CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 129/11
[2012] ZACC 21

In the matter between:

PFE INTERNATIONAL INC (BVI)	First Applicant
PFE INTERNATIONAL INC (LIBERIA)	Second Applicant
VAN DYCK CARPETS (PTY) LTD	Third Applicant
MEHDY ZARREBINI	Fourth Applicant
MEHRAN ZARREBINI	Fifth Applicant

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED	Respondent

Heard on : 14 August 2012

Decided on : 27 September 2012

JUDGMENT

JAFTA J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment of the Supreme Court of Appeal in which the High Court order granted in favour of the applicants was overturned and the applicants were directed to pay the costs of the appeal. At the heart of the matter is the determination of the legislative regime regulating the exercise of the right of access to information held by the state after the commencement of legal proceedings. The applicants contend that the Promotion of Access to Information Act[1] (PAIA) is the relevant legislation, whereas the respondent claims that Rule 38 of the Uniform Rules of Court (Uniform Rules) applies. The High Court upheld the applicants' contention[2] but the Supreme Court of Appeal reversed the order based on that finding and held that access to the requested information may be sought in terms of Rule 38.[3]

Constitutional and legislative framework

[2] For a better understanding of the applicants' claim for access to information and the respondent's refusal, it is necessary at the outset to outline the legal basis for the claim. The right of access to information held by the state is guaranteed by section 32 of the Constitution. It provides:

> "(1) Everyone has the right of access to—
>
> (a) any information held by the state; and

[1] 2 of 2000.

[2] *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2011 (4) SA 24 (KZD).

[3] *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) and Others* 2012 (2) SA 269 (SCA) (*IDC*).

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

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

[3] The importance of this right has been explained by this Court in *Brümmer v Minister for Social Development and Others*.[4] In that case the Court said:

> "The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'. . . . Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas."[5] (Footnotes omitted.)

[4] PAIA is the national legislation contemplated in section 32(2) of the Constitution. In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA.[6]

[4] [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[5] Id at paras 62-3.

[6] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73. See also *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 40; *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para 52;

[5] Section 11 of PAIA gives effect to the right of access to information held by public bodies. It reads:

> "(1) A requester must be given access to a record of a public body if—
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> (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
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> (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
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> (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
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> (3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by—
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> (a) any reasons the requester gives for requesting access; or
>
> (b) the information officer's belief as to what the requester's reasons are for requesting access."

[6] However, access to information held by bodies such as Cabinet and the courts cannot be sought in terms of PAIA because this Act does not apply to those bodies. Section 12 of PAIA provides:

> "This Act does not apply to a record—
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> (a) of the Cabinet and its committees;
>
> (b) relating to the judicial functions of—
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> (i) a court referred to in section 166 of the Constitution;
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> (ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996); or
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> (iii) a judicial officer of such court or Special Tribunal;
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> (c) of an individual member of Parliament or of a provincial legislature in that capacity; or

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and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 22-6.

> *(d)* relating to a decision referred to in paragraph (gg) of the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law."

[7] Apart from information in possession of public bodies listed in section 12, PAIA does not apply to information sought for the purposes of civil or criminal proceedings, if the request for access is made after the commencement of proceedings and access to that information is provided for in another law. This is the position irrespective of whether the information is held by a public or private body.[7]

Background and legal history

[8] The following facts are common cause. The first and second applicants – PFE International Inc (BVI) and PFE International Inc (Liberia) – are companies in the PFE group of companies which carried on various businesses, including the manufacturing of carpets. The fourth and fifth applicants, Messrs Mehdy Zarrebini and Mehran Zarrebini, are directors of the first and second applicants. The third applicant, Van Dyck Carpets (Pty) Ltd, is a member of the PFE group.

[9] In September 2001, the first applicant purchased 45% of the shares in South African Fibre Yarn Rugs Limited (SAFYR) from the respondent, the Industrial Development Corporation of South Africa (IDC), which held 98% of the shares in the company. As a result of the acquisition, the fourth and fifth applicants became

[7] See section 7(1) quoted in [19].

directors of SAFYR while they continued as directors of the first applicant. The first applicant, through Messrs Zarrebini, acquired shares in Van Dyck Carpets.

