IN THE HIGH COURT OF SOUTH AFRICA,

EASTERN CAPE DIVISION, GQEBERHA

CASE NO: 1257/2021

1. REPORTABLE:
2. OF INTEREST TO OTHER JUDGES:
3. REVISED:

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In the matter between:

AKHONA METHOD CAGA	First Applicant
DENVER JOHNSON	Second Applicant
TOKELO MOHANOE MOLELENGUANE	Third Applicant
MVUSELELO CORNELIUS MAKANDA	Fourth Applicant
MAWANDE MASELA	Fifth Applicant
MZUKISI DALI	Sixth Applicant
KQUATA SEQOKO	Seventh Applicant
LINDINKHOSI HASHE	Eighth Applicant
NTSIKELELO WONDERBOY KAMNQA	Ninth Applicant

MASIXOLE BOTHA	Tenth Applicant
SIYABONGA MAFANA	Eleventh Applicant
XOLANI KALI	Twelfth Applicant

and

TRANSNET SOC LTD	First Respondent
THE INFORMATION OFFICER, **TRANSNET SOC LTD**	Second Respondent

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JUDGMENT

BOTHA AJ:

Introduction

[1] The applicants are former employees of the first respondent, Transnet SOC Ltd, specifically its subsidiary, Transnet Port Terminals, established in 2000, when Portnet was divided into two parts, one being the National Ports Authority (Pty) Ltd (the NPA).[1] I shall refer to the First Respondent as "*Transnet*" throughout this judgment.

[2] The second respondent is Transnet's Port Terminals' Information Officer.[2]

[3] Transnet was formed and incorporated in terms of the Legal Succession to the South African Transport Services Act (the SATS Act).[3] It is a wholly state-owned public company

[1] See para 3.3. of Transnet's Information Manual issued in term of s14 of the Promotion of Access to Information Act 3 of 2000 (PAIA) and which is Annexure G to the Answering Affidavit.

[2] As defined in s1 of PAIA.

[3] Act 9 of 1989. The SATS Act has been repealed by s 89 (1) of the National Ports Act No. 12 of 2005 in so far as it relates to any provision for the management and operation of the ports referred to in Act No. 12 of 2005.

(SOC) with many business divisions.[4] The National Ports Act[5] now regulates the business of the NPA, as a subsidiary company of Transnet.[6] The main function of the NPA is " to own, manage, control and administer ports to ensure their efficient and economic functioning".[7]

[4] It is common cause that the applicants were dismissed from the employ of Transnet's Port Terminals in 2016 for gross insubordination.[8] It is also common cause that the applicants challenged the fairness of the dismissals and referred disputes to the Transnet Bargaining Council (TBC).[9] The First and Third to Twelfth Applicants were represented by the National Union of Metalworkers of South Africa (NUMSA). The Second Applicant was represented by another union, namely the United National Transport Union (UNTU). NUMSA's referral was submitted late and its application for condonation on behalf of the First and Third to Twelfth Applicants was dismissed by both the Arbitrator and the Labour Court. The application for leave to appeal the Court's decision was dismissed in February 2018.

[5] UNTU's dispute, on behalf of the Second Applicant, was filed on time. The Bargaining Council's Arbitrator found that the Second Applicant's dismissal was substantively fair and that dismissal was an appropriate sanction in the circumstances. A review application to the Labour Court was dismissed.[10]

[6] Despite these rulings, the Applicants continued to challenge the legitimacy of their dismissals, *inter alia*, by way of repeated calls to Transnet officials pleading for reinstatement[11] and a referral to the Public Protector in 2019. The referral was not pursued because Transnet advised the Public Protector's office that the matter was *res judicata*.[12]

4 Chirwa v Transnet 2008 (4) SA 367 (CC) para 1.
5 Act 12 of 2005.
6 See s3(2) of Act 12 of 2005.
7 S11 of Act 12 of 2005. See too Transnet's Information Manual, which is Annexure G to the Answering Affidavit.
8 See paras 1 and 5.1, Answering Affidavit; paras 13 and 16, Founding Affidavit and Annexure A to the Answering Affidavit reflecting the employer as Transnet Port Terminals.
9 Para 5.4, Answering Affidavit.
10 Paras 5.8 and 5.9, Answering Affidavit.
11 Para 6, Answering Affidavit.
12 Para 8, Answering Affidavit.

[7] In 2021 the applicants launched this application in terms of the Promotion of Access to Information Act (PAIA)[13] in which they requested the respondents to provide access to two reports, namely:

a. a report compiled by a Forensic Investigator, Owen Mavana, in 2019, based on case number BC.NUMSA/TPT(ECP)13623, allegedly referring to the circumstances leading to the dismissal of the applicants from the respondent's employment (the so-called Mavana report); and

b. the ICAS report of 2018 concerning the Ngqurha Container Technical Department, which also allegedly contained information related to the dismissal of the applicants (the so-called ICAS report).

[8] In an amended notice of motion, the applicants later added an alternative prayer, namely that the respondents be directed to deliver the Mavana Report to the Court in terms of section 80(1) of PAIA to enable the Court to examine the Report and to decide whether the applicants are entitled to be granted access to it.

Issues between the parties arising from the papers

Applicants' case

[9] The applicants initially alleged that they were entitled to access to both the Mavama and ICAS Reports to protect their due process and labour rights as ex-employees of Transnet.[14] They added that the Reports were needed to enable them "to take advice and then make a decision as to whether any further steps should be taken".[15]

[10] The applicants have since conceded, however, that they are not entitled to access to the ICAS Report.

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13 Act 3 of 2000.

14 Para 16, Founding Affidavit.

15 Para 16, Replying Affidavit; para 2, Respondents' Heads of Argument.

[11] Despite their reliance on their labour law rights, the applicants request for access to information and this application were both framed on the premise that Transnet acted as a public body in terms of PAIA in relation to the reports in issue (subsequently, only the Mavana Report remaining in issue).[16] This disconnect unfortunately complicated the issues unnecessarily.

Respondents' case

[12] Transnet refuses to provide access to the Mavana Report on the basis that:

a. the Report is excluded from the scope of application of PAIA because section 7 of the Act applies, but in any event;

b. Transnet acts as a private body in respect of employee relations, including disciplinary proceeding; and

c. the Mavana Report relates to its activities as an employer; and

d. the applicants have not established that the Mavana Report is required for the exercise or protection of their rights in terms of section 50 of PAIA, given that Transnet acted as a private body in respect of the Report and the applicants' employment.

[13] Should the applicants, however, demonstrate that they have met the section 50 threshold, the respondents then claim that the Mavana Report falls within the exclusion in section 65 of PAIA, [17] which provides that "a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement".

[14] In support of this ground of refusal, the respondents explain that the Mavana Report was produced pursuant to an agreement of confidentiality between Mr Mavana and Transnet, with the report containing riders protecting its confidentiality and non-distribution to third

[16] See paras 14, 16 and 17, Founding Affidavit and Annexure B thereto; namely a completed Form A: Request for Access to Record of Public Body in terms of PAIA (for both reports).

[17] Paras 51 and 52, Answering Affidavit.

parties without the prior consent of Transnet and Mr Mavana.[18] The respondents add that this exclusion would apply even if I find that Transnet is a public body for the purpose of this request as the same exclusion applies to a request for access to records of public bodies in terms of section 37 of PAIA.

[15] Regarding the scope of application of PAIA, the section 7 argument, the respondents claim that the Mavana Report was available to the applicants during the Bargaining Council and Labour Court proceedings.[19] If the Report had had any bearing on their cases, the applicants would have been entitled to request access to the Report in terms of the rules governing discovery in those *fora*, which they failed to do. On this basis, the respondents argue that section 7(1) of PAIA applies and that the Report is excluded as a record to which the Act applies.[20] Also, section 7 applies regardless of whether Transnet acted as a public or private body in relation to the Mavana Report.

