REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 25001/15

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

25/04/2018
DATE

SIGNATURE

25/4/18

In the matter between:

LUNGISA PUMP (PTY) LTD Applicant

and

EXXARO COAL MPUMALANGA (PTY) LTD Respondent

J U D G M E N T

SELLO, AJ:

[1] This is an application, brought in terms of section 82 of the Promotion of Access to Information Act, 2 of 2000 ("the PAIA"), for access to records held by the respondent.

[2] The applicant is a duly registered company. On or about 6 November 2014 it made a request, in terms of s. 53(1) of PAIA, to the respondent for access to certain specified documents.

[3] The respondent having considered the request declined to grant the applicant access to any of the requested documents. The respondent in its letter refusing access invoked the provisions of its Promotion to Access to Information Manual.

[4] It is common cause that the parties have an extended business relationship, in terms of which the applicant was contracted to the respondent, on an order basis, to service and repair pumps utilised in the respondent's mines, the respondent having approved the applicant as a vendor during 2010.

[5] The applicant's director, who is the deponent to the founding affidavit, learnt through the security manager of the respondent that a complaint had been laid against the applicant with the respondent. Following investigations conducted by the respondent, the latter terminated the business relationship with the applicant.

[6] The applicant contends that it was not informed of the nature and/or extent of the complaint and despite numerous efforts on its part, such detail was never availed to it by the respondent.

[7] The respondent explains in its answering affidavit the nature of the relationship between the parties. The applicant was one of six suppliers providing pumps, parts for pumps and services relating thereto, to the respondent.

[8] The respondent received two anonymous complaints concerning the applicant, as a result of which the respondent engaged the services of Ernest and Young Auditors to conduct a forensic investigation in relation to these complaints. It is on the basis of a report by Enerst and Young that the respondent took the decision to terminate the business relationship.

[9] The respondent confirms that it declined to grant access to any of the requested information and contends that it was in law entitled so to do. The respondent asserts that in terms of the provisions of PAIA it has a right to refuse the access to the requested documents.

[10] The information for which the applicant made the request can be classified into three broad categories – the messages received by the call centre in connection with or in respect of the applicant; the forensic report by Enrst and Young; and the identity of persons who made the allegations of fraud and/or corruption against the applicant. The applicant invokes the provisions of s. 50 of PAIA to claim access to this information.

[11] Section 50 of PAIA provides, in part, as follows:

"A requester must be given access to any record of a private body if-

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

[12] The applicant has pleaded that the right it seeks to assert is the right to its good name; the right to a reputation and the protection thereof; the right to privacy and the right to protect itself against interferences with its business relationships.

[13] The respondent has invoked the following provisions of the PAIA to deny the applicant access – s.64 (if the record contains financial or commercial information of a third party or information supplied in confidence by a third party); s. 65 (the record contains information of a third party whose disclosure would constitute a breach of a duty of confidence); s. 68 (if the record contains trade secrets, financial, commercial information of the respondent).

[14] In the answering affidavit the respondent had contended that the application falls to be dismissed on the basis that it was instituted more than 30 days after the refusal to grant access was communicated to the applicant as prescribed by s. 78 of PAIA. In argument however, the respondent did not persist with this ground.

[15] The correct approach to adopt in this case is a two-staged enquiry. Firstly, the applicant bears the onus to show that the request fell within the ambit of s 50(1). Only when the applicant has discharged such onus does the onus shift to the respondent to prove the application of any of the grounds for refusing access contemplated in chapter 4 of part 3 of the Act.

[16] It is trite that to discharge the onus the applicant 'need only put up facts which prima facie, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect' (See: ***Claase v***

Information Officer, South African Airways (Pty) Ltd 2007 (5) SA 469 (SCA) at para 8).

[17] In argument, counsel for the applicant placed much reliance of the case of ***Makhanya v Vodacom Service Provider Co (Pty) Ltd*** 2010 (3) SA 79 (GNP). In my view such reliance is misplaced as the ***Makanya*** case is distinguishable. In this case, the applicant, an account holder with Vodacom, was receiving persistent harassing telephone calls which he could not trace and therefore not stop. Following Vodacom's refusal to provide the details of the telephone numbers and/or identity of callers, the applicant approached court. His primary objective was to put an end to the consistent invasion of his privacy and the information he sought was relevant to the objective. In *casu,* the applicant does not state at how it would utilise the information sought to protect its rights. This is my view is a key distinguishing feature between this matter and the ***Makhanya*** case.

