



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: Acting Justice Cockrell
Date of hearing: 7 February 2024
Date of judgment: 9 February 2024

Case No: 11890/2022

PAUL FREDERIK LOUBSER (SNR) N.O. First Applicant

FREDERIK HENDRIK LOUBSER N.O. Second Applicant

HAYWARD LOUBSER N.O. Third Applicant

WILHELMINA MARSHALL N.O. Fourth Applicant

PAUL FREDERICK LOUBSER N.O. Fifth Applicant

UZELL LOUBSER N.O. Sixth Applicant

(in their capacities as trustees for the time being of the Paul Loubser Trust)

and

VODACOM (PTY) LTD Respondent

JUDGMENT

Judgment delivered by email to the parties' legal representatives and by release to SAFLII.

COCKRELL AJ:

Introduction

- [1] The applicants are the trustees of the Paul Loubser Trust (“the Trust”).
- [2] In 2005, the Trust concluded a written agreement (“the Lease”) with the respondent (“Vodacom”) in terms of which the Trust leased immovable property to Vodacom. The Lease permitted Vodacom to install on the property various items of infrastructure that are commonly used for purposes of radio telecommunications. I shall refer to the infrastructure as “the Mast”.
- [3] The subject matter of the Lease was the property (“*die perseel/gebou*”) rather than the Mast. Vodacom was entitled to install the Mast at its own cost.
- [4] The Lease was extended. It ultimately expired by effluxion of time on 30 June 2020.
- [5] It is common cause that Vodacom continued to occupy the leased premises after 30 June 2020 by virtue of the fact that the Mast was not removed.

- [6] The Trust believes that Vodacom kept the Mast operational after 30 June 2020 without paying rent. The Trust says that it intends to sue Vodacom for its continued use of the property after 30 June 2020. The Trust has not yet instituted legal proceedings.
- [7] In 2022, the Trust lodged a request for access to the records of Vodacom in terms of the Promotion of Access to Information Act 2 of 2000 (“the Act”). Although the incorrect form was attached to the founding affidavit, it is common cause that a request was lodged in terms of Part 3 of the Act, which deals with access to the records of private bodies.¹ That request was declined by Vodacom.
- [8] The Trust has now applied to this Court in terms of section 78 of the Act for “appropriate relief” as contemplated in section 82. The Trust seeks an order directing Vodacom to make available the documents listed in paragraphs 1.1 to 1.10 of the notice of motion.
- [9] Vodacom opposes the main application. Its only basis for opposition is that the Trust has not shown that the requested documents are required for the exercise or protection of a right. Vodacom also lodged a counter-application directed at allowing it to remove the Mast and ancillary equipment.

The main application

- [10] Insofar as relevant for present purposes, section 78(2)(d) of the Act provides that a requester aggrieved by a decision of a private body to refuse a request for access, may “apply to a court for appropriate relief in terms of section 82”. Section 82, in turn,

¹ Annexure TTMK1 to the replying affidavit.

provides that the court hearing such an application “may grant any order that is just and equitable”.

[11] The juristic nature of an application in terms of section 78 of the Act was considered in *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 6 SA 285 (SCA). There the Supreme Court of Appeal held that the legislature intended the issues “to be visited anew by the court hearing a section 78 application”.²

[12] It follows that the present application does not amount to a review of, or appeal against, the decision of Vodacom to refuse access to the requested records. It is rather “a civil proceeding like any motion matter, in the course of which both sides ... are at liberty to present evidence to support their respective case for access and refusal”.³ There is accordingly no merit in Vodacom’s argument that the Trust could not elaborate in its founding affidavit on the somewhat terse allegations contained in the original request for access to the records.

[13] In order to succeed in the present application, the applicants have to establish as a threshold requirement that the requested records are “required for the exercise or protection of any rights”.⁴ This is a requirement that applies in the case of private bodies but not in the case of public bodies. It derives from section 32(1)(b) of the Constitution.

[14] The meaning of the threshold requirement was considered in *Clutchco (Pty) Ltd v Davis* 2005 3 SA 486 (SCA) para 13. There Comrie AJA held as follows:

² Para 26

³ Para 24.

⁴ Section 50(1)(a) of the Act.

“... ‘required’ 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. It appears to me, with respect, that this interpretation correctly reflects the intention of the Legislature in section 50(1)(a).” (my underlining)

[15] This approach has been confirmed by the SCA in subsequent cases⁵ and also by the Constitutional Court.⁶

[16] In short, a requester must show that the requested record is reasonably required for the exercise or protection of a right. It is not sufficient for the requester merely to show that the requested record would be of some assistance to it.

