

SOUTH AFRICA / JUDGMENT

Kanyi Ilanga Trading (Pty) Ltd v Stoltz and Another (967/2023) [2023] ZAMPMBHC 64 (30 November 2023) [2023] ZAMPMBHC 64

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer

CASE / FILE NUMBER

967/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

FLYNOTES:

PAIA – Tracking device data – Identity of offender –
Arson –
Seeking to access vehicle tracking data reflecting respondent's movements and use of motor vehicle
– Requests information to confirm suspicion and to identify respondents as defendants in future action for damages
– Applicant's suspicion would be fortified should information place respondent at scene of crime where fire broke out – Applicant adequately identified right it seeks to exercise and protect – Demonstrated that information will assist in exercising or protecting right in question – Compliance with procedural requirements satisfied –
Respondent ordered to grant access to applicant to relevant records – Promotion of Access to Information Act 2 of 2000, s 50.
IN THE HIGH COURT OF
SOUTH AFRICA

MPUMALANGA DIVISION,
MBOMBELA (MAIN SEAT)
CASE
NUMBER: 967/2023
1)
REPORTABLE: YES
2)
OF INTEREST TO OTHER JUDGES: NO
3)
REVISED: No
Date
30 November 2023
Signed
In
the matter between:-
KANYI
ILANGA TRADING (PTY) LTD
(Registration

No: 20212/172234/07) Applicant
and
ALBERT
TIAAN
STOLTZ
First Respondent
SESEFIKILE
TRADING (PTY) LTD
Second Respondent

JUDGMENT

GREYLING-COETZER AJ

Introduction

- [1] The applicant, KANYI ILANGA TRADING (PTY) LTD, applies for access to information in terms of Section 32(1)(b) of the Constitution and Sections 1, 4, 7, 10, 18, 27, 50, 56, 78 and 82 of the Promotion of Access to Information Act, 2 of 2000 (“PAIA”).
- [2] The applicant believes that arson was perpetrated at the Satico Plantation, Louw’s Creek, Mpumalanga (“Satico plantation”) on Saturday, 10 December 2022, and that it has been committed by the first respondent, acting within the course and scope of his employment with the second respondent. This belief arises from the first respondent being observed to have been present in the Satico Plantation on Saturday, 10 December 2022, and from a voice message being sent by the first respondent via a WhatsApp messaging to a representative of the applicant, advising that a fire had originated at the Satico plantation. The fire caused damage to 1 250 tonnes of standing trees and timber to the extent of R972 500.00.

- [3] The tyre tracks of a Toyota Land Cruiser vehicle bearing registration number F[...] 2[...] M[...] (“the vehicle”) driven by the first respondent was visible in the mud at Satico plantation. Other than it being common cause that the first respondent was present at the Satico Plantation on the date in question, and he is being suspected of the unlawful conduct of arson it is not clear to the applicant whether the first respondent is indeed responsible for the unlawful conduct of arson.
- [4] Accordingly, and in terms of Section 50 of PAIA, the applicant requested access to certain records to identify the appropriate offender in order to protect and exercise its rights in respect of the Satico Plantation, and for the purpose of a potential damages claim (“the Section 50 request”).
- [5] It is common cause that prior to the launching of this application, the respondents had failed to provide a proper response to the applicant’s Section 50 request. The applicant thus alleges that the respondents have disclosed no legitimate basis upon which to refuse access to the records, and seeks this court to order the first respondent to grant access to the applicant to the following records:-
- “1.1 plotting record of the first respondent’s movements through the tracking device on his, alternatively the second respondent’s motor vehicle, Toyota Land Cruiser bearing registration number F[...], reflecting the first respondent’s movement and use of this motor vehicle on the mountain area in the Satico Plantation, Louw’s Creek, Mpumalanga from 06:00 on Friday, 9 December 2022 to 24:00 on Monday, 12 December 2022;*
- 1.2 any records held in respect of the said motor vehicle (registration no: F[...]) generated and held by the tracking service provider of the first respondent, alternatively the second respondent, in respect
- of the said motor vehicle;
- 1.3 all any data relating to the tracking of the said motor vehicle over the aforementioned period from 06:00 on Friday, 9 December 2022 to 24:00 on Monday, 12 December 2022;
- 1.4 the cell phone records of the first respondent in respect of cell phone number 0[...] over the period 06:00 on Friday, 9 December 2022 to 24:00 on Monday, 12 December 2022;
- 1.5 all WhatsApp, Facebook and Twitter communications performed and/or received by the first respondent on his cell phone device operated through cell phone number 0[...] over the period 06:00 on Friday, 9 December 2022 to 24:00 on Monday, 12 December 2022.”
- [6] In the answering affidavit the respondents sought to respond to the applicant’s Section 50 request. The respondents contend that the information sought and in terms of prayers 1.1 to 1.3 above, does not exist which was communicated to the applicant in January 2023 in correspondence from JVR Konsult and confirmed thereafter by the respondents’ attorneys of record per email.

