REPUBLIC OF SOUTH AFRICA

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

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

DATE SIGNATURE

Case No.: 37344/2015

In the matter between:

Sasfin Commercial Solution (Pty) Ltd **Applicant**

and

First Rand Bank Ltd **Respondent**

Coram: VALLY J

Heard: 19 MAY 2016

Delivered 11 AUGUST 2016

Summary: Right of access to information-PAIA-Contract-Written Agreement

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ORDER

The application is dismissed with costs.

JUDGMENT

Vally J

Introduction

[1] Everyone has the right access the information held by another person if that information is required by that person to exercise or protect any of her rights.[1] To enhance and clarify the meaning and content of this right the legislature had enacted the Promotion of Access to Information Act 2 of 2000 (PAIA).

[2] Taking advantage of the provisions of PAIA the applicant, Sasfin Commercial Solutions (Pty) Ltd (Sasfin) asks the court to order the information officer of the respondent, Firstrand Bank Ltd (Firstrand) to:

> "1.1 in respect of each debtor of the Wesbank Division of the respondent for asset finance transactions (whether by way of instalment sale or finance lease), where there was a repossession of the asset financed and a sale thereof by or on behalf of the respondent, for which a claim was made by the respondent for input of value added tax ("VAT") and/or output VAT was declared to be paid, for the months of any VAT period covered by the period 1 July 2014 to 31 December 2014, of all documents (including statements of account for debtors, debtors' ledgers and general ledgers) evidencing the following:
>
> 1.1.1 the capital amount of the original sale or lease to the debtor;
>
> 1.1.2 the interest and other charges raised by respondent against the debtor;
>
> 1.1.3 payments made by the debtor or on its behalf;
>
> 1.1.4 the amount realized on the sale by the respondent of the

[1] Section 32(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution)

asset, including the gross amount and expenditure;

1.1.5 the output VAT declared in respect of the sale on repossession;

1.1.6 the input VAT claimed in relation to the sale on repossession or any bad debts or loss;

1.1.7 the amount written off by way of bad debt.

1.2 the VAT returns and calculations in respect of the period 1 June 2010 to 30 June 2015."

[3] It also seeks the usual order of costs against Firstrand. It founds its request on rights it acquired by concluding a contract with Firstrand.

[4] Firstrand has a Division referred to as Wesbank that concentrates on providing finance to third parties who wish to obtain assets, such as motor vehicles. The order being sought concerns the records of Wesbank.

The contract

[5] In 2014 Sasfin and Firstrand concluded a written agreement (the agreement). The parties say it was concluded on 13 June 2014. The agreement has its origins in a proposal put forward by Sasfin to Firstrand. In fact, the agreement consist of two pages and is structured in a form of a letter sent by one David Edwards (Edwards) of Sasfin to one Arch Arnesen (Arnesen) who was the Head of Indirect Tax at Firstrand. The letter was sent on 13 June 2014. The contents of the letter read:

"**PROPOSAL TO PROVIDE SERVICES**

I refer to your discussions with Nick Griesel yesterday.

As mentioned, we had a contract with Wesbank for a VAT review accepted by Mr Declan Jones on 28 March 2011. The agreement was for a comprehensive review of all VAT aspects but on commencement of the assignment, Mr Jones instructed us to only review VAT on expenditure as the VAT on finance transactions had been thoroughly checked in a previous project.

At a recent VAT review at another bank, we found that the VAT treatment of certain transactions were (sic) not being recorded correctly. We have obtained an opinion from Gerhard Badenhorst of ENS to confirm that our findings were valid.

From the data obtained at our previous assignment, we were able to establish that we may be able to effect a saving at Wesbank.

VAT ENGAGEMENT

We would undertake an assignment to establish whether the VAT treatment of certain transactions were (sic) being dealt with correctly. This process should not require more than two days.

Should the results of our investigation indicate that VAT had been under claimed, we will assist in the calculation of the claim resulting from the incorrect accounting for a specific type of transaction, once you have agreed with the validity of our findings.

We will report to you on our findings and discuss with you the legal opinion that we have obtained. We are prepared to discuss the matter in detail with your auditors and legal advisors, should you so require.

