

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D1269/2022

In the matter between:

PILISANANI TRADING ENTERPRISE 50 CC

Applicant

and

THE INFORMATION REGULATOR (SOUTH AFRICA)

First Respondent

**RICHARDS BAY MINING (PTY) LTD t/a RICHARDS
BAY MINERALS**

Second Respondent

**RICHARDS BAY TITANIUM (PTY) LTD t/a RICHARDS
BAY MINERALS**

Third Respondent

**RIO TINTO MANAGEMENT SERVICES SOUTH
AFRICA (PTY) LTD t/a RIO TINTO**

Fourth Respondent

JUDGMENT

Olsen J:

[1] On 16th May 2022 the applicant, Pilisanani Trading Enterprise 50 CC delivered a complaint to the Information Regulator, an office established in terms of s 39 of the Protection of Personal Information Act, 2013. The Information Regulator is the first respondent. The complaint concerned what the applicant regarded as the unlawful failure of the second, third and fourth respondents to produce records which had been requested of them. The complaint was delivered out of time. The Regulator advised the applicant that an application to condone this would be required. It was delivered. The application for condonation was refused. The applicant now asks this court to review and set aside the Regulator's decision to refuse condonation, as well as the finding made during the course of considering the application for condonation

that there was in any event no merit in the complaint. This court is also asked to substitute its own decision for that of the Regulator by granting the condonation which the Regulator had been asked to grant.

[2] However the Regulator may have expressed itself in recording its view that the complaint was without merit, its finding in that regard is in my view not reviewable. It was necessary and appropriate for the Regulator to consider the merits of the complaint as a prominent feature of the application for condonation for the late delivery of the complaint. But it had no jurisdiction to make a final binding decision in regard to that issue until and unless it granted the application for condonation. In considering the application for condonation the Regulator was obliged to approach the subject in the manner set out in paragraph 51 of the judgment in *Golden Core Trade and Invest (Pty) Limited v Merafong City Local Municipality and another* [2023] 4 All SA 589 (SCA)

“Whether a delay should be overlooked does not and should not entail a determination of the merits of the review or collateral challenge. The merits of the challenge are to be weighed on the following basis: if the delay is to be overlooked, is there a challenge that warrants the attention of the court? In other words, whether there is a serious question to be decided. To decide the merits assumes the very jurisdiction that is yet to be determined.”

A proper reading of the Regulator’s decision reveals that it approached the issue of the merits of the complaint in that fashion.

[3] A further order sought is one authorising the applicant to continue to pursue an earlier application that it launched out of this court to compel the production of the records in question. That application (the “first application”) was launched prematurely, because it preceded the submission of the complaint to the Regulator. The operative provision is s 78 (1) of the Promotion of Access to Information Act, 2000 (PAIA), which is to the effect that an application may only be made to court for relief after the complaints procedure referred to in s 77A of PAIA has been exhausted. In order to “exhaust” a procedure one must engage with it according to its terms, and, to proceed further, exit the procedure without the relief which was sought. If that happens relief may be sought from the court. This court cannot be asked to authorise the continued pursuit of the earlier premature application unless the Regulator has considered the

applicant's complaints, and refused to grant the relief sought by the applicant. The Regulator has not yet done so because it refused the application for condonation.

[4] The applicant has asked in the alternative that the matter be remitted to the Regulator. That is the correct approach. I accordingly proposed to approach this case upon the basis that what is before this court is an application to review and set aside the Regulator's decision to refuse to condone the late delivery of the complaint. If it is found that such an order should be granted a decision must then be made as to whether the court will substitute its own decision on the application for condonation for that of the Regulator. Depending on the decision on that issue the matter would then fall to be remitted to the Regulator either to

- (a) reconsider condonation, and if it is granted to consider the merits of the complaint; or
- (b) to consider the merits of the complaint.