[7] In addition, the respondents raise challenges to the applicability of the PAIA, the statutory compliance required, the locus standi of the applicant, misjoinder of the second respondent, the non-joinder of third parties and prejudice.

[8] According to the applicant, the purported response to the Section 50 request amounts to a refusal to provide access to the records in terms of PAIA.

Background facts

[9] The facts leading up to this application are largely common cause.

[10] The main business of the applicant, amongst others, is the rendering of silviculture and fire protection services to Sappi Southern Africa Ltd (“Sappi”), and more particularly in the present instance, at the Satico Plantation.

[11] As part of the fulfilment of its services to Sappi, the applicant during or about 1 April 2019 sub-contracted the first respondent, acting through the second respondent, to render part of these services at the Satico Plantation. As a consequence, the first respondent, acting within the course and scope of his employment with the second respondent, was given accommodation at House No 1, Satico Plantation and was permitted to operate and render his services from the aforementioned address and within the Satico Plantation.

[12] Save for the reasons for termination of the sub-contract, it is common cause that on 24 October 2022, by way of written notice, the applicant terminated the contract of the second respondent with effect from 30 November 2022.

[13] It is common cause that on Saturday, 10 December 2022, the first respondent was seen at the Satico Plantation, and that he was removing his belongings from the house, that he sent a WhatsApp voice message to Mr Louis Oberholzer, indicating that a fire originated at

the Satico Plantation and that it was raining on said day. The first respondent admits that his vehicle would leave tyre tracks when driven through mud.

[14] It is however denied that the first respondent was “op die berg” as alleged by the applicant.

[15] On 12 December 2022, Mr Shabangu contacted the first respondent on his cell phone and asked him where he had been on Saturday, 10 December 2022, to which the first respondent replied that he collected some of his belongings from the Satico Plantation. After being questioned about the origin of the fire and after being requested to send his tracking information in respect of the vehicle

(as the first respondent was being suspected of committing arson by starting a fire in the Satico Plantation), the first respondent

merely replied that “it is what it is”. After being advised that workmen had advised Mr Shabangu that he (the first

respondent) was on the mountain within the Satico Plantation, the first respondent replied in a similar fashion. These responses are denied by the first respondent.

[16] The first respondent had no reason to be in the mountain area section of the Satico Plantation during the period 10 – 12 December 2022, as his contract with the applicant had already been terminated with effect from 30 November 2022.

The PAIA request

[17] On 4 January 2023 the applicant's attorneys addressed correspondence to the respondents, which letter was served by the Sheriff. The correspondence was titled "NOTICE IN TERMS OF SECTION 50 OF THE PAIA ACT". It also encapsulating the PAIA request also contains a demand in terms of Section 345 of the Companies Act, 71 of 2008.

[18] The reason for the request was set out by outlining the background facts and the events on 10 December 2022 in respect of the alleged arson. In this regard the letter contained a typographical error, reflecting the date to be 12 December 2022 as opposed to 10 December 2022.