[16] In short, according to the respondents, the request for the Mavana Report is a "fishing expedition" for information supporting the applicants' ongoing "agenda of reinstatement."[21]

Applicants' response

[17] In response, the applicants deny that Transnet acted as a private body in relation to the production of the Mavana Report. They allege that it concerns not only their "individual" employment rights, but also those of "the whole department". They add that they act in their capacity as former employees of Transnet, "who have an interest it is important to know the outcome" (*sic*).[22]

[18] Paras 51-52, Answering Affidavit.

[19] Paras 34-35, Answering Affidavit.

[20] See para 8, Respondents' Heads of Argument; *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC).

[21] Paras 34-35, Answering Affidavit.

[22] Para 33, Founding Affidavit; para 15, Applicants' Heads of Argument.

[18] Moreover, according to the applicants, as pointed out in the Founding Affidavit, the Mavana Report was produced with the aim of investigating various irregularities at Transnet, which is evident from the fact that "the matter was presented in Parliament on the 14 October 2020 in the Portfolio Committee as the public has vast interest. The committee has made an inquest in the Department of Public Enterprise."[23] This fact, the applicants claim, demonstrates that whilst the Report may impact upon their labour rights (which was the originally stated basis for their request for access to the Report), the Report goes far further than that – it relates to a conspiracy by Transnet against the applicants and other employees, which matter warranted a forensic investigation, and which suggests "systemic failures" at Transnet at the times of the applicants' dismissal, the consequences of which include a recommendation that the applicants be re-instated.[24]

[19] The respondents deny these allegations in their answering affidavit. They specifically deny that the Mavana Report contains any mention of a conspiracy and that it addresses the circumstances giving rise to the applicants' dismissal.[25]

[20] Regarding the presentation of the Report to Parliament and the subsequent inquest, it is not clear from the founding affidavit or Annexure D thereto how and why "the matter" was referred to Parliament; nor is it apparent who referred the matter to Parliament. It is equally unclear whether "the matter" refers to the Mavana Report, or the ICAS Report, or both reports, or the alleged conspiracy at Transnet when the applicants were dismissed from Transnet's employ.[26]

[21] The deponent to the respondents' answering affidavit states that she has no knowledge of the presentation of the ICAS Report in Parliament (or any other report) or a so-called inquest. She calls upon the applicants to present proof of the presentation of the Report in Parliament.[27]

[23] Para 33, Founding Affidavit; para 8, Replying Affidavit.

[24] Paras 19 and 21, Founding Affidavit; paras 6, 13, 14 and 36, Replying Affidavit;

[25] Par 70, Answering Affidavit.

[26] Paras 33 – 34, Founding Affidavit and Annexure D thereto. It is unclear whether "the matter" refers to the Mavana Report only or other supposed irregularities at Transnet. However, it is noteworthy that para 34 of the Founding Affidavit specifically refers to the ICAS Report, which the applicants have since conceded is confidential.

[27] Para 86, Answering Affidavit.

[22] The invitation to present more information about the discussion of the Report/s in Parliament and the engagement of Parliament's Portfolio Committee in "the matter" is not taken up in the Replying Affidavit. The First Applicant merely repeats the allegations contained in his founding affidavit and again asserts broadly that the very nature of a forensic report entails that there must have been some form of wrongdoing at Transnet, which matter is in the public interest.[28]

[23] In regard to the section 65 exemption, the applicants' response to this assertation is that, even if the Mavana Report falls within the ambit of section 65, the mandatory public interest "override" in either section 46 or 70 of the Act applies (depending on whether Transnet acted as a public or private body)[29] and thus I should grant the applicants access to the Report regardless of any confidentiality that may pertain to the Report.

[24] Concerning the respondents' reliance on section 7 of PAIA, the applicants say that during the Labour Court proceedings, "only a transcript of the report was submitted." Also, the founding affidavit asserts that the transcript was inaccurate, because *inter alia* an important audio recording was omitted.[30] Thus, as I understand the submission, section 7 of the Act does not apply.

[25] This allegation is dealt with specifically by the respondents in the answering affidavit, in which it is asserted that audio recordings do not form part of the Mavana Report and it is not at all clear what the distinction is between a transcript of the Report and the Report itself.[31] The replying affidavit does not address this issue; the first applicant again merely repeating what was said in the founding affidavit.[32] It is not denied that either the Mavana Report or the ICAS Report were available to the parties during the various labour proceedings.

[28] Para 8, 35 to 36, Replying Affidavit.
[29] An issue still to be determined.
[30] Para 21, Founding Affidavit
[31] Paras 67 and 68, Answering Affidavit
[32] Para 44, Replying Affidavit.

[26] Instead, by means of the amended notice of motion, the applicants place reliance on section 80 of PAIA and ask that I exercise my discretion to view the Report to decide whether they are entitled to access to it. Section 80(1) provides that '[D]espite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.' Colloquially known as a 'judicial peek,' this provision permits the court hearing the application to review the record in issue independently to assess whether the justification for the denial of access is a valid one.[33]

Background to the PAIA Request

[27] The applicants' PAIA request for access to the reports was lodged in November 2020. The applicants used "Form A: Request for Access to Record of Public Body".[34] In January 2021, the CEO of Transnet's Port Terminal replied to the request. Access to the ICAS report was refused using sections 33(1)(a) and 34 of PAIA (*inter alia* to protect the privacy of a third party who is a natural person). Further clarity was requested about which specific Mavana Report was required as Mr. Owen Mavana had apparently prepared a number of reports for Transnet in 2019.[35]

[28] The first applicant responded to Transnet's request for information and provided some detail about the specific Mavana Report requested,[36] but did not indicate the basis underlying the applicants' entitlement for the production of the Report.[37]

[29] Transnet did not reply to the request in time and the applicants then launched an internal appeal against Transnet's failure to provide the documents. Even though Transnet had apparently reached a decision to refuse access to the reports, this decision was not sent to the applicants within the prescribed PAIA period. There was thus a deemed refusal of the appeal.[38]

33 See President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC) at para 42.

34 See paras 26-27, Founding Affidavit and Annexure B thereto.

35 Para 26, Founding Affidavit.

36 Para 28, Founding Affidavit; Annexure C, Founding Affidavit; para 12, Answering Affidavit.

37 Paras 29-30, Founding Affidavit; para 13, Answering Affidavit.

38 Ss 27 and 58 of PAIA.

[30] This application was then launched.

[31] After receipt of the respondents' replying affidavit, the applicants conceded that they are not entitled to the ICAS Report. For this reason, I am only required to decide whether the applicants are entitled to access to the Mavana Report, alternatively whether the Report should be provided to the Court to exercise its discretion in terms of section 80(1) of PAIA.

Issues in dispute

[32] The main issue between the parties is whether the applicants are entitled to access to the Mavana Report in terms of PAIA, alternatively whether this Court should exercise its discretion in terms of section 80(1) of the Act (the so-called "judicial peek") to determine whether the PAIA threshold has been met and, if so, whether section 65 applies (assuming Transnet acted as a private body in respect of the Report / relationship in question).

[33] This question is complicated by the fact that there is a dispute between the parties as to whether Transnet should be treated as a private or as a public body in relation to the Mavana Report and the basis upon which access to the Report is requested.

[34] The applicants have also alleged that, even if the Report contains a confidentiality exclusion permitting Transnet to withhold access to the Report, then the mandatory public interest "override" in either section 46 of 70 of the Act applies (depending on whether Transnet acted as a public or private body) and thus I should grant the applicants access to the Report.

[35] A preliminary issue is whether section 7 of the Act applies and whether or not the Mavana Report constitutes a record falling within the scope of application of the Act.

[36] Much is made in the papers of the fact that the applicants used "Form A: Request for Access to Record of Public Body"[39] when they first requested access to the reports.[40] In my view, even if I should find that Transnet acted as a private body, this is a matter of form, does not impact on whether or not the applicants have complied with PAIA's procedural requirements, and should not influence whether I grant or refuse access to the Mavana Report.[41] Instead, what must be determined is whether the Report constitutes a record in terms of PAIA, whether Transnet acted as a public or private body in relation to the creation of the Report, its connection to the applicants' employment and their concomitant dismissal and, in turn, whether the applicants are entitled to access to the Report.

