the appellant to identify a part of the order appealed against, while the latter is concerned with the relief or order that the appellant seeks to be substituted for that appealed against. In this respect, the appellant has stated in several instances in its notice of appeal that what it seeks is that the order of the court a quo be substituted with an order compelling the respondent to furnish it with the requested records. This, indubitably, complies with rule 49(4)(b).

[23] Counsel also placed reliance on the explanatory notes in *Erasmus Superior Court Practice* Vol 2 in which the learned authors seem to suggest that the notice of appeal under rule 49(4) must comply with the requirements of the repealed rule 49(3). I do not read the notes to have that effect. However, if that is what the learned authors seek to convey, their views are incompatible with the clear provisions of rule 49(4).

<u>The issues in the appeal</u>

[24] Having disposed of the preliminary argument, I turn now to the substantive issues in the appeal, which, I propose, are crisply, the following:

(a) Whether the respondent was entitled to rely on new grounds for refusing the appellant's request for access to its records;

(b) Whether the basis on which the court a quo dismissed the application is correct, in the context of PAIA;

(c) whether costs should be ordered in the matter, and if so, the principles involved.

[25] I consider the above issues, in turn.

*New grounds of refusal raised in the answering affidavit*

[26] To my mind, the position of the respondent is analogous to that of administrative bodies, where such bodies are generally, not permitted to furnish new or additional reasons to those they furnished when they took impugned decisions. In *Jicama*, Cleaver J cited with approval the following *dictum* in *R v Westminster City Council*:[9]

'… The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'

[27] In *National Lotteries Board v South African Education and Environment Project*[10] Cachalia JA said:

'In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law

[9] *R v Westminster City Council, Ex Parte Ermakov* [1996] 2 All ER 302 (CA) at 316c-d.
[10] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA).

also demands the same approach as the English courts do is not a matter I need strictly decide.'[11]

[28] Given the above authorities, I am of the view that the court a quo should have found that it was impermissible, and not open to the respondent, for it to raise and place reliance on new grounds of refusal in the answering affidavit, to bolster its decision to refuse the applicant's request for access to the records. The matter should therefore have been determined on the ground relied on by the respondent in its letter dated 20 November 2013.

*The basis on which the court a quo dismissed the application*

[29] To consider the basis on which the application was dismissed, two sections of PAIA are relevant, namely ss 11 and 45. Section 11 gives effect to the right of access to information held by public bodies, while s 45 provides the grounds on which a request for access to a record of a public body may be refused. I find it prudent to set out in full, those sections.

[30] Section 11 reads:

> '(1) A requester must be given access to a record of a public body if—
>
> (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
>
> (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
>
> (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
>
> (3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by—
>
> (a) any reasons the requester gives for requesting access; or
>
> (b) the information officer's belief as to what the requester's reasons are for requesting access.'

[11] Para 27.

[31] Section 45 provides:

'The information officer of a public body may refuse a request for access to a record of the body if:

(a) the request is manifestly frivolous or vexatious;

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

[32] Section 11(1)(a) provides, in peremptory and emphatic terms, the right to the requester to be furnished with the requested record if all procedural requirements have been met. The public body has no residual discretion to refuse such request, unless on one of the grounds of refusal set out in chapter 4 (ss 33-46).

*Part (a) of the request*

[33] In this regard, s 45 is relevant, as the court a quo seemingly relied on it to dismiss part (a) of the request. To recap on that aspect, the court a quo dismissed part (a) of the appellant's request on the basis that it was 'too wide and cumbersome'. Unfortunately, the court did not furnish any reasons why that was the case. However, just before reaching that conclusion, the court a quo had mentioned the provisions of s 45(*b*), which provides a basis of refusal if the 'work involved in processing the request would substantially and unreasonably divert the resources of the public body.' It is therefore not clear if the court a quo, by concluding that the request was wide and cumbersome', meant the substantial and unreasonable diversion of resources as envisaged in s 45(*b*).

[34] Three aspects arise from the above. First, the basis on which the court a quo dismissed the application, was never relied on by the respondent in its refusal contained in the letter dated 20 November 2013. It must be recalled that in that letter, the basis for the refusal of the request was that all its employees complied with the regulations. That ground itself, is not one of the grounds set out in chapter 4 (ss 33 – 46) on which a request for access to a record may be refused. On this basis alone, the court a quo should have found that the respondent's response to the appellant's request was inadequate, and based on irrelevant considerations.

[35] Second, the irony of the reason furnished for the refusal (that the respondent's employees complied with the regulations) is that for that very reason, access to the records should be given. That is because if such an assertion is made in good faith, it would be that the maker of the statement had checked and verified the very records the appellant sought. There should, in the result, be no difficulty in furnishing the records, unless, of course, the statement was made egregiously. I am fortified in this view by the fact in terms of regulation 14, the respondent is required to monitor compliance with the prescribed minimum competency levels for financial officials and supply chain managers, and report the consolidated information.

