IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 18821/2020

In the matter between:

DAVID BENATAR Applicant

and

THE BLACK ACADEMIC CAUCUS Respondent

Bench: P.A.L. Gamble

Heard: 11 October 2021

Delivered: 15 December 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on Wednesday 15 December 2021

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. Who is the Black Academic Caucus? That is the question the applicant wants answered and in these proceedings he seeks to do so by invoking the provisions of the Promotion of Access to Information Act, 2 of 2000 ("PAIA" or "the Act").

2. The background to these proceedings is located in the hallowed halls of academia. At stake is not some esoteric question of great scientific or philosophical moment but, it seems, an issue of accountability arising from a war of words that were initially exchanged at that most venerated of academic gatherings – a faculty board meeting. The battle was waged, not over the awarding of degrees, the allocation of offices or the transformational staffing requirements of a department, but whether the refreshments on offer at such meeting should cater for the dietary requirements of attendees who prefer to adhere to a vegetarian or vegan diet.

3. Later, there was public criticism of the manner in which a student was treated when she was not awarded a degree due to her absence from classes.

THE PARTIES

4. The applicant ("Prof. Benatar") is a professor in the Department of Philosophy at the University of Cape Town ("UCT"), a position which he held in September 2015. It appears from the context of the application that the Department falls under the Faculty of Humanities at UCT.

5. The respondent is the Black Academic Caucus ("BAC"), a voluntary association with juristic personality formed in accordance with its constitution adopted on 3rd November 2015. It is capable of suing (and being sued) in its own name and has perpetual succession. The declared purposes and objectives of the BAC are

tenfold as its constitution declares. It is not necessary for present purposes to detail these: a recitation of the Preamble to the BAC constitution will suffice.

"PREAMBLE

WHEREAS WE, members of the BLACK ACADEMIC CAUCUS are committed to:

CHALLENGE the slow pace of transformation that continues to maintain hegemonies and reproduces colonial relations of power.

Advocate for an inclusive and diverse academic institution that also prioritizes Black staff and their knowledge.

DO HEREBY today the 3rd of November 2015 adopt this constitution of the Black Academic Caucus at the University of Cape Town ('UCT')"

6. The constitution makes provision for the establishment of an executive committee of the BAC which comprises a chairperson, vice-chairperson, treasurer, secretary and an additional member. Membership of the BAC is defined with reference to 3 specified categories of natural persons and the constitution makes provision for the payment of membership fees, adherence to a members' code of conduct and the usual other obligations one would find in such a voluntary association.

7. On 26 January 2017, UCT, represented by its erstwhile Vice-Chancellor Dr. Max Price ("the VC"), and the BAC, represented by its erstwhile chairperson, Prof. Shadrack Chirikure, concluded a written memorandum of understanding in terms whereof the BAC was afforded formal recognition as an "Interest Group" at UCT. That memorandum records that the BAC was founded in 2012.

THE BAC STATEMENT OF 14 SEPTEMBER 2015

8. In the founding affidavit herein Prof. Benatar refers to a statement issued by the BAC on 14 September 2015 ('the 2015 statement") regarding events

which occurred at a meeting of the Humanities Faculty Board on 10 September 2015. The meeting was evidently attended by the VC, the Dean of Humanities, Prof. Buhlungu, and a number of other senior scholars in the Faculty, including Professors Benatar and Pippa Skotnes. The 2015 statement is lengthy and for the sake of avoiding prolixity I shall provide a synopsis thereof.

9. It appears that the agenda for the meeting included a proposal that vegetarian or vegan food be included on the menu at Board meetings and Faculty events. Prof. Buhlungu, who was in the chair, noted that the issue raised wider considerations than just the Board and suggested that it merited consultation with other members of the Faculty. The BAC supported this saying -

"Ethics of diet, the banning of animal products and consumption at faculty-wide events, are issues that implicate the wider university community and thus BAC supports the Dean's proposal to open this for conversation."

10. Profs Benatar and Skotnes and their supporters felt otherwise and demanded that their proposal be debated there and then. It is claimed by the BAC that they were disrespectful, insulting and condescending towards the Dean and attacked his integrity. Having taken up about half the time of the meeting with their vocal objections, Prof. Benatar's "group" is alleged to have walked out in a huff, slamming the door behind them. This was cause for further umbrage on the part of the BAC which castigated Prof. Benatar for employing, inter alia, "racially inflective" language.

11. The BAC went on to criticize Prof. Benatar for attempting to bully the Dean in the presence of the VC, for using animal rights as a wedge to compromise the proper functioning of the Board and the broader transformation agenda at UCT and for exhibiting a lack of basic courtesy "towards a very accommodating Dean".

12. The context of the criticism of the BAC of Prof. Benatar's behaviour and utterances in the 2015 statement is cast in the context of the well-publicised "Rhodes

Must Fall" movement[1], which saw student protests against relics of colonialism on the UCT campus during that campaign, and the subsequent "Fees Must Fall" movement, which was aimed nationally at securing a reduction in student fees. Prof. Benatar is taken to task in the 2015 statement for his opposition to the former movement and for imperiling transformation at UCT.

