IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: A12/2020

Court a quo No: 37790/2017

Delete whichever is not applicable

(1) Reportable: No.
(2) Of interest to other Judges: No
(3) Revised.

26 January 2022
Date **Signature**

In the matter between:

Mobile Telephone Networks (PTY) Ltd Appellant

AND

Bob Fanie Ngubeni Respondent

The judgment is uploaded on the case line by the Judge's secretary. It has also been submitted electronically to the parties' legal representatives by email. The date of this judgment is deemed to be 26 January 2022.

JUDGMENT

Munzhelele, J (van der Westhuizen, J and Noko, AJ concurring)

Introduction

[1] This is an appeal brought by Mobile Telephone Network (PTY) LTD '(MTN)' against the whole judgment of the North Gauteng High Court (MNGQIBISA–THUSI J), which was granted in favour of the respondent, Mr Ngobeni. The Court *a quo* found that the respondent has made out a case under section 50(1) of the Promotion of Access to Information Act 2 of 2000 (PAIA). The appellant was ordered to furnish the respondent with all the documents mentioned on annexure BN01 within ten (10) days. The appellants were also ordered to pay costs. The appeal of this judgment is with the leave of the court *a quo*.

[2] MTN' is a private company that is in the business of a mobile network operator and service provider. It provides mobile telephony, data, and related services and facilities to South African customers.

Background facts

[3] On 6 October 2016, the respondent fell into a construction hole at Halleluya Street, Nellmapius, Mamelodi. The hole was not properly cordoned off. The respondent sustained injuries as a result of this incident. He was then hospitalized to receive medical attention. He was discharged from the hospital, on 22 November 2016 respondent and thereafter approached N.S Swan Attorneys for assistance to claim compensation for the injuries suffered. The attorneys, through his investigations, found that the appellant was responsible for the groundwork installing fibre- optic internet connections for the area. On 13 December 2016, the respondent launched a formal request for access to information held by MTN. The respondent completed a form C with annexure BN01. The annexure contains the following documents which were requested: service level agreement between MTN and Optical Mediaworx (PTY) Ltd, site register for Hallelujah Street, Nellmapius for the 6th of October 2016, Occurrence register for the 6 October 2016, incident report book for the 6 October 2016, incident report for the incident of the 6 October 2016, municipal authority to conduct groundworks and lastly the ICASA certificate to conduct groundworks for fiber cables. When completing form C, the

respondent indicated that the right to be exercised or protected is that he wants to institute and investigate a possible claim for damages as a direct result of the incident that occurred on 6 October 2016. The reason why the respondent required access to the specified record was indicated as the same reason given on the first question of the right protected or to be exercised.

[4] When the respondent's attorneys did not receive any answer to their request within 30 days from the MTN, they applied to the Court against such refusal of their request. They wanted the MTN to be compelled by the Court to allow the respondent to access the information requested. The appellant opposed the application because the request was faxed to a wrong fax number and that the respondent failed to direct the request to the information officer at MTN. Thirdly, the appellant contended that the respondent did not show sufficient cause why he required such records. The Court *a quo* on paragraph 14 of the judgment, found that although the respondent used an incorrect fax number in its request, it is apparent that the letter did reach the MTN's offices. It cannot be said that the respondent had not complied with the provisions of the Act. The Court a quo said on para 24, that considering the object of the PAIA section 9, the respondent has shown sufficient cause that the information requested is for the protection of a right, namely delictual claim and as such the respondent has satisfied requirements for access to the information requested.

Arguments by the appellant

[5] The appellant argued during the appeal hearing that the jurisdictional requirement was not met. They further argued that sending the fax to the wrong fax number resulted in the MTN information officer not receiving the request and could not be able to answer. They contend that the Court *a quo* having found that the fax number was incorrect, the Court should have found that such requirement was not met and then dismissed the application. They also argue that the respondent did not mention that such a request reached the information officer's office in their founding affidavit. They further contend that there was no duty on the officer who might find the faxed form C to take it anywhere.

They argue that the respondent had an obligation to find whether the request reached the intended place. The respondent did not mention on the founding affidavit that he made a follow up to ascertain whether the request reached the MTN information officer.

[6] The appellant further contends that the respondent must demonstrate what right should be protected, what information is required, and how that information will assist in protecting the right. The respondent's founding affidavit and form C do not explain how the information will assist in protecting the right. The respondent wanted to institute a delictual claim, and it was established that the appellant was the one digging holes, and the question would be why the respondent would want such requested information when he already knows the company's identity, that is responsible. The appellant argues that the respondent failed to lay the factual foundation base to the usefulness of the information requested in protecting his rights.

[7] The respondent did not oppose the appeal.

The Law

[8] The Constitution of South Africa guarantees the right of access to all information held by the private bodies in terms of section 32 of the Constitution, which reads thus:
"Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

[9] The parliament brought into existence the promulgation of the Promotion of Access to Information Act 2 of 2000 (PAIA) to give effect to section 32 of the Constitution. The applicable provisions of the PAIA that regulate the requests for information from private companies are sections 50 and section 53. Section 50(1) of PAIA sets out the obligation to provide access to information, subject to specific jurisdictional requirements, and it 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 of this Part.'

