

REPUBLIC OF SOUTH AFRICA

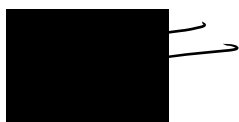


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2022/12875

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: YES

DATE: 31 July 2023



In the matter between:

HENDRINA MARIA MAGDALENA LEUVENNINK

Applicant

and

THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY

1st Respondent

N NARAINDATH

2nd Respondent

THE MINISTER OF TRANSPORT

3rd Respondent

XCALIBUR RESOURCES (PTY) LTD

4th Respondent

JUDGMENT

K STRYDOM, AJ

Introduction:

- 1) As with Romulus and Remus, the acronyms "PAIA" and "PAJA" sound confusingly similar. However, despite being borne of the same mother, they are individuals in their own right. Confuse or conflate the two and you will get the tail-end of the story, an incorrect interpretation of the law or an oddly named city in Italy.

- 2) In an opposed application for access to records in terms of the Promotion of Access to Information Act 2 of 2000 (“PAIA”), both the Applicant (to a lesser) and the Respondent (to a greater extent) laboured under the incorrect impression that they were in Court for a review application. This fundamental error had an exponential ripple effect that greatly complicated and conflated the issues.
- 3) Typing applications in terms of PAIA as “applications for review”, is a dangerous misnomer, which, from the outset places such applications in the wrong context. As will become evident in this judgment, context is everything.
- 4) Whilst the Court naturally has to review (in the normal grammatical sense) the refusal of the information officer, it does not do so as a Court of review (in the legal sense).
- 5) As explained by Ngcobo CJ in *President v M&G* (2011 CC), in proceedings under PAIA, a Court does not conduct a review of the refusal of access to information but ‘decides the claim of exemption from disclosure afresh, engaging in a de novo reconsideration of the merits’.¹ This was a reiteration of the view of the Supreme Court of Appeal, in the same matter, the previous year:
*[12] The proceedings that are contemplated by s 78(2) are not a review of or an appeal from the decision of the information officer or the internal appeal. They are original proceedings for the enforcement of the right that the requester has....*²

Background

- 6) On the 4th of February 2021, the Applicant’s husband was involved in a fatal accident while piloting an airplane belonging to the fourth Respondent. The first Respondent investigated the accident and published a final report. The Applicant thereafter appointed two experts who agree that the first Respondent’s report lacked certain relevant information necessary to establish the cause of the accident. For purposes of this application, it is only necessary to note that all investigations done thus far, differ on the exact cause of the accident. One of the Applicant’s experts has advised that he requires the following records from the first Respondent, to enable him to provide a final report:

¹ *President v M&G* (2011) CC at para 13-14

² *The President of RSA v M & G Media* (570/10) [2010] ZASCA 177 (14 DECEMBER 2010)

- a) All correspondence recorded between the pilot of ZS-XAT and the pilot of ZS-XAS from take off until the time of the crash including recordings from ground control, tower control and air control;
 - b) ATNS Radar Plot/s relating to ZS-XAT and ZS-XAS from the day of the accident;
 - c) Detailed weather reports relating to the day of the accident;
 - d) Transcripts of the communication/s between ZS-XAT and ZSXAS and between both aircraft and the respective control towers L/ATNS;
 - e) Witness Statements relating to and considered towards determining the final conclusion/s of AIID Investigation;
 - f) Accident Site and other photographs used for the AIID Investigation;
 - g) Detailed accident site plots showing the locations of each part;
 - h) Engine OEM teardown report Vector P&W;
 - i) Post-accident control surfaces Service Ability Inspection Report; and
 - j) Human Factors Analysis Report
- 7) There is no dispute that that the Applicant properly applied for access to these records in terms of PAIA and that access was refused by the second Respondent, the deputy information officer of the first Respondent. (The third and fourth Respondent's having been added as interested parties only, the reference to "Respondent" forthwith is a reference to the first Respondent or the second Respondent, as the case may be, in context of such a reference.)
- 8) In its refusal letter, the Respondent relies on regulation 12.04.6 of part 12 of the South African Civil Aviation Regulations of 2011 ("SACARS"), which States that certain records *"...shall not be made available for purposes other than accident or incident investigation, unless a Court of law determines that the disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or future investigation, taking into account all applicable law..."* ("the weighing test")
- 9) The refusal letter goes further to inform the Applicant *"... that in terms of section 25(3)(c) [of PAIA] you have the right to lodge an application with a Court to **review** this decision within a period of 30 days."*
- 10) The reference to "review" in the refusal letter is of the Respondent's creation, as section 25(3)(c) of PAIA makes reference to an "application" to Court. In fact, PAIA makes reference to "review" only once and then only regarding parliament's obligation to review Section 87, which deals with transitional provisions. Even then, the reference to review is in the normal grammatical sense and not the legal sense.

