

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 1155/ 2017
Heard: 7 December 2017
Delivered: 13 March 2018

In the matter between

BUTTCAT BOAT BUILDERS (PTY) LTD

First Applicant

NITOFKO (PTY) LTD t/a NAUTI-TECH

Second Applicant

And

ARVESCO 119 (PTY) LTD t/a CARRYCAT

First Respondent

DAWIE SCHOLTZ

Second Respondent

JUDGMENT

GOOSEN, J.

- [1] The applicants brought an application for access to documents in terms of the Promotion of Access to Information Act, Act 2 of 2000 (hereinafter 'PAIA'). They sought access to a range of documents, including drawings, plans, sketches, designs and photographs relating to the manufacture of ski boat hulls. The respondents opposed the application. The defence raised is that the respondents do not have in their possession the documents sought by the applicants. The applicants accordingly did not pursue the relief sought in the notion of motion, save that they persisted in seeking a costs order against the respondents.

- [2] In the light of this it is necessary to briefly outline the background and to examine the circumstances giving rise to the application.
- [3] The first applicant is the manufacturer of catamaran ski boats known as the 'Butt Cat'. It owns the intellectual property rights relating to the hull design of all Butt Cat ski boats. The second applicant's business involves the installation of fittings, railings, electronic motors and steering systems to the Butt Cat hulls and supplies ready to operate ski boats to the market.
- [4] During 2012 the second respondent utilised one of first applicant's Butt Cat hulls as a plug from which he produced a mould. This mould was then used to manufacture hulls. A top structure was fitted to the hulls and the ski boat was marketed as a 'Carry Cat' ski boat. As a result of this the first applicant's attorney wrote to the second respondent alleging that the second respondent was breaching the first applicant's intellectual property rights. The dispute was resolved during October 2013 when the infringing mould was destroyed.
- [5] The respondents continued to manufacture ski boats. During 2016 the first applicant became aware of Carry Cat ski boats being sold which, according to it, bore a striking resemblance to the Butt Cat hulls produced by the first respondent.
- [6] On 30 November 2016 the applicants, via their attorney and under cover of a detailed letter setting out the background, addressed a request for access to a record of a private body in terms of s 53 (1) of PAIA. The documents sought are those detailed in the notice of motion in this application.

- [7] On 20 December 2016 the respondents' attorney replied to the request. The response takes issue with several ancillary issues raised in the covering letter and asserts that the request is 'confusing'. The 'ancillary' issues concern the relationship between the two applicants and the circumstances in which they came to own the intellectual property concerned. The letter even raises the question as to the nature of the firm Randell & associates, the applicants' attorneys. Importantly, the letter in reply does not address the substance of the request for access to the records.
- [8] The applicants' attorneys responded to the letter in detail, providing information, inter alia, relating to the relationship between the applicants. The letter concludes with the assertion that the respondents are obliged to comply with PAIA and that the applicants will, failing provision of the requested information, approach a court for appropriate relief.
- [9] This letter elicited further correspondence from the respondents' attorney. In a lengthy letter dated 8 February 2017 the attorneys took the stance that the applicants are competitors of the respondents and that the applicants are not entitled to access to the information sought. The attorneys stated further that the applicants had failed to provide documents requested by the respondents which would establish the applicants' rights to intellectual property. The letter then deals with the underlying merits of the dispute, contending that the matter was resolved in 2013. An invitation was extended to the applicants' attorney to inspect "a provisional comparative diagram" which would establish that the hull design differs from the Butt Cat hull.
- [10] The applicants thereafter launched this application on 31 March 2017. An answering affidavit was filed in May 2017. The affidavit deals with the background issues referred to above and addresses certain aspects of the merits of the applicants' allegation of

passing-off. In regard to the substance of the relief sought, namely the production of certain documents, the second respondent states that:

12.2 Neither the First Respondent nor I are in possession of any of the documents sought by the Applicants. The documents which the Applicants seek are drawings, templates, sketches, notes, photographs and plans which they allege were used in the design of the Carrycat 670 and 760.