[37] To address these issues, I now turn to PAIA itself, its scope of application, the requirements for access to a record, both from a private and public body, and the various grounds of refusal at stake. I also address the basis for section 80, which entitled the Court to exercise its discretion to have access to the Report.

The PAIA: Constitutional and Legislative Framework

The purpose of PAIA

[38] PAIA was enacted to give effect to the constitutional right of access to information entrenched by section 32 of the Constitution and provides a statutory right of access to records held by public and private bodies.[42]

[39] In *Brümmer v Minister for Social Development*,[43] the Constitutional Court explained the importance of the right of access to information as follows:

' … in a country which is founded on values of accountability, responsiveness and openness, [the importance of the right] cannot be gainsaid. To give effect to these founding values, the public must

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39 Attached as Annexure G to the Answering Affidavit.

40 See too para 17, Applicants' Heads of Argument.

41 See Fortuin v Cobra Promotions CC 2010 (5) SA 288 (ECP). But compare MIDI Television v DPP (Western Cape) 2007 (5) SA 540 (SCA).

42 President of the Republic of South Africa v Mail and Guardian 2012 (2) SA 50 (CC).

43 2009 (6) SA 323 (CC)

have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information. . . .'[44]

PAIA's Structure

[40] PAIA is divided into four Parts. Part 1 contains its general introductory provisions, including the objectives of the Act (section 9) and the types of records to which the Act does not apply (section 7). The provisions in Part 1 apply to records held by both private and public bodies. Part 2 of the Act addresses access to records held by public bodies, whereas Part 3 applies to records held by private bodies. Part 4 contains the provisions governing internal appeals. Parts 2 and 3 set out the threshold and procedural requirements to be met for requests for access to records held by public and private bodies respectively. They also contain provisions listing the various grounds upon which both public and private bodies may refuse access to records held by them.

[41] Before distinguishing between a public and private body and the threshold tests that have developed to determine whether a requester is entitled to access to a relevant record, it is necessary to address the introductory and general provisions in Part 1 of the Act.

[42] The objectives of PAIA are set out in section 9 and resonate with the *Brümmer* Court's description of the importance of the right. For example, section 9(e) provides that the objectives of the Act are 'generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies; (ii) to understand the functions and operation of public bodies; and (iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.'

The application of PAIA – section 7

[44] At paras 62-63. See too, more recently Competition Commission of South Africa v Standard Bank of South Africa Ltd; Competition Commission of South Africa v Waco Africa (Pty) Ltd 2020 (4) BCLR 429 (CC) paras 10-12 and My Vote Counts NPC v Minister of Justice and Correctional Services 2018 (5) SA 380 (CC) paras 19-25.

[43] Chapter 2 of Part 1 of PAIA is headed "General Application Provisions". The provision most relevant here is section 7. It provides that the PAIA *does not apply* to information sought for the purpose of criminal or civil proceedings after the commencement of those proceedings (**my emphasis**). This is so regardless of whether the holder of the record is a public or private body. The three requirements listed in section 7, must nonetheless be met for a record to be excluded from the application of the Act.[45] These are that the Act does not apply to any record if: a) that record is requested for the purpose of criminal or civil proceedings; (b) [was] so requested after the commencement of such criminal or civil proceedings …; 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.

[44] The rationale for the exclusion of such records from PAIA's scope of application is that 'the right of access to information, as given effect to by PAIA, should not be used to circumvent the particular rules of procedure in litigation.[46] This rationale was recently confirmed by the Constitutional Court in Competition Commission of South Africa v Standard Bank,[47] the Court holding that "a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings' and that the purpose of section 7 is to protect the process of the court.[48] After proceedings have been instituted, the parties should be governed by the applicable rules of court.

[45] However, section 7 must be restrictively interpreted.[49]

Access to records held by public and private bodies

[46] Assuming that the section 7 application hurdle is overcome, PAIA provides that both public and private bodies must provide access to requested records if the threshold requirements in sections 11 and 50 respectively are met. This is the case, unless refusal of the

[45] PFE International v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC) para 20.

[46] PFE International para 21.

[47] Competition Commission of South Africa v Standard Bank of South Africa Ltd; Competition Commission of South Africa v Waco Africa (Pty) Ltd 2020 (4) BCLR 429 (CC).

[48] At paras 16-17. See too Unitas Hospital v van Wyk 2006 (4) SA 436 (SCA) paras 21-22, dealing with pre-action discovery.

[49] PPE International para 18; Competition Commission of South Africa v Standard Bank of South Africa Ltd para 17.

request is permitted by a ground of refusal recorded in PAIA. These grounds must be narrowly interpreted and carefully applied though as they limit the constitutional right of access to information.[50]

[47] The distinction between a public and private body is important when determining whether a requester is entitled to a record, because PAIA contains different threshold tests depending on whether the record in issue is held by a public body as opposed to a private body.

Threshold test for access to records held by a public body

[48] Section 11(1) of PAIA provides that when information is requested from public bodies, a requester *must* be given access to the information requested if a) the requester complies with all the Act's procedural requirements for such a request *and* b) access to that record is not refused by any ground for refusal contemplated in Chapter 4 of the Act.

[49] In President of the Republic of South Africa v M &G Media Ltd (M &G Media Ltd)[51] the Constitutional Court held that the language used in section 11 of the PAIA places a peremptory obligation on a public body to give access of information to the requester. This means that the disclosure of information is the rule, whilst exemption from disclosure, the exception. When access is sought to information in the possession of the state it must be made available. Refusal limits the right of access to information. The onus is thus on the state to justify a request for refusal of access to a record.[52]

Threshold test for access to records held by a private body

[50] In the case of private bodies, section 50 of the Act applies, and the right is exercisable only to the extent that the record requested is required for the exercise or protection of the

[50] President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC) para 22, dealing with access to a record held by a public body.

[51] 2012 (2) SA 50 (CC).

[52] At para 23.

requester's rights.[53] If this threshold is met, and the various procedural requirements are met, then the report must be provided, unless the requester raises a Chapter 4 ground of refusal.

[51] The requester bears the onus of proving that the request falls within the ambit of section 50(1) of PAIA and is thus required to state what right is relied upon, the record required, and why that record is required to exercise or protect that right.[54] It is thus more difficult to obtain access to a report generated by a private body.

[52] To discharge this 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."[55]

[53] The meaning of the word "required" has been interpreted as follows: '[i]information can only be required for the exercise of a right if it will be of assistance in the exercise or protection of the right'.[56] This meaning was refined in Clutchco (Pty) Ltd v Davis,[57] the Supreme Court of Appeal holding that "required" does not equal necessity. Rather the test is whether the record is "reasonably required" based on the facts of the case, which test must be understood to "connote a substantial advantage or an element of need."[58]

[54] In Company Secretary of Arcelormittal v Vaal Environmental Justice Alliance[59] the Supreme Court of Appeal re-emphasised the intersection between the "required" constraint and the facts of the matter. The Court added that "the word "required" should be construed as "reasonably required" in the circumstances. The court must thus determine whether an

53 S50 of PAIA.

54 Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA).

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

56 Cape Metropolitan Council v Metro Inspection Services (Western Cape) *CC* 2001 (3) SA 1013 (SCA) para 28.

57 2005 (3) SA 486 (SCA) at para 13.

58 Fortuin v Cobra Promotions CC 2010 (5) SA 288 (ECP).

59 2015 (1) SA 515 (SCA) para 50

applicant has laid a proper foundation setting out why the document is reasonably required for the exercise or protection of his or her rights.