[18] In ***Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*** 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026), the appellant purported to cancel a contract on the ground that the first respondent had committed a material breach by submitting fraudulent commission claims. It sought disclosure of specified documents regarding these claims. Streicher JA said in paras [28] and [29]:

"'[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.

[29] Although the first respondent did not expressly say so, it is clear that the information required is the particulars of allegations that it claimed and received commissions to which it was not entitled. All the documents referred to would probably contain such information. The right which the first respondent wishes to protect is its right to a good name and reputation. It denies that it submitted fraudulent claims. In order to protect its good name and reputation it obviously has to have particulars of the specific allegations made against it. It follows that the Court a quo correctly ordered that the first respondent be given access to the aforesaid documents." [own emphasis]

[19] In ***Cape Metropolitan Council*** the claimant had specifically alleged that 'the access was reasonably required for the exercise or protection of its rights and in particular to consider whether it had a contractual or delictual claim for damages against the appellant or a claim for damages against SDR or any other party, or to exercise its constitutional rights to equality or to protect its business reputation and good name by obtaining an interdict or otherwise' [para 24 of the judgment].

[20] In the current case the applicant merely asserts its right to privacy and reputational damage and is silent on what steps it intends to take in protection thereof and to what extent the information sought is relevant. It is indisputable that the applicant enjoys the constitutionally protected rights contended for. The

mere existence of those rights however does not entitle the applicant to access of records in terms of s. 50 of PAIA. More is required.

[21] The applicant admits that the respondent is at liberty to contract with whomever it so wishes. The applicant does not express an intention to legally challenge the respondent's decision to terminate the contractual arrangement and or to claim for damages from the respondent or anyone. It simply states that because its reputation has been tarnished, it is entitled to this information. I disagree that the this constitutes a basis for the records as contemplated in s. 50 of PAIA.

[22] In ***Unitas Hospital V Van Wyk And Another 2006 (4) Sa 436 (SCA)*** the SCA, considering the meaning of expression 'require' expressed in s. 50, confirmed 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.."*. The court approved the test formulated in ***Cape Metropolitan Council*** and concluded that "*if the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied*" [at para 16].

[23] The applicant does not state the purpose for which it seeks access to the requested records. It is not possible therefor to consider whether the correlation between these documents and the purpose for which they are sought.

[24] The respondent pleaded that the information, on the basis of which it commissioned the forensic investigation, was received through a call-in service of the respondent and on an anonymous basis. Whilst it is not determinable on

the papers whether the anonymous caller could be an employee of the respondent, it is conceivable that it could be.

[25] The Protected Disclosures Act, 26 of 2000 are worthy of consideration. This Act protects from disclosure certain information received by the employer. Section 6 stipulates that -

"(1) Any disclosure made in good faith-

(a) and substantially in accordance with any procedure authorised by the employee's or worker's employer for reporting or otherwise remedying the impropriety concerned and the employee or worker has been made aware of the procedure as required in terms of subsection (2) (a) (ii); or

(b) to the employer of the employee or worker, where there is no procedure as contemplated in paragraph (a),

is a protected disclosure.

(2) (a) Every employer must-

(i) authorise appropriate internal procedures for receiving and dealing with information about improprieties;"

[26] In ***Radebe And Another V Premier, Free State And Others*** 2012 (5) SA 100 (LAC) the court confirmed that if an employee discloses information in good faith and reasonably believes that the information disclosed shows or tends to show that improprieties were committed or continue to be committed, then the disclosure is protected. Likewise, the respondent would be precluded from disclosing this information, but in order to do so it would have to determine and disclose that it has been received from an employee, which could result in adverse consequences for the employee concerned.

[27] The applicant cannot use the provisions of PAIA to narrow the scope of parties who may have provided information to the respondent. This would constitute a 'fishing expedition' which s. 50 does not intend (See: ***Unitas Hospital*** at para [21]).

[28] I find that the applicant has failed to meet the test threshold as defined in ***Unitas Hospital*** and has thus failed to discharge the onus it bore in this matter, to prove that the records requested are required for the exercise or protection of any of the asserted rights. The applicant has therefore failed to prove entitlement to the records sought.

[29] The applicant's case therefore falters at the first stage of the two-stage enquiry referred to above. In the circumstances, it is not necessary to consider the defences raised by the respondent in denying the applicant access to the requested documents.

[30] I make the following order:

The application is dismissed with costs.

M SELLO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT:	Adv GF HEYNS
INSTRUCTED BY	KRÜGEL HEINSEN INCORPORATE
FOR THE RESPONDENT	Adv MC ERASMUS SC
INSTRUCTED BY	HANNES GOUWS PARTNERS INC

DATE OF JUDGMENT