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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23709/2015

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

FEIZAL GAFOOR

APPLICANT

and

**LAKEWOOD HOMEOWNERS ASSOCIATION
REGISTRATION NUMBER 2005/033750/08**

FIRST RESPONDENT

**TRAFALGAR PROPERTY AND FINANCIAL
SERVICES (PTY) LTD**

SECOND RESPONDENT

JUDGEMENT

COLLIS AJ:

INTRODUCTION

[1] This is an application brought in terms of the Promotion of Access to Information Act, 2 of 2002 ("PAIA"), wherein the Applicant seeks to compel the Lakewood Homeowners Association NPC, and its agent, Trafalgar Property Financial Services (Pty) Ltd, to deliver a set of records requested under section 50(1).

BACKGROUND

[2] During August 2007, the Applicant purchased an immovable property described as Erf [...] Lakewood Estate, being unit number [...], Ormonde Extension 36 Township.

[3] During or about February 2014, the Applicant entered into a sale agreement with a third party to sell the said property. The Applicant was required to obtain a clearance certificate from the First Respondent so as to finalise the sale. At the time, the Second Respondent (an agent of the First Respondent) informed the Applicant that before a clearance certificate could be released by the First Respondent, the Applicant was required to pay an amount of R 269 370 in late building penalties to the First Respondent. The late building penalties were incurred in the period June 2009 to December 2013.

[4] The Applicant under protest proceeded to pay the late building penalties amount in order not to jeopardise the sale. Pursuant to the aforesaid payment the property was ultimately registered into the name of the new owner on or about 23 April 2014.

PREScribed LEGISLATIVE FRAMEWORK

[5] Under section 50(1) of PAIA, a person is entitled to obtain access to records held by a private body only if:

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

[6] From the section quoted above there are two threshold requirements that must be satisfied before the Act can find applicability to a private body such as the First Respondent, namely that:

6.1 Firstly, the records must be reasonably required for the exercise or protection of any rights.

6.2 Secondly, the request for access to those records must comply with the procedural requirements of PAIA.

[7] Further, access to record is regulated by Section 32 of the Constitution¹ which provides as follows:

“S 32(1) Everyone has the right to access to-

- (a) any information held by the state; and

¹ Act 108 of 1996

(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.”

[8] In the founding affidavit², the Applicant alleges that after making payment of the penalty levies, under protest, he instructed his attorney to address a letter requesting documentation from the Respondents, for purposes of computing the penalty amount.

[9] In essence the Applicant alleges that unless he is furnished with the documentation sought, he would not be able to prepare his case challenging his liability for the penalty. On the 26th February 2015 the Applicant had not received a response to his letter. He then directed a formal request to the First Respondent for access to record of a private body, in terms of section 53(1) of PAIA, read together with regulation 10.

RESPONDENT’S BASIS FOR REFUSAL TO FURNISH THE DOCUMENTS AS REQUESTED

[10] The Respondents deny any obligation to provide the Applicant with copies of the requested documents for the following reasons:

10.1 As the Applicant is no longer a member of the Association, his rights of access to the Association’s information are therefore curtailed.

² FA para 11-20 pages 10-13

10.2 During the period that the Applicant was a member of the Association, he was fully informed of the late building penalty and at the time he had every opportunity to request any additional information.

10.3 The request to be furnished with the said documents is considered to be pre-action discovery for which the Applicant had no automatic right, for his contemplated litigation against the Association. The Applicant has failed to demonstrate exceptional circumstances to justify pre-action discovery.³

[11] At paragraph 33 to the Answering Affidavit, the Respondents sets out, that the tax invoice dated 13 March 2014 clearly specifies the amounts of the late building penalties for the different periods of non-compliance. Furthermore, after service of the application on the Respondents, the Respondents' attorney in good faith wrote a letter to the Applicant on 8 October 2015, wherein the bulk of the documents so requested were attached, and an offer was made to pay the Applicant's costs in preparing the founding papers.⁴

[12] The Respondents explained that the reasons for the documents not provided were the following:

All resolutions and minutes pertaining to penalties⁵

12.1 As the Applicant is no longer a member of the Association he has no existing right to claim these documents under the Association's Constitution. In this regard the Applicant has also failed to explain why these documents are required for the exercise or protection of any right. All minutes of all AGM's have already been provided during October 2015 and that no signed resolutions pertaining to building

³ AA para 10 pg 52-53

⁴ AA para 40 pg 60

⁵ AA para 45 to 48 pg 62

penalties exist as the Architectural Guidelines provides for the imposition of such penalties.