[10] Subsequently, SAFYR instituted proceedings in the High Court, seeking an order directing the applicants to transfer those shares to it. SAFYR asserted that Messrs Zarrebini, in their capacity as its directors, owed it a fiduciary duty. They acquired the shares in the applicant in breach of that duty. These proceedings were referred to trial and pleadings were filed. After the close of pleadings, SAFYR requested further particulars for trial. It sought information based on the allegations made in the plea filed by the applicants.

[11] The applicants did not furnish the particulars but, acting in terms of PAIA, requested access to the records of the IDC. When they received no response, they launched the present application in the High Court. The applicants invoked section 11 of PAIA to enforce their right of access to information held by the IDC, which is a public body. The purpose for which access to records was required appears in the founding affidavit. In relevant part it reads:

> "[T]he information necessary to respond to some of the particulars requested [by SAFYR] . . . is contained in the documents requested . . . and the information in those documents and records is peculiarly within the knowledge of the Respondent in the sense that in order to respond to the Request for Further Particulars for Trial the applicants require access to the documents requested . . . so as to be able to obtain the necessary information . . . [T]he Applicants also require access to the information and records to prepare for trial but:
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> (i) as the Respondent is not a party to the application, it cannot be compelled to make discovery;

> (ii) the identity of the particular books and records is within the peculiar knowledge of the Respondent and cannot be identified for the purpose of a subpoena *duces tecum*."

[12] In opposing the relief sought, the IDC contended that since access to the relevant records was requested for the purposes of civil proceedings which were already pending in the High Court, the applicants should have sought the relevant information by means of a *subpoena duces tecum*, issued in terms of Rule 38(1)(a) of the Uniform Rules. Relying on section 7(1) of PAIA, the IDC argued that PAIA does not apply.

[13] The High Court considered the issue that required determination to be whether, in terms of section 7(1),[8] the application of PAIA to the present case was excluded. Having construed the section, the High Court identified conditions which must be satisfied before the application of PAIA could be excluded. It held that one of those conditions is that access to the information sought must be provided for by another law. The Court examined Rule 38(1) to determine whether it met this condition. Based on its interpretation of the text of the Rule, the High Court held that a subpoena may be issued in terms of that Rule only after a trial date has been fixed. As the date was still to be set in this matter, it held, the rule could not be invoked. Accordingly, the IDC was ordered to give the applicants access to the requested information.

[14] On appeal, the Supreme Court of Appeal agreed with the High Court that all three conditions listed in section 7(1) must be met before PAIA is rendered

[8] For the full text of this provision see [19].

inapplicable. But it differed with the High Court on whether Rule 38(1) constitutes the "other law" envisaged in the section. Having determined the purpose of section 7(1), the Supreme Court of Appeal proceeded to interpret Rule 38(1), and held that there was "no reason why a party should not serve a *subpoena duces tecum* at any stage of the procedure".[9]

[15] Having held that the purpose of section 7(1) is to exclude the application of PAIA in matters regulated by court rules, the Supreme Court of Appeal held that the information sought by the applicants must be obtained in terms of Rule 38(1), and consequently all three conditions of section 7(1) were met. The Supreme Court of Appeal reversed the order issued by the High Court and replaced it with an order dismissing the application with costs.

In this Court

[16] The first issue to be decided is whether leave to appeal should be granted. There can be no doubt that the matter raises a constitutional issue. It concerns the exercise of the right of access to information, a right entrenched in the Bill of Rights. This is the first occasion on which this Court is asked to determine the legislative regime applicable to a request for access to information required for pending court proceedings. In view of the importance of the right of access to information, it is desirable that this Court should adjudicate the case. Moreover, there are prospects of success. Two courts have reached divergent outcomes on the same issue. In these

[9] *IDC* above n 3 at para 13.

circumstances I am satisfied that it is in the interests of justice that leave to appeal be granted.

Merits

[17] The only issue raised on the merits is whether the Supreme Court of Appeal was correct in holding that PAIA does not apply to this case. The answer to this question turns on the proper interpretation of section 7(1) of PAIA and Rule 38(1), with a view to determining whether this Rule constitutes legislation contemplated in section 7(1)(c).

[18] When construing section 7(1) it must be borne in mind that the purpose of PAIA is to give effect to the right of access to information. On the contrary, section 7 excludes the application of PAIA. A restrictive interpretation of the section is warranted so as to limit the exclusion to circumstances contemplated in the section only. A restrictive meaning of section 7(1) will thus ensure greater protection of the right.

