

REPUBLIC OF SOUTH AFRICA



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

Case No.: 37790/2017

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

13/03/2019

*[Signature]*

In the matter between:

BOB FANIE NGUBENI

Applicant

and

MOBILE TELEPHONE NETWORKS (PTY) LTD

Respondent

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JUDGMENT

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[1] The applicant seeks relief in terms of s 78(2)(d)(i)<sup>1</sup> read with s 82<sup>2</sup> of the Promotion of Access to Information Act<sup>3</sup> ("the Act"), for information held by the respondent pertaining to the following documents:

- 1.1 Service level agreement between MTN and Optical Mediaworx (Pty) Ltd;
- 1.2 Site register for Hallelujah Street, Nellmapius for 6 October 2016;
- 1.3 Occurrence register for Hallelujah Street, Nellmapius for 6 October 2016;
- 1.4 Incident report for incident on 6 October 2016;
- 1.5 Municipal authority to conduct ground works; and
- 1.6 ICASA certificate to conduct ground works for fibre cables.

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<sup>1</sup> Section 78(2)(d)(i) of the Act 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.

<sup>2</sup> 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".

<sup>3</sup> Act 2 of 2000.

[2] Section 32(1)(a) and (b) of the Constitution provide that everyone has the right of access to any information held by the State as well as by another person that is required for the exercise or protection of any rights. The right of access to information as enshrined in s 32 of the Constitution was brought into effect by s 50(1) of the Act which reads as follows:

"(1) A requester must be given access to any record of a private body if-

- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4<sup>4</sup> of this Act".

[3] It is not in dispute that the respondent is a private body.

[4] On 6 October 2016, the applicant, Mr Bob Fanie Ngobeni, allegedly fell into a construction hole on or around Halleluja Street, Nellmapius, Mamelodi. The hole was not cordoned off. As a result of the fall, the applicant allegedly sustained injuries and received medical treatment after being admitted to hospital.

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<sup>4</sup> Sections 62-70 of the Act.

[5] In his founding affidavit deposed by Mr Swan, the applicant's attorney, on 22 November 2016 the applicant he approached N S Swan Attorneys to represent him in an action he intended instituting for a claim for damages suffered as a result of the injuries he sustained. After the applicant's attorneys discovered that the manhole was linked to the respondent, Mobile Telephone Networks (Pty) Ltd, which was at the time conducting ground work for the installation of fibre-optic connection cables in the area, on 13 December 2016 the attorneys sent a letter by fax (fax number (011) 912 3131) to the respondent. Attached to the letter was Form C of the Act in which the documents sought were requested from the respondent.

[6] According to the applicant the respondent did not, however, respond to the letter, leading to the applicant launching these proceedings. It is the applicant's contention that by failing to respond to his request within 30 days of the letter being faxed, the respondent is, in terms of s 58 of the Act, deemed to have refused the request. There is nothing to controvert the applicant's linking of the respondent with the manhole complained of. In its answering affidavit in response to the allegation on the link, the respondent proffers a bare denial without substantiating its denial.

[7] Section 58 provides that:



"If the head of a private body fails to give the decision on a request for access to the requester concerned within the period contemplated in section 56(1)<sup>5</sup>, the head of the private body is, for the purposes of this Act, regarded as having refused the request".

- [8] The respondent opposes the granting of the application on the ground that the applicant failed to comply with the provisions of the Act, in particular, s 53(1) read with s 51(1); s 53(2)(f); and s 54 of the Act.
- [9] In its answering affidavit the respondent denies receiving the request sent to it as alleged by the applicant. The respondent avers that if indeed the applicant did fax the request, he failed to use the fax number of its information officer as reflected in its manual which is on its website.
- [10] In terms of s 53(1) a request to a document(s) of a private body must be made in the prescribed form and sent to the private body's address, fax or electronic address. s 51(1) of the Act provides that:

"(1) Within six months after the commencement of this section or the coming into existence of the private body concerned, the head of the private body must compile a manual containing-

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<sup>5</sup> Section 56(1) reads in part as follows: "Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the head of the private body to whom the request is made must, as soon as reasonably possible, but in any event within 30 days, after the request has been received or after the particulars required in terms of section 53(2) have been received- (a) decide in accordance with this Act whether to grant the request; and (b) notify the requester of the decision ...".

- (a) The postal and street address, phone and fax number and, if available, electronic mail address of the head of a private body;
- (b) a description of the guide referred to in section 10, if available, and how to obtain access to it;
- ...
- (e) sufficient detail to facilitate a request for access to a record of the body, description of the subjects on which the body holds records and the categories of records held on each subject..."

[11] It is the respondent's contention that it has complied with the provisions of s 51(1) in that it has published the required manual on its website and that if the applicant had searched for it would have discovered the correct fax number of its information officer to whom the request should have been addressed. It was submitted on behalf of the respondent that since the fax number used by the applicant is its general number it did not receive the letter of request and that the faxed request letter could have landed anywhere within its premises.

[12] Without conceding that it received the letter of request, it is the respondent's contention that the applicant did not comply with the provisions of s 53(2)(f)<sup>6</sup> of the Act in that in its application form requesting access to the documents it requires, the author of the form failed to indicate in what capacity he was requesting the information.

