South Africa’s Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence

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SOUTH AFRICA’S PROMOTION OF ACCESS TO INFORMATION ACT: AN ANALYSIS OF RELEVANT JURISPRUDENC

BY WILHELM PEEKHAUS

Is South Africa’s constitutional right of access to information working in practice? According to the author, it still faces substantial political and commercial resistance, and the success of the courts in enforcing its implementing legislation, the Promotion of Access to Information Act (PAIA), is mixed. The article reviews how the courts have interpreted and enforced the provisions of PAIA. More than a decade after its promulgation, the Act remains obstructed by continuing implementation challenges. Nonetheless, the courts have established a corpus of jurisprudence that admonishes public as well as private bodies to adhere to their constitutional and statutory information disclosure obligations in ways that will contribute to the development of a balanced access to information regime as the access laws evolve.

INTRODUCTION

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.1

This specifically articulated constitutional right of access to information places South Africa among a minority of countries globally that attribute such a fundamental level of importance to this right.2 Moreover, as evidenced by paragraph (b) in the quoted text above, the drafters of South Africa’s Constitution went further than even this minority of countries by extending the constitutional right of access to information beyond the typical boundary of government information to also encompass information held by private sector entities, if such information is required to prosecute or protect any of the other rights enunciated in the Constitution.

The broad scope of constitutional protection for the right of access to information in South Africa reflects an underlying belief in the critical lynchpin role this right plays in advancing the civil, political,
and socio-economic rights contained in the Constitution’s extensive Bill of Rights. Indeed, the Constitutional Court, the highest court in the land for cases about the interpretation or application of the Constitution, has underlined on several occasions the foundational import of the right to access to information. For example, in *Brümmer v Minister for Social Development and Others*, Judge Ngcobo wrote that:

> 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.

As one prominent access to information scholar and activist in South Africa maintains, “…it is when FOI [freedom of information] is used as a leverage right for the protection or promotion of other socio-economic rights that it finds its real meaning in the context of a developing country.”

In order to translate the constitutional right of access to information into a justiciable right, the Parliament of South Africa promulgated the Promotion of Access to Information Act (PAIA) in February 2000, which subsequently entered into force in March 2001. As set out in its Preamble, PAIA is intended to “foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information [as set out in Section 32 of the Constitution’s Bill of Rights]” and to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.” Section 9 of PAIA further proclaims, among other things, that the objectives of the Act, beyond giving effect to the constitutional right of access to information, include helping to facilitate the constitutional obligations of the State to promote a human rights culture and social justice, and to promote transparency, accountability, and good governance of both public and private bodies. We thus note

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3 *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC), ¶¶ 62-63.


5 Republic of South Africa, Promotion of Access to Information Act (Act No. 2 of 2000) [hereinafter PAIA].

6 Although the objectives of the Act are framed in terms of information, its specific provisions refer to records, which, whether under the control of a public or private body, are defined as “any recorded information – (a) regardless of form or medium; (b) in the possession or under the control of that public or private body, respectively; and (c) whether or not it was created by that public or private body, respectively.” PAIA, § 1. Throughout the article, I will mainly employ the more familiar term *access to information* rather than access to a record. A 2002 decision by the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) interpreted this section of the Act to mean that a single page can constitute a record and that a record does not have to be original to be subject to the access to information requirements specified by PAIA (*CCII Systems (Pty) LTD v Fakie & Others* NNO 2003 (2) SA 325 (T), ¶ 14). In *Clause v Information Officer of South African Airways (Pty) Ltd.* [2006] SCA 163 (RSA), the Supreme Court of Appeal clarified that the provisions of PAIA entitle a legitimate requestor to receive access to the record itself (or a copy) rather than having to accept an exegetical rendering of what an information officer warrants a record to contain.
that the stated overarching intentions of PAIA reflect the “leverage” function attributed to the right of access to information by the Constitutional Court and Dimba, among others.

The proclaimed purposes of the Act, coupled with the wide range of organizations subject to and information captured within its purview, initially drew claims about providing the “gold standard” for access legislation. Yet, actual experience through the decade after its implementation reveals much more of a mixed, and often disappointing, state of affairs. For example, usage by South Africans remains low and limited mainly to civil society organizations. For years, the South African Human Rights Commission has bemoaned a lack of awareness of the Act, inadequate human and financial resources to train information officers and build and maintain information access infrastructures within public bodies, and an overwhelming lack of executive and senior management “buy-in” into the principles and spirit of PAIA, which, perhaps not surprisingly, has led to the internalization of a mindset among some personnel that equates information sharing with risk and vulnerability for their employer. Echoing such sentiments, the National Planning Commission (an initiative established by the Office of the President that is responsible for developing a long-term vision and strategic plan for South Africa) recently articulated a sharp critique of the country’s access to information regime: “Ineffective implementation of the Promotion of Access to Information Act is due to wilful neglect, lack of appreciation of the importance of the right, an institutional culture of risk aversion and/or secrecy and a lack of training. The absence of a useable enforcement mechanism is one of the primary obstacles.”

Specific to the latter concern, PAIA has long been critiqued for delegating ultimate oversight and enforcement of its provisions to the courts, which can be very expensive and time-consuming. But how have the courts interpreted and enforced various disputed provisions of PAIA over the last decade or so? Have the courts established a corpus of judicial precedent that responds to some of

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10 Richard Calland, “Illuminating the Politics and the Practice of Access to Information in South Africa,” in Paper Wars: Access to Information in South Africa, ed. Kate Allan (Johannesburg: Wits University Press, 2009), 1-16; Kate Allan, “Applying PAIA: Legal, Political and Contextual Issues,” in Paper Wars: Access to Information in South Africa, ed. Kate Allan (Johannesburg: Wits University Press, 2009), 144-200; Wilhelm Peekhaus, “BioWatch South Africa and the Challenges in Enforcing Its Constitutional Right to Access to Information,” Government Information Quarterly 28 (2011): 542-552. See also the three previously-cited annual reports from the South African Human Rights Commission. While it is true that the Public Protector, at his or her discretion, is charged with mediating disputes over access requests filed with public bodies (including a duty to advise complainants regarding appropriate remedies), this institution has thus far failed to discharge this role in any substantial depth. See Allan. Section 91 of PAIA mandates this dispute resolution role to the Public Protector through a consequent amendment to Section 6 of the Public Protector Act (1994).
these critiques and that might thus aid in developing a more robust access to information regime in South Africa? Given the pivotal role of the courts in adjudicating attempts by people and organizations to enforce their access to information rights, these are the questions that this article seeks to address. The following pages therefore provide an analysis of the major jurisprudence developed in respect of PAIA since its promulgation. This analysis relies almost exclusively on the legal rulings in respect to PAIA written by South African courts at all levels of the judiciary. Where relevant, the article also draws on secondary sources from legal and policy scholars who have discussed access to information in South Africa.

In order to respond to the two queries informing the analysis in this article, our attention first turns toward the relevant sections in PAIA that establish the ultimate enforcement powers of the courts, including some of the ways the judiciary itself has interpreted these provisions. The following section considers the major distinction between public and private bodies, including relevant interpretations from the courts and the implications this distinction has for the right of access to information in South Africa. This leads into an examination of some of the exemptions written into the Act that provide grounds for refusing access to information requests and which have attracted judicial scrutiny. The subsequent section examines judicial interpretations of the public interest override provisions in the Act, which establish conditions under which information may be disclosed even if it would normally otherwise be subject to an exemption. The penultimate section provides an account of the displeasure articulated by several members of the judiciary over the failure of various public and private bodies to comply with either the letter or the spirit of the Act. By way of conclusion, the final section responds to the second query driving this article by providing a general assessment of the judicial precedents thus far established in respect to PAIA and their implications for South Africa’s access to information regime. Some brief consideration will also be given to the soon-to-be-created Information Regulator, an ombuds office that appears to respond to a number of the weaknesses associated with reliance on the courts for enforcement of the Act.

Before considering the major precedents established to date in respect to PAIA by the courts in South Africa, we first need to briefly consider the provisions in the Act that grant ultimate adjudication powers to the courts.