We can furthermore assist in the process of getting approval from SARS, should this be required, in order to get approval of a refund claim.

FEES

Our fees will be 20% of any savings achieved.

VAT savings for the purpose of this proposal, is defined as additional input tax deductions achieved as a result of our VAT assignment to which the vendor is legally entitled. This implies that a fee will only be payable if there is an enhanced VAT recovery as a direct result of our VAT assignment.

Where the recoveries are secured by reason of a reduction of the VAT payable in respect of a return, which still has to be submitted, our fee note will be raised on the submission of such return. Where, however, the recoveries are secured by a VAT refund, our fee note will be raised once the company receives such refund from SARS. In both cases our standard terms, which require payment on presentation, will apply. Amounts overdue are subject to interest at the prevailing prime overdraft rate.

The fee will only be payable in respect of reductions in VAT payable or refunds for past periods and the current VAT period and will not be payable in respect of any future savings achieved as a result of applying the findings to those future periods.

LIMITATIONS

To carry out the above, we would require access to the relevant information to conduct our assignment. The information required is of a very limited and specific nature and little time will be required from your staff.

TIMING

We are in a position to commence with the work at a time suitable to both parties.

CONFIDENTIALITY

The Parties respectively undertake and shall procure that the secrecy and confidential nature of all information and exchange pursuant to the agreement or in the course of carrying out this transaction shall be observed at all times and that such secret or confidential information shall only be disclosed by the Parties to third Parties to whom disclosure is required by law or approved by the other Party in writing or is made to a third Party in his/her capacity as an employee, council, advisor or agent of such Party, being himself bound to observe confidentiality.

ENGAGEMENT

Should you be in agreement with the proposal set out above, please sign the attached acceptance and return to Sasfin Commercial Solutions (Pty) Ltd.

Regards,
David Edwards
CEO: Sasfin Commercial Solutions" (Bold in original)

[6] At the end of the letter, after the signature of Edwards, the following is to be found:

> "I, (in manuscript - Declan Jones), duly authorised hereto in my capacity of (in manuscript - CFO Wesbank) do hereby appoint Sasfin Commercial Solutions (Pty) Ltd to perform the VAT services on the conditions set out above."

[7] It was countersigned by one Declan Jones (Jones) on 8 September 2014 in his capacity as the Chief Financial Officer. Once countersigned it metamorphosed from a proposal into a contract. Thus, strictly speaking the contract was concluded on 8 September 2014 and not 13 June 2014, which is when the letter offering the services was sent.

[8] There are really three material parts of the contract that concern this case. Firstly, there is the portion titled "**VAT Engagement**", which really

captures what Sasfin would do for Wesbank (i.e. if Wesbank accepted the offer, which we know Wesbank did). Sasfin would undertake an assignment to establish whether Wesbank treated certain of its VAT transactions correctly in terms of the Value-Added Tax Act 89 of 1991 (VAT Act). This assignment would take no more than two days. Secondly, Sasfin would charge a fee of 20% of any savings on past VAT returns if the results of the assignment showed that Wesbank under-recovered any VAT refunds by not dealing correctly with its Vat Returns on certain transactions. Thirdly, once Sasfin was engaged Wesbank would furnish it with the relevant information, but which information "*is of a very limited and specific nature*" and the provision of which will require "*little time*" from the staff of Wesbank.

[9] The contract must be understood in the context of the business of Wesbank. The manner in which Wesbank provides finance to the third party (the customer) is by purchasing the asset and then sells it to the customer on an instalment sale basis, or leases it to the customer by means of a letting transaction. During the life of the instalment sale, or the lease agreement, the ownership of the asset remains with Wesbank but possession thereof is given to the customer. The transaction of sale or lease of the asset attracts a VAT payment. Should the customer default on any payment due in terms of the sale or lease agreement Wesbank has a right to, and often does, cancel the agreement and repossess the asset. The asset is then re-sold to another customer. This transaction, too, attracts a VAT payment. However, the VAT due on the outstanding balance of the initial (or previous, should the asset be resold again) sale would now be treated as input VAT for purposes of the

second (or subsequent) sale. This input VAT can be claimed as a credit when Wesbank completes its VAT returns where the second (or subsequent) sale is recorded. All this is basically standard practice in the industry and Wesbank is not only familiar with it but has been applying it. However, Sasfin claimed that it is possible that Wesbank may not be calculating the input VAT correctly and it offered Wesbank an opportunity to engage it to examine a "*very specific and limited*" amount of Wesbank's records (referred to as "*information*" in the contract). The upliftment and provision of the records would require the investment of "*very little time*" on the part of Wesbank's staff. Finally, the contract was concluded on the basis that the entire process would take no "*more than two days*".

