



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 7 March 2024

Case No. 2023-019308

In the matter between:

MONTROSE MEWS BODY CORPORATE

Applicant

and

MATLOSE MOELA NO

First Respondent

COMMUNITY SCHEMES OMBUD SERVICE

Second Respondent

BEAUTY MMANTHO MOKOKA

Third Respondent

Summary

The Promotion of Access to Information Act 2 of 2000 (“PAIA”) does not apply to an “application” for books of account made by a member of a body corporate under Management Rule 26 (2) in Annexure 1 to the Sectional Titles Schemes Management Regulations, 2016. The Management Rules are made under the Sectional Titles Schemes Management Act 8 of 2011. PAIA is not intended to apply to situations in which a duty to disclose information arises from a pre-existing legal relationship between a person seeking information and the person holding that information.

JUDGMENT

WILSON J:

- 1 The applicant, Montrose Mews, is a body corporate constituted out of a sectional title scheme established under section 36 (1) of the Sectional Titles Act 95 of 1985, read with section 2 (1) of the Sectional Titles Schemes Management Act 8 of 2011 (“the Sectional Titles Management Act”). The third respondent, Ms. Mokoka, is a member of that body corporate. Montrose Mews applies to me under section 6 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) to review and set aside an adjudication order issued by the first respondent, Mr. Moela. In making the adjudication order, Mr. Moela was acting in his capacity as an adjudicator appointed by the second respondent, the Ombud, to decide disputes raised under the Community Schemes Ombud Service Act 9 of 2011 (“the Community Schemes Act”).

- 2 Mr. Moela’s order directed Montrose Mews to hand over a number of bank statements to which he concluded Ms. Mokoka is entitled under the Sectional Titles Management Act. Montrose Mews takes issue with that conclusion, on the basis that Ms. Mokoka’s entitlement to see the bank statements is not regulated by that Act, but by the Promotion of Access to Information Act 2 of 2000 (“PAIA”). Montrose Mews contends that the adjudication order is wrong in law because Ms. Mokoka has not applied under PAIA for the information she seeks. Ms. Mokoka insists that PAIA does not apply. She has refused to fill out an information request under PAIA. She says she has an unconditional right to the information she seeks under the Sectional Titles Management Act and its Regulations.

3 The parties initially raised a number of preliminary disputes. Montrose Mews contended that Ms. Mokoka had denied in her answering affidavit that PAJA applies to these proceedings. I do not think that Ms. Mokoka's papers really take issue with PAJA's application, but the way in which she address the issue is quite vague. Montrose Mews also alleged that Mr. Moela had exhibited bias in his adjudication of the dispute before the Ombud. In the end, though, Ms. Mokoka having unambiguously accepted that PAJA does apply, and Montrose Mews having not persisted in the bias point, the parties agreed that the only issue I need to determine is whether PAIA applies to a request made for information of the nature Ms. Mokoka wants. If it does, the adjudication order must be set aside. If it does not, then the order stands.

4 In my view, PAIA does not apply to Ms. Mokoka's request, but that does not mean that Ms. Mokoka is entitled to unrestricted access to the information she has requested. Her right of access to the bank statements springs from Montrose Mews' statutory obligation, under Management Rule 26 (2) in Annexure 1 to the Sectional Titles Schemes Management Regulations, 2016, ("the Regulations") to afford her access to its books of account. The purpose of that access is spelt out in Management Rule 26 (1) (a) (iv). It is to ensure that Ms. Mokoka has the information of necessary to allow her to "assess the body corporate's financial situation". It follows that, where the documents to which Ms. Mokoka has a right of access contain more information than is necessary to achieve that end, the information to which Ms. Mokoka does not need access may be redacted from them. This permits Montrose Mews to protect confidential information that may be contained in the bank statements, so long as sight of that information is not necessary to

allow Ms. Mokoka to assess Montrose Mews' financial situation. Whether and to what extent the information may be redacted is primarily a matter for the body corporate, subject, of course, to Ms. Mokoka's right to challenge the redactions before the Community Schemes Ombud.

5 PAIA does not apply to Ms. Mokoka's request to see the bank statements she demands because it was never intended to apply in situations where a duty to disclose information arises from pre-existing legal relationship between a person seeking information and the person holding that information. PAIA is rather intended to apply where a person seeking information from a private body would otherwise have no right to it. To hold otherwise would lead to absurd results, mostly by imposing an additional burden on the exercise of existing rights of access to information.

6 In giving my reasons for reaching these conclusions, I will first address the nature of the information Ms. Mokoka seeks. I will then set out her right to receive that information under the Sectional Titles Management Act and its Regulations. I will explain why PAIA has no impact on these rights, or the process by which they are exercised. I will, finally, set out the basis on which limited redactions of the statements Ms. Mokoka seeks may be permitted.

The information Ms. Mokoka seeks

7 On 30 September 2022, Ms. Mokoka asked to see bank statements reflecting the state of Montrose Mews' administrative fund, and a statement of the fund's expenditure for the months of July and August 2022. Although the papers are not entirely clear on this point (there is a great deal of unhelpful and heated crossfire), the request was apparently motivated by

what Ms. Mokoka thought was a poor auditor's report, and her suspicion that an irregular loan had been made to the body corporate.