**Court Enforcement Provisions in South Africa’s Promotion of Access to Information Act**

Section 78 of PAIA provides a requester with the right to apply to the court for a review of a decision made by a public or private body to refuse access to information, to extend the time period for responding to a request, to charge a request fee (the amount of the access fee may also be appealed), or to grant access in a form other than that outlined in the original request. Third parties may also make applications to the courts to review decisions to release records that contain information about them. Although the Act stipulates that applications to the court for judicial review must be made...
within 30 days,\textsuperscript{11} the Constitutional Court declared this time bar to be unconstitutional because it deprives requesters of an adequate and fair opportunity to seek judicial redress. The Court further reasoned that, because such a restriction is not a reasonable and justifiable limitation on the right of access to information, it cannot be countenanced by Section 36 of the Constitution.\textsuperscript{12}

In order not to usurp the powers of Parliament, the Constitutional Court suspended for 18 months its declaration of the invalidity of subsection 78(2) of PAIA. This deferral was granted to provide the legislature sufficient time to remedy the deficiency in the Act in a way that would be consistent with the Constitution. Nonetheless, the court found it necessary to implement an interim regime to regulate applications to court in a way consistent with the spirit and objectives of PAIA. Citing the time bar established in the Promotion of Administrative Justice Act (2000) for instituting review proceedings after the conclusion of internal remedies or after the person is informed of administrative decisions sought to be taken on review, the court ruled that an interim regime of 180 days following notification of the decision would afford requestors an adequate and a fair time period to consider whether to avail themselves of judicial relief from the courts. However, the court further specified that the time limit of 180 days must be flexible so as to allow a court, when the interests of justice demand, to extend or condone non-compliance with the period of 180 days.\textsuperscript{13}

The Parliament has thus far failed to enact a legislative remedy for this defect, which technically means that the Act contains no time restriction for making an application to the courts. That having been said, the Protection of Personal Information Act of 2013 (discussed briefly below) does include an amendment to PAIA that replaces the 30-day period in subsection 78(2) with a 180-day period. Although the new Act was gazetted and became law on November 26, 2013, its actual commencement date remains unspecified and so it has not yet entered into force.

Section 81 of the PAIA establishes that court applications constitute civil proceedings and that the relevant rules of evidence apply. Accordingly, the burden of proof in PAIA cases is assessed on a balance of probabilities. Section 82 provides the court with the power to grant any order that is just and equitable, including orders confirming, amending, or setting aside the decision that is the subject of the application; requiring the relevant official of a public or private body to take such action or to refrain from taking such action as the court considers necessary within a specified period; granting an interdict, interim or specific relief, or declaratory order as to compensation; or, about costs.

The Supreme Court of Appeal reinforced the importance of subsections 81(3) and 25(3) of the Act, which set out, respectively, that, in applications made to the courts, the burden of establishing that the

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\item \textsuperscript{11} PAIA, § 78(2).
\item \textsuperscript{12} Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC). Section 36 of the Constitution specifies permissible limitations of rights: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights [of the] Constitution of the Republic of South Africa.”
\item \textsuperscript{13} Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC).
\end{itemize}
refusal of an access request complies with the provisions of the Act falls upon the body refusing access; and that, if an access request is refused, the body must provide adequate reasons for the refusal, including the provisions of the Act relied upon.\textsuperscript{14} (Subsection 56(3) sets out the same requirement for private bodies.)

As pointed out above, PAIA applies to both public and private entities. However, there are some key differences that render critical the distinction between public and private, which, as the courts have recognized, can be problematic given the increased outsourcing of public service provision to private contractors and the expansion of public-private partnerships.

**Distinguishing Between Public and Private Bodies**

PAIA defines a **private body** as a natural or legal person or partnership that conducts (or has conducted) any trade, business or profession. A **public body** is defined to include national and provincial departments and municipalities, as well as any functionary or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation.\textsuperscript{15} This broad definition must be read in tandem with Section 8 of PAIA, which states that entities may be considered either a public body or a private body depending on the record in question.\textsuperscript{16} Therefore, for purposes of the Act an entity may, in one instance, be a public body and, in another instance, be a private body, depending on whether the relevant record relates to the exercise of a power or performance of a function as a public body or as a private body.

Indeed, as Judge Griesel of the Cape of Good Hope Provincial Division of the High Court (now the Western Cape High Court) pointed out in *Institute for Democracy in South Africa and Others v African National Congress and Others*,

[...] the definition of ‘public body’ is a fluid one and [...] the division between the categories of public and private bodies is by no means impermeable. The Act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their existence. The records being sought can thus relate to a power exercised or a function performed as a public body, in which event Part 2 of PAIA is applicable, or they can relate to a

\textsuperscript{14} *President of the Republic of South Africa and Others v M & G Media Limited* 2011 (2) SA 1 (SCA). Several other court decisions reiterate that subsection 81(3) of the Act provides that the burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. See for example *CCII Systems (Pty) LTD v Fakie & Others NNO* 2003 (2) SA 325 (T); *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA); *Centre for Social Accountability v The Secretary of Parliament and Others* 2011 (5) SA 279 (ECG); *De Lange and Another v Eskom Holdings Limited and Others* 2012 (1) SA 280 (GSJ); *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC); *SA Airlink (Pty) Limited v The Mpumalanga Tourism and Parks Agency and Others* [2012] ZAGPJHC 143; *M & G Media Ltd v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP).

\textsuperscript{15} PAIA, § 1.

\textsuperscript{16} Ibid., § 8.
power exercised or a function performed as a private body, in which event Part 3 of PAIA is applicable.\textsuperscript{17}

As one might expect, this distinction has been the source of some confusion among and dispute between record holders and those seeking access to information under the Act. In this same court decision, Griesel similarly weighed in on how to ascertain which provisions apply in the event of ambiguity about the nature of the record holder, suggesting that a determination of the application of either the public or private body provisions of PAIA might consider the source, nature, and subject matter of the power being exercised by the body and whether the exercise of that power rises to the level of a public duty.

In subsequent jurisprudence, the Supreme Court of Appeal identified several tests that can be applied to establish whether records created by private bodies might, nonetheless, be subject to the public body provisions of the Act. The tests are as follows:

1. Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;
2. Whether the property vested in the corporation is held by it for and on behalf of the Government;
3. Whether the corporation has any financial autonomy;
4. Whether the functions of the corporation are governmental functions.\textsuperscript{18}

Judge Conradie went on to assert that “The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.”\textsuperscript{19}

However, as the definition of a public body outlined at the outset of this section indicates, PAIA places emphasis on the public nature of the function or power being emphasized. Thus, and as

\textsuperscript{17} Institute for Democracy in South Africa and Others v African National Congress and Others 2005 (5) SA 39 (C), ¶ 49. In this case, the Institute for Democracy in South Africa and two private individuals applied for relief from the court to compel the country’s then major political parties to disclose information about substantial political donations they had received. All four respondents (the African National Congress, the Democratic Alliance, the Inkatha Freedom Party, and the New National Party) vigorously opposed the relief claimed by the applicants. Ultimately the court ruled that, in receiving private contributions, political parties are not public bodies for purposes of PAIA.

\textsuperscript{18} Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) SA 66 (SCA), ¶ 17. This case was an appeal by Mittalsteel against a ruling from the Pretoria High Court ordering the company to provide records requested by Mondli Hlatshwayo under PAIA § 11. The issue on appeal was whether the appellant, at the relevant time and in creating the requested documents, was a public body as that term is to be understood in the Act. In a unanimous decision, the court concluded that Mittalsteel was, at the relevant time, and when exercising the functions in respect to the requested records, a “public body” for the purpose of PAIA § 11. The company was thus ordered to provide access to those records.

\textsuperscript{19} Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo 2007 (1) SA 66 (SCA), ¶ 19.
Conradie went on to point out, there may be circumstances in which the control test is not the most suitable for determining whether an entity should be construed as a public or private body for purposes of the Act. For example, increasing privatization of public services and utilities has caused private bodies to perform what are traditionally government functions without being subject to control by any of the spheres of government. This independence from control notwithstanding, such entities may properly be classified as public bodies based on a function test. When applying the function test, the same court considered the following elements:

1. Whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question;

2. Whether the government has encouraged the activities of a body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government;

3. Whether the body was exercising extensive or monopolistic powers.20

The South Gauteng High Court drew on the precedents established in *MittalSteel South Africa Ltd v Hlatshwayo* and *Institute for Democracy in South Africa and Others v African National Congress and Others*, *inter alia*, to inform its analysis of whether the 2010 FIFA World Cup Organising Committee South Africa Ltd. was a private or public body for purposes of PAIA.21 Based on these preceding cases, Acting Judge Morison examined the nature of the powers and functions performed by the FIFA World Cup Organising Committee and engaged two important factors as part of his analysis: 1) state control of the entity;22 and 2) whether the entity received and dispensed public funds).23 Ultimately, Morison concluded that the company must be considered a public body for purposes of PAIA and thus must disclose the records requested by the applicants.