[19] It was declared that the information is required for the exercise of the applicant's right in respect of the Satico Plantation, relaying on the entitlement in terms of PAIA to access to the information and that there exists no ground for refusal of access by the applicant to the information and records as contemplated in Chapter 4 of PAIA.

[20] The following was requested:-

20.1 full particulars of all the tracking in respect of the vehicle, reflecting fully the whereabouts of the first respondent's, movements and use of the vehicle on the mountain area in the Satico Plantation from 06h00 on 9 December 2022 to 24h00 on 12 December 2022; and

20.2 full access to the tracking device in the vehicle and to provide consent to the tracking service provider/tracking company to allow the applicant full access to all and any data relating to the tracking of the said motor vehicle over the mentioned period.

[21] The request sets out that the records were required in order to protect and exercise the applicant's right in respect of the

Satico Plantation and seeking damages in amount of R972 500.00.

[22] On 20 January 2023 a reply was received from JVR Konsult, confirming that they act on behalf of the respondents. It was recorded that the applicant's attorneys have telephonically been advised that the vehicle is not fitted with a tracking device, and if the applicant is adamant that the vehicle is indeed fitted with a tracking device, the applicant is welcome to, at its own cost

and in consultation with JVR Konsult, arrange for the inspection and/or downloads (if applicable) of the vehicle's data at the tracking company.

[23] The letter further confirmed that the applicant's request in terms of PAIA in the circumstances "cannot be adhered to".

[24] On 13 February 2023 an e-mail was sent to the applicant's attorneys of record. In the email, the respondent's attorney

confirmed that her instruction was that "the clients stand by the content as set out in the letter of JVR Konsult dated 20 January 2023".

Legal framework

[25] Section 32 of the Constitution introduced a free-standing right of access to information, and provides as follows: -

"(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.
- (2) National legislation must be enacted to give effect to this and may provide for reasonable measures to alleviate the administrative and financial burden on the State."

[26] PAIA is the legislation which was enacted in terms of Section 32(2) of the Constitution, to give effect to the right of access to information.

[27] The right as enshrined in Section 32 of the Constitution is two-fold. First, it relates to information held by the State, and secondly, it expands the reach of the right of access to information to include information held by persons other than the State.

[28] Section 9 of PAIA sets out the objective of PAIA to be:-

"...

- (a) to give effect to the constitutional right of access to-
 - (i) any information held by the State; and
 - (ii) any information that is held by another person and that is required for the exercise or protection of any rights;
- (b) to give effect to that right-
 - (i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
 - (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;

- (c) ...
- (d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and
- (e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone-
- (i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;
- (ii)”

[29] Section 50 of PAIA regulates the request for information held by private bodies, and provides as follows:-

“(1) A requested must be given access to any record of a private body if

- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this part.” (own emphasis)

[30] Aforementioned therefore sets out the jurisdictional requirements entitling a requester to access to information held by private bodies. The respondents contends that the applicant has failed in establishing these requirements in its request and application.

[31] Considering the respondents’ response to the request for information and that the request cannot be adhered to on the basis

that the vehicle is not fitted with a tracking device, it is relevant to have regard to the content of Section 55.

[32] Section 55 of PAIA provides as follows:-

“(1) If-

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

the head of a private body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

- (2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the head.
- (3) For the purposes of this Act, the notice in terms of subsection (1) is to be regarded as a decision to refuse a request for access to the record concerned.
- (4) If, after notice is given in terms of subsection (1), the record in question is found, the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part.”