13. The 2015 statement requests Prof. Benatar to be called to account and concludes as follows:

"As BAC, we are appalled by Prof. Benatar's behaviour, which appears to undermine transformation. This statement by BAC is an attempt to ask the university to think carefully about how debates are raised within the university. We ask whether the VC intends to condemn the conduct of colleagues for actions that perpetuate an untransformed agenda.

Specifically, we request the following from the VC:

1. An indication from the VC on whether Professors Benatar and Skotnes will be asked to account for their conduct at the meeting.

2. Clear direction on the issue of whether HoDs and line managers' performance assessment will be linked to their commitment to transformation.

We look forward to your response."

The founding affidavit provides no narrative or history of what subsequently became of the issues raised by the BAC in the 2015 statement nor of any steps taken by UCT or either of the parties to this application.

THE BAC STATEMENT OF 2 OCTOBER 2017

14. In the founding affidavit Prof. Benatar references a further statement made by the BAC on 2 October 2017 ("the 2017 statement") which is entitled

[1] See for example Hotz and others v University of Cape Town 2018 (1) SA 369 (CC)

"Parading White Privilege". The context to the statement is to be found in its opening paragraph.

"On the 29th of September, 2017, an article appeared in the *Cape Times* (Uproar over UCT concession to miss test for Rocking the Daisies) regarding a lecturer in the UCT Philosophy Department who granted concessions to students who had bought tickets 'well in advance' to attend to the Rocking the Daisies music festival in Darling."

Once again I shall provide a synopsis of the 2017 statement.

15. The BAC expressed its dissatisfaction with the alleged unequal treatment in the Philosophy Department of Black and White students. Firstly, it said that –

"(G)ranting students concessions to attend entertainment events (parties) and then advantaging them for missed tests is a flagrant abuse of the concession system[2]."

16. Secondly, the BAC referred to an incident in 2016 involving a Black African student who was –

"(R)efused…her DP (duly performed) despite the fact that she had presented evidence of a debilitating medical condition. The outcome of her attempts to challenge her DPR status[3] was that she faced disciplinary action for allegedly defaming the Head of Department. The same department now has compassion for students who bought tickets to attend a music festival in Darling.

An inconsistent approach in handling the needs of students who face personal calamities/difficulties and students who want to attend entertainment events draws attention to the ways in which racialised class disparities are reinforced at UCT."

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[2] The term is not explained in the 2017 statement nor the founding affidavit.

[3] The term is similarly not explained in either the 2017 statement or the founding affidavit.

17. The 2017 statement concludes as follows.

"While there have been positive changes in the institution, in 2017 we again find ourselves asking some of our colleagues and the university to show situational awareness and sensitivity around issues of race, gender and class. That we have to do this is deeply disappointing because it hints that the positive changes that we see are not lasting or that they are the result of insincere intentions.

We expect that UCT will act in accordance with its strategic plan and take the opportunity to ensure that its rules are applied consistently without favour - as opposed to merely redirecting this matter back to the lecturer or his department. In so doing, UCT should reaffirm that it does not belong to some, but to all who study and work at the institution. We call on the university to pursue a more visible campaign around inclusivity."

The founding affidavit again provides no narrative or history of what subsequently became of the issues raised by the BAC in the 2017 statement nor of any steps taken in relation thereto by UCT or either of the parties to this application.

PROF. BENATAR'S COMPLAINTS REGARDING THE STATEMENTS

18. In the founding affidavit Prof. Benatar complains that, in issuing the 2017 statement, the BAC had implied that –

"[11] …as the head of the Philosophy Department I had acted in an unfair manner to a student, that white students were being granted additional privileges and that black students were being humiliated and traumatized."

19. Prof. Benatar goes on to make the following generalised allegations regarding both the 2015 and 2017 statements.

"[12] These statements were a personal attack on my integrity, reputation, and good name. Furthermore, they constitute unfair discrimination which impugned upon my right to be treated equally.

[13] Given that the Respondent has levied these accusations at me, I have a right to know on whose behalf those accusations were made. I pause to point out that these statements were issued under the name of the Respondent as an association and are readily available online.

[14] The requested record is required for the exercise and protection of these rights."

THE REQUEST UNDER PAIA

20. After setting out the contents of s50(1)(a) of PAIA[4], Prof. Benatar points out that on 18 May 2020 he directed a request incorporated in the Form C contemplated under s53 of PAIA to the erstwhile chair of the BAC, Prof. Phoebe Kisubi-Mbasalaki, for the following records:

20.1 The complete BAC membership list and office bearers as of September 2015, October 2017 and May 2020;

20.2 The Constitution and founding documents and rules of the BAC; and

20.3 All public statements made by the BAC since its founding.

21. Prof. Benatar says that there was no response by the erstwhile chairperson of the BAC to his request despite numerous attempts at follow-up and consequently, as of 17 June 2020, there was a deemed refusal for the request in terms of ss56 and 58 of PAIA. A letter of demand to the BAC dated 7 December 2020 by Prof. Benatar's attorneys also having been ignored, this application was launched on 14 December 2020.