Prayers in terms of the notice of motion

- 11) Having been so advised by the Respondent, the Applicant duly brought this application requesting that the refusal be “**reviewed and set aside**” “... *in terms of the provisions of section 25(3)(c)*...” of PAIA.
- 12) The Court is also requested to order that the first and second Respondents provide the records within 15 days.
- 13) An alternative prayer, for an order that the records be made available in terms of the provisions of regulation 12.04.6 of part 12 of SACARS, is also included (“the alternative prayer”).

Preliminary challenge by Respondent: Incompetency of an application to PAIA

- 14) The Respondent, in its answering affidavit (dated 16 September 2022), alleged that it was not competent for the Applicant to bring this application in terms of PAIA, that the refusal constituted administrative action and that, as such, the Applicant should have approached the Court in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).³ It further argued that, insofar as PAJA might not apply, the Applicant should have brought the application under the principle of legality.⁴
- 15) The Respondent argued that the refusal is lawful as the requested records are exempt from disclosure in terms of section 41 of PAIA. Therefore, as the Applicant has not demonstrated that the decision is unlawful, it cannot be “reviewed”.
- 16) With regards to the alternative prayer, in terms of regulation 12.04.6 of part 12 of SACARS, the Respondent argued that this Court is only empowered to make a determination in terms of the weighing test provided for in the regulation. It further submitted that the Applicant has not provided the Court with sufficient legal or factual information upon which it can make such a determination.
- 17) The aforementioned remained the contentions of the Respondent, as per its heads of argument, despite the Applicant, in her replying affidavit, directing the Respondent’s attention to Section 1(hh) of PAJA which specifically States that the provisions thereof do not apply to decisions taken in terms of PAIA.⁵

³ First and Respondent’s answering affidavit para 2.2 - Case Lines 007-6

⁴ First and Respondent’s Heads of argument paras 2.4 to 2.0 - Case Lines 012-51 to 012-55

⁵ Applicant’s replying affidavit para 12 Case Lines 011-4

- 18) It was only on the day of hearing that counsel for the Respondent, quite rightly, conceded that the application could not have been brought in terms of PAJA given these provisions.
- 19) In view of this concession, Counsel amended the Respondent's argument, but persisted with the view that the application is incompetent. The amended argument is premised on the fact that the notice of motion refers to a review under section 25(3) of PAIA, whereas applications to Court are regulated in terms of section 78. Because of the reference to the incorrect section (or so the argument goes), the application is not properly before this Court in terms of PAIA.
- 20) As PAIA is specifically excluded from the operations of PAJA, Counsel submitted that the Applicant should therefore have brought the application as a review under the legality principle. As she had failed to do so, the application stands to be dismissed.

Evaluation of Respondent's (amended) challenge

- 21) In *Garvas*⁶ it was Stated is that "*ours is a 'never again' Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away.*"
- 22) PAIA forms part of the body of "never again" legislative instruments that are the direct embodiment of the protection of the freedoms so guaranteed. Its primary objective is to give effect to right of access to information as entrenched in Section 32 of the Constitution.
- 23) Its nature as a proverbial "champion of the people" is evidenced by Section 2 which requires that, when interpreting a provision of the Act every Court must prefer a reasonable interpretation consistent with the objects of the Act over any alternative interpretation inconsistent with these objects.
- 24) Seen within this context, it should be self-evident that the objection based on the, supposedly, incorrect section referred to in the notice of motion is contrived and overly technical. Section 25 of PAIA references the duty of a public body refusing access to records, to inform an Applicant of his/her right to apply to Court, whereas section 78 (and onwards) regulates the conduct of such an application. Regardless of the section, PAIA does not cater for different types of applications governed by different sections. The argument that the reference to section 25 (instead of section 78)

⁶ *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1)SA 83 (CC) para 63

resulted in the Respondent not knowing what case it is called upon to meet is therefore disingenuous.

