(Western Cape Division, Cape Town)

Reportable

Case No: 16325/2021

In the matter between:

CHANDRE GOOSEN-JOUBERT **Applicant**

vs

WOMEN4WOMEN NPC **Respondent**

JUDGMENT DELIVERED ON 16 MAY 2022

MANTAME J

INTRODUCTION

[1] The applicant approached this Court for a relief after the respondent, who is an affiliate of Mrs South Africa ("Mrs SA"), a company running a beauty pageant for married women in South Africa, refused her access to information. This application served before this court in terms of Section 78(2)*(d)*(i) of the Promotion of Access to Information Act 2 of 2000 ("PAIA"), after the respondent ("W4W") refused the applicant access to the requested documents. The applicant seeks an order in terms of Section 82 of PAIA in the following terms: (i) that the decision of the respondent not to provide the applicant with the information requested be set aside; and (ii) the respondent provide the applicant with the requested documents.

[2] The respondent opposed this application on the following grounds, some of which were raised belatedly in their heads of argument, that: (i) the applicant has not complied with all the procedural requirements prior to launching this application; (ii)

the applicant was provided with access to the documents that she requested in the prescribed Form C, that she submitted to W4W in terms of Section 53 of PAIA, after she delivered the Form C, but prior to launching this application; (iii) the applicant does not require the requested documents for the exercise of her rights because, *firstly,* the requested documents and rights to be exercised, as stated in the Form C, differs substantially from the requested documents and rights to be exercised as alleged in this application, and, *secondly,* the applicant has failed to provide evidence that the requested documents are 'required' for the exercise of her rights; and that (iv) the applicant has brought the application for an ulterior motive. She has embarked on a social media smear campaign against W4W and its director, namely Ms Cindy Nell-Roberts ("Ms Nell-Roberts). She has abused the procedures set out in PAIA for the purpose of obtaining pre-action discovery, and worse yet, to harass W4W and Ms Nell-Roberts.

Background Facts

[3] On 9 June 2021 the applicant submitted to the respondent a formal request for access to information in terms of Section 50 of PAIA. In this request, and under the heading: '**description of the record or relevant part of the record**', the applicant requested:
'Annual reports of Women4Women which includes narrative reports, financial statements as well as the accounting officer's reports for the financial year 2019, 2020 and 2021 as is required in terms of the Non-Profit Organisation Act. I also request the Constitution of Women4Women.'

[4] On 27 July 2021 the respondent's attorney addressed a letter to the applicant and stated:
'2. . . . our client is only obliged to give access to any record if that record is required for the exercise or protection of any right. The protection or exercise of the rights referred to in your application for access to information is independent of your entitlement to the records requested. Having said that, please be advised that all the information which is required to be disclosed to the public law (sic), is freely available on our client's website . . .

3. Furthermore, we advise that PAIA is not applicable if the record is requested for the purpose of criminal or civil proceedings. As you have stated in your request for access that your "request is also for possible recourse", your reliance on the provisions of PAIA is misconstrued.'

[5] As stated at the commencement of this judgment, the W4W is a non-profit organisation affiliated to Mrs SA, a private company incorporated in terms of the Company Laws of South Africa, that runs a pageant for married South African women.

[6] Mrs SA concluded a written agreement with the respondent, specifying the terms of their affiliation to the respondent. In terms of this agreement, Mrs SA would raise funds for all the affiliates through the aforementioned beauty pageant.

[7] On 26 February 2020 the applicant entered the Mrs SA beauty pageant as a contestant. At the time, it was made known to her that 312 other contestants had also entered the beauty pageant. The 312 contestants were then reduced to 100 contestants ("Top 100"). Following the Top 100 contestants, there was another elimination process to 50 contestants ("Top 50"). Further, another round of eliminations followed to 25 contestants, which progressed to the final event of the beauty pageant. The applicant competed through each round of the elimination process and made it to the final event of the beauty pageant.

[8] After each round of the elimination process, all the contestants, including the applicant, were required to conclude written agreements with Mrs SA. For instance, in respect of the Top 100 contract, all the contestants were required, in terms of clauses 4.7.7 and 4.7.9, to do the following in respect of the respondent:

'The semi-finalist will sell 5 tickets to the Women4Women Breakfast on Sunday 26th April 2020 at R450 each. The total of R2250 must be paid directly (sic) bank account which will be provided on or before Friday 10th April 2020 . . .

The semi-finalist will in addition to the above, sell ten (10) tickets to the Charity Gala dinner, at R1250 each. This R12 500 must be paid to the bank account which will be provided by Friday 19th June 2020 . . .'

