

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



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

Case number: 36915/2013

In the matter between:

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

Applicant

And

**CITY POWER JOHANNESBURG (PTY) LIMITED
DEPUTY INFORMATION OFFICER**

**First Respondent
Second Respondent**

Summary: Promotion of Access to Information Act, 2 of 2000 – applicant sought information as to local content of solar geysers provided in terms of tender awarded by first respondent – first respondent failed to acknowledge request for information in terms of PAIA - applicant appealed such ‘deemed refusal’ – applicant then launched application for access to information in terms of section 78 of the Act.

Respondents thereafter ‘refused’ the request for access to information on, inter alia, the grounds that the documentation contained “ *financial, commercial, scientific or technical information of third parties which, if disclosed, would likely to cause harm to the financial or commercial interests of such third party*” and that “*tender documents submitted by each of the successful bidders contain sensitive and confidential financial and commercial information regarding each bidder’s product and the pricing thereof as well as other sensitive commercial and financial information relating to each bidder’s business*”. When the matter came to court in 2014 both parties acknowledged that the information officer had failed to follow the procedures in Chapter 5 of PAIA and had failed to give notice to third parties – the court ordered notice to be given by 8th August 2014.

Respondents further failed to make a decision on the request for access to information within 30 days of the notices – which 30 day period is mandated by the Act.

The application was set down on the opposed motion roll of 20th April 2015 – respondents decided on 1st April 2015 to solicit responses from third parties – then made a decision to “refuse” access to the requested information on 10th April. At the hearing on 20th April, respondents raised the point *in limine* that the applicant was now required to appeal the ‘refusal’ of 10th April and the application could therefore not be heard.

The court found the provisions of Part 1 Chapter 5 of PAIA providing for notices to and engagement with third parties to be peremptory provisions of the Act which the court had no discretion to waive – the court found that the first 2014 “refusal” was made without the full conspectus of information including the input of third parties – accordingly the 2014 appeal pertained only to the 2014 “refusal”. The court found that the applicant may elect to appeal the current (2015) “refusal” but must have done so prior to litigating.

The court commented on the many acts and omissions of the respondents in frustrating access to the requested information which is detrimental to the ‘culture of justification’ contemplated in both PAIA and the Constitution of the Republic of South Africa.

The application was postponed *sine dies* and the question of costs was postponed to a date to be arranged for consideration of personal liability for costs on the part of second respondent and employees of first respondent.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. This was meant to be an application in terms of the Promotion of Access to Information Act , No 2 of 2000 (‘PAIA’) arising out of a request for information made by applicant to first respondent. Unfortunately, without notification or presentation of any papers, it turned into the hearing of a preliminary technical point pertaining to the internal workings of PAIA.
2. The issue now before me is whether or not the applicant is obliged in 2015 to pursue yet another internal appeal in terms of section 74 of PAIA against a ‘refusal’ by respondents in April 2015 to furnish information requested (notwithstanding that an earlier appeal was lodged in August 2013 against an earlier refusal by respondents in July 2013).
3. The chronology is instructive:

- a. Applicant made the request for information of first respondent on 3rd July 2013. The information sought is that which will indicate whether or not there is local content (as required) to solar powers provided in terms of a tender (applicant proceeding only with prayers 1.5, 1.8 and 1.9 in Notice of Motion).
- b. There was a failure on part of respondents to give any answer to this request. Applicant held this to be a 'deemed refusal'. Applicant then pursued a PAIA appeal¹ on 2nd August 2013.
- c. Litigation then commenced in October 2013. An answering affidavit was filed in November 2013.
- d. In a further affidavit in July 2014, the second respondent relied upon the right of *"mandatory refusal of a request for documentation containing financial, commercial, scientific or technical information of third parties which, if disclosed, would likely to cause harm to the financial or commercial interests of such third party"*.² The second respondent went on to state that *"tender documents submitted by each of the successful bidders contain sensitive and confidential financial and commercial information regarding each bidder's product and the pricing thereof as well as other sensitive commercial and financial information relating to each bidder's business"*.³
- e. When the matter came to court in July 2014, respondents pointed out that they had now belatedly realized that they had failed to comply with the relevant provisions of Chapter 5 of PAIA requiring notice to be given to third parties. By order of Victor J on 30th July 2014, respondents were to notify all third parties by not later than 8th August 2014 of the request for information and thereafter to furnish applicants with copies of any responses received. Respondents did so notify the third parties.
- f. On 2nd March 2015 notice was given that this matter was set down for hearing on the opposed roll of 20th April 2015.
- g. Then, on 1st April 2015, second respondent belatedly decided to solicit further responses from third parties and accordingly, contacted third parties and offered them a further opportunity to respond.⁴
- h. Second respondent then decided on 10th April 2015 to 'refuse' access to the information as requested. That 'refusal' was communicated to applicant on 14th April 2015.
- i. The matter was set down for hearing on the opposed roll on Monday 20th April 2015 at which time respondents' counsel handed up a practice note, a supplementary affidavit and heads of argument.