Thus, the pivotal query for determining whether an entity is a public or private body for purposes of the Act would seem to turn on whether the body is exercising a public power or performing a public function in terms of any legislation. Being able to clearly differentiate between public and private bodies is more than just an exercise in accurate categorization. Indeed, the public/private distinction is critical because, although PAIA sets out legislative rights of access to information held by both public and private bodies, the obligations that attach to the former are more stringent than for the

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20 Ibid., ¶ 21.
21 *M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd. and Another* 2011 (5) SA 163 (GSJ). In this case, the publisher of a newspaper, *The Mail & Guardian*, brought an application for judicial relief to the South Gauteng High Court when one of its investigative journalists was denied access to certain records relating to the procurement and tender processes applied by the company responsible for organizing the 2010 World Cup in South Africa. The company asserted that it was a private body and thus not subject to disclosure requirements under PAIA § 11. Although rejecting this claim, the applicants nonetheless submitted a “private body” request for access to the documents. This private body request included reference to the fact that the applicants required access to the records in order to exercise their right to media freedom and to vindicate the right of the public to receive information on matters of public interest. The company subsequently refused the private body request, asserting that the applicants had failed to establish that they required access to the records in order to exercise or protect their rights.
22 Ibid., ¶¶ 148-149, 158.
23 Ibid., ¶¶ 239, 258, 266.
latter. Except in the case of specific mandatory and discretionary exemptions contemplated in Part 2, Chapter 4 of the Act, Section 11 mandates all public bodies to provide access to its records as long as all procedural requirements for filing an access request have been satisfied.\textsuperscript{24} Requests for access to information from public bodies do not require any reason or justification for the request. The courts have confirmed this interpretation: “…once a requester has complied with the procedural requirements for access and overcome the refusal grounds in chapter 4, he or she must be given access. [Section] 11 makes that clear. Not only that, [section] 11(3) makes it equally plain that the requester’s reasons are not relevant.”\textsuperscript{25} Thus, and as would be expected of access to information legislation, the presumption of the Act is in favor of access to publicly held information. The highest court on constitutional matters in South Africa has reinforced precisely this presumption: “…the disclosure of information is the rule and exemption from disclosure is the exception.”\textsuperscript{26}

This unqualified right to access publicly-held information does not extend to records under the control of private bodies. In addition to the procedural requirements\textsuperscript{27} and set of exemptions articulated in Part 3, Chapter 4 of the Act, PAIA sets forth the additional qualification that private bodies are subject to access demands only in the case of records “required for the exercise or protection of any rights.”\textsuperscript{28} Since it has been left to the courts to interpret the meaning and scope of this requirement, the following section of this article elaborates on the major cases decided to date in South Africa that have clarified the application of this part of the Act.

\textit{Jurisprudence in Respect of the Caveat “required for the exercise or protection of any rights”}

A pre-PAIA case that nonetheless established a precedent for determining the application of this section of the Act touched on the Section 32 constitutional right of access to information. This case, which was a dispute over whether cancellation of a contract constitutes an “administrative action”

\textsuperscript{24} PAIA § 11. The Supreme Court of Appeal confirmed the necessity for requestors to comply with the procedures set out in PAIA when seeking access to information. See \textit{Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape) [2007] 3 All SA 318 (SCA)}. PAIA § 18 (on public bodies) and § 53 (on private bodies) stipulate that requests for access to information are to be made in the prescribed forms. Regulations developed in respect of the Act (No. R. 187) provide templates for the forms to which requests for access to records must substantially correspond (Form A for a public body and Form C for a private body). See Republic of South Africa, \textit{Regulations Regarding the Promotion of Access to Information, Government Gazette Vol. 440, No. 23119} (Feb. 15, 2002).

\textsuperscript{25} \textit{Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA), ¶ 59}.

\textsuperscript{26} \textit{President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC), ¶ 9}.

\textsuperscript{27} However, in a case heard by the Eastern Cape High Court, Acting Judge Grogan ruled that although failure to comply with the procedural requirements set out in PAIA § 53 is generally fatal to an access request:

…in circumstances where it has been made obvious in previous correspondence why the information is required, and for what purpose, a requester need not restate the reasons in the pro forma request notice. While the applicable provisions are cast in peremptory form, I do not think it was the intention of the lawmaker that a “requester” should be non-suited merely because the form is not completed. The question is whether, in the circumstances of the present case, it can be said that the respondent was aware, or ought reasonably to have been aware, of the reasons for the request. […] I accordingly find that the respondent was not entitled to rely on the applicant’s failure to fill in parts of the request form to escape the obligation imposed by section 50(1) of the Information Act.

\textit{Fortuin v Cobra Promotions CC 2010 (5) SA 288 (ECP), ¶¶ 17, 23. See also S.A. Airlin (Pty) Limited v The Mpumalanga Tourism and Parks Agency and Others [2012] ZAGPJHC 143.}

\textsuperscript{28} PAIA, § 50(1)(a).
under Section 33 of the Constitution, established the threshold criterion of “assistance,” which would be considered in subsequent cases around Section 50 rights under PAIA. In this earlier case, Judge of Appeal Streicher held that: “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 [Section] 32 of the Constitution, 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.”

In a subsequent case directly involving PAIA, the Supreme Court of Appeal further refined the interpretation of the phrase required for the exercise or protection of any rights to mean “reasonably required,” so long as that qualification “is understood to connote a substantial advantage or an element of need.” Thus, for a record to meet the threshold of “required,” a requester must first demonstrate some connection between the requested information and the exercise or protection of the implicated right.

In Unitas Hospital v Van Wyk, the Supreme Court of Appeal articulated the relationship between these various precedents as part of its decision to vacate a lower court ruling that van Wyk was entitled to a record she had requested from Unitas Hospital, a private body for purposes of PAIA. Writing for the majority, Judge of Appeal Brand pointed out that the threshold requirement of “assistance” established in Cape Metropolitan Council v Metro Inspection Services meant that if a requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. However, Brand went on to argue that mere compliance with the threshold requirement of “assistance” is not sufficient to satisfy Section 50 of PAIA. Instead, Brand confirmed the narrower Clutchco interpretation of Section 50 of PAIA as only being available to a requester who has shown the “element of need” or “substantial advantage” of access to the requested information. However, while other courts have articulated similar caveats about applying this section of PAIA, Brand expressed a reluctance to venture a formulation of a positive, generally applicable definition of what “require” means given the innumerable potential applications of Section 50 of PAIA: “Any redefinition of the term “require” with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: the question whether the information sought in a

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29 Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others: 2001 (3) SA 1013 (SCA), ¶ 28.
30 Clutchco (Pty) Ltd v Davis: 2005 (3) SA 486 (SCA), ¶ 13. Andrew Davis, a minority shareholder in Clutchco, a family business controlled by his father, made a PAIA § 50 request for information regarding the company's finances after being removed as a director of the company. Davis asserted that he desired the records due to his suspicion that not all of the company’s transactions were reflected in its financial statements and that he needed the information to establish the value of his shares. Clutchco refused to provide the information, claiming that Davis only desired the records to harm the company. The Court found that the Companies Act (1973) provides for numerous mechanisms to protect shareholders other than allowing access to financial records, including the requirement that auditors have access to the information needed to allow them to make findings as part of their reports. Therefore, a more substantial foundation than that advanced by Davis, who failed to specifically criticize the existing auditors or seek the advice of an experienced accountant, was required for him to receive access to the records in this case. Ibid., esp. ¶¶ 16, 18.
31 Unitas Hospital v Van Wyk and Another: 2006 (4) SA 436 (SCA). See also Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others: 2001 (3) SA 1013 (SCA).
32 See for example M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd. and Another: 2011 (3) SA 163 (GSJ).
particular case can be said to be ‘required’ for the purpose of protecting or exercising the right concerned, can only be answered with reference to the facts of that case having regard to the broad parameters laid down in the judgment of our courts, albeit, for the most part, in a negative form.”33

The test of substantial advantage or element of need as an appropriate threshold criterion for determining whether a record meets the statutory meaning of “required for the exercise or protection of a right” as established in these cases has been applied in subsequent jurisprudence. For example, in Institute for Democracy in South Africa v African National Congress and Others, the court denied the request for access to the donation records of political parties because, among other reasons, the applicants had failed to establish a threshold connection between the donation records and the rights to freedom of expression or association.34 In Claase v Information Officer of South African Airways, the Supreme Court set aside the lower court’s decision and ruled that Claase, a retired South African Airways pilot, had established sufficiently the existence of the record sought and the necessity of its disclosure to protect and exercise a contractual right. The court therefore ordered the airline to produce the requested record.35

Thus, an access request to a private body would seem to need to combine both specificity and a substantial foundation of need in support of any other right articulated in the Constitution or legislation. This interpretation of the statutory use of the term “require” in PAIA has, according to one commentator, “set the bar impossibly high […] and] made requesters nervous about litigating against private bodies.”36 Constitutional scholars have similarly admonished that because, in most cases, people seeking access to information are not aware of the contents of the records for which they seek access, they cannot be expected to demonstrate a link between the record and the rights implicated with any degree of detail or precision.37 This critique seems particularly relevant to the restrictive interpretation established in Cape Metropolitan v Metro and Clutcheo v Davis (the latter cited approvingly in Unitas Hospital v Van Wyk), as just outlined.