[9] In respect of the Top fifty contract, all the contestants were required, in terms of clauses 4.7.7 and 4.7.9, to do the following in respect of the respondent:
'The semi-finalist will sell five (5) tickets to the Women4Women Breakfast on Sunday 18th October 2020 at R450 each. The total of R2250 must be paid directly (sic) bank account which will be provided on or before Friday 30th September 2020 . . .
The semi-finalist will in addition to the above, sell ten (10) tickets to the Charity Gala dinner, of R1250 each. This R12 500 must be paid to the bank account which will be provided by Friday 30th September 2020 . . .'

[10] In respect of the Top 25 contract, all the contestants were required, in terms of clauses 4.7.7 and 4.7.8, to do the following in respect of the respondent:
'The Finalist will host a fundraising event/campaign in aid of Women4Women, as stipulated in the Mrs SA Operation Manual, with a minimum profit of R10 000.
The R10 000 minimum profit must be paid in full by 31 January 2021 to the Mrs SA Standard FNB (sic) account.'

[11] Because of the Covid 19 pandemic and the resultant lockdown restrictions, the April 2020 Breakfast, referred to in paragraph 8 above, was moved to 18 October 2020 and was held at Emperor's Palace, Johannesburg. The contestants were required to pay the aforementioned funds for this breakfast between the periods 8 August – 8 October 2020.

[12] The Charity Gala dinner that had to follow was held at Casalinga, Muldersdrift on 13 November 2020. The contestants had to raise the funds for this gala dinner between the periods 8 August – 23 October 2020.

[13] According to the applicant she met each of the requirements in terms of the aforementioned contracts. In fact, she stated that she went over and above these requirements, and raised an amount of R136 100 for W4W, in addition to the aforementioned amounts. The payment was effected in two payments. First, the applicant paid into Mrs SA's First National Bank ("FNB") bank account an amount of R9 000, and second, she paid an amount of R136 100 into the respondent's FNB bank account.

[14] The final event of the Mrs SA beauty pageant was held on 18 March 2021. Regrettably, the applicant did not win the title of “Mrs South Africa 2021” on that evening; notwithstanding, she was awarded the “Mrs Charity” title. Despite the fact that she did not win the “Mrs South Africa” title, being awarded the “Mrs Charity” title meant that she would be affiliated to Mrs SA and the respondent.

[15] On 23 March 2021 the applicant was furnished with a contract in respect of Mrs Charity title. In terms of the contract, she was required to raise more funds for the respondent. Despite having to raise more funds for the respondent, she would also be responsible for any costs incurred by her as Mrs Charity, for example, transportation and accommodation costs.

[16] Since the applicant had previously incurred an exorbitant amount of costs on the Mrs SA beauty pageant, the terms of the contract did not sit well with her. On reflection, she became even more uncomfortable with what she was getting herself into. She then decided not to sign the contract, and informed Mrs SA, in an email dated 24 March 2021, that she could not accept the title of Mrs Charity.

[17] On 15 April 2021 the applicant proceeded to publish a statement on her Instagram account that she would not be accepting the Mrs Charity title. In this publication, she did not provide any reasons for her repudiation of this title. She somehow reserved her right to reveal her reasons at a later stage. Following the Instagram post, Mrs SA, and the persons closely associated therewith, embarked on what she called a smearing campaign to invalidate her concerns about the *bona fides* of the beauty pageant. One ‘Johnson’, the director of Mrs SA, instituted proceedings against her and two others, in respect of which it was alleged that she published defamatory statements against them. The proceedings were instituted as follows:

17.1 On 9 June 2021 they instituted proceedings to this Court under Case No.: 9742/2001 (“the first application”); and

17.2 On 22 June 2021, they instituted proceedings to this Court under Case No: 10524/2021, on an urgent basis, in respect of which they sought similar (if not the same) relief as in the first application (“the second application”).

[18] In respect of the first application, the Registrar of this Court issued and authorised the disclosure of the bank statements of the respondent's FNB bank account, in terms of a *subpoena duces tecum*, on 23 June 2021. The second application was dismissed by Henney J on 29 June 2021.

[19] Due to the fact that the applicant contributed to the respondent, she asserts that she is entitled to the information requested on 9 June 2021. As W4W is a non-profit organisation that is concerned with the upliftment of women, she is entitled to know how its funds are disbursed.

