REPUBLIC OF SOUTH ARICA

IN THE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Case number: 75782/13

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

10/11/2016
DATE

SIGNATURE

FANA HLONGWANE	1st Applicant
NGWANE AEROSPACE (PTY) LTD	2nd Applicant
HLONGWANE CONSULTING (PTY) LTD	3rd Applicant
NGWANE DEFENCE (PTY) LTD	4th Applicant
NGWANE PROPERTIES (PTY) LTD	5th Applicant
NGWANE MINING (PTY) LTD	6th Applicant
SPARUS CONSULTING CC	7th Applicant

and

ABSA BANK LIMITED	1st Respondent
MARTHINUS VAN RENSBURG N.O	2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1] The relief sought by the applicants in the notice of motion is the following:

1.1 That the respondents' decision to refuse to grant the applicants access to all the records as described in paragraph 1 of Annexure "B" of the applicants' request in terms of the Promotion of Access to Information Act[1] ("the Act"), be set aside.

1.2 That the respondents be ordered to make all the records referred to in paragraph 1 of the said annexure which have not yet been provided to the applicants, available to the applicants within four weeks of the date of this order.

1.3 In the alternative to prayer 1.2, that the respondents be ordered to disclose to the above Honourable Court for its examination such records set out in paragraph 1 of annexure "B" of the applicants' request in terms of the Act as the Honourable Court may require, so that the Honourable Court may determine whether the applicants ought to be granted access to the said records.

1.4 That the respondents be ordered to pay the costs of this application.

[2] The first applicant brings this application in his personal capacity and also in a representative capacity as director of second to seventh applicants.

[3] The first respondent is a registered financial institution in which the applicants hold various banking accounts. The second respondent is employed by the first respondent as an information officer.

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[1] Act 2 of 2000.

Legal framework

[4] The applicants brought this application in terms of section 78(2) (d) (i)[2] of the Act. The relief sought is contained in section 82[3] of the Act.

[5] The objects of the Act are set out in section 9 as follows:

> "(a) to give effect to the constitutional right of access to-
>
> (i) any information held by the State ; and
>
> (ii) any information that is held by another person and that is required for the exercise or protection of any rights;
>
> (b) to give effect to that right-
>
> (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
>
> (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;
>
> (c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of 'requester', allowing them, amongst others, to access information from private bodies upon compliance with the four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;
>
> (d) to establish a voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and

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[2] Section 78(2)(d)(i) reads as follows: "A requester-(d)aggrieved by a decision of the head of a private body- (i) to refuse a request for access; may, by way of application, within 30 days apply to court for appropriate relief in terms of section 82.

[3] Section 82 provides that: "The court hearing an application may grant any order that is just and equitable, including orders- (a) confirming, amending or setting aside the decision which is the subject of the application concerned; (b) requiring from the information officer or ... the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order; (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or (d) as to costs".

(e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone-

(i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;

(ii) to understand the functions and operation of public bodies; and

(iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights".

[6] In terms of section 50(1) (a) private entities, just like public bodies, in order to promote transparency, accountability and effective governance in private entities, are expected to provide information in their possession to a person who requests such information in order to exercise or protect his rights[4].

[7] In *Cape Metropolitan Council v Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*[5] the court stated that:

"In order to make out a case for access to information ... an applicant had to state the right it wished to exercise or protect, what the information was and how that information would assist it in the exercise or protection of that right."

[8] The following issues need to be determined:

8.1 whether the documents sought by the applicants are required for the exercise or protection of a right;

8.2 what rights the applicants seek to exercise or protect; and

[4] Section 50 (1) (a) of the Act provides that: "A requester must be given access to any record of a private body if-that record is required for the exercise or protection of any rights.

[5] 2001 (3) SA 1013 (SCA) at [28].

8.3 whether the reasons proffered by the respondents for the refusal to give access to the information required by the applicants are valid in terms of sections 62-70 of the Act.

[9] In dealing with phrase 'required for the exercise or protection of any rights in section 50(1)(a) of the Act, the Supreme Court of Appeal in *Clutcho (Pty) Ltd v Davis*[6] said the following:

> "[13] I think that 'reasonably required' in the circumstances is about as precise a formulation as can be achieved provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the legislature in section 50(1) (a)."

See also In *Unitas Hospital v Van Wyk and Another*[7].