[55] Similarly, in My Vote Counts NPC v Speaker of the National Assembly, the Constitutional Court confirmed 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. . . .'[60]

Definitions of and distinction between public and private bodies

[56] A public body is defined as a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.[61]

[57] The definition of an "organ of state" in section 239 of the Constitution correlates with the definition of a "public body" in the PAIA. The only difference is that for PAIA a "public body" does not exclude a court or judicial officer.[62]

[58] A private body is defined as a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; (c) any former or existing juristic person; or (d) a political party, but excludes a public body.[63]

[59] Section 8(1) of the PAIA provides that a public body referred to in paragraph (b) (ii) of the definition of 'public body' in section 1, or a private body may be a) either a public body or a private body in relation to a record of that body; and b) in one instance be a public body

[60] At para 31.
[61] S 1 of PAIA.
[62] Mittalsteel SA Ltd v Hlatshwayo 2007 (1) SA 66 (SCA) at para 8.
[63] S 1 of PAIA.

and in another instance be a private body, *depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body* (**my emphasis**).

[60] Thus, section 8 of PAIA provides that a body could be a public body in respect of certain records, and a private body in respect of other records. Importantly, to determine whether a particular record was generated by a public body or private body, an analysis of the activity or function exercised by the body when it produced the record in question is needed.[64]

[61] So, for example, in Transnet Ltd v SA Metal Machinery Company (Pty) Ltd,[65] where an unsuccessful tenderer requested that Transnet give it access to records reflecting the successful tenderer's pricing, it was accepted that Transnet acted as a public body in relation to the tender, which concerned the removal of galley waste from ships in the Cape Town harbour. Transnet resisted disclosure, relying on two grounds of refusal. Whilst I address the nature of the ground of refusal relied upon in this case below, it is noteworthy that the Court in SA Metal held that where Transnet enters into a commercial agreement of a public character (the disclosure which does not involve risk to State security or the safety of the public), then "the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer's tender price from disclosure after the contract has been awarded."[66]

[62] Section 8(2) of PAIA provides further that a request for access to a public record must be made in terms of section 11 and that a request for access to a private record must be made in terms of section 50. I have already set out the threshold requirements for access to reports whether held by a public or private body.

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64 M & G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd 2011 (5) SA 163 (GSJ) at para 149.

65 2006 (6) SA 285 (SCA).

66 At para 55.

Grounds justifying refusal of access

[63] PAIA recognises that there are justifiable limitations on the right of access to information held by both public bodies and private bodies.[67] The grounds of exemption applicable to both bodies are set out in Chapter 4 of Parts 3 and 4 of the Act respectively.

[64] PAIA includes both mandatory and discretionary grounds for refusal. The use of the word 'must' in the text of the relevant ground signifies a mandatory ground of refusal and requires the officer of the relevant body to refuse access if the grounds provided in the Act are established. Discretionary grounds are denoted using 'may' and allow the officer of the relevant body to use their judgment in determining whether to grant access where the grounds provided in the Act are established. Such discretion must be exercised lawfully and reasonably.[68]

[65] Should I find that Transnet acted as a private body, the respondents assert that section 65 of the Act applies. This provision is headed "Mandatory protection of certain confidential information of third party" and provides that "[T]he head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.

[66] In relation to a public body, the equivalent ground of refusal is found in section 37 of the Act. It is headed 'Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party.' It provides that:

"(1) Subject to subsection (2), the information officer of a public body –

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or

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[67] See President of the Republic of South Africa v M & G Media Ltd n50 at para 11 and PAIA's preamble.

[68] Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd 2013 (3) SA 315 (SCA) at para 12.

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information—

(a) already publicly available; or

(b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned.'

I address the way in which this ground of refusal has been interpreted below.

Mandatory disclosure in the public interest

[67] Any ground of refusal, whether raised by a public or private body, or whether mandatory or discretionary, is subject to the public interest override in PAIA, with section 46 applying to public bodies and section 70 applying to private bodies. The wording of the respective sections is almost identical. They provide that even where a ground for refusing access to a report exists, the public interest in that report will outweigh the ground of refusal. Two elements must be met. Firstly, it needs to be established that the disclosure of the record would reveal evidence of either a) a substantial contravention of, or failure to comply with, the law or b) an imminent and serious public safety or environmental risk. Secondly, after establishing that the records falls within one of these categories of information, it must be established that the public interest in the disclosure of the record clearly outweighs the harm contemplated in the relevant ground for refusal.[69]

Burden of proof – grounds of refusal

[68] Section 81 of PAIA provides that the burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party

[69] President of the Republic of South Africa v M & G Media Ltd n50 at para 23.

refusing access. As in any civil proceedings, the evidentiary burden of a balance of probabilities must be discharged.[70]

[69] The body refusing access must provide evidence that the contested record falls within the boundaries of the ground of refusal relied upon. Sufficient evidence must be advanced for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed. It is unacceptable merely to repeat the language used in PAIA to justify the exemption. It is also inadequate for a deponent to state only that a specific exemption applies. Instead, "sufficient information to bring the record within the exemption claimed" must be produced.[71]

[70] In addition, the Constitutional Court in M & G Media Ltd held that a court should be cognisant that a PAIA application and the reliance on a ground of justification raises its own unique challenges. Firstly, the facts upon which the exemption is justified are invariably within the knowledge of the holder of information. Consequently, the requester may need to use a bare denial to counter the facts raised by the holder justifying refusal of access. Because a bare denial will normally not be sufficient to raise a genuine dispute of fact, the *Plascon-Evans*[72] rule requires that the application be determined on the factual allegations made by the party refusing access. Secondly, a holder of information who has to rely on the contents of the record to justify the exemption claimed, will be prevented from doing so by virtue of sections 25(3)(b) and 77(5)(b) of PAIA, which preclude any reference to the content of the record in order to support a claim of exemption [73]

[71] Courts are therefore empowered by section 80(1) of PAIA to call for additional evidence in the form of the contested record to test the validity of the exemption claimed.[74] It is to this section which I now turn.

Section 80(1) – Judicial Peek

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70 President of the Republic of South Africa v M & G Media Ltd at para 23.

71 President of the Republic of South Africa v M & G Media Ltd at paras 32-35.

72 See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634G-635D

73 President of the Republic of South Africa v M & G Media Ltd at paras 34-35.

74 President of the Republic of South Africa v M & G Media Ltd at para 36.

[72] Section 80(1) of PAIA provides: "Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds."

[73] Section 80(1) was drafted as an override provision that may be applied despite the other provisions of PAIA and any other law. [75]

[74] In M & G Media Ltd, after analysing relevant foreign law as to when section 80 should apply, the Court concluded that "[J]udicial peek facilitates the responsible exercise of the judicial function where courts may be lacking the material necessary to responsibly determine whether the record falls within the exemption claimed."[76] The situation is complicated though, because section 80 does not list the circumstances in which a court may exercise its power to examine the record.

[75] The power to view the record is nonetheless a discretionary one, which must be exercised judiciously, with due regard to a) the importance of the right of access to information in the constitutional project and b) any difficulties the parties may face in meeting the relevant threshold tests entitling or refusing access. In short, the provision enables a court to review the record independently to adjudicate the validity of the request and "provides legislative recognition that, through no fault of their own, the parties may be constrained in their abilities to present and refute evidence".[77]

[76] As to the relevant standard for the exercise of its discretion, the position is that the court should consider whether there is a possibility of injustice caused by the difficulties faced by parties in access to information disputes. And, in assessing whether there is potential for injustice, a court should implement section 80(1) only when it would be in the interests of

[75] President of the Republic of South Africa v M & G Media Ltd at para 39.

[76] President of the Republic of South Africa v M & G Media Ltd at paras 47-48.

[77] President of the Republic of South Africa v M & G Media Ltd at para 42.

justice to do so (which necessarily requires an analysis of the public interest, and specifically whether the argument for non-disclosure applies or not).[78]

[77] It will generally be in the interests of justice to invoke section 80 where there is doubt, emerging from the unique evidential limitations in access to information disputes, as to whether an exemption is rightly claimed. This may be the case where, through no fault of either party, the evidence presented is insufficient to allow the court to determine responsibly whether access is permitted.

[78] Ultimately, the underlying aim of section 80 is to ensure that courts are not "forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly".[79] The discretion to exercise a judicial peek is thus a critical tool enabling courts to assess claims asserting claims of non-disclosure independently and uphold the constitutional right of access to information.[80]

The section 7 argument: Does PAIA apply to the Mavana Report?