[20] On 8 July 2021 FNB provided the applicant with the respondent's bank statements for the period May 2020 – May 2021. Upon perusal of these bank statements, the applicant noticed that there had been numerous personal payments made from the respondent's account, as follows, as reflected in annexure "CGJ14.1":

20.1 On 3 April 2020 R250 000 was inexplicably transferred from the respondent's bank account, without any reference or explanation recorded for this payment;

20.2 On 3 April 2020 R750 was paid to Figure It, a private gym in Durbanville. This is seemingly a membership to a gym for one person which the respondent paid for monthly. Similar payments are reflected in the other statements that were made available;

20.3 On 11 April 2020 R282.49 was spent on a Facebook game;

20.4 On 23 April 2020 R5 000 was paid to Jacqueline Ferns, who was crowned Mrs South Africa 2020;

20.5 On 24 April 2020 R750 was paid to Figure It.

[21] In respect of annexure "CGJ14.2":

21.1 On 15 May 2020 R44.99 was paid in respect of an Apple subscription;

21.2 On 25 May 2020 R750 was paid to Figure It;

21.3 On 26 May 2020 R59.99 was paid in respect of an Apple subscription.

[22] In respect of "CGJ14.3":

22.1 On 2 June 2020 R575 was spent on a Facebook game (Strike War Gaming);

22.2 On 11June 2020 R154.55 was spent on a Facebook game;

22.3 On 18 June 2020 R44.99 was paid in respect of an Apple subscription;

22.4 On 25 June 2020 R55.99 was paid in respect of an Apple subscription;

22.5 On 26 June 2020 R750 was paid to Figure It.

[23] In respect of "CGJ14.4":

23.1 On 1 July 2020 R500 was paid to Nolene Trainer, a personal trainer. The reference used for this payment was "Cindy Nell-Roberts".

[24] In respect of "CGJ14.5":

24.1 Two payments of R750 were made to Figure It, on 20 and 27 August 2020.

[25] In respect of "CGJ14.6":

25.1 On 5 September 2020 R690 was paid in respect of Facebook purchase;

25.2 On 19 September 2020 R750 was paid to Figure It.

[26] In respect of "CGJ14.7":

26.1 On 21 October 2020 R690 was paid in respect of a Facebook purchase;

26.2 On 23 October 2020 R11 200 was paid in respect of school fees;

26.3 On 23 October 2020 R750 was paid to Figure It;

26.4 On 27 October 2020 two payments were made to Ace Models, a modelling agency. The first payment was in the amount of R2 100, and the second payment was in the amount of R600. Ms Nell-Roberts is a director and co-owner of Ace Models.

26.5 Between the periods 23 – 30 October 2020, numerous Uber trips were paid for from this bank account.

[27] In respect of "CGJ14.8":

27.1 On 13 November 2020 R6 000 was paid to Ace Models;

27.2 On 13 November 2020 R690 was paid in respect of a Facebook purchase;

27.3 On 27 November 2020 R750 was paid to Figure It;

27.4 On 27 November 2020 R4 500 was paid to Ace Models;

27.5 Between the periods 16 – 30 November 2020, numerous Uber trips were paid for from this bank account.

[28] In respect of "CGJ14.9":

28.1 On 11 December 2020 two payments were made to Ace Models. The first payment was in the amount of R4 800, and the second payment was for the amount of R4 620;

28.2 On 30 December 2020 R750 was paid to Figure It;

28.3 Between the periods of 9 – 26 December 2020 numerous Uber trips were paid for from this bank account.

[29] In respect of "CGJ14.10":

29.1 On 19 January 2021 R10 126 was paid to Mrs SA;

29.2 On 29 January 2021 R750 was paid to Figure It;

29.3 On 29 January 2021 an Uber trip was paid for from this bank account.

[30] In respect of "CGJ14.11":

30.1 On 9 February 2021 R350 was paid in respect of a Bishops' cat class. The reference used was Ms Nell-Roberts' minor son;

30.2 On 26 February 2021 R750 was paid to Figure It;

[31] In respect of "CGJ14.12":

31.1 On 11 March 2021 R8 000 was paid for Ms Nell-Roberts' minor daughter's 8th birthday party;

31.2 On 13 March 2021 R690 was paid in respect of a Facebook purchase;

31.3 On 2 March 2021 R750 was paid to Figure It.

[32] In respect of "CGJ14.13":

32.1 On 30 April 2021 R750 was paid to Figure It.

[33] Ms Nell-Roberts, it was said, has admitted making numerous payments for personal expenses, which she alleges were made 'erroneously' from the

respondent's bank account. The applicant contended that the truth was rather that charity funds that were intended for women's empowerment, community upliftment and youth education, were used to pay for personal expenses. It was the applicant's contention that Ms Nell-Roberts tried to silence her by instituting legal proceedings against her.

[34] On 9 July 2021 Ms Brigitte Willers, on behalf of the respondent, emailed her and stated the following:

34.1 an invitation was extended to her to meet the respondent's auditors and life skills development teachers, to show her the documents relating to what they do and how they distribute charity funds; and

34.2 an offer to donate the funds she had raised for them to a different non-profit organisation was made.

[35] Since the applicant had not received the requested access to accounting records, on 11 July 2021 she sent a letter to the respondent again requesting to be furnished with the accounting records. This letter was not responded to by the respondent.