22. In the founding affidavit it is said that the BAC's deemed refusal was not justified and that it had not sought to justify its decisions on either formal or procedural grounds. Furthermore, it is claimed that none of the grounds for refusal contemplated

[4] I.e. 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."*

under Ch. 4 of PAIA can validly be claimed by the BAC and thus it is asserted that the refusal of access to information was unlawful.

23. The relief sought in the notice of motion is for an order –

"1. Declaring that the Respondent's deemed refusal to provide access to the information requested by the Applicant in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') and described in the founding affidavit is unlawful and in conflict with the provisions of PAIA and section 32 of the Constitution;

2. Ordering that the Respondent provide the Applicant within 10 days of the order with the following records:

2.1 The complete Black Academic Caucus ('BAC') membership list and office bearers, as of **September 2015**, **October 2017**, and **May 2020**;

2.2 The founding documents and rules of the BAC, other than its Constitution;

2.3 All public statements made by the BAC since its founding.

3. Directiing that the costs of this Application be paid by the Respondent on the attorney and client scale…"

24. The drafter of the notice of motion appears to have thought that the application was one for review under Rule 53 because the notice of motion also calls for the production by the BAC of "the record of proceedings sought to be corrected or set aside, together with such reasons as they (sic) are by law required to give or make, and to notify the Applicant that they have done so." Further, the applicant reserved the right to amend his notice of motion and supplement his founding affidavit within 10 days of receipt of the record as aforesaid. These additional allegations in the notice of motion are seemingly the result of the drafter having used the wrong template and are to be regarded as *pro non scripto*.

OPPOSITION TO THE PAIA REQUEST

25. The answering affidavit in these proceedings, filed on 8 April 2021, was deposed by the BAC's secretary *pro tem*, Dr Tirivanhu Chinyoka, a lecturer in mathematics at UCT. After furnishing some background detail to the founding of the BAC and its aims, objectives and philosophy, Dr Chinyoka identifies the office bearers of the BAC elected at its annual general meeting of 30 June 2020.

26. After noting that there was an obvious anomaly between the request filed under s50 of PAIA and the notice of motion (in that Prof. Benatar no longer seeks a copy of the BAC's constitution) which had gone unexplained, Dr Chinyoka refers to the provisions of s50 and focusses on the requirement that the "requester" under that section of PAIA may only apply for relief if the information requested "is required for the exercise or protection of any rights".

27. It is contended that Prof. Benatar failed to articulate the precise provisions of PAIA upon which he relied or which he claimed the BAC had transgressed. The answering affidavit stresses the importance of this argument as follows.

"16.2.1. In terms of PAIA, the Applicant bears the onus to show that the request falls within the ambit of section 50 of that Act. I say that the Applicant has failed to put up any facts in this regard to discharge the *onus.*

16.2.2. The Applicant must establish that he has a right which access to the record is required to exercise or protect. I say that the Applicant has failed to put up any of the required facts in this regard.

16.2.3. Further, the principle of subsidiarity dictates that one may not rely directly on the Constitution in the face of legislation designed to give effect thereto.

16.3 PAIA is the legislation enacted to give effect to the constitutional right of access to information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.

16.4 Accordingly, any attempt by the Applicant to place reliance directly on the Constitution as a basis for the relief that he seeks would be impermissible."

28. The answering affidavit goes on to establish the core of the BAC's attack on the application, which was also dealt with extensively in argument by its counsel.

"18. I am advised, and say, that for a valid request for information, it is incumbent upon the Applicant 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 and protecting that right.

19. I respectfully reiterate that the Applicant failed in his Request to meet the required threshold for a valid request, and that the failure has simply extended to the papers before this Honourable Court.

20. In the Request, under G, the Applicant simply indicated, without more, that he sought the above information in order to exercise or protect the right to access to information, and also the rights to equality, human dignity, and to a good name and reputation.

21. It is unclear what the Applicant meant by a right to a good name and reputation, as to whether this is a right that the Applicant also derived from the Constitution.

22. I am advised, and say, that the Applicant in any event failed to demonstrate as to whether and how each of the records requested are required for the exercise or protection of any rights purportedly asserted by the Applicant.

23. The Applicant went further in the Request to provide the following explanation for seeking the information for the exercise or protection of the rights which he had set out:

> 'The BAC has, on at least two occasions made public statements that mentioned me either by name or by position, and which targeted me, at least in part, on the basis of my purported race. The individuals constituting the BAC remain nameless, despite my repeated and reasonable requests for disclosure of their membership list and office bearers. I wish to know in whose name the BAC has acted, what rules govern this

body, and what the pattern of its public statements is, **in order to properly assess my options for exercising and protecting my rights.'** [Emphasis added]

24. I say, respectfully, that the above explanation for seeking the information was lacking in specificity and failed to demonstrate that each of the items of the information sought was reasonably required by the Applicant as set out in PAIA. I further say the following:

24.1. It would appear from the explanation above, that the underlying reason for the Applicant's pursuit of the records is that the Applicant is aggrieved by certain statements which were previously made by the BAC.