Respondents’ refusal

[33] Although the respondents did not directly object to providing the records, their grounds upon not providing same was set out in the

correspondence by JVR Konsult that the information does not exist as the vehicle does not have a tracking device installed. In the answering affidavit and as foreshadowed above the respondents repeat this reason and opposes the application on the following grounds:-

- (a) PAIA does not find application to the first respondent as a natural person;
- (b) The correspondence as request dated 4 January 2023, does not comply with Section 53 of PAIA, which requirements are pre-emptory;
- (c) The applicant has failed to establish the jurisdictional requirement of section 50 of PAIA;
- (d) The court application does not comply with the rules of procedure for applications to court in terms of PAIA;
- (e) The request embodied in the letter of 4 January 2023 only relates to the tracking records, whereas the current relief sought in the application includes telephonic and social media communication;
- (f) The respondents challenge the applicant’s locus standi on the basis that any damages that it intends to claim are not damages befalling the applicant, but damages befalling the operator of the plantation, being Sappi. The applicant has no right to protect in this matter;
- (g) A misjoinder of the second respondent in respect of the relief sought;
- (h) A non-joinder of third parties in respect of the relief pertaining to cell phone communication and social media content; and
- (i) Prejudice founded on the applicant’s abuse of the PAIA process to obtain information which may incriminate the first respondent, and therefore infringes on his right to privacy.

Does PAIA find application to the first respondent being a natural person?

[34] It's convenient to first determine whether PAIA is applicable to the first respondent.

[35] The first respondent alleges that PAIA does not apply to him, as he is not a 'private body' as envisaged in Section 50

when regard is had to the definition of 'private body' as contained in Section 1 of PAIA, qualified by the word "...but only in such capacity".

[36] The first respondent alleges that when the contractual relationship between the applicant and second respondent was terminated with effect on 30 November 2022, the first respondent also at that time as employee of the second respondent, ceased to operate as such, and accordingly at the time of the alleged incident being 10 December 2022, the second respondent did not operate at all. The first respondent contends that he, as a natural person, did not carry on trade or business or profession in any such capacity.

[37] Section 1 of PAIA defines a 'private body' to mean:

"(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;

(b) ...; or

(c) any former or existing juristic person; ..." (own emphasis)

[38] A "head" of, or in relation to, a private body means:

"(a) in the case of a natural person, including a person referred to in paragraph (c) of the definition of 'political party', that natural person or any person duly authorised by that natural person;

...

(c) in the case of a juristic person-

(i) the chief executive officer or equivalent officer of the juristic person or any person duly authorised by that officer; or

(ii) the person who is acting as such or any person duly authorised by such acting person; or

(d) ..."

[39] If one has regard to the right of access to information in terms of Section 32 of the Constitution, it applies to information held by any person. In *My Vote Counts NPC v Speaker of the National Assembly and Others*[1] in the minority judgment, the Constitutional Court held that that the word 'person' is plainly very wide and includes any individual or association or community or group.

[40] In terms of Section 9 quoted above, the primary objective of PAIA is to give effect to the constitutional right of access to any information that is held by another person and that is required for the exercise or protection of any rights.

- [41] It is contended on behalf of the first respondent that the use of a qualifying phrase ‘but only in such capacity’, contained in the definition of ‘private body’, indicates that such an individual is a private body for the purpose of PAIA only in as far as the request in question pertains to fulfilling of a role and in no other capacity.
- [42] It cannot without more be concluded that the second respondent ceased to operate, or for that matter to exist, the moment when the contractual relationship between the applicant and the second respondent was terminated on 30 November 2022. From the CIPC report relied on by the respondents, the second respondent remains in business, and the first respondent is the sole director of the second respondent. Therefore, on the strength of the definition of ‘private body’, more particularly a natural person who carries or has carried on any trade or business, PAIA finds application, in this regard to the first respondent.
- [43] Similarly, if regard is had to the definition of ‘head’ of private body, the first respondent is included under said definition, and PAIA is equally applicable to him.
- [44] For as far as it is contended by the first respondent that he is the owner in his private capacity of the vehicle in question, and therefore the information sought is private information of a natural person, it does not take the matter any further.
- [45] Having found as set out above the issue of misjoinder raised by the respondents’ does not have merit.

