REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO : 4663/10

In the matter between :

PFE INTERNATIONAL INC. (BVI)	**FIRST APPLICANT**
PFE INTERNATIONAL INC. (LIBERIA)	**SECOND APPLICANT**
VAN DYCK CARPETS (PTY) LTD	**THIRD APPLICANT**
MEHDY ZARREBINI	**FOURTH APPLICANT**
MEHRAN ZARREBINI	**FIFTH APPLICANT**

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	**RESPONDENT**

JUDGMENT

Delivered on the 1ST day of November 2010

MOTALA AJ

INTRODUCTION

[1] The aforesaid Applicants instituted the present application against

the Respondent in the Witwatersrand Local Division (as it was then known) on 22nd March 2007. The purpose of the application was to enforce the Applicants' right of access to certain records of the Respondent in terms of section 11 of the Promotion of Access to Information Act, No. 2 of 2000 (referred to hereinafter as "PAIA"), it being contended that the Respondent as a "public body" within the definition of those words under section 1 of that legislation was obliged to afford such access

[2] The relief sought by the Applicant was for an order in the following terms:

'1. The Industrial Development Corporation of South Africa Limited (ie. the respondent) is ordered to furnish to the Applicants the documents and records set forth in the schedule (annexure "B") to the Request for Access to Record of Public Body which is in turn annexure "A" to the founding affidavit of the Fourth Applicant, Mehdy Zarrebini, within seven (7) days of service of this order upon the Respondent;

2. That in the event that the respondent fails to comply with paragraph 1 of this order or in the event that the applicants

contend that any compliance with this order is inadequate then the applicants are given leave to apply on the same papers, supplemented insofar as may be necessary, for further relief;

3. The Respondent is ordered to pay the costs of this application.'

[3] The Respondent signified its intention to oppose the application and in due course thereafter delivered its answering affidavit. On 24th July 2007 the Witwatersrand Local Division of the High Court (now the South Gauteng High Court) granted an order pursuant to the provisions of section 9 of the Supreme Court Act, No. 59 of 1959, read together with section 3 of the Interim Nationalisation of Jurisdiction of High Courts Act, No. 41 of 2001, for the transfer and determination of the application by this Court. A somewhat inordinate delay ensued before the Applicants eventually delivered their replying affidavits during April 2010. The matter finally became before me for hearing as an opposed motion on 22 September 2010.

THE RELEVANT BACKGROUND

[4] A *conspectus* of the papers reveals the material factual matrix within which this application falls to be determined to be the following. The facts I proceed to recount are either common cause or otherwise undisputed:

a) prior to 14 September 2001 the Respondent owned approximately 98% of the shares in the public company South African Fibre Yarn Rugs Limited ("SAFYR");

b) on 14 September 2001 the First Applicant, ie. PFE International Incorporated (BVI), acquired 45 % of the issued shared capital of SAFYR from the Respondent;

c) pursuant to such acquisition, the Fourth and Fifth Applicants were appointed directors of SAFYR;

d) the said acquisition agreement was subsequently terminated with the result that the First Applicant re-transferred its shares

in SAFYR to the Respondent. The Fourth and Fifth Applicants simultaneously resigned as directors of SAFYR;

e) during the incumbency of the Fourth and Fifth Applicants' directorships of SAFYR, the First Applicant acquired the issued shares in the Third Applicant from a company incorporated in Belgium, viz. *Domo Societe Anonym* ("DOMO BELGIUM");

f) SAFYR instituted an application out of this Court under case number 18757/2004 wherein it:

(i) alleged that the Fourth and Fifth Applicants at all material times:

(aa) either directly held shares in or were indirectly beneficially interested in the First and Second Applicants;

(bb) as directors and joint Chief Executive Officers of SAFYR each owed the latter a fiduciary duty;

(ii) contended that the Fourth and Fifth Applicants had breached their fiduciary duties to SAFYR in failing to secure for the latter the opportunity to purchase the shares in the Third Applicant (I mention in parenthesis that the Applicants denied any such breach);

(iii) claimed an order that the Applicants "disgorge" the shares in the Third Applicant to SAFYR;

(g) the application was referred to trial and after the exchange and closure of pleadings, SAFYR requested further particulars to the plea delivered by the present Applicants (*qua* Defendants in the action) for purposes of trial preparation. The said request for further particulars appears at pages 31 to 38 of the record of the application as annexure "I" thereto.