24.2. The Applicant is aware however that the BAC is a recognized stakeholder at UCT, that it engages through its office bearers as a corporate body with official UCT structures, including the Vice Chancellor, and that it acts on behalf of its membership.

24.3. The Applicant is fully aware of the rules that govern the BAC, which rules are embodied in the BAC constitution, a copy of which was available to the Applicant and in respect of which he had possession.

25. I respectfully say, further, it seems clear that the underlying reasons given by the Applicant for why the records are required do not relate to the exercise of the right to 'access to information, and also the rights to equality, human dignity, and to a good name and reputation', but, as the Applicant put it, 'to properly assess my options for exercising and protecting my rights'.

26. As such, the Applicant failed to meet the required threshold for seeking the identified records.

27. Accordingly, I say that the reasons given do not meet the test of the records being required to 'exercise or protect' the right relied upon."

Much of the remainder of the answering affidavit is devoted to putting up the BAC's case on the merits of the complaints levelled against it by Prof. Benatar and accordingly need not be traversed in this judgment.

THE REPLYING AFFIDAVIT

29. On 10 May 2021 the Judge President granted an order by agreement that the matter be set down on the opposed motion roll on 11 October 2021 notwithstanding that Prof Benatar had not filed a replying affidavit: this only occurred on or about 5 July 2021. Much like the founding affidavit, the reply is fairly concise and largely argumentative as to whether the professor is entitled to the relief that he seeks herein.

30. At the risk of some repetition, I shall cite the reasons advanced in reply (to the extent that they may be admissible or relevant) for the PAIA request.

"18. Being provided with the information that I seek will provide me with the ability to engage the individuals that sullied my good name, attacked my reputation, undermined my dignity, and discriminated against me. Instead of having to confront the faceless entity of the BAC it is vital that I am told in whose name the BAC acts so that I can know who my accusers are…

20. I have also asked for all public statements made by the BAC since its founding. This information will enable me to determine if there is a pattern in the statements made by the BAC, to determine if there are statements that refer to me and which I am currently unaware of, and to determine if I am being victimized by the BAC in a manner that is similar or different to other targets of the BAC…

22. The principle of restorative justice is founded on the idea that people who have had an acrimonious encounter are able to restore their relationship through an open process of healing and discussion. This is not possible if one of the parties remains hidden. Therefore, it is necessary that I am provided with the information which I seek."

WHAT IS THE PURPOSE OF THE APPLICATION?

31. It merits mention that Prof. Benatar does not articulate with any degree of precision, either in the founding or the replying affidavits, how he intends exercising his proclaimed legal rights once he has been granted access to the information requested from the BAC. Having said in the PAIA request form that he needed the

information in order to be in a position to consider how to exercise his rights, the case seems to have drifted in reply into the somewhat nebulous realm of “restorative justice” embracing a desire that the professor and the BAC restore an undefined and allegedly established relationship through “an open process of healing and discussion.” The Court is, however, not enlightened as to what the basis of this process will be, nor how it will be advanced. After all, as they say, it takes two to tango, and without a foundational basis for engagement, the prospect of restoring an alleged relationship appears to be still-born.

32. What is clear from the papers is that Prof. Benatar did not make any attempt to engage contemporaneously with the BAC after the publication of either the 2015 or 2017 statements. Rather, the application under s53(1) of the Act commenced with the filing of the statutory Form C on 18 May 2020, almost 5 years after the issuing of the first statement and nearly 3 years after the second. The BAC points out that the PAIA application came in the midst of the early stages of the Covid19 pandemic when the country was under a severe Level 4 lockdown. Significantly, the Form C document identified Dr Phoebe Kisubi-Mbasalaki as “The Head” of the BAC and consequently Prof. Benatar had knowledge that she was an office bearerof the BAC at the time.

33. The application for information had been preceded by an exchange of emails between Prof. Benatar and Dr Kisubi-Mbasalaki between 4 and 11 May 2020. In the correspondence of 4 May 2020 Prof. Benatar addressed Dr Kisubi-Mbasalaki as “the current Chair of the…BAC...at UCT.” The email dealt only with the 2017 statement and effectively accused the BAC of defaming him as the Head of Department. In that regard, Prof. Benatar accused the BAC of furthering the earlier defamation of himself by Ms Mkhumbuzi and of not affording him the opportunity to correct certain alleged inaccuracies therein. There is no threat to sue the BAC for defamation or to take any other legal action against it nor to engage with it in relation to the issues complained of, nor, importantly, is there any reference to the 2015 statement.

34. The email concludes with a "request and a two-part question."

"The request is to please supply me with the BAC's full current membership list, as well as the one from October 2017. In each case please indicate who the office bearers are and were.

The question is: Am I correct in thinking that no current public listing is available of at least the office-bearers of the BAC? If so, why is that?"