[36] On 26 July 2021 a further letter was forwarded to the respondent, requesting the accounting records. In an email dated 26 July 2021, the respondent informed her that they sent the documents requested to Mrs SA, to share with the past and the present contestants, and that the respondent added these documents to their website. In addition, on 27 July 2021 they addressed a letter to the applicant informing her that the respondent is only obliged to provide documents they are required to disclose; the requested documents were available on their website; and that PAIA did not apply to any other documentation requested for the institution of criminal or civil proceedings.

[37] The applicant stated that the respondent's interpretation of PAIA is incorrect. She has not commenced with any criminal or civil proceedings against the respondent, and was not precluded by Section 7 of PAIA from making the aforementioned request. On 28 July 2021 she forwarded a letter to the respondent, in which she informed the respondent that the financial statements published on the

website were not all the documents requested by her and that her rights in respect of their failure to provide her access thereto remained reserved.

Issues

[38] This court is called upon to determine whether the applicant is entitled to the information requested in terms of Section 78(2)*(d)*(i) of PAIA, and whether the respondent furnished the requested information.

Discussion

[39] Prior to the amendment of 30 June 2021, the section read:

'**Section 78. Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies -** (1) . . .

(2) A requester –

. . .

(d) aggrieved by a decision of the head of a private body –

(i) to refuse a request for access; or

(ii) . . .

may, be way of an application, within 180 days apply to a court for appropriate relief in terms of Section 82.'

The applicant submitted that since the request for information ensued on 09 June 2021, the provisions of PAIA pre-amendment apply to these proceedings. It was the applicant's contention that in a situation where the respondent has failed to furnish her with the requested information, she has the right to access to that information within the confines of Section 32 of the Constitution[1]. PAIA was enacted to move away from a past characterised by 'a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violation' and seeks to 'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information'[2].

[40] In response to this application, W4W raised some points in *limine*. First, that the applicant had failed to comply with procedural requirements. However, at the hearing of this application, the respondent's counsel conceded that the applicant was

[1] The Constitution of the Republic of South Africa Act 108 of 1996.
[2] Preamble of PAIA.

not required to proceed with an internal appeal against the respondent's decision not to furnish her with the requested information. Section 74 of PAIA relates to an internal appeal against the decision of a public body, whereas the respondent is a private body. This point was not persisted with.

[41] Second, the respondent stated that the applicant had been required to exhaust the complaints procedure set out in Section 77A of PAIA prior to launching this application. Section 78 of PAIA, which the applicant relied on, was substituted by section 110, read with paragraph 19 of the schedule to the Protection of Personal Information Act[3] ("POPI"). The amendment to the aforesaid provision of PAIA was effective from 30 June 2021 – so, the applicant relied on this section as it was prior to the amendment. It was the respondent's contention that Section 78(1) of PAIA, as amended, provides for the jurisdictional requirements that must be present for this court to hear the application. This section, as amended, states that:

'A requester or third party may only apply to a court for appropriate relief in terms of section 82 in the following circumstances:

> (a) after that requester or third party has exhausted the internal appeal procedure referred to in section 74; or
>
> (b) after that requester or third party has exhausted the complaints procedure referred to in section 77A.'

[42] Section 77A(2) of PAIA states that:

'A requester –

> (a) . . .
>
> (d) aggrieved by a decision of the head of a private body –
>
> > (i) to refuse a request for access; or
> >
> > (ii) taken in terms of section 54, 57(1) or 60;

may within 180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Information Regulator in the prescribed manner and form for appropriate relief.'

It was the respondent's submission that the applicant launched this application on 22 September 2021, after the amendment of PAIA had taken place. In the respondent's

[3] Act 4 of 2013.

opinion, the applicant was required to submit a complaint to the Information Regulator after the respondent denied her access to the requested information. No complaint to that effect was submitted by the applicant. An application to this court for appropriate relief was premature, as the jurisdictional requirements have not been met. The respondent therefore requested that this application be dismissed on this ground alone.

[43] On the merits, it was stated that the applicant has been given access to the documents she requested, by such documents having been placed on their website. The said documents were annexed by the applicant in her founding affidavit. The respondent went a step further and requested the applicant to attend a meeting with the respondent's auditors to discuss the issues related to the respondent.

