



**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF MAKHADO
HELD AT LOUIS TRICHARDT**

Case No.: 152/2020

In the matter between:

ZOUTNET CC

ANTON JACOBUS VAN ZYL

and

THE MAKHADO LOCAL MUNICIPALITY



1ST APPLICANT

2ND APPLICANT

RESPONDENT

JUDGMENT

INTRODUCTION

- [1] This is an application in terms of the Promotion of Access to Information Act 2 of 2000 (hereafter referred to as "PAIA"), arising out of a request for information relating to the sale of Erf 3456, Louis Trichardt, Ext 2 and Erf 1953, Louis Trichardt, Ext 2 (hereinafter referred to as the "Properties") under tender or bid nr.: 73 and 74 of 2018, respectively.
- [2] The First Applicant is the owner and publisher of two print newspapers and three websites related to such newspapers. The two newspapers are distributed under the names: Zoutpansberger and Limpopo Mirror. The URL's of the three websites are: www.zoutnet.co.za; www.limpopomirror.co.za; and www.zoutpansberger.co.za.
- [3] The Second Applicant, Mr. Anton Jacobus van Zyl, is the editor of the Zoutpansberger and Limpopo Mirror newspapers and also a reporter doing special and investigative journalism for the newspapers. The Second Applicant

is also the sole member of the First Applicant, responsible for the commercial management of the business.

- [4] The Respondent is the Makhado Municipality, a local municipality established in terms of the *Local Government: Municipal Structures Act* 117 of 1998.
- [5] The parties were requested to file written heads of argument due to the restrictions gazetted and guidelines provided under the Disaster Management Act to address the spread of the COVID-19 virus.

FACTUAL BACKGROUND

- [6] It is common cause that the Second Applicant made an application to the Respondent, addressed to the Respondent's Information Officer, requesting information in terms of the *Promotion of Access to Information Act*.¹ According to the Respondent's PAIA manual, the Municipal Manager is indicated as the Information Officer.²
- [7] The application was preceded by various correspondence (dated from 20 August 2019 to 7 October 2019) between the Second Applicant and the spokesperson, Municipal Manager and other functionaries of the Respondent.³ These correspondence are in reference to the sale of the Properties and the PAIA manual of the Respondent.
- [8] On 14 October 2019, the Second Applicant submitted an application in terms of Section 18(1) of PAIA in the prescribed form by hand to the Respondent and paid the required fee of R35.00. Thereafter, a copy of the application was submitted to the Respondent (to Ms. Susan Caroto: Manager Corporate Support Services) via e-mail as well.

¹ Second Applicant's Founding Affidavit: Annexures "AJVZ 16" at pages 65-69.

² Second Applicant's Founding Affidavit: Annexure "AJVZ 20" at pages 79-95.

³ Second Applicant's Founding Affidavit: Annexures "AJVZ 4" at pages 33-34, "AJVZ 5" at pages 35-35, "AJVZ 6" at pages 37-39, "AJVZ 9" at pages 49-50, "AJVZ 11" at pages 54-57, "AJVZ 13" at pages 61-62, "AJVZ 14" at page 63, and "AJVZ 15" at page 64.

- [9] The Second Applicant received no response from the Respondent and deeming such non-response to be a denial, the Second Applicant submitted a notice of appeal on 10 December 2019 to the Speaker of Council in line with paragraph H of the Respondent's PAIA manual.⁴
- [10] Save to deny that the application and appeal form was correctly completed in respect of the Second Applicant's capacity in requesting the information and the reasons for the application, the Respondent did not deny that the application and appeal were submitted to it.
- [11] No response to the internal appeal had been received by the Second Applicant and as such, having exhausted all internal remedies, the Second Applicant brought an application for access to such information through the court system.
- [12] In response to the application, the Respondent raised points *in limine* which this Court finds it prudent and necessary to deal with before the merits of the application can be entertained.

POINTS IN LIMINE

LOCUS STANDI OF THE FIRST APPLICANT

- [13] In the answering affidavit filed on behalf of the Respondent, Mr. Tshivengwa disputed the First Applicant's entitlement to the relief claimed.⁵ In essence, the Respondent denies that the First Applicant is a "requester" as defined in Section 1 of PAIA.
- [14] The Respondent pointed out that the particulars of the First Applicant do not appear on the application and it is only the particulars of the Second Applicant that appear on the form.⁶ The Respondent further states that the

⁴ Second Applicant's Founding Affidavit: Annexure "AJVZ 20" at page 89.

