REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **42983/2015**

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

Date: **WHG VAN DER LINDE**

In the matter between:

Property Master (Pty) Ltd **Applicant**

And

Redefine Properties Ltd **Respondent**

Judgment

Van der Linde, J:

Introduction

[1] The applicant applies under s.50(1)(a) of the Promotion of Access to Information Act 2 of 2000 ("PAIA") for an order against a *"private body"* as defined to provide it with two written sale of land agreements.[1] The respondent resists the disclosure on four bases,[2] amongst other things because the applicant has not shown a *"right"* as required by s.50 (1)(a) of PAIA.

[2] The essence of the parties' dispute on this score is that the applicant contends that the words *"any rights"* are so wide that they even include the right to investigate whether the applicant has a cause of action available to it to claim relief in an appropriate forum from the respondent.[3] The respondent contends that such an interpretation is a bridge too far, and that the applicant needs to define with some exactitude the right that it will want to enforce.[4] But in any event, according to the respondent the applicant has such material as it needs to enforce such right as it has.[5]

[3] These two opposing contentions illustrate where the rub lies in this application. The applicant's contention, if unqualified, implies virtually no threshold to access entitlement. A person need then only allege that s/he wishes to investigate whether s/he has any rights against anyone, and access would be compellable.

[4] The respondent's contention in turn, if unqualified, implies that if a person is able to define, with some exactitude, the right s/he wishes to enforce, the availing of information is unnecessary for the exercise or protection of that right. These issues are considered below after referring to the facts.

[1] Notice of motion, pp 1 and 2.
[2] Answering affidavit, pp 79 to 81, paragraphs 5.1 to 5.4, asp paragraph 5.3.
[3] Applicant's supplementary heads of argument, paragraph 6.3.
[4] It assumes in its heads of argument that the only conceivable right can arise from a contract which, since it was subject to a suspensive condition, never could give rise to any rights: see paragraphs 7 to 11.
[5] Op cit, paragraph 2.2.

The facts

[5] The applicant owned a stand, Erf 3, in K W's T, some 6 m2 in extent. On 21 October 2004 it sold the stand to a trust called Thycel Trust in terms of a written agreement which contained the following provision (emphasis supplied):

"The parties confirm that here is an existing application for the subdivision of Erf 3, K W's T. The parties agree that it is their intention that the purchaser acquires the portion marked 'A' on the attached draft sub divisional diagram. Although this agreement is for the sale of the whole of Erf 3, K W's T, once the application for the subdivision is approved, <u>the parties agree herewith that the portion of Erf 3 marked 'B'</u> on the attached draft sub divisional diagram, <u>will then be transferred into the name of the Seller without any consideration</u> payable by the Seller to the Purchaser. The parties further agree that the costs of such transfer, will be borne by the Seller."

[6] According to the applicant,[6] when this agreement was concluded, and since then to this day, the applicant was and has been occupying the portion defined as "B".[7] Portion "B" is larger than portion "A", the former measuring 3982 m2 and the latter measuring 2316 m2.[8] The purchase consideration of R1.8m took account of the subdivision and the retransfer of portion "B" to the applicant.

[7] The transfer took place but before any subdivision occurred, slightly more than four months later, Thycel on-sold the property to ApexHi on 8 March 2005. Their written agreement contained a clause in these terms (emphasis supplied):

"11.1 The parties record and agree that their intention is:

[6] Founding affidavit, page 9, paragraph 12.
[7] See page 24 for the diagram.
[8] Ibid.

11.1.1 for the purchaser to acquire the property and to take transfer thereof on the transfer date; and

11.1.2 for the purchaser, after having taken transfer and after the sub-division, to transfer the specified portion back to the seller.

……..

11.3 The purchaser agrees:

11.3.1 …

11.3.2 that once the sub-division is complete, to transfer the specified portion back to the seller at nil consideration, it being agreed that the purchase price payable by the purchaser for the property already takes into account the sub-division."

