Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: CIV APP FB 19/2022

In the matter between:

RUSTENBURG LOCAL MUNICIPALITY Appellant

and

LAYER3 TELECOM (PTY) LTD Respondent

In re:

LAYER3 TELECOM (PTY) LTD Applicant

and

RUSTENBURG LOCAL MUNICIPALITY Respondent

CORAM: REID J *et* MFENYANA J *et* DEWRANCE AJ

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **15 April 2024.**

ORDER

1. The respondent's application to introduce further evidence is granted and annexure "N1" to the founding affidavit in that application is hereby received into evidence.

2. The appeal is dismissed with costs.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] This appeal lies against the judgment and order of this Court per Petersen J (court *a quo*) handed down on 8 October 2021. The appeal is with leave of that court.

[2] The essence of the appeal is that the court *a quo* erred in considering the points in *limine* raised by the appellant, without regard to the substantive defence as set out in its answering affidavit.

[3] It is pertinent to briefly consider the genesis of the dispute between the parties and the facts leading up to the appeal, to the extent necessary for the determination of the present appeal.

FACTUAL BACKGROUND

[4] The appellant issued four tenders during the course of 2017 to 2019. These tenders relate to ICT infrastructure support. All of the tenders, save for the fourth one, were cancelled and re-advertised.

[5] This appeal deals with access to information relating to all four tenders and turns on a very narrow issue. For this reason, it is not necessary to discuss the terms and conditions relevant to the tenders.

[6] In all the above instances, the respondent submitted responses in respect of all the invitations and received some communication from the appellant in respect of the first and second tenders. No communication was received in respect of the third and fourth tenders.

[7] Having received no communication and after identifying certain discrepancies with regard to *inter alia* the bid numbers, the respondent on 21 February 2020 delivered a letter to the appellant, demanding copies of certain specified documents in respect of all four tenders. In the letter, the respondent indicated that it intended to file a review application. Accompanying the letter was a Form A for request for access to records of a public body in terms of section 18(1) of the Promotion of access to Information Act[1].

[1] Act 2 of 2000.

[8] On 24 February 2020 the appellant acknowledged receipt of the request and advised the respondent to pay an access fee in the amount of R35.00. The said letter was received by the respondent on 28 February 2020 and on the same day, the respondent paid the required fee. Simultaneously, the respondent demanded an undertaking that the appellant would not proceed with the evaluation and adjudication of the tender pending the filing of a review application, as previously demanded in the respondent's letter of 21 February 2020. The respondent further indicated its intention to file an urgent application, should the appellant fail to provide an undertaking. The undertaking was not provided.

[9] In the midst of the emerging dispute between the parties, the country was placed on lockdown due to the COVID-19 virus. Thereafter some negotiations ensued between the parties' legal representatives from 5 May 2020.

[10] During the course of engagement on 27 May 2020 the appellant's attorney indicated that the documents requested by the respondent had been received and would be made available to the respondent's attorneys. When the documents were ultimately provided, they were incomplete, prompting the respondent to make an application in terms of the provisions of the PAIA.

[11] It appears from the record that the appellant in its letter, advised the respondent that it was unable to locate some of the missing

documents, particularly in relation to the second and fourth tenders despite its diligent search.

[12] It further appears from the record that the respondent further queried the incompleteness of the documents provided in respect of the first and third tender. Despite undertaking to provide the outstanding documents by 30 June 2020, the appellant failed to do so, and on 8 July 2020 the respondent filed an application to this court that the appellant be ordered to provide the requested documents, which it listed in annexure “OT3” to the founding affidavit. The application was heard by the court on 29 July 2021.

[13] The court granted an order for the appellant to provide the records within a period of 10 days.

[14] The record shows that at the hearing of the matter in the court *a quo*, the appellant raised a point in *limine* that the respondent had not exhausted the internal appeal procedure as required in terms of section 74 of the PAIA and had thus failed to comply with the peremptory provisions of the PAIA. It contended that the respondent was, as a consequence barred from approaching the court. This position was opposed by the respondent, who argued that section 74 could only be triggered if the respondent failed to give a decision on the applicant’s request for access.

[15] The court *a quo* aligned itself with the respondent's contention that the respondent had made a decision to grant access to the records and that there was no decision to be taken on appeal.

[16] Having dealt with the point in *limine* the court a *quo* proceeded to deal with the merits of the application. It considered to a large extent, the constitutional purpose behind the existence of the PAIA, to foster a culture of transparency and accountability by giving effect to the right of access to information for protection of rights. The court *a quo* correctly identified a constitutional matter which formed the subject matter of the dispute. Thus, this matter brings into sharp focus the court's powers under section 172(1) of the Constitution.

[17] It further appears from the record that at the hearing of the application *a quo,* the appellant invoked the provisions of sections 23(1) and (2) of PAIA, which provide *inter alia* that, if the records cannot be found, the information officer must depose to an affidavit, informing the requester that the records cannot be found, and give a full account of all steps taken to find the record in question or to determine whether the record exists, including all communications with every person who conducted the search. That is the 'substantive' defence referred to by the appellant in its notice of appeal. The appellant avers that the court *a quo* ought to have dismissed the application with costs.

[18] In opposing the appeal, the respondent contends that the appellant's ground of appeal has no merit as the court *a quo* considered the

defence raised by the appellant and reflected as much in its judgment. A reading of the judgment indicates that the court *a quo* found no merit in the appellant's explanation that the documents were lost as this was only provided after the appellant had agreed to provide the records, and further requested the respondent to pay the prescribed access fee. According to the court *a quo*, the appellant 'claimed' that the documents were lost.