- 25) Similarly, the argument that the Applicant is bound to the grounds for “review” as set out in section 25, is nonsensical and seems to be based on an amalgamation of principles relating to reviews brought in terms of PAJA with applications brought in terms of PAIA.
- 26) Whilst PAJA may list several grounds for review, PAIA's only “ground” for bringing an application is that there was a procedurally compliant request for access, which was refused and that internal remedies have been exhausted (if applicable). As Stated in *De Lange & another v Eskom Holdings Ltd & others*: “...the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of s 11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and as long as none of the grounds of refusal are applicable. Those grounds of refusal are set out in Ch 4 of Part 2 of the Act.” [Underlining my own].
- 27) Following questions posed by the Court, counsel for the Respondent admitted that, had the Applicant not made specific reference to Section 25 and merely termed this application “an application in terms of PAIA,” there would not have been a challenge to the competency of the application and relief sought under PAIA. This is illustrative of how overly technical this challenge was.
- 28) It is accordingly held that the application brought (insofar as it is an application for access to records), in terms of PAIA, is competently before this Court.
- 29) Although this finding renders the argument, on the applicability of the principle of legality in the context of PAIA applications, moot for purposes of the preliminary challenge, it also underscored a large portion of the Respondent’s argument on the merits of the application and therefore necessitates comment.
- 30) The doctrine of subsidiarity, as recognised in, for instance, *Bato Star*⁷, prohibits a litigant from indirectly enforcing and protecting a Constitutional right against infringement by means of the common law where there is legislation in place that gives effect to the right in question. It is only where the legislation does not give effect to the right or makes no provision for it, that the common law (in the case of administrative action - the doctrine of legality) may be invoked. To hold otherwise would be contrary to the notion of a single

⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

system of law as endorsed by the Constitutional Court in *Pharmaceutical Manufacturers*.⁸

- 31) Within the context of PAJA, the principle of legality is relied upon where the exercise of power does not fall within the limited scope of administrative action as defined by the act, but nonetheless affects the rights of parties. The principle is based on the rule of law position that "*the exercise of public power is only legitimate where lawful*"⁹ as now enshrined in S33 of the Constitution. In such cases the provisions of section 33 of the Constitution are relied upon directly to review such an exercise of power. To this extent the principle of legality operates as "...a backstop or safety net ..." ¹⁰ for instances where PAJA does not apply.
- 32) This does not mean that, as PAJA does not apply to decisions made in terms of PAIA, parties can review a refusal of access to information with direct reference to Section 32 of the Constitution on the basis of legality. Such an argument misconstrues PAIA as a subordinate of PAJA, instead of recognising that PAIA stands on equal footing to, and distinct of, PAJA. Essentially, once the right to be enforced is one as expressed by section 32 of the Constitution, PAIA is applicable, without any reference to PAJA.
- 33) The majority finding in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*¹¹ makes it clear that our Courts have not developed a justiciable principle akin to legality within the context of access to information. Should it do so, such a principle, having its genesis in access to information as opposed to fair administrative action, would, in any event, stand apart from the principle of legality. Such a principle, were it to be developed, could for instance be referred to as "the principle of transparency."¹²
- 34) Even before the decision in *My Vote Counts*, this Court endorsed the applicability of the subsidiary theory in the context of access to information. In the matter of *Kerkhoff*

⁸ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at para 45

⁹ *Fedsure Life Assurance Ltd. and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (328/97) [1998] ZASCA 14; 1998 (2) SA 1115 (SCA) at paras 56 and 59

¹⁰ C Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 South African Law Journal 207 ('Enforcement'), 219.

