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**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 53/2019**

In the matter between:

**BHEKANI WELCOME GCABASHE**

Applicant

And

**MTN GROUP LTD**

Respondent

**JUDGMENT**

**NYATHI J**

**A. INTRODUCTION**

- [1] This is an application to compel the respondent to furnish cell phone records of the applicant for the cell phone number 083 926 1601 for the period from 20 April 2014 to 29 April 2014.
- [2] The application is opposed by the second respondent.
- [3] The applicant is Bhekani Welcome Gcabashe an adult male currently incarcerated at Zonderwater Medium A Correctional Center, Cullinan, Gauteng. The respondent is MTN (Pty) Ltd a private company and a South African multinational corporation and mobile network provider incorporated in accordance with the law of the Republic of South Africa. Its principal place of business is situated at 2[...] 1[...]th A[...], F[...], R[...], J[...].

## **B. BACKGROUND**

- [4] The applicant in this matter was charged with and convicted of armed robbery and is currently incarcerated at Zonderwater Medium A Correctional Centre, Cullinan in Gauteng. The applicant is in the process of appealing his conviction and sentence. He brought an application to compel the respondent, MTN, to provide him with copies of his cell phone records for cell phone number 083 926 1601 for the period 20 April 2014 until 29 April 2014. These records were once released by the respondent to the National Prosecuting Authority in terms of section 205(1) of the Criminal Procedure Act 51 of 1977 for trial purposes. The applicant is of the opinion that his cell phone records that were used by the state in his trial to secure his conviction were either tainted or fabricated.

- [5] The applicant contends that he was wrongfully charged and convicted of armed robbery as a result he seeks his detailed itemised billing records for the period of the robbery in question because he harbours suspicions regarding the cell phone records that were used in his trial which led to his conviction.
- [6] He intends to compare the records he will obtain from the respondent with those used at trial to determine the accuracy thereof. The applicant contends that he was not part of the robbery crew and was not in contact with any of the co-accused before, during and after the robbery and he was not found in possession of the money that was stolen.
- [7] He contends that the number 083 925 1601 for which the cell phone records are sought is his. He contends that his cell phone records which are in the possession of the respondent will detail and reveal his whereabouts at the time when the robbery is alleged to have taken place, and this will prove his innocence once and for all as he submitted that he was not part of the robbery crew.
- [8] He contends that this cell phone triangulation evidence is essential to his appeal and the realisation of his constitutional right to a fair trial. The applicant relies on section 32(1)(b) of the Constitution to show his entitlement to the records requested from the respondent. The applicant submits that section

32(1)(b) of the Constitution trumps any other legislation including statutes dealing with communication-related information such as RICA.<sup>1</sup>

[9] The applicant submits that the respondent will not suffer any prejudice if the court finds in his favour, while he stands to suffer great prejudice if the court does not grant the relief he seeks. The prejudice will be that he will not be able to bring another application to introduce further evidence to prove that he was wrongfully convicted. Moreover, if the court does not grant the relief sought it will set a dangerous precedent, one that will cause an injustice and violate people's constitutional rights.

[10] The applicant has filed a second set of heads of argument. Here the applicant contends that he is a customer of the respondent as the number 083 925 1601 which he requests records for belonged to him before the robbery leading up to the period when he was convicted, and it was serviced by the respondent up until it was put out of service after this application was lodged.

[11] He submits that he was never in a contractual agreement with the respondent, but he was on a pre-paid plan also offered by the respondent. He attached a confirmatory affidavit of his wife of 23 years attesting same. He submits that although he cannot obtain his account details since he is incarcerated, the number in question appears in his ABSA business bank account and cheque

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<sup>1</sup>Regulation of Interception of Communications and Provision of Communication Related Information Act No. 70 of 2002.

account. He submits that this is sufficient to establish his locus standi and that he is a customer of the respondent who is entitled to the cell phone records he seeks. He further submits that the respondent has this information at its fingertips and can assist the court in determining that the number in question is in fact his number and that he is a customer of the respondent.