[5] The second, third and fourth respondents in these proceedings are Richards Bay Mining (Pty) Ltd, trading as Richards Bay Minerals; Richards Bay Titanium (Pty) Ltd, trading as Richards Bay Minerals; and Rio Tinto Management Services South Africa (Pty) Limited, trading as Rio Tinto. The precise nature of the relationship between the second and third respondents cannot be discerned from the papers in this application. One might assume from the fact that they share the trade name "Richards Bay Minerals" that they are partners. On the other hand it may be that the mining and industrial operation conducted on the North coast of KwaZulu-Natal comprises two separate business enterprises whose efforts in their respective fields produce and dispose of the output of the mining enterprise referred to as Richards Bay Minerals ("RBM"). The fourth respondent, as its name implies, appears to provide management services to RBM. A Mr Nair signed an affidavit in partial response to the request for information on behalf of RBM and introduced himself as follows.

"I am currently employed by Rio Tinto Management Services (Pty) Ltd and provide services for the Rio Tinto Group and to [RBM] as the Senior Business Partner..."

Whether the terminology employed by Mr Nair is mere "business-speak", or whether he intended to convey that the fourth respondent is a partner of Richards Bay Minerals, and that Richards Bay Minerals is indeed a partnership, is not clear.

[6] The applicant is in the business of providing services to industry. I think it fair to say on the papers before me that RBM was the applicant's major customer.

[7] One assumes that any reasonable and diligent business enterprise takes care in the selection of persons it will engage to provide services which are necessary for the business in question to function. The service provider should be capable of performing the service, and of doing so on terms which the enterprise finds acceptable. RBM has formalised its approach to this sort of vetting exercise. Service providers which meet its standards may be accorded "vendor status". As I understand the applicant's case, RBM's officials who make decisions as to the allocation of such outsourced services or works may allocate work to service providers who have vendor status.

[8] It is clear on the papers that vendor status does not entitle any service provider to receive work from RBM. It qualifies one to receive work, but establishes no entitlement to receive work.

[9] Things started to go awry in the relationship between RBM and the applicant. In the result by letter dated 24th March 2021 the applicant was informed that its vendor status was terminated. That meant that it would no longer be considered a service provider to whom work could be allocated as and when needed.

[10] It appears that certain correspondence changed hands until by letter dated 23rd June 2021 the applicant drew the attention of RBM to clause 22 of the "Rio Tinto Global Purchase Order Conditions for Goods and Services" which, according to the letter, provided that a party "may give the other a request to negotiate specifying the dispute and requiring its resolution under clause 22". The letter went on to demand the reinstatement of the applicant's vendor status, and to indicate that if that was not done within 72 hours it would "proceed to enforce its remedies, which may include invoking the provisions of clause 22 of the contract and/or proceeding by way of High Court application for the review of Rio Tinto/RBM's unlawful conduct." The applicant's misapprehension that RBM's decision no longer to classify the applicant as having vendor status is susceptible to judicial review was finally abandoned in its replying affidavit in these proceedings. Notwithstanding RBM's failure to restore vendor status

to the applicant, the latter failed to pursue the right to negotiate under the Rio Tinto Global Purchase Order Conditions. Instead, on 26th July 2021, the applicant, represented by its attorneys, submitted a request for access to records held by the respondents.

[11] The following records were requested.

- (a) "Procurements Government Committee Report on [Pilisanani] and any further report carried out by RBM internal audit team." (The word "Government" should be "Governance", and was understood as such.)
- (b) "Any non-conformance report in respect of [Pilisanani]".
- (c) "Proof of sending to [Pilisanani] of the
 - (1) PGC report and
 - (2) Non-conformance report."

Under the heading "Particulars of Private Body" the applicant addressed the request to "The Head: Rio Tinto and/or Richards Bay Minerals". I will revert to the request form later.

[12] By letter dated 19th August 2021 (which must have been sent about 4 days later, because an affidavit by Mr Nair attested to on 23rd August 2021 accompanied it) the second to fourth respondents declined to make any records available.

