



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

CASE NO: 01366/2023

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

DATE 14 JUNE 2024

SIGNATURE

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VIVIAN ALBERTS

Applicant

and

**THE UNIVERSITY OF
JOHANNESBURG**

First Respondent

**THE INFORMATION OFFICER OF
THE UNIVERSITY OF
JOHANNESBURG**

Second Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email

and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 14 June 2024

JUDGMENT

UNTERHALTER J

Introduction

- [1] The applicant, Professor Alberts, was a professor in the physics department of the first respondent (UJ). For some twenty years, Professor Alberts has been engaged upon research and development of thin film photovoltaic solar technology ('the technology'). The technology is used for the generation of solar energy. The development of the technology resulted in intellectual property. In 2005, a company was incorporated, Photovoltaic Technology Intellectual Property (Pty) Ltd ('PTiP') by UJ, through which the commercial application of the technology could take place.
- [2] In 2012, the Industrial Development Corporation ('IDC') provided funding for PTiP. This resulted in a shareholders' agreement between UJ, the IDC, and Professor Alberts, with the IDC holding 49.75% of the shares in PTiP, UJ holding 27.64%, and Professor Alberts the balance of 22.61%. The funding was to establish manufacturing plants and solar parks. In March 2014, a company, Innovative Investment Corporation (Pty) Ltd ('IIC') was incorporated. Its directors were Messrs Marcus and van Schoor, and Ms Spilhaus. IIC was to be used as a holding company for the commercialisation of various UJ projects. What UJ, and, in particular, the UJ Strategic Financial Projects Department ('the Projects Department') and the Commercialisation Investment Committee ('CIC'), knew of the activities of IIC is a matter of some considerable dispute between Professor Alberts and UJ.
- [3] In 2017, suspected illegal actions of Messrs Marcus and van Schoor, and their use of the IIC, came under scrutiny by UJ. That scrutiny included actions that had been taken affecting PTiP. Whether UJ's Council had reason to do so earlier is also in dispute. Messrs Marcus and van Schoor were suspended. UJ appointed Sizwe Ntsaluba Gobodo ('SNG') to investigate the affairs of the IIC, and the conduct of its directors. Professor

Alberts was informed by UJ's acting Deputy Vice Chancellor, Professor Manorare, of the SNG investigation. Professor Alberts welcomed this, and he indicated that PTiP would also undertake an investigation concerning how the IIC and its directors had impacted PTiP. Professor Alberts indicated that for the purposes of his investigation, he wanted access to information yielded from the SNG investigation that had a bearing on PTiP. It is common ground that Professor Manorare agreed. Certain documents were provided to Professor Alberts, but others, he complained, were not. SNG produced a report ('the SNG report'). Professor Alberts sought access to the report, but UJ declined his request.

- [4] Amid no small amount of publicity concerning the alleged fraudulent activities of Messrs Marcus and van Schoor, PTiP floundered. Professor Alberts sought to salvage the position, but in vain. Professor Alberts blames the leadership of UJ for failing to act to save PTiP. In September 2017, PTiP ceased operations. In May 2018, it was placed in business rescue, and ultimately in liquidation.
- [5] On 18 March 2022, Professor Albert's attorneys addressed a letter to the Chief Information Officer of UJ (I reference the attorneys in this way without thereby assuming the capacity in which Professor Alberts instructed the attorneys.) The letter listed the records that were sought. This was done in terms of s11 of the Promotion of Access to Information Act 2 of 2000 ('PAIA'). Correspondence ensued. Among other matters, UJ contended that when the records sought were created, UJ was acting in a private capacity. Professor Alberts's attorneys then, in the alternative, sought records in terms of s53 of PAIA, the provision that regulates the manner of access to a record of a private body. UJ refused the request. Professor Alberts did not accept the reasons given by UJ for refusing the request. On 5 September 2022, an internal appeal was noted against the refusal by UJ to grant access to the records requested of it. . On 17 October, 2022 UJ dismissed the appeal.
- [6] Professor Alberts then brought proceedings in terms of ss78 and 82 of PAIA to set aside UJ's decision to refuse access to the information sought, and to direct UJ to grant access. The records sought are described in five categories set out in the notice of motion. This is the case that now serves before me.