[79] It is not disputed that the Mavana Report was available to the applicants during the Labour Court and Bargaining Council Proceedings.[81] The applicants have also not explained why discovery of the Report was not requested during such proceedings (apart, that is, from general incompetence on the part of their union representatives during such proceedings).[82]

[80] Whilst the applicants claim that the Mavana Report relates to a conspiracy at Transnet when they were dismissed, and that it is in the public interest, having being prepared by a forensic investigator,[83] and having served for consideration before a parliamentary

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78 President of the Republic of South Africa v M & G Media Ltd at para 42. The public has an interest in information held by a public or private party where that information tis not exempt from its disclosure being released.

79 President of the Republic of South Africa v M & G Media Ltd at para 52.

80 See too, the more recent judgment of, Savoi v National Prosecuting Authority [2023] ZACC 38 [23].

81 See paras 19-21, Founding Affidavit; paras 34-35 and 51-52, Answering Affidavit; para 44, Replying Affidavit and para 8, Respondents' Heads of Argument.

82 Para 22, Replying Affidavit.

83 See para 6, Replying Affidavit.

committee),[84] the applicants seeks access to the Report to challenge their dismissal from Transnet.[85]

[81] The applicants' motivation is irrelevant, however, when considering whether the Mavana report falls within the scope of section 7 of PAIA as a record to which PAIA does not apply. Section 7 will exclude a record from PAIA's ambit only when all three of its requirements are met.[86] These are that a) the record is requested for the purpose of criminal or civil proceedings; (b) the record is requested after the commencement of such criminal or civil proceedings; 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.[87]

[82] The question is whether these three requirements have been met here. The enquiry is complicated by the fact that the cases involving the applicants' dismissal from Transnet were finalised in 2017, whereas this application was launched in 2022, with the initial PAIA request lodged in 2020. The question, in other words, is whether section 7(1) can be used to exclude a requested record from PAIA's ambit *after* the relevant court proceedings to which the records relate have been finalised (**my emphasis**).

[83] This point was not addressed in detail in argument by either party. The applicants did not deal with the issue at all and the respondents asserted merely that section 7(1), specifically section 7(1)(c) applies, because the applicants were free to use the rules of discovery to obtain the Mavana Report during their earlier proceedings and chose not to do so. I was not referred to specific authority to support the argument, other than PFE International Inc (BVI),[88] to which I refer to in more detail below. Also, it was only in oral argument that I was informed which "law" would permit the applicants to access the Mavana Report during the various Labour Court and Bargaining Council proceedings.[89]

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84 See paras 14-15, Replying Affidavit.

85 Para 16, Founding Affidavit; paras 9-17, Replying Affidavit.

86 See Competition Commission of South Africa v Standard Bank of South Africa Ltd; Competition Commission of South Africa v Waco Africa (Pty) Ltd 2020 (4) BCLR 429 (CC) at paras 14-17.

87 PFE International Inc (BVI) at paras 20-21.

88 2013 (1) SA 1 (CC).

89 I was informed in argument that the Uniform Rules of Court, as published in terms of Act 59 of 1959, apply to proceedings in the Labour Court. I was not enlightened as to whether such Rules also apply to

[84] It is thus necessary to determine how section 7(1) has been applied in other cases and whether its provisions should be interpreted to exclude a record that was available during prior proceedings, but which was not requested at the time.

[85] The records in PFE International Inc (BVI) were requested to enable the applicants to respond to a Request for Particulars for Trial in a matter which was already pending.[90] The respondents argued that because access to the records was requested for the purpose of pending civil proceedings, the applicants should have used a *subpoena duces tecum* in terms of Rule 38(1) of the Uniform Rules of Court and that the records did not fall within the ambit of PAIA by virtue of the exclusion in section 7(1) of PAIA. It was common cause that the first two requirements of section 7(1) of PAIA had been met. The issue before the Court was whether Rule 38(1) fell within the ambit of section 7(1)(c) of PAIA and constituted a "law" which entitled the applicants to access to the records.[91] In answering this question, the Court confirmed that Rule 38(1) was to be interpreted generously to enable the applicants to obtain access to the records requested as part of the civil proceedings. Such an interpretation meant that Rule 38(1) entitled the applicants to access the same documents requested under PAIA and that the Rule accordingly amounted to a "law" as contemplated by section 7(1)(c) of PAIA. Thus, the applicants could not rely on PAIA to obtain access to the records.[92]

[86] In Mahaeeane v Anglogold Ashanti Limited,[93] a matter dealt with by the Supreme Court of Appeal, a class action had been launched against the respondent for damages sustained by current and former mineworkers after contracting silicosis arising from their employment. Although also formerly employed by the respondent and also ill with silicosis, the appellants were not listed as members of the original class in the certification application (some 56 current and former employees were, in fact, listed). The certification application was granted, but was subject to an appeal.[94]

Bargaining Council proceedings.

90 PFE International Inc (BVI) at para 11.

91 PFE International Inc (BVI) at para 22.

92 PFE International Inc (BVI) at paras 31-32. The Court confirmed the judgment of the Supreme Court of Appeal.

93 2017 (6) SA 382 (SCA).

94 Mahaeeane v Anglogold Ashanti Limited at paras 1-2.

[87] Whilst the appeal was pending, the appellants requested access to various records held by the respondent in terms of section 50(1) of PAIA (request for records held by a private body), stating that they were included in the group of persons to which the class action related. Their attorney testified that the records were required to enable him "to assess and advise the [appellants]: Whether or not the respondent complied with the general duty of care owed by it to the [appellants] to provide and maintain a safe and healthy work environment for its employees as stipulated in section 5 of the [Mine Health and Safety Act 29 of 1996] (the MHSA)."[95]

[88] The respondent claimed that the appellants were purposefully omitted from the class action to avoid the ambit of section 7(1) of PAIA and that the PAIA application was merely "a stratagem to obtain discovery in advance for the class action."[96] In support, the respondent added that the requested records were required for the class proceedings which had already commenced and that the discovery rules provide for the production of the records requested.[97] In any event, according to the respondent, the appellants had not met the threshold test in section 50(1) of PAIA for access to records held by a private body.[98]

[89] In relation to the interplay between sections 50(1) and 7(1) of PAIA, the Supreme Court of Appeal held that the appellants bore the onus of proving that the request fell within section 50's ambit.[99] If discharged, only then would the question of whether the records were excluded by section 7(1) of PAIA arise. The case *in casu*, of course, is different – the applicants request Transnet for access to the Mavana Report in its capacity as a public body and specifically refute the allegation that the Mavana Report was created merely for private employment relations.

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95 Mahaeeane v Anglogold Ashanti Limited at para 5.
96 Mahaeeane v Anglogold Ashanti Limited at para 7.
97 Mahaeeane v Anglogold Ashanti Limited at para 7.
98 Mahaeeane v Anglogold Ashanti Limited at para 8.
99 The relevant test is to establish prima facie that access to the record is required to exercise or protect the right relied upon.

[90] In regard to the section 50(1) analysis, the Mahaeene Court referred to the decision in Unitas Hospital v Van Wyk,[100] and held that the appellants' request did not meet the requisite threshold because the records were not requested to enable the appellants to formulate their claim. Instead, the records were requested to evaluate the prospects of the success of the claim, with the discovery process enabling this objective.[101] In any event, even though the appellants were not listed in the certification of the class action, they were included in the class, and the certification process constituted the commencement of the proceedings between the parties.[102] The appellants were thus not entitled to the records requested because a) they had not discharged the onus in section 50(1); and b) section 7(1) applied – proceedings had commenced, which proceedings entitled the appellants to obtain access to the requested records through the discovery process.

[91] Whilst helpful, neither of these cases correlate with the scenario presented *in casu* – that is a request for access to a report relevant to proceedings finalised at least two years before the PAIA request was launched and which was available at the time of the proceedings.