[19] The respondent thus contends the appeal is based on an incorrect reading of the judgment. It argued that the court *a quo* found that the appellant had made a decision to grant access to the records but subsequently, for some clandestine reason did not want the applicant to have insight to the requested records. In this regard, the respondent avers that the appellant's failure to give a clear account of the steps it took since the request was made in February 2020 supports the finding by the court.

[20] To my mind the consideration by the court *a quo* was made against the backdrop of the constitutional imperatives behind the enactment of the PAIA.

[21] The court *a quo* fully examined the provisions of ss 25, 27, 74 and 78 of the PAIA. I do not consider it to be worth any while to regurgitate them in this judgment. I align myself with those considerations and findings.

[22] Of relevance is the discourse which played itself out during the argument of this appeal. The appellant contended that in not providing the requested information, it is deemed to have refused to grant access to the information in terms of section 27 of the PAIA. It is the respondent's contention that the provisions of section 23 of the PAIA would have only found application if it was not possible to find the requested documents, and the court *a quo* correctly found that the appellant was withholding the documents.

[23] Even in the event that the documents could not be found as the appellant alleged, which was rejected by the court *a quo,* the appellant had a duty to meaningfully respond to the request for the documents in terms of section 23(2) of the PAIA. The respondent further contended that the appellant did not provide the affidavit contemplated in section 23(2) of the PAIA and did not give a full account of steps taken to find the records, and all communications with every person who conducted the search on behalf of the information officer. It bemoaned the fact that the appellant only informed the respondent for the first time, in the answering affidavit that it is not possible to give access to the records.

[24] Relevant to the above provisions, the court *a quo* stated in paragraph 44 of the judgment:

> "*It is clear that when regard is had to annexure "OT9" and paragraph 2 in particular, that the respondent made a decision to grant access to the public records held by it, as requested by the applicant. The*

> *decision was not only made (in) accordance with the prescripts of section 25(1)(a) of PAIA to grant access to the public records requested, but the prescribed fee payable for the record was requested from the applicant and duly paid*."

[25] What is apparent from this finding by the court *a quo*, is that there was no refusal, deemed or otherwise by the appellant, to grant access to the requested information. A proper reading of section 25 of the PAIA shows that the information officer must (first) decide whether to grant access to the requested information, and *"if the request for access is granted… state the access fee to be paid"*. It follows naturally that without a decision to grant access to the records, the provisions of subsection 2 would not become operable. I agree with the respondent that section 23 of the PAIA does not find application in the circumstances of this case.

[26] The domino effect of the appellant's decision to grant access and setting in motion the provisions of section 23(2) of the PAIA in relation to the access fee, is that it does not lie in the appellant's mouth to invoke the provisions of section 74 of the PAIA, which deals specifically with a requester's right of internal appeal in the event of a refusal. There was no refusal. Automatically, any reliance on section 78 of the PAIA must also fail.

[27] For these reasons, the appeal must fail.

RESPONDENT'S APPLICATION TO INTRODUCE FURTHER EVIDENCE ON APPEAL

[28] I now turn to discuss the application by the respondent to introduce further evidence. I do so on the basis that it is desirable that this court deals with all the issues relevant to this appeal.[2]

[29] At the commencement of the matter, we considered an application by the respondent in terms of section 19(b) of the Superior Courts Act[3], for the introduction of further evidence in the form of a document listing all tenders awarded by the appellant during March 2020. The import of this document, the respondent avers, is that the appellant appointed a service provider in respect of tender number: RLM/DCS/0026/2019/20 (fourth tender) on 13 March 2020 after a recommendation and approval on 11 March 2020.

[30] In support of its application, the respondent avers that the allegation that the appellant had made an appointment on the fourth tender is not new, but the respondent had no proof of this allegation. Importantly, the respondent contends that two weeks after the respondent had requested the documents the appellant went ahead with the appointment. At that stage, the documents requested by the respondent were available as the appellant required them for the appointment of the service provider, and ought to have formed the basis of the recommendation.

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2 See *Jordan and Others v State and Others* 2002 (11) BCLR 1117 (CC), para [21]

3 Act 10 of 2013.

[31] According to the respondent, this new information only came to the attention of the respondent on 31 March 2023 while the respondent's attorney was doing an online search.

[32] It is trite that section 19(b) of the Superior Courts Act clothes an appeal court with the power to receive further evidence. In *Colman v Dunbar*[4] the Appellate Division (as it then was) stated that the criteria for admission of further evidence are (a) the need for finality, (b) the undesirability of permitting a litigant who has been remiss in bringing forth evidence, to produce it late in the day, and (c) the need to avoid prejudice. The Constitutional Court (CC), in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[5] cautioned that this power should be used sparingly, and that further evidence should only be admitted in exceptional circumstances. The CC further approved these criteria and added that the evidence must be 'weighty, material and presumably to be believed'.

[33] Applying these criteria to the application brought by the respondent, I have no doubt in my mind that the evidence sought to be admitted is material to the determination of the current dispute and meets the requirements set out in *Colman v Dunbar*.

[34] In the exercise of the discretion conferred on this court, the application to introduce new evidence should succeed.

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4 1933 AD 141 (A).
5 2005(2) SA 359 (CC).

[35] The further evidence shows that the lost documents' defence is improbable, farfetched, and fanciful. For this reason, also, the appeal should fail.

COSTS

[36] The general principle is that costs follow the result. The successful party is entitled to its costs. I find no reason to deviate from this principle.

[37] The appellant is consequently liable for the costs of the appeal.

ORDER

[38] In the result I make the following order:

1. The respondent's application to introduce further evidence is granted and annexure "N1" to the founding affidavit in that application is hereby received into evidence.

2. The appeal is dismissed with costs.

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S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

I agree.

_____
FMM REID
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

I agree.

_____
M DEWRANCE
ACTING JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

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Date reserved:	18 August 2023
Date of judgment:	15 April 2024