<u>Events after the conclusion of the contract</u>

[10] One day after the contract was signed, on 9 September 2014, one Nick Griesel (Griesel) of Sasfin wrote per email to one Sybrand Fouché (Fouché) of Wesbank and asked him to supply him with:

> "VAT return information as submitted to Firstrand for inclusion in the **VAT return calculations for the past 60 months**." Emphasis added

[11] One Ian Cloete (Cloete) being the head of Indirect Tax AT Firstrand responded to the email that same day. His response is particularly pertinent. It reads:

> "Your email to Sybrandt refers.
>
> We are eager to move things along **but this request seems a bit odd**. Firstly, there is limited information that can be gleaned from the return itself. Secondly, if you are checking if something particular exists (as you previously explained) then you should surely be able to determine this just as easily from a single return or a few sample returns. **One could conclude from this opening information request that you are either already in quantification mode, having skipped the diagnostic stage altogether (which implies that you**

have known all along about something that does exist), or that this could be a fishing exercise.

Both scenarios are at odds with my understanding of your motivation for the assignment, but besides this, there may be easier ways for us to provide you with the information that you need and save hour time in the process too, We maintain a spreadsheet containing the data of every field of every WesBank VAT return together with graphs that we use to help monitor movements. In theory we could provide you with this entire spreadsheet but if you are looking for something specific as contended then it should be sufficient to provide you with the information on specific fields only.

Please confirm what you are looking for so that we can decide how best to assist. The attached sample return (Aug 2013) should enable you to identify the specific field(s) that are of interest to you."[2] (Emphasis added)

[12] The ink was barely dry on the contract and the parties had already indicated that they do not understand the contract to mean the same thing. Worse, the response of Cloete demonstrates that upon receiving the request of Griesel Firstrand immediately became suspicious of the motives of Griesel and, by implication, of Sasfin. Further and more importantly it became immediately apparent that Firstrand was not willing to part with the amount of information that Sasfin was seeking. Firstrand not only had a different understanding of the terms of the contract, which understanding derived from the oral proposal put to them by Griesel of Sasfin before email (which eventually constituted the contract) was sent to them but it also took the view that a very limited information of a one VAT return would suffice for Sasfin determine whether Firstrand was correctly reflecting the VAT inputs in a subsequent sale of a repossessed asset.

[13] Within a few hours of receiving Cloete's email Griesel responded thereto. In his reply he attempts to allay the concerns of Cloete as well as

[2] All quotations from correspondences between the parties' representatives are verbatim. Grammatical and other errors have been left intact.

explain why he requires so much information – five years of VAT returns of WesBank. His reply reads:

> "I fully understand your concerns.
>
> I can firstly assure you that I am not busy with a fishing exercise at all. I requested to see the VAT returns over the past five years to establish firstly whether there has been any material change to the VAT return since 2009/10. I received only three VAT returns at the time of my previous review.
>
> As I mentioned there are two aspects that I wanted to confirm, the one minor and the other more important.
>
> The first aspect is Imported Services. From the VAT returns it appeared as though Output VAT was declared on the full value of the imported service. I wanted to establish whether that was in fact the case or whether it may have been an exception.
>
> The other aspect involves the accounting for Instalment Credit Agreements. I herewith include a spreadsheet with my understanding of the accounting entries based on the limited information that I have. Can you please confirm whether my understanding is in fact correct or please indicate how it is done in the general ledger.
>
> Once I have received confirmation or correction of these accounting entries, I propose to comment on that and at the same time supply you with Gerhard Badenhorst's opinion. That will enable you to assess and consider his opinion prior to having a meeting wand handing over to you."