[17] How does this threshold requirement operate in the case of pre-action discovery? In other words, to what extent may a potential litigant use the Act in order to investigate whether it has a cause of action before initiating litigation?⁷

⁵ See, for example, *Unitas Hospital v Van Wyk* 2006 4 SA 436 (SCA) paras 17 and 18; *Company Secretary, ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance* 2015 1 SA 515 (SCA) para 50; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 5 SA 469 (SCA) para 9.

⁶ *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC) para 31.

⁷ Once the litigation is instituted, section 7(1) is triggered. It provides as follows:

“This Act does not apply to a record of a public body or a private body if—

- (a) that record is requested for the purpose of criminal or civil proceedings;
- (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
- (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.”

[18] The SCA has considered this question in a series of judgments:

18.1. In *Unitas Hospital v Van Wyk* 2006 4 SA 436 (SCA), Brand JA held as follows:⁸

“[21] I do not believe that open and democratic societies would encourage what is commonly referred to as ‘fishing expeditions’ which could well arise if s 50 [of the Act] is used to facilitate pre-action discovery as a general practice Nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any action is launched. The deference shown by s 7 [of the Act] to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are only discoverable if they are relevant to the litigation while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course.

[22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must only be available to a requester who has shown the ‘element of need’ or ‘substantial advantage’ of access to the requested information, referred to in *Clutchco*, at the pre-action stage. An example of such a case is, in my view, to be found in *Van Niekerk v Pretoria City Council* (supra), upon which considerable reliance was placed by the court *a quo* The point is, however, that the facts of that case were materially different. Van Niekerk had a report by experts who did not identify who was responsible for the damage to his equipment (848C). The City Council, on the other hand, relied on a report which apparently exonerated it from responsibility (848F-G). Quite understandably, in the

⁸ Cloete JA agreed with “the reasoning and conclusion” of Brand JA (para 50). Conradie JA agreed with Brand JA and Cloete JA, but on narrower grounds. Harms JA concurred with Conradie JA and Cloete JA. Cameron JA dissented.

circumstances, Van Niekerk's allegation was that without the report relied upon by the City Council, he was unable to establish whether it could be held liable (848H-I). Though I think it is legitimate to use s 50 to identify the right defendant, I do not agree with the court *a quo*'s thesis that one is entitled, as a matter of course, to all information which will assist in evaluating your prospects of success against the only potential defendant. On that approach, the more you know the better you will be able to evaluate your chances against your opponent. The corollary of this thesis therefore seems to be that the requester will in effect always be entitled to full pre-action discovery. The *dicta* by Cameron J in Van Niekerk referred to by the court *a quo* (see para [14] above) cannot legitimately be relied upon in support of its thesis."

- 18.2. In *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 5 SA 469 (SCA), Combrinck AJA revisited the issue:

"[9] The next question is whether access to the record sought is 'required' for the protection of the right....

The substantial advantage in this matter consists in the fact that the contents of the record would be decisive. (*Unitas* para [54]) ie they would bring a short sharp end to the dispute (*Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 848G.) They would either confirm the appellant's contentions in which event SAA would apparently have no defence, or they would support the latter's case in which event the appellant would obviously, as his counsel said in argument, not proceed with the proposed litigation. SAA's reluctance to produce the document in these circumstances is inexplicable."

- 18.3. In *Mahaeane v AngloGold Ashanti Limited* 2017 6 SA 382 (SCA), the majority of the SCA held as follows:

"[19] In this regard, the draft particulars of claim (the particulars) annexed to the certification application achieve prominence. The substantive part runs to over 65 pages, although approximately half of

these deal with the asbestosis claim which does not apply to the appellants. They set out in detail, over nearly three pages, what the respondent ‘knew, or ought reasonably to have known’ about the harm of being exposed to silica dust and the manner in which silicosis can be prevented. Arising from that knowledge, the duties of the respondent are pleaded, including statutory duties, the common law duty of care and constitutional obligations. These run to over four pages. The particulars go on to plead the basis on which the class action members aver that the respondent breached its statutory duties. These refer in detail to legislation and specific conduct which fell short of the statutory requirements. These breaches run to some 18 pages. Strict liability under the statutes is then pleaded and, in the alternative, a negligent breach of duties which is said to give rise to delictual liability. The particulars go on to plead breaches of the common law duty of care which the class members contend were owed to them by the respondent. These run to some nine pages. The alleged breach of constitutional duties is then pleaded running to one page and incorporating conduct pleaded in paragraphs 112 to 138 comprising some 35 pages. The particulars then plead the causal connection between the silicosis contracted and the actionable conduct of the respondent. From all of this it can be seen that the appellants are clearly in a position to formulate their claim.