[5] The Applicants contend that the information necessary to respond to some of the further particulars requested is contained in the documents that are the subject matter of its request for access in terms of section 11 of PAIA and that the information in those

documents and records is peculiarly within the knowledge of the Respondent. As alluded to above, the Applicants further contend that the Respondent is a public body for purposes of PAIA inasmuch as it is a functionary or institution exercising a public power or performing a public function in terms of legislation. It is, in particular, a statutory body constituted in terms of the Industrial Development Act, No. 22 of 1940, having the functions and objects set forth in section 3 of the said enactment. The Respondent did not in its answering affidavit cavil at the foregoing proposition. At the hearing before me counsel for the Respondent, Mr A.M. Stewart SC, expressly conceded that the Respondent was indeed a public body for purposes of PAIA. Such concession was in my view wisely made;

[6] While the Respondent in terms of paragraph 3 (b) of its answering affidavit (deposed to by attorney Andrew Dale Parsons) sought to contend that the Applicants failed to fully comply with the procedural requirements of PAIA relating to the form of request for access to the required records, it did not persist in such challenge in the heads of argument filed on its behalf or at the hearing before me. In any event, there is in my view no material dispute on the papers in relation to the question of the Applicants' compliance with

the procedural requirements of the Act relating to the form of request for access to the information sought. The application falls, in the result, to be adjudicated upon the basis that the request for access in the instant case indeed complied with all of the essential procedural requirements contemplated in section 18 of PAIA.

THE ISSUES

[7] In argument before me counsel for the Respondent, Mr A.M Stewart SC, resisted the application on essentially a single ground. Invoking the provisions of section 7 (1) of PAIA, he argued that that legislation finds no application in relation to a request for production of, or access to, a record for the purpose of pending criminal or civil proceedings. In this regard he drew attention to the fact that it was common cause that:

a) the Applicants requested the records or information in issue for the purpose of the aforementioned civil proceedings under case number 18757/2004;

b) such proceedings commenced in November 2004;

c) the Applicants' request for information was only made in January 2007, some twenty seven months after the commencement of the said proceedings.

[8] Counsel for the Respondent proceeded to contend that the production of or access to records for the purpose of pending civil proceedings is provided for in other law, in particular the rules of court relating to discovery, disclosure and privilege. The Applicants were in the result obliged, so the argument went, to seek access to or production of the required records in the rules of court. They were not entitled to invoke PAIA for that purpose, its applicability having been ousted by section 7 (1) thereof. Recognising that the Respondent was not a party to the pending civil proceedings with the result that the rules of court governing discovery could not be invoked against it, the Respondent's counsel identified Uniform Rule 38 (1) (a) as the relevant rule in which the Applicants' remedy was to be found. Such subrule entitled any party to civil proceedings, as of right, to sue out from the office of the registrar a subpoena having the effect of compelling a witness to produce any document which the party requiring his attendance desires to be produced in

evidence.

[9] The Respondent in its heads of argument resisted the application on yet a further basis. Drawing attention to the definition of 'record' in section 1 of PAIA, the Respondent contended that the Applicants failed to identify any particular record alleged to be in the possession or under the control of the Respondent. It drew attention to the fact that the Applicants sought records *indicating* a list of factual matters without clearly identifying the actual record or records that reveal such facts. In the same breath, it criticized the Applicants' request for records *'relating to'* certain matters, reports, enquires or financial assistance without clearly identifying what they are. In essence, the Respondent's complaint is that the Applicants' request for access did not relate to records which already existed; what the Applicants really sought, according to the Respondent, was the creation of records for the purpose of responding to the request from information that may only exist in the memories of present or past employees of the Respondent.

[10] The Applicants, who were represented at the hearing before me by Mr D.J. Shaw QC and Mr A.W.M Harcourt SC, vigorously disputed

the grounds and basis on which Respondent sought to limit their right of access to information.

[11] It is against the foregoing backdrop that I proceed to determine the said issues.

THE LAW

[12] It would be both useful and convenient, in my view, to briefly set out the law relevant to this application. An appropriate point of departure is section 32 of the Constitution (Constitution of the Republic of South Africa, Act 108 of 1996), which provides as follows:

"(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."

[13] It is abundantly clear from the aforegoing that the Constitution confers upon every person a general and unqualified right of access to any information held by the State and its organs. Section 32 (2) of the Constitution required the enactment of national legislation to give effect to that right, which legislation "may provide for reasonable measures to alleviate the administrative and financial burden on the State". PAIA is that legislation. The right to obtain information, albeit for the limited purpose of litigation, is conferred also by Uniform Rules 53, 35 and 38, which regulate review proceedings, the discovery procedure and the procedure compelling the production of documents by a witness subpoenaed to appear at a trial, respectively. Such rules in turn find their source in section 30 (1) of the Supreme Court Act 59 of 1989 which confers upon a party to civil proceedings the power to enforce the production, in those proceedings, of any document in the possession of any person in the manner provided for in the rules of court.