12.3 Neither First Respondent nor I generated any of the documents referred to in the Notice of Motion. We have never been in possession of any such documents. Our attorney made the tender in his letter dated 8 February 2017 (annexure “M” to the founding affidavit) on our instructions. It was a *bona fide* tender and in response to Applicants’ request dated 30 November 2016 (annexure “G”) to the founding affidavit. This is all that the Respondents could produce by way of documentation. The Applicants’ attorney did not accept the invitation to inspect. The Respondents have therefore made a full disclosure well before this application was launched.

[11] The applicants filed a replying affidavit in which they cast doubt upon the assertion by the respondents that they were never in possession of documents required for the manufacture of ski boat hulls. In regard the respondents ‘defence’ the following is said:

The Applicants are now faced with the respondents attesting under oath that they do not possess any documents. The Respondents should have done this in terms of the imperative set out in section 55 of PAIA. Since they failed to do this, section 58 became operative and the Respondents were deemed to have refused to furnish these documents. Against this refusal, the Applicants had little choice but to initiate these proceedings. The Respondents have only now by way of an answering affidavit gone under oath as envisaged in section 55. They have attested that no documents are available and none ever existed. The Applicants have little choice but to accept that explanation – a scenario which points ineluctably to direct and unlawful copying. It has also rendered the main relief in the application academic. This would leave only the question of costs.

[12] This is the central issue to be decided. Although the respondents advance an argument that the application is defective because the applicants have not established their *locus standi* entitling them to the relief sought, the true basis for opposition is that the application ought never to have been brought because the applicants were advised that the respondents are not in possession of the records sought.

[13] Section 50 of PAIA provides that,

- (1) 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; and
 - (c) Access to that records is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

[14] The section must be read with the definition of 'requester', provided for in s 1, which , in relation to a private body, means

- (i) Any person, including, but not limited to, a public body or an official thereof, making a request for access to a record of that private body;
- (ii) A person acting on behalf of the person contemplated in subparagraph (i);

[15] A 'requester' is accordingly not required to establish any qualification in order to avail him / herself of the provisions of PAIA. The only qualification is that the record is required for the exercise of protection of a right.

[16] In the founding affidavit the allegation is made that the applicants are 'requesters' as envisaged by PAIA and that they require access to the specified documents in order to protect intellectual property rights which vest in the applicants. The case is made out that the applicants have reason to believe that the respondents have unlawfully copied the designs of Butt Cat ski boats. This allegation is met with a denial and the averment that the respondents are aware of the manufacture of Butt Cat ski boats but that they have no knowledge in whom the intellectual property rights vests.

[17] Elsewhere in the founding affidavit, in the context of describing the nature of the relationship between the applicants, the applicants state that the second applicant provides expert boat fitment. The applicants entered into an agreement whereby the

second applicant would be the sole distributor of Butt Cat boats. The hulls are manufactured by the first applicant and the fitment of the upper structures and electronics is undertaken by the second applicant. The allegation is made that the second applicant seeks to protect its rights against the respondents' alleged unlawful conduct in copying design features. It is alleged that the second applicant's rights are co-extensive with the first respondent's rights.

[18] Although these allegations are denied, the denial refers back to the earlier denial of *locus standi* which is predicated on a plea of no knowledge.

[19] There can be no doubt that the applicants meet the requirements set by s 50 of PAIA. The denial of "*locus standi*" does not assist the respondents. The threshold requirements provided by s 50 require that the applicants establish that they are parties who have met the formal requirements for access to a record and that they require the specified documents for the purposes of exercising or protecting rights which they specify. The respondents are unable to challenge the allegation of fact – namely that the applicants are vested with rights to intellectual property which they seek to protect. The further allegations – set out in considerable detail in the founding affidavit – set out the basis upon which the applicants contend that their rights have been or are being infringed. When these are read as a whole they establish that the applicants fall within the ambit of s 50 of PAIA.

[20] It is apposite to note that the respondents do not assert that the applicants are not entitled to access to the records sought on the basis that they do not require the records for the exercise or protection of any right. The defence, as already stated, is that they do not possess the records sought.