35. Despite follow up emails to her on 11 and 18 May 2020, Dr Kisubi-Mbasalaki did not favour the professor with the courtesy of a reply. In the answering affidavit herein Dr Chinyoka candidly admits that the request was intentionally ignored by the BAC.

"[31] The BAC took the view that Prof Benatar had no legal cause or right to the information sought under PAIA, and so did not want to give him any credence by way of a response. Prof. Benatar's e-mails were provocative and condescending. The best way to deal with them was simply to ignore them."

36. From May to November 2020, matters appear to have gone nap after the PAIA application was served on Dr Kisubi-Mbasalaki. And, then after an unexplained hiatus of 6 months, the professor took up the cudgels again. The replying affidavit shows that on Tuesday 24 November 2020, Prof. Benatar addressed an email to Prof. Nomusa Makhubu, enquiring whether she was still then the interim chair of the BAC, and if not, who the current chair was. Prof. Makhubu was also asked whether the BAC posted such information publicly.

37. When Prof. Makhubu did not reply, Prof. Benatar then approached a member of the university's administrative staff, Mr Royston Pillay, by email on Thursday 26 November 2020 asking whether he knew if details of the BAC's office-bearers were listed publicly. After no reply from Mr Pillay, Prof. Benatar was referred by an auto-reply response on the former's email account in the event of urgency, to Dr Karen van Heerden, then the Acting Registrar of UCT. Claiming that the matter was indeed urgent, on Tuesday 1 December 2020, Prof. Benatar requested a response

from the Acting Registrar who informed him that she was busy with other matters but would endeavour to respond later.

38. Dr van Heerden did indeed revert to Prof. Benatar after hours on the same day, explaining by email that she was unable to assist, while noting that she had sent an urgent message to Mr Pillay. To this Prof. Benatar responded –

"Thanks for your reply and for having looked into this. Identifying the current office bearers of the BAC is a perennial problem. They do not keep a public record of these details. They often do not reply to email enquiries for this information and Royston is sometimes unaware who the current Chair is. I hope that he has now established who the current chair is and will reply either to you or me."

At 21h24 that night Mr Pillay replied to Prof Benatar and told him that Dr Chinyoka was the secretary of the BAC.

39. The founding affidavit was then deposed to on 11 December 2020 and, as I have said, the application was launched on 14 December 2020 with the answering affidavit being filed on 8 April 2021.

40. The BAC has placed the relevance of the application, and the alleged protection of Prof. Benatar's rights directly in the spotlight. Its counsel, Mr. Sidaki made plain during argument that the professor bore the onus of establishing that he was entitled to the requested information and that he had advanced no legally tenable basis therefor.

41. In argument, Mr. Oppenheimer, counsel for Prof. Benatar, eschewed any reliance on a claim for damages for defamation (or any other form of *injuria*) or constitutional damages. Ultimately, said counsel, the case was grounded on the principle of restorative justice. Manifestly, any action based on wrongs (whether under the common law or statute) committed in 2015 and 2017 have prescribed. Counsel confirmed, too, that no proceedings of any sort were pending before any court, tribunal or private body.

THE APPROACH TO PAIA IN OUR COURTS

42. The right relied on by Prof. Benatar is protected in the Bill of Rights under s32 of the Constitution, 1996, which reads as follows.

"**Access to information**

32. (1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

43. In PFE International[5] the Constitutional Court provided the following background to the right and the legislation promulgated to enforce it.

"[3] The importance of this right has been explained by this Court in Brümmer v Minister for Social Development and Others.[6] In that case the Court said: —

'The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information '. . .. Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom

[5] PFE International Inc. (BVI) and others v Industrial Development Corporation of South Africa 2013 (1) SA 1 (CC)

[6] 2009 (6) SA 323 (CC) at [62] – [63]

of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.' (Footnotes omitted.)

[4] PAIA is the national legislation contemplated in section 32(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA."

The BAC, as a "private body", would fall within the category of "private person" referred to in this judgment.

44. S2(1) gives direction as to the interpretation of PAIA.

"When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects."

45. Fundamental to the enforcement of an applicant's rights under PAIA are the provisions of s50(1) thereof.

"(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 Act."

46. As already alluded to, the focus of the BAC's refusal to adhere to Prof. Benatar' s request is grounded in s50(1)(a): there is no suggestion that there has

been non-compliance with the procedural requirements of PAIA nor that the refusal is based on any of the grounds permitted in Ch. 4 of the Act.

47. In Metro Inspection Services[7], Streicher JA discussed the import of the right protected under s32 of the Constitution in circumstances which prevailed prior to the promulgation of PAIA.[8] That fact notwithstanding, the approach adopted was synonymous with an application under PAIA.

"[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 in terms of s 32, 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."