[12] Additionally, the applicant has annexed in his second set of heads, the “without prejudice” correspondences sent to his erstwhile attorneys and then to him after his attorneys withdrew. One of these essentially state that the respondent has not received any proof that the number for which the cell phone records are sought belongs to the applicant and as such they cannot release such information to him until he has satisfied them that the number does or did belong to the applicant; further, the respondent states that the cell phone records released to the state in terms of section 205(1) of the Criminal Procedure Act 61 of 1977 should be in the record of the applicant’s criminal trial and the respondent invites the applicant to request this information from his criminal trial record. In the second without prejudice correspondence, the respondent calls on the applicant to withdraw the application before this court due to the delay in finalizing this matter and due to the applicant’s erstwhile attorneys’ withdrawal. Failing to do so, the respondent stated they will move to dismiss this application and seek costs on an attorney and client scale.

### **C. THE RESPONDENT’S SUBMISSIONS**

[13] The respondent raised points *in limine* in that the applicant did not set out the empowering provision on which he relies on for bringing this application and it thus difficult to determine if the applicant has made all the necessary averments to support the allegations he made; the applicant does not allege the grounds upon which he is entitled to the information he has requested from the respondent, he did not furnish proof that he was a customer of the respondent during the period upon which he requires the cell phone records; the applicant's application has lapsed in that the maximum storage period for archived communication-related information.

[14] The respondent submits that the Independent Communications Authority of South Africa (ICASA) prescribed regulations in terms of section 4 read with section 69(1) of the Electronic Communications Act 2005 in respect of the code of conduct for electronic communications and electronic communications network services licensees, which stipulate that requested communication-related information can only be provided to customers or consumers, subject to certain exceptions. The respondent submits that the applicant has not shown any relationship with the respondent entitling him the title of 'customer'.

[15] The respondent submits that the applicant is mistaken in believing that it can and should provide the information sought. The respondent submits that the reason for such a submission is that the regulations released by ICASA stipulate that communication-related information must be stored for a maximum period of 3 years and this application is late as the three years have lapsed and

the respondent no longer has the information requested in its possession. The respondent further submits that this application is futile and if the court grants the order sought by the applicant, the order will have no practical effect as the respondent cannot provide information it does not have, and it will expose the respondent to incurable and perpetual contempt of court.

[16] The respondent submits that this application is flawed, and the relief sought is not legally competent based on the submissions it made above, as such the application falls to be dismissed with costs.

#### **Issues for determination**

[17] There are two issues for consideration in this matter. Firstly, whether the applicant is entitled to request the cell phone records from the respondent and secondly, whether the relief sought is legally competent.

#### **D. ANALYSIS OF THE LEGAL PROVISIONS**

[18] Section 32 of the Constitution stipulates that:

“Access to information

(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

...”

[19] The right guaranteed by section 32(1) appears to be a broad right, one that allows one to request any information about oneself, the use of ‘any information’ indicates that a requester is not limited in terms of what they can request access to. This right is also broad in that it is applicable to both the public and private bodies and is not merely restricted to state-held information. This provision finds application in this matter as the applicant (requester) requests access to the information in the form of cell phone records that he believes is held by the respondent, a private body.

[20] The court in **ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd**<sup>2</sup> gave the word ‘required’ in section 32(1)(b) of the Constitution a generous and purposive meaning and held that ‘required’ should be understood to mean ‘reasonably required’.<sup>3</sup> The court further held that the applicant in that matter “*clearly require[d] the documents referred to in the notice of motion in order to determine whether the tender process complied with the requirements of section 33 of the Constitution. Until it has had sight thereof, it cannot decide whether it has any claim for relief against the respondent.*”<sup>4</sup>

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<sup>2</sup> 1998 (2) SA 109 (W).

<sup>3</sup> 1998 (2) SA 109 (W) para 20.

<sup>4</sup> 1998 (2) SA 109 (W) para 21.