¹¹ *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* (CCT249/17) [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (21 June 2018)

¹² Murcott and Van der Westhuizen: "The ebb and flow of the principle of legality: Critical Reflections on *Motau* and *My Vote Counts*" *Juta Constitutional Court Review* (2015) 7 CCR 43 page 70

v Minister of Justice and Constitutional Development and Others,¹³ where the Applicant sought to rely directly on section 32 of the Constitution as the basis for his review, Southwood J (in approving of the finding in *Institute for Democracy in South Africa v ANC*¹⁴), Stated that “....‘s 32 of the Constitution provides the underlying basis for and informs the rights contained in PAIA, but that the section itself is subsumed by PAIA, which now regulates the right of access to information’; that parties must assert the right via the Act and therefore that s 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information where no challenge is directed at the validity or Constitutionality of any of the provisions of PAIA.”

35) In the present matter, the fallacy of the Respondent's argument is two-fold: It assumes that, in cases of access to information, there is an alternative review remedy available based directly on section 32 of the Constitution. Stemming from this, it then assumes that such a review would be based on the principle of legality and would therefore place a burden on the Applicant to prove unlawfulness.

36) This line of flawed reasoning pervaded most of the contentions by the Respondent on the merits of the application with countless references to the necessity for the Applicant to prove the unlawfulness of the refusal.

37) Given that it has already been found that the principle of subsidiarity places the application squarely within the ambit of PAIA, arguments related to requirements under PAJA or legality, will not be pertinently addressed in assessing the merits of the application.

The merits of the application

Onus

38) In terms of PAIA, the burden is on the party refusing access to provide sufficient evidence for a conclusion, on the balance of probabilities, that the record in question falls within the description of the statutory exemption it seeks to claim.¹⁵

39) On the day of hearing, I enquired from the parties whether the Respondent is a public or a private body, as this had not been pertinently raised in the papers. After some queries

¹³ *Kerkhoff v Minister of Justice and Constitutional Development and Others* (2011 (2) SACR 109 (GNP)) [2010] ZAGPPHC 5; 14920/2009 (10 February 2010) para 17

¹⁴ *Democracy in South Africa v ANC* 2005 (5) SA 39 (C) para 17

¹⁵ Sections 11(1) read with Section 81(3) of PAIA; *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) (29 November 2011) para 23

regarding the relevance of this, counsel for the Respondent submitted that the Respondent is a public body. This determination is highly relevant when the Court has to establish whether the Applicant has discharged her onus in terms of PAIA. Section 11, which deals with public bodies, requires only that the Applicant meet the procedural requirements of PAIA. Once she has so complied, the Respondent is obligated to provide the records, unless it can prove that such a record is exempt from disclosure in terms of PAIA. Had the Respondent been a private body, the Applicant would also have had to show that the information requested is required ‘*for the protection of any rights*’ in terms of Section 50.

40) It not being in dispute that the Applicant complied with the procedural requirements of PAIA and the Respondent’s counsel having confirmed that no issue will be raised regarding the exhaustion of internal remedies, the onus then shifted to the Respondent to prove that the requested records are exempt from disclosure by virtue of statute.

41) Regarding the sufficiency of proof, the Constitutional Court, in 2011, in *President of the Republic of South Africa and Others v M & G Media Ltd* (“*President v M&G (2011 CC)*”) held that it is not sufficient for the Respondent to merely recite the wording of the statutory exemption relied upon¹⁶ and laid down the following principles:

a) “*Affidavits must subscribe the justification for non-disclosure with reasonably specific detail for the requester of information to be able to mount an effective case against the agency’s claim for exemption.*”¹⁷

b) “*The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people’s enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.*”¹⁸

Respondent’s justifications for refusal of access

42) Despite the refusal letter proffering only the provisions of part 12 of SACARS as reasons for refusing access to the records, the Respondent, in its answering affidavit expanded its reasons for refusal.