⁵ Respondent's Answering Affidavit: page 5-7 at para 5-11.

⁶ Respondent's Answering Affidavit: page 6 at para 7.

First Applicant was introduced in the PAIA proceedings in the internal appeal by attaching an annexure to the Notice of Internal Appeal Form, which is a letter done on the First Applicant's letterhead.⁷

[15] The issue of *locus standi* was not addressed in the replying affidavit filed on behalf of the Applicants⁸. The heads of argument filed on behalf of the Applicants denied that the First Applicant was joined to these proceedings as a requester, but rather on the basis that the Respondent might raise the issue of interest in respect of the First Applicant. Mr. van Zyl, in his founding affidavit, detailed and attached as annexures the various correspondence between the Applicants and the representatives of the Respondent. Mr. van Zyl also seemed to have been "wearing two hats", as he clearly acted in his own name, but at the same time also clearly acted on behalf of "Zoutnet", "Zoutpansberger" and "Limpopo Mirror".

[16] The Respondent knew who was corresponding with it from the very start. As an example, the enquiry⁹ sent to Mr. Bobodi on 20 August 2019 per e-mail, specifically shows the following information:-

- a) From: Anton van Zyl
- b) CC: Andries van Zyl andries@zoutnet.co.za
- c) Subject: Media enquiry
- d) Banner at the bottom of the page refers to:
 "Anton van Zyl" being Owner/Manager
 The contact information: 015-5164996/7 and 084-6164997
 URL: www.zoutnet.co.za
 Picture depicting the words "Zoutnet News with an independent soul"
 Phrase: "Publishers of Zoutpansberger and Limpopo Mirror"

[17] The Respondent indicated that no information of the First Applicant was contained within the application form, yet some of the information corresponds with that of the First Applicant.

⁷ Respondent's Answering Affidavit: page 6 at para 8.

⁸ The First and Second Applicants are collectively referred to as the "Applicants" in this judgment.

⁹ Second Applicant's Founding Affidavit: Annexure "AJVZ 4" at page 33.

[18] Section 78 of PAIA determines that only a “requester” and “third party” has legal standing to bring an application such as this. A requester is defined in Section 1 of PAIA as follows:-

“ ‘requester’, in relation to-

(a) a public body, means-

(i) any person ... making a request for access to a record of that public body; or

(ii) a person acting on behalf of the person referred to in subparagraph (i)

[19] The definition of requester quoted above refers to “a person making a request”. A requester is not defined in PAIA as the person who fills in the form.

[20] Regulation 6 of the Regulations¹⁰ regarding the promotion of access to information states that:-

“A request for access to a record as contemplated in section 18(1) of the Act must substantially correspond with Form A of Annexure B.”

[21] Section 18(1) of PAIA provides:-

“A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.”

[22] The request form has an area for the details of the requester and a separate area for filling in the details of the person acting on behalf of the requester. In this instance, the Mr. van Zyl completed the portion of the person requesting access to the information, but left the portion of the particulars of the person on whose behalf the request is made blank.

[23] The Respondent, although taking issue with the content of Mr. van Zyl's request form, did not make out a case of being misled by Mr. van Zyl's

¹⁰ Regulations published under Government Notice R187 in Government Gazette 23119 of 15 February 2002.

approach to how he filled in the forms¹¹. The PAIA processes were preceded by approximately ten e-mails and/or letters sent by Mr. van Zyl to the Respondent representatives, all regarding the same query.

[24] The Respondent, not having been misled and as there is no prejudice to the Respondent in the manner in which the forms were filled out, this does not deprive the First Applicant of its *locus standi*.¹² Mr. van Zyl had indicated to the Respondent through the preceding correspondence that he was unsatisfied with the information received from the Respondent and that PAIA processes would be followed. When the prescribed forms were used, they did not detract from or alter that which had gone before. The forms should not be regarded in a vacuum.

[25] The point *in limine* is accordingly dismissed.

NON-JOINDER OF THIRD PARTIES

[26] The Respondent contends that the Applicants ought to have joined the two entities that were the successful bidders in respect of the Properties, being: i) Trendy Tiles and Sanitary Ware; and ii) Banyana Enterprises.¹³ The Respondent's contention is based on the fact that the Applicants made remarks about the two entities and as such they would be directly and substantially affected by the outcome of this court application.