Factual background

[10] As indicated above, the applicants were holders of bank accounts in the first respondent. During November 2012 the first respondent, through the second respondent informed the first applicant that a decision had been take to close the bank accounts of the first to sixth applicants as a result of a review of its bank's business. Notice of the closure of the bank account of the seventh applicant only came later. After various communications between the applicants' attorneys and the first respondent, on 3 May 2013 the first respondent responded to an inquiry from first applicant's attorneys as to the

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[6] 2005 (3) SA 486 (SCA).
[7] 2006 (4) SA 436 (SCA). In dealing with the meaning of 'required' in section 50 (1) (a) of the Act, the court held that: "[6] .... Generally speaking the question whether a particular record is 'required' in the context of s50 (1) (a) for the exercise of protection of a particular right is inextricably bound up with the facts of that matter."

reason for the closure of the bank accounts, the first respondent responded by informing the applicants' attorneys that: "Absa in the normal course of its business regularly performs reviews of its underlying businesses, and their related client bases, to analyse their alignment to the organisation's overall strategy. On occasion this analysis suggests that there are clients that we cannot serve optimally. In these instances it is best to stop providing banking services. This decision was taken with regards to Adv Hlongwane."

[11] After a flurry of communication between ABSA and first applicant's attorneys and the deadline for the closing of the accounts being shifted, the first respondent finally closed the bank accounts during December 2013, including the bank account of the seventh applicant.

[12] As a result of the closure of the bank accounts, the applicants lodged a complaint with the Ombudsman for the Banking Services ("the Ombud") against the first respondent on the ground that first respondent based its decision to close the applicants' accounts on the basis of the first applicant's political affiliation and/or profile which was a violation of the applicants' human rights under the Constitution. The relief the applicants sought from the Ombud was for first respondent to be directed to reverse its decision to close the accounts. After investigating the matter, the Ombud responded to the applicant's complaint and informed them that "he could not find any maladministration on the part of Absa."

[13] Subsequent to receiving the Ombud's ruling, the applicants lodged a request in terms of section 53 (1) of the Act with the second respondent in which they sought to be provided with the following documents:

"10.1 All documentation, statements, financial statements, records, correspondence, internal communications, documentation and memorandums, internal e-mails, notices of meetings, minutes of meetings, transcriptions of meetings relating to the above and to:

10.1.1 The identification of the Accounts listed in annexure A for a review.

10.1.2 The recommendation to perform a review of your business and the Accounts' profile.

10.1.3 The decision to perform a review of your business relating to the Accounts.

10.1.4 The investigation performed regarding the review of your business.

10.1.5 The decision to close the Accounts.

10.1.6 The confirmation by Mr Stuart-Reckling in his email dated 3 May 2013 in which he confirmed that ABSA cannot serve its client optimally.

10.1.7 The confirmation by Ms Marsha Davids during a telephonic discussion that a "Political Exposure Review" was performed on Mr Hlongwane and his related entities, which discussion was confirmed in an email of 20 May 2013.

10.2 All criteria and factors considered by ABSA to close the Accounts and to give formal notice thereof.

10.3 All the submissions by ABSA to the Ombudsman for Banking Services relating to the Accounts and all the correspondence between ABSA and the Ombudsman for Banking Services regarding this matter".

[14] In the above request, the applicants averred that the closure of the accounts was unreasonable and unfair and that it was a violation of their constitutional rights. Furthermore, the applicants indicated that they needed the information so that they could properly consider and evaluate the affected rights and obtain legal advice thereon, before potentially instituting legal action.

[15] The first respondent provided the applicants with the documents requested in sub-paragraphs 10.1.5; 10.1.6, 10.1.7 and 10.2 above. With regard to the rest of the information requested, the first respondent informed the applicants that the information was either 'confidential, alternatively legally privileged, further alternatively, that it is not required or related to the alleged rights that your client seeks to establish'.