[14] This response certainly allayed some of the concerns of Cloete. The next morning, 10 September 2014, he responded by saying that Firstrand will revert to Griesel on the accounting entries and then explained how Firstrand dealt with tax on imported services. Finally, he said that the input tax "*was calculated centrally*" and therefore Griesel "*would not have picked this up from the Wesbank return.*" Later that morning he sent Griesel another email. This time he wrote, *inter alia*:

> "… it appears that you have also misunderstood how we process repossession input tax claims.
>
> The repossession input tax deduction is limited to the outstanding cash value (R54 000.00 in your example) and not the unrecovered balance after applying the proceeds of the sale to the ICA account (i.e. the R20k per your example). Furthermore, paragraph (i) of the second proviso to s22(1) specifically prohibits any 22(1) bad debt claim where repossession has taken place, There can

therefore be no further 'top-up' bad debt deduction, even if the repossession input tax deduction does not cover the full outstanding case value … but as explained, this is not the case.

We will ask the WesBank's systems people to confirm this so that we can provide you with the necessary comfort/assurance, but it does appear at this stage that we have all been chasing our tails for nothing. **It is not clear how you were going to determine any of this from all the returns that you asked for, so I am glad we did not go down that route.**" (Emphasis added)

[15] It is clear from this email that Firstrand, through Cloete, had come to the conclusion that the information sought by Griesel would be of no assistance as WesBank's calculation of the input VAT on the resale of the repossessed asset was based on the outstanding cash value of the asset. This he believed was the correct way to calculate the input VAT. Within an hour Griesel responded to this email where he in essence reaffirmed (is reiterated a better word) his request for the information. He explained why he requested the information. His explanation was:

"The purpose of requesting all the VAT returns (which I do not believe was an unreasonable request), was in order for me to get an overall view of VAT declared and claimed and more importantly whether there were any abnormal adjustments or spikes as you referred to during the period.

I would like to ensure that I understand you correctly. Use the information from the August 2013 VAT return as an example. In this month an amount of R10,561,809 VAT was declared on Repo Sales and the VAT on Bad Debts amounted to R 13, 827,499. Is it then correct to assume that the amount debited to Bad Debts amounted to R 23 256 358 (difference of R 13,827, 499 and R 10,561,809 divided by 14%)?

The accounting entries would then be:

Bank	86,003,301.86	
ICA		75,441,492.86
VAT Repos		10,561,809.00
VAT Bad Debts	13,827,499.00	
Bad Debts	23,326,358.00	
ICA		37,153,857.00

The amount of Bad Debts as calculated above seem very low compared to actual Bad Debts in the general ledger.

You seem to have come to the conclusion that this exercise (**which does not require much time from anybody**) was fruitless but **I would certainly like to**

> **understand the above aspects better** before I can come to the same conclusion.
>
> I include (an) opinion herewith which covers sections 22, 10(16) and 16(3) quite clearly. His opinion in respect of s22 seems to differ from yours." (Emphasis added)

[16] The opinion of an attorney was attached to the email. It is of note that Griesel does not claim that the information sought is exactly what was agreed to in the contract. Instead he claims to want the information so that "*he would like to understand*" the aspects concerning the approach to Bad Debts. Rather than resolving the dispute regarding the necessity of amount of information being sought by Sasfin from Firstrand, the contents of this email only exacerbated that dispute. A few hours after receiving the email Cloete responds saying that the opinion of the attorney was no revelation to them and that the opinion was consonant with Firstrand's interpretation and application of s 22(1) of the VAT Act. He proceeded to engage Griesel on Griesel's understanding of how Firstrand factored in the bad debts it endured as a result of the repossession in the calculation of the VAT refund it claimed. The email is lengthy and closes with the following paragraph:

> "To conclude, **your mandate is to check if something very specific** is an issue and then following that through, if applicable (**not mine or analyse data to identify possible anomalies**). I think we agree that the imported services issue can now be dismissed but with regards to your main issue please explain what part of (the attorney's) opinion I am missing so that we can establish if there is any more work to be done." (Emphasis added)

[17] Cloete was concerned, and transparent about his concern, that Griesel was straying from the terms of the contract and that, in fact, he was "*min(ing) or analys(ing) data*" rather than "*check(ing) if something very specific was an issue.*" An hour later, Griesel replied to the email stating, inter alia:

> "I understand that my mandate is to check a specific issue. I will explain the issue fully below.
>
> All I require is to establish what accounting entries are being processed in the general ledger when an ICA account becomes bad and a decision is made to repossess an asset. **I would think to provide me with the standard accounting mapping for that should be easy. The alternative would be to provide me with a small sample of the actual accounting entries for accounts where assets were repossessed and written off as a bad debt.**" (Emphasis added)

[18] Thus, on 10 September 2014 there was some fairly intense communications between Griesel and Cloete.