Compliance with the procedural requirements

- [46] It is contended on behalf of the respondents that Sections 50 and 53 of PAIA outline the form of request for access to information, and that the applicant failed to prove the requirements of Sections 50 and 53 of PAIA.
- [47] It is contended that it was (1) necessary for the applicant to mention the right it wishes to exercise or protect, (2) identify what the information is which is required, and
- (3) how that information would assist the applicant in exercising or protecting that right.
- [48] Section 53 of PAIA reads as follows:-
- “(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.*
- (2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned-
- (a) to provide sufficient particulars to enable the head of the private body concerned to identify-
- (i) the record or records requested; and
- (ii) the requester;
- (b) to indicate which form of access is required;

- (c) to specify a postal address or fax number of the requester in the Republic;
 - (d) to identify the right the requester 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;
 - (e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and
 - (f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.”
- [49] The respondents’ argument that the first respondent’s presence is common cause and therefore the information sought relates to a common cause fact, is misguided as the way the applicant’s request is understood is that it is to establish not whether the first respondent was present in general, but in the mountain area, and more specifically at the source or within the vicinity of the fire.
- [50] The request, in my view, complies with Section 53 in that the information required is identified, the right which the applicant seeks to protect is set out, and from the recordal of the circumstances on the day in question, speaks to how it would assist in establishing the exact position of the first respondent within the Satco Plantation. Whether the ‘how’ is permissible in terms of PAIA still needs to be decided and is dealt with under the applicable heading below.
- [51] The respondents further contend that the applicant’s request for tracking information beyond the date of 10 December 2022 amounts to overreach. I agree with the respondents in this respect. There is no basis set out by the applicant as to why the tracking records of Friday 9 December 2022, Sunday 11 December 2022 and Monday 12 December 2022 would serve the purpose relied upon by the applicant in terms of Section 50.
- [52] It is also the respondents’ case that prayers 1.4 and 1.5 of the notice of motion wherein the applicant seeks cell phone records and all WhatsApp, Facebook and Twitter communication from the cell phone device operated through cell phone number 0[...] for the period 06h00 on 9 December 2022 to 24h00 12 December 2022, were not contained in the request for information. This indeed correct and cannot be refuted or justified by the applicant’s contention that the respondents are duty-bound to furnish the information requested in prayers 1.4 and 1.5 of the notice of motion, where the applicant has never been privy to that information, and whilst it is within the particular knowledge of the first respondent. Similarly, absent the information being properly identified in the request in compliance with Section 53, the mere fact that the first respondent admitted having responded per WhatsApp, cannot be said to put it beyond question that the content of the WhatsApp communication is relevant, and that that the applicant is entitled to the information requested in respect thereof.

- [53] As set out herein above, compliance with the procedural requirements of PAIA relating to the request for access to information, is a jurisdictional requirement, and clearly pre-emptory when regard is had to Section 50(1)(b) of PAIA.
- [54] Having found that the applicant is not entitled to the relief per prayer 1.4 and 1.5 of the notice of motion there is no need for the issue of non-joinder to be further considered save to briefly state that the contention on behalf of the respondents that PAIA has mandatory protection for the privacy of third parties, and none of these third parties have been notified is not convincing. The obligation to inform third parties befalls the respondents in terms of Rule 3(4) of Regulation 1284 dated 4 October 2019 under Government Gazette No 42740 as promulgated under PAIA[2] and the first respondent, in terms of Section 71 of PAIA, as head of a private body.

Required for the exercise or protection of any rights

- [55] The prescribed content of a request in terms of Section 53 can never be drafted with the same precision and detail as would be required in pleadings or affidavits before court. On this basis it would be acceptable to employ statements of a conclusionary nature or

which is phrased in more general terms containing less detail or evidence in substantiation. Yet, in an application such as this, it is encumbered upon the applicant to adequately establish that the information is required for the exercise or protection of a right.