[19] Section 7(1) provides:

> "This Act does not apply to a record of a public body or a private body if—
> (a) that record is requested for the purpose of criminal or civil proceedings;
> (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
> (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

[20] It is plain from its language that the section lays down three conditions which must be met if the application of PAIA is to be denied. First, access to information must be sought for the purpose of civil or criminal proceedings. Second, the request must be made after the commencement of the proceedings. And third, access to the record or information must be provided for in another law.

[21] In determining whether each condition has been satisfied, it is important to keep in mind the purpose served by the exclusion. Regarding this, the Supreme Court of Appeal rightly said:

> "The purpose of s 7 is to prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings. In the event that 'the production of or access to' the record 'is provided for in any other law' then the exemption takes effect. The Legislature has framed s 7 in terms intended to convey that requests for access to records made for the purpose of litigation, and after litigation has commenced, should be regulated by the Rules of Court governing such access in the course of litigation."[10] (Footnote omitted.)

[22] It is common cause that the first two conditions have been established here. The dispute relates to condition (c) only. The question to be determined is whether Rule 38(1) constitutes "law" envisaged in section 7(1)(c). The determination of this narrow issue depends on the interpretation given to Rule 38(1). As the subrule is crucial to this enquiry, I consider it necessary to quote it in full. It reads:

> "(a) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which

[10] *IDC* above n 3 at para 9.

> subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.
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> If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial.
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> (b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape recording and make copies or transcripts thereof, after which the witness is entitled to its return."

[23] If read literally, the text of the Rule suggests that the process of issuing a *subpoena duces tecum* can be employed only in circumstances where attendance of a witness is sought for the purpose of testifying at a trial. And if such "witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial." The subrule goes on to state that any witness who is required to produce tangible evidence of the types listed above, must hand it over to the registrar as soon as possible, unless the witness claims that the evidence in question is privileged. Once it is given to the registrar the parties are entitled to inspect it and make copies.

[24] Invoking the literal meaning of the subrule, counsel for the applicants argued that Rule 38(1) does not amount to law contemplated in section 7(1)(c) because it

authorises the issuing of a subpoena to secure the attendance of a witness at a trial, for the purpose of producing evidence. It was submitted that when the request for access was made, the applicants did not know whether the information sought would constitute evidence at the trial and they could not tell whether it would be necessary for them to call the IDC officials as witnesses at the trial. In any event, counsel submitted, a trial date was not fixed at the relevant time.

[25] If the literal approach to construing Rule 38(1) was correct, the argument advanced by the applicants would have merit. But the Rule must be generously and purposively interpreted so as to give the holders of the right the fullest protection they need.

[26] In addition, section 39(2) of the Constitution plays an important role in the interpretation of the Rule.[11] In peremptory terms, this section imposes an obligation on all courts to promote "the spirit, purport and the objects of the Bill of Rights", when interpreting legislation. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*[12] this Court observed:

> "A court is required to promote the spirit, purport and objects of the Bill of Rights when 'interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of

[11] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[12] [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

> developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law."[13] (Footnotes omitted.)

[27] The Supreme Court of Appeal rejected the narrow, literal reading of the Rule and opted for a construction that promotes wider access to information. This construction is also in line with the purpose for the exclusion of PAIA in cases where access to information is regulated by the rules of court. Even before the adoption of the Constitution in 1994, our courts construed the rules in a manner that advanced the process of litigation if the literal reading would hamper its progress.

[28] In *Trust Sentrum (Kaapstad) (Edms) Bpk and Another v Zevenberg and Another*,[14] the Cape High Court rejected the argument that it was not competent for a party to use a *subpoena duces tecum* if the person to whom it applies was not intended to be called as a witness at a trial. The Court said:

> "I am, however, far from satisfied that the witness referred to in Rule 38(1*)(b)* must of necessity be obliged to testify under oath at the trial, for the following reasons, viz (i) however *bona fide* a party may be in issuing a subpoena *duces tecum* on some person to produce a certain document in his possession at the trial, ie intending to call such person as a witness, it would be idle to have him go into the witness-box if both parties were satisfied with their inspection of the document when handed to the Registrar, merely because he had to be a witness; (ii) the Cape practice did not require the person under a subpoena *duces tecum* to produce whatever documents he was called on to bring to Court to produce them under oath in the witness-box . . . and

[13] Id at para 27.