Although not expressed in the same terms, a lengthy 2010 decision from the South Gauteng High Court in respect to a request from a newspaper to compel access to information from a private body seems to recognize such concerns and thus cautions against a too restrictive application of the term required: “PAIA therefore requires requesters to demonstrate a need to know the information – a connection between the information requested and the protection and enforcement of rights. But the degree of connection should not be set too high or the principal purpose of PAIA will be frustrated. The words “required for the protection and exercise of rights” must therefore be interpreted so as to enable access to such information as will enhance and promote the exercise and protection of rights.”38

33 Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA), ¶ 18. Brand went on to argue that because van Wyk had failed to substantiate her claim that the requested private body record would be of assistance, the additional showing of “element of need” or the “substantial advantage” suggested in Clutcheo did not even arise. As a result, Brand, holding that the application against Unitas should have been dismissed by the lower court, dismissed the appeal.


35 Claase v Information Officer of South African Airways (Pty) Ltd. [2006] SCA 163 (RSA).

36 Allan, 149.


38 M & G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd. and Another 2011 (5) SA 163 (GSJ), ¶ 355.
Similarly, the earlier *Keylile Chemicals v Harmony Gold Mining Company Limited* decision from the Witwatersrand Local Division of the High Court (now the South Gauteng High Court),

39 Judge Mbha cited approvingly the finding in *Claase v Information Officer of South African Airways* 40 that an applicant need only put up facts which prima facie, though open to some doubt, establish that he has a right that access to the record is required to exercise or protect. While these more expansive interpretations of the provisions of the Act in respect to access to information from private bodies are welcome, it bears pointing out that they have yet to be tested by the Supreme Court of Appeal, which, as just outlined in some detail, has thus far adopted a more restrictive application of PAIA Section 50.41

As is typical for access to information statutes, PAIA sets out several categories of information that may or must be exempted from normal disclosure requirements. Thus, beyond the challenges associated with an access to information regime that applies to both the public and private sectors, South African courts have also been called upon to adjudicate disputes about the applicability of statutory exemptions from information disclosure, to which our attention now turns.

**JUDICIAL CONSIDERATION OF STATUTORY EXEMPTIONS TO ACCESS IN PAIA**

PAIA includes mandatory and discretionary grounds for both public (Part 2, Chapter 4) and private (Part 3, Chapter 4) bodies to refuse access to information requests. Mandatory exemptions require the information officer or head of a body to refuse access to requested records, while discretionary exemptions provide the information officer or head of the body with some latitude in deciding whether to apply the exemption, as long as the discretion is exercised lawfully and reasonably. These

39 *Keylile Chemicals v Harmony Gold Mining Company Limited* [2007] ZAGPHC 258. In this case, Harmony Gold Mining cancelled, without reason, a supply contract with Keylile Chemicals for a range of cleaning materials and other products used for general application in the mines of the former. Since Keylile never received a key record (General Conditions) that apparently formed part of the contract, the company requested access to this record from Harmony in order to determine which of its contractual rights may have been implicated by the early cancellation. Keylile similarly maintained that access to this record would assist it in determining which of its contractual rights could be enforced, if at all, and thus would allow the company to decide if it should proceed with or abandon the potential enforcement of its contractual rights against Harmony. Relying on precedents set in *MEC for Roads and Public Works Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA), *CCII Systems (Pty) LTD v Fakie & Others NNO 2003 (2) SA 325 (T), and Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA)*, Mbha ruled that PAIA § 7(1) (the provision that excludes the Act from applying to records required for criminal or civil proceedings after commencement of proceedings) did not bar Keylile from access to the requested record. Citing *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Another 2001 (3) SA 1013 (SCA) and Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA)*, Mbha opined that Keylile established sufficiently that the requested records were “required” for purposes of PAIA § 50(1)(a) or “reasonably required” as phrased in *Clutchco*. According to Mbha, “Without access to the General Conditions the applicant [Keylile] cannot even attempt to set out the essence of its cause of action, let alone formulate and articulate a proper case against the respondent. If made to obtain the requested records through discovery, the applicant would be prejudiced because it would then be too late to broaden or narrow the scope of issues for trial as the case might be.” *Keylile Chemicals v Harmony Gold Mining Company Limited* [2007] ZAGPHC 258, ¶ 17.16. Harmony Gold Mining was thus ordered to provide the requested record and to pay the court costs.


41 As this article goes to press, the Supreme Court of Appeal is set to hear an appeal from ArcelorMittal South Africa Ltd. (Amsa) to overturn a 2013 ruling from the South Gauteng High Court to release records requested by the Vaal Environmental Justice Alliance.
grounds for refusal can be further differentiated into strict and conditional refusals. Strict refusal requires only that the record being requested contain a specified type of information in order to be exempt from disclosure. A conditional refusal requires not only that the requested record contain a specified type of information but also that a particular consequence would occur as a result of the disclosure of that information. The majority of conditional refusals contained in the provisions of the Act are triggered if the release of the information either “would be likely to” or “could reasonably be expected to” cause the stated harm or consequence.

In commenting on the difference between “would be likely to” and “could reasonably be expected to,” Currie and Klaaren have suggested that both provisions require that harm will be a probable result but that the test in the case of the latter threshold is less stringent and that this indicates a lesser degree of probability than “likely.” They consider that the effect of “reasonable” is to indicate a “moderate” or “fair” probability as opposed to “likely,” which implies a “strong” probability. As with other provisions of PAIA, the courts have been called upon to interpret and apply these distinctions.

**Mandatory Protection of Third Party Commercial and Certain Confidential Information**

The Supreme Court of Appeal, in considering the difference between “would be likely to” and “could reasonably be expected to” in respect of mandatory protections for commercial information of a third party, has indicated its dissatisfaction with Currie’s and Klaaren’s interpretation: “Clearly (c) in [Section] 36(1) requires something less than ‘likely’. Significantly it avoids ‘possible’ or ‘possibly.’ One could conclude therefore that what was intended was something between a probability and a possibility. It is understandable, therefore, that the authors [Currie and Klaaren] opt for a moderate probability. However, that necessarily involves elevating ‘likely’ in (b) to mean strong probability in order to explain the difference between (b) and (c).”

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43 PAIA, §§ 36(1)(b), 36(1)(c). PAIA § 36(1) sets out the following (emphasis added): “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) trade secrets of a third party; (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; or (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected – (i) to put that third party at a disadvantage in contractual or other negotiations; or (ii) to prejudice that third party in commercial competition.” Emphasis added.

44 *Transnet Ltd and Another v S.A Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA), ¶ 39. Transnet Limited, the wholly State-owned national public transport company and appellant in this case, has a number of trading divisions. One of them, National Ports Authority of South Africa (NPASA), invited tenders for a two-year contract for the removal of galley waste from ships in Cape Town harbor. The successful tenderer was Inter Waste (Pty) Limited. Another tenderer was SA Metal Machinery Company (Pty) Limited (the respondent). Sometime after the award of the tender, the respondent wrote and asked NPASA for copies of various documents, one of which was Inter Waste’s completed tender document, including a price schedule. Transnet sought to rely on PAIA §§ 36 and 37 in order to refuse the access request. Based on the facts of the case, the Supreme Court of Appeal concluded that while a tender price could be protected from release on the basis of confidentiality during the pre-award phase of the tender process, a confidentiality clause could not validly protect against disclosure of the successful tenderer’s price after the contract had been awarded. The court refrained from considering the question of whether such a confidentiality clause would continue to protect the unsuccessful tenderers.
As the court went on to point out, the term “probable” makes it more difficult to refuse disclosure than “possible” and favors the rule rather than the exceptions (i.e. access rather than refusal). Judge President Howie thus rejected an interpretation that involves the use of degrees of probability because it creates the potential for confusion and could well lead to problems in the practical application of the legislation to concrete cases. Both “likely to cause harm” and “could reasonably be expected” involve a result that is probable, when objectively considered. The difference between the phrases, according to Howie, is to be measured instead by degrees of expectation: “In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which ‘could reasonably be expected’. The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.”

