IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No. 2022/14821

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES.
DATE: 06 March 2023

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In the matter between:

ELITE PLUMBING AND INDUSTRIAL SOLUTIONS (PTY) LTD — Applicant

and

CASPER LE ROUX INC ATTORNEYS — First Respondents

JADEL DEVELOPMENT (PTY) LTD Second Respondents

JUDGMENT

HOPKINS AJ

1. The applicant seeks an order from this court directing the respondents to furnish it with information sought in two requests for information, dated 10 January 2022 and 17 February 2022 respectively. It does so in terms of the Promotion of Access to Information Act No. 2 of 2000 ('PAIA"), specifically section 53(1) which deals with requests for access to the record of a private body.

2. By way of some background, the applicant was owed R349,618.58 by the second respondent for services that it had rendered. The second respondent apparently did not pay the applicant because it had not been paid by its own creditors, the main culprit being a developer called Malan Developments (Pty) Ltd. Eventually, the applicant sued the second respondent and obtained a judgement against it for the payment of what was owing together with interest and costs. Sometime later, the applicant heard that Malan Developments (Pty) Ltd had been liquidated and that the liquidator had paid the second respondent an amount of R12,589,614.65. The liquidator supposedly paid the money into the first respondent's trust account. The first respondent is a firm of attorneys who had been representing the second respondent in the litigation. The applicant, encouraged by this news, wrote to the firm of attorneys requesting details about the

money that it had supposedly received on behalf of the second respondent. The firm of attorneys declined to provide the information, claiming that it was protected by attorney-client privilege. The applicant then made two formal requests for access to the information under section 53(1) of PAIA. Those formal requests, too, were refused. This precipitated the applicants approaching this court for an order to compel the firm of attorneys to provide it with the information that sought.

3. It is useful at this juncture to consider the legislative scheme that affords citizens a right to access information. Prior to the constitutional era, citizens had no general right of access to information in South Africa. In fact, quite the contrary was true. The apartheid State directed considerable resources towards maintaining secrecy in government. There were many statutes that contained provisions which made it a criminal office for officials to release information to the public. The inclusion of a right of access to information in the Constitution was therefore seen as an important measure of assuring citizens that the government would, in the future, be committed to upholding the constitutional values of transparency, openness, participation and accountability. But PAIA does not only provide citizens with a right of access to information held by public bodies. It also provides a right of access, under certain conditions, to information held by private bodies. In *Centre for Social Accountability vs. Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) at 53 it was held that the distinction between the right to information held by the State on the one hand, and information held by private institutions on the other, is significant because in the case

of the former the right is unqualified whereas in the case of the latter it is limited to information that is necessarily required for the exercise or protection of a right.

4. In this case we are dealing with information held by a firm of attorneys on behalf of its client, ie. information held by a private body. Section 50 of PAIA deals with the right of access to a record held by a private body. Section 50(1) provides that:

> A requester must be given access to any record of a private body if:
>
> *(a)* that record is required for the exercise or protection of any rights;
>
> *(b)* that person complies with the procedural requirements in this Act relating to a request for access to that record;
>
> *(c)* access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

5. As to the requirement in section 50(1)(*a*), *Mr Ossin*, who represented the respondents, sought to persuade me that what the applicant actually wants from the firm of attorneys is not a record properly so-called but rather information, a less exact term. He then sought to draw a distinction between the two concepts. Essentially, he argued that the information sought by the applicant - details about the money received from the liquidator - falls outside the definition of a record. I disagree. The term *record* is defined in section 1 of PAIA to mean "any recorded information (*a*) regardless of form or medium; (*b*) in the possession or under the control of the private body; (*c*) whether or not it was created by that private body". The information sought by the applicant, in my view, falls squarely within this definition. But even if there was some doubt, section 2 of PAIA instructs every court to prefer any reasonable interpretation of a provision in PAIA that is consistent with the objects of PAIA over any alternative interpretation

that is not. The objects of PAIA are set out in section 9 and they include giving effect to the constitutional right of access to *any* information held by a private person where that information is required in order to exercise or protect a right. In my view the provisions of PAIA must be generously and purposively interpreted in order to give effect to that object. The right that the applicant seeks to protect is its right to be paid by the second respondent in accordance with the judgment that it obtained. That right can only be vindicated, according to the applicant, if it knows what has happened to the money that the second respondent received from the liquidator.