[44] The respondent stated that the requested information is not necessary for the exercise of applicant's rights. Notably, the request in the Form C differs from the request in the application. In the Form C, she requested: 'Annual reports for Women4Women, which includes narrative reports, financial statements, as well as the Accounting Officer's reports for the financial year 2019, 2020 and 2021 as required in terms of the Non Profit Organisations Act. I also request the Constitution of Women4Women.' In this application, the applicant requested: 'The general ledgers, other documents and books used in preparation of the Respondent's financial statements in respect of 2018, 2019, 2020 and 2021.' As stated by the respondent, the applicant needed to be clear and unequivocal in her request. In other words, she needed to comply with the peremptory provisions of PAIA, and failure to do so renders this application fatally defective. In *Fortuin v Cobra Promotions CC*[4] it was stated:

'The Information Act [ie PAIA] affords subjects an extraordinary remedy, which could be open to abuse. This is why the Legislature states in clear terms that persons to whom requests are addressed should be appraised, not only of why the requester seeks the information, but should also be given an explanation for the request. Without this information, the person to whom the request is addressed cannot

[4] (1658/09) [2010] ZAECPEHC 40 (17 June 2010) para 15. See also: *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184 (26 November 2014).

evaluate whether the requirements of section 50(1), which obliges disclosure, have been met. Like that provision, both subsections of section 53 are cast in peremptory terms. Failure to specify the right the requester seeks to exercise or protect and to provide an explanation for why the information is required will generally be fatal to a request.'

[45] In the respondent's view, no evidence was provided that the applicant requested the 'required' documents or information to exercise her rights. In the respondent's opinion, the applicant indicated in Form C that she required the documents to exercise her right to '[j]ust administrative action and promotion of public interest' and '[t]he right of equality before the law.' The respondent viewed the rights mentioned by the applicant as vague. In this application, she indicated that she required the documents to exercise her right to lodge a complaint in respect of Ms Nell-Roberts' 'alleged transgressions of provisions of the Companies Act', and to lay a criminal charge of theft against Ms Nell-Roberts and other signatories of Women4Women with the South African Police Service ("the SAPS"). In the respondent's further opinion, the rights stated by the applicant are primarily targeted at Ms Nell-Roberts, and not W4W.

[46] The respondent relied on numerous authorities in its illustration for the word 'required', as stated in Section 53 of the PAIA. For instance, it was stated that in *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others*[5], Streicher JA held that;

'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.'

[47] In addressing the remarks made by Streicher JA above, Comrie AJA in *Clutchco (Pty) Ltd v Davis*[6] stated:

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[5] (10/99) [2001] ZASCA 56 (30 March 2001) para 28.
[6] (035/04) [2005] ZASCA 16 (24 March 2005) para 13.

'. . . the words "assistance" and "assist" . . . indicates that "required" does not mean necessity, let alone dire necessity. I think that reasonably required in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. . . .'

[48] In delivering the majority judgment, it was argued that Brand JA approved Streicher JA's remarks in *Unitas Hospital v Van Wyk and Another*[7], and held that:
'. . . it is said that it does not mean the subjective attitude of "want" or "desire" on the part of the requester; that, at the one end of the scale, "useful" or "relevant" for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is "essential" or "necessary" for the stated purpose. . .'

[49] Navsa ADP in *Company Secretary of Arcelormittal SA*[8] reiterated that the question of whether a record is 'required' is inextricably linked to the facts of the matter. The court went on to state that:

'Thus, the word "required" in s 50(1)*(a)* of PAIA should be construed as "reasonably required" in the prevailing circumstances (see *Clutchco* para 12). A scrutinising court should determine whether an applicant for information did "lay a proper foundation for why that document is reasonably required for the exercise or protection of his or her rights". . . .'

[50] In a more recent judgment, *My Vote Counts NPC v Speaker of the National Assembly and Others*[9] Cameron J held that:
'. . . The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact-bound. . . .' (Internal footnote omitted.)
In essence, it was the respondent's submission that the applicant must show an element of need to access the requested documents, and that such access would be substantially advantageous.

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[7] (231/05) [2006] ZASCA 34 (27 March 2006) para 16.
[8] Fn 4 above paras 49-50.
[9] (CCT 121/14) [2015] ZACC 31 (30 September 2015) para 31.

[51] The respondent stated that the bank statements in the applicant's possession, are sufficient evidence for the applicant to make an election of whether to pursue recourse against W4W (and/or Ms Nell-Roberts) for transgressions of the Companies Act. The extent of the alleged transgressions is an issue that will become relevant if the applicant pursues such recourse. In *Unitas Hospital* the SCA held that the spouse of a man that passed away during or after a medical procedure, was not entitled to the doctor's report that would show the full extent and details of the alleged medical negligence on the part of the hospital staff. The SCA held that the spouse had sufficient facts at her disposal to make an election of whether to pursue a claim for medical negligence against the hospital. The doctor's report would do no more than possibly expound on the extent of such claim. It was said that the same principle applies in this application.

[52] It is the respondent's belief that the applicant has an ulterior motive in launching and persisting with this application. In respondent's understanding, it is evident from this application that the applicant has a long-standing feud with Ms Nell-Roberts and W4W. The applicant persistently posted information relating to the issues that she has with Ms Nell-Roberts, and W4W, on social media platforms, and made antagonistic and personal remarks about Ms Nell-Roberts. The applicant launched this application against the respondent, but relies exclusively on misconduct allegedly committed by Ms Nell-Roberts in asserting that she 'requires' the requested documents so that she can pursue legal recourse against Ms Nell-Roberts. It was submitted that the applicant has not made out a case against W4W, has failed to comply with the procedural requirements set out in PAIA and, further, she has failed to show that she 'requires' the requested documents to exercise her rights. The application should therefore be dismissed with attorney-client costs.