48. More recently, in Manuel[9], the Gauteng High Court discussed the import of s50(1)(a). The matter involved an application by a former cabinet minister for access to documentation allegedly held by the respondents which he said demonstrated that he and his wife had been the subject of unlawful surveillance. The applicant had come across an article in an online news and opinion service, the Daily Maverick, titled "*#Gupta Leaks: Guptas spied on Manuel, Malema and bank bosses"*. The article, he claimed, established that his personal information had been obtained unlawfully and he thus requested access to certain records held by the respondents with a view to identifying the appropriate defendants in order to exercise his constitutional right to privacy.

49. In assessing the enforceability of Mr Manuel's request for information under PAIA, with reference to various of the established authorities, Weiner J remarked as follows.

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[7] Cape Metropolitan Council v Metro Inspection Services Western Cape CC and others 2001 (3) SA 1013 (SCA)

[8] As the judgment demonstrates at [25], the vindication of the right was then advanced under certain transitional provisions then contained in Item 23 (2)(a) of Schedule 6 to the Constitution.

[9] Manuel v Sahara Computers (Pty) Ltd and another 2020 (2) SA 269 (GP)

"[28] In establishing that information is required for the exercise or protection of a right, Manuel is required to satisfy two distinct requirements. His counsel referred to various authorities in this regard. In summary, and based upon such authorities, the requisites are the following:

(a) Firstly, he must identify the right that he seeks to exercise or protect, and show that *prima facie*, he has established that he has such a right. In respect of section 50(1)(*a*) of PAIA the word 'any' before the word 'right' has been held to mean that the broadest possible interpretation must be given to what qualifies as a right for purposes of the section.

(b) Secondly, he must demonstrate how the information will assist in exercising or protecting the right in question. He must thus establish a connection between the information requested and the right sought to be exercised or protected and must '…"lay a proper foundation for why that document is reasonably 'required' for the exercise or protection of his or her rights"…' As was held in *Unitas Hospital v Van Wyk*,[10] while it does not suffice for Manuel simply to 'want' or 'desire' the Records, or state that they are merely 'useful' or 'relevant', he does not need to establish that they are 'essential' or 'necessary'. Instead, the information must provide Manuel with 'assistance' in the sense of 'substantial advantage or an element of need'. This requirement, which is 'accommodating, flexible and in its application fact-bound', means only that the information must be '…"reasonably" required in the circumstances." (Authorities otherwise omitted)

50. The learned Judge then referred to allegations made by Mr Manuel in the papers in which he clearly articulated the rights which he sought to vindicate.

"[30] Manuel acknowledges that he might have various legal remedies by which he can exercise or protect his right to privacy. Some of the causes of action and/or remedies to which he refers include:

(a) The *actio iniuriarum*, which would enable Manuel to sue for damages for the violation of his right to privacy.

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[10] 2006 (4) SA 436 (SCA) at [16]-[17]

(b) If the person/s who violated such rights is/are within the employ of the state (which, according to the Article, might well be the case), Manuel may also have a remedy arising from a breach of a statutory duty.

(c) If the disclosure and the surveillance of Manuel's movements involved members of the Intelligence Services, he might have claims arising from certain statutes relating to the Intelligence Services.

(d) If these unlawful activities are ongoing, he would be entitled to interdictory relief to protect against the ongoing and future invasion of his privacy.

[31] Manuel submits that the Records would provide him with assistance in the sense of substantial advantage or an element of need. In the absence of the Records, he does not know who his defendant would be, or what cause of action he has against such defendants. With the Records, he will be able to formulate his cause of action and identify the defendants."

51. In the result, the learned Judge found, on the facts before her, that Mr Manuel was entitled to the information requested.

"[44] In my view, Manuel is entitled to use PAIA to establish who his defendants might be and/or what cause of action he has against them. He does not require the Record to assess his prospects of success, which would amount to pre-litigation discovery. Thus, the request is permitted under PAIA and does not amount to pre-litigation discovery."

52. In this matter, not only must Prof. Benatar establish the right(s) which he intends to assert, he must also establish the further criterion contemplated under s50(1)(a) that the requested information is "required" to enable him to "exercise or protect…any [of his] rights."

53. The element of "requirement", which has been the subject of much judicial debate since the promulgation of PAIA, was summarized as follows by Brand JA in Unitas Hospital.

"[18] I respectfully share the reluctance of Comrie AJA[11] to venture a formulation of a positive, generally applicable definition of what 'require' means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term 'require' with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: the question whether the information sought in a particular case can be said to be 'required' for the purpose of protecting or exercising the right concerned, can only be answered with reference to the facts of that case having regard to the broad parameters laid down in the judgment of our courts, albeit, for the most part, in a negative form."

54. Finally, at para [21] of Unitas Hospital the learned Judge of Appeal stressed that the provisions of s50 of PAIA should not be permitted to be used for a pre-litigation fishing expedition: this would defeat the purpose of the discovery procedure (with its own discrete set of established principles) once the action had been commenced.