6. The next requirement is more controversial. Section 50(1)(*b*) of PAIA provides that the requester is only entitled to access the record of a private body where the requester has complied with the procedural requirements in PAIA. In that regard *Mr Ossin* furnished the court with detailed heads of argument in which he outlined a number of procedural shortcomings. Of particular significance to this judgment are his arguments around the respondents' claim that the applicant fatally failed to exhaust its internal remedy before approaching this court for relief. It is to this issue that I now turn my attention.

7. The procedure for obtaining access to a record of a private body starts with a formal request from the requester to the head of the private body. Section 53(1) provides that the request must be made in the prescribed form and that it must be made to the private body at its address, fax number or by email. According to section 53(2) the form for the request must (*a*) provide sufficient particulars to enable the head of the private body *inter alia* to identify the record being requested and who the requester is, (*b*) indicate which form of access

is required, (*c*) specify the postal address of fax number of the requester, (*d*) identify the right that the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right, (*e*) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed, and (*f*) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.

8. In terms of section 56, the head of the private body is required to notify the requester within 30 days whether the request for access is granted or refused. According to section 58, a failure to make a decision is deemed to be a refusal.

9. If the request is granted, all is good and well. However, if the request is refused then, according to Chapter 2 of Part 3 in PAIA, the aggrieved requester may apply to court for appropriate relief in terms of section 82 of the Act. Section 82 empowers the court hearing such an application to grant any order that is just and equitable. Broadly the court can grant an order confirming the decision to refuse access to the record or one that sets aside the decision and replaces it with something else. The type of relief contemplated in section 82, although not a closed list, is set out in subsections *(a)* to (*e*). The question that I am seized with, however, is whether or not an applicant, before approaching the court for relief in terms of section 82 of PAIA, is obliged to first exhaust an internal remedy.

10. Section 78 deals with applications to court. Section 78(1) is particularly relevant. It provides as follows:

> A requester… may only apply to a court for appropriate relief in terms of section 82 in the following circumstances:
>
> *(a)* after that requester… has exhausted the internal appeal procedure referred to in section 74; or
>
> *(b)* after the requester… has exhausted the complaints procedure referred to in section 77A.

11. The wording of section 78(1) is clear. A requester may only apply to court after it has first exhausted the internal appeal procedure referred to in section 74 or after it has exhausted the complaints procedure referred to in section 77A. Stated differently, an aggrieved requester who has not exhausted the internal appeal procedure referred to in section 74 or the complaints procedure referred to in section 77A may not approach a court for relief in terms of section 82. There is thus an internal appeal procedure and a complaints procedure. These, if they apply, must be exhausted before the requester can approach a court.

12. When does the internal appeal procedure referred to in section 74 apply and when does the complaints procedure referred to in section 77A apply? Let me begin with the internal appeal procedure referred to in section 74: the text of section 74 commences with the words "a requester may lodge an internal appeal against a decision of the information officer of a public body…". There is no mention in section 74 of the internal appeal procedure applying to a decision taken by the head of a private body. The internal appeal procedure referred to in section 74 is therefore not applicable in this case.

13. Does the complaints procedure referred to in section 77A apply to the head of a private body? Chapter 1A deals with complaints that an

aggrieved requester may make to the Information Regulator. I pause to point out that the *Information Regulator* is defined in section 1 of PAIA to mean the Information Regulator established in terms of section 39 of the Protection of Personal Information Act, 2013 ("POPI"). Section 39 of POPI provides that:

> There is hereby established a juristic person to be known as the Information Regulator which:
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> *(a)* has jurisdiction throughout the Republic;
>
> *(b)* is independent and is subject only to the Constitution and to the law and must be impartial and perform its functions and exercise its powers without fear, favour or prejudice;
>
> *(c)* must exercise its powers and perform its functions in accordance with this Act [POPI] and the Promotion to Access Information Act [PAIA]; and
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> *(d)* is accountable to the National Assembly.