[21] Moreover, in ***Tobacco Institute of Southern Africa and Others v Minister of Health***, the test for section 32(1) was set out as follows on page 752G-H:

*“In order to trigger the aforementioned right of access, two threshold requirements must be met. Firstly, the information must be ‘required’ and, secondly, it must be required for the exercise or protection of any of the claimants’ ‘rights’.”*

[22] Considering the above, it can be argued that the test for section 32(1) is whether the information sought is reasonably required for the enforcement and realisation of the applicants’ rights. This is to say that when the requester of information reasonably requires said information for the purpose of exercising or protecting any of their rights and cannot determine if they have a claim or a relief in respect of that right without the sought information in sight, they should be provided with the sought information. In this matter, the applicant seeks to appeal his conviction and sentence and is of the belief that the sought cell phone records are the only evidence that can aid him in determining if he can and should pursue the appeal. Furthermore, the applicant is of the belief that the sought cell phone records will be the evidence that he will need to succeed in his appeal, provided it is sufficient to pursue an appeal.

[23] Furthermore, section 32(2) of the Constitution stipulates that “national legislation must be enacted to give effect to this right...” set out in section 32(1) which is the right of access to any information, hence, the Promotion of Access

to Information Act 2 of 2000 (PAIA), which regulates the provision of access to requested information. The Constitutional Court in ***Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others***<sup>5</sup> held that where the Constitution requires for legislation to be enacted which will give effect to the constitutional rights guaranteed in the Constitution, and said legislation is indeed enacted, the litigant should not directly rely on the Constitution unless there are deficiencies in the said legislation.<sup>6</sup> This is affirmed in various judgments, one being the judgment of ***PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd***<sup>7</sup> where the Constitutional Court said the following regarding PAIA in relation to section 32 of the Constitution:

*“PAIA is the national legislation contemplated in section 32(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA.”*<sup>8</sup>

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<sup>5</sup> [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

<sup>6</sup> [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 437.

<sup>7</sup> [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC).

<sup>8</sup> [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) para 4.

[24] This is important because bypassing the enacted legislation and relying directly on the Constitution when the legislation put in place to give effect to the constitutional rights defeats the purpose of having the legislation enacted in the first place. This speaks to the principle of subsidiarity which “denotes hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail.” As such, directly relying on the Constitution is impermissible. An application of this kind triggers the provisions of PAIA, but there are exceptions to its application. One exception is when the constitutionality of PAIA is being challenged and the second exception is when the circumstances outlined in section 7(1) of PAIA apply. The former exception does not apply in this matter as none of the parties have sought to challenge the constitutionality of PAIA. The latter exception ought to be inquired into. Section 7(1) of PAIA provides that:

“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.”

[25] It is worth noting that the purpose of section 7(1) in limiting the applicability of PAIA is to

*“Prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings.”*<sup>9</sup>

The purpose of this bar is to ensure that parties involved are governed by the applicable rules of court, it is not to prevent parties access to information that they may be entitled to. Hence section 7(2) of PAIA, which stipulates that evidence obtained in contravention of section 7(1) of PAIA will be inadmissible unless a court of law is of the opinion that its inadmissibility will be detrimental to the interests of justice.<sup>10</sup>

[26] In this application, it is common cause that the requirements set out in subsections (a) and (b) of section 7(1) of PAIA have been established because 7(1) sets a three-legged test, merely satisfying the requirements set out in subsections (a) and (b) of section 7(1) of PAIA will not suffice, subsection (c) of section 7(1) of PAIA needs to be met as well. The Supreme Court of Appeal in ***Industrial Development Corporation of South Africa Ltd v PFE International Inc. (BVI) and Others***<sup>11</sup> held that “*all three of the requirements of s 7(1) must be met in order to render PAIA inapplicable to the request.*” This was further confirmed by the Constitutional Court in ***PFE International Inc (BVI) supra.***

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<sup>9</sup> Industrial Corporation of South Africa Ltd v PFE International and Others 2012 (2) SA 269 (SCA) para 9.

<sup>10</sup> Section 7(2) of Promotion of Access to Information Act 2 of 2000.

<sup>11</sup> *Supra* [2011] ZASCA 245; 2012 (2) SA 269 (SCA); [2012] 2 All SA 71 (SCA) para 8.

[27] As a result, the outstanding question becomes whether the requirement in subsection 7(1)(c) has been established, in that, whether the production of or access to sought records is provided in any other law. “‘Other law’ refers in this context to the body of law which includes the rules relating to discovery, disclosure and privilege. In other words, if access to information is requested for the purpose of criminal proceedings the right thereto has to be sought elsewhere. As was said in *Unitas Hospital v Van Wyk and Another*,<sup>12</sup> in the context of civil proceedings, **‘once court proceedings between the parties have commenced, the rules of discovery take over’.**” [own emphasis].