[14] Uniform Rules 53 and 35 manifestly find no application in the present matter. The present are not review proceedings against the Respondent, nor is the Respondent a party to the pending civil

proceedings so as to be susceptible to the discovery procedure provided for in Uniform Rule 35. The Respondent was perforce confined in these circumstances to identity, as it does, the process of the *subpoena duces tecum* contemplated in Uniform Rule 38 (1) (a) as to that which fell to be invoked by the Applicants to compel the production of any documents in its possession or under its control.

[15] The Respondent's case, which seeks to justify limitation of the Applicants' right of access to the information requested, rests four square on section 7 (1) of PAIA. That section reads as follows :

"(1) This Act does not apply to a record of a public body or a private body if –

a) that record is requested for the purpose of criminal or civil proceedings;

b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

It is significant that these jurisdictional requirements are cumulative – all three must co-exist for the operation of PAIA to be excluded.

[16] The objects of PAIA are clearly enunciated in section 9. They include:

"(a) to give effect to the constitutional right of access to –

(i) any information held by the State; and

ii) …..

(b) to give effect to that right -

(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and

(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution."

[17] It is abundantly clear, in the circumstances, that the interpretation of the provisions of PAIA must be informed by the Constitution. Section 39 (2) of the Constitution, in particular, obliges every court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights (see, for instance, ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*** **2004 (4) SA 490 (cc) at para [72];** ***MEC for Roads and Public Works, Eastern Cape and another v Intertrade Two (Pty) Ltd*** **2006 (5) SA 1 (SCA) in para [11]**). Section 2 (1) of PAIA moreover enjoins courts, when interpreting its provisions, to prefer any reasonable interpretation that is consistent with its objects over any alternative interpretation that is inconsistent with those objects. The overall tenor of PAIA makes those objects clear, namely, generally to make information held by the State and private bodies accessible to the public to promote transparency and accountability.

[18] *Appropos* the nature and extent of a public body's obligation where the right of access to information is invoked, I find the following *dicta* of Cameron J (then a judge of the Transvaal Provincial Division of the High Court) in ***Van Niekerk v Pretoria City Council 1997***

(3) SA 839 (T) at 850 A – C, dealing with a claim brought under section 23 of the interim Constitution (the precursor to section 32 of the final Constitution), to be particularly instructive and illuminating:

> "In my view, s 23 entails that public authorities are no longer permitted to "play possum" with members of the public where the rights of the latter are at stake. Discovery procedures and common - law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the constitution, as manifested in s 23 is to subordinate the organs of state… to a new regimen of openness and fair dealing with the public."

DISCUSSION

[19] I proceed to examine the merit of the Respondent's contention that section 7 (1) of PAIA limits, and effectively negates, the right of

access sought to be enforced by the Applicants.

There can be no dispute that the jurisdictional requirements set out in sub-sections (1) (a) and (1) (b) of section 7 of PAIA have been established in the present matter. It is manifestly clear, moreover, that the records required by the Applicants were specifically requested for the purpose of the pending civil proceedings and that such request postdated the commencement of such proceedings. Such is in fact common cause. The question, then, is whether the jurisdictional requirement contemplated in sub-section 7 (1) (c) has been established, ie. whether the production of, or access to, those records for the purpose of the pending civil proceedings is *provided for in any other law*.

[20] It is well established that "other law" in this context is intended to be construed as an expression of wide and general import. It refers to the body of law which includes the rules relating to discovery, disclosure and privilege (***National Director of Public Prosecutions v King*** **2010 (7) BCRL 656 (SCA) at para 39**). As alluded to hereinbefore, the Respondent specifically invokes Uniform Rule 38 (1), in particular the *subpoena duces tecum* procedure there

provided for, as constituting the "other law".

[21] Does Uniform Rule 38 (1), in particular, *provide for* (my emphasis) the production of or access to the records sought by the Applicants. It would be useful, as a precursor to venturing to answer such question, to canvas the provisions of the said subrule. It reads :

" **38 Procuring evidence for trial**

(1) (*a*) Any party desiring the attendance of any person to give evidence *at a trial* (my emphasis), may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.