- [7] UJ offers the following lines of defence to resist disclosure. First, UJ contends that Professor Alberts is not the requester. PAIA is predicated upon the rights of access of a requester to be given access to records. UJ's first line of defence is that the requester is PTiP. Yet it is Professor Albert who moves this court to grant him access. As he is not the requester, he has no right of enforcement, and he is non-suited on this basis. I shall reference this as 'the requester challenge'.
- [8] Second, UJ argues that PAIA is not of application because the records sought by Professor Albert's fall within s7 of PAIA. Section 7 specifies that PAIA does not apply to records that satisfy certain conditions. The records sought, UJ contends, satisfy the conditions. Once that is so, there is no claim to be made under PAIA. I shall reference this as 'the s 7 challenge.'
- [9] Third, UJ contests the claim that the records to which Professor Alberts seeks access are records of a public body. While UJ accepts that a university, for certain purposes, exercises public powers and functions, PTiP was a commercial project, and records produced in the course of this project are the records of a private body. The significance of this distinction between public and private is that s 50 of PAIA requires that, to obtain access to any record of a private body, the requester must show that the records sought are required for the exercise or protection of any rights of the requester. UJ submits that the documents sought are not so required, and hence Professor Albert's claim must fail.
- [10] Finally, there is a wide-ranging dispute between the parties as to whether the records sought exist or can be found. UJ observes that a court cannot order the impossible. If, as UJ maintains, the records (at the very least in three of the five categories), after reasonable efforts, have not been found, then even if Professor Alberts were to establish a right, this court cannot order UJ to produce records it cannot find. As to the SNG report, which UJ does hold, a tender is made by UJ to produce it. Professor Alberts, in his affidavits, mounts a detailed attack on what he contends to be the insufficient efforts of UJ to search for the records. I shall reference this as the 'sufficiency dispute'.
- [11] If the requester challenge has merit, it disposes of the case. For this reason, I commence with this issue.

The requester challenge

- [12] PAIA regulates what is required for a requester to be given access to a record of a public body and any record of a private body. It is the requester that is given access. A requester is defined, in relevant part, as a person making a request for a record (s 1 of PAIA). The issue that arises in this case is this: who made the request for access to the records? That is the person who may have a right of access to the records requested, and it is that person who may apply to court for appropriate relief if access is denied. Professor Alberts contends that he is the requester entitled to relief before this court. UJ submits that Professor Alberts is not the requester, and consequently he has no rights of access to the records sought, and no right to approach this court for appropriate relief.
- [13] The dispute rests upon an assessment of the evidence as to who made the request. The letter addressed by Professor Alberts's attorneys to UJ, dated 18 March 2022, requesting access to records is the logical starting point ('the March letter'). The attorneys' letter states that with reference to 'Photovoltaic Technology Intellectual Property// University of Johannesburg: request for access to records in terms of the Promotion of Access to Information Act, 2 of 2000', 'We confirm that we act on behalf of Vivian Alberts, in his capacity as director of Photovoltaic Technology Intellectual Property (Pty) Ltd ('PTIP'). The letter then references the attorneys' special power of attorney. That special power of attorney is attached to the letter, and it is given by 'Vivian Alberts in my capacity as Director of PHOTOVOLTAIC TECHNOLOGY INTELLECTUAL PROEPRTYduly authorised thereto...'. The special power of attorney nominates the attorneys to request access to the records. The March letter goes on to request identified records in terms of s 11 read with s 18 of PAIA. This letter is clearly framed, and makes a request on behalf of PTiP to obtain access to the records identified in the letter.
- [14] The March letter refers to the 'prescribed Form A' which is attached. That form has two sections of relevance. Section B requires the particulars of the person requesting access to the record. That is completed in the name of Johann Venter, the attorney nominated in the special power of attorney, and his identity number is given. Section C requires the particulars of the person on whose behalf the request is made. This section is completed as follows: "Full names and surname: Vivian Alberts' and his identity number is given.

[15] UJ's attorneys came on record, and in a letter dated 18 May 2022, observed that the request was made to UJ as a public body, but the documentation sought would have been created by UJ acting as a private body and performing a private function. In a letter dated 5 July 2022, responsively, Professor Albert's attorneys wrote, confirming that they acted for PTiP, attaching the same special power of attorney referenced in the March letter, and requested access to certain records, but now invoking ss 18 and 53, to request these records of UJ as a private body. Such a request, in terms of s 50(1) of PAIA, stipulates that the records must be required for the exercise or protection of any rights. The letter goes on to record : ' We record that the requested information is required for the exercise and fulfilment of *inter alia* the following rights and duties: ...3.3 Our client's duty to act in the best interests of PTIP in an informed and transparent manner, as envisaged under s 76(3)(b) of the Act.' This is a reference to the provision of the Companies Act that sets the standards of conduct of a director of a company. It is inescapable that Professor Alberts was invoking his duties as a director of PTiP to act in the best interests of the company, as the basis for requesting the records. The letter of 5 July 2022 attached Form A that was completed in the same way as had been done in the attachment to the March letter.