- [56] The applicant therefore has to satisfy two requirements, the first being, the applicant must identify the right that it seeks to exercise and need only put up facts which prima facie, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect.[3]
- [57] Considering the wording of Section 50(1)(b), the word ‘any’ as contained before the word ‘right’ was held in MGG Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another[4] to demonstrate that the broadest possible interpretation must be given to what qualifies as a right for the purpose of Section 50 (1)(a).
- [58] Secondary to aforementioned, the applicant must demonstrate how the information will assist in exercising or protecting the right in question.[5] In *Unitas Hospital v Van Wyk*[6] it was stated that there is a reluctance by court to make any positive statements as to what the expressions ‘require’

means. It proceeded to state:

“The inclination is rather to define the expression in terms of what it does not mean. So, for example, it is said that it does not mean the subjective attitude of ‘want’ or ‘desire’ on the part of the requester; that, at the one end of the scale, ‘useful’ or ‘relevant’ for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is ‘essential’ or ‘necessary’ for the stated purpose.” (own emphasis)

[59] Thus, it does not suffice to simply want or desire the records, or state that they are merely useful or relevant. Equally the applicant does not need to establish that they are essential or necessary.

[60] In *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC[7] the closest positive formulation was articulated as follows:

‘Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise of protection of the right. It follows that, in order to make out a case for access to information . . . 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.’ (own emphasis)

[61] In *Clutchco (Pty) Ltd v Davies*[8] and considering that set out above in *Cape Metropolitan Council* (supra), Comrie AJA stated that:

“It seems to me that Streicher JA’s choice of the words ‘assistance’ and ‘assist’ in the above passage indicates that ‘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 s 50(1)(a).”[9] (own emphasis)

[62] According to the applicant the information is required for the exercise and protection of the applicant’s rights in respect of the Satico Plantation, and in order to consider and institute any action necessary to compensate its damages in the amount of

R972 500.00. The applicant contends that it has the right to obtain the information to protect its right of limiting its risk that may follow as a result of the fire at the Satico Plantation and its contractual obligation to provide silviculture and fire protection services at Satico Plantation. Further to this, it emphasised that the right it seeks to enforce is its right to access to the information under PAIA.

[63] It is thus understood that the applicant requires the information which would assist it in identify the respondents as the defendants in any future action for damages, or limiting of the applicant’s

damages in respect of the Satico Plantation.

[64] It was held in *Manuel v Sahara Computers (Pty) Ltd and Another*[10] vindication of a right by way of court proceedings is a way in which to exercise that right.[11]

[65] The applicant has satisfied the first of the two requirements in that it has adequality identified the right it seeks to exercise

and protect. Consequentially the respondents' challenge to the applicant's locus standi on the basis that any damage can only be attributed to Sappi or the third party owner, and not the applicant, must fail.

[66] What then remains is whether that which is sought by the applicant is reasonably required to exercise and protect the applicant's right?

[67] In *Mahaeane v AngloGold Ashanti*[12] the underlying reasons given why the records are required was found not to relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. It was held that the reasons given, therefore, do not meet the test of the records being required to 'exercise or protect' the right relied upon. In *Mahaeane* (supra) the cause of action and proposed defendant and its details were clearly known to the appellants. The court further held that:

"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."

[68] In *Unitas* (supra) the requester did not require the record to formulate her claim for purpose of instituting an action. She was aware of who her defendant was. Brand JA proceeded to state:

"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."

[69] In *Manual* (supra)[13] the court held that the requester was entitled to use PAIA to establish who his defendants might be and/or what cause of action he had against them.

[70] The facts of each matter is cardinal in the determination of the issue whether the record is reasonably required. As explained by Brand JA in *Unitas* (supra) the enquiry is fact based. There is simply no 'one size fits all' approach that can be applied. It was aptly restated by Cameron JA in the minority judgment of *Unitas* (supra) "Like the statute, the standard is accommodating, flexible and in its application necessarily fact- bound." [14]

[71] On the facts of this matter the information is not reasonably required to formulate the cause of action. The applicant knows what

the cause of action is, alternatively has enough information to substantiate at least one cause of action. Factually, the applicant

does not know who committed the arson and caused the damage to the Satco Plantation. The applicant requests the information to confirm its suspicion and to identify the respondents as the defendants.