[19] On 22 September 2014 one Trevor Barber (Barber) of Firstrand sent Griesel an extract of three random repossession accounts to analyse. Griesel analysed these three samples.

[20] He met with Cloete, Barber and others from Firstrand on 4 November 2014 to discuss the finding that emerged from his analysis. His finding was that Firstrand had "*under-claimed on VAT in two of them and over claimed in the remaining one.*" The discussion at the meeting revealed that the problem which presented itself one day after the contract, i.e. on 9 September 2014, had not abated. Griesel's account of the discussion is recorded in an email he sent to Cloete the next day. The material contents of the email reads:

> "You indicated that you felt that the differences found in the calculation of VAT in the 3 sample transactions were insignificant and that you could see no reason to look into my enquiries about the accuracy of the VAT calculations on bad debts any further. …
>
> "I accepted that the small sample did not prove anything conclusive. I pointed out that my analysis of the 4 VAT returns that I have, led me to believe that was a substantial risk that Input VAT on Bad Debts may be underclaimed. You answered by saying that one could not only look at 4 VAT returns to determine the accuracy of the calculations and also made it clear that you would not provide me with more VAT returns as I requested, as you suspected me of conducting "a fishing exercise".

> "I would like to make it quite clear that I am not interested in some "fishing exercise". My only concern is the accuracy of Input VAT on Bad Debts. …
>
> **The only reason why I requested the complete VAT returns and not for extracts explained above was because I am fully aware that your staff are very busy and I did not want them to conduct an exercise that I could do easily**.
>
> You did agree however, that I could present a written motivation of my views to you, that you would consider it and respond to it.
>
> You furthermore agreed that a further sample of at least 10 transactions would be provided to me, including some form 2011 and older before some system changes were implemented.
>
> I undertake to submit the abovementioned written explanation and motivation to within 3 days of receiving the additional sample of transaction." (Emphasis added)

[21] It is important to note that Griesel clearly understood that the contract did not entitle Sasfin to the detailed VAT returns of WesBank for five years. He claimed to have only sought this initially because he knew that Firstrand's staff were very busy.

[22] Cloete responded the same day to Griesel's email. He agreed that he committed Firstrand to provide a further 10 random samples for Griesel "*to interrogate*" and recorded his understanding of the discussion as well as of the contract. He wrote, *inter alia*:

> "Against this backdrop I was just pointing out that your restricted mandate from the beginning was to check if a very specific problem which you believed existed (and which was supported by the (attorney's) opinion you provided) did in fact exist. **Even if the high-level tests suggested a *potential* problem, this does not extend this mandate into a full investigation.**
>
> It now appears that there is no specific technical aspect needs to be confirmed after all. You were not in a position to take us through your calculations or theory when we met yesterday but requested that you be allowed to do so at a future date. We agreed to this on the understanding that you would send us your paper in advance" (Emphasis added).

[23] On 21 November 2014 Griesel met Cloete and others from Firstrand once again. Nothing of material emerged from this meeting.

[24] On 2 December 2014 Griesel sent Cloete and Barber a spreadsheet reflecting his findings on one of the samples sent to him. On 4 December 2014 he emailed his findings on six further samples. His analyses revealed that there were minor differences between his calculations and those of Firstrand. According to his calculations of the first three samples Firstrand over-claimed a net amount of R24.00, while his calculations of the other six samples showed an even smaller variance between his calculation and that of Firstrand.

[25] Griesel met Cloete on 22 January 2015 to discuss the findings of Griesel. At this meeting Cloete informed Griesel that he disagreed with Griesel's calculation of VAT in respect of bad debts.