¹⁶ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) (29 November 2011) para 24

¹⁷ *President v M&G (2011) CC* at para 18

¹⁸ *President v M&G (2011) CC* at para 24

- 43) The Respondent States that the following documents do not exist and/or are not in its possession:
- a) The “Post-accident control surfaces Service Ability Inspection Report” does not exist and the Respondent is not in possession thereof.
 - b) The “Human Factors Analysis Report” does not exist and the Respondent is not in possession thereof.
 - c) The “Detailed accident site plots showing the locations of each part” is not in the possession of the Respondent.
- 44) Regarding the remainder of the records, the Respondent, States that it relies on the provisions of section 41(1)(a)(iii) and s41(1)(b)(iii) of PAIA for the refusal to provide the requested records. The sections provide that access to a record may be refused if the disclosure thereof:
- a) “...could reasonably be expected to cause prejudice to the international relations of the Republic¹⁹” or
 - b) “...would reveal information required to be held in confidence by an international agreement.”²⁰

Evaluation of records refused as not in existence and/or in possession of Respondent

- 45) In the answering affidavit the Respondent makes a bald averment that the “Post-accident control surfaces Service Ability Inspection Report” and the “Human Factors Analysis Report” do not exist, as “the type of investigation conducted by the Civil Aviation Authority did not require information that would have resulted in the reports sought.” No further information is supplied.
- 46) In the matter of *Treatment Action Campaign v Minister of Correctional Services and Another*,²¹ the Court evaluated the sufficiency of such an averment in an affidavit with reference to the provisions of S 23 of PAIA, which States that: “*The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.*”

¹⁹ Section 41(1)(a)(iii) of PAIA

²⁰ Section 41(1)(b)(iii) of PAIA

²¹ *Treatment Action Campaign v Minister of Correctional Services and Another* (18379/2008) [2009] ZAGPHC 10 (30 January 2009) para 31.5 (“Treatment Action Campaign”)

- 47) When held up to the standard of this section, it is self-evident that the answering affidavit is wholly insufficient. It contains no information regarding a search done for the records or enquiries made as to the existence of the records. The deponent, being the deputy information officer, does not State how she came to the expert determination that the type of investigation done does not require the reports, nor is there confirmation from the duly qualified person from whom she received this information to this effect.
- 48) Similarly, with regards to the averment that the Respondent is not in possession of these reports and the “Detailed accident site plots showing the locations of each part”, the affidavit does not meet the requirements as espoused in *President v M&G (2011 CC)*. In this regard it is noted that for purposes of PAIA, references to “documents” include document in the “possession or control”²² of the public body. Section 20 provides for the procedure to be adopted in cases where documents cannot be found or are not in existence. The Respondent has, for example, not addressed these procedures in the answering affidavit.
- 49) The Respondent has accordingly provided insufficient information to bring these three records within the ambit of the exemptions claimed.

Evaluation of refusal ito Section 41(1)(a)(iii): “*prejudice to the international relations*”

- 50) Despite the inference the Respondent wishes the Court to draw, the provisions of section 41 of PAIA are not absolutely prohibitive. Section 41(1)(a)(ii) provides that the information officer of a public body may refuse a request for access to record. The Respondent therefore not only needs prove that the requested record falls under the section’s exemption provision, but also needs to provide reasons why, in the exercise of its discretion afforded by the section, it decided to refuse the Applicant access to the requested records.
- 51) Section 41(2)(g) and (h) describes the type of information that may cause prejudice to international relations as, for instance, the positions adopted or to be adopted by South Africa or another State or international organisation in international negotiations or the content of diplomatic correspondence. Whilst this is not an exhaustive list, the nature of the exemption can be gleaned from these examples: the exemption pertains to information or records held that, by their nature should remain secret, lest they impact future negotiations or diplomatic relations with other States. The Respondent has provided no information showing how divulging records to enable the Applicant to find

²² Section 1 PAIA

out the cause of her husband's death, would influence the Republic's relationships or negotiating powers on a global level.