Section 53 of PAIA provides as follows:

'(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.

(2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned –

(d)….. to identify the right the requester is seeking to exercise or protect and provide an explanation why the requested record is required for the exercise or protection of that right;.'

[10] In terms of the above sections, the respondent is entitled to information from MTN to exercise or protect any of his rights. Including the right to sue for delictual damages. See *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 844A-846G where Cameron J held that:

'Rights in s 23 of the interim Constitution included all rights and not only fundamental rights as set out in chap 3 of the interim Constitution.' Section 23, which Cameron J referred to, is similar to section 32 of the Constitution of South Africa.'

Discussion

[11] It is a trite principle that a Court of appeal is not entitled to set aside the decision of a court a quo taken in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter, would have come to a different conclusion; it may interfere only when it appears that the Court *a quo* had not exercised its discretion judicially, or that it had been influenced by wrong principles or misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. See *National*

Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14 A-E (par 11).

[12] However, the case at hand, its decision is not taken in the exercise of true discretion and that the Court of Appeal is entitled to decide the appeal based on its own view of the merits of the case. I do not think the power to determine the rights sought to be protected or whether the respondent had complied with the procedural requirements in the PAIA Act relating to a request for access to that record is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. Regarding this appeal, the Court of appeal can come to a different conclusion from that reached by the Court *a quo* on the merits of the matter.

[13] As a starting point, the appellant argued that the respondent did not meet jurisdictional requirements. They were referring to the fact that the respondent did not send the request to the MTN information officer as required. They contend that the fax number 011 912 3131 reflected on the letter dated 13 December 2016 and form C is incorrect. The correct fax number is 011 912 3168. According to the appellant's PAIA manual published on the website, form C should be forwarded to the information officer Rakesh Ishwardeen. The Court *a quo* agreed with the appellant's argument that the fax number used was incorrect. But, surprisingly, it went further to make a finding that even though the fax was incorrect, the request by the respondent reached the office of MTN. The question is whether such a finding is correct in law and in principle.

[14] We find that there is no proper compliance with the procedural requirement for notification in terms of section 53 as the letter, and Form C were sent to an incorrect fax number. Section 51 provides that the head of a private body must compile a manual containing the postal and the street address, phone numbers and fax numbers and, if available, the electronic email address of the head of the body. This information should be made available or accessible to the public so that they can use it. MTN had the said manual compiled, and the fax number was reflected on it. There was no need for the

respondent to use an incorrect fax number when the correct one was provided. If the public can use any other fax number, this will make section 51 of the PAIA superfluous.

[15] The respondent's request had to reach the office of the information officer as the person dealing with such on the MTN manual. When a fax number has been mentioned or provided by the head of the private body as being the fax number at which the requested information will be obtained the respondent had a duty to ensure that the fax number to which his section 50 read with 53 of the PAIA 's request is sent to a provided fax number. If the request was delivered to the provided fax, then the Court should be satisfied that that request will be received.

[16] Another issue is that no attempt had been made in the founding papers by the respondent to inform the Court if the request was received by the information officer at MTN, seeing that a wrong fax number was used. The respondent had to make allegations on his founding affidavit that would satisfy the Court from which the notice to compel was sought that the letter and the form C had reached the MTN on a balance of probabilities and prove that the correct office received the request. In *Ferreira v Premier, Free State and 0thers* 2000 1 SA 241 (OFS) at 254BC VAN COLLER, J said: 'It is the practice of our courts that an applicant must, generally speaking, make out a case in his founding affidavit...' The respondent failed to adhere to this practice mentioned in the above case. It is further trite that an applicant must stand or fall by his/her founding affidavit. See *Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others* [2017] ZASCA 43; [2017] 2 All SA 740 (SCA) at para 21.

[17] The Court *a quo* made a conclusion to accept that there was adequate proof regarding the delivery of the request without being supported by evidence to that effect. We find that a mere dispatch of the request to the wrong fax number is not sufficient to conclude that such request reached the information officer. On this issue alone, we agree with the appellant that the Court *a quo* misdirected itself and that in the absence of

satisfactory information, the Court *a quo* should have dismissed the application to compel compliance with section 50 of the PAIA by the respondent.

[18] The second issue is whether the Court *a quo* found correctly that the respondent was entitled to access the information he requested from MTN. The appellant contends that the respondent failed to meet the test imposed by s 32 of the Constitution read with section 50 and 53 of the PAIA, in that he did not demonstrate how the information in those documents was required for the exercise or protection of any of his rights. The appellant also submits that the Court *a quo* erred in finding that the respondent proved the requirements of section 50 and 53 of the PAIA. The appellant contended further that it was firstly, necessary for the respondent to mention the right he wishes to exercise or protect, and secondly, what the information is, which is required, and thirdly, how that information would assist him in exercising or protecting that right.