[21] Before dealing with this aspect and its impact upon the question of costs it should be emphasised that the respondents at no stage sought to rely on the provisions of Chapter 4. Chapter 4 makes provision for several grounds for refusal of access to records on the basis, *inter alia*, of the protection of private information of a third party or the protection of commercial information as provided by s 68.

[22] Section 55 of PAIA, upon which the respondents rely, provides that:

- (1) If –
 - (a) all reasonable steps have been taken to find a record requested; and
 - (b) there are reasonable grounds for believing that the record –
 - (i) is in the private body's possession but cannot be found; or
 - (ii) does not exist,

the head of a private body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.
- (2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the head.
- (3) For the purposes of this Act, the notice in terms of subsection (1) is to be regarded as a decision to refuse a request for access to the record concerned.
- (4) If, after notice is given in terms of subsection (1), the record in question is found, the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part.

[23] The section places upon a private body which seeks to rely upon the fact that it is unable to locate a requested record or does not have in its possession a requested record, the obligation to make a full disclosure on oath or under affirmation. This obligation arises immediately it is established by the private body that it cannot give effect to the request for the reasons set out in s 55. The obligation to make the disclosure under oath or affirmation gives effect to the underlying purpose of PAIA and the Constitutional obligation upon which PAIA rests. In terms of the Constitution the right of access to information is a fundamental right to which all persons – both public and private – must give effect. The right is regulated by legislation. That legislation – in

the form of PAIA – determines the ambit of the right and makes provision for limitations to the right of access to records. The legislation also defines the procedural obligations which rest upon a requester and the body to whom the request is directed. In the case of both public and private bodies the fundamental obligation is to provide access to records properly requested in terms of PAIA unless there is a ground upon which the request may be refused as provided in the legislation.

- [24] Section 55 is designed to deal with the circumstance that a record cannot be found or does not exist. It imposes upon the party to whom a request has been directed obligations which must be strictly complied with.
- [25] In this instance the respondents failed to furnish a statement under oath that the documents sought do not exist. That defence was only raised at the stage that the answering affidavit was filed.
- [26] Contrary to the assertion in the answering affidavit that the applicants knew well in advance of bringing the application that the requested records do not exist, the correspondence referred to above did not make that assertion. Indeed there is no claim made in the correspondence that the requested records do not exist. Annexure M to the founding affidavit, upon which the respondents rely, is a letter addressed by the respondents' attorneys to applicants' attorneys. It contains the invitation to inspect a "provisional comparative diagram". It makes no assertion, despite traversing several issues over five pages that the records do not exist. The same is true of the earlier letter dated 20 December 2016.
- [27] The first time that this assertion is made is in the answering affidavit.

[28] The position that the applicants found themselves in therefore is the following: a request was made for access to certain records in terms of s 50 of PAIA; the request complied with all the formal requirements set out in the Act; no decision was made in terms of s 56 to provide or refuse access to the records within the time periods stipulated in that section and no request was made in terms of s 57 for an extension of time within which to make the decision. According in terms of s 58 of PAIA the respondents are deemed to have refused the request for access to the records and the applicants were entitled to proceed with the application to court to gain access to the records.

[29] There can accordingly be no doubt that the applicants were entitled to pursue the application for the relief set out in the notice of motion. Upon receipt of the answering affidavit the position of the respondents was clarified for the first time. I have already indicated that the application falls within the ambit of the provisions of s 50 as read with s 1 of PAIA and that, in relation to the merits of the application for access, the applicants were entitled to pursue the application.

[30] It follows from this that the applicants are be entitled to the costs occasioned by having to launch this application.

[31] I therefore make the following order:

The respondents are ordered to pay the applicants' costs jointly and severally, the one paying the other to be absolved.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants
Adv. I. Bands
Instructed by Randell & Associates

For the Respondents
Adv. B. Westerdale
Instructed by Slabbert Attorneys
c/o Brown Braude & Vlok