In this same case, the Supreme Court of Appeal also considered Section 37 of the Act, which deals with mandatory protections for certain third party confidential information. The court determined that, when a public body enters into a commercial agreement of a public character, the imperatives of transparency and accountability entitle members of the public, in whose interest public bodies operate, to know the expenditure details of such an agreement: “Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause.” The court further reasoned that, if the disclosure of the record would not be likely to cause the harm referred to in Section 36(1)(b) and could not reasonably be expected to result in probable harm of the kinds referred to in Section 36(1)(c), then there is no basis to conclude that disclosure would expose the information holder to an adverse judgment for contractual relief. Therefore, the information should not be exempt under Section 37(1)(a) of PAIA.

Based on its analysis of the various sections of PAIA invoked by the appellants to resist disclosure, the court ultimately ruled that the record in question failed to pass the threshold requirements set out in the exemptions in the Act. The court, in upholding the lower court’s order that the requested records be provided, thus dismissed the appeal.

The disagreement between the court and Currie and Klaaren notwithstanding, the interpretive outcome appears similar – the phrase “would be likely to” establishes a higher threshold for refusing disclosure than the phrase “could reasonably be expected to.” The “could” in Section 36(1)(c) rather than “would” is, according to Judge President Howie, a concession to a third party’s right that achieves the necessary proportionality in balancing the competing rights between access and protection of sensitive information. But to require the consequences in Section 36(1)(c) to be mere possibilities rather than the higher threshold of probability would unduly favor the third party and conflict with the injunction in Section 2(1) of the Act, which requires the courts to interpret any of its provisions in ways that are consistent with its overall objectives.

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45 Ibid., ¶ 42 (emphasis in original).
46 Ibid., ¶ 56.
47 Ibid., esp. ¶¶ 54, 57.
48 The courts have ensured that their decisions heed this legislative stipulation. See for example President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC) and Judge of Appeal Cameron’s dissenting opinion in Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA), ¶ 40.
Similar to the Supreme Court of Appeal decision in *Transnet v SA Metal Machinery*, the South Gauteng High Court found in *SA Airlink v The Mpumalanga Tourism and Parks Agency* that the respondent had failed to establish why the release of purported confidential business information contained in the requested record would cause harm to the third party’s commercial interests and thus expose the respondent to a successful claim for damages. According to Judge Saldulker, “[a] party relying on this provision must show that harm is not simply possible, but probable.” Finding that the respondent had not successfully brought forth any reason to refuse access to the records, the court ordered the respondent to produce copies of the requested record.

In a case where a public body is requested to provide information that was provided by a third party and thus potentially subject to a discretionary exemption, the Constitutional Court has made clear that the government must act as an “impartial steward” and not align itself either with those who have furnished the information or with parties seeking access to it. According to the court: “It was important that the objectivity not only be present, but be seen to be present in circumstances where the information related to questions of general public interest and controversy, and there was no lawful ground to withhold it. This required objectivity and distance in respect of any competing private interests that might be involved. The greater the public controversy, the more the need for transparency and for manifest fidelity to the principles of the Constitution, as ultimately given effect to by PAIA.” Similar to much of the jurisprudence in respect to PAIA discussed thus far, these decisions demonstrate that the courts have interpreted certain disputed statutory exemptions contained in the Act in precedent-setting ways that favor access to information.

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49 *SA Airlink (Pty) Limited v The Mpumalanga Tourism and Parks Agency and Others* [2012] ZAGPJHC 143. SA Airlink is a privately owned airline operator. Mpumalanga Tourism and Parks Agency (MTPA) is a State organization mandated to develop tourism. In 2009, MTPA contracted with Comair, a competitor of SA Airlink, to provide flights between two airports. However, the contract was awarded without tender. SA Airlink, asserting that MTPA unfairly favored Comair, submitted an access request for a copy of the agreement between MTPA and Comair. MTPA refused the request and denied an internal appeal, asserting that disclosure would cause Comair to suffer prejudice because the contract contained a confidentiality clause and commercial information. SA Airlink therefore filed an application with the High Court to compel MTPA to provide the requested record.

50 Ibid., ¶ 23.

51 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), ¶45. Biowatch Trust, a non-governmental organization engaged in nature conservation activities, filed a number of access requests asking the Registrar for Genetically Modified Corps to disclose information pertaining to the use of genetically-engineered organisms in South Africa. The Registrar refused access on the grounds that Biowatch’s request was too broad and some of the information sought was commercially confidential, the disclosure of which would harm the interests of several companies. Biowatch appealed to the High Court, which concluded that Biowatch had a clear right to some of the information and that the Registrar’s failure to grant access to these documents violated the organization’s rights under § 32(1)(a) of the Constitution. Although the High Court granted eight out of eleven of Biowatch’s requests, it held that because of the sweeping nature of the requests made, the government did not have to pay the organization’s legal costs. Moreover, the High Court awarded costs against Biowatch in favor of Monsanto, which, the court concluded, was “compelled” to intervene in the proceedings. Biowatch appealed the costs orders up to the Constitutional Court, which ruled that it is the state’s duty to cover the costs of a successful applicant in constitutional litigation. Ibid., ¶ 56. Given that the litigation addressed not a private dispute, but inaction on the part of state authorities, the Constitutional Court reversed the lower court’s costs order against Biowatch. I have provided an extended analysis of this case elsewhere; see Peekhaus.
Discretionary Protection of Information about the Internal Operations of Public Bodies

The Act also offers safeguards to facilitate the smooth functioning of government by providing public bodies a discretionary exemption for information that relates to the internal workings of the body. In considering this section of PAIA, the courts have indicated a preference for a narrow application of this statutory exemption because it abridges the constitutional right of access to information. In a decision at the Eastern Cape Division of the High Court, Judge Revelas wrote that “The provisions of section 44 of the Information Act may not to [sic] be invoked for purposes of convenience, or because full disclosure would attract criticism, cause embarrassment or because it is believed that a sanitized version of the report in question would better serve the interests of all concerned. There must also be sufficient grounds to pronounce the release of a document or information as ‘premature’.”

The Supreme Court of Appeal has also provided guidance about the meaning of Section 44(1)(a) of the Act, arguing that a restrictive meaning of the word “obtain” is to be preferred: “In the context under discussion it must mean procuring information for any of the purposes referred to in the subsection.” Consequently, Section 44(1)(a) must not be used to refuse access to records that are initially obtained for a different purpose but subsequently used for the purpose of formulating a policy.

52 As set out in PAIA § 44, access requests may be refused if the record contains an account of a consultation, discussion, or deliberation that has occurred, or an opinion, advice, report, or recommendation obtained or prepared for the purpose of assisting in decision-making or policy development. A request for such information may also be refused if the disclosure of the record could reasonably be expected to frustrate the deliberative and decision-making processes in or between public bodies, the success of any policy, or the effectiveness of a testing, examining, or auditing procedure or method used by a public body. Access to a record may also be refused if it contains a preliminary, working, or other draft of an official of the body, or an evaluation or opinion prepared for the purpose of determining the suitability of a person for employment, promotion, scholarship, or similar and an express or implied promise was made to the person to keep the information confidential.

53 Public Service Accountability Monitor and Another v Director-General: Office of the Premier: Eastern Cape Provincial Government [2008] ZAECHC 70, ¶ 24. This application to the courts arose from the refusal by the Director General of the Office of the Eastern Cape Premier to provide the non-governmental organization Public Service Accountability Monitor with a copy of the full, unabridged version of the Rapid Assessment Survey of 2006, which recorded the responses of approximately 12,200 households in the Eastern Cape Province about their perceptions of the Provincial Government’s general performance and service delivery.