[19] The respondent in his founding affidavit and the form C never mentioned why or how the information he requires, as mentioned on the annexure 'BN01', will assist him in protecting the said right. Information can only be required to exercise or protect a right if it will assist in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 53 of the PAIA, an 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. The respondent failed to indicate on his founding affidavit these requirements. In *Unitas Hospital v Van Wyk & another* 2006 ZASCA 34 2006 4 SA 436 (SCA), Brand JA said:
'Generally speaking, the question whether a particular record is "required" for the exercise or protection of a particular right is inextricably bound up with the facts of that matter.' In this matter, the respondent did not make any effort to substantiate the request made on form C, and no sound reason has been given for such requested documents. Streicher JA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) para 28 said that:

'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise of protection of the right. It follows that, in order to make out a case for access to

information . . . an 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.'

[20] The Court *a quo* found that the respondent has shown sufficient cause that the information requested is to protect a right, namely delictual claim. And that such decision was influenced by taking into consideration the objectives of the PAIA section. The Court *a quo* ignored the fact that the respondent should have provided reasons for how such requested information would assist in exercising or protecting that right. Form C was completed, but the respondent only indicated the right he wanted to protect or exercise. As mentioned earlier, he did not explain why or how the requested records are required for the exercise or protection of the right. The respondent's answer in trying to explain why the required information will assist in protecting his right he just wrote the following words 'kindly see 1 supra'. On the paragraph that he was referring to it was just written the following words 'institute and investigation of a possible claim for damages due to the incident on 6 October 2016'. These answers are not sufficient or proper to the question of how. He failed to tell the Court how each of those records would assist him.

[21] The appellant submits that the respondent has not made out a case under s 50(1) for the records. We agree with the argument by the appellant that the respondent failed to give reasons how the records will assist him. The appellant says that the right asserted to seek compensation in delict for personal injury is not in dispute, but there are no stated reasons on how the records could 'assist in protecting such right. The appellant submits that the request does not match the right asserted. Even during the hearing of the matter when the respondent was asked how Optical Mediaworx (PTY) LTD service level agreement will assist his delictual claim. The respondent was unable to answer the questions of the Court. He also failed to mention the same on his founding affidavit and the form C.

[22] The respondent had the onus to prove that he met the requirements of s 50(1)(a) and 53. In this regard, the respondent needed only to put up facts that prima facie

establish that he has a right to access the record to exercise or protect his right to sue MTN. And further proof of how those records requested will assist in exercising and protecting such right' See *Claase v Information Officer South African Airways Pty Ltd* 2007 (5) SA 469 (SCA). The respondent failed to prove how such records will assist him in exercising the right to claim a delictual claim. He already had the information through his investigations that enabled him to sue the MTN. The respondent should know that section 32 of the Constitution and section 50 of the PAIA are not there for just taking; procedural requirements need to be complied with before the right is exercised. The information requested could be available for him through discovery as well. Even on this point alone, the respondent cannot succeed on his application.

[23] The leading case on s 50 of the PAIA is *Unitas Hospital v Van Wyk & another* 2006 4 SA 436 (SCA). In that matter, the respondent's husband died while he was a hospital patient. She contended that the nursing staff's negligence brought about his death and that she had an action for damages suffered through his death. She applied under the PAIA for access to a report to institute that action. The Court held that:

'the report was general and not one relating specifically to treatment received by her husband. It was held that 'it can be accepted with confidence that Mrs Van Wyk did not require the Naudé report to formulate her claim to institute an action.' She did not require it for the exercise or protection of any right. Mrs van Wyk did not specifically state that she required the Naudé report to exercise any right in her founding papers. Without access to the report, she said that her right to claim damages from Unitas would be affected ('aangetas word'). She did not elaborate on what benefit she thought she could derive from the report's contents. Her application was denied.'

[24] PAIA provides a valuable tool where the pre-trial discovery of a particular document or documents is required for the exercise or protection of any rights, but the tool must be used carefully with due regard to the facts of each case and the rights of both sides. Resort to it should be the exception rather than the rule. In that way, the rights of the defendant, who by definition is a private body entitled to reasonable protection of privacy and commercial confidentiality, who before the enactment of PAIA might not have been able to exercise or protect rights properly or adequately, will both be secured. See *Unitas Hospital v Van Wyk & another* 2006 4 SA 436 (SCA).

For the above reasons, therefore, the appeal should succeed.

Order

[25] The following order is made:

1. The appeal is upheld with costs including costs of the counsel.

2. The order of the Court *a quo* is set aside and substituted by the following order: 'the application is dismissed with costs, including the costs of the counsel.'

M. Munzhelele

Judge of the High Court Pretoria

Heard on: 20 October 2021

Delivered on: 26 January 2022

Appearance:

For the Appellant: Adv T.K Manyage

Instructed by: Ledwaba Mazwai attorneys