[27] The Applicants deny that the joinder of the two entities (as mentioned above) is necessary,¹⁴ as the information requested relates to: i) the Bid Specifications/Evaluation/Adjudication Committee within the Respondent; ii) the Respondent's Supply Chain Management Policy; and iii) full details (including company registration number) of the two entities.

¹¹ The request for information and the internal appeal form.

¹² *M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another* (2011 (5) SA 163 (GSJ)) [2010] ZAGPJHC 43; 09/51422 (8 June 2010) at para 20-30.

¹³ Respondent's Answering Affidavit: page 7-8 at para 12-18.

¹⁴ Applicant's Heads of Arguments: page 14-15 para 21.5.

[28] The test for non-joinder is set out by the Supreme Court of Appeal in *ABSA Bank Ltd v Naude NO*¹⁵, as follows:-

"[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, Kwazulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."
(Footnotes omitted)

[29] In *Judicial Service Commission and Another v Cape Bar Council and Another*¹⁶ the Supreme Court of Appeal held that:-

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."

[30] Applying the above test, in the present matter, this Court is of the view that the point raised by the Respondent bears no merit. There are no facts supporting the contention that it was necessary to join the two entities as parties to these proceedings. The Respondent did not refuse access to the information on the basis that a third party would be prejudiced when the initial request and appeal was submitted to it. The Second Applicant had requested information regarding the two entities and indicated that Trendy Tiles and Sanitary Ware could not be found as a registered company.

¹⁵ (20264/2014) [2015] ZASCA 97 (1 June 2015) at para 10.

¹⁶ 2013 (1) SA 170 (SCA) at par [12] at para 12.

[31] This application is for an order to gain specific information from the Respondent and considering the type of information requested, there is nothing indicating that the two entities have direct and substantial interest in this matter.

[32] The point *in limine* is accordingly dismissed.

MERITS

[33] Having now dealt with the points *in limine* raised by the Respondent, I now turn to the merits of the matter.

ISSUES IN DISPUTE

[34] The issues in dispute can be summarised as follows:-

[34.1] Whether the Applicants complied with the requirements in PAIA for a request for information from the Respondent as outlined in Sections 11 and 18 of PAIA;

[34.2] Whether the Respondent had a valid reason for refusal per Sections 34-45 of PAIA;

[34.3] In the event that it is found that the Respondent did have a valid reason for refusal, whether such valid reason is overtaken by the so-called “public interest override” outlined in Section 46 of PAIA;

CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PAIA APPLICATIONS

[35] Section 32 of the *Constitution*¹⁷ provides thus:-

¹⁷ *Constitution of the Republic of South Africa*, 108 of 1996.

- “32 (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 right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”*

[36] PAIA is the legislation enacted to give effect this constitutional right.

[37] The importance of this right of access to information was explained by the Constitutional Court in the matter of *Brümmer v Minister for Social Development and Others*¹⁸, where the Court held at para :-

“The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information”. . . . Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. (Footnotes omitted.)”

[38] Section 11 of PAIA reads as follows:-

- “11 (1) *A requester must be given access to a record of a public body if—*
- (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and*
 - (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.*
- (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.*

¹⁸ [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

- (3) *A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by—*
- (a) any reasons the requester gives for requesting access; or*
 - (b) the information officer's belief as to what the requester's reasons are for requesting access."*

[39] Section 11 must be read with Section 18 of PAIA, which describes how the request should look. Section 18(1), 18(2)(a), 18(2)(d)-(f) of PAIA states as follows:-

- "(1) A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.*
- (2) The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned-*
- (a) to provide sufficient particulars to enable an official of the public body concerned to identify-*
 - (i) the record or records requested; and*
 - (ii) the requester;*
 - (d) to specify a postal address or fax number of the requester in the Republic;*
 - (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 information officer."*

[40] Section 19(2) of PAIA states the following:-

- "(2) If a requester has made a request for access that does not comply with section 18(1), the information officer concerned may not refuse the request because of that non-compliance..."*

[41] According to Section 11(1)(a) a public body must give a requester access to a record if the procedural requirements relating to a request for access has been

met, unless there is a valid ground for refusal as outlined in Sections 34-45 of PAIA.

