


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: <del>YES</del> /NO
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3) REVISED: <i>yes</i>
<i>13/2/2025</i> 
DATE SIGNATURE

**CASE NO: 38545/2022**

In the matter between:

**CAROLINA LOCAL ECONOMIC DEVELOPMENT CENTRE**

1<sup>st</sup> Applicant

**LUMKILE TERRENCE SIBEKO**

2<sup>nd</sup> Applicant

and

**ILIMA COAL COMPANY (PTY) LTD**

1<sup>st</sup> Respondent

**ELLIOT OTTY MAHLANGU N.O.**

2<sup>nd</sup> Respondent

**WALTER PHILLIP MOHLAKO N.O.**

3<sup>rd</sup> Respondent

**MOKGADI EDWIN MAKOBELA N.O.**

4<sup>th</sup> Respondent

**WILLEM ANDRIES N.O.**

5<sup>th</sup> Respondent

ILIMA DEVELOPMENT AGENCY (PTY) LTD

6<sup>th</sup> Respondent

TIBAYA FARMING (PTY) LTD

7<sup>th</sup> Respondent

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## JUDGMENT

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*(The matter was heard in open court and judgment was reserved. The reserved judgment was delivered by handing it down and uploading thereof onto the electronic file of the matter on CaseLines. The date of uploading the judgment onto CaseLines is deemed to be the date of the judgment).*

BEFORE: **HOLLAND-MUTER J:**

[1] The Applicants approached the court for relief under section 78 read with section 82 of the Promotion of Access to Information Act, 2 of 2000 ("PAIA"), reviewing and setting aside the decisions taken by the First to Seventh Respondents (collectively referred to as the Respondents) refusing to give the Applicants access to information sought by the Applicants.

**PARTIES:**

**Applicants:**

[2] The **First Applicant** is a Non-Profit Organisation registered in terms of the Non-Profit Organisation Act, 1997, with its registered address at Office no 32,

Steyn Street, Carolina in Mpumalanga. The **Second Applicant** (L T Sibeko referred to as "**Sibeko**") is the General Secretary of the First Applicant.

### **Respondents:**

[3] The **First Respondent** is Ilima Coal Company (Pty) Ltd ("**Ilima Coal**") operating in the Carolina district.

[4] The **Second to Fifth Respondents** are the trustees for the Carolina Development Trust ("the **Trust**"). The Trust operates in the Carolina district. Two of the trustees reside in Carolina while the other two reside in Gauteng.

[5] The Trust was established in 2005 by Ilima Coal (recognised as a '**Public Benefit Organisation**' {**PBO**}) in terms of section 30 of the Income Tax Act.

[6] The Trust's objective is to effect sustainable community development in the Carolina area through:

6.1 Stimulating and facilitating economic development to eradicate poverty;

6.2 Assisting in job creation as well as preparing aspirant employees for the job market;

6.3 Promoting and supporting education and training projects;

6.4 Promoting and supporting participation in sport and recreation; and

## 6.5 Promoting tourism, arts and culture in the area.

[7] Ilima Coal established the trust in the area where it's mining operations takes place to achieve its social objectives as committed in its Social and Labour Plan ("SLP"). The trust was to carry Ilima's initial social development.

[8] The **Sixth Respondent** is Ilima Development Agency (Pty) Ltd (Ilima Development) with the mission and vision to develop sustainable community development in the Chief Albert Luthuli Municipality (Carolina district) to improve the quality of life for the people of the area. The intention with the Sixth Respondent was to broaden the development activities of Ilima Coal to include other mining operations and other businesses operating in the area. The underlying remained to address poverty and to create sustainable development in the area.

[9] Ilima Development established a cordial relationship with the Chief Albert Luthuli Municipality.

[10] The **Seventh Respondent** is Tibaya Farming (Pty) Ltd ("Tibaya"). Tibaya was formed during 2009 as a Social and Labour Plan for Ilima Coal. Tibaya was formed to house various farming ventures with the main aim to create job opportunities in the agricultural sector for the community of the Chief Albert Luthuli Municipality. Tibaya owns 194 hectares of land and leases some 1 000 hectares of land from other entities from where it performs its duties. Ilima is the main funder of Tibaya.

[11] The Respondents are four different entities and the Applicants deemed it prudent to approach this court with one application seeking (1) a declaratory order that the Respondents' decisions (four independent decisions) to refuse Applicants access to information sought is unlawful and in conflict with PAIA.