[26] On 29 January 2015 Griesel presented his report. The Summary of his report reads:

> "Differences were found in the calculation of VAT in respect of all 9 transactions. **Individually the differences are insignificant** but in the bigger picture, the numbers are large. It is also important in my view that calculations such as these should be done with absolute accuracy. There is also a risk of penalties on amounts over claimed.
>
> Should you decide to proceed with an in depth review of VAT calculation on Bad Debts, we should be able to complete the review within approximately 2 months." (Emphasis added)

[27] Apart from stating that the individual differences between his calculation of WesBank's input VAT and WesBank's own calculation being "*insignificant*", he agreed that the initial contract did not entitle Sasfin to the VAT returns of

WesBank for five years prior to the date of the contract. Moreover, of fundamental importance is his statement: "*Should you decide to proceed with an in depth review of VAT calculation on Bad Debts, we should be able to complete the review within approximately 2 months.*" This is really an invitation to Firstrand to conclude a new contract or to amend the existing one. If accepted it would result in two crucial changes to the existing one: firstly, it would result in an "*in depth review of VAT calculation on Bad Debts*", and secondly, Sasfin would now be given two months, rather than the two days referred to in the contract, to complete the task.

[28] That was the last time Cloete or anyone else from Firstrand communicated with Griesel. The new proposal of Griesel did not find favour with Firstrand. Firstrand decided that the process envisaged in the contract had been exhausted. It decided to terminate the contract. Cloete was unsure as to whom he should communicate this decision to so he sent an email to Jones of Sasfin seeking clarity on the role of Griesel. In this email he specifically informed Jones that Firstrand wished to terminate the contract, ("*end the engagement*" in Cloete's words) He was informed by Jones that the contract was with Sasfin and that Griesel while not an employee of Sasfin acted for and on behalf of Sasfin in this matter. Cloete accepted this.

[29] On 2 March 2015 Jones was sent, per email, a termination letter, the material contents of which read:

> "We wish to advise that Mr Griesel has completed his review and that the specific concern which gave rise to the appointment proved to be unjustified.

> Accordingly, we regard the matter as finalised and the engagement terminated."

[30] Sasfin did not contest this interpretation of Firstrand. Neither Griesel nor Jones responded to this letter. It did not claim that Firstrand had no right to terminate the contract or that Firstrand breached the contract by not providing it with the full record of all the VAT Returns of Wesbank from 2010 to date of contract, or even just by failing to provide it with more samples of the VAT Returns of WesBank during this period. However, on 23 July 2015 Sasfin, through its attorneys, requested in writing the information referred to in [1] above. It claims that this information, which is exclusively in the possession of Firstrand, is required by it in order for it to be able to exercise its rights. The right Sasfin relies upon is the right "*to claim an amount against*" Firstrand, but as it is unsure whether it actually has a case against Firstrand, it "*seeks to protect itself by determining whether or not it should institute action against.*" The information was requested in terms of s 53 of the PAIA. Firstrand, we know, have refused to provide it.

<u>Sasfin's claim that it 'requires' the information</u>

[31] Sasfin's claim against Firstrand is contractually based. It is founded on an alleged breach of contract by Firstrand. This alleged breach, it says, empowers it with a 'right' – the right to seek damages it may have suffered as a result of Firstrand's alleged breach. To establish its 'right' in these circumstances Sasfin only has to put up facts to show that it has a *prima facie* right to the information. Furthermore, as Sasfin claims that it 'requires' this

information in order to establish whether it actually has a claim, it need not show that the information it seeks is 'essential' or 'necessary'[3] for it to pursue its claim. The information need only be "*reasonably required*".[4]It must, nevertheless, lay a proper foundation for why the information is reasonably required. [5] Accordingly, to determine whether Sasfin actually mounts the hurdle of showing that it has a *prima facie* right to the information and that it 'requires' the information to pursue this claim it is necessary to have regard to the above facts.[6]

[32] Sasfin claims that Firstrand breached the contract by failing to provide it with all the necessary information for it to perform its obligations. As it was unable to complete the exercise it was contracted to do, it suffered a loss. It says that while Firstrand provided it with some samples which allowed it to commence performing its obligations these samples were too small for it to meaningfully complete the exercise. Firstrand, it claims, obstructed it by only willing to relinquish a small sample of the information data, when the amount of information that was to be provided is not limited in the contract.