[42] Section 33(1) of PAIA states:-

"(1) The information officer of a public body-
(a) must refuse a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1)(a), 38(a), 39(1)(a), 40 or 43(1); or
(b) may refuse a request for access to a record contemplated in section 37(1)(b), 38(b), 39(1)(b), 41(1)(a) or (b), 42(1) or (3), 43(2), 44(1) or (2) or 45,
unless the provisions of section 46 apply."

[43] The Respondent relies on three specific sections as the basis for refusal of the request for information. Those are Sections 34, 36 and 45 of PAIA.

[44] Section 34(1) and (2)(c) of PAIA provides:-

"(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.
(2) A record may not be refused in terms of subsection (1) insofar as it consists of information-
...
(c) already publicly available;"

[45] Section 36(1)(b) and (2)(a) of PAIA provides:-

"(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-
(a) ...
(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party;
(2) A record may not be refused in terms of subsection (1) insofar as it consists of information-

(a) *already publicly available;*"

[46] Section 45 of PAIA provides:-

"The information officer of a public body may refuse a request for access to a record of the body if:

- (a) the request is manifestly frivolous or vexatious;*
- (b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."*

[47] The Applicants raised the issue of public interest which is found in Section 46 of PAIA. This Section reads as follows:-

"Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

- (a) the disclosure of the record would reveal evidence of-*
 - (i) a substantial contravention of, or failure to comply with, the law; or*
 - (ii) an imminent and serious public safety or environmental risk;*
 - and*
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

[48] The media plays an important role in providing citizens with information and in doing so fostering a culture of transparency. In *Khumalo and Others v Holomisa*¹⁹ the Constitutional Court held that:-

"[i]n a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a

¹⁹ [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 24.

significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16."

[49] Having now outlined the legal framework applicable in this matter, I now turn to the application thereof to the facts in this case.

**PROCEDURAL REQUIREMENTS OF THE REQUEST MADE:
COMPLIANCE WITH SECTIONS 11 AND 18 OF PAIA**

[50] The Respondent contends that the Applicants failed to comply with the procedural requirements set by PAIA,²⁰ in that:-

[50.1] no valid right was put forward in the initial request for information submitted to the Respondent; and

[50.2] the Second Applicant had initially failed to indicate that he represented the First Applicant.

[51] The Applicants denied non-compliance with Sections 11 and 18 of PAIA and referred to the manner in which the initial request for information was filled in by the Second Applicant, as well as Section 19 of PAIA.²¹

[52] The Respondent referred to case law in support of the above contention.

[53] Reliance was placed on *Institute for Democracy in South Africa And Others v African National Congress and Others*²², even though the facts in that matter is clearly distinguishable from the present matter. In that instance, the court had to decide on a request for access to information made to a private body and it is trite that different requirements apply to private and public bodies.

²⁰ Respondent's Heads of Argument: pages 14-18 at para 29-40.

²¹ Applicant's Heads of Argument: pages 15-18 at para 21.6.

²² (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).

- [54] The Respondent further relied on *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*²³, which is a Supreme Court of Appeal case decided before PAIA came into operation. The excerpt from the case is directly in conflict with Section 11(3)(a) of PAIA.
- [55] The Respondent misdirected itself in requiring the Applicants to prove what right is sought to be protected or enforced. As the Respondent is a public body, there is no such requirement. The Respondent also referred to the possible reason why the Applicants wanted the information (being for a 'topical story'), yet the reason why the information is sought, is not relevant for a request for information directed at a public body.
- [56] The Respondent did indicate that the Second Applicant had failed to complete the portion of the request form where he ought to have indicated that he was making the request on behalf of the First Applicant.
- [57] In order to determine whether the Applicants complied with PAIA, we need to firstly determine what the procedural requirements are that is prescribed by PAIA in regard to the request for information. The requirement has been found to be: "whether the correct request in the prescribed form was sent to the correct information officer at the correct address..."²⁴ (own emphasis).
- [58] Section 18(2) contains the requirements that the form must comply with. The requester is required to provide sufficient particulars to enable an official of the public body to identify the requester.
- [59] The Respondent does not argue that it did not know who the requester was that was making the request for access to information, but rather that full details were not supplied.

²³ (10/99) [2001] ZASCA 56 (30 March 2001).