¹ In terms of section 74 of the Act.

² Paragraph 7.

³ Paragraph 10.

⁴ Paragraph 14 onwards of supplementary affidavit of 16th April 2015.

PART 2, CHAPTER FIVE OF PAIA

4. Respondents have taken the following point. The 'refusal' in terms of section 49 (1)(c)(ii) was only made on 14th April 2015. The applicant "may" lodge an internal appeal against such refusal in terms of section 74(1). The applicant must lodge such appeal if it intends to proceed to court with this or any other application because Section 78 only permits the applicant to apply to court after it has "exhausted the internal appeal procedure" provided for in terms of section 74.
5. Applicants maintain that they have pursued an appeal in August 2013 against the then deemed refusal of the respondents. They have therefore already "appealed" the "refusal". There is no purpose served in noting an appeal against this subsequent refusal because they have already appealed a refusal to furnish the information requested and the decision has not changed.
6. I regret, for the reasons which I set out below, that I must uphold the point raised by respondents.

Audi Alteram Partem re Third Parties

7. PAIA, in its preamble, makes it absolutely clear that the purpose of the legislation is to give effect to the Constitutional right of access to any information held by the State – the so-called 'culture of justification'.⁵ However, such right of access may be limited to the extent that it is reasonable and justifiable in an open and democratic society.
8. Chapter Five of PAIA seeks to involve and protect third parties to whom certain requested information pertains. It was not argued before me whether or not the information sought falls within the purview of a record contemplated in section 34, 35, 36, 37, or 43. However, at the hearing before Victor J, both parties agreed that notice was required to be given to third parties and it was so ordered. The nature of the evidence was not argued before me and I have been given no reason to believe that the provisions of section 47 to 49 are not of application.
9. Section 47 requires the information officer of first respondent to inform all third parties (to whom the requested tender information relates) of the request made by the applicant. These third parties are to be offered the opportunity to make representations to the information officer – either consenting to the disclosure of

⁵ The *President of the Republic of South Africa and others v M & G Media Ltd* 2011 (2) SA 1 SCA.

the information or setting out why the request for access to the information should be refused.⁶ Such response from the third parties may be made within 21 days.⁷

10. Once the information officer has made a decision whether or not to grant the request for access to the tender information, then the information officer must notify both third parties and the applicant of the decision made. Should the request for information be granted, the information officer must offer the third parties an opportunity to lodge an internal appeal against such decision.⁸ Should the request

⁶Section 47 Notice to third parties: (1) The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.(2) The information officer must inform a third party in terms of subsection (1)-(a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and (b) by the fastest means reasonably possible. (2) When informing a third party in terms of subsection (1), the information officer must- (a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be, and describe the content of the record; (b) furnish the name of the requester;(c) describe the provisions of section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be;(d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46 (a) in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and (e) state that the third party may, within 21 days after the third party is informed-(i) make written or oral representations to the information officer why the request for access should be refused; or(ii) give written consent for the disclosure of the record to the requester.

⁷ Section 48 Representations and consent by third parties(1) A third party that is informed in terms of section 47 (1) of a request for access, may, within 21 days after the third party has been informed-(a) make written or oral representations to the information officer concerned why the request should be refused; or (b) give written consent for the disclosure of the record to the requester concerned. (2) A third party that obtains knowledge about a request for access other than in terms of section 47 (1) may- (a) make written or oral representations to the information officer concerned why the request should be refused; or(b) give written consent for the disclosure of the record to the requester concerned.