[13] Believing that it was entitled to do so, on 4th February 2022, 165 days after the second to fourth respondents had refused to provide the records, the applicant launched an application to this court for an order that the records be produced. It received the second to fourth respondents answering affidavit on 25th March 2022 in which it was informed that the first application was premature. It then took just over seven weeks to submit its complaint to the first respondent, unaccompanied by the application for condonation which was obviously required and which was only produced a further week later. The first respondent's decision refusing condonation reached the applicant on 13th June 2022. The present application to review the Regulator's decision was issued on 13th December 2022 which by my count is 182

days after the decision was conveyed to the applicant. (Nothing is made of that delay in this case.) The applicant's propensity to delay is remarkable.

[14] The decision of the first respondent on the application for condonation was expressed as follows.

- "1) The complaint has not been submitted within the period referred to in section 77A (2) of PAIA and there are no reasonable grounds to condone the late submission.
- 2) There are therefore no merits in the complaint and, given the unjustified delay in lodging the complaint, the condonation application is rejected. In the circumstances any further action by the Regulator would be inappropriate or unnecessary."

The wording employed in the decision reflects the provisions of s 77D of PAIA which provides as follows in relevant part.

- "(1) The Information Regulator, after investigating a complaint in terms of s 77A, may decide to take no action or, as the case may be, require no further action in respect of the complaint if, in the Information Regulator's opinion-
- (a) The complaint has not been submitted within the period referred to in s 77A (2) and there are no reasonable grounds to condone the late submission;
 - (b) ... ; or
 - (c) It appears to the Information Regulator that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate."

[15] The reasons given for the decision may be summarised as follows.

- (a) The complainant "failed to provide sufficient and persuasive reasons for the late submission of the complaint".
- (b) Neither the written request submitted to the second to fourth respondents nor the complaint form discloses the underlying right

sought to be exercised or protected through the production of the records requested.

- (c) A single request cannot be made of multiple private bodies using the linguistic device “and/or”. There are three private bodies in this case (i.e. the second, third and fourth respondents), and the request ought to have been made individually to each of them.
- (d) No prejudice would be suffered by the applicant if condonation is refused. It could withdraw the first application and deliver proper requests for records to each of the private bodies concerned.

[16] The applicant’s grounds of review of the first respondent’s decision, stated expressly in both its founding affidavit and supplementary founding affidavit, are that the decision was unreasonable and irrational. The applicant accordingly relies on ss 6(2)(f) and (h) of PAJA. The claim that the decision was irrational will be disposed of immediately. Section 6(2)(f)(ii) of PAJA permits the court to review administrative action if it is not rationally connected to

- “(aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator”.

Counsel for the applicant delivered no argument in support of the proposition that any of the required rational connections were absent. In my view he was correct in adopting that approach. His argument on the subject of reasonableness addressed the reasons given for the Regulator’s decision, asserting that

- (a) in some instances they were either fallacious or weak; and
- (b) viewed collectively, they could not reasonably support the decision which was made.

The question to be decided is accordingly whether the applicant has established the grounds of review in s 6(2)(h) of PAJA.

[17] Before dealing with the reasons given by the first respondent for reaching its decision it is perhaps advisable to consider in more general terms the approach which ought to be adopted by the first respondent when asked to condone the late delivery of a complaint.