Evaluation of refusal to Section 41(1)(a)(iii) of PAIA: "*international agreement*"

- 52) The Respondent argues that, as South Africa is a party to the *Convention on International Civil Aviation* ("the Convention") of the International Civil Aviation Organisation ("ICAO"), it is prohibited by the Convention from disclosing the requested information. Annex 13 clause 5.12 of the Convention²³ provides that: "*the State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the competent authority designated by that State determines, in accordance with national laws and subject to appendix 2 and 5.12.5, that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigation:...*"
- 53) These provisions have been incorporated into part 12 of the South African *Civil Aviation Regulations*, 2011 ("SACARS"). The Respondent argues that it is therefore prohibited by international agreement, as well as domestic law, from providing the records requested by the Applicant.
- 54) In developing this argument, reliance is placed on section 231 of the Constitution which provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation. It is argued that the Court can therefore not lawfully grant an order would contravene the Convention and section 41 of PAIA, without the Applicant bringing a Constitutional challenge to the "... *validity of section 41 of PAIA, the Convention and part 12 of the Civil Aviation Regulation.*" ²⁴
- 55) This argument is based on the assumption that the provisions of the Convention's Annex 13 are binding on ratifying States and that the obligation in terms thereof is one of non-disclosure of records.
- 56) This assumption misconstrues both the nature of the Annexes in general, as well as the duties of the ratifying States in terms thereof. In terms of Article 37 of the Convention, ratifying States: "... *undertake to collaborate in securing the highest practicable degree*

²³ ICAO Annex 13 to the Convention: Aircraft Accident and Incident Investigation

²⁴ Respondent's Heads of Argument para 2.14 found at Case Lines 012-62

*of uniformity in regulations, standards, procedures and organisation in relation to aircraft...*²⁵

- 57) To this end ICAO has adopted, and amends from time to time, international standards and recommended practices and procedures dealing with 11 prescribed matters and such other matters concerned with the safety, regularity and efficiency of a navigation as may from time to time be appropriate. These are known as the Annexes to the Convention.²⁶
- 58) Annex 13 is borne from article 26 of the Convention which obliges ratifying States to conduct an enquiry into aircraft accidents. The foreword to the Annex however makes it clear that ICAO adopted a resolution recognising that parties may deviate, in terms of article 38 of the Convention from the provisions of Annex 13, save for the explicit provisions contained in article 26.²⁷ Article 26 does not contain any reference to the accessibility of records.
- 59) The duty is therefore not on States to not disclose such information, but rather to incorporate the recommendations as per the Annex into their national legislation, in order to achieve uniformity of regulation of civil aviation, as per Article 37.
- 60) By incorporating the provisions of Annex 13 into 12 of the SACARS, South Africa has complied with its obligations under the Convention and Annex 13. Put differently, South Africa does not have an obligation, in terms of the international agreement, to not disclose records to the Applicant- it had a duty to bring its own regulations pertaining to disclosure in line with that of Annex 13, insofar as possible, within the confines of its own regulatory system. If those domestic procedures fell foul of the provisions of Annex 13, ICAO should have been notified in terms of Article 38. There is no obligation of non-disclosure *vis-à-vis* the Applicant and resultantly her right of access is not impeded by the exemption as per Section 41(1)(b)(iii) of PAIA.
- 61) The Respondent has also argued that, as the provisions of Annex 13 have been incorporated into national legislation by way of part 12 of SACARS, the disclosure is also prohibited under Section 41 of PAIA.
- 62) It is doubtful whether the provisions of domestic legislation (even when informed by international agreements) could be regarded for purposes of exemption from disclosure

²⁵ LAWSA, 2nd ed, 2 Part 1 par 37 referring to Article 37, read with arts 54(1) and 90 of the Convention

²⁶ Article 37 of the Convention

²⁷ ICAO Annex 13 to the Convention: Aircraft Accident and Incident Investigation, Foreword: Relationship between Annex 13 and Article 26 of the Convention, 2020

under Section 41 of PAIA (which deals with international obligations). Regardless, even if such an interpretation is accepted, Section 5 of PAIA makes it clear that it applies to the exclusion of “...*any provision of any other legislation that prohibits or restricts the disclosure of record of a public or private body and is materially inconsistent with object or specific provision of the Act.*”