[8] The sub-clauses in between those quoted above, oblige Thycel to do all things necessary to achieve the sub-division. ApexHi in turn agrees to sign all documents on request to achieve this result. The *"specified portion"* underscored above is identified in the agreement as portion B in the annexed diagram; and the same diagram as was annexed to the first sale from the applicant to Thycel, was again annexed to this agreement.[9] The applicant says of these provisions that their purpose was to protect the interest that the applicant had in the property as reflected in its agreement with Thycel.[10]

[9] Subsequently, at some stage during 2010, ApexHi was either taken over by or merged with Redefine Properties Ltd, the respondent, a listed company. Although the applicant said that it did not know details of this, nor clearly whether it was a take-over by the respondent or a

[9] Page 52.
[10] Founding affidavit page 7, paragraph 6.

merger, the respondent did not clarify any of this uncertainty. It simply agreed that the details are not relevant.[11]

[10]The applicant has obtained a copy of the deed of transfer whereby ApexHi transferred Erf 3046 to the respondent on 11 November 2010 for R13.3m.[12] The size of the property transferred suggests that no sub-division had taken place.[13]

[11]Since the applicant knows no detail of the take-over or merger between ApexHi and the respondent, it also does not have the written agreement whereby ApexHi sold the property to the respondent. It obviously therefore cannot tell what the respondent knew of the written agreement between ApexHi and Thycel, in particular the clause in the agreement that the purchase price for the acquisition of the property took account of the sub-division whereby portion "B", occupied by the applicant, would be transferred back to Thycel.

[12]This agreement is being sought in terms of prayer (a)(i) of the notice of motion.

[13]Within the same timeframe the respondent on-sold the property to Arrowhead Properties (Pty) Ltd on 8 September 2011. It was transferred by the respondent to Arrowhead on 28 November 2011. This agreement too is not available to the applicant, and so it cannot tell whether anything was said between those contracting parties about portion B, then still occupied by the applicant. This agreement is now being sought in terms of prayer (a)(ii) of the notice of motion.

[14]Thereafter, on 20 November 2013, Arrowhead sold the property to Mathipane Tsebane CC for R2.545m.[14] In clause 8.2 it is recorded that the shaded portion "A" was being occupied by a third party, a reference to the applicant, *"without the payment of compensation or*

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[11] Answering affidavit page 86, paragraph 25.
[12] Annexure D, page 53.
[13] Ibid, page 54.
[14] Page 57.

otherwise by such third party."[15]In the attached diagram the applicant is referred to as "the squatter."[16]

"Any right"

[15]Against this background the applicant submitted that notice of what it calls its initial right to subdivision and retransfer was not passed on from one purchaser to another. It speculates that it was dropped between ApexHi and the respondent, or between the respondent and Arrowhead. It submitted that the purpose of clause 11 of the second sale, from Thycel to ApexHi, was to preserve Thycel's capacity to give effect to its obligation to transfer portion "B" to the applicant after subdivision will have occurred.[17]The point is that at this stage the applicant requires, it says, the deeds of sale to determine whether it has a damages claim against any of the companies in this series of transactions and, if so, against whom.[18]

[16] The applicant submitted that the *"broadest possible interpretation"* should be ascribed to the term *"any rights"*, relying on M & G Media Ltd and Another v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another.[19]It argued too, relying on the Supreme Court of Appeal in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others,[20] that the concept is so wide as to include the right to investigate whether any right exists at all.

[17]The applicant stressed the dicta of Streicher, JA who recorded that the party concerned had alleged in his founding affidavit that the access was reasonably required *"for the exercise or protection of its rights and in particular to consider whether it had a contractual or delictual*

[15] Clause 8.2, page 62.
[16] Page 69; see too answering affidavit page 8, paragraph 10.
[17] Applicant's heads of argument, paragraphs 25, 27.3.
[18] Founding affidavit, page 9, paragraph 15.
[19] 2011 (5) SA 163 (GSJ) at [334].
[20] 2001 (3) SA 1013 (SCA).

claim for damages against the appellant or a claim for damages against SDR or any other party."[21]

[18]These words must be seen against the background of the how the founding affidavit in that case actually read. The relevant portion is not reproduced in the judgment of the Supreme Court of Appeal, but in the judgment of Cleaver, J in the court a quo (emphasis supplied):[22]

"Metro further relies on its constitutional right of access to information as contained in s.32 of the Constitution. In this regard the access prayed for in the notice of motion is reasonably required for the exercise or protection of Metro's rights and <u>in particular to consider whether Metro has a contractual or delictual claim in damages against the respondent, or a claim for damages against SDR Inspection Services or any other party, or to exercise its constitutional rights to equality, or to protect its business reputation and good name by obtaining an interdict or otherwise."</u>

[19]The respondent's response to these submissions was that both cases relied on by the applicant were still subject to the test laid down by the Supreme Court of Appeal in Clutchco (Pty) Ltd v Davis.[23] There Comrie, AJA was concerned with a shareholder of a private company who sought to use the provisions of PAIA to get access to the books and records of the company. The court a quo granted the relief, but is was reversed on appeal. The appeal court held that the information was not *"reasonably required"* to protect or exercise the right concerned, since the provisions of the Companies Act 61 of 1973 contained a refined structure for providing information to shareholders of a private company.