[36] Third, the basis on which part (a) of the applicant's request was premised (being too 'wide and cumbersome') is not a ground on which a request for access to a record may be refused in terms of PAIA. There is simply no such ground anywhere in the text of the Act. Even if one assumes that the court a quo meant to rely on s 45(*b*) – that compliance would substantially and unreasonably divert resources of the respondent - there was no evidence before the court to justify that conclusion. Ordinarily, such an assertion, backed by the relevant evidence, would be advanced by the public body to which the request is made. In the present case, no such assertion was made, and the court a quo misdirected itself by relying on a basis not advanced to it by the respondent.

*Part (b) of the request*

[37] I turn now to part (b) of the applicant's request. In this regard, the court a quo concluded that the request was vague, and lacked sufficient particularity to enable the respondent to determine which report should be made available to the appellant. The court pointed out that in terms of regulation 14 the respondent was obliged to prepare two reports in a financial year. As the appellant had not stated which of the two reports, or for which financial year, it required, the request was vague and that the respondent was entitled to refuse it. Once more, this ground was not advanced by the respondent in its response to the applicant's request, and should have been ignored. The appellant asserts that the respondent should have raised the issue of vagueness when the request was made and not remain quiet, only to raise the issue

during litigation. I agree. A simple letter to the appellant seeking clarity as to which report it sought, would have clarified whatever lurking vagueness there was.

[38] In my view, the court a quo overlooked the objects and purpose of PAIA, which among others, is to provide a simple and inexpensive mechanism of obtaining information held by public bodies. Also what seems to have eluded the court a quo, is the injunction in s 2(1), which provides that when interpreting a provision of PAIA, every Court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects. In my view, the court a quo adopted too technical an approach to the application. That approach led it astray, and in the process, scrutinized the applicant's request for access to the records with an eye reserved for court pleadings. That is inconsistent with the objects of PAIA.

The remedy

[39] The upshot of the above findings is that the appeal should be allowed. The respondent should be ordered to furnish the records requested by the appellant in parts (a) and (b) of its request. To avoid any further technical points of ambiguity with regard to part (b), I propose to make an order to facilitate the furnishing of further particulars by the appellant to the respondent as to the specific report it seeks. In that way, I will be adopting an approach which is consonant with the objects of PAIA, and giving effect to the right of access information held by public bodies.

Costs

[40] Finally, the issue of costs. This is a matter within the discretion of the court, which discretion must be exercised judiciously having regard to all the circumstances. The court a quo dismissed the application with costs. Unfortunately, in doing so, the court did not give consideration to the fact that it was concerned with constitutional litigation. The general principle with regard to costs in constitutional litigation was laid down by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*[12] and *Biowatch Trust v Registrar, Genetic*

[12] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

*Resources and Others.*[13] In *Affordable Medicines,* the Court held that one of the considerations is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. But there are exceptions, such as where the litigation is 'frivolous or vexatious'.[14]

[41] In *Biowatch* it was established that the general rule in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, while if unsuccessful each party should pay its own costs.[15] The present matter raises a constitutional issue of importance aimed at vindicating a constitutional right of access to information. Even if unsuccessful, as the court a quo found, the appellant should not have been mulcted in costs. Its application could not be described as frivolous or in any way inappropriate. Far from it, as it raised an important constitutional issue. The applicant was left with no choice but to approach the Court, as the respondent had refused to provide it with access to the requested records.

[42] The appellant has been successful in the appeal proceedings. In *Biowatch*, para 25, it was stated that 'particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.' In the present case, I find none of such reasons to deprive the appellant its costs. As a result, costs should follow the result in accordance with the principles discussed above.

Order

[43] In the result the following order is made:

1. The appeal is upheld;

2. The order of the court a quo made on 20 February 2015 is set aside and in its stead the following is substituted for it:

[13] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).
[14] Para 138.
[15] Paras 23 and 24.

(a) The respondent is ordered to furnish the applicant with the records requested in the applicant's request dated 4 October 2013;

(b) To the extent there is ambiguity in part (b) of the request referred to above, the respondent is entitled to request the applicant to furnish it with the information of the specific report it seeks;

(c) The respondent is ordered to pay the costs of the application.

3. The respondent is ordered to pay the costs of this appeal.

_____
T.M. Makgoka
Judge of the High Court

I agree

_____
N. Ranchod
Judge of the High Court

I agree

_____
M. Canca
Acting Judge of the High Court

Date of hearing: 9 March 2016

Judgment delivered: 27 May 2016

Appearances

For the Appellant: Adv. J.L Basson

Instructed by: Hurter Spies Inc., Pretoria

For the Respondent: Adv. P. Ramano

Instructed by: Xaba Attorneys, Johannesburg

Adams & Adams, Pretoria