The further relief amounts to four separate orders, Prayers (b) to (e) of the Notice of Motion and (3) costs against those who opposes the application.

[12] The above summary of the Respondents objectives and development of the local community is very brief. It is clear that although Ilima Coal (the First Respondent) is the initial founder of the other entities, each entity focuses on its specific terrain.

### THE REQUESTS:

[13] The Applicants (requestors) request to the *First Respondent* is for the annual reports submitted to the Department of Minerals and Energy for the Social and Labour Plan from 2018 until 2022.

[14] The Applicants (requestors) request to the *Second, Third, Fourth and Fifth Respondents*, in their capacity as trustees of the Carolina Development Trust, is for information as listed in annexure "A" to the Notice of Motion.

[15] The Applicants (requestors) request to the *Sixth Respondent* is for the information as listed in annexure "B" to the Notice of Motion.

[16] The Applicants (requestors) request to the Seventh Respondent is for the information as listed in annexure "C" to the Notice of Motion. *A copy of annexures A, B & C annexed at the end of the judgment.*

[17] I will deal with the magnitude of the contents of the requests below.

[18] The Respondents opposed the application on the following grounds:

18.1 The Applicants failed to comply with the provisions of PAIA rendering the application fatally defective and premature;

18.2 The Applicants failed to first exhaust the obligatory mechanisms provided for in terms of section 78 of PAIA. Failure to do so is dispositive of the application;

18.3 The Applicants launched a single application to four separate decisions to request in one application four different and separate requests for access to information relating to each of four different entities represented amongst the Respondents. This amounts to a misjoinder of parties and will be addressed below.

18.4 The Applicants seek to vindicate a constitutional right of access to information but they have no standing in terms of the Bill of Rights lacking the necessary *locus standi*.

18.5 The Applicants failed to establish a right of access to the records of the four separate Respondents;

18.6 The Second Applicant has no *locus standi*, failed to apply in his own name for any records and is merely acting in a representative capacity;

18.7 The First Applicant is not a beneficiary of the Trust;

18.8 The Board of the First Applicant was not empowered by its members to institute any litigation against the respective Respondents for failure to obtain the necessary authorisation of its members;

18.9 The Respondents, with the exception of the Trust, are all located in the Carolina district in the jurisdiction of the Mpumalanga High Court. The trustees of the trust, but for two of the trustees residing in Gauteng, are all resident in Carolina district. The misjoinder of non-resident parties does not vest this court with jurisdiction;

18.10 The documents sought by the Applicants amounts to a fishing expedition. The documents are not properly identified and the Applicants have not shown why they need access to the documents, what right(s) they intend to protect and failed to show why these documents are required. The application is a mere trawling exercise to see what can be trawled in.

[19] The above mentioned grounds to oppose the application are all dispositive of the application and each sufficient to dislodge the application.

#### **FAILURE TO COMPLY WITH PROVISIONS OF PAIA:**

[20] The legislator deemed it necessary to avoid the unnecessary litigation in respect of requests for access to information by establishing the **Information Regulator** in terms of section 39 of the ***Protection of Personal Information Act, 4 of 2013 ("POPI")***. The process to facilitate access to information is balanced to protect the right to information with the rights of protecting information. This process is a strict control mechanism to prevent unnecessary litigation in this regard.

[21] A requestor must follow and comply with the prescribed process to facilitate access to information and failure to comply with the provisions of PAIA and POPI is terminal for an application.

[22] Section 53 of PAIA prescribes the process and form of such application to a private body requesting access to information held by the private body. The form for a request for access for purposes of this provides that the requestor must at least:

(i) provide sufficient particulars to enable the private body concerned to identify the record(s) requested and the requestor;

(ii) to indicate which form of access is required;

(iii) to specify a postal and or fax address of the requestor in the Republic;

(iv) to identify the right the requestor is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right;

(v) that the requestor be informed of the decision of the request; and

(vi) if the request is made on behalf of a person, to submit proof of the capacity in which the requestor is making the request to the reasonable satisfaction of the private body.



[23] In **The Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others [2001] ZASCA 56 on 30 March 2001** in [28] it was 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, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is requested and how that information would assist him in exercising or protecting that right."*

[24] In the present application before the court the applicants failed to state (i) what the right is they wish to protect; (ii) they did not state with sufficient precision what information is requested , and (iii) failed to set out how that information would assist in exercising or protecting that right.