[28] The sought information can be accessed by means of a subpoena in terms of section 35(1) of the Superior Courts Act 10 of 2013 which stipulates that “A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court”. Section 35(1) of the Superior Courts Act can be read with rule 38(1) of the Uniform Rules of Court which can be used at any stage of any proceedings. Rule 38(1) allows for any party desiring inter *alia* the production of any document or thing to have access to such document or thing through a subpoena. Also, rule 35 of the Uniform Rules of Court which allows for the discovery, inspection and production of

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<sup>12</sup> National Director of Public Prosecutions v King 2010 (7) BCLR 656 (SCA) para 39.

documents can also be explored as an avenue to access the sought information. Resultantly, I find PAIA not applicable in this matter.

[29] Considering that the respondent's opposition to this application was anchored on the provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) and its regulations, this aspect requires consideration hereunder.

[30] The interception or monitoring of certain communications in South Africa is governed by RICA. Section 12 of RICA provides the following regarding the prohibition of provision of communication-related information:

*“Subject to this Act, no telecommunication service provider or employee of a telecommunication service provider may intentionally provide or attempt to provide any real-time or archived communication-related information to any person other than the customer of the telecommunication service provider concerned to whom such real-time or archived communication related information relates.”*

[31] In addition, the Independent Communications Authority of South Africa (ICASA), established by section 3 of the Independent Communications Authority of South Africa Act 13 of 2000, which is responsible for regulating telecommunications *inter alia*, prescribes regulations in terms of section 69(1) of the Electronic Communications Act 36 of 2005 which stipulates the following:

*“69 Code of conduct, end-user and subscriber service charter:*

*The Authority must, as soon as reasonably possible after the coming into force of this Act, prescribe regulations setting out a code of conduct for licensees subject to this Act and persons exempted from holding a licence in terms of section 6 to the extent such persons provide a service to the public.”*

[32] Empowered by section 69(1) above, ICASA prescribed regulations in respect of the code of conduct for electronic communications and electronic communications network service licences.<sup>13</sup> The relevant paragraph of the said regulations is paragraph 3.8. titled ‘Consumer Confidentiality’ which stipulates that:

*“Licensees must protect the confidentiality of consumer information, and in particular, must-*

*(a) Use the information only for the purpose permitted or required,*

*(b) Report or release that information only to the consumer or prospective consumer,*

*(c) Only release that information to another person:*

*(i) When directed by the written instruction of the consumer or prospective consumer, or*

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<sup>13</sup> Regulations relating to the Code of Conduct for Electronic Communications and Electronic Communications Network Services Licences, GN 1740 GG 30553, 7 December 2007.

- (ii) *When directed by an order of a court;*
- (iii) *During the process of collection of debts owed to the licensees to accredited debt collection agencies;*
- (iv) *By the licensees' auditors for the purpose of auditing their accounts; and*
- (v) *In terms of any applicable law."*

[33] Paragraph 3.8 essentially stipulates that telecommunication service provider may release communications-related information only to consumers or prospective consumers of the telecommunication service provider subject to certain exceptions, exceptions which are not present in this matter.

[34] That is to say that the real-time or archived communication referred to in RICA and the Regulations, can be released, upon request, to the telecommunication service providers' consumers or prospective consumers subject to certain exceptions (which, as I have found, are not applicable in this matter).

[35] This requires the person requesting information to show that they are a consumer of the service provider and as a result, they are entitled to the information requested. Section 1 of RICA defines a 'customer' as:

*"... any person—*

- (a) to whom an electronic communication service provider provides an electronic communications service, including an employee of the electronic communication service provider or any person who receives or received such service as a gift, reward, favour, benefit or donation;*

*(b) who has entered into a contract with an electronic communication service provider for the provision of an electronic communications service, including a pre-paid electronic communications service; or*

*(c) where applicable—*

*(i) to whom an electronic communication service provider in the past has provided an electronic communications service; or*

*(ii) who has, in the past, entered into a contract with an electronic communication service provider for the provision of an electronic communications service, including a pre-paid electronic communications service;”*

[36] Provided that the applicant is a customer in terms of the definition set out in the RICA, he will be entitled to having the communication-related information released to him as envisaged by section 12 of the RICA and the ICASA Regulations set out above.

