

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: A171/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	<input checked="" type="radio"/> YES <input type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	<input type="radio"/> YES <input checked="" type="radio"/> NO
(3) REVISED.	<input checked="" type="checkbox"/>
18/2/16	<i>M. F. Jones</i>
DATE	SIGNATURE

18/2/2016

In the matter between:

THE SOUTH AFRICAN PORK PRODUCERS ORGANISATION APPELLANT

And

THE NATIONAL COUNCIL OF SOCIETIES FOR THE
PREVENTION OF CRUELTY TO ANIMALS RESPONDENT

JUDGMENT

Fabricius J,

1.

This is an appeal against the whole of the judgment delivered by Phatudi J on 5 November 2014, leave having been granted by the Court a quo.

2.

The Appellant sought access to certain documents in terms of s. 78 and 82 of the *Promotion to Access to Information Act, 2 of 2000 (herein after "the Act")*, which application was denied by the Respondents.

3.

The relevant facts are straight forward: a complaint had been lodged by a member of the public with the Respondent, and pursuant thereto an inspection was conducted by a senior inspector of the Respondent at the Applicant's piggery, a commercial pig-farm in the Limpopo Province, and a member of the Applicant.

Following such investigation, the Applicant requested six records held by the Respondent, but prior to the proceedings five of those records were provided, and one was refused, which formed the subject matter of the application before the Court a quo. It appears that the Respondent contemplated whether or not to institute criminal proceedings and as a matter of logic, at such proceedings, the identity of the complainant and the nature of the complaint would have been in the public eye. Respondent thereafter decided not to institute such proceedings, and then relied on the grounds referred to in s. 37 (1) (b) and 44 (2) (a) of the *Act*. It is clear from the Respondents Answering Affidavit and the judgment of the Court a quo, that the Respondent in essence relied on the argument that the complaint was given in confidence, and that the disclosure thereof could probably be expected to prejudice the future supply of similar information, and that it was accordingly in the public interest that similar information should continue to be supplied. Respondent was also of the view that the complaint could not be redacted so as to hide the identity of the complainant.

The Act was promulgated as a result of the provisions of *s. 32 of the Constitution of the Republic of South Africa*, which affords everyone the right of access to any information held by the State. However, it is also clear that s. 36 makes provision for a limitation clause, and accordingly the *Act* does contain limitation clauses, a number of which are contained in chapter 4 of the *Act*. The procedural requirements of the *Act* were met by the Appellant, and therefore the onus shifted onto the Respondent to show, on a balance of probabilities, that its grounds of refusal raised to prevent access to the relevant record were justified.

See: *Section 81 of the Act* and the *President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA)*.

Section 37 (1) (b) reads as follows: "Subject to sub-section (2), the information officer of a public body may refuse the request for access to a record of the body if a record consists of information that was supplied in confidence by a third party, the

disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source: and if it is in the public interest that similar information or information from the same source, should it be supplied". The provisions of sub-section 2 do not apply in the present instance.

Section 44 (2) (a) reads: "Subject to sub-section (4), the information officer of the public body may refuse a request or access to a record of the body if the disclosure of the record could reasonably be expected to jeopardise the effectiveness of the testing, examining or auditing procedure or method used by a public body". The provisions of sub-section 4 also do not apply in the present instance.

The standard required in order to accept the grounds of refusal raised by a Respondent is to be determined objectively. In relation to both grounds of refusal relied upon by the Respondent herein, it would thus be required of the Respondent to show objectively and on a balance of probabilities that if the record were to be disclosed, there would be a "reasonable expectation" that the harm sought to be avoided may occur.

See in this context: *Transnet Ltd and Another v SA Metal Machinery Company*

(Pty) Ltd [2006] 1 All SA 352 (SCA) at par. 31, 40 - 43.

6.

The redacted form of the complaint had not initially been requested. The reason for refusal by the Respondent is primarily based on the provisions of s. 37 (1) (b) and it was also dealt with on this basis by the learned Judge in the Court a quo.

The purpose of this sub-section is stated to be to protect the flow of confidential information to public bodies.

See: *Currie and Klaaren, the Promotion of Access to Information Act Commentary (2002) at p.155.*

There are three parts to the enquiry: whether the record consists of information supplied in confidence by a third party, if disclosure could reasonably be expected to prejudice a supply of similar information or information from the same source, and if it is in the public interest that similar information should continue to be supplied.

Evidence of a reasonable expectation of confidentiality is what is required to classify

the information as having been supplied in confidence. In its Answering Affidavit the

Respondent stated that it does, and all Societies for the Prevention of Cruelty to

Animals are obliged to treat all complaints received as confidential, as is evidenced

by its own Code of Ethics. The relevant portion of this Code provides that "under no

circumstances should a complainant's name or other details be divulged except for

the purposes of a prosecution".

