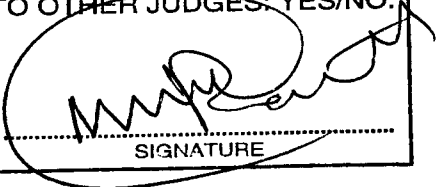




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELÈTE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
5/11/2014 DATE	 SIGNATURE

Case No: 26060/2014

Date heard: 15 September 2014

Date of judgment: 05 November 2014

In the matter between:

THE SOUTH AFRICAN PORK PRODUCERS ORGANISATION

Applicant

and

THE NATIONAL COUNCIL OF SOCIETIES FOR THE
PREVENTION OF CRUELTY TO ANIMALS

Respondent

JUDGMENT

A.M.L. PHATUDI J:

[1] The applicant institutes this application for a relief in terms of section 78 and 82 of the Promotion of Access to Information Act, Act 2 of 2000. (PAIA) The applicant seeks access to certain documentation allegedly in possession and or under control of the respondent.

[2] At the commencement of the hearing, I expressed my disapproval on the part of legal practitioner's tendency of requesting or directing that their matters be heard by certain judges. The applicant's attorney requested "that the matter be allocated to a senior judge adequately experienced to consider relevant issues" is, in my view, regrettably discouraged. I know not of such title, "senior judge". An acting judge is a judge. All judges are deemed to be adequately experienced to adjudicate and consider any legal issue before him/her.

[3] The applicant, The South African Pork producers Organisation (SAPPO) is a non-profit organisation representing the pork industry nationally in South Africa. The respondent is the National Council of the Societies for the Prevention of Cruelty to Animals (NSPCA). The respondent is the umbrella organisation for Societies for the Prevention of Cruelty to Animals (SPCA). SPCA is a creature of the Societies for the

Prevention of Cruelty to Animals Act, Act 169 of 1993 (SPCA Act). The respondent is thus a public body as defined in PAIA.

Factual Background

[4] A complaint was lodged with Lephalale SPCA (SPCA) regarding the poor living conditions of pigs in Vus'ithemba Piggery Vaalwater situated near Vaalwater, Limpopo Province (Piggery). SPCA forwarded the complaint to NSPCA. NSPCA deployed Senior Inspector Pieterse (Pieterse)¹ to conduct an inspection of the Piggery.

[5] On the 13 August 2013, Pieterse, accompanied by the Trainee Inspector Wentzel of SPCA, obtained a warrant issued by Modimolle Magistrates Court in terms of section 8(1)(a) of the Animals Protection Act 71 of 1962. An inspection was conducted. Pieterse issued a directive called warning 1548. It was directed, among others, that the 'sick/injured or otherwise unsound pigs must be treated immediately by a veterinarian or the pigs must be humanely destroyed without delay ...'²

¹ Warning 1548 – Annexure 554 to Founding Affidavit – Page 37

² Ibid

[6] The owner of the Piggery engaged the services of Dr John Van Zyl, a Veterinarian. On the 14 August 2013, Van Zyl conducted an inspection of the Piggery. Van Zyl recommended, among others, that 'the animal in G8 who is battling to get up is to be sent for slaughter ASAP ...'³

[7] The applicant, through its attorneys, requested access to certain documents and reports in possession of the respondent pertaining to Vus'ithemba Piggery. The applicant was then furnished with the required information but for '[a]ll information, including but not limited to any complaints received by the NSPCA, upon which the inspector's reasonable suspicion was based enabling him to testify under oath in order to obtain the warrant.'⁴ The applicant's counsel submits that the said information is required even if the complainant's name is redacted.⁵

[8] The respondent refused to furnish the applicant with the complaint received by SPCA on the 'ground that the disclosure of the record consist of information supplied in confidence by the complainant.'⁶ In substantiation of its refusal, the respondent stated that 'if the NSPCA is compelled to disclose the details of complaints made to it or any SPCA, the disclosure could reasonably be

³ Annexure SS5 to Founding Affidavit – Page 38

⁴ Founding Affidavit paragraph 25.1 – Page 11

⁵ Redaction means obscuring or deletion of specific information, name or words without editing the document.

⁶ Answering Affidavit paragraph 10 – Page 87

expected to prejudice the future supply of similar information from persons wishing to remain anonymous.⁷ In declining to furnish the applicant with such complaint, the respondent relies on the provisions of section 37(1) (b) and 44(2) (a) of PAIA.