[20]That obviously does not apply here; but what is important for present purposes is that the Clutchco court followed Streicher, JA (who was also on the Clutchco court) in CMC, specifically at [28]. There the learned judge held that *"an applicant has to state what the*

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[21] Ibid, at [24]. See also [29].
[22] Reported at 1999 (4) SA 1184 (C) at 1196.
[23] 2005 (3) SA 486 (SCA).

right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."

[21]It must of course be remembered the CMC court held that that threshold was met on the facts of that case. And the facts of that case, particularly the relevant portion of the founding affidavit that bears out the uncertainty that then still beset the applicant, have been quoted above.

[22]In the present matter the applicant set out the factual background. That is followed by its assertion that it had a right to subdivision and retransfer. It argues that notice of that right was not passed from one purchaser to another. And it wants to investigate whether it has a *"claim in damages"* against any of the companies in the series, following from the failure to have passed on notice of the right to subdivision and retransfer.

[23]Granted, it has not further particularised its claim. But one knows from the factual background that the purchase price of the sale of Erf 3 excluded, at least in respect of the first two sales, a price for portion "B", because that portion was to go back to the applicant, who was actually occupying it throughout. One knows too that there was either a merger or a take-over between ApexHi (a party to the second sale and thus in the know) and the respondent. But that is where the knowledge trail ends.

[24]The applicant is thus unable to particularise a potential claim for damages against say the respondent, because it cannot tell what the respondent knew. Obviously neither ApexHi nor the respondent is the applicant's contracting party, and so a claim in contractual damages is not envisaged against either ApexHi or the respondent. The only claim for damages that could be envisaged against a defendant other than Thycel is a delictual claim for damages.

[25]The applicant potentially also has a claim for damages against ApexHi. From its contract with Thycel one knows that the former had knowledge at least of Thycel's interest and obligation to the applicant, and so also of the applicant's interest, since the applicant was present on portion "B" throughout. What the applicant does not know, is how ApexHi treated such

knowledge in its on-sale of the property to the respondent, as part of the take-over or merger.

[26]I return now to where the rub lies in this application. If the applicant had enough information to formulate its claim for damages with more accuracy, it would not need the information sought. It could then assess its prospects of success and, if favourable, institute an action. Further information, in the nature of *facta probantia*, could then be obtained either by discovery or, if the repository of the information was not a party to the litigation, by *subpoena duces tecum*.

[27]But if it has too little information to formulate its cause of action with precision, and it therefore cannot issue a summons, but it can show that it has a claim, at least potentially, then in my view the provisions of PAIA avail. The applicant must show a cognizable right, the potential exercise or enforcement of which is involved on the particular facts of the case, depending on the information that is reasonably required to be availed.

[28]Here the applicant has shown that it started off in this series of transactions with an entitlement to obtain retransfer of portion "B". That was clearly a contractual right against Thycel. Thereafter Thycel conveyed knowledge of the applicant's entitlement to ApexHi, all the while with the applicant still on the premises.

[29]That knowledge could conceivably expose ApexHi, if with knowledge of the applicant's interest, it acted in a manner intended to deny the applicant the ability to enforce that right, to a delictual claim for damages. And if that is so, then the same reasoning would apply in the case of the respondent.

[30]Such a claim could potentially fit the requirements for liability arising from a third party's intentional interference in the contractual rights of another; or it could fit the wrongful infringement of a *"legally-recognised right"* of another. In these instances, where the

recognition of a claim is often fact-driven,[24] the foundation of liability is Aquilian, not contractual.

[31]In these circumstances the dicta of Morison, AJ in M & G Media, which is binding on me, apply. It follows that in my view the threshold requirement in s.50(1)(a) of *"any rights"* has been met.

Is the information sought "*required*"?