[20] The above deals with the question of whether the records are reasonably required to exercise or protect the right asserted by the appellants, to claim damages from the respondent from their having contracted silicosis. As indicated, a right to claim damages is invoked. This will necessitate court proceedings. It is necessary to avoid the unwelcome spectre of applications under the PAIA being brought to obtain premature discovery. It seems to me that a rule of thumb which will avoid this is to enquire whether, in the context of future litigation to exercise the right relied on, the records requested are reasonably required to formulate a claim. This seems to me to have been the implicit test applied in *Unitas Hospital*. If needed to formulate a claim, it can be said that they are reasonably required under s 50(1) of the PAIA. As I have said, the appellants do not need the requested records to formulate their claim.” (my underlining)

[19] In my view, the SCA judgments establish the following principles when the Act is used for pre-action discovery:

19.1. Once an action is commenced, the normal rules of discovery apply. Since the rules of discovery “have their own built-in measures of control to promote fairness and to avoid abuse”, prospective litigants may not “avoid these

measures of control by compelling pre-action discovery under s 50 [of the Act] as a matter of course”.⁹

19.2. This means that pre-action discovery in terms of the Act “must remain the exception rather than the rule”.¹⁰ In other words, the Act may be used for pre-action discovery in exceptional cases but not in all cases.

19.3. What, then, determines when it is permissible to use the Act for pre-action discovery and when it is impermissible to do so? In answer to this question, the SCA has held that it is “legitimate to use s 50 [of the Act] to identify the right defendant” but that a potential litigant is not “entitled, as a matter of course, to all information which will assist in evaluating [its] prospects of success against the only potential defendant”.¹¹ The SCA has also held that a “rule of thumb” is to “enquire whether, in the context of future litigation to exercise the right relied on, the records requested are reasonably required to formulate a claim”. In other words, “[i]f needed to formulate a claim, it can be said that they are reasonably required under section 50(1) of PAIA”.¹²

[20] Applying these principles, I am of the view that the Trust has not shown that the requested documents are reasonably required for the exercise or protection of its right to institute an action. I reach this conclusion for the following reasons:

⁹ Unitas Hospital (supra) para 21.

¹⁰ Unitas Hospital (supra) para 22. Cloete JA used the same expression in para 55 of his separate concurring judgment.

¹¹ Unitas Hospital (supra) para 22.

¹² Mahaeane (supra) para 20.

20.1. The requested documents are not reasonably required to identify the right defendant (i.e. the test in *Unitas Hospital*). If the Trust has a cause of action, it would lie against Vodacom. Although the Trust suggested in its heads of argument and in oral argument that it may have also a claim against MTN on the basis that MTN is using the Mast, the founding affidavit makes no mention of a potential cause of action against MTN and the notice of motion does not refer to the position of MTN.

20.2. The requested documents are not reasonably required to formulate the Trust's claim (i.e. the test in *Mahaeeane*). On the contrary, the founding affidavit avers that “the mere fact that the Vodacom mast remains on the property means that the Trust is entitled to market related rental and/or holding over damages”.¹³ The founding affidavit goes on to explain that “the rental amount for this period is R25,000 per month (excl. VAT), which would be increased by 7.5% per annum (first escalation taking place on 1 July 2020)”.¹⁴ The founding affidavit then concludes that Vodacom “is indebted to the Trust in excess of R600 000,00 (excl VAT and interest) for market related rental and/or holding over damages for the period July 2020 to the date of this affidavit”.¹⁵

20.3. It is unnecessary for me to express a view as regards whether the averments quoted in the previous paragraph are well-founded in law and I refrain from doing so. The point for present purposes is a different one: it is that, according to the Trust's own version, the Trust does not need to know whether the Mast

¹³ Founding affidavit para 26.

¹⁴ Founding affidavit para 27.

¹⁵ Founding affidavit para 28.

was decommissioned on 30 June 2020 in order to formulate the claim that it intends to bring against Vodacom for holding over. In other words, since the Trust says that it has a cause of action based on Vodacom's failure to vacate the leased property when the Lease ended, the requested records are not required in order for the Trust "to exercise its property rights and claim damages from the respondent for holding over".¹⁶ If the Trust's claim for holding over were good, it would be good without regard to whether Vodacom did or did not continue to use the Mast after 30 April 2020.