[16] The reasons given by the respondents to the applicants necessitating the closing of their accounts are, inter alia, the following:

16.1 that the first respondent is bound, in terms of legislation in prevention of money laundering to put in place policies in order to manage its money laundering risk and to put in place measures, in terms of the Financial

Intelligence Centre Act[8] ("FICA") to facilitate the detection and investigation of money laundering;

16.2 that the policies it has formulated and are implementing take into account the risk level of their customers to money laundering;

16.3 that in terms of their high profile clients its due diligence obligations are more onerous in order to comply with the requirements of FICA;

16.4 that the first applicant was identified as a Politically Exposed Person ("PEP");

16.5 that in 2012 the Arms Procurement Commission ("the Commission") had requested information about some of the applicants;

16.6 that in the light of revelations that the first applicant was implicated in the arms procurement contracts, the first applicant became a high risk client and exposed it to some risks relating to money laundering which was not commensurate to the benefit it received in having the first applicant as a client;

16.7 that they were prohibited from disclosing to the applicants that they were being investigated by the Commission; and

16.8 that the first respondent was entitled, in terms of the contract and each of the applicants to close their banking facilities on notice.

Submissions on behalf of applicants

[17] The following submissions were made on behalf of the applicants. That the applicants needed the requested information for the purpose of receiving informed advice from their legal representatives as to whether to proceed and

[8] Act 38 of 2001.

to institute action against the first respondent which potentially could include, a declaratory order that first respondent's decision to close the accounts constitutes unlawful and unconstitutional conduct, alternatively, breach of contract and compel the first respondent to reopen the accounts; payment of damages consequent upon the infringement of the right to dignity.

[18] Although it was submitted on behalf of the respondents that since the applicants were seeking final relief, in the light of the court being faced with two opposing versions, the principles as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9] should apply. However, I am of the view, as correctly pointed out by Counsel for the applicants, that all that was required of the applicants in order to succeed was for them to present facts which prima facie, though open to some doubt, established that they have the right, to which access to the record is required, to exercise or protect[10]. Further it was submitted on behalf of the applicants that the merits or demerits of the applicants' case was irrelevant to their entitlement to the information requested.

[19] It was contended on behalf of the applicants that the respondents bore the onus of proving on a balance of probabilities, why the information should not be made available to applicants. Counsel for the applicants argued that it was for the respondents to convince the court that, inasmuch as the information requested was in the possession of the first respondent and despite the fact that the information might be necessary for the exercise or protection of a right, the

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[9] 1984 (3) SA 623 (A) at 643E-635C.
[10] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA0 at [8].

information should not be made available the applicants as there are other considerations militating against such information being made available to the applicants.

[20] It was further submitted on behalf of the applicants that the documents sought from the first respondent were of critical importance in determining whether the first respondent had good cause and acted in good faith when it made the decision to close the accounts. It was argued that once the information was made available the court would be in a position to determine whether a valid commercial reason exists for first respondent to terminate its relationship with the applicants.

[21] In the alternative, it was argued if the curt was not inclined to allow the applicants to have the requested information, the court have what is termed a judicial peak into the required documents.

Submissions on behalf of the respondents

[22] Counsel for the respondents raised two preliminary points. Firstly, it was submitted that the applicants, contrary to normal motion procedure had in argument raised the issue of confidentiality when it was never raised either in the founding affidavit or their replying affidavit. Furthermore that the applicants' argument was based on annexures to the founding affidavit which were never canvassed in the affidavit[11]. Secondly counsel raised the issue of onus which I have already dealt with.

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[11] In *NDPP v Zuma* 2009 (2) SA 207 at [47] the court stated that: "...It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers

[23] On the merits counsel for the respondents submitted that what the applicants are seeking is to be granted unfettered and unrestricted access to all the documents the first respondent had in its possession as set out in its request, without setting out what it is actually looking for and the reasons why it required access to those documents. It was argued on behalf of the respondents that the onus was on the applicants to show the need for the documents. It was submitted that the applicants could not be allowed to embark on a speculative jaunt of its own. The applicants had to show that whatever document they required was reasonably required to enable the applicants to exercise their rights. It was submitted that the applicant wanted to convey to this court that the first respondent's real reason for closing the accounts was that it reasonably believed that the first applicant was a politically exposed person because it understands that there is a connection between the applicants the arms deal commission and therefore the reason for closing the accounts was not made bona fide.

[24] Counsel argued that contrary to the applicant's counsel submission, the *Bredenkamp and Others v Standard Bank of South Africa Ltd*[12] was not authority for the proposition that bona fides was a requirement for a decision to close a client's account. Counsel further argued that since the applicants were well aware of the relief they are seeking, they have not set out in their papers

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when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. The position is no different from the case where a witness in a trail is not called upon to deal with a fact and the court then draws an adverse conclusion against that witness".