[16] UJ's attorneys addressed a letter dated 4 August 2022 in reply. In this letter (' the August letter') UJ declined the requests for access to records. Those requests are described as 'your request on behalf of Vivian Alberts' and refer both to the request in terms of ss 18 and 53 of PAIA, as also the request made in terms of ss 26 and 76(3)(b) of the Companies Act. Among the reasons to decline the request were these:

'2.1 Your client has failed to evidence that the information requested is reasonably required for the exercise or protection of *his* rights; (my emphasis)

2.2 The information is sought within the context of civil litigation in that in or about November 2018, your client *via* his attorneys, Adams & Adams, directed a letter to UJ contemplating litigation. Pursuant thereto, your client and UJ agreed to the appointment of an arbitrator who accepted such appointment;

2.3 Photovoltaic Technology Intellectual Property (PTIP) has been placed in business rescue and your client no longer holds rights or duties arising from the Companies Act...'

- [17] Professor Alberts's counsel observes that the August letter references Professor Alberts as the person who has failed to show that the information is reasonably required for the protection of *his* rights. And the litigation there referenced is a claim by Professor Alberts against UJ seeking compensation from UJ for its breaches of the Shareholders agreement concluded between Professor Alberts and UJ in respect of PTiP - clearly a reference to Professor Alberts in his personal capacity as a shareholder and not as a director of PTiP. The August letter also understands Professor Albert to request access as a director of PTiP, and hence in his capacity as such.
- [18] In a letter dated 5 September 2022, notice was given by Professor Alberts's attorneys of an internal appeal in terms of s74 of PAIA against the refusal to grant access to the records requested. The grounds of appeal state, among other matters, that no litigation has commenced or is pending. As to Professor Albert's position as a director of PTiP, Professor Alberts relies upon s137(2) of the Companies Act, and the continuing functions of the director of a company in business rescue. Upon this basis Professor Alberts pursues his request for information in terms of the Companies Act, 'as well as in terms of the other rights'.
- [19] The outcome of the internal appeal is also attached to the papers. The decision recounts the process by which the appeal came to be noted. In doing so, it makes repeated references to the requests made by PTiP. The internal appeal is stated to be one submitted by 'Vivian Alberts in his capacity as director of PTiP.' In its reasoning, the decision concludes that UJ acted as a private body 'relative to PTiP'. It then considers the rights invoked by Professor Alberts as a director of PTiP. The decision rejects the proposition that Professor Alberts has the authority of the business rescue practitioner 'to take action on behalf of or in the interests of a company in business rescue', that is to say PTiP.
- [20] What Professor Alberts avers in respect of this documentary record is the following: 'my right of access to the information and records requested in terms of PAIA is broader and not limited to my directorship and shareholding in PTiP... I do not purport to act on behalf of PTiP or anyone else, although my rights and interests are to some extent interwoven with PTiP'. This passage is not altogether easy to interpret. It may well be that Professor Alberts has rights and interests that extend beyond his directorship and shareholding in PTiP, but the question to be answered is simpler, and it is this: who was

the requester. There are three possible answers: the requester was Professor Alberts, or it was Professor Alberts acting as a director on behalf of PTiP, or the requester was both Professor Alberts and PTiP.

[21] The documentary record, fairly interpreted, yields the following. First, there can be little doubt that the request was initiated on behalf of PTiP. The letter makes this plain and the special power of attorney confirms this position. Though Form A refers to Vivian Alberts as the person on whose behalf the request is made, it is a form that does not provide for an incorporated requester. The contents of the March letter is controlling because it is substantive and, in unambiguous terms, states that the request is made by Professor Alberts as a director of PTiP. In that capacity, Professor Alberts could only be requesting the records on behalf of the company, and not in his personal capacity. Acting as a director of PTiP, he is invoking the rights of the company.

[22] There is nothing in the letters of UJ attorneys in May 2022 that gives any indication of a different understanding as to who the requester was. The responsive letter of 5 July 2022 from Professor Albert's attorneys reaffirmed that Professor Alberts was acting as a director of PTiP, and did so to request records in the event that UJ was acting as a private body. It is the August letter of UJ's attorneys which raises as a reason to decline the requests that PAIA does not apply to the requests because they are made after the commencement of civil proceedings. Those proceedings concern a claim by Professor Alberts as a shareholder. It is thus UJ's attorneys who invoke proceedings in which Professor Alberts is the claimant and not PTiP. This gave rise to a ground of appeal in which it is contended that no civil litigation has commenced or is pending.

[23] That the civil proceedings of Professor Alberts were raised in the correspondence does not introduce Professor Alberts as a requester. First, in terms of s 7, if PTiP was the requester, it might have made the request of UJ for the purpose of Professor Albert's civil proceedings as a shareholder. If that was so, and these civil proceedings had commenced, and permitted of the production of the records, then PAIA would not be of application. I make no finding at all whether this was so. Rather, the invocation by UJ's attorneys of s7 is consistent with PTiP as the requester.