14. Returning to section 77A of PAIA, which deals with complaints to the Information Regulator, subparagraphs (1) and (2) are relevant. They provide as follows:

> (1) A requester… referred to in section 74 may only submit a complaint to the Information Regulator in terms of this section after the requester… has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for is section 74.
>
> (2) A requester –
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> *(a)* that has been unsuccessful in an internal appeal to the relevant authority of a public body;
>
> *(b)* aggrieved by a decision of a relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
>
> *(c)* aggrieved by a decision of the information officer of a public body referred to in paragraph (*b*) of a definition of a public body in section 1…; or
>
> *(d)* aggrieved by a decision of the head of a private body to refuse a request for access…

> made within 180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Information Regulator in the prescribed manner and form for appropriate relief.

15. Section 77A(2) applies to two different types of requesters: a requester of access to information held by a public body and a requester for access to the record of a private body. We see this from the body of the text. Section 77A(1) provides that, in the case of a public body, a requester must first exhaust the internal appeal in section 74 before it is entitled to submit a complaint to the Information Regulator. In the case of a private body, as we have already seen, there is no requirement to first exhaust an internal appeal because PAIA does not make any provision for an internal appeal against a refusal by the head of a private body. Thus, where a requester has been refused access by the head of a private body, that requester may, within 180 days of the decision, forthwith lodge a complaint to the Information Regulator.

16. In the context of requests made for access to a record held by a private body, the scheme of the legislation allows a citizen to approach the head and request access to the record. If the head refuses access, the aggrieved requester may lodge a complaint with the Information Regulator under section 77A. Sections 77A to 77K deal more fully with the complaints procedure but, by way of a brief summary, the complaint must be made in writing and the Information Regulator, upon receiving it, must investigate the complaint and thereafter advise the parties of the course of action that it proposes. It may, for example, decide to take no action at all, or it may try to assist the parties to reach a settlement, or it may make an assessment of whether the private body has complied with its obligations. Ultimately, the

Information Regulator may serve an enforcement notice on the head of the private body either confirming, amending or setting aside the decision that is the subject of the complaint or requiring the head to take such action as may be specified in the notice. Non-compliance with an enforcement notice is an offence.

17. In other words, according to the scheme of the legislation, a citizen can request access to a record of a private body and if the request is refused, the citizen has recourse to an entire complaints procedure that will yield a decision from the Information Regulator.

18. Let me now return to section 78 of the Act which deals with applications to court, specifically section 78(1)(*b*) which expressly provides that:

> A requester… may only apply to court for appropriate relief in terms of section 82… after the requester… has exhausted the complaints procedure referred to in section 77A.

19. Those words "may only apply to court… after the requester… has exhausted the complaints procedure referred to in section 77A" make it plain that an aggrieved requester for a access to a record of a private body is not entitled to approach a court unless it has first exhausted the complaints procedure referred to in section 77A. When a statute expressly states that an internal remedy must be exhausted before an application to court can be launched, the exhaustion of that remedy is an indispensable requirement for the launching of the application to court. There is good reason for this as the Constitutional Court explained in *Koyabe and Others vs. Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at paras 35 and 36:

> Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
>
> First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.

20. It is common cause that the applicant in this case did not exhaust the complaints procedure referred to in section 77A. It was not, in the circumstances, entitled to approach this court for relief in terms of section 82 of the Act. I therefore agree with *Mr Ossin* that the applicant's failure to exhaust the internal remedy is fatal to its application to this court in these proceedings.

21. The respondents had other strings to their bow, however, in light of the view that I have already expressed on the peremptory language employed in section 78(1) of PAIA, it is unnecessary for me to engage them.

22. The application is dismissed with costs.

HOPKINS AJ

Heard on	**16 February 2023**
Judgment delivered on	**06 March 2023**

Appearances

For the applicants:	Adv. Terence Ossin
Instructed by:	Casper le Roux Inc. Johannesburg
For the respondent:	Ms. Riekie Erasmus
Instructed by:	Riekie Erasmus Attorneys Johannesburg