[53] The applicant took issue with additional point in *limine* that was raised in the respondent's heads of argument, and not mentioned in their answering affidavit so as to be able to deal with the point properly. It was submitted by the applicant that the respondent's actions smack of opportunism.

[54] In her response to this point, the applicant acknowledged the amendment of certain provisions of PAIA with effect from 30 June 2021. Notwithstanding this, the

applicant asserted that she applied for access to the information on 9 June 2021, prior to the amendment taking place. It is trite that, in our common law, there is a presumption that statutes do not apply retrospectively. This presumption against retrospectivity has found wide recognition in case law for purposes of both statutory[10] and constitutional interpretation.[11] The presumption is based on legal certainty and fairness, ie that persons should know what the law is to 'conform their conduct accordingly'[12]. Meaning that any acts completed before the commencement of a statute belong, as far as that statute is concerned, to the past.[13] There are no provisions in PAIA or POPI that express or imply that any of the amendments of PAIA apply retrospectively. Therefore, the presumption against retrospectivity applies to this application. It was stressed that the provisions of PAIA applicable before the amendments are applicable in this application.

[55] Further, after the respondent's refusal of the applicant's request to access to information, Section 56 of PAIA governs the manner in which the respondent should respond to the requester, and it reads as follows:

'(1) . . . the head of the private body to whom the request is made must, as soon as reasonably possible, but in any event within 30 days, after the request has been received or after the particulars required in terms of section 53 (2) have been received –

(a) decide in accordance with this Act whether to grant the request; and

(b) notify the requester of the decision and, if the requester stated, as contemplated in Section 53 (2) *(e)*, that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

. . .

(3) If the request for access is refused, the notice in terms of subsection (1) *(b)* must –

(a) state adequate reasons for the refusal, including the provisions of this Act relied on;

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[10] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) paras 27 and 68.
[11] *S v Mhlungu* 1995 (3) SA 867 (CC) paras 37 - 38.
[12] *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) para 36.
[13] *Du Plessis v Raubenheimer NO* 1917 OPD 104 at 111.

(b) exclude, from any such reasons, any reference to the content of the record; and

(c) state that the requester may lodge a complaint to the Information Regulator (sic) an application with a court against the refusal of the request, and the procedure (including the period) for lodging a complaint to the Information Regulator or the application.'

[56] The applicant submitted that if the respondent relied on the amended provisions of PAIA, it similarly failed to comply with the new provisions as stated in Section 56. The respondent was supposed to furnish the applicant with its decision to refuse the applicant's requested information within 30 days, but failed to do so. In addition, she was not obliged to first exhaust the internal appeal procedures as referred to in Section 78(1)*(a)*. The respondent's interpretation herein is at odds with Sections 56(3)*(c)*, 54(3)*(b)* and *(c)*, 56(2)*(c)* and 57. According to the applicant, if regard is had to these sections, a requester who is aggrieved in the relevant scenarios under these provisions may lodge a complaint with the Information Regulator or (which is missing/omitted from Section 56(3)*(c)*) bring an application to the court. The applicant's stance is that the requester is given a choice between the two processes. In any event, it was the applicant's contention that the respondent had failed to comply with Section 56(3)*(c)* – such a notice was not given, if their reference to the new provisions of PAIA was to be a consideration in this matter.

Analysis

[57] The applicant in this application is not farther from the respondent. Gathering from the allegations in the founding affidavit, she spent some time with the respondent, as each time she succeeded to the next level of the Mrs SA contest, she and other contestants were required to raise funds for the respondent. It has not been disputed that the respondent is an affiliate of Mrs SA. Mrs SA draws married women from the entire country to compete in this prestigious event. This beauty pageant is said to be an empowerment and support programme for married women in South Africa, and it is a life-changing journey for the women who enter this renowned empowerment programme.

[58] There is no doubt that, as an affiliate of Mrs SA, the respondent's objectives and purpose mirrored that of Mrs SA. As indicated, W4W is a non-profit organisation and that its main focus is on women's empowerment, community upliftment and youth education. Considering the value and/or the amount raised by the applicant for the respondent, she was motivated to be part of this esteemed event.