*List of Directors and members of the Lakewood Homeowners Association*⁶

12.2 In this regard the Respondents allege that copies of the minutes of the AGM's provided contain a full list of directors dating back to 2009, but that the Applicant has no basis to request a list of directors as from inception of the Association prior to him becoming a member of the Association.

*Additional invoices relating to penalties.*⁷

12.3 In this regard the Applicant requested all invoices issued from 21 August 2007 to December 2013. The only invoices relevant would be those that reflect the late building penalty which was levied. It is alleged that the Applicant was issued with invoices for October, November and December 2010. In respect of all other periods it was the practice to only issue invoices upon receipt of payments, such as the tax invoice issued during March 2014.

*List of penalties imposed on other owners*⁸

12.4 In this regard the Respondents refused to furnish this document as it denied that the Applicant has satisfied the threshold requirement under section 50(1)(a) of PAIA. What penalties, if any, imposed on other owners has no bearing on the Applicant in order for him to protect or exercise any of his rights.

⁶ AA para 51 to 53 pg 63

⁷ AA para 58 to 59 pg 65

⁸ AA para 61 to 65 pg 66

[13] The Applicant in his Replying Affidavit⁹ sets out, the remainder of the documents that he had not been provided with are required firstly because he was a former member of the Association and as such he is entitled to have access to such documents. As a former member he was entitled to have received all minutes, invoices, records and a list of directors. Furthermore, that he has a reason to believe, that the building penalty imposed on him, was done without proper deliberation and as such he requires a list of penalties imposed on other owners, in order to ascertain his legal rights and to formulate his claim. In addition to the above, the Applicant further contends, that the number of directors was not at all times in accordance with the First Respondent's memorandum of association.

[14] At the hearing of the application, counsel for the Applicant had submitted that the Applicant only still persist with the application in so far as para 1.1; 1.7; 1.8 and 1.9 of the Amended Notice of Motion. Counsel also confirmed that the Respondents no longer needed to apply for condonation in respect of their Answering Affidavit which was filed late.

[15] In *Clutchco (Pty) Ltd v Davis*¹⁰ it was held that the phrase: "required for the exercise or protection of any rights" as mentioned in section 50(1) (a) means that the record must be "reasonably required."

15.1 The Applicant must demonstrate some "substantial advantage or element of need".¹¹

⁹ RA para 38 to 45 pg 215

¹⁰ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at paras 12-13

¹¹ *Company Secretary, Arcelomittal South Africa Ltd And Another v Vaal Environmental Justice Alliance* 2015 (1) SA 436 (SCA) at para 50

15.2 “Substantial advantage or need” denotes less than absolute necessity, but more than mere usefulness.¹²

[16] In order to satisfy this threshold requirement, the Applicant must lay a proper foundation as to why the documents are reasonably required for the exercise or protection of his or her rights.¹³

[17] The SCA explained this burden which an applicant carries in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* as follows:

“It follows that, in order to make out a case for access to informationan applicant has to state what the right is that he wishes to protect, what the information is, which is required, and how that information would assist him in exercising or protecting that right.”

[18] As mentioned in paragraph 8 above, the Applicant, in relation to his claim to be instituted, merely sets out that he wishes to contest his liability for payment of such penalty and it is for this reason that the said documents are required. The Applicant failed to set out how the information he requires would assist him in exercising or protecting his right. In this regard he also provides no specifics as to the claim he intends to institute and why with the information already at his disposal he is unable to formulate his claim.

¹² *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at para 16

¹³ *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) at para 12

[19] Having regard to the threshold requirements set out in section 50(1)(a) and the case law made reference to above, I am unable to find that the Applicant reasonably requires the outstanding documents in order to exercise or protect any of his rights.

ORDER

[20] In the result I make the following order:

20.1 The application is dismissed in so far as paragraphs 1.1; 1.7; 1.8 and 1.9 of the Amended Notice of Motion.

20.2 The First and Second Respondents are awarded the costs incurred upon the attendant of two counsel.

C. J. COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION JOHANNESBURG

APPEARANCES:

COUNSEL FOR APPLICANT:	Adv T. Lipshitz
INSTRUCTED BY:	Yousha Tayob Attorneys
COUNSEL FOR FIRST & SECOND RESPONDENTS:	J.J. Meiring SC and C. McConnachie
INSTRUCTED BY:	Abba Parak Incorporated
DATE OF HEARING:	04 August 2016
DATE OF JUDGMENT:	08 December 2016