- 63) As such, the provisions of PAIA prevail and this Court is therefore not bound to the provisions of SACARS or the Convention (insofar as direct incorporation may be argued) where such provisions are materially in conflict with the provisions of PAIA.
- 64) Furthermore, even if the Convention, Annex 13 or SACARS created an international obligation for purposes of Section 41(1)(a)(iii), no information was provided to enable the Court to determine whether the requested records fall within the ambit of Annex 13 and whether the Respondent applied its mind in accordance with the discretion afforded to it in terms of section 41(1).
- 65) The Respondent, in relying on the exemption, deals with the requested records *en bloc*. This approach does not comply with the requirements as per *President v M&G (2011 CC)*. The lackadaisical approach of the Respondent is evidenced, for instance, by the request for “detailed weather reports relating to the day of the accident”. This record is also refused based on the provisions of Annex 13 or part 12 of SACARS, despite neither instrument listing it as a prohibited record. Counsel for the Respondent took umbrage against this being pointed out by the Court, as, in his view, this was not part of the Applicant’s case. This is an incorrect interpretation of evidentiary burden on the Respondent in terms of PAIA. Given that the onus is on the Respondent to justify the refusal of access to the record, it is the duty of the Respondent to sufficiently canvas its reason for refusal of, for instance, this specific record.

The relief sought

- 66) I am, however, in agreement with the Respondent’s submissions regarding the alternative prayer based on SACARS. Had the Applicant wanted relief in terms of the provisions of regulation 12.04.6 of part 12 of SACARS, it would have had to place information before the Court to enable it to perform the weighing test described above. In that event, the Court could, at most, have declared that “.. *the disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or future investigation...*”

- 67) However, the Respondent's objections to the relief sought under PAIA were based on principles applicable in PAJA or legality reviews, such as, for instance the need for exceptional circumstances to be proven before a Court can substitute its decision for that of the public body. I do not intend to deal with each of the objections in light of my previous findings on the inapplicability of PAJA or legality principles in PAIA applications.
- 68) PAIA itself provides what can or cannot be granted. Section 82 of PAIA empowers the Court to make any decision it deems just and equitable, including orders setting aside the decision, orders requiring the Respondent to "*..take such action...as the Court considers necessary..*", interdicts, declarators and even orders pertaining to compensation.

Finding

- 69) The Court is called upon to decide whether the Respondent has proven that the record requested falls within the ambit of the exemption relied upon. If not, the default position under PAIA prevails and access to records held by public bodies must be granted.
- 70) As set out above, the Respondent has failed to prove that any of the records are exempted from production in terms of PAIA. The order, in general, therefore reflects the default position. However, as Section 82 provides for flexibility of approach where in the interest of justice and, as the Court cannot order an impossibility, the order provides for instances where it is alleged that records do not exist or are not in the possession of the Respondent.

Costs

- 71) From the outset, the Respondent opposed this application based on an erroneous reliance on PAJA and the principle of legality. The deponent to the answering affidavit, being the deputy information officer, laboured under the misapprehension that PAIA does not provide a mechanism for her decision to be appealed to Court. Even though it is confounding that the information officer, who presumably should be *au fait* with the provisions of PAIA, was unaware of the provisions of section 87, the opposition at that stage might have been forgivable on the basis of *bona fide* ignorance.
- 72) However, once the replying affidavit, indicating the non applicability of PAJA ito of S11 thereof, was served, in November 2021, reliance on such ignorance could no longer justify the opposition. Instead of reassessing its position and filing papers to amend or

supplement its arguments, it proceeded headstrong with the position as stated in the answering affidavit. It was only on the date of trial, that counsel conceded that their objection is simply unsustainable. Despite this concession, as evidenced above, the argument presented to Court was still permeated with principles that resort under PAJA or legality reviews and the Respondent persisted with placing the burden on the Applicant to prove unlawfulness. It also sought to limit the powers of this Court by referencing the need for “special circumstances” to be proven before the Court could “substitute” its decision for that of the information officer.

73) The Respondent made no attempt to comply its obligations in terms of PAIA and relied on bald generalised references to the exemptions, without laying a fundamental basis for the reliance thereon. In the instance of the weather reports, the exemption relied upon was nonsensical.