²⁴ *Paul v MEC for Health, Eastern Cape Provincial Government and Others ; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province and Others* (5031/2018; 5108/2018; 5689/2018) [2019] ZAECHMHC 18; [2019] 3 All SA 879 (ECM) (29 March 2019) at para 11. See also Section 18(1) of PAIA.

[60] This argument, however, is not supported by the facts. When considering the request²⁵ for information completed by the Second Applicant, the following information regarding the requester is contained therein:-

[60.1] Full names and surname: Anton Jacobus van Zyl

[60.2] Identity number: 670329 5115 08 6

[60.3] Postal address: PO Box 1680, Louis Trichardt, 0920

[60.4] Fax number: (015) 516 2303

[60.5] Telephone number: 015 516 4996/7

[60.6] E-mail address: anton@zoutnet.co.za

[61] As already indicated above under the heading of "*Locus Standi* of the First Applicant", the Second Applicant is a journalist for, editor of, employee of and sole member of the First Applicant. If he were expected to submit a separate request for information in each roll that he fulfils, it would lead to an unnecessary multiplication of requests that the Respondent would be forced to attend to.

[62] The Respondent has a duty to assist requesters if they did not submit the request in the manner required by Section 18(1) of PAIA. A request for access to information that does not comply with the requirements of Section 18(1) may not be refused unless the public body has complied with Section 19(2) of PAIA.

[63] The request for access to information submitted by the Second Applicant requested information held by the Respondent, in the prescribed form, sent to the information officer of the Respondent, to the correct address.

[64] The Respondent did not seriously attack the compliance with procedural requirements in terms of PAIA and tried to make out a case of non-compliance by stating that the request form was incomplete.

[65] The Respondent, having made no allegation and provided no proof that it complied with the requirements for public bodies in terms of Section 19(2) of

²⁵ Second Applicant's Founding Affidavit: Annexure "AJVZ 16" at page 65-69..

PAIA before it can refuse a request, can not now claim that there was non-compliance when the initial request had been submitted to it.

[66] Applying the above to the facts of this case, the Respondent's contention that the Applicants' application was defective for non-compliance with PAIA, is unfounded.

**PROTECTION OF PRIVACY OF THIRD PARTY BEING A NATURAL PERSON:
COMPLIANCE WITH SECTION 34 OF PAIA**

[67] The Respondent contends that it was entitled to refuse access to the requested information on the basis that such refusal is done to protect the privacy of a third party who is a natural person as required by Section 34 of PAIA.²⁶ The Respondent submits that it "is justified in refusing to grant this information to the Applicants without the involvement or the consent of those third parties".²⁷

[68] The Applicants deny that the Respondent was entitled to refuse the information as the Respondent had failed to show that the information relates to a natural person (i.e. that the third parties are natural persons) and that such disclosure would be unreasonable.²⁸ The Applicants also take issue with the Respondent placing the burden of including the third parties in the PAIA process upon the Applicants, whereas that burden ought to be on the Respondent.²⁹

[69] In order for the Respondent to successfully rely on Section 34 of PAIA, it has to prove that:-

[69.1] the third party is a natural person;

[69.2] the information requested involved personal information of such person; and

[69.3] that the disclosure of the information would be unreasonable.

²⁶ Respondent's Answering Affidavit: pages 15-16 at para 39-43.

²⁷ Respondent's Answering Affidavit: page 16 at para 41.

²⁸ Applicant's Heads of Argument: page 25 at para 22.2.

²⁹ Applicant's Heads of Argument: page 25 at para 22.2.4.

[70] In the Respondent's own papers, the third parties are referred to as companies.³⁰ It is not made clear that personal information would be divulged and why the Respondent did not apply Section 28³¹ of PAIA or at the very least address the possibility of severing the part of the record that contains such personal information. The Respondent has also not shown why the disclosure would be unreasonable in the circumstances. The Respondent's position is that it acted in accordance with the requirements of PAIA and as such the Respondent ought to have given notice to the third parties in terms of Section 47 of PAIA at the time that the request for access was received. The Respondent makes no allegation that an objection was received from the third parties and no basis for unreasonableness is alleged.