[33] Sasfin's claim about the contract not limiting the amount of information to be provided is, however, not entirely correct. The contract specifically states that the "*process should not require more than two days*" and "*(t)he information required is of a very limited and specific nature and little time will be required*

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[3] *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at [16]
[4] *Id* at [17]
[5] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at [12]
[6] *Id* at [6], where the following is said: "Generally speaking, the question whether a particular record is 'required' for the exercise or protection of a particular right is inextricably bound up with the facts of that matter."

from your staff." While the contract did not specify the exact amount of information that would be needed by Sasfin, it certainly recorded that it would be "*very limited and specific*". This is understandable for the issue was not whether Firstrand may have miscalculated all the input VAT it reclaimed over the years, but whether Firstrand adopted a correct approach in its calculation of the input VAT. The approach it adopted can be gleaned from one, or if need be a few, of the VAT returns submitted by Firstrand to the South African Revenue Services. There is no need to examine each and every VAT return submitted by Firstrand to establish the approach adopted by Firstrand. Sasfin's version, to quote, from the founding affidavit is that "(t)*he agreement was concluded on the basis of a specific issue of principle (based on the opinion one (the attorney) which, if applied to the (Firstrand) would result in a considerable VAT saving.*" This theme is continued in the replying affidavit, where the following is said: "*..it was simply a question of whether or not the principles that are set out in the founding affidavit regarding VAT were properly applied*." The proposal was not an offer to audit or examine each and every return submitted by Firstrand. It was an offer to examine the "*limited and specific*" information to establish whether the approach adopted by Firstrand was legally sound. Sasfin referred to this as an issue of principle. It is this offer that was accepted and no other. To achieve this there is no need, nor does the contract call, for an examination of each and every VAT return submitted by Firstrand (whether for the five years referred to in the notice of motion or for however long), prior to the conclusion of the contract. Moreover, nowhere in the contract is there any stipulation that Firstrand was to provide all the information sought so that Sasfin could examine them all to see if there was a significant amount that Firstrand could reclaim for

Input VAT with regard to all sales of repossessed assets by WesBank. The contract does not entitle Sasfin to any more information than was already furnished to it by Firstrand.

[34] Thus, in my judgment the facts revealed thus far do not allow for the conclusion that Sasfin has succeeded in presenting a *prima facie* case though open to doubt that it has a right to the information. It has not shown, even on the low threshold of a *prima facie* case though open to doubt, that Firstrand had incorrectly calculated the Input VAT it claimed for sales of repossessed assets by WesBank. At best for Sasfin it was only able to show that there were minor discrepancies between the way it calculated this Input Vat and the way Firstrand did. On Sasfin's own version the discrepancies were not significant. In my judgment it was furnished with sufficient information to conduct the exercise it contracted for.

[35] It is particularly noteworthy that when the exercise contracted for was complete and failed to yield the result anticipated by Sasfin, Sasfin, through Griesel, proposed a new contract: one that involved "*an in depth review of VAT calculation on Bad Debts*" and that would take "*approximately 2 months*" to complete. Firstrand made clear that it was not in the market for this contract. Hence, the case that Sasfin wants to make out is the one that does not exist. There has been no breach of the contract to provide information to allow for "*an in depth review of VAT calculation on Bad Debts*", for there is no such a contract. In a sentence, there can be no breach of a non-existent contract.

[36] Once Sasfin fails to make out a *prima facie* case that it has a right to the information then *caedit questio*: it has to fail in its quest to have Firstrand compelled to provide it. Put differently, it has failed to show that the information is reasonably required in order to protect or exercise a right. [7]

[37] In the result, the application is to be dismissed. Both parties, correctly, agreed that costs should follow the result.

Order

[38] The application is dismissed with costs

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Vally J

Date of hearing: 19 May 2016
Date of judgment: 11 August 2016

For the applicant: PJ Van Blerk SC
Instructed by: JS Salant Attorneys

For the respondent: RM Pearse and S Kazee
Instructed by: Norton Rose Fullbright South Africa Inc

[7] *Clutchco* (*supra*) [13]