As regards the prejudice to the supply of future information, it was submitted by the

Respondent that it follows as a matter of course that if persons who have complaints

about animal cruelty learn that their identity or information pertaining to the

complaint, made to the Respondent or any SPCA, could be disclosed upon request

by any person, there would be a reasonable expectation that the future supply of

information would be prejudiced or jeopardised.

This was clearly the Respondent's primary reason, it was dealt with on that basis by

the Court a quo, and in my view it is the crux of the appeal before us. In the same

vein it was submitted by the Respondent that it is in the public interest that similar

information should continue to be provided in order that cruelty to animals could be

detected, punished and hopefully prevented and the objects and functions of the Respondent, and SPCA's in general, fulfilled. Given the Respondent's lack of resources, it relies heavily on the public to report instances of alleged animal cruelty and it would prove extremely difficult to do so were people to decline to lay a complaint due to concerns of intimidation, victimisation or other repercussions. Again, this is clearly set out in the Respondent's Answering Affidavit, and can actually not be disputed in my view. In the context of the provisions of s. 44 (2) (a) it was submitted that it is reasonably foreseeable that the Respondent's ability to perform its statutory mandate would be jeopardised by disclosing the complaint against the piggery, essentially for the same reasons that apply in connection with the provisions of s. 37 (1) (b).

7.

It is clear from the judgment read as a whole in the light of the affidavits before the Court, that the learned Judge found that the Respondent's refusal to provide the information sought, was mainly to protect the identity and the information of the

person who submitted a complaint. The identity of the relevant complainant alone was never found to be the sole reason to prevent disclosure, but only the main reason. Not only was the complainant's identity referred to, but also the information that the person provided. It is clear from the judgment read as a whole that the Court had regard to and accepted the reasoning of the Respondent's Chief Executive Officer who, in the Answering Affidavit said the following:

7.1

The record consists of information supplied in confidence by a third party;

7.2

Disclosure of complaints made to the Respondent or local SPCA's could reasonably be expected to prejudice the future supply of similar information from persons wishing to remain anonymous and that it is in the public interest that similar information continue to be supplied so as to further the Respondent's statutory objective;

7.3

By disclosing information about the complaint, one of the main sources of the Respondent's information, being tip-offs, is likely to be jeopardised and the Respondent's obligations threatened;

7.4

The Respondent's rules and Code of Ethics published in terms thereof prevent disclosure of the complainant's name or any other details except for purposes of a prosecution;

7.5

Actions which a person in respect of whom a complaint has been made to the Respondent or local SPCA may well receive public attention, at least within the small community in which the relevant piggery operated (Vaalwater), and dissuade other concerned businesses from laying complaints, thus damaging the SPCA's reputation and limiting its effectiveness;

7.6

There would accordingly be a decrease in the number of complaints made to the Respondent and other SPCA's if the complainant's information were to be disclosed.

8.

It is also clear from the Answering Affidavit that the confidentiality of the complainant was a paramount concern of the Respondent, and it is clear that it expressly stated that any information relating to the complainant would jeopardise the Respondent's work. It is also clear from the Replying Affidavit that these concerns and issues were not disputed by the Appellant, and could not be so disputed.

9.

I have already stated that the onus to justify the refusal rested on the Respondent and in this context the Constitutional Court in the *M & G Media* case *supra*, said the following at par. 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 the 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". It was also submitted by the Respondent that the threshold has been met, that it was decided on this basis by the Court a quo, and that there was no merit in the appeal. I agree with that submission. It appears clearly from the Respondent's Answering Affidavit and the judgment of the Court a quo that this is the case.

10.

One question remains, and that is whether or not the relevant record should have been made available to the Applicant in the light of the provisions of s. 28 of the *Act*. This section obliges public bodies to first determine whether a ground of refusal applies to the record requested and if so, to determine whether the protected information can reasonably be severed from the remainder of the record. If it can be,

the remainder must be disclosed. Respondent indicated in its Answering Affidavit

that it is the identity and details of the complainant and the information of the complainant that it sought to protect. In the present instance the totality of the complaint could not be redacted.

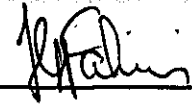
11.

In the light of the above, which goes to the root of the matter, it is not necessary to deal with other grounds of appeal raised by the Appellant herein, which are at best peripheral and at worst red herrings.

12.

Accordingly, the following order is made:

The appeal is dismissed with costs.



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

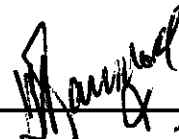
I Agree



JUDGE W. R. C. PRINSLOO

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

I Agree



JUDGE N. RANCHOD

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: A171/15

Counsel for the Appellant:

Adv J. C. Prinsloo

Instructed by: Gildenhuis Malatji Inc

Counsel for the Respondent:

Adv S. Freese

Instructed by: Marston Taljaard

Date of Hearing: 10 February 2016

Date of Judgment: 18 February 2016 at 10:00