[32]S.50(1)(a) provides that the information (or *"record"*) must be *"required for the exercise or protection of any rights"*. Another of the respondent's four challenges to the relief sought was the contention that the applicant does not need any further documents to ascertain whether it has a claim, since the property was in fact never subdivided.[25]

[33]The Clutchco court considered[26] that the word *"required"* here *"does not mean necessity, let alone dire necessity. I think that 'reasonably required' in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need."*

[34]Once one accepts, as here one must, that the applicant's case as mounted in its founding affidavit was not that it wished further to investigate its rights against Thycel, then the conception that the applicant is intent on pursuing a contractual claim may be set aside. Rather, as the founding affidavit has pointed out, the claim for damages is potentially against sellers who despite knowledge failed to pass on notice of the applicant's interest to subsequent purchasers. That can, in law, only be a delictual claim, if the detailed facts bear it out and policy considerations support it.

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[24] See generally, LAWSA, 2nd ed, vol 8, Part 1, Delict, by JR Midgley and JC Van der Walt, at paragraph 60. Compare Neethling – Potgieter – Visser, Law of Delict, by J Neethling and JM Potgieter, 7th ed, page 69, paragraph 5.2.5.

[25] Answering affidavit, page 80, paragraph 5.3.

[26] At [13].

[35]On this basis it is difficult to see why the information sought would not afford the applicant a *"substantial advantage"* or would not signify "*an element of need*." The two contracts may not completely satisfy the applicant's need for information, but that is a different issue.

Did the applicant comply with the "*procedural requirements*"?

[36]S.50(1)(b) provides that a requester must comply with the procedural requirements of PAIA. The respondent contended that the applicant did not.[27] S.53(1) requires that *"a request for access to a record of a private body must be made in the prescribed form."* S.53(2) provides that the form so prescribed must at least require the information set out in paragraphs (a) to (f).

[37]Regulations under PAIA were published,[28]and regulation 10 reads: *"A request for access to a record as contemplated in section 53 (1) of the Act must substantially correspond with Form C of Annexure B."*

[38]Form C requires particulars of the private body concerned; of the requester; of the record sought; of any reasons for exemption from fees; of the form of access required; of the right sought to be exercised or protected; and of the preferred form of notice in response to the request.

[39]The applicant's request was not the prescribed form, but was contained in three letters, dated 3 November 2014, 12 May 2015 and 25 August 2015 respectively.[29]The aggregation of the contents of these letters covers the topics identified in the prescribed form, barring the question of the payment of fees. Of the right sought to be exercised or protected, the following is said: *"Client was the initial owner of Erf 3, K W's T, and upon the sale thereof*

[27] Answering affidavit, page 79, paragraph 5.1.
[28] On 15 February 2002 in GG 23119, GN R187, and subsequently amended.
[29] Only the last two are part of these papers, being annexures F and G respectively, at pages 70, 72.

certain rights were reserved in its favour." And, *"Client requires a copy of both deeds of sale to determine how, in the sequence of later sales, his rights were extinguished."*

[40]The applicant submitted that the letters contain all of the content set out in and required by s.53(2) of PAIA, and that those letters *"substantially"* correspond with Form C.

[41]The respondent contends however that it compiled a manual as required by s.51(1) of PAIA, which manual is required by regulation 9 to be published on the website of the private body concerned. The respondent does not actually contend that the applicant was required to have complied with the manual, although the manual itself might be read as suggesting that it is imperative that form C be complied with.[30]

[42]The respondent's general submission is simply that the applicant has not complied with the peremptory provisions of PAIA,[31]and here reliance is placed on the language of s.53(1), the relevant portion of which is quoted above.

[43]There is no doubt that the language of s.53(1) suggests, by the use of the word *"must"*, that compliance is peremptory. But the substance of the sub-section is to exact compliance with a regulation, which is in more accommodating terms. It requires simply that the request *"must substantially correspond"* with form C.

[44]The contents of the letters cover the required contents of form C, barring fees. But the respondent's manual says that the prescribed fee is only R57 (including VAT), and the applicant in reply challenged that the manual was on the website at any time before 4 February 2016.[32]

[45]For the rest, it seems incongruous to say that despite all of the required information (except the fee) being included in the letters, there will not have been *"substantial correspondence"* with form C unless the contents of the letters were actually cast in the format of the form. This might still have been an argument if the letters were lengthy and cumbersome, but as is

[30] Answering affidavit, page 95, *"Completion and submission of the access request form (Form C)."*
[31] Answering affidavit, page 82, paragraph 11.
[32] Replying affidavit, page 107, paragraph 7.

illustrated by their contents, they were not. They were crisp and to the point, and there was no reply to them.[33]

[46]In my view the applicant has accordingly substantially complied with the procedural requirements of PAIA relative to the request for access to the record of a private body.