[59] It would be prudent to first deal with the point in *limine* raised by the respondent. To the extent that the remaining point in *limine* was raised in respondent's heads of argument, and not in the answering affidavit, the Supreme Court of Appeal in *Louw and Others v Nel* remarked, with reference to motion proceedings, that the parties' affidavits constitute both their pleadings and their evidence.[14] Pleadings must be lucid, logical and intelligible. A litigant must plead his or her cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his or her opponent to the case that must be met. A litigant who fails to do so may not afterwards advance a contention of law or fact where its determination may depend on evidence which his or her opponent has failed to place before the court because he or she was not sufficiently alerted to its relevance.[15] (Emphasis added)

[60] The respondent's view in this regard was that the point raised *in limine* constitutes a legal point. It was at liberty to raise a point of law in their heads of arguments.

[61] The argument put forward by the respondent in this instance is misplaced, in the sense that if this court were to find that the applicant has failed to comply with the jurisdictional requirements before approaching this court, that would be the end of this application. This point on its own is dispositive of the matter. However, it is not open to the respondent to raise an important point *in limine* in their arguments. The applicant is entitled to deal with the respondent's defences properly and procedurally. Litigation by ambush is not palatable.

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[14] 2011 (2) SA 172 (SCA) para 17.
[15] *National Director of Public Prosecutions v Phillips and Others* 2002 (1) BCLR 41 para 36.

[62] It is my considered opinion that the respondent should have raised the second point *in limine*, and further points on merits, in its answering affidavit, so as to be dealt with by the applicant in her replying affidavit. For this reason, the applicant was compelled to file supplementary heads of argument in order to deal with the belatedly raised point *in limine*, and further points on merits, that appeared for the first time in argument. Even if it were to be argued that the point raised by the respondent is a point of law, regard is to be had to the fact that its determination depends on evidence which the respondent did not place before court, but which could be gleaned only in their heads of argument. Be that as it may, the procedure adopted by the respondent is not desirable and has to be discouraged at all times.

[63] However, to the extent that the point raised suggests that the applicant was required to exhaust the complaints procedure set out in Section 77A of PAIA prior to the launch of this application, this point has to be dealt with. In the respondent's view, Section 78 of PAIA was substituted by Section 110, read with paragraph 19 of the Schedule to POPI. The applicant was required to submit a complaint to the Information Regulator after the respondent denied the applicant the information requested. So the jurisdictional requirements, so said the argument, have not been met.

[64] In a situation where the process of a request for information was initiated before the commencement of the enacted provisions, it was not competent for the applicant to escalate the process using the enacted provisions. Otherwise, if that would be allowed, it would create confusion and contribute to the lack of clarity if both old and new provisions of PAIA/POPI would be utilised in this process simultaneously. The Constitutional Court in *Veldman*[16] stated:

'26. Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and

[16] Fn 10 above.

stable. Legislative enactments are intended to “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed”.

27. As Innes CJ reasoned in *Curtis*:

> “The general rule is that, in the absence of express provision to the contrary, statues should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.’ (Internal footnotes omitted, own emphasis supplied.)

[65] In the circumstances the respondent’s submission on the applicant’s failure to comply with jurisdictional requirements is not assailable. However, since the process of the request for information started before the commencement of the new provisions, it follows therefore that the process would continue and be concluded as such in terms of the old provisions for purposes of clarity, stability and certainty. The launch of this application on 22 September 2021 does not automatically mean that the applicant should assume the new provisions of PAIA. I tend to agree with the applicant’s submission that the presumption of retrospectivity is applicable in matters such as the present. The applicant, in the circumstances, cannot be faulted for approaching this court for appropriate relief.

[66] Now, with regards to the merits, first the respondent stated that the applicant was provided with access to the documents that she requested, in their website, and the said documents were annexed by the applicant in her founding affidavit, and that the applicant was invited to a roundtable discussion to meet with the respondent’s auditors to thrash out issues that were of applicant’s concern. It appears that the respondent did not appreciate the fact that the applicant embarked on a formal process in terms of PAIA. A formal request having been made to the respondent, it was not open to the respondent to treat the applicant in a cavalier manner by sending her to their website and/or assuming that the information requested was received, simply because some of the information was annexed in the applicant’s founding affidavit. Common sense dictates that, the fact that the applicant proceeded with an application, gives credence to her remonstration that the information requested was not received and that remained the applicant’s stance throughout these proceedings. Further, the formal process having been embarked upon, it was

not clear from the respondent what a roundtable discussion with the auditor would have achieved. It was not clear whether this invitation to a meeting was with or without prejudice. In light thereof, it is my interpretation that the respondent in this regard attempted to sway the applicant off track by making these suggestions. In the evidence before this court, there is no intimation that the parties attempted to settle the matter.

[67] The applicant is correct in her submission that the respondent has not complied with Section 56 of PAIA, as their response failed to comply with the 30-day period as stipulated. The request was made on 9 June 2021, and the response was received on 27 July 2021. However, the assertion by the respondent that the information was made available through its website, seems to be in stark contrast with the respondent's contention that the applicant does not 'require' the requested documents for the exercise of her rights and/or that the applicant has failed to provide evidence that the requested documents are 'required' for the exercise of her rights. If such was the respondent's view, why was it necessary for it to make the documents it said it furnished available through its website?