The Law

[9] Section 32 of the Constitution of the Republic of South Africa (Constitution) makes provision for access to information. Subsection (1) stipulate:

- '(1) Everyone has the right of access to
- (a) Any information held by the state; and
 - (b) Any information that is held by another person and is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[10] PAIA was enacted to give effect to the provisions of section 32(2) of the Constitution. The objects of PAIA are 'to give effect to the constitutional right of access to any information held by the State that is required for the exercise or

⁷ Answering Affidavit paragraph 11 – Page 87

protection of any rights.⁸ The constitutional right is subject to justifiable limitations, including, but not limited to limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance.⁹

[11] Section 36(1) of the Constitution provides for limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society.¹⁰ The Supreme Court of Appeal (SCA), through the pen of Nugent JA echoed the openness in the democratic society in the **President of Republic of South Africa and Others v M & G Media (Ltd)**¹¹ that

'[1] Open and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the State', of which Ngcobo J said the following in *Brümmer v Minister for Social Development and Others*: 'The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to

⁸ Section 9(a)(i) of PAIA

⁹ Section 9(b)(i) of PAIA

¹⁰ 36 Limitation 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.

¹¹ 2001 (2) SA 1 SCA

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.”¹

[2] But few constitutional rights are absolute. Generally they are capable of being limited within the confines of s 36. The right of access to information held by the State has indeed been limited by the Promotion of Access to Information Act 2 of 2000 – which fulfils Parliament’s constitutional obligation to enact national legislation to give effect to the right.¹²

[12] In refusing to provide access to the complaint, the respondent relies on section 37(1) (b)¹³ and 44(2) (a)¹⁴ of PAIA respectively. The respondent deems such refusal a reasonable protection of privacy in respect of the third party who provided information that was supplied in confidence when lodging the complaint with them. The respondent further contend that the disclosure of the record could reasonably be expected to jeopardise the effectiveness of their method used to the

¹² Ibid Paragraph [1] and [2] footnotes omitted

¹³ Subject to subsection (2), the information officer of a public body –

(a) ...

(b) May refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party –

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.

¹⁴ Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if –

(a) the disclosure of the record could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body.

protection of information provided by the members of the public who lodges complaints against animal abuse such as that of the Piggery.

[13] It seems to be common cause between the parties that the respondent does not have the internal appeal procedures¹⁵ in place which the applicant would have followed prior to them approaching this court in terms of section 78 read with section 82 of PAIA.

[14] The issue to be considered is whether the respondent's grounds and reliance on the provisions of section 37(1) (b) and section 44(2) (a) in refusing the applicant with access to all information relating to complaints received that subjected Piggery's inspection justified.

[15] The respondent does not dispute being in possession of documented information forming the complaint against the Piggery. I enquired from the respondent counsel if the respondent accepts word of mouth complaint or does the respondent require lodgement of complaints under oath. The respondent's counsel became dodgy of my question.

¹⁵ Section 74 of PAIA – A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of “public body” in section 1 (a) to refuse a request for access; or ...

She, after taking further instructions, submits that the respondent does not necessarily require the complaint to be under oath.

[16] I further enquired if redaction of the name(s) of the complaint lodger would cause any prejudice. Counsel submits that reasonable expectations of harm may occur and members of the public may be ward off to expose animal abuse. The respondent's refusal is mainly to protect the identity and the information of the person who submitted a complaint regarding the alleged animal cruelty at the Piggery with Lephalale SPCA. The applicant submits that they are only interested in the contents of the complaint and not who reported. They submit they would welcome redaction.

[17] The question to be determined is whether the refusal of access to the complaint lodged with Lephalale SPCA infringes the right¹⁶ protected by the Bill of Rights. If it does, the next question to be determined is whether that refusal of access to the complaint¹⁷ is justifiable.

¹⁶ The right of access to information – See section 32 of Constitution

¹⁷ Infringement of the right

[18] It is common cause between the parties that the respondent's refusal to let the applicant access to the complaint lodged with Lephalale SPCA does infringe the applicant's right of access to information.

[19] As a point of departure on the second leg is that the respondent submitted that such refusal of access to the said complaint is reasonable and justified as envisaged in terms of section 37(1) (b) of PAIA read with section 9(b) of PAIA and section 36(1) of the Constitution. The respondent further refers to justifiable limitations as set out in section 9(b) of PAIA.¹⁸ The limitations set out in section 9(b) aim at the (i) reasonable protection of privacy, (ii) commercial confidentiality and (iii) effective, efficient and good governance.