[92] Although the decision in Competition Commission of South Africa v Standard Bank of South Africa Ltd; Competition Commission of South Africa v Waco Africa (Pty) Ltd[103] does not deal with such scenario, it provides some guidance as to how section 7(1) should be interpreted in such a case. Here, the Constitutional Court was required to assess the relationship between section 7(1) of PAIA and the rules of the Competition Tribunal regulating discovery in cases where a complaint of anti-competitive behaviour had been referred by the Commission to the Tribunal. The Court confirmed the principle that the objective of section 7 and its equivalent in other legislative instruments is to ensure that PAIA's requests do not disrupt or interfere with court proceedings where the discovery rules also permit access to documents relevant to the case.[104] The Court reiterated that if PAIAwere to apply in such cases, it "would be disruptive to court proceedings."[105]

[100] 2006 (4) SA 436 (SCA). See Mahaeeane v Anglogold Ashanti Limited at para 12.
[101] Mahaeeane v Anglogold Ashanti Limited at paras 22-23.
[102] Mahaeeane v Anglogold Ashanti Limited at paras 25-27.
[103] 2020 (4) BCLR 429 (CC).
[104] Competition Commission of South Africa v Standard Bank of South Africa Ltd at paras 195-197.
[105] Competition Commission of South Africa v Standard Bank of South Africa Ltd at para 196.

[93] Given the objective of section 7(1), that its ambit should be restrictively interpreted to facilitate the right to access to information, and that PAIA itself dictates in section 2 that the Act is to be interpreted in a manner that gives effect to PAIA's objectives, as set out in section 9, I find that section 7(1) does not apply on these facts and in respect of already concluded proceedings. Certainly, a request for access to a record after court proceedings have been finalised cannot disrupt such proceedings. Another factor to consider is that only the Second Applicant's case was dealt with substantively, whereas the other applicants' cases were not submitted in time and were dismissed on this basis.

[94] This means that I now need to determine whether the Mavana Report was produced by Transnet as a public body or as a private body and, accordingly, which threshold test for access should be applied.

The status of Transnet in relation to the Mavana Report – public body or private body?

[95] Transnet is an State Owned Company (SOC) and can act as both a public and private body for the purposes of PAIA.[106] It will act as a public body when it a) exercises a power or performs a function in terms of the Constitution or a provincial Constitution or b) it exercises a public power or performs a public function in terms of any legislation.[107]

[96] Transnet will be regarded as a private body for PAIA purposes when it acts in a way that does *not* amount to the exercise of a public power or the performance of a public function authorised by legislation *and* it produces a record in relation to such function.

[97] The crucial issue therefore is whether Transnet produced the Mavana Report in the exercise of a power or performance of a function as a public body or in its capacity as a private body. This question must be answered with reference to the nature of the activity or

[106] S 8 of PAIA.

[107] See s239 of the Constitution and the definition of a public body in s1 of PAIA.

function exercised by the body *when it generated the record in question*,[108] and thus, Transnet's functions. Put another way, the enquiry is whether the function to which the record relates is a public or private function.[109]

[98] The answering affidavit endeavours to explain the nature of both the ICAS and Mavana Reports and the circumstances in which these reports were produced. Whilst it deals in detail with the ICAS Report,[110] it does not contain the same level of detail about the Mavana Report.

[99] The nature of the ICAS Report is elaborated upon in the section where reliance is placed on section 63 of PAIA (Mandatory Protection of Privacy of a Third Party) as a ground of refusal. Here, we are informed that ICAS is a corporate entity, named ICAS Employee and Organisation Enhancement Service Southern Africa (Pty) Ltd (or ICAS for short) and that it operates as an Employee Assistance Programme provider. It supports the promotion of employee health and well-being.[111] In 2018 Transnet asked ICAS to conduct sessions with randomly selected employees at the Port of Ngqura site to identify and understand "key issues of concern in the employment relationship" from an employee perspective.[112] The ICAS Report was produced as a result. Its front page clearly indicates that it is a confidential document, with the employees involved having agreed to participate openly in the sessions on the basis that their confidentiality would be honoured.[113] The deponent to the respondents' affidavit adds that Transnet is in possession of the Report, that she has read it, and that she can confirm that it does not deal with the applicants' dismissal. She asserts that the Report relates the experiences of the interviewed employees at Transnet and their attitude towards Transnet, as employer.[114]

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108 M & G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd 2011 (5) SA 163 (GSJ) paras 149 and 177.

109 J Klaaren & G Penfold "Access to Information" in M Chaskalson et al Constitutional Law of South Africa at 62-12.

110 See paras 42-43, Answering Affidavit.

111 Para 42, Answering Affidavit.

112 Para 43.1, Answering Affidavit.

113 Paras 43.2-43.3, Answering Affidavit. See too para 50, stating that the ICAS Report was procured and produced under absolute confidentiality and trust and also that the employees involved have not consented to the Report's release.

114 Para 43.2, Answering Affidavit.

[100] Following this explanation, the applicants conceded that they were not entitled to access to the ICAS Report.[115]

[101] The answering affidavit only devotes two short paragraphs to the Mavana Report – immediately after explaining the circumstances under which the ICAS report was commissioned and produced.[116] All that is disclosed is that the Mavana Report (like the ICAS Report) was "produced pursuant to an agreement of confidentiality between Mr Mavana and Transnet"; that the Report "is for management information and internal discussion purposes only" and that "the report was prepared solely for purpose of reportion (sic) of the findings / observations and may not be used for any other purposes."[117] The deponent does not state that Transnet is in possession of the Report or that she has read the Report. The deponent also does not disclose what issues the Report addresses. There is no indication about whether any employees participated in group-based sessions leading to the production of the Report and, if so, whether these employees have consented to its disclosure. The fact that the Report was prepared for management information and internal discussion only does not take the matter much further (that is to show that it concerned employee-related matters only), especially given the applicants' allegations about the nature of the Mavana Report in their founding affidavit.

[102] To aggravate matters, later on, when replying to the specific allegations about the Mavana Report in the founding affidavit, the deponent to the answering affidavit merely denies that the Mavana Report addresses an alleged conspiracy at Transnet, or irregular conduct on the part of Transnet's officials,[118] or the "circumstances giving rise to the dismissal of the Applicants."[119] Additional facts supporting the denial are not provided.

[103] Whilst I accept that the deponent to the affidavit had to deal with both the ICAS Report and the Mavana Report in her answering affidavit, and that the facts were somewhat convoluted by virtue of the nature of the two reports involved, the public / private body debate and the entire sequence of events, which commenced with the applicants' dismissal in

115 Para 2, Replying Affidavit.
116 Paras 51 and 52.
117 See paras 51-52, Answering Affidavit.
118 Para 65, Answering Affidavit.
119 Para 70, Answering Affidavit.

2017, it is the respondents who allege that Transnet acted as a private body in relation to the production of the Mavana Report and they must prove this allegation. This approach accords with the general tenor of the Act and sections 78 and 81 thereof.[120] It also ensure that the objects of the Act and that the constitutional value of accountability underpinning the right to access to information is promoted.[121]

[104] I am thus not satisfied that the respondents have produced sufficient evidence to convince me that the Mavana Report indeed deals with confidential employee matters and that it was produced by Transnet in its capacity as a private body.

[105] My conclusion is supported by a consideration of Transnet's status as an SOC and the fact that it acts in the public interest, as a custodian of South Africa's ports, rail and pipelines.[122]

[106] The National Ports Authority (NPA) is a division of Transnet. The NPA's main function is to own, manage, control and administer ports to ensure their efficient and economic functioning, which includes a lengthy list of functions, such as providing port infrastructure, maintaining the sustainability of the ports and their surroundings; regulating and controlling pollution and the protection of the environment within the port limits; and ensuring that South Africa fulfils her international obligations relevant to ports. These are all clearly public functions and, when the NPA fulfils these types of functions, it acts as a public body.[123]

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[120] See too Twala v Member of the Executive Council, Department of Education, Eastern Cape 2016 (2) SA 425 (ECB) at para 12.