20.4. In its founding affidavit, the Trust says that the amount referred to in paragraph 20.2 above "is limited solely to rental and does not include ancillary costs and/or damages which the Trust has suffered as a result of the respondent's conduct, or the conduct of the respondent's agents and/or representatives".¹⁷ The Trust elaborates on this in its replying affidavit by suggesting that it may have "alternative claims ... founded on the principles of unjustified enrichment and/or fraud".¹⁸ The replying affidavit does not explain the legal nature of such a claim. It is possible that it may be based on *Hyprop Investments Limited v NCS Carriers and Forwarding CC* 2013 4 SA 607 (GSJ), where a Full Court held that "a holding over claim can be made out either in contract or in delict"¹⁹ and that "a claim under unjust enrichment is also viable".²⁰

¹⁶ Founding affidavit para 49.

¹⁷ Founding affidavit para 29.

¹⁸ Replying affidavit para 10.

¹⁹ Para 48.

²⁰ Para 44. Professor Bradfield summarises the position as follows in *The Law of South Africa* volume 26(1) 3rd edition para 107 (footnotes omitted):

'There may be some confusion as to the meaning of the words "holding over", but they are merely a convenient label to denote an erstwhile lessee's conduct in remaining in

20.5. Mr Felix, who appeared for the applicant, appeared to suggest in oral argument that the Trust would have a claim in delict or in unjustified enrichment in addition to a claim for contractual damages. I have some difficulty in understanding how such a claim would be formulated but it is unnecessary to express a final view on the issue. It suffices to say that, if the Trust has a supplementary claim that is additional to its claim for damages for holding over, then the supplementary claim would in my view be covered by the principle in *Unitas Hospital* that a potential litigant is not “entitled, as a matter of course, to all information which will assist in evaluating [its] prospects of success against the only potential defendant”.²¹

20.6. When all is said and done, the Trust’s attitude is a simple one: it says that it is “entitled to know what the exact position is” before it institutes an action against Vodacom.²² However, that does not accord with the jurisprudence of the SCA for the reasons already given.

20.7. A final observation is that the list of requested documents in the notice of motion is lengthy – it runs to some two-and-a-half pages. I intend no criticism of the drafter when I say that the list has the look and feel of a request for further-and-better discovery rather than a “short sharp” request as in *Claase*. This is

possession of leased property after the lessee’s right to possess the property has been terminated and that affords the lessor a remedy in damages. The remedy may lie in contract for the lessee’s breach of its contractual or common law obligation to restore the lessor to free and undisturbed possession at the end of the lease, or in delict for the former lessee’s wrongful action in remaining in occupation of the property without legal right to do so and in so doing causing the lessor financial loss. The claim may equally be based in enrichment.’

²¹ Unitas Hospital (supra) para 22.

²² Founding affidavit para 50.

exacerbated by the fact that some of the requested documents antedate the termination of the Lease (prayers 1.1, 1.2 and 1.4). To take one example: there is nothing in the founding affidavit to indicate why the Trust requires copies of all Eskom invoices received by Vodacom pertaining to the Mast “from January 2018 to date”²³ since, on the Trust’s own version, the Lease continued in operation until 30 June 2020. In other words, even if the Trust were correct that it has “a right to know what the property is being utilised for”,²⁴ that could not conceivably apply to the period before 30 June 2020. Moreover, some of the documents sought in the notice of motion do not refer to any time period at all.²⁵

[21] In short, the applicants have not shown that the requested documents are reasonably required for the exercise or protection of the Trust’s right to institute an action. The Trust knows the identity of the only potential defendant that is mentioned in the founding affidavit and it is able to formulate its claim against that defendant. Once the Trust initiates an action, the rules of discovery will apply with all of the safeguards that are built into that process.

[22] The main application must therefore be dismissed.

[23] Mr Felix argued that the Trust was justified in bringing the main application even if it were to be unsuccessful. I disagree for the reasons given above. In my view, there is no reason why costs should not follow the result.

²³ Prayer 1.2 of the notice of motion.

²⁴ Founding affidavit para 51.

²⁵ Prayers 1.5 to 1.8 of the notice of motion.

The counter-application

[24] I was informed from the bar that the counter-application became moot when Vodacom removed the Mast and ancillary equipment from the property. It is therefore unnecessary for me to address the counter-application further.

[25] The parties were in agreement that I should order that the counter-application be removed from the roll with no order as to costs.

Order

[26] In the result, I make the following order:

1. The main application is dismissed.
2. The first to sixth applicants are to pay the respondent's costs in the main application on a joint and several basis, the one paying the others to be absolved.
3. The counter-application is removed from the roll with no order as to costs.

A. COCKRELL

Acting Judge of the High Court

Cape Town

9 February 2024

APPEARANCES

Applicants' counsel: JK Felix

Applicants' attorneys: Johan Victor Attorneys

Respondent's counsel: A Coetzee

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