[68] In any event, the applicant stated in Form C, amongst others, that the information is required for the exercise or protection of the aforementioned right – '. . . my request is also for possible legal recourse.' Whether the applicant stated in this application that she wanted to institute civil or criminal proceedings is neither here nor there, as all types of proceedings can be referred to as legal recourse in layman's terms. A Form C (prepared by a layman) and an application (prepared by a legally qualified person) to the high court would not, in my view, adopt the same terminology and the same style of articulating issues. There is no requirement that the one procedure must be the carbon copy of another. In my opinion, the documents requested and the reasons therefore remain the same. There is nothing untoward, in my view, in the description of the right that is required to be protected and/or exercised. Whether the said proceedings would be meant for Ms Nell-Roberts and/or the respondent, is irrelevant at this point, as the applicant still awaits the documents to be furnished by the respondent. It follows therefore that the resultant legal proceedings (civil of criminal) would commence once the applicant examined

the documents requested. The ultimate transgressor, if any, would be borne out by what is contained in the documents to be furnished.

[69] The applicant, as stated above, raised a considerable amount of money for the respondent. Even if she was a general member of the public, and had a reason to believe that the respondent's funds were not being used in a manner that it was intended, she was entitled to invoke the provisions of PAIA. The right to access to information fosters a culture of transparency and accountability in public and private bodies. The applicant clearly requires the documents requested.

[70] A suggestion that the applicant abused the procedures set out in PAIA for the purpose of obtaining pre-action discovery, is groundless and unsubstantiated. These allegations, in my view, are premature, as the applicant has not yet elected to institute proceedings, whether civil or criminal. The issues she identified were the personal payments that were made from the respondent's non-profit organisation bank account, which was said to have been erroneously made and corrected. Whether all the erroneous personal payments made were reversed, that was not clarified.

[71] Perhaps the documents requested would give more clarity. The respondent suggested that the documents requested in this application differ substantially from the documents that were initially requested in Form C. As pointed out above, the exercise of completion of a Form C by a layperson cannot be equated to a substantial court application. On reading the prayers in this application, the documents requested in this instance have to include the supporting documents that were used in preparation thereof, in the form of general ledgers and so on.

[72] The contention that the information is required and/or requested for ulterior motives, as the applicant initially embarked on a smear campaign and/or posted unsavoury information on social media against Ms Nell-Roberts, is irrelevant to the information requested in my view. The alleged standing feud between the applicant and Ms Nell-Roberts should have been dealt with in a different forum, if any, and not be a defence in these proceedings. On considering the evidence presented, there is no suggestion that such posts are linked to the financial statements requested. In

any event, even if there was any connection between the information requested and the social media posts, the respondent has a legal remedy at its disposal to prohibit the applicant's alleged behaviour on social media platforms. However, there is no evidence that such was done.

[73] In my view, the applicant has made out a proper case that entitles her to the documents requested, save for the financial statements of 2018, as they did not form part of the initial request. In the result, the following order shall issue:

73.1 The decision by the respondent and/or head of the respondent not to provide the applicant with the information requested, is set aside;

73.2 The respondent and/or head of the respondent is ordered to provide the applicant access to the following information, in terms of Section 78(2) of PAIA:

73.2.1 The general ledgers, other documents and books used in preparation of the respondent's financial statements in respect of 2019, 2020 and 2021;

73.3 The respondent and/or head of the respondent is ordered to deliver the original documents, referred to in paragraph 73.2.1 herein, within fourteen (14) days of the order at the applicant's attorneys of record, Liddell, Weeber and Van der Merwe Incorporated, situated at 52 Broad Road, Wynberg;

73.4 The attorneys Liddell, Weeber and Van der Merwe Incorporated are authorised to take possession of the aforementioned documents and make copies thereof;

73.5 The attorneys Liddell, Weeber and Van der Merwe Incorporated are ordered to return the aforementioned documents to the respondent at the respondent's attorneys' place of business within fourteen (14) days after taking possession thereof;

73.6 The respondent is ordered to pay the costs of this application.

MANTAME J
WESTERN CAPE HIGH COURT

Coram	:	**B P MANTAME, J**
Judgment by	:	**B P MANTAME, J**
FOR APPLICANT	:	**ADV R LIDDEL** **0214262683/0733238855** **reubenliddell@capebar.co.za** **ADV S WEBB** **084 407 0000** **staceywebb@capebar.co.za**
FOR RESPONDENT	:	**ADV K FELIX** **0214243393/0747421992** **jkfelix@capebar.co.za**
Date (s) of Hearing	:	**21 April 2022**
Judgment delivered on	:	**16 May 2022**