EVALUATION OF THE REQUEST

55. Considering Prof. Benatar' s request in the light of these authorities, I am driven to conclude that he has failed to establish, with the requisite degree of accuracy, what the right is that he wishes to exercise or protect and how the information requested from the BAC will assist him in exercising or protecting such right.[12]

56. The case commenced with the issuing of the Form C notice to the BAC. In the passage referred to above, Prof. Benatar states in that notice that he requires the information (or, more correctly the "Record" as it is called in PAIA) "in order to properly assess my options for exercising and protecting my rights." In such circumstances, Prof. Benatar is not entitled to the record as Gorven AJA held in Mahaeene[13].

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[11] This is a reference to the judgment in Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA) at [13]

[12] Cf. Metro Inspection Services at [28]

[13] Mahaeeane and another v Anglogold Ashanti Limited 2017 (6) SA 382 (SCA) at [17]

"[17] It seems clear that the underlying reasons given for why the records are required do not relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, do not meet the test of the records being required to 'exercise or protect' the right relied upon."

57. The case in the founding affidavit is purportedly made out in para's 12 - 14 thereof.[14] These allegations do not say what course of action at law Prof. Benatar intends pursuing.

58. It seems that the high-water mark of the case (as eventually articulated in the replying affidavit and as counsel for the professor submitted) is that he is considering embarking on a process based on the principle of restorative justice. This process has not been explained by Prof. Benatar and it is difficult to understand the right intended to be exercised, given that the term is customarily associated with criminal proceedings. The following extract from the website of the Western Cape Government demonstrates how restorative justice is ordinarily understood.[15]

"SUMMARY

Concerns about the effectiveness of traditional criminal justice systems have given rise to new approaches to criminal justice. One such approach is Restorative Justice, a theory that focuses on reconciling and reintegrating offenders into society rather than on retribution. This theory and its practical applications are explained briefly in this short article.

WHAT IS RESTORATIVE JUSTICE?

Restorative justice is a theory of justice that relies on reconciliation rather than punishment. The theory relies on the idea that a well-functioning society operates with a balance of rights and responsibilities. When an incident occurs which upsets that balance, methods must be found to restore the balance, so that members of the community, the victim, and offender, can come to terms with the incident and carry on with their lives.

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[14] See [19] above

[15] www.westerncape.gov.za/general-participation/what-restorative-justice

In order for this to happen, the offender must accept responsibility for the fact that his or her behaviour has caused harm to the victim, and the victim must be prepared to negotiate and accept restitution or compensation for the offender's wrongdoing. In essence, restorative justice aims as far as possible to 'put right the wrong'. It is based on the idea that we are all connected, that crime is a violation of relationships, and that such violations create obligations.

Although formal 'restorative justice programmes' were first introduced in countries such as Australia and New Zealand, restorative justice concepts are certainly not new to South Africa. In many South African communities, the way of dealing with children has traditionally included mechanisms that encourage children to take responsibility for their actions. This includes outcomes such as an apology, restitution and reparation, and restoring relationships between offender and victim.

In addition, where a community is involved, meetings are held publicly so as to provide everyone with a sense of ownership in the process. This is still evident in the way traditional courts function and the principles they uphold. Offenders in most cases are not separated from their support system of family and close relatives, and those closest to offenders hold them responsible. In other words, concepts that have now been labelled restorative justice have been in use in South African communities for some time…"

59. It is significant, as I have pointed out, that the papers make no mention of any response, whether contemporaneous or later, by Prof. Benatar to the 2015 statement. Yet he seeks now, some 6 years later, to engage in an undefined and nebulous process long after he appears to have buried the proverbial hatchet. Similarly, the 2017 statement, which appears to be far less direct in its criticism of Prof. Benatar than the 2015 document, has not been shown to have resulted in any further interaction between the parties. The BAC therefore was entitled to assume that Prof. Benatar did not intend taking the matter further and is hardly likely to embark now on any so-called "restorative justice" process.

60. Moreover, Prof. Benatar has not referred to any legal process, programme or forum in which his recently proclaimed desire for "restorative justice" vis-à-vis the BAC might be founded, commenced and pursued. The Court is left in the

dark as to why, after all these years, he now wishes to engage again with his erstwhile *bete noir*.

61. In the result, I have come to the conclusion that the application fails to clear the first statutory hurdle.

62. But, if I am wrong on this score, I consider that Prof. Benatar has in any event stumbled at the second hurdle – that of establishing "requirement". Viewing the two statements contextually, it is clear that they were issued by the BAC acting in its collective capacity. Further, its constitution informs Prof. Benatar of its objectives, its broader constituency and its status as a legal *persona.* Accordingly, any legal or other process aimed at exercising the professor's legal rights thus lies against the BAC as such and falls to be commenced against the BAC, for that is the entity which has been directly (in the case of the 2015 statement) and possibly also impliedly (in the case of the 2017 statement) critical of Prof. Benatar.

63. Knowledge of the identity of the office bearers and/or the membership of the BAC is not required to enable any legal (or other) process aimed at seeking the enforcement of rights and redress to commence, just as any potentially defamatory statement made on behalf of a duly constituted voluntary association such as a political party, a soccer club or a ratepayers' association, would not require the injured party to have or demand knowledge of the identities of the constituent members. In this case, the action lies against the BAC, plain and simple.