[18] Section 7(1) of PAJA provides, *inter alia*, that proceedings for judicial review must be instituted within 180 days. Section 77A of PAIA is to the same effect, as it requires a requestor to lodge a complaint within 180 days of the decision to which the complaint relates. Each of s 9 of PAJA and s 77D(1)(a) of PAIA allows its processes to be pursued despite delay beyond 180 days, in the case of the former provision upon the grant of a court order extending the period in the interests of justice, and in the case of the latter provision by allowing condonation when there are reasonable grounds to grant it. In my view the difference between the words used in the two enactments to allow for relaxation of the time bar signifies no material difference between them. In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) it was held that s 7(1) of PAJA reflected a determination by the legislature that a delay exceeding 180 days is *per se* unreasonable. In the result, unless the period is extended under s 9 of PAJA, a court may not entertain the review application at all. It is apparent from what I stated earlier in this judgment, that in my view the manner in which the 180 day deadline has been dealt with in PAIA is to the same effect. Absent condonation the first respondent has no jurisdiction to entertain the complaint at all.

[19] Condoning the delay under s 77D of PAIA means overlooking it. I see no signifier in PAIA that suggests that the relevant factors are different, or materially different in any event, to those to be taken into account by a court when considering whether to overlook an unreasonable delay in launching review proceedings. The wide-ranging discussion on the subject of assessing delay in paragraphs 44 to 70 of the judgment in *Buffalo City Metropolitan Municipality v ASLA Construction (Pty) Ltd* 2019 (4) SA 331 (CC) is helpful in identifying the relevant considerations. In the context of the present litigation I suggest that the following are prominent matters which ought to be considered by the Information Regulator.

- (a) It is a feature of the rule of law that delays should not be tolerated. There is a broad public interest in the achievement of certainty in affairs. In any particular case an individual's reasonable expectation is implicated, that it should be entitled to move on with reasonable certainty regarding the position from which it proceeds.

- (b) There must be an explanation for the delay, that is to say for all of it. The conduct of the party responsible for the delay is material. The degree of that party's fault in relation to the delay is a significant feature of its conduct.
- (c) Prejudice or potential prejudice to both sides in granting or refusing condonation is a consideration.
- (d) The enquiry is fact driven. The relative importance or prominence of each of the considerations which the Information Regulator should consider depends on the context. There is no reason to suppose that in any particular case they will weigh equally in the scales.

Delay and the conduct of the applicant

[20] The Protection of Personal Information Act, 2013 provided for the amendment of PAIA to introduce the role of the Information Regulator, and the provision requiring the complaints procedure of that office to be exhausted before acquiring a right to approach the court for assistance. The amendments were not brought into effect immediately. Government Gazette number 43461 dated 22nd June 2020 gave notice that the amendments would come into effect a year later, on 30th June 2021. Just short of a month after that the applicant made its request for records from the second to fourth respondents, which was declined on or about 23rd August 2021. The document recording the response of the second to fourth respondents was signed by a Mr Jachs who is described as "Legal Counsel – Commercial". It appears that he also, like the applicant, was unaware of the fact that the amended provisions had come into force. In his notice declining the request he informed the applicant that it "may lodge an application with the court against the refusal in accordance with the Act". According to the applicant it only learnt of the problem when the answering affidavit in the first application was delivered by the second to fourth respondents on 25th March 2022. By then the 180 day time limit to submit a complaint to the Regulator had long passed.

[21] This scenario may be seen to engage the old truism that ignorance of the law is no excuse. Ignorance is, however, at least an explanation for the delay up to 25th March 2022. The extent to which the explanation that the delay was the product

of ignorance of the law may ripen into a factor making a contribution to a reasoned decision in favour of condonation must depend on the facts of each case. We are not dealing here with a lay individual attempting to traverse what to him or her may appear to be a maze set up by PAIA. The applicant is a commercial operation pursuing commercial interests, and could afford to engage and did engage the services of an attorney to assist it from the very beginning. The only explanation for the attorney's ignorance which was offered in the application to the first respondent for condonation reads as follows.

"The applicant's legal representatives were unaware of the amendments to the Act, effective from 30th June 2021, *inter alia* as a result of difficulties in the circulation of Government Gazettes promulgating new legislation as well as the lack of or poor notification of the Act having been amended."