If any witness has in his possession or control any deed, instrument, writing or thing which the party

requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court *at the trial* (again my emphasis).

(1) (b) Any witness who has been required to produce any deed, document writing or tape recording *at the trial* shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged…"

[22] It is abundantly clear from a plain reading of the said subrule that a subpoena may only be issued thereunder *after* a trial date has been fixed. The clear references in the subrule to the purpose of a subpoena being to secure the attendance of a person "to give evidence at a trial" and the production of any deed, instrument, writing or thing "to the court at the trial" put this beyond doubt. Form 16 in the First Schedule, being the prescribed form of process identified in the subrule for subpoenaing witnesses, fortifies the foregoing proposition. It provides for the date on and time at which the witness is required to appear in court and to bring with him and

produce to such court the documentation clearly stipulated in the subpoena.

[23] As alluded to earlier, the request for information in the present matter was made in January 2007, a point in time when a date for trial was neither established nor ascertainable. In these circumstances, Uniform Rule 38 could not be said to have *provided for* a right of access to, or to production of, the records sought by the Applicants for the specific purpose already mentioned.

[24] Mr Stewart on behalf of the Respondent argued that section 7 (1) (c) of PAIA is not to be read as having the effect that if the applicant for information cannot get the record in question under the rules governing the production of or access to documentation in litigation, then that subsection does not apply, with the result that resort can then be had to PAIA. He argued that section 7 (1) (c) had the effect of ousting PAIA from having any applicability if "the production of or access to" the record is provided for in any other law governing the proceedings. In other words, even if the application of the other law results in a denial of access in the proceedings, PAIA remains inapplicable.

[25] The argument advanced by Mr Stewart cannot be faulted if (and only if) the fundamental premise thereof accepts or recognises the actual existence or availability of other law in the form of one or more rules of court that provides for production of or access to the required record.

A useful illustration of the foregoing may be made by reference to the provisions of Uniform Rule 35 (14). The said subrule entitles a party to any action, for purposes of pleading after appearance to defend has been entered, to require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof. If an application to court in terms of the said subrule fails on the ground that the record or document is found not to be relevant to a reasonably anticipated issue in the action, the unsuccessful party would manifestly not be entitled to invoke PAIA instead. This is because the production of or access to the record or document is indeed provided for in the subrule. Failure to obtain the required access, for instance on the ground of lack of relevance,

would not have the effect of rendering PAIA applicable (see ***Ingledew v Financial Services Board: in re Financial Services Board v Van Der Merwe & another*** **2003 (4) SA 584 (CC**), an unsuccessful appeal to the Constitutional Court against a judgment of the Pretoria High Court to the effect that section 32 of the Constitution and PAIA were not applicable to the appellant's request for information required for the purposes of pleading in the course of a pending action on the basis that such right of access, albeit subject to certain limitations, was indeed provided for in Uniform Rule 35 (14))

[26] The Respondent *in casu* not being a party to the pending civil proceeding and a trial date not having being established, the Applicants could clearly not obtain production of or access to the required information in terms of the Uniform Rules at the stage at which they required such access. Rule 38 (1) did not provide for access to the information sought at the material time. One can readily conceive of instances where a party to a pending *lis* may require access to or the production of information in the possession or under the control of a third party for purposes of pleading or other essential preparation. The denial of access to such information

before trial could be grievously prejudicial to such party. To interpret section 7 (1) (c) of PAIA as ousting its application in such circumstance would, in my judgment, not only be doing violence to the clear language of the said subsection in terms of the golden rule of interpretation but would also constitute an infringement of section 39 (2) of the Constitution, which obliges every court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights, including the right of access to information in terms of section 32 of the Constitution. In coming to this conclusion, I am fortified by section 2 (1) of PAIA which enjoins courts, when interpreting the provisions of that enactment, to prefer any reasonable interpretation that is consistent with its objects over any alternative interpretation inconsistent therewith.

[27] Mr Stewart on behalf of the Respondent drew my attention to the writing of legal academics Iain Currie and Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) at 53 – 4. He urged upon me acceptance of the views expressed by such learned authors in the following *dicta*:

'… Section 7 (1) (c) provides that the exemption is applicable if

> 'production of or access to the record' is 'provided for in any other law'. This is ambiguous. On the one hand, 'provided for' could be read as meaning that the exemption applies only when the rules of evidence and discovery *permit* disclosure of a record and not when they *prevent* disclosure. On the other hand, the phrase can be read as synonymous with 'regulated by'. In other words, if the law of evidence governs the production of or access to a record, whether it does so positively by requiring disclosure or negatively by preventing it, the record is exempt from the AIA (a reference to PAIA). Our preference is for the second interpretation …"

I must, with respect, disagree with the learned authors in their interpretation of the words 'provided for' as being synonymous with the words 'regulated by'. 'To provide' in its ordinary parlance is something distinctly different from 'to regulate'. In any event, in the view I take of the matter, even if the expression 'provided for' is read as being synonymous with 'regulated by', I am satisfied that there is no rule of court that provides for or otherwise regulates the production of or access to records in the possession of a third party (ie. someone not a party to the civil proceeding) necessarily required

prior to trial.