8 On receipt of Ms. Mokoka's request for information, Montrose Mews referred Ms. Mokoka to a PAIA manual it had prepared. Montrose Mews took the view that PAIA applies to any request made by a member of the body corporate for information held by the body corporate. Montrose Mews undertook that any request made under PAIA would not be unreasonably refused, by which it appears to have meant that the request would not be refused unless PAIA supplied the body corporate with a ground of refusal.

9 Ms. Mokoka took the view that Montrose Mews' reliance on PAIA was no more than a tactic meant to conceal information to which she was entitled under the Management Rules. While I understand why Ms. Mokoka's suspicions may be have been aroused, I do not think that Montrose Mews seized upon PAIA as a reason to obstruct her. The body corporate appears genuinely to believe that its capacity to disclose information is regulated and constrained by PAIA and by the Protection of Personal Information Act 4 of 2013. In argument before me, Mr. Campbell, who appeared for Montrose Mews, emphasised that the bank statements to which Ms. Mokoka seeks access contain information about deposits and withdrawals which are of a confidential nature, and which she may not be entitled to see. He urged me to find that the appropriate way to decide whether, and to what extent, Ms. Mokoka has a right to see the bank statements is to follow the process laid out in PAIA for determining whether and to what extent an information request should be acceded to.

10 However, before reaching PAIA, I think it is in the first place necessary to consider whether the Management Rules afford Ms. Mokoka the more direct right of access to the bank statements that she claims. It is to the Management Rules that I now turn.

The Management Rules

11 Section 10 (2) (a) of the Sectional Titles Management Act requires Montrose Mews to abide by a prescribed set of Management Rules, unless the Rules are amended with the consent of the Ombud on application by a developer, or unless the body corporate unanimously resolves to amend them, repeal them, add to them or substitute them with other rules. There is no suggestion that the prescribed Management Rules have been lawfully departed from in this case. They accordingly apply to Montrose Mews.

12 Annexure 1 to the Regulations sets out the applicable Management Rules. Rule 26 requires Montrose Mews to keep “proper books of account”. A book of account is not literally a ledger which must be always open to inspection. It is rather any record or set of records that show such “transactions entered into” by Montrose as it “can reasonably be expected or required” to record, having regard to its “particular trade or calling” (see *Horwitz v Rex* 1908 TPD 641 at 643).

13 Sections 3 (1) (a) and (b) of the Sectional Titles Management Act require Montrose Mews to establish and maintain an administrative fund (out of which operating expenses are met), and a reserve fund “in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property”. Statements reflecting the state of each of these funds,

and the deposits into, and withdrawals from, them are accordingly “books of account” that Montrose Mews is required to keep. This is confirmed in Management Rule 26 (1) (b).

14 Management Rule 26 (1) (a) (iv) requires that these books of account must contain the “information to allow members to assess the body corporate's financial situation”. Management Rule 26 (2) requires Montrose Mews, “on application” by any member of the body corporate to “make all or any of [its] books of account and records available for inspection and copying”.

15 Ms. Mokoka accordingly has a right under the Management Rules to inspect the statements she wishes to see “on application”. The words “on application” are somewhat of an anomaly in the Management Rules. Under Management Rule 25 (7) records of debits and credits on a particular body corporate member’s account must be provided to that member “on request”. Management Rule 27 (4) also entitles a body corporate member to see the documents set out in Management Rule 25 (7) (3) “on request”. The documents listed in Management Rule 25 (7) (3) include, as Rule 27 (3) (l) stipulates, records that the Regulations require a body corporate to keep. Since a book of account is plainly a record “required by the Regulations”, the right to records “on request” in Management Rule 25 (7) (3) conflicts, on its face, with the right to a book of account “on application” in Management Rule 26 (2).

16 I think the only sensible way of resolving this conflict is to accept that Management Rule 26 (2) carves out an exception to Management Rule 25 (7) (3). In other words, the records to which Management Rule 27 (3) (l)

refers are all the records required to be kept under the Regulations, except books of account.

- 17 It follows that the right to seek such books of account as are necessary to allow a member of a body corporate assess the body corporate's financial situation may only be exercised "on application".

PAIA does not apply

- 18 Mr. Campbell submitted that the words "on application" mean "on application under PAIA". However, I do not think that is correct. Purely at the textual level, the submission is misconceived. The Management Rules postdate the adoption of PAIA by over 15 years. Had the Management Rules meant to require a member of a body corporate to apply under PAIA for basic financial information contained in books of account, they surely would have said so. They do not.