54 Minister for Provincial & Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110 (SCA), ¶ 17. This failed appeal concerned the interpretation and application of PAIA § 44(1). The Minister for Local and Provincial Government refused to release to a voluntary association of traditional leaders in the Province of Limpopo a report compiled by a commission of enquiry known as the Ralushai Commission. Although an interim report had been released publicly, officials in the department did not make the final report public. After a failed request and internal appeal, the association applied to the Pretoria High Court for an order declaring that it had a right to access the report and thus that the decision by the Minister’s information officer denying it access to the report should be set aside. The Minister, in opposing the application, contended that the request for access had been refused in terms of PAIA §§ 44(1)(a) and 44(1)(b) of the Act. The Pretoria High Court dismissed the Minister’s reliance on § 44(1)(b), finding that the Minister had failed to prove that the disclosure of the report would frustrate the deliberative process. Although the High Court adopted an expansive interpretation of the term “obtain,” Judge Botha nonetheless held in favor of the association because the information officer for the Minister had failed to consider that the refusal of access in terms of § 44(1)(a) is not mandatory. Botha thus ordered the Minister to release certain sections of the report to the association. The Minister appealed the decision but, as noted in the text, the Supreme Court of Appeal adopted a narrower interpretation of the term “obtain” and dismissed the appeal.
or making a decision. That is, in order to attract the exemption protection, the record must have been initially procured for one of the purposes specified in that section of the Act.

Citing with approval this interpretation of the term “obtain,” Judge of Appeal Nugent of the same court subsequently applied a narrow interpretation in President of the Republic of South Africa and Others v M & G Media Limited, in which he pointed out that Section 44(1)(a) of PAIA “…does not render a report subject to secrecy if it is ‘reasonably conceivable’ that it has been of assistance in formulating policy etc. It does not even render it subject to secrecy if it ‘would have been of assistance.’ Nor even if the President ‘was able to utilise the report to assist him.’ It is subject to secrecy only if it was obtained or prepared for that purpose.”

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55 President of the Republic of South Africa and Others v M & G Media Limited 2011 (2) SA 1 (SCA). This appeal concerned a report in the possession of the President of the Republic. Two senior judges prepared the report after their visit to Zimbabwe shortly before an election that was held in that country in 2002. The judges undertook this work at the request of then-South African President Thabo Mbeki. The report has never been released to the public at large. As mentioned above in the context of another case, M&G Media (the respondent) is the publisher of a weekly newspaper called The Mail & Guardian. The company sought access to the report in 2008 but the deputy information officer for the Office of the Presidency refused disclosure. M&G lodged an internal appeal, as required under the Act, but the Minister subsequently dismissed it. M&G and the then-editor of its newspaper applied to the North Gauteng High Court under the provisions of the Act for an order compelling the President to disclose the report. Acting Judge Sapire granted the order and the President (and the deputy information officer and the Minister in the Presidency) subsequently appealed the decision with the leave of that court. In a unanimous ruling written by Judge of Appeal Nugent, the Supreme Court of Appeal dismissed the appeal with costs. The Presidency consequently appealed that decision to the Constitutional Court, which, rather than determining the matter once and for all, argued that the court should have reviewed the report under the “judicial peek” power set out in PAIA § 80. Incidentally, Nugent contemplated this provision but ultimately dismissed its application for fear of the effects that the prohibitions on disclosure contained in this section of the Act might have on the public trust in the courts: “I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.” President of the Republic of South Africa and Others v M & G Media Limited 2011 (2) SA 1 (SCA), ¶ 52. In any event, the Constitutional Court referred the case back to the court of first instance for the judge to review the report; President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC).

56 President of the Republic of South Africa and Others v M & G Media Limited 2011 (2) SA 1 (SCA), ¶ 34. In his February 2013 ruling, Judge Raulinga of the North Gauteng High Court found that the state had failed to discharge the burden placed on it under PAIA § 81(3). Furthermore, and based on the review of the report in question, Raulinga indicated that, although unable to disclose those material aspects of the contents of the report that may compromise any possible appeal process to the superior courts, important aspects of the report, as they bear on the decision to refuse access, could be disclosed. After reviewing the report, Raulinga found that the rationale put forward by the Office of the Presidency for refusing disclosure stretched the bounds of credulity: “The contents of the report do not support the first ground that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to section 41 (l)(b)(i) of PAIA. There is also no indication that the report was prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in section 44(l)(a) of PAIA. […] In my view most of the information is public knowledge. The report itself does not reveal that it was intended to be kept secret.” M & G Media Ltd v President of the Republic of South Africa and Others 2013 (3) SA 591 (GNP), ¶¶ 59, 62. Raulinga thus ordered the Presidency to release the requested report to M&G Media. The Presidency subsequently appealed this decision to the Supreme Court of Appeal, which in September 2014 upheld the High Court’s decision and dismissed the appeal with costs; President of the Republic of South Africa and Others v M & G Media Ltd (998/2013) [2014] ZASCA 124.
In a further clarifying case, the High Court held that the provisions of Section 44 of the Act should not be used to refuse access to draft reports, policies or opinions, or advice or recommendations in cases where a final report or policy has been adopted or a final decision taken.\(^{57}\)

These judicial interpretations of this section of PAIA respond to the admonition issued by Klaaren and Penfold for a restrictive application of what they have critiqued for being too broad a provision for non-disclosure of government information.\(^{58}\) Similarly, while successive governments have failed to live up to the early progress made in respect of freedom of access to information that Lor and van As celebrated soon after the enactment of PAIA, the courts have clearly indicated their willingness to hold the government to account in ways that facilitate the transparency and accountability objectives of the Act.\(^{59}\)

**MANDATORY DISCLOSURE IN THE PUBLIC INTEREST**

Some of the exemptions contained in PAIA are rather broad in scope. Although not clear, the breadth of exemptions written into the Act may have motivated its drafters to enshrine in PAIA a public-interest test for both public and private bodies,\(^{60}\) against which any exemptions are supposed to be balanced. Thus, the final stage in any assessment of a request for access to a record, if circumstances exist that would otherwise justify refusing access, must be to consider whether the public-interest override sections apply. These identical sections provide that the record must be disclosed whenever two conditions are met. First, it must be established that “disclosure of the record would reveal evidence of” a serious contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk. After establishing that the record contains one of these two categories of information, the second step requires a finding that the public interest in the disclosure of the information “clearly outweighs” the harms contemplated in the particular exemption provisions. If both conditions are met, the record must be disclosed despite any of the grounds for non-disclosure otherwise contained in the Act, except in the case of certain records held by the South African Revenue Service.\(^{61}\)

Yet, the public-interest override sections of the Act have been critiqued by at least one commentator for failing to either define the term “public interest” or to offer any guidance about how to actually measure whether it outweighs the harm articulated in a particular exemption provision.\(^{62}\) Similarly, legal scholars have expressed concern that the public-interest override possesses a relatively narrow scope that applies only to the two categories of information just outlined rather than to any

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\(^{57}\) **CCII Systems (Pty) LTD v Fakie & Others** NNO 2003 (2) SA 325 (T).


\(^{60}\) PAIA, §§ 46, 70 (respectively).

\(^{61}\) Ibid., § 35.

\(^{62}\) Allan.
information deemed to serve the public interest in a more general sense. According to Currie and Klaaren, “…there is more to the term ‘public interest’ than the aspects specifically identified in the override (i.e. the public interest in upholding the law and in awareness of public safety or environmental risks). There is also a public interest in furthering the general goals of the Act (i.e. facilitating and promoting the disclosure of information to promote open government and human rights).”\textsuperscript{63} A similar perspective was articulated in the South Gauteng High Court, where Judge Kgomo argued that “The term ‘public interest’ in my view, may mean more than the meagre aspect specifically identified in the section. It may include the public interest in upholding the law as well as the publics’ [sic] awareness of public safety or environmental risks. There may also be the public interest in furthering the general goals of the Act.”\textsuperscript{64}

A further critique leveled against Section 46 of the Act is that the language in the provisions (e.g. “substantial contravention,” “imminent and serious,” and “clearly outweighs”) is so restrictive as to potentially render the override inapplicable in practice.\textsuperscript{65} As pointed out by Judge Alkema of the Eastern Cape High Court, such restrictive language in the relevant section of the Act is potentially exacerbated further by the requirement that disclosure “would” rather than “may” reveal evidence of contraventions of, or failure to comply with, the law.\textsuperscript{66} This highlights one of the challenges of any access to information regime – namely that a requester is often unaware of the full scope of the information contained within the records related to an access request. Indeed, ascertaining the complete scope of information held by the state on a matter of interest is often part of a requester’s motivation for lodging an access request. In the context of the public-interest override, it thus may be impossible to prove that disclosure “would” reveal legal contraventions. “The restrictive language used may have the effect of undermining the constitutional right of access to information and may call into question the constitutionality of the entire structure of the PAIA or, at least, of the section.”\textsuperscript{67} However, Alkema goes on to argue that such a restrictive application of the section would be misaligned with the interpretational obligation to construe any legislative provision in accordance with the spirit and purport of the Constitution where such interpretation is reasonably possible.\textsuperscript{68}