[71] The Respondent is also of the view that as the names and particulars of the successful bidders were published on the website of the Respondent that any information requested beyond that is to be gained by the requester's own research and investigations.³² The Applicants' case however, is that a thorough search had been done, yet only one third party could be traced to the Northern Province and no information about the other third party could be found.³³

[72] The third party, Banyana Enterprise, is a company according to both the Applicants and the Respondent. The other third party, Trendy Tiles and Sanitary Ware, is an unknown entity according to the Applicants and a company according to the Respondent.³⁴

[73] Considering all of the reasons above, Section 34 of PAIA is not applicable to at least one of the third parties, Banyana Enterprise, nor has it been shown that it is applicable to the remaining third party. The Respondent has also failed to

³⁰ Respondent's Answering Affidavit: page 16 at para 41 ("*...the third parties to disclose their company details...*").

³¹ Section 28 of PAIA provides that: "*(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which- (a) does not contain; and (b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.*"

³² Respondent's Answering Affidavit: page 14 at para 37.

³³ Second Applicant's Founding Affidavit: page 14-15 at para 32-33.

³⁴ See footnote 30 above.

show compliance with the requirements under Section 34 of PAIA, which is a prerequisite for reliance thereon.

- [74] The Respondent's contention that it is justified in refusing the request for access in order to protect the privacy of a third party, who is a natural person, is unfounded.

PROTECTION OF COMMERCIAL INFORMATION OF THIRD PARTY:
COMPLIANCE WITH SECTION 36 OF PAIA

- [75] The Respondent contends that it is further entitled to refuse the request for information in terms of Section 36 of PAIA in order to protect the commercial information of third parties.³⁵
- [76] The Applicants deny that Section 36 of PAIA can be successfully applied in the circumstances, as the Respondent has failed to prove that any of the requested information fall within the categories listed and the Respondent had not complied with the provisions of Section 47 of PAIA.³⁶
- [77] As indicated above, the information requested relates to: i) the Bid Specifications/Evaluation/Adjudication Committee within the Respondent; ii) the Respondent's Supply Chain Management Policy; and iii) full details (including company registration number) of the two entities.
- [78] It is not clear from the request how any information requested falls within the ambit of Section 36 of PAIA, nor does the Respondent specify the type of information and the extent to which Section 28 of PAIA could have been applied to such information.
- [79] The Respondent also contends that the Court would not be in a position to know whether the third parties consent to the information being furnished, as

³⁵ Respondent's Answering Affidavit: page 16 at para 42.

³⁶ Applicant's Heads of Argument: page 27 at para 22.2.6.

the third parties are not joined to these proceedings.³⁷ This statement seems to be a roundabout way for the Respondent to admit that it did not comply with Section 47 of PAIA.

[80] The contention of the Respondent rings hollow, as it had every opportunity to notify the third parties of the request as required in terms of Section 47 of PAIA and no reference is made to the outcome of such proceedings.

[81] The Respondent's contention that it is justified in refusing the request for access in order to protect the commercial information of the third parties, is unfounded.

MANIFESTLY FRIVOLOUS OR VEXATIOUS REQUESTS OR SUBSTANTIAL AND UNREASONABLE DIVERSION OF RESOURCES
COMPLIANCE WITH SECTION 45 OF PAIA:

[82] The Respondent contends that the application is frivolous and vexatious in terms of Section 45 of PAIA, in that:-

[82.1] the Applicants are abusing the PAIA procedures by "requesting the officials of the Municipality to leave their posts and supply them with newsworthy material for the Applicant to publish newspapers",³⁸

[82.2] the Applicants have no interest in the information requested and they are also not requesting the information due to complaints from the general public;³⁹

[82.3] the Applicants "did not have the *locus standi* to challenge the award of the tenders as they were not part of the bidders",⁴⁰ and

[82.4] in complying with the request, the Respondent's resources would be diverted in an unjustified manner by having officials and employees of the Respondent leaving their posts.⁴¹

³⁷ Respondent's Answering Affidavit: page 16 at para 43.

³⁸ Respondent's Answering Affidavit: page 10-15 at para 26-38.

³⁹ Respondent's Answering Affidavit: page 14-15 at para 37-38.

⁴⁰ Respondent's Heads of Argument: page 21 at para 49.

⁴¹ Respondent's Answering Affidavit: page 14 at para 36-37.