[37] It is noteworthy that the applicant merely averred in his founding affidavit that the number for which the records are sought belongs to him. Any other averment or argument advanced by the applicant in this regard, was raised in his replying affidavit and second set of heads of argument. It is trite in law that in motion proceedings “an applicant must stand or fall by his or her founding affidavit.”<sup>14</sup> That is to say that new facts or evidence or grounds for the

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<sup>14</sup> Mokoena and Others v Lengoabala; In re: Lengoabala v Nhlapo and Others [2016] ZAFSHC 4 para 7.

application cannot be made in the replying affidavit, this extends to the heads of argument which should just be a summary of the legal issues, arguments and authorities relied on. New facts or evidence cannot be introduced at this stage.

[38] To establish that he is a customer of the respondent, the applicant introduced new facts in his second sets of heads of argument as set out above, in which inter *alia* he annexed confirmatory affidavits of his wife and ex-wife attesting that the number in question belongs to him or belonged to him prior to and during the robbery for which he is incarcerated and as a result, he was a customer to the respondent. In such instances where additional information is added in the replying affidavit (and by extension, the heads of argument) the court has a judicial discretion to exercise, it can either permit or strike out the additional information.<sup>15</sup>

[39] In addition, to make out his case, the applicant makes reference to the privileged communication (labelled 'without prejudice') from the respondent in which the respondent admitted to having handed the sought information to the National Prosecuting Authority for the applicant's criminal trial, following a section 205 subpoena and essentially advising the applicant to withdraw his application.

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<sup>15</sup> Faber v Nazerian [2013] ZAGPJHC 65 at paragraph 22 and 23.

[40] The principles that are applicable to privileged communications were set out by the court in ***Groep v Golden Arrow Bus Services (Pty) Ltd and a Related Matter***<sup>16</sup> as follows:

*“It is by now trite that communications exchanged by litigants in the course of legal proceedings in a bona fide endeavour to resolve their differences are protected from subsequent disclosure at trial and from admission into evidence.”* In *Naidoo Trollip* JA observed that the rule is based upon considerations of public policy to encourage the extra curial resolution of disputes:

‘The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation.’<sup>17</sup>

[41] However, there are exception to this rule. One exception is if the privileged communication is an admission of insolvency, another exception is if the privileged communication is an acknowledgment of liability that interrupts the running of prescription as contemplated in section 14 of the Prescription Act.

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<sup>16</sup> [2018] 1 All SA 508 (WCC).

<sup>17</sup> [2018] 1 All SA 508 (WCC) para 31.

None of these exceptions exist in this matter. As such, the without prejudice correspondence from the respondent remain inadmissible and stand to be struck from the record.

[42] Since the applicant is unrepresented by a legal practitioner, it is important to note what the court in **NS v MFS**<sup>18</sup> said in paragraph 3 regarding leniency to self-representing litigants:

*“The legal processes and filing notices, affidavits and other documents may be a maze for parties seeking to represent themselves in action proceedings. There is a delicate dance between adhering strictly to the rules of the court, to ensure that the process runs smoothly and allowing some leniency towards a self-representing litigant who may not have a bird’s eye view of how the law as a system operates or know about the intricate details of the law and legal processes, to ensure that both parties are genuinely heard.”*

[43] This is to say that while there is a strict requirement to comply with the court rules, courts can be flexible and grant leniency to a self-representing litigant who may be a layman in law. Ideally in matters like the one before this court, on fairness and policy grounds, the court could grant leniency regarding the admissibility of new facts or evidence in the replying affidavit and heads of argument and the admissibility of privileged communication. However, the

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<sup>18</sup> [2023] JOL 60905 GJ para 3.

issue of the time lapse for storage of communication-related information, discussed below, does not necessitate such leniency.