In developing his arguments, Alkema also responded, albeit not directly, to another concern articulated by Allan, who asserts that the onus for demonstrating that the disclosure would reveal evidence of a contravention of law or an imminent safety or environmental risk falls on the requestor to a private body.\textsuperscript{69} Assuming that she is correct in assignment of the burden of proof, this would again render the public-interest override that much more difficult to enforce given that requestors are even less likely, than in the case with public bodies, to know the full scope of the information of interest held within the custody of a private body. According to Alkema, however, “…the word ‘clearly’ means no more than ‘clear evidence’ whilst retaining the civil standard of onus on a balance

\textsuperscript{63} Currie and Klaaren, 109.
\textsuperscript{64} De Lange and Another v Eskom Holdings Limited and Others 2012 (1) SA 280 (GSJ), ¶ 139.
\textsuperscript{65} Klaaren and Penfold.
\textsuperscript{66} Centre for Social Accountability v The Secretary of Parliament and Others 2011 (5) SA 279 (ECG).
\textsuperscript{67} Ibid., ¶ 90.
\textsuperscript{68} Ibid., ¶ 108.
\textsuperscript{69} Allan.
of probability.” That is, and in a way that appears to respond to Allan’s concern, the restrictive wording contained in PAIA Section 46 (which is mirrored in section 70 for private bodies) must be read subject to Section 81, which stipulates that the rules of evidence applicable in civil proceedings apply to any court proceedings brought under the Act and thus that the civil onus for discharging the burden of proof referred to in Section 81(2) is proof on a balance of probability. This means that an assessment about the applicability of Section 46 (or presumably Section 70) must be based on a balance of probability that the disclosure of the requested information would reveal evidence of a substantial contravention of, or failure to comply with, the law.

These concerns about the scope and thus potentially circumscribed application of the public-interest override notwithstanding, the courts have demonstrated a willingness to invoke Section 46 of the Act. For example, in a case heard before the Eastern Cape High Court, Acting Judge Dukada held that, although access to the requested record in question might legitimately be refused in terms of PAIA Sections 44(1)(a) and 44(1)(b), its disclosure would reveal substantial contravention of, or a failure to comply with, the law and thus the Section 46 public-interest override clearly outweighed the harm to the interest protected by the exemptions.

In *De Lange and Another v Eskom Holdings Limited*, the South Gauteng High Court similarly found that, despite a legitimate use of the exemptions that protect information about third parties, the records in question would reveal evidence of an imminent and serious public safety or environmental risk in respect of the country’s electricity supply. The respondent, Eskom, was thus ordered to provide certain specific information outlined by the court to the applicants, who were also awarded costs. The case was subsequently appealed to the Supreme Court of Appeal, which dismissed the appeal, although for reasons that did not rely on Section 46 of the Act. As such, Deputy President Mthiyane, writing for the majority, did not engage in an analysis of the public-interest override provision.

Similarly, the North Gauteng High Court considered and applied the public-interest override provisions in the case remitted back to it by the Constitutional Court. In this dispute over access to a report prepared for former President Mbeki and which the Office of the President refused to provide to M&G Media, Judge Raul found that “…the report potentially discloses evidence of a substantial contravention of, or failure to comply with the law. […] I am of the view that the public interest….”

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70 Centre for Social Accountability v The Secretary of Parliament and Others 2011 (5) SA 279 (ECG), ¶ 108.
71 AVUSA Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and Others 2012 (1) SA 158 (ECP). Despite complying with the order from the High Court to provide the record, the respondent appealed the decision to the Supreme Court of Appeal, which dismissed the appeal precisely because of the compliance with the lower court’s ruling. Although the actions in handing over the report pre-empted the appeal and rendered moot the issue between the parties to the litigation, the court dealt briefly with it. Ultimately, Judge of Appeal Wallis concluded that any assessment about the applicability of the public-interest override must be a fact-sensitive one, the outcome of which will vary from case to case depending on the particular facts. Qoboshiyane NO and Others v AVUSA Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA).
72 De Lange and Another v Eskom Holdings Limited and Others 2012 (1) SA 280 (GSJ).
73 BHP Billiton PLC Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA), esp. ¶¶ 16, 18.
74 M & G Media Ltd v President of the Republic of South Africa and Others 2013 (3) SA 591 (GNP). See also footnotes 55-56 above.
supersedes the harm that may ensue should the report be released.” The High Court thus ordered that the refusal by the respondents for access to the report be set aside and that the report be provided to M&G Media within ten days of the order. M&G Media also won its costs.

JUDICIAL DISAPPROVAL OF NON-COMPLIANCE WITH PAIA

As mentioned previously, seeking remedy through the courts is a daunting and typically expensive undertaking fraught with significant uncertainty. In a country such as South Africa, which remains plagued by educational, cultural, and socio-economic divisions, the appropriateness of the courts as an effective mechanism to adjudicate disputes over demands for government and private sector transparency is even more questionable. Such concerns have been borne out by experience, which reveals a relatively shallow and narrow application of PAIA that remains limited mostly to a small number of NGOs who make regular use of the Act and its provisions and which are able, albeit not in all cases given their own resource constraints, to litigate compliance failures on the part of the government.

Members of the judiciary themselves have also commented disapprovingly on this situation, noting in several opinions their increasing annoyance at practices by both public and private bodies that frustrate and disregard the objectives and aims of the Act. For example, in a unanimous decision from the Supreme Court of Appeal about a dispute over access to information between South African Airways (SAA) and one of its retired pilots, Judge of Appeal Combrinck penned the following in his ruling: “It is unfortunate that the Promotion of Access to Information Act […] should result in pre-trial litigation involving huge costs before the merits of the matter are aired in court. One of the objects of the legislation is to avoid litigation rather than propagate it. This is the fourth case in which information has been sought in terms of the Act that has in the past eighteen months required the attention of this court.” Combrinck went on to give effect to his annoyance at the failure of the company to discharge its access to information duties under the Act: “As a mark of this court’s displeasure at SAA’s conduct a punitive costs order will be made in respect of the proceeding in the court below.” Citing this decision approvingly, Judge Mbha of the Witwatersrand Local Division of the High Court (now the South Gauteng High Court) complained that “…the objectives of the Act are being increasingly frustrated by an absence of common sense on the part of the parties bent on disregarding the aims of the Act.”

75 Ibid., ¶ 67.
76 Although it did not grapple with the application of Section 46 of the Act to this case, the Supreme Court of Appeal nonetheless upheld the High Court’s order against the Presidency to release the report requested by M&G Media; President of the Republic of South Africa and Others v M & G Media Ltd (998/2013) [2014] ZASCA 124. See also footnote 56 above.
77 Calland.
78 Claan v Information Officer of South African Airways (Pty) Ltd. [2006] SCA 163 (RSA), ¶ 1.
79 Ibid., ¶ 11.
Judge Southwood of the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) has similarly written scathingly of the failure of public bodies to respect their access to information duties under the Constitution and PAIA: “It is disturbing that the first respondent [Minister of Correctional Services] has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court. This is not what is expected of a government Minister and a state department. In my view their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds.”81 In the same fashion, Judge Alkema of the Eastern Cape High Court was at pains to restrain his displeasure at the conduct of public bodies when dealing with access to information requests: “…the conduct of the respondents [the Secretary of Parliament, the Speaker of Parliament, and the Chief Whip of The African National Congress] in not observing the procedural requirements of the Act is yet another example of how rapidly the non-compliance with procedural requirements can degenerate into a maze of inextricable and indissoluble legal dead-locks from which there is often no point of return. Such an exercise is time-consuming and an unnecessary legal expense to litigants; in this case the South African taxpayer.”82

Although not directly critical of the court enforcement written into the Act, these court opinions do reveal a cognizance among members of the judiciary that seeking redress through the courts to compel public and private bodies to fulfill their constitutional and statutory access to information obligations can be a costly endeavor fraught with uncertainty, which ultimately undermines the objectives of the Act and the consequent development of a dynamic access to information regime.