In my view that explanation is of doubtful value in the applicant's pursuit of condonation. An attorney who purports to be qualified to represent a client in proceedings in which access to information is sought may reasonably be expected to acquaint herself with the current legislative provisions on the subject.

[22] The Information Regulator bears some responsibility for the maintenance of the integrity of the processes of that office. The 180 day deadline is not an arbitrary provision. It is designed to impose finality – to bring proceedings to an end – when there has been inaction for a period of 180 days. In exercising the power to grant condonation the Information Regulator must take care not to act in a way which undermines that legislative intent. In the papers before me the applicant has more than once attempted to shift the blame for its predicament onto the shoulders of the second to fourth respondents. That argument would have carried more cogency if this was a case of misleading a lay requestor attempting to gain access to records without professional assistance. It is a factor, but I am not sure that it makes that much difference to the Information Regulator's approach to the issue, that the ignorance of the legal position resided not only in the applicant's attorney, but also in the mind of the in-house legal counsel employed by the second to fourth respondents.

[23] No explanation at all was tendered to the Information Regulator to justify the delay of seven weeks between when the applicant had knowledge of the problem, and the date of submission of the complaint to the Regulator. It is an immutable

requirement of all applications for condonation that the explanation for the delay must traverse the whole of the period of delay. The applicant failed to meet that requirement. Having been notified of its default the applicant should have acted immediately. It had only recently delivered a founding affidavit (and a supplementary founding affidavit) in the first application setting out its entire case for provision of the records. With that material readily to hand, delaying delivery of its complaint for seven weeks was in my view inexcusable.

[24] The applicant has not conducted itself appropriately. It took nearly the full 180 days which it believed to be available to launch the first application to this court when there was no obvious reason for it to do so. Its subsequent delay in lodging its complaint illustrates the applicant's blatant disregard for the obvious interests of the second to fourth respondents in achieving finality in the dispute over access to records.

[25] The Information Regulator cannot be faulted for finding that the applicant failed to provide sufficient and persuasive reasons for the late submission of the complaint. Condonation might nevertheless have been reasonably granted if the other considerations material and relevant to the enquiry supported condonation in the interests of justice.

The Exercise or Protection of a Right

[26] Section 32(1) of the Constitution reads as follows.

“Everyone has the right of access to-

(a) any information held by the State;

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

The qualification to the right of access to information held by persons other than the State, that the information should be “required for the exercise or protection of any rights”, is the express provision which lays the foundation for the cohabitation of s 14 of the Constitution (the right to privacy) and s 32 in the same constitution.

[27] Until the enactment of PAIA access to information held by the State was confined by the same qualification as is presently applicable only in the case of persons other than the State. The effect of the qualification was simply summarised in paragraph 28 of the judgment in *Cape Metropolitan Counsel v Metro Inspection Services Western Cape CC and others* 2001(10) BCLR 1026 (A).

“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”

PAIA follows the same course. Section 50(1) sets out the conditions which must be met for a requestor to be entitled to records of a private body. The first requirement is that the record must be required for the exercise or protection of any rights. The second is that the requestor must comply with the procedural requirements laid down in PAIA relating to a request for access to the record in question. Section 53(1) requires a request for access to a record of a private body to be made in the prescribed form. Section 53(2) lays down that the form for such a request must at least require the requestor concerned to meet certain conditions. One of them is that it must “identify the right the requestor is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right”.

[28] Paragraph G of the form in question is headed “Particulars of Right to be Exercised or Protected”. Paragraph G1 requires the requestor to indicate “which right is to be exercised or protected”. In response the applicant’s form reads as follows.

“Access to information in terms of section 32 of the Constitution of the Republic of South Africa.”

Paragraph G2 requires the requestor to explain why the records requested are “required for the exercise or protection of the aforementioned right”. The applicant’s explanation read as follows.

“The right to consider the documentation sought for purposes of considering whether a right of relief may lie against any party liable to enable the party

seeking the documentation to give consideration to instituting an appropriate claim, including a claim for damages.”