64. And, as matters now stand, Prof. Benatar in fact now knows from the various email exchanges in May and November 2020 as well as the answering affidavit, who the office-bearers of the BAC are and what its constitutional foundation and guiding principles are. There are two documents issued by the BAC upon which a claim for the protection of the professor's alleged good name and reputation might be based and he requires nothing more to advance such claim. To be sure, knowledge of the membership of the BAC at various junctures of its existence is no more required to advance a claim against the voluntary association which allegedly maligned the professor than knowledge of a company's shareholders might be to initiate a claim

against a corporate entity such as a newspaper or publishing house for defamation or breach of privacy rights.

65. The last part of the request – for production of all statements made by the BAC concerning Prof. Benatar – is, in the words of Brand JA in Unitas Hospital[16], no more than a fishing expedition. A request for that information now amounts to pre-litigation discovery, to which a PAIA applicant is not entitled.[17]

66. In the result the application must fail.

COSTS

67. In the notice of motion, Prof. Benatar asks for a punitive costs order against the BAC and that it should pay his costs on the attorney and client scale. No basis is advanced in the founding affidavit for this prayer. In the concluding paragraphs of the answering affidavit, the BAC gives its reasons for similarly asking that it be awarded punitive costs. It says that the application amounts to a fishing expedition and that Prof. Benatar was in possession of at least certain of the requested information before the PAIA application was launched. He is accused of litigating frivolously and vexatiously and is accused of abusing the court process.

68. At the end of the replying affidavit Prof. Benatar says the following in responding to para's 81 to 85 of the answering affidavit.

"[63] I deny these allegations. On the issue of costs, it is evident that I would not have been furnished with the names of the current BAC office bearers without launching this application, on that basis alone I should be awarded costs. I have made out a proper case for the relief that I seek."

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[16] At [21]

[17] See Manuel at [37] – [44] and the authorities there cited.

Once again, no case is advanced for asking for a punitive costs order. In argument, Mr Oppenheimer persisted with the relief sought in the notice of motion, describing the BAC's approach as "dilatory and unhelpful".

69. In reply, Mr Sidaki levelled similar criticism at Prof. Benatar, saying that he had presented a case that was fundamentally flawed and that a punitive costs order was warranted in the circumstances.

70. It is of some concern to the Court that Prof. Benatar has taken so long to approach the Court – in the case of the 2015 statement more than 5 years. And yet, in the founding affidavit there is very little said about that statement, the primary focus being on the 2017 document. When all had been said and done many years ago, he decided to rely on PAIA without explaining the obvious hiatus to the Court.

71. Further, in his private correspondence on 1 December 2020 with Dr van Heerden, when urgently pressing UCT's administrative staff for information regarding the identity of the office bearers, Prof. Benatar reverted to a theme that pervaded his interchanges in May 2020 with Dr Kisubi-Mbasalaki –

"Identifying the current office bearers of the BAC is a perennial problem. They do not keep a public record of these details. They often do not reply to email inquiries for this information and Royston [Pillay] is sometimes unaware who the current Chair is. I hope that he has now established who the current chair is and will reply either to you or to me."

72. Just what Prof. Benatar was about in seeking this information is not clear from the papers. In the answering affidavit, Dr Chinyoka remarks that Prof. Benatar is a senior academic who has been Head of the Philosophy Department for more than a decade. It is said by the BAC that Prof. Benatar is known by staff and students alike as a person with "enormous clout" in the university and that he does not shy away from controversial issues in the public domain "concerning the exercise of his authority at UCT". It is said further that Prof. Benatar has been criticized by other academics in the media and that he has similarly criticised others on public platforms.

73. If he was intending to exercise his "clout" and give the BAC a lesson on what he considered to be ethical conduct in academia, this litigation could certainly be categorized as an abuse of process. But that issue has not been properly ventilated on the papers and I can make no finding one way or the other in that regard.

74. The answer on the issue of attorney–client costs is to be found, in my view, in the old Cape decision in Alluvial Creek[18] where Gardiner J stated the approach thus.

"Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

The case has been cited with approval on numerous occasions in the Supreme Court of Appeal.[19]

75. In this case, a voluntary association representing a group of concerned academics has been put to unnecessary expense in opposing an application which is without merit. That constitutes vexatious litigation as contemplated in Alluvial Creek and a punitive costs order may be made.

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[18] *In re* Alluvial Creek Ltd 1929 CPD 532 at 535

[19] See for example Claase v Information Officer, South African Airways (Pty) Ltd 2007 (5) SA 469 (SCA) at [11]; Boost Sports Africa (Pty) Ltd v The South African Breweries (Pty) Ltd 2015 (5) SA 28 (SCA) at [27].

ORDER OF COURT

The application is dismissed with costs on the scale as between attorney and client

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GAMBLE, J

Appearances:

For the applicant:

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c/o Marais Muller Hendricks Inc., Cape Town.

For the respondent:

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