- [83] The Applicants deny that the application is frivolous and vexatious, alternatively they contend that the requested disclosure falls within the ambit of Section 46 of PAIA.⁴²
- [84] Section 45 of PAIA states that an information officers of a public body may (not must) refuse a request for access to a record of the body if the request is manifestly frivolous or vexatious, or the work involved in processing the request would substantially and unreasonably divert the resources of the public body.
- [85] The Respondent essentially argues that the request has no purpose and is done for no other reason than to annoy the Respondent. To substantiate this point, the Respondent points to the fact that the Applicants requested information regarding the successful bidders, yet in the Applicants' papers they admit that they are in possession of the successful bidders' names. This argument does not take into consideration that the Applicants also state in their papers that they could not find further information when researching the names of the bidders and they requested more information regarding the bidders for this reason.
- [86] The Respondent points to the Applicants simply looking for a new story, but that there is nothing there to report on. The determination of whether there is or is not anything to report on is not something for the Respondent to decide. The Applicants will decide whether or not to publish a story and the public will decide whether or not they believe the story published. If any member of the public then decides to lay a complaint based on what they have learned, they will be armed with the information gained. This is the purpose of the news media. In this regard, see the quotation from the Constitutional Court in *Khumalo and Others v Holomisa* above at para 48 and the *Helen Suzman*-matter⁴³.

⁴² Applicants' Heads of Argument: page 18-25 at para 22.1.

⁴³ *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 44: "PAIA affords any person the right of access to any information held by the State. The person seeking the information need not give any explanation whatsoever as to why [they] require the information. The person could be the classic busybody who wants access to information held by the State for the sake of it."

[87] The Respondent bears the onus of proving that the request is one that falls within the ambit of Section 45 of PAIA. No allegations were made and no evidence was provided to prove what the nature and extent of the workload would be in order to comply with the request. Such allegations and proof is necessary in order to substantiate the claim that resources would be unreasonably diverted. No indication is given of the “man-hours” involved, the amount of copies that would have to be made or any other resource that would be expended, in order to comply with the request.

[88] Therefore, the reliance upon Section 45 of PAIA, is unsubstantiated and the Respondent has failed to discharge the onus upon it in respect of Section 45.

[89] As this Court has found that Section 34(1), 36(1) and 45 of PAIA does not find application to the request, Section 46 of PAIA need not be considered.

RULING

[90] The Applicants, having complied with the procedural requirements for a request for access to a record held by a public body and having exhausted the internal appeal remedies available to it, is entitled to access to such record as the Respondent failed to prove a basis to refuse access.

COSTS

[91] The issue of costs is a matter of discretion which must be exercised judiciously having regard to all the circumstances. Applications of this nature are constitutional litigation matters and the general principle with regard to costs in constitutional litigation was laid down by the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources and Others*⁴⁴.

[92] The Constitutional Court in the *Biowatch*-matter stated at para 56 the following:-

⁴⁴ 2009 (6) SA 232 (CC) at para 24-25.

"I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door – at the end of the day, it was the state that had control over its conduct."

[93] The Applicants raised a constitutional issue. The Applicants were forced to approach a Court for relief after exhausting the available internal appeal procedures. The Applicants have succeeded in the application and the Respondent, being a public body, should bear the costs of litigants who have been successful against it.

ORDER

[94] The deemed refusal of the request for access to record held by the Respondent is set aside;

[95] The Respondent is ordered to, within 15 court days of this order being handed down, furnish the Second Applicant with the information outlined in his request in terms of PAIA, being:-

[95.1] The full details (including company registration number) of the success bidders on:

- a) Tender 73/2018; and
- b) Tender 74/2018

[95.2] The functionality criteria (if any) set by the Bid Specification Committee for

- a) Tender 73/2018; and
- b) Tender 74/2018

[95.3] A copy of the Makhado Municipality's Supply Chain Management Policy;

[95.4] A copy of the minutes of the meeting and recommendation of the Bid Specifications Committee, which include the details of the members of the committee, for

- a) Tender 73/2018; and
- b) Tender 74/2018


[95.5] A copy of the minutes of the meeting and recommendation of the Bid Evaluation Committee, which include the details of the members of the committee, for

- a) Tender 73/2018; and
- b) Tender 74/2018

[95.6] A copy of the minutes of the meeting and recommendation of the Bid Adjudication Committee, which include the details of the members of the committee, for

- a) Tender 73/2018; and
- b) Tender 74/2018

[96] The Respondent is ordered to pay the costs of this application.


V. GRUNDLINGH
MAGISTRATE
LOUIS TRICHARDT



JUDGMENT HANDED DOWN ON:

10/09/2020

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