[24] Second, in the letter of Professor Albert's attorneys dated 2 September 2022 in which an

internal appeal is noted, and in the internal appeal form itself, there are grounds of appeal raised that point to PTiP as the requester. In order to sustain a request against UJ as a private body, it is required that the record is required for the exercise or protection of any rights. Those rights are formulated on the basis of Professor Albert's position as a director. And hence as rights (or duties) invoked on behalf of the company and not in his personal capacity. This is further supported by the invocation of s137(4) of the Companies Act. In order to establish that Professor Alberts may act in the best interests of PTiP, even though the company was in business rescue, it is claimed that he enjoyed ongoing duties as a director, and thus remains authorised to act in the interests of the company. Whether this is so as a matter of company law, I venture no opinion. It is rather that the authority claimed by Professor Alberts is to act for the company. This is strongly probative of PTiP as the requester.

- [25] It is so that the decision to dismiss the internal appeal does contain references to Professor Alberts as well as PTiP. But I cannot attribute great significance to this treatment. The author of the decision, Professor Mpedi, the Vice-Chancellor designate, is unlikely to have been aware that references to Professor Alberts and PTiP might have the significance that is now the subject of contestation.
- [26] I was reminded by counsel for Professor Alberts that I should not adopt a technical approach to the question before me. And I do not do so. But there must ultimately be an answer to the question: who was the requester? The overwhelming documentary evidence before me establishes that PTiP was a requester. The correspondence and notices affirm this. The capacity in which Professor Alberts is cast is that of a director of PTiP with authority to act on behalf of the company.
- [27] I have considered whether in addition to PTiP, Professor Alberts in his personal capacity might also be a requester. That would ordinarily have required some clarification of this dual role, and there is none. I allow for the possibility that PAIA does not preclude two requesters seeking the same records. And it may have been possible for Professor Alberts to have also become a requester by some means other than formal notice. But that is not my reading of the documentary record. The substantive treatment of the issues is based on his role as a director. The engagement in respect of the civil proceedings in which he claims as a shareholder, for the reasons given, do not make Professor Alberts a requester.

And finally, the request was carefully formulated by attorneys. That request made it plain who was requesting the records, and the request did not deviate from that delineation of PTiP as the requester.

- [28] For these reasons, I find that PTiP was the requester. Only a requester may apply to court to secure access to the records sought in the application before me. PTiP should have brought the application as the requester. PTiP did not do so. Professor Alberts is the applicant but not the requester. He is non-suited on this basis.

The s 7 challenge

- [29] It was submitted that even if I should uphold the requester challenge, it would be helpful nevertheless to entertain the s7 challenge. There are cases in which a conclusion on one aspect of a case, even if determinative, should not discourage a court from deciding other disputes. I do not consider this to be such a case. My finding that PTiP was the requester does not prevent Professor Alberts from bringing a request for the records that were sought by PTiP. If he should do so, the question that is likely to reoccur is whether the civil proceedings brought by Professor Alberts gives rise to the non-application of PAIA. That could, in turn, raise an issue as to whether a request made after civil proceedings were no longer pending (being one averment of Professor Alberts) may nevertheless be for the purpose of civil proceedings. I am reluctant to embark upon an interpretation of s 7 when this issue is not before me and its factual permutations may become relevant to a dispositive interpretation.

Conclusion

- [30] Once the requester challenge holds good, as I find, the application must be dismissed. The further issues raised by the application thus do not fall to be considered, save only for the question of costs. UJ has made a tender to grant access to the SNG report. To the extent that the parties cannot resolve what parts of the report fall to be disclosed in terms of the tender, this court may see the SNG report and determine that issue. This was accepted by the parties, and requires no order to be made.

[31] UJ submitted that the costs should follow the result in the ordinary way. UJ contends that the application has been brought in furtherance of Professor Alberts's civil claim for substantial damages. That is a private commercial interest, and there is no reason why he should not be liable for the costs. I am disinclined to uphold this contention. The significance of the work that Professor Alberts and PTiP were engaged upon went beyond private interest. Without deciding any matter concerning the specific modalities of PTiP's operations, there was considerable public funding that supported the innovative work of Professor Alberts. It was also work, on the evidence before me, that had a public significance, given the national importance of finding and using alternative forms of energy generation. What caused this promising project to fail is thus not simply relevant to any civil claim. The possible institutional failings are matters of wider public interest. This, in part, is what actuates Professor Alberts's efforts to secure the records. His failure in this application does not warrant an order of costs in the light of these wider public interest considerations.

[32] In the result, the following order is made: the application is dismissed.

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**UNTERHALTER J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, GAUTENG DIVISION,
JOHANNESBURG**

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DATE OF HEARING: 06 JUNE 2024
DATE OF JUDGMENT: 14 JUNE 2024