74) I echo the sentiments expressed by Southwood J, in awarding costs on the scale as between attorney and own client, in *Treatment Action Campaign*:

“It is disturbing that the first Respondent has relied on technical points which have no merit and instead of complying with its Constitutional obligations has waged a war of attrition in the Court. This is not what is expected of a government minister and a State department. In my view their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible.”

75) However, I am mindful of the fact that the Applicant, in framing her relief in prayer 1 of the notice of motion, contributed to the conflation of issues. Furthermore, the Applicant did not, in the notice of motion or in Court, seek costs on a punitive scale.

76) The notice of motion prays for an order against the first and second Respondents. The second Respondent is cited in her personal capacity. No case has been made out that would elevate her conduct to the a level of *mala fides* that would attract personal liability for costs.

77) The Applicant requests the costs of two counsel premised on the technical nature of the Respondent’s objection based on the Convention. Having also wrestled with the Convention and the Annexes thereto in preparation of this judgment, I agree with the Applicant on this point.

78) I, therefore, make the following order:

ORDER

1. The Respondent is ordered to make the following original records available for inspection by the Applicant or her representatives or any experts appointed by her and to furnish clear copies thereof to the Applicant within 15 business days of this order:
 - a. All correspondence recorded between the pilot of ZS-XAT and the pilot of ZS-XAS from take off until the time of the crash including recordings from ground control, tower control and air control;
 - b. ATNS Radar Plot/s relating to ZS-XAT and ZS-XAS from the day of the accident;
 - c. Detailed weather reports relating to the day of the accident;
 - d. Transcripts of the communication/s between ZS-XAT and ZSXAS and between both aircraft and the respective control towers L/ATNS;
 - e. Witness Statements relating to and considered towards determining the final conclusion/s of AIID Investigation;
 - f. Accident Site and other photographs used for the AIID Investigation;
 - g. Engine OEM teardown report Vector P&W;
2. The Respondent shall within 15 business days of this order take all reasonable steps to find or determine the existence of the following records:
 - a. Detailed accident site plots showing the locations of each part;
 - b. Post-accident control surfaces Service Ability Inspection Report; and
 - c. Human Factors Analysis Report
3. In the event that a record as per 2 above, is under the control of the Respondent, but not in its possession, the Respondent shall within 15 business days of this order obtain the record from the person, entity or body in whose possession it is and make the original record available for inspection by the Applicant or her representatives or any experts appointed by her and furnish clear copies thereof to the Applicant.
4. In the event that a record as per 2 above do not exist, the Respondent shall within 15 business days of this order:
 - a. Furnish the Applicant with an affidavit for each record it claims does not exist, deposed to by its Chief Information officer, or if not possible, its deputy information officer, setting out a full account of all steps taken to determine whether the record exists and the basis for the conclusion that the record does

not exist, including all communications with every person on whose advice it was determined that the record does not exist.

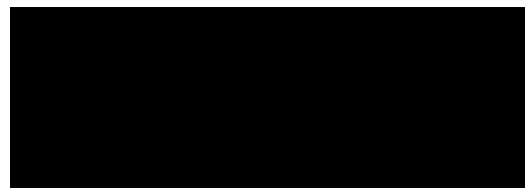
b. Confirmatory affidavits from each person referred to in the affidavit as per 3a above.

5. In the event that a record, as per 2 above, is not in the possession or under the control, of the Respondent, but is in the possession of another public body, the Respondent shall, within 15 business days of this order:

a. Comply with the procedures as set out in Section 20 of the Promotion of Access to Information Act, and

b. Furnish the Applicant with an affidavit, for each record not in its possession or under the control, deposed to by its Chief Information officer, or if not possible, its deputy information officer, setting out a full account of all steps taken to comply with Section 20 of the Promotion of Access to Information Act and indicating which public body is in possession of the record, including all communications with every person such requests were sent to.

6. The Respondent is ordered to pay the costs of the Applicant on a party and party scale, including the costs of two counsel.



K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Date of hearing: 12 April 2023

Judgment delivered: 24 July 2023

Amended: 31 July 2023

Appearances:

For the Applicant:

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