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<sup>6</sup> Section 53(2)(f) of the Act provides that: "The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned- (f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head".

- [13] Further, it is the respondent's contention that the applicant failed to pay the required fee as prescribed by s 54 of the Act when it applied for access to the documents requested.
- [14] Although the applicant used an incorrect fax number in its letter of request, it is apparent that the letter did reach the respondent's offices. It cannot therefore be said that the applicant had not complied with the provisions of the Act.
- [15] The contention by the respondent that the applicant's letter of request is not in compliance with the provisions of s 53(2)(f) is misplaced. Accompanying the Form C of the Act was a letter on Swan Attorneys' letterhead. Furthermore the covering letter clearly states that *'(w)e confirm that we are acting on behalf of Mr Ngobeni...'* I am of the view that even though the attorneys in completing the requesting form did not indicate in what capacity they acted, this non-compliance is not so material that it cannot be condoned. Furthermore, the respondent's allegation that the applicant is non-compliant in that he had not paid the prescribed fee has no merit. S 54(1) of the Act provides that:

"The head of a private boarding to who a request for access is made must by notice require the requester, other than a personal requester, to pay the prescribed requested fee (if any), before further processing the request".



[16] It could not have been expected of the applicant's attorneys to determine what the prescribed fee was in light of the fact that no response was received to its request. Furthermore, in line with the provisions of s 77 of the Act, the information is requested before the institution of any civil claim.

[17] The only remaining to be decided is whether the applicant has made up a case to be granted access to the documents it is requesting access to. In *Claase v Information Officer of South African Airways (Pty) Ltd*<sup>8</sup> court held that, in an application instituted by a requester aggrieved by a private body's refusal of a request, "the applicant need only put up facts which *prima facie*, though open to some doubt, establish that he has a right [for] which access to the record is required to exercise or protect.

[18] The threshold that the information must be 'required for' in s 50(1)(a), the court in *Company Secretary of Arcelormittal of South Africa and Another v Vaal Environmental Justice Alliance*<sup>9</sup> stated that:

"[50] Thus, the word 'require' in s 50(1)(a) of the Act should be construed as 'reasonably required' in the prevailing circumstances (see *Clutchco* para12). A scrutinising court should determine whether an applicant for information did 'lay a proper foundation for why that document is

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<sup>7</sup> Section 7(1) (a) of the Act provides that: "This Act does not apply to a record of a public body or a private body if – (a) that record is requested for the purpose of criminal or civil proceedings".

<sup>8</sup> 2007 (5) SA 469 (SCA) at para [8].

<sup>9</sup> 2015 (1) SA 515 (SCA).



reasonably "required" for the exercise or protection of his or her rights"

<sup>10</sup>.

[19] However, the right of access to information is not absolute. S 63(1) of the Act provides that:

"Subject to subsection (2), the head of private body must refuse the request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual".

[20] Further, in terms of s 65 and s 66(a) of the Act a private body must under certain circumstances refuse access to information in its possession. Section 65 of the Act provides that a private body must refuse access to its information if disclosure of such information would be in breach of a confidentiality agreement between the private body and a third party. On the other hand s 66(a) provides that:

"The head of a private body –

- (a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual".

[21] In *Cape Metropolitan Council v Metro Inspection Services*<sup>11</sup> the court held that:

<sup>10</sup> See also *Unitas Hospital v Van Wyk & Another* 2006 (4) SA 436 (SCA) at para [18].

<sup>11</sup> 2001 (3) SA 1013 (SCA).

"[28] Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information ... the applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."

[22] It is the applicant's contention that it seeks access to the information requested in order to institute a delictual claim against the respondent for the loss suffered as a result of the injuries he sustained.

[23] In terms of s 81(3) of the Act the onus to show that the refusal is justified rests on the body that has refused the request. However, in its opposition to the application the respondent has not raised any substantive grounds for opposing the application.

[24] Taking into account the objects of the act, in particular, s 9(c)<sup>12</sup>, I am satisfied that the applicant has shown sufficient cause that the information requested is for the protection of a right, namely, a delictual claim. I am of the view that the applicant has satisfied the requirements for access to the information requested.


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<sup>12</sup> Section 9(e) reads as follows: "The objects of this Act are- 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".

[25] With regard to the issue of costs, I am not convinced that a punitive order against the respondent is warranted.

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

1. The respondent's information officer to deliver a notice of the required fees to Swan Attorneys within 10 days of this order.
2. The respondent is ordered, within 10 days of this order, to furnish the applicant's attorneys with the following documents:
  - 2.1 Service level agreement between MTN and Optical Mediaworx (Pty) Ltd;
  - 2.2 Site register for Hallelujah Street, Nellmapius for 6 October 2016;
  - 2.3 Occurrence register for Hallelujah Street, Nellmapius for 6 October 2016;
  - 2.4 Incident report for incident on 6 October 2016;
  - 2.5 Municipal authority to conduct ground works; and
  - 2.6 ICASA certificate to conduct ground works for fibre cables.
3. The respondent to pay the costs of this application.

  
NP MNGQIBISA-THUSI  
Judge of the High Court

For Applicant Adv I S Ferreira (instructed by N S Swan Attorneys)

For Respondent Adv N Manaka (instructed by Ledwaba Mazwai Attorneys)