[28] It has also been suggested by the aforesaid commentators (*ibid,* at p 53) that the purpose of section 7 of PAIA is to prevent its provisions from having any impact on the law governing discovery or compulsion of evidence in civil and criminal proceedings by prohibiting access after the commencement of litigation. The underlying rationale for such prohibition is to ensure that "litigants make use of the remedies as to discovery in terms of the Rules … and to avoid the possibility that one litigant gets an unfair advantage over his adversary" (***CCII Systems (Pty) Ltd v Fakie & Others NNO (Open Democracy Advice Centre, as Amicus Curiae*) 2003 (2) SA 325 (T) at para [21]**). This situation does not, in my opinion, arise on the facts of the present case. It must be remembered that the Respondent is the major and controlling shareholder in the Plaintiff. It holds almost all of the issued shares therein. It is not surprising in these circumstances that the Respondent's attorneys of record in the present application are also the attorneys of record for the Plaintiff in the pending civil action. Records or other information in the possession of the Respondent would be readily available to the Plaintiff in the action. It is in these

circumstances difficult to envisage how affording the Applicants access to the required records of the Respondent would result in their gaining an unfair advantage over the Plaintiff in the action.

[29] I advert now to the Respondent's complaint that the Applicants' request for access does not clearly and specifically identify the particular records alleged to be in the possession or under the control of the Respondent. Mr Stewart on behalf of the Respondent enunciated such complaint in paragraph 22 of his Heads of Argument in the following terms:

> "None of the records is actually identified. It is apparent that the applicants in fact seek particular information from the respondent, which information is not contained in identified documents or other media and which may only exist in the memories of present or past employees of the respondent. For the information to be furnished records would have to be created specifically for the purpose of responding to the request. Records which do not already exist are obviously not covered by PAIA; PAIA governs access to pre-existing records and does not require the creation of new records."

[30] Section 23 of PAIA deals specifically with the situation where a record requested from a public body can either not be found or does not exist. The information officer of the public body would be entitled in such circumstances, by way of affidavit or affirmation of the nature contemplated in sub sections 23 (1) and 23 (2), to notify the requester that it is not possible to give access to the requested record. PAIA also contemplates under Chapter 4 thereof a host of additional grounds justifying refusal of access to certain records in various circumstances. These are matters that properly fall to be dealt with by the Respondent in its response to the request for access.

CONCLUSION

By reason of the aforegoing, I am satisfied that the Applicant's request for access to the information required by it is one properly made in terms of PAIA and to which the provisions of that Act apply. That finding is determinative of the present application in favour of the Applicants. With regard to the question of liability for the costs of the application, there are no compelling reasons whatsoever to warrant any departure from the

salutary principle that costs should follow the result. I am satisfied moreover, that the matter was one of sufficient novelty and complexity to warrant the Applicants' employment of two counsel.

ORDER

In the result, I grant an order in the following terms:

1. The Industrial Development Corporation of South Africa Limited ("the respondent") is hereby ordered to process the applicants' Request for Access to Record of Public Body appearing at page 15 to 22 of the indexed papers in the application within one month of service of this order upon the Respondent;

2. In the event of the Respondent failing to comply with paragraph 1 of this order, or in the event that the applicants consider the respondent's compliance with this order deficient or inadequate, then the applicants are given leave to make application to this Court on the same papers, duly supplemented insofar as may be necessary, for such further or alternative relief as it may be advised;

3. The Respondent is directed to pay the costs of this application, such to include those consequent upon the employment of two counsel.

Date of hearing: **22 SEPTEMBER 2010**

Date of judgment: **1 NOVEMBER 2010**

Counsel for Applicants: **MR. D.J SHAW QC &**
MR A.W. M. HARCOURT SC

Instructed by:	**BARKERS INC., DURBAN**
Counsel for Respondent:	**MR. A.M STEWART SC**
Instructed by:	**DENEYS REITZ, DURBAN**