[20] The respondent submitted that the release of the complaint will result in the breach of the complainant's privacy and the confidentiality of the information which was provided. It is common practice that the State organs such as the respondent and South African Police Services

¹⁸ Section 9(b) of PAIA provides: 'The objects of this Act are –

- (a) ...
 - (i) ...
 - (ii) ...
- (b) To give effect to the right –
 - (i) Subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
 - (ii) In a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution.'

encourage members of the public to come out if they see or know of anyone who transgresses the law to combat cruelty to animals or crime respectively.

[21] A member of the public lodged with Lephalale SPCA a complaint regarding the poor living conditions of pigs at the Piggery. Upon investigation by the NSPCA senior inspector and the applicant's Veterinarian, it was recommended among others that 'the animal (pig) in G8 who is battling to get up is to be sent to slaughter ASAP.' Considering the recommendation made by experts in the animal welfare, it is clear that the complaint was genuine. Had it not be for the complainant bringing such cruelty to the animals to the attention of Lephalale SPCA, the respondent would not have conducted the investigation. The cruelty of the animals would not have been detected.

[22] The applicant submitted that they need the information provided to the respondents to enable them to take disciplinary measures against the Piggery, their member. The applicant further submitted that the names of the complainant may be redacted or red taped if indeed the respondent needs to protect the identity of the complainant.

[23] Considering the mandatory protection of certain confidential information, the respondent is given the discretionary power¹⁹ to refuse a request for access to a record which consists of information that was supplied in confidence.²⁰ It is evident that the object of PAIA is among others, to give effect to the constitutional right of access to any information held by the State subject to justifiable limitations that include the reasonable protection of privacy.²¹

[24] The applicant (SAPPO) is the national organisation that represents the pork industry in South Africa. Provincial organisations in the pork industry are members of SAPPO. The farmers in the pork industry are members of the provincial organisation. The provincial organisations are said to be autonomous with powers to regulate the conduct of its members.

[25] The applicant's submissions that they seek the information to enable them to take disciplinary action against its member have not been supported by supporting affidavit from its Limpopo branch. In my view, there is no merit in the applicant's contention in that, the applicant may

¹⁹ Usage of the word "May refuse" in section 37(1)(b) of PAIA

²⁰ Section 37(1)(b)

²¹ Section 9(a)(i) and 9(b)(i) of PAIA

still put the disciplinary action in motion against the Piggery on the reports filed by the respondent and the Veterenian. The recommendations by the inspector of the respondent and that of the veterinarian suffice for such an action.

[26] The respondent submitted that they abandoned their intent to press criminal charges against the Piggery. If the respondent had persisted with its intent of pursuing the criminal charges, then the confidentiality and or protection of privacy would have been removed. In that event, neither the applicant nor the respondent has a reasonable expectation of confidentiality.

[27] I enquired from the respondents counsel why they maintain that providing the applicants access to the information with redaction of the complainant's name would still be in breach of the protection of privacy. Counsel submitted that it will be easy to know the identity of the complainant from the information provided even if the complainant(s) name is redacted. She further submitted that had the criminal proceedings been pursuit, then the complaint would have been obliged to testify, thus removing protection that the Act provides.

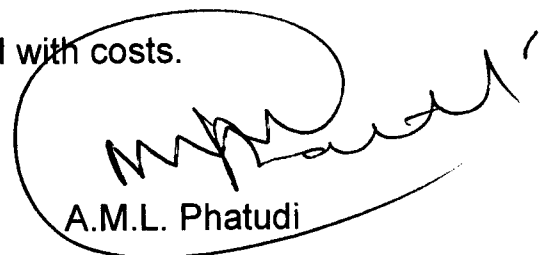
[28] Hartzenberg J dealt with the issue of confidentiality in **CCII System (Pty) Ltd v Fakie and Others NNO**.²² There the court held that there is a duty to protect the confidentiality of the complainants. It was further held that 'it is for the respondent to identify the record which is to be protected in terms of section 37 and why the respondent maintain that access to it be withheld.'²³

[29] Considering the submissions made by both parties, I am of the view that the protection of privacy of the complainant and protection of confidentiality of the information given by the complainant is reasonable justifying the limitation in the constitutional right of access to information.

[30] It is trite law that costs follow the event. The respondent succeeds with their defence. They are thus entitled to their costs. The following order is thus made.

Order:

The applicant's application is dismissed with costs.



A.M.L. Phatudi

Judge of the High Court

²² 200392) SA 325 (T)

²³ Ibid Page 333 - 334

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