[72] Should the information place the first respondent within the mountain area of the Satco Plantation it would fortify the applicant's suspicion that the first respondent may have committed arson, by proverbially 'placing him on the scene', but it would not prove that he indeed commit arson. Thus the required information would not assist the applicant in strengthening its prospects of success and prove that that the first respondent was the cause of the harm.

[73] On aforesaid basis it is conclude that the applicant legitimately utilised section 50 of PAIA to potentially identify the right defendant and the information sought is thus reasonably required.

Prejudice

[74] Lastly, it was contended on behalf of the first respondent that this application is an abuse of process, as it seeks to obtain incriminating information that could prejudice the first respondent. In this respect the first respondent relies on the right to privacy as protected by Section 14 of the Constitution, more specifically Section 14(d) that provides that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. Having regard to the word 'communications' as utilised by the first respondent, it is assumed that this argument relates to prayers 1.4 and 1.5 which prayers it has already been found the applicant is not entitled to.

[75] Further, the first respondent contends that the information sought could amount to incriminating evidence and even though the first respondent is at no stage an accused, the relief would amount to a fishing expedition that could be used in criminal proceedings. Assuming that the use of the word 'information' in this context refers to all the information per prayers 1.1 to 1.5 of the notice of motion alternatively prayers 1.1 to 1.3 of the notice of motion, which is the only relevant relief remaining, the first respondent relies on Section 35 of the Constitution. It is contended that Section 35(3)(f) more specifically which, according to the first respondent, provides that everyone has the right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence.

[76] It needs to be clarified that the aforesaid right relied on does not extend to everyone as alleged by the first respondent but is specifically qualified to the extent that everyone who is arrested for allegedly committing an offence enjoys the right as set out under Section 35(1). Further to that, and specifically dealing with Section 35(3)(f), said right befalls every accused person.

[77] The first respondent is not an accused person, nor does PAIA provide for such information to qualify as mandatory protection, and therefore found a basis for mandatory refusal of access to records.

- [78] The only limitation in respect of an application is found in Section 7, which makes it clear that PAIA is not applicable to records requested for criminal or civil proceedings after commencement of proceedings.
- [79] In *PFE International and Others v Industrial Development Corporation of South Africa Ltd*[15] it was held that the language utilised in Section 7 lays down three conditions which must be met if the application of PAIA is to be denied. First, access to information must be sought for the purpose of civil or criminal proceedings. Second, the request must be made after the commencement of the proceedings. Thirdly, access to the record of information must be provided for in another law.
- [80] Therefore, for as far as it is contended that the tracking records sought in prayers 1.1 to 1.3 might be incriminating in nature, it is not precluded by PAIA.

Section 55 of PAIA

- [81] In light of the justification for refusal as raised by the respondents to the extent that the information does not exist Section 55 is relevant. It requires a private body that claims that records do not exist or cannot be found to (a) go under oath to say that it is not possible to provide access to the record;
- (b) provide a full account of all steps taken to find the record or to determine whether it exists; and (c) provide such an affidavit or affirmation in response to the initial PAIA request, in which case it is deemed to be a refusal.
- [82] In *Manuel (supra)*[16] it was held that a mere statement that a record cannot be found or does not exist does not suffice. The court is required to scrutinise the private body's version on affidavit to determine whether its account is satisfactory.[17]
- [83] In the present matter neither of the respondents deposed to an affidavit or affirmation in response to the applicant's PAIA request. An allegation of non-existence, and thereby deemed refusal, was relayed in terms of the initial reply by JVR Konsult and confirmed by the e-mail despatched by the respondents' attorney of record.
- [84] Absent compliance with Section 55 of PAIA, the applicant was therefore entitled to proceed with the current application, particularly in respect of prayers 1.1 to 1.3. Had the respondents complied with Section 55, it would have been a well-founded defence to the relief sought herein per prayers 1.1 to 1.3 of the notice of motion.