Has access been refused[34] in terms of chapter 4 of part 3 of PAIA?

[47]Here the onus is on the respondent.[35] It is required to put up evidence to persuade a court that, on the probabilities, the information sought fall within the exemption. [36] The respondent's case on this point is presented in one paragraph[37] in the introduction section of the answering affidavit, and in six paragraphs under the rubric of *"Confidentiality"*.[38]

[48]The case mounted is that the information sought: constitutes *"confidential information relating to the inner workings of the respondent's business"*; if disclosed, could adversely affect its share price; if disclosed, its competitors *"could gain an insight into the respondent's business transactions."* In this latter regard it is said that a competitor could extrapolate the manner in which the respondent assesses whether a particular property represents an attractive investment opportunity.[39] A competitor, it is said, could use this information *"to the respondent's detriment."*[40]

[49]Concerning confidentiality it is said that the ApexHi sale was part of the larger take-over transaction, and that the details of the transaction remain confidential in order to protect the respondent's business interests detailed in the various agreements that comprise the take-over.[41]

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[33] Founding affidavit, page 10, paragraph 17.
[34] There has been a deemed refusal; s.58, read with s.56(1), of PAIA, and founding affidavit, page 10, paragraph 17.
[35] S.81(3) of PAIA.
[36] President of the Republic of South Africa and Others v M & G Media Ltd, 2012 (2) SA 50 (CC) at [23].
[37] Page 80, paragraph 5.2.
[38] Page 83, paragraphs 12 to 17.
[39] Answering affidavit, page 83, paragraph 14.
[40] Answering affidavit, page 84, paragraph 15.
[41] Answering affidavit, page 84, paragraph16.

[50]PAIA requires, for the exemption to favour a private body, that the information sought either aspires to *"trade secrets"*,[42] or that the disclosure of the information is *"likely to cause harm to the commercial or financial interests"*[43] of the body.

[51]As to trade secrets: the respondent nowhere asserts that the contents of the two sale agreements constitute trade secrets. This is particularly relevant having regard to the fact that the title deeds of the property are public documents, available in the relevant Deeds Registry. These provide details of the location and size of the property; they provide particulars of real rights, including mortgage bonds and township conditions, over the property; they provide particulars of the seller of the property; and they tell one what the purchase price was.[44]

[52]The point is not only that this information cannot constitute trade secrets because it is in the public domain; the point is also that the respondent has not explained why those parts of the sale agreements that do not find their way into the Deeds Registry, constitute trade secrets, when those parts of the sale agreements that do find their way into the Deeds Registry, obviously no not constitute trade secrets.

[53]In my view the respondent has accordingly not discharged the onus of proving that the information contained in the sale agreements constitutes trade secrets.

[54]As to whether the disclosure of the information is "*likely to cause"* the respondent commercial or financial harm: two propositions are apposite. First, the threshold imputes a probability yardstick; the respondent is required to show that it is more probable than not that the harm will eventuate. And here it is of importance to note that the respondent has not averred that harm is likely to eventuate. It has asserted merely that harm *"could"* eventuate. That is not sufficient, because it makes no attempt at assessing the probabilities of the harm occurring.

[42] S.68(1)(a).
[43] S.68(1)(b).
[44] Compare founding affidavit, annexure D, pages 53 to 56.

[55]The second proposition is that, in any event, if those aspects of the sale agreements that are within the public domain do not cause the respondent commercial or financial harm, it is difficult to be persuaded that other aspects of the sale agreements that are not in the public domain would do it. Again, there is no attempt at explaining what the topics are that those other non-disclosed clauses of the sale agreements deal with, that would likely have this consequence.

[56]It follows that this aspect too of s.68 of PAIA has not been satisfied.

Conclusion

[57]As will have been inferred, in my view the application must succeed. I make an order in the following terms:

(a) The respondent is directed to comply with the request for information contained in the letter of Smith Tabata Attorneys dated 25 August 2015, annexed to the founding affidavit, within ten days of the applicant paying the prescribed fee.

(b) In particular, the respondent is to provide to the applicant copies of the deed of sale by which the respondent acquired Erf 3 K W's Town from ApexHi Properties Ltd on or about 12 April, 2010; and the deed of sale by which the respondent sold that property to Arrowhead Properties Ltd on or about 8 September 2011.

(c) The respondent is to pay the costs of the application.

WHG van der Linde
Judge, High Court
Johannesburg

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