To the extent that any meaning can be discerned in the applicants answer to paragraph G2 of the form, it establishes or reveals no connection between it and the right set out in paragraph G1 of the form. The Information Regulator stressed that it is the “underlying right” which must be disclosed, by which is meant the right to be exercised or protected with the assistance of the records identified in the request. It is difficult to conceive of any circumstances in which a person’s right of access to information can feature as the right in paragraph G1 of the request form. Delivering the request constitutes the exercise (or an attempt thereat) of that very right.

[29] For the reasons already given it is clear that a failure to state the right which is sought to be exercised or protected with the assistance of the records to which access is requested rendered the request fatally defective. In their response to the request the second to fourth respondents drew attention to the fact that the right in question had not been disclosed. They also drew attention to other shortcomings in the form which had been submitted to them. The response presented by those respondents nevertheless dealt with the documents, recording that some of them did not exist at all, and that for the rest their production was excused by factors such as a reasonable expectation that their production might endanger the life or physical safety of committee members and their internal audit team. In my view the second to fourth respondents could in fact both reasonably and lawfully have stated that they declined to make any response until a proper request, disclosing the right in question, and the manner in which the records related to the exercise or protection of that right, were disclosed.

[30] It should be added that the right sought to be exercised or protected was also not disclosed in the complaint lodged by the applicant with the Information Regulator. (Despite the topic receiving some attention in the papers in the present application I find myself still unable to identify any statement made on behalf of the applicant which discloses a right, or an alleged right, to be exercised or protected; or which was infringed by the second to fourth respondents when RBM decided no longer to afford the applicant the status of an approved vendor.) In the circumstances the Information Regulator correctly found that the complaint raised no question on the

merits which warranted the Regulator's attention. An assessment of the merits of the complaint yielded no reason to condone the unreasonable delay.

The Remaining Reasons

[31] Whilst the Regulator was correct in stating that where multiple private bodies are believed to hold records which are being sought, a separate request to each is required, that shortcoming in the applicant's request for information could reasonably have been overlooked in this case, if other considerations supported condonation. I say this because of the lack of clarity regarding the relationship between the three respondents which may involve them constituting a single "private body" known as RBM. Whilst the three respondents raised this issue in their response to the request, they nevertheless managed to put together a collective response.

[32] The Regulator's finding that refusing condonation would not prejudice the applicant, because it could still deliver a request in proper form, disclosing the right sought to be exercised or protected, is more significant than it may at first appear to be. The point is that this significant defect in the applicant's request was drawn to its attention by RBM in its response delivered in August 2021. The applicant should then immediately have delivered fresh requests which met the requirements of PAIA and section G of the request form. (I should perhaps qualify this statement by observing that there is nothing in the papers in the present application to signify that the applicant had a right to the "vendor status", the deprivation of which appears to have set off the chain of events leading to the present litigation; nor any right to receive work from RBM. Perhaps the applicant could not then, and cannot now, identify such a right as a basis for requesting records from RBM.)

[33] In challenging the Regulator's reason dealt with in the paragraph immediately above, the applicant complains that there are cost implications involved in withdrawing the first application, and that there "is also a consideration of further delay in the relief sought by the applicant". Even if one excuses the applicant's premature launch of the first application, all of the delay which had occurred by the

time that the Regulator had to rule on the application for condonation had been caused by the applicant.

Conclusion

[34] I conclude that whilst some of the Regulator's reasons for refusing condonation are less compelling than others, the lack of merit in the complaint made to the Regulator, and the failure of the applicant to fully explain and justify its delays, renders untenable the applicant's argument that the refusal of condonation is reviewable for unreasonableness.

Order

1. The application is dismissed with costs.
2. Counsels fees may be taxed on scale B.


Olsen J

Case Information:

Date of Hearing:
Date of Judgment:

10 June 2025
16 July 2025

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