[121] Note that in Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA) para 78 the SCA stressed the importance of openness and accountability in the public sector and that these values align with PAIA's objectives.

[122] The National Ports Authority (the NPA) is a division of Transnet, with the government as its sole shareholder. It exercises its functions in terms of legislation, namely the National Ports Act 12 of 2005. Section 2 of the Act provides that its objects are *inter alia* to promote and develop "an effective and productive South African ports industry that is capable of contributing to the economic growth and development of our country". Section 2 must be read with section 11 of the Act, which sets out the NPA's functions.

[123] S 2 of the National Ports Act states its aims. See too s13, which is headed co-operative governance, and provides that all organs of state must co-operate with one another to ensure inter alia the effective management and oversight of all ports.

[107] However, the NPA requires human capital and must employee people to fulfil its functions. The question is then whether it acts as a public or private body in relation to employment matters, which would include the termination of an employee's employment.

[108] The courts have developed various tests to determine when an organ of state or SOC will act as a private body as opposed to as a public body. These include a consideration of the source, nature and subject-matter of the power the body exercises when it performs the function; whether the function involves the exercise of a public duty; the level of discretion and autonomy available to the body when performing the function or activity; and the level of state control and funding involved in relation to the function or activity. [124]

[109] The judgment in Chirwa v Transnet[125] is valuable in determining whether Transnet acts as a private or public body in relation to employment matters. Here, the Constitutional Court was tasked with determining whether the dismissal of a public sector employee gave rise to concurrent actions in both labour and administrative law and thus whether the High Court had concurrent jurisdiction with the Labour Court.[126] The law on the point was not settled at the time, with different views (both academic and judicial) existing as to whether the dismissal of public sector employee by an organ of state involved the exercise of public power and thus constituted administrative action in terms of the Promotion of Administrative Justice Act (PAJA).[127] To address this problem, the Chirwa majority[128] held that although Transnet, as a public entity and a "creature of statute", exercised a public power and function when dismissing an employee,[129] the exercise of that power alone was not "decisive of the question whether the exercise of the power in question constitutes administrative action".[130]

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124 See, for example, Institute for Democracy in South Africa v African National Congress 2005 (5) SA 39 (C); Mittalsteel SA Ltd v Hlatshwayo 2007 (1) SA 66 (SCA); M & G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd 2011 (5) SA 163 (GSJ); and Khadi v University of Venda [2015] JOL 32942 (LT).

125 2008 (4) SA 367 (CC).

126 See paras 19-20.

127 Act 3 of 2000. See the judgment of Ngcobo J in *Chirwa* at paras 127 to 150 where the debate is sketched.

128 See the separate judgment of Ngcobo J, who deals with the administrative action point in detail. The majority judgment, penned by Skewiya J, expressly concur with Ngcobo J on this point. See paras 72-73.

129 At para 101

130 At para 139.

This had to be answered with reference to the meaning of administrative action in section 33 of the Constitution, a crucial factor being the nature of the function (plus its subject matter) that is performed.[131] In relation to the dismissal of an employee, the majority held that the subject matter of the power involved is the termination of the contract of employment (*in casu* for poor work performance), with the source of the power being the employment contract between the employee and Transnet. The fact that Transnet is a creature of statute and an organ of state did not detract from the reality that, in terminating the contract of employment, Transnet exercised a contractual power, which did not constitute administration or administrative action.[132]

[110] It is as a result of this judgment that, for the purposes of PAIA, that employment matters of organs of state have generally been classified as private matters, as opposed to public ones.[133]

[111] Transnet is thus correct when it asserts that when requesting a record generated in relation to the employment and subsequent dismissal of the applicants (or any other employee), a requester would usually need to frame the request in terms of section 50 of the Act – that is, as a request to access the record/s of a private body.[134]

[112] This does not mean, however, that the Mavana Report should automatically be treated as one created by Transnet in its capacity as a private body. In other words, the generation of the Mavana Report, and the function which Transnet fulfilled at the time, must be determined with reference to the purpose or reason why the Report was commissioned and its contents.

[131] At paras 138-139.

[132] At paras 142-145. Note that the meaning of the phrase “public function” or “public power” was usefully clarified by the minority judgment, penned by Langa CJ, holding at para 186 that “[D]etermining whether a power of function is ‘public’ is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.”

[133] Hence the wording in Transnet’s PAIA Manual suggesting that requests for access to records held by Transnet in its private capacity should be made in terms of Annexure 3 to the Manual in accordance with section 53 of PAIA. See para 28 of the Answering Affidavit and Annexure G thereto.

[134] Paras 28-29, Answering affidavit.

The fact that it may relate to the employment of the applicants or any other employee is a factor to consider, but it is not the only factor.

[113] In support of the claim that Transnet acted as a private body in relation to the production of both the ICAS and Mavana Reports, the respondents point to Transnet's PAIA Manual, Annexure G to the answering affidavit. They state that the Manual sets out the distinction between Transnet acting as a public body versus Transnet acting as a private body. It then assists the requester to determine in which capacity Transnet acts in relation to a record requested.[135] The requester is told to consider the nature of Transnet's conduct and the power it exercised when producing the record (whether a public power is exercised or whether a public function in terms of any legislation is performed).[136] In relation to employee related matters, such as disciplinary proceedings, the requester is specifically informed that Transnet *generally* does not exercise a public power and will be regarded as a private body (**my emphasis**).[137] These allegations accord entirely with the Manual.

[114] But, then the respondents go further. They add that both the Reports requested by the applicants fall within the category of "employee records", as defined in 12.2 of Transnet's PAIA Manual, because a) the reports are sought by the applicants, as ex-employees, who assert to enforce their labour law rights against their former employer and b) the reports pertain to employment matters. Thus, the applicants' request for access to both records should be classified as a request for records from Transnet in its capacity as a private body because Transnet created the reports in relation to employee matters and whilst exercising a private power.[138]

[115] The respondents have made out a case to support this argument in respect of the ICAS Report, but the same is not true in respect of the Mavana Report. Here, I agree with the applicants that the respondents have provided insufficient and inadequate detail about the nature of the Report and the reason why it was commissioned to support their claim that it was generated in respect of private employee matters.[139] There is a distinct difference

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[135] Para 28, Answering Affidavit.

[136] To this extent the Manual reflects the correct legal position. See, for example, Mittalsteel SA Ltd v Hlatshwayo 2007 (1) SA 66 (SCA).

[137] See para 6, Answering Affidavit and 6.4 of the PAIA Manual.

[138] Para 30, Answering affidavit

[139] See paras 9-16, Applicants' Heads of Argument.

between the attention given to the ICAS Report as opposed to the Mavana Report, which lends credence to the applicants' claim that the characterisation of the request "as an inconsequential internal affair limited to employee / employer relations" was an attempt to deflect attention away from the true nature of the Mavana Report.[140]

[116] Moreover, the respondents' argument that the Mavana Report must be regarded as a report generated by Transnet in its capacity as a private body simply because the Report is requested by employees who wish to assert their labour law rights, is not logically coherent. It is tainted by "the fallacy of accident", also known as the *dicto simpliciter*, a common fallacy in legal argumentation.[141] The fallacy occurs when a general rule is applied to a specific situation in which the rule is inappropriate because of the situation's specific facts. It is trite that general rules are developed from a consideration of general, common situations. But, when a situation is exceptional because of its accidents or own special facts, an exception to the rule must exist and it is inappropriate to apply the general rule as a matter of course.[142] To avoid the fallacy, the court must consider whether the facts of the case are distinguishable from the situations that gave rise to the general rule in the first place.[143] This, of course, requires sufficient facts to be placed before the court to enable it to do so.