[12] 2010 (4) SA 468 (SCA).

why the information given to them and that given to the Ombud which is in their possession was not sufficient and how it would assist them in exercising and protecting their rights. That the applicants have only laid out a legal conclusion and not facts as to why they are in need of the documents sought.

[25] Furthermore, as regards to information the first respondent received from the Commission it was argued that that information could not be released without the permission of the Commission, particularly as it had not been joined. It is the contention of the respondents that the accounts were closed because when the Commission started and the first applicant's name was bandied in the media, this raised the first applicant's profile. In terms of the respondents' obligations in terms of FICA, the first respondent is required, in respect of people who are classified as 'Politically Exposed People' ("PEP") to put in place certain measures as it is taken that such persons are vulnerable to money laundering schemes. In view of the additional resources the first respondent would have to expend on monitoring the first applicant and his associated entities versus the benefit that would accrue to the first respondent through the applicants, a business decision was made that it would be prudent to terminate the relationship it had with the applicants.

[26] It was finally submitted that the application should be dismissed as the applicants have failed to show why the documents sought are reasonably required.

[27] It is common cause that the applicant complied with the procedural requirements for a request to access information under the Act.

[28] The first issue to be determined is whether the information needed by the applicants is for the exercise or protection of their rights. According to the applicants, they need the information in order for their legal representatives to determine whether any of their rights were affected and also consider instituting legal action if necessary. Nowhere in the founding affidavit or the replying affidavit do the applicants allude to which rights they seek to exercise or protect. It could not be expected of the first respondent to provide the applicants with information in a situation where the applicants have failed to explain which rights they wished to protect or exercise and the relevancy of the information required for that purpose.

[29] In terms of the contractual relationship between the first respondent and the applicants, the first respondent was entitled to terminate the relationship on proper notice. The first respondent had given the applicants ample notice of their intention to close their accounts.

[30] Furthermore, it is apparent that the first respondent made the decision to close the applicants' account after it became apparent that the first applicant had become a PEP, there was not only a commercial but also a reputational risk to the first respondent in keeping the first applicant and his related entities as clients. The first respondent had no obligation to retain a client whose monitoring in terms of money laundering measures put in place would be more onerous when compared with the benefit, in terms of fees, it would receive from the applicants. I am of the view that the first respondent's bona fides in deciding

to close the applicants' accounts cannot be questioned[13]. In the Bredenkamp matter (supra) where the court was faced with facts similar to the facts in this case, the court held that:

> "[65] The appellants' response was that, objectively speaking, the Bank's fears about its reputation and business risks were unjustified. I do not believe it is for a court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved".

[31] Even though the first applicant's connection to the Commission might have been a factor in the first respondent's decision to close the accounts of the applicants, I am satisfied that the overriding reason for the decision was business related and concerns about the risks involved.

[32] Further, I am of the view that giving the applicants the information they seek, the first respondent would have been in contravention of the prohibition against disclosure of what the Commission was investigating. Furthermore, this would have led to the exposure of the first respondent's processes which are in place with regard to investigating and monitoring money laundering activities of their clients and could have exposed confidential information relating to investigations it had undertaken in this regard. I am therefore satisfied that the decision by the first respondent to refuse to give the applicants access to the information they required was rational and lawful. Furthermore, in view of the fact that the applicants had not formulated the rights they wished to exercise or

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[13] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 at 832H-I.

protect it is not clear how accessing the information they seek would have gained them substantial advantage in any potential litigation.

[33] The fact that the applicants have not categorically shown what rights they wished to exercise or protect is indicative of the fact that the applicants might have been on a fishing expedition to find out circuitously what information the Commission had on them. Nothing stopped the applicants from going directly to the Commission to seek for the information they required.

[34] With regard to the applicants' alternative prayer that this court should have a look at the information required and then decide whether it should be made available to the applicants, in view of the fact that the applicants already knew that they were being investigated by the Commission, it is not necessary for this court to determine whether the information held by the first respondent should be made available to them or not.

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

'The application is dismissed with costs.'

NP MNGQIBISA-THUSI
Judge of the High Court

Appearances:

For the Applicants: Adv JP Vorster SC
Instructed by: Stockenstrom Fouche

For the Second Respondent: Adv BE Leech SC

Instructed by: Webber Wentzel