- 19 In addition, the words the Management Rules do use seem to me to be inconsistent with the proposition that the rights of access to information they create are only to be accessed through PAIA. The trigger for the exercise of PAIA rights is the making of a "request" by a "requester" (section 1 of PAIA). This sits uncomfortably with the text of the Management Rules. That text, as I have said, draws a distinction between information provided "on request" and information provided "on application". The information that is to be provided "on request" includes information about a body corporate member's own account. The intent is clearly to provide the person requesting that information with access to it on demand. But that is clearly not the sense in which PAIA uses the term "request" and "requester", which connote

individuals who seek information that may nonetheless be withheld from them if a ground of refusal is established under PAIA (see, generally, Chapter 4 of PAIA). Besides, the term “application” under PAIA means “application to court” (section 1 of PAIA). That is clearly not the sense in which the term “application” is used in Management Rule 26 (2).

20 If that were not enough to rule out the application of PAIA (it is), the manifest purpose of PAIA is not to displace other statutes which provide for defined rights of access to information to individuals who are embedded in specific legal relationships. The clearest indication of this is that a “requester” under PAIA may be any person at all, or any other person acting on their behalf. A “requester” need not demonstrate a prior legal relationship with the body from which they seek the information. Anyone can access information under PAIA. Where they seek information from a public body, their reasons for seeking the information are irrelevant (section 11 (3) of PAIA). Where a requester seeks information from a private body, they need only show that the information is required to exercise or protect their rights (section 50 (1) (a)). All of this appears to me to suggest that PAIA requests are meant to facilitate access to information in circumstances where a requester would otherwise have no right to it.

21 The contrary interpretation would, in my view, lead to absurdity. In the context of this case, it would mean that a member of the body corporate would have to pay a fee under PAIA to access any information from the body corporate – even information about their own account (see section 54 (1) of PAIA). More generally, though, it would significantly encumber many other

statutory rights of access to information. Section 26 of the Companies Act 71 of 2008 delineates a shareholder's right of access to company records "in addition to and not in substitution for" a requester's rights under PAIA (section 26 (7) (b)). It seems to me that this stipulation, introduced by amendment, makes clear what is already implicit in this and in other statutory rights of access to information, such as those afforded under the Management Rules – that PAIA is meant to supplement those specific rights rather than displace them.

22 In sum, it would be truly perverse to encumber specific statutory rights of access to information with the machinery of PAIA, which is manifestly designed to kick-in only when no such specific rights exist. It would also be at odds with my obligation under section 39 (2) of the Constitution, 1996, to promote the spirit purport and objects of the Bill of Rights when interpreting legislation. The right of access to information in section 32 of the Constitution, and general legislation like PAIA that is intended to give effect to it, ought to be read to facilitate rather than encumber the dissemination of information. To subject a body corporate member's rights under the Management Rules to the strictures of PAIA seems to me to be a needless encumbrance, without foundation in the Constitution, or in PAIA itself.

23 None of this means, of course, that Montrose Mews ought not to have taken any steps to comply with PAIA. It means only that PAIA does not apply to the duties of disclosure it owes under the Management Rules.

The right to redact irrelevant information

- 24 That leaves only the question of whether Ms. Mokoka is entitled to an unredacted record, and how, if not in terms of PAIA, any limits on her rights of access to the statements she seeks are to be determined and policed. I think that the answer is simple. The use of the word “application” in Management Rules 26 (2) denotes that, although Ms. Mokoka is entitled to the statements she seeks under the Management Rules, she is not entitled to information in them that is not necessary to allow her to assess the Montrose Mews’ financial situation, and which Montrose Mews has a good faith basis to redact. This would include personal information that is irrelevant to Ms. Mokoka’s assessment of Montrose Mews’ financial state. The word “application” is meant to facilitate a consideration of the extent to which the information to be disclosed under section 26 (2) is necessary to allow a person entitled to it to assess a body corporate’s financial situation.
- 25 That does not mean that all personal information may be redacted *per se*. Access to some personal information of other body corporate members (their identities and payments they have made to the body corporate, for example), may be a necessary incident of Ms. Mokoka’s rights under the Management Rules. That compromise is in the nature of sectional title arrangements, where members of a body corporate have to adopt rules and practices necessary to live together, and manage the property they share. The extent of that compromise in any particular context depends on the nature and application of the Sectional Titles Management Act and the rules adopted under it. In the case of any disagreement, an approach the Ombud, where it has jurisdiction, will generally be the appropriate way of resolving the dispute, subject to a right of appeal or review to this court.

Order

26 It follows that the review application must fail. Each party sought a punitive costs order against the other. Ms. Mokoka sought a costs order against Montrose Mews' trustees in their personal capacities. Her failure to join the trustees is not the only reason why that relief should not be granted. Both parties have raised issues of significance, and although Montrose Mews has been unsuccessful in setting aside Mr. Moela's order, it has raised issues that are of obvious importance about the way that it must discharge its duties to provide information to its members. Costs should follow the result on the ordinary scale, against the body corporate alone.

27 For all these reasons, the application is dismissed with costs.

S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 7 March 2024.

HEARD ON: 14 February 2024

DECIDED ON: 7 March 2024

For the Applicant: AG Campbell
Instructed by Du Toit Burger Attorneys

For the Third Respondent: E Liebenberg
Instructed by Meijer Attorneys