[117] The fallacy in the respondents' argument is as follows – the respondents assert that the applicants are former employees of Transet; they were dismissed from Transnet; their dismissals were upheld by various labour fora; the applicants now request access to a record which apparently addresses the circumstances extant at Transnet when they were dismissed and may impact on their reinstatement; the record is thus an employment record and the general rule applies. The factual situation at play here, however, appears to be very different to the usual employment type matter and a case has not been made out to show that the Mavana Report is an ordinary employment record. It simply does not follow that whenever an employee or ex-employee seeks access to a record held by the body in an attempt to enforce his or her labour law rights, that such record must automatically be treated as one that

[140] Para 14, Applicants' Heads of Argument.
[141] Saunders (1993) "Informal Fallacies in Legal Argumentation" South Carolina Law Review Volume 44 at 344 367.
[142] Ibid.
[143] Saunders 369.

was generated by a private body, and thus that the general rule will always apply without exception.[144]

[118] I therefore find that the respondents have not discharged the onus of proving that Transnet acted as a private body in relation to the Mavana Report and that the threshold test in section 50 of PAIA applies to determine if the applicants are entitled to access to the Report. This means that I need not ascertain whether or not the applicants have shown, *prima facie*, that they are entitled to access the Report because they require it to exercise or protect their rights. Instead, section 11(1) of PAIA applies, namely that when information is requested from public bodies, a requester must be given access to the information requested if a) the requester complies with all the Act's procedural requirements for such a request and b) access to that record is not refused by any ground for refusal contemplated in Chapter 4 of the Act.[145]

[119] The procedural requirements have indeed been met, but Transnet claims that access to the record should be refused in terms of a ground of exemption, namely "Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party".[146]

Ground of refusal relied upon by Transnet – breach of confidence owed to a third party in terms of an agreement

[120] Section 37(1)(a) of PAIA provides that "Subject to subsection (2), the information officer of a public body – must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement". This is a mandatory ground of refusal as indicated by the use of the word "must" in the provision.

[144] Compare para 28 of the answering affidavit, specifically the highlighted section dealing with clause 6.4.4 of the Trasnet's PAIA Manual, and para 29.2 of the same affidavit.

[145] See De Lange v Eskom Holdings *Ltd* 2012 (1) SA 280 (GSJ) paras 34-35.

[146] This is the equivalent ground of exemption to that relied upon by Transnet should I have found that it generated the report as a private body.

[121] The onus of proving that a ground of refusal applies is on the party relying on that ground to refuse access to the record.[147]

[122] Briefly, the basis upon which Transnet asserts that the Mavana Report is subject to a confidentiality clause is as follows: the Mavana Report was produced pursuant to an agreement of confidentiality between Mr Mavana and Transnet, with the Report containing a specific provision stating that it was produced subject to an agreement of confidentiality between Mr Mavana and Transnet and that it should not be distributed to third parties without the prior consent of Transnet and Mr Mavana.[148] To this Transnet adds that the "report was prepared solely for purpose of reportion (sic) of the findings / observations and may not be used for any other purposes."[149] Moreover, Mr Mavana's consent to disclosure of the Report to the applicants has not been obtained.

[123] Unlike the ICAS Report, there is no indication that Transnet employees participated in interviews to prepare the Mavana Report on the condition that their involvement in the generation of the Report remain confidential. There is also no disclosure on the part of the deponent to the answering affidavit that she has read the Report and that it indeed contains confidential information that must be protected.

[124] In M &G Media Ltd[150] the Court dealt specifically with the sufficiency of the evidence needed to discharge the onus of proving that a body is entitled to rely on a ground of exemption. The Court held that – "The proper approach to the question whether the state has discharged its burden under section 81(3) of PAIA is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed."[151] This analysis will also depend upon the nature of the exemption claimed.[152]

[147] Transnet v SA Metal para 25.
[148] Paras 51-52, Answering Affidavit.
[149] See paras 51-52, Answering Affidavit.
[150] 2012 (2) SA 50 (CC).
[151] At para 23.
[152] At para 25.

[125] It is insufficient for the holder of a record to repeat the language of the exemption claimed to prove that the exemption applies. As held in M &G Media Ltd, "The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government."[153]

[126] When assessing whether sufficient evidence has been presented, a deponent's assertion that the information is within her personal knowledge is not enough. The deponent must also explain how her knowledge was acquired. This is needed to discern the weight to be attached to the claims in the affidavit. The crucial factor "is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged."[154]

[127] In the same vein, according to the Court, the holder of the information must put up facts which enable the court to conclude, on a balance of probabilities, that the record falls within the ambit of the exemption claimed to discharge the burden of proof in terms of section 81(3) of PAIA.[155] The sufficiency of the facts presented must be assessed with reference to the context, the obligation on public bodies to be open and accountable and that the holder of the information may be constrained by the confidentiality of the record to when asserting why that record is confidential.[156]

[128] As indicated, these constraints can be overcome by resort to section 80(1) of PAIA, enabling a court to consider the record itself to determine whether the ground of refusal relied upon is justified.

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153 At para 24.

154 At para 28.

155 At para 32.

156 At paras 33-35. Plus, sections 25(3)(b) and 77(5)(b) of PAIA preclude —any reference to the content of the record to support a claim of exemption.

[129] Had I been asked to determine whether this onus had been discharged in relation to the ICAS Report, my conclusion would have been different. In respect of that Report, the deponent, as the relevant Information Officer, has set out detailed facts explaining why the Report is confidential and why its disclosure should be protected – not only because of the confidentiality clause, but also because confidentiality is needed to protect the rights of the employees who participated in the proceedings leading up to the generation of the ICAS Report. The same is not true for the Mavana Report. There is no indication that the Report contains confidential information of third parties and that section 37(1)(b) applies. The only indication of any confidentiality is the respondents' claims that Mr Mavana and Transnet agreed that the Report is confidential and that it could not be released without either their prior consent – thus invoking section 37(1)(a) of PAIA. There is also no suggestion that Mr Mavana has been approached to request whether he agreed to the disclosure of the Report.

[130] In *Transnet v SA Metal*,[157] the Supreme Court of Appeal held that, in order to rely on section 37(1)(a) of PAIA, which provides that non-disclosure of a record is mandatory if it would constitute grounds for an action of breach of confidence owed to a third party in terms of an agreement, there must be a a risk that if the third party sued for a breach of confidentiality the information holder could be subject to an adverse finding for a material breach entitling cancellation of the agreement or as to an award of damages.[158] The mere inclusion of a confidentiality clause in a record is not sufficient to bring the record within the ambit of the ground of exclusion.[159] This test was confirmed in SA Airlink (Pty) Limited v The Mpumalanga Tourism and Parks Agency.[160]

[131] The respondents have not produced sufficient facts to enable me to determine whether there is indeed such a risk and have thus not discharged the relevant onus of proof to show that the ground of refusal applies on these facts.

Reliance on section 80(1) of PAIA

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[157] 2006 (6) SA 285 (SCA).

[158] At paras 54-55. It is acknowledged that the Court was concerned with a commercial agreement, but the principle remains the same.

[159] At para 55.

[160] 2013 (3) SA 112 (GSJ).

[132] I need only exercise my discretion in terms of section 80(1) of PAIA to have a judicial peek at the Mavana Report if there is a possibility of injustice by virtue of the inherent evidential difficulties faced by parties in access to information disputes.

[133] Given that the respondents have failed to discharge the onus resting on them to prove that the Report falls within the ambit of section 37(1)(a) and that this could have been done, I find that there is no reason for me to exercise such discretion.

Order

The following order is issued:

[1] That the Respondents furnish to the Applicants in terms of the Promotion of Access to Information Act 2 of 2000, a copy of the Report compiled by Forensic Investigator, Owen Mavana, in 2019, based on case number BC.NUMSA/TPT(ECP)13623, allegedly referring to the circumstances leading to the dismissal of the applicants from the respondent's employment (the so-called Mavana report) within 20 days as from the date of service of this order; and

[2] That the First Respondent pay the Applicants' cost of suit.

JC BOTHA
ACTING JUDGE OF THE HIGH COURT

Date heard : 9 February 2023

Date delivered	:	22 March 2024
For the Applicant(s)	:	Adv Rossi, instructed by Randell & Associates, Gqeberha.
For the Respondent(s)	:	Adv Mahabeer SC, instructed by Carla Vermeulen Attorneys, Gqeberha.