⁸ Section 49 Decision on representations for refusal and notice thereof: (1) The information officer of a public body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47- (a) decide, after giving due regard to any representations made by a third party in terms of section 48, whether to grant the request for access;(b) notify the third party so informed and a third party not informed in terms of section 47 (1), but that made representations in terms of section 48 or is located before the decision is taken, of the decision; and (c) notify the requester of the decision and, if the requester stated, as contemplated in section 18 (2) (e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible, and if the request is- (i) granted, notify the requester in accordance with section 25 (2); or (ii) refused, notify the requester in accordance with section 25 (3). (2) If, after all reasonable steps have been taken as required by section 47 (1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused. (3) If the request for access is granted, the notice in terms of subsection (1) (b) must state- (a) adequate reasons for granting the request, including the provisions of this Act relied upon; (b) that the third party may lodge an internal appeal or an application, as the case may be, against the decision within 30 days after notice is given, and the procedure for lodging the internal appeal or application, as the case may be; and (c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph (b), unless such internal appeal or application with a court is lodged within that period. (4) If the information officer of a public body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned after the expiry of 30 days after notice is given in terms of subsection (1) (b), unless an internal appeal or an application with a court, as the case may be, is lodged against the decision within that period.

for information be refused and applicant lodges an internal appeal⁹, then the third parties must be informed thereof.¹⁰

11. It would seem that those individuals and entities who are third parties in this matter are probably the successful bidders in the tender process. It is presumably them to whom the requested information pertains.
12. Chapter Five of the Act has gone to a lot of trouble to ensure that these third parties are kept in the loop as regards any request for information concerning the tender under scrutiny. They are to know of the request, have the opportunity to make input into the decision to be made, be informed of the decision, have the opportunity to appeal the decision, and have the opportunity to make input into any appeal process initiated by the applicant.
13. This is more than mere lip service to *audi alteram partem* in respect of third parties. It is an extremely detailed process which is clearly spelt out. I cannot see that this court would have any discretion to excuse compliance with any stage of this process which is so prescribed in the Act and no such discretion was argued.

The Decision of the Information Officer

14. There can be no doubt that the initial refusal of the second respondent in 2013 and 2014 was unprocedural and without full information before him. The second respondent had not, prior to the end of August 2014, given the third parties an opportunity to make any input into his decision-making process. He was therefore operating without a full conspectus of facts and information.
15. To the extent that the second respondent sought, in July 2014, to claim that the information could not be released because it was "*sensitive and confidential*", he was merely offering an unsubstantiated thumbsuck. He had not asked for a response from nor heard from any third parties; none of them had expressed this view; his knee jerk response was not only unprocedural but it was made without regard to all relevant information. I should point out that relevant information includes views both for and against disclosure of the information.

⁹ Section 74 Right of internal appeal to relevant authority (1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1- (a) to refuse a request for access; or (b) taken in terms of section 22, 26 (1) or 29 (3), in relation to that requester with the relevant authority. (2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1 to grant a request for access.

¹⁰ Section 76.

16. It does not appear that the information officer has given any thought to reduction, redaction, removal or deletion of portions or sections of information from the records in respondents' possession. His July 2014 affidavit refers to certain documents which he believes constitutes 'sensitive and confidential financial and commercial information' (for example, audited financial statements or tax clearance certificates) which "ought not to be divulged". He does not appear to have considered the possibility that staples can be undone and papers removed or censored if, indeed, any of this information is so confidential.
17. In short, the earlier appeal noted by the applicant in August 2013 was against a decision made by second respondent absent the information which is now available, viz the representations and views of the third parties. There is both an entirely different decision which has now been made in April 2015 and an entirely different set of considerations which may or may not have come into play in making that decision and to be presented and considered in an entirely new appeal against this refusal. The appeal of August 2013 cannot constitute or suffice as an appeal against a decision of 2015.

Appeal Against The 2015 "Refusal"

18. The applicant may appeal the 2015 refusal. That is its election. However, should the applicant wish to institute legal proceedings in connection with the 2015 "refusal", it is obliged to first exhaust all internal remedies in terms of PAIA before turning to the court for assistance.¹¹

¹¹ Section 78 Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies (1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74. (2) A requester- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body; (b) aggrieved by a decision of the 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 the definition of 'public body' in section 1- (i) to refuse a request for access; or (ii) taken in terms of section 22, 26 (1) or 29 (3); or (d) aggrieved by a decision of the head of a private body- (i) to refuse a request for access; or (ii) taken in terms of section 54, 57 (1) or 60, may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82. (3) A third party- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body; (b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; or (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body, may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

19. The applicant must first pursue and exhaust the appeal procedure against the “refusal” of 2015. Only then and thereafter may the applicant, if unsuccessful in its appeal, proceed, by way of application, to a court for appropriate relief.
20. It may be that this applicant will lodge and pursue an appeal against the 2015 “refusal” and, if unsuccessful, may decide to proceed to court on the same papers duly supplemented or by way of a new application. I make no comment in this regard.