**CONCLUSION**

As mentioned at the outset of this article, PAIA has been hailed as providing the “gold standard” of access to information legislation. Indeed, the scope and depth of coverage of the Act and its constitutional underpinnings suggest the aptness of this epithet. Yet, more than a decade after its promulgation, the Act remains obstructed by continuing, and in some cases, worsening implementation challenges. As similarly discussed, reliance on the courts to adjudicate disputes over access to information has long been critiqued as a substantial weakness in South Africa’s access to information regime. For example, members of an ad hoc Parliamentary Committee pointed out in their 2007 report to Parliament: “The complex and potentially expensive appeals mechanism provided for in the legislation places further obstacles in the way of ordinary individuals wishing to access information. […] an aggrieved individual can only challenge decisions denying access to information in an ordinary court of law. The cost and complexity of such processes often make it difficult if not

81 *Treatment Action Campaign v Minister of Correctional Services and Another* [2009] ZAGPHC 10, ¶ 36.
82 *Centre for Social Accountability v The Secretary of Parliament and Others* 2011 (5) SA 279 (ECG), ¶ 44.
impossible for individuals or groups without adequate resources to exercise their right to information through the Act. It is significant that only a handful of cases reach the courts.\(^{83}\)

The relatively long time frames, complexity, high costs, and significant uncertainty associated with legal processes, coupled with the lack of any substantive legislated penalties for non-compliance, provide significant incentives for both public and private bodies to adopt a strategy of silence whereby they completely fail to even acknowledge, let alone process or respond to requests for information. In practice, this means that many of the individuals and organizations attempting to avail themselves of the constitutional right of access to information embodied in the provisions of PAIA face an arduous and protracted adversarial process against the cloak of secrecy still firmly entrenched within South African governance structures.

Similar to the critique articulated by the \textit{ad hoc} Parliamentary Committee, Allan contends that the overwhelming majority of litigated complaints against failures to disclose requested information have been settled prior to the commencement of a hearing, thus limiting the corpus of judicial precedent in respect of the interpretation of PAIA.\(^{84}\) As the analysis presented in this article attests, there may be some merit to this charge, as evidenced by the relatively small number of cases brought before the courts since the enactment of PAIA. However, as also demonstrated herein, the precedents being established in this increasing body of access to information jurisprudence in South Africa mitigate Allan’s charge. For example, the courts have clarified the necessary criteria for distinguishing between public and private sector bodies for purposes of PAIA, which is crucial because information held by private sector bodies must only be released if a requestor can establish that the information is “required for the exercise or protection of any rights.” The courts have similarly provided guidance about how to interpret this requirement, articulating the test of “substantial advantage or element of need” as an appropriate threshold criterion for determining whether a record meets the statutory meaning of “required for the exercise or protection of a right.”

However, this assessment of the statutory language by the courts has attracted some critique since, without knowing the precise informational content of a record being requested, it may be difficult to demonstrate, with any degree of detail or precision, a link between the record and the rights implicated. This is an irony that plagues many access to information regimes; a lack of information is often the motivation for seeking access. So expecting a close articulation of the connection between the requested information and the right being exercised or protected may frustrate the objectives of PAIA. Although the High Courts have recognized this dilemma and thus advocated a more expansive interpretation of these provisions of the Act, the more restrictive interpretation developed by the Supreme Court of Appeal still finds application.


\(^{84}\) Allan.
In responding to what sometimes appears to be an habitual practice among public and private bodies of invoking exemptions as part of systematic efforts to avoid disclosure, the courts have also delivered reasoned assessments of the valid application of various statutory exemptions from information disclosure requirements under PAIA. The courts, in recognizing the circumvention potential these exemptions can exercise on the goals of the Act, have generally applied the exemptions in a restrictive fashion that establishes access to information as the norm; albeit one that is subject to legitimate limitations. The courts have similarly underscored the statutory onus placed on public and private bodies to provide proof about the applicability of any exemption invoked to avoid disclosure of requested information. Put another way, the courts have established a corpus of jurisprudence that admonishes especially public, but also private, bodies to adhere to their constitutional and statutory information disclosure obligations in ways that will contribute to the development of a balanced access to information regime.

Although commentators and some courts have expressed concern about the restrictive language of the public-interest override in the Act, various courts have demonstrated a willingness to invoke this section of PAIA to order the release of information that would otherwise be subject to a disclosure exemption. Considered in tandem with the strict application of statutory exemptions as a number of courts have preferred, this bodes well for the continued development of South Africa’s access to information regime. Finally, it is encouraging that the courts have articulated their displeasure over the failure of various public and private bodies to comply with the provisions of the Act, which subsequently compels requestors to make application to the courts. This judicial annoyance, which has been given effect through the imposition in some cases of punitive costs orders, might provide some impetus for public and private bodies to take more seriously and honor their access to information duties.

As the foregoing analysis has demonstrated, when called upon, the courts have demonstrated a generally commendable commitment to not only the spirit and objectives of the Act but also to its enforcement. In part, this reflects recognition among the courts that without access to information rights, themselves a constitutional right in South African law, other fundamental rights risk being harmed as a result of government and private sector opacity. Yet, despite this growing corpus of jurisprudence that firmly undergirds the development of a robust access to information regime, some members of the judiciary recognize and, in their judgments, have pointed to the long-critiqued structural weakness in South Africa’s access to information regime – namely its reliance on the courts to arbitrate disputes over access to information, which poses a significant hurdle to people attempting to enforce their constitutionally guaranteed access to information rights.

Fortunately, the South African government has finally undertaken significant steps to address some of these weaknesses in its access to information regime, as reflected in passage of the Protection of Personal Information Act in 2013. This law, although promulgated to provide statutory protection
for personal information, introduces a number of substantive amendments to PAIA. Once it enters into force, the new law will establish an independent Information Regulator, who will have jurisdiction throughout the country. The powers and duties of the Information Regulator in terms of PAIA are set out in Parts 4 and 5 of that Act (appeals against decisions and applications to the courts, respectively). Thus, the Information Regulator will assume all the powers and responsibilities currently performed by the South African Human Rights Commission under PAIA in respect of promotion and compliance monitoring. The Information Regulator will also be empowered to assess whether a public or private body generally complies with the provisions of PAIA. Such an assessment can be conducted at the initiative of the Information Regulator or at the request of the information officer of a public body, head of a private body, or any other person. Similarly, rather than having to apply to the courts for relief, requestors unsatisfied with the decision of a body will be able to submit a complaint to the Information Regulator, who will have investigatory, order-making, and enforcement powers.

This new body promises to respond to some key weaknesses in PAIA, particularly reliance on the courts for oversight and enforcement. Moreover, as outlined in some detail above, the courts have provided a strong foundation of common law precedent upon which this new body can draw in order to breathe new life into South Africa’s access to information regime. However, since the Act containing these amendments to PAIA has yet to be enacted, it remains to be seen how well these new provisions will remedy this weakness in the Act.

Thus, future research will be required to determine the effectiveness of the Information Regulator, including an analysis of how well it draws on the corpus of common law developed by the courts in respect of PAIA in order to resolve access to information disputes in ways that contribute to the robustness of South Africa’s access to information regime. Indeed, it would also be worth investigating whether the creation of this ombuds office results in an upsurge in appeals by requestors aggrieved by public and private bodies about their access decisions, or indeed, use of the provisions of the Act more broadly.

as well as an indefinite extension of the timeframe to respond to this category of information. The bill sets out that classified information may only be released in response to an access to information request if the head of an organ of state first declassifies the information, which is only required if the same conditions contained in the PAIA public-interest override apply to the requested information. The head of the state organ must conduct the review of the classified information for purposes of possible declassification only “within a reasonable time” (§ 19(6)). Requestors may appeal decisions made by the Minister of the relevant state organ but only within 30 days of receipt of the decision (§ 31(2)). As discussed above, the courts have determined this timeframe to be unconstitutional. Presumably the Constitutional Court would also find this abbreviated appeal period problematic. If unsatisfied with the outcome of the internal appeal, requestors may apply to the courts for appropriate relief. These latter provisions will place the access portions of this bill offside of the newest amendments to PAIA through the Protection of Personal Information Act, as discussed below. In addition to the erosion of access to information rights, the bill stipulates harsh penalties for anyone who discloses or merely possesses classified information (e.g. §§ 15, 43, 44, 49). Given all of this, the bill has been subject to significant criticism for its potential to seriously undermine freedom of information, freedom of the press, freedom of expression, and, ultimately, democracy more generally. President Zuma surprised many in September 2013 when, citing constitutionality concerns, he refused to sign the bill into law and instead referred it back to the National Assembly for reconsideration. As this article goes to press in late 2014, the bill has yet to be signed into law by the President.


Court Cases

AVUSA Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and Others 2012 (1) SA 158 (ECP).

BHP Billiton PLC Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA).

Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC).

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA).

CCII Systems (Pty) LTD v Fakie & Others NNO 2003 (2) SA 325 (T).

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Claase v Information Officer of South African Airways (Pty) Ltd. [2006] SCA 163 (RSA).

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