[14] 1989 (1) SA 145 (C).

> Rule 38(1)*(b)* was beyond doubt introduced into the rules to make the Cape practice applicable in all the Divisions of the Supreme Court, and indeed to streamline that procedure by requiring production (also not under oath) prior to the trial. It is unnecessary for me to hold in this matter that the word 'witness' should read 'person', but it seems to me that fully to achieve what the draftsman of Rule 38(1)*(b)* so sensibly set out to do the word 'person' should be substituted for the word 'witness'."[15]

[29] The statement quoted above demonstrates some of the anomalies brought about by the literal construction of Rule 38. It is difficult to imagine how a party that is still to have access to a document can positively tell that a document would definitely be tendered as evidence at the trial. It seems to me that access must precede the formulation of an opinion regarding whether a particular document would have any evidential value at the trial. Limiting the scope of the Rule to documents that are to be tendered as evidence and persons who are going to testify results in an absurdity. Furthermore, the literal construction would also lead to the application of PAIA and Rule 38 to the same case, depending on the stage of the proceedings. PAIA would apply before the trial date is set and Rule 38 afterwards.

[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice.[16] It is this power that makes every superior court the master of its

[15] Id at 149F-J. See also section 30(1) of the Supreme Court Act 59 of 1959 (Supreme Court Act) which provides that:

> "A party to civil proceedings before the court of any division in which the attendance of witnesses or the production of any document or thing is required may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of court."

[16] Section 173 of the Constitution provides:

own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.

[31] It is the flexibility of the interpretation and application of the rules of court that affords the applicants access to the same documents they sought under PAIA. In some cases a mechanical application of a particular rule may lead to an injustice. For example, the Supreme Court of Appeal issued directions dated 28 February 2011 in terms of which parties are given permission to deliver applications for leave to appeal to the Registrar of that Court even if some documents required by its Rules are outstanding.[17] These directions also excuse parties from lodging formal applications for condonation for not complying with section 21(2) of the Supreme Court Act, regarding the period within which an application for leave should be submitted to the Court. It is therefore necessary for courts to have the power to adjust the application of rules to avoid injustices. Moreover, the court rules are tailored to facilitate introduction and management of cases under the courts' supervision.[18] I agree with

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> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[17] Practice Directions: Supreme Court of Appeal 2011 (2) SA 523 (SCA) at paras 1-2, which in relevant part provide:

> "Because of problems experienced in obtaining orders from registrars in High Courts, the registrar will, for the time being, accept applications for leave to appeal or notices of appeal without the certified copy of the order as required by rule 6(2)*(c)* or 7(3)*(c).* Instead, a letter from the registrar of the court certifying the date of the order will be sufficient.
>
> If an application for leave to appeal is filed within 21 court days, instead of within 21 ordinary days as required by s 21(2) of the Supreme Court Act 59 of 1959, it will, for the time being, not be necessary for the applicant to apply formally for condonation for the failure to comply with that provision."

[18] *Bladen and Another v Weston and Another* 1967 (4) SA 429 (C) at 431.

the Supreme Court of Appeal that allowing PAIA to apply in cases such as this would be disruptive to court proceedings.

[32] For all these reasons, I am persuaded that the Supreme Court of Appeal held correctly that Rule 38(1) constitutes a law contemplated in section 7(1)(c) of PAIA and that as a result PAIA does not apply to this case.

Costs

[33] Although this case raises a constitutional issue, it is essentially a commercial matter. The claim in the trial which is still to come before the High Court relates to the transfer of company shares. Significantly, the present dispute is not about the denial of the right of access to information. As construed by the Supreme Court of Appeal, Rule 38(1) would afford the applicants access to the same documents they sought under PAIA. When asked why they pursued an appeal instead of seeking access to the relevant information in terms of Rule 38, their counsel informed this Court that they considered that the Supreme Court of Appeal was wrong. In these circumstances I can think of no reason why the applicants should not bear the costs.

Order

[34] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

For the Applicants:	Advocate D Shaw QC, Advocate M Harcourt SC, Advocate N Ferreira instructed by Barkers Attorneys.
For the Respondent:	Advocate P Olsen SC, Advocate H Gani instructed by Norton Rose South Africa (incorporated as Deneys Reitz Inc).