Frustration of this Application to Access Public Information

21. I have already referred to the Constitutional importance of this legislation and the ‘culture of justification’.
22. I am unimpressed with the approach taken by and the attitude of the respondents. Firstly, they failed to respond to requests for information in 2013. Secondly, the decision to refuse to disclose information was made in 2014 and was made without reading the relevant provisions of the Act and taking steps to implement same in respect of third parties. Thirdly, such an important decision was made without having the full conspectus of information before him. Fourth, having been ordered by the court to notify third parties, respondents did so but the information officer then failed to make his decision within the 30 days as mandated in section 49(1). Fifth, no decision was made over a period of 8 months. Sixth, having failed to make a decision within the prescribed 30 days, the information officer then failed to inform any parties of an entitlement to appeal. Seventh, realizing on 2nd March 2015 (on receipt of the notice of set down dated 26th February 2015 for the hearing on 20th April 2015) that no decision one way or the other had been made and that the processes set out in Chapter Five had not been followed or pursued, the information officer then decided to solicit responses from third parties (who had apparently decided not to make representations when they had originally received notification in August 2014) which is not a permitted intervention. Eighth, such solicitation was made some 11 working days before the hearing of this application with the obvious result that the court proceedings would be rendered nugatory. Ninth, the information officer, having solicited responses from third parties, then made a decision to ‘refuse’ on 10th April some 5 working days before the hearing of this application again with the obvious result that the court proceedings would be rendered nugatory. Tenth, respondents thereafter prepared a supplementary affidavit dated 16th April 2015 and heads of argument dated 19th April - all of which were handed up to court when this matter was called for hearing on the opposed motion court roll.

23. It should be obvious that the respondents have not only been dilatory in regard to the required provisions of PAIA and apparently obstructive in bringing this matter to finality but also contemptuous of this court and its proceedings.
24. If the information officer had given notice to third parties pursuant to the court order of 30th July 2014, he would have made his decision by mid-September 2014 and any appeals against such decision would have been lodged, prosecuted and adjudicated upon long before this hearing on 20th April 2015.
25. For these reasons I am not in agreement with respondents' counsel that the hearing of this application is "premature" - I prefer to take the view that the hearing of this application has been 'frustrated'.
26. In such circumstances, the respondents have succeeded in impeding the request for access to information which was made on 3rd July 2013. I do not know whether or not there has been mere incompetence or deliberate purposive action to obstruct the request for access to this particular information concerning this particular tender. It really does not matter which it is – the result is the same. A tender was granted and information pertaining thereto has been sought and refused under the most peculiar of circumstances. Shakespeare wrote that 'Something is rotten in the state of Denmark'¹² – I trust that the applicant is not correct in suspecting that there is something rotten in City Power of Johannesburg. Whether or not there is, respondents have ensured (thus far) that they have not abided and supported the 'culture of justification' which is a cornerstone of our Constitutional democracy.

COSTS

27. I have made it clear that I have no option other than to postpone this matter *sine dies* in order to enable the further procedures set out in Part 2 Chapter Five and Part 4 Chapters One and Two of the Act to be followed and implemented.
28. I am very reluctant to simply order that the wasted costs occasioned by the respondents be paid by the taxpayer. This teaches no one anything about responsibility or compliance with statutory duties.
29. Accordingly, I shall postpone the question of costs (as discussed with both counsel at the hearing) to a date to be arranged when both parties are asked to furnish this court with affidavits and argument as to whether or not and whom within the offices of first and second respondent should bear personal financial responsibility for wasted costs.

¹² Hamlet, Act I, scene iv page 5.

ORDER.

An order is made as follows:

1. The application is postponed *sine dies*.
2. First Respondent is to pay the wasted costs of applicant including those costs occasioned by the employment of two counsel, senior and junior.
3. The question of liability for costs on the part of first or second respondent or any employee thereof is postponed to a date to be arranged within the months of April or May 2015.

DATED AT JOHANNESBURG 23rd APRIL 2015

SATCHWELL J

Attorneys for Applicant: Kgokong Nameng Tumagole Inc.
Counsel for Applicant: Adv H.B Marais SC and with him Adv M Cajee
Attorneys for First Respondent: Whalley Van Der Lith Inc.
Counsel for First Respondent: Adv J Both SC
Dates of hearing: 20th April 2015.
Date of judgment: 23rd April 2015