[44] Regarding the storage of the communication-related information, RICA finds application again. According to section 30(1)(b) of RICA, telecommunication service providers are obligated to store communication-related information, as stipulated below:

“Notwithstanding any other law, a telecommunication service provider must –

(a) ...

(b) Store communication-related information.”

[45] To give effect to section 30(1)(b) of RICA, section 30(7)(a) read with section 30(2)(ii)(bb) of RICA, stipulate that a directive in respect of the storage of communication-related information must be issued by the Minister of Communications, as stipulated below:

“30. Interception capability of telecommunication services and storing of communication-related information.

(7) The Cabinet member responsible for communications must, within two months after the fixed date and in consultation with the Minister and other relevant Ministers and after consultation with the Authority and a telecommunication service provider or category of telecommunication service providers to whom, prior to the fixed date, a telecommunication service licence has been issued under the Electronic Communications Act-

Issue a directive referred to in subsection (2)(a) in respect of such a telecommunication service provider or category of telecommunication service providers; and ...”

[46] Read with section 30(2)(a) below:

“30. Interception capability of telecommunication services and storing of communication-related information.

(1) The Cabinet member responsible for communications, in consultation with the Minister and the other relevant Ministers and after consultation with the Authority and the telecommunication service provider or category of telecommunication service providers concerned, must, on the date of the issuing of a telecommunication service licence under the Electronic Communications Act, to such a telecommunication service provider or category of telecommunication service providers-

(a) issue a directive in respect of that telecommunication service provider or category of telecommunication service providers, determining the-

(i) security, technical and functional requirements of the facilities and devices to be acquired by the telecommunication service provider or category of telecommunication service providers to enable the-

...

(bb) storing of communication-related information in terms of subsection (1)(b);

[47] Pursuant to the above provisions, the Minister of Communications issued a directive in respect of different categories of telecommunications service providers.<sup>19</sup> The relevant parts pertaining to the storage of communication-

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<sup>19</sup> Directives in respect of Different Categories of Telecommunications Services Providers made in terms of the Regulation of Interception of Communication-Related Information Act (70/2002), GN 1325 GG 28271, 28 November 2005.

related information is paragraph 17 of part 5 of the directives under schedule B, which stipulates the following:

*“17. Period for which communication-related information must be stored- Communication-related information, whether real-time or archived communication-related information, must be stored for a cumulative period of three (3) years from the date on which the indirect communication to which the communication-related information relates, is recorded.”*

[48] The nett outcome of the above is that the telecommunication service providers are obligated to retain and store real-time or archived communication-related information of their customers for a cumulative period of 3 (three) years before destroying it, as such, there is no existing obligation on the respondent to still have the sought information. Moreover, considering the submission by the respondent that it cannot provide the information sought by the applicant because it no longer exists, it is important to note that the court cannot make an order that will be impossible to comply with as this would be setting up “the offending party to contempt proceedings for not procuring something he did not have in the first place and exposes the order to ridicule.”<sup>20</sup>

## **E. CONCLUSION**

[49] On the first question up for determination, the applicant has not made out a case that he is entitled in law to the requested information. On the second

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<sup>20</sup> Makate v Vodacom (Pty) Ltd [2013] JOL 30668 (GSJ) para 16.

issue, I find that the relief sought by the applicant is not legally competent due to the lapse of time.

[50] In the result, the application cannot succeed. What remains to be decided is the question of costs. The applicant is in a precarious position of being incarcerated. He acted in pursuance of his rights. His situation is thus as envisaged in the sage decision of the ***Constitutional Court in Biowatch Trust v Registrar Genetic Resources***<sup>21</sup> with the understanding *mutatis mutandis*, that although not a State entity, the respondent is a corporate entity of formidable stature compared to the applicant. The application was also not informed by any malice on the part of the applicant.

[51] The following order is made:

The application is dismissed. I make no order as to costs.

**J.S. NYATHI**

**Judge of the High Court**

**Gauteng Division, Pretoria**

Date of hearing: 05 October 2023

Date of Judgment: 06 March 2024

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<sup>21</sup> 2009 (6) SA 232 (CC)

On behalf of the Applicant: In person

On behalf of the Respondent: Adv. Mahlalela

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**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the Caselines electronic platform. The date for hand-down is deemed to be 06 March 2024.