Costs

- [85] Considering the partial success of the applicant, it justifies a departure from the general principle that costs should follow the event. This is fortified by a consideration of the letter as communicated to the applicant by JVR Konsult. Therein the applicant

was invited to arrange for an inspection and/or to download the vehicle's data at the tracking company at the applicant's

cost, should the applicant be adamant that the vehicle was fitted with a tracking device.

[86] From that before court it does not appear that applicant utilised this invitation. Had it done so, it might have circumvented the necessity for at least a successful portion of this application.

[87] On aforementioned grounds, it is justified that no cost order be made.

Order

[88] I make the following order:-

1 The first respondent is ordered to grant access to the applicant to the following records:-

1.1 the plotting record of the first respondent's movements through the tracking device on his, alternatively the second respondents' motor vehicle, a Toyota Land Cruiser bearing registration number F[...], reflecting the first respondent's movements and use of this motor vehicle on the mountain area in the Satiko Plantation, Louw's Creek, Mpumalanga, from 24h00 on Friday 9 December 2022 to 24h00 on Saturday 10 December 2022;

1.2 any records held in respect of the said motor vehicle bearing registration number F[...], generated and held by the tracking service provider of the first respondent, alternatively the second respondent, in respect of said motor vehicle;

1.3 all and any data relating to the tracking of the said motor vehicle for the period from 24h00 on Friday 9 December 2022 to 24h00 on Saturday 10 December 2022.

2 The first respondent is ordered to grant the access contemplated in paragraph 1 above to the applicant within 21 (twenty-one) days of date of this order.

3 No order as to cost.

D GREYLING-COETZER

ACTING JUDGE OF THE HIGH COURT

FOR APPLICANT: Adv. P. Sieberhagen Instructed by Markus Saayman Inc Attorneys E-mail: anna@msaaymaninc.co.za FOR RESPONDENTS: Adv. A. Basson Instructed by Van Antwerpen Attorneys Inc c/o A de Kock Attorneys E-mail: anneline@adkattorneys.co.za

Judgment

reserved: 29 August 2023

Judgment

delivered: 30 November 2023

[1] 2016

(1) SA 132 (CC) at par [105]

[2] Both the applicant and respondents throughout make reference to the repealed set of rules under Regulation 965 dated 9 October 2009. These rules have been replaced by Regulation 1284 dated 4 October 2019 under Government Gazette No 42740

[3] Claase v Information Officer, South African Airways (Pty) Ltd 2007

(5) SA 469 (SCA) at par [8]

[4] 2011

(5) SA 163 (GSJ) at par [334]

[5] MMG Media (supra) at par [352]

[6]

[2006] ZASCA 34; 2006

(4) SA 436 (SCA) at par [16] to [17]

[7] 2001

(3) SA 2013 (SCA) at par [28]

[8] 2005

(3) SA 486 (SCA) at par [13]

[9] Which was approved in the minority judgment of Cameron J in My Vote Counts NPC v Speaker of the National Assembly & others 2016

(1) SA 132 (CC) para 31.

[10]

2020

(2) SA 269 (GP)

[11] Id para at par [33]

[12]

2017

(6) SA 382 (SCA)

[13]

at para [44]

[14]

at para [30]

[15] 2013

(1) SA 1 (CC) at par [20]

[16]

at para [50]

[17] CCII Systems (Pty) Ltd v Lekota NO (2005) ZAGPHC 45 (15 April 2005) at par [16]

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2023/64.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kanyi-ilanga-trading-pty-ltd-v-stoltz-and-others-unknown-topic-ampmbhc-2023>

Prepared on 12 October 2026 · Esheria