[25] Section 78(1) of PAIA deals with applications to court and is applicable on the application before the court. Any non-compliances or failures to comply with pre-emptory provisions are fatal for the present application before the court.

[26] A similar approach was followed in **Elite Plumbing and Industrial Solutions (Pty) Ltd v Casper Le Roux Attorneys and Another 2023 JDR 0756 (GJ)** in [11] that *"Stated differently, an aggrieved requestor who has not exhausted the internal appeal procedure referred to in section 74 or the complaints procedure referred to in section 77A may not approach a court for relief in terms of section 82"*.

[27] The Constitutional Court echoed similar in **Brummer v Minister for Social Development and Others 2009 (6) SA 323** in [43] that *"Section 78(1) provides that a requestor or a third party seeking relief in terms of section 82 may only do so after exhausting the internal appeal procedures provided for in PAIA"*.

[28] The Constitutional Court has ruled in **Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 A** at [35-36] that where the exhausting of an internal remedy is expressly stated in legislation, no action could be instituted before compliance with internal procedure is met. If not, it would open the proverbial floodgates of direct litigation. There has to be compliance with prerequisites in legislation before courts be approached for relief.

[29] The court is of the view that the Applicants failed to comply with the requirements of PAIA.

#### **MISJOINDER:**

[30] The Applicants launched a single application seeking relief against four different entities because these entities separately refused applicants' request of access to information from each individual entities. The test to join separate entities in one application/action is governed by Rule 10 of the Uniform Rules of Court. The gist for successful joinder is the relief sought from the individual entities are substantially the same question of law or fact.

[31] The Applicants relief is for access to information from each individual entity but the specific information sought is different in each instance. There are four different lists being sought from the respondents. Annexures "A" & "B" are mere extracts from the Company Act and lacks specific clarity why all of the listed documents are needed by the Applicants. A mere shotgun approach firing into a bush waiting to see what emerges is not what is required. There is in my view no overlap of information sought from each entity which overlap in cause of action. To further cloud the issue is the vagueness of the right(s) sought to be protected by the Applicants. There is no common overlapping in the information that is sought from the different entities.

[32] What is requested cannot be argued to be what was decided in **Mossgas (Pty) Ltd v ESKOM and Another 1995 (3) SA 156 (W)**. There is no “same right” calling for protection and the respondents will have to reply to allegations relating to other parties without any knowledge thereto. Eg respondent 1 would not be able to reply to allegations made about respondent’s seven’s refusal to supply information. None of the Respondents would be in a position to reply to the requests made to the other Respondents because the information sought from one respondent does not fall within the knowledge of the other respondents.

[33] I am of the view that the joinder amounts to a misjoinder and an abuse of Rule 10.

#### **LACK OF LOCUS STANDI:**

[34] The Applicants seek to protect their alleged constitutional right to access to information. Section 38 of the Constitution lists the persons who have the right to approach the court alleging that a right has been infringed or threatened requesting the relief sought.

[35] The annexed constitution of the First Applicant is silent on the office bearers and who may represent the First Applicant. There is further proof of elected office bearers and it is not possible to determine whether the second applicant is the general secretary as alleged and whether he was authorised to depose to the founding affidavit. There is no proof that he is a member of the first applicant.

[36] The constitution of the First Applicant provides for office bearers with a term of office for three years. The First Applicant was created during 2017 and no proof of later elections is submitted. Clause 2 of the constitution authorises



the Board to litigate on behalf of the organisation mandated in terms of clause 5 by the membership. There is no list of office bearers' portfolios, who the present board members are and whether the Second Respondent was authorised to depose to the founding affidavit on behalf of the First Applicant or that he was authorised to litigate in his alleged portfolio as general secretary. This is fatal for the application.

[37] The Second Applicant never applied in his personal capacity for any of the information which is now sought. He is barred from applying for the information because he did not request it at any stage earlier. In **Giant Concerts CC v Rinaldo Investments (Pty) Ltd JDR 2298 (CC)** in [48] it was held that an own-interest litigant must demonstrate that his or her interests or potential interests are directly affected by the conduct of the refusing of the request, the present application is premised on the alleged protection of the Applicant's right. The Second Applicant cannot on his own seek the relief sought for lack of his direct interest therein and his failure to request the information earlier as set out above.

[38] A representative in general does not have

[38] The Respondents requested the Applicants with a Rule 7 Notice to provide it with the necessary power to institute litigation on behalf of the Applicant. *locus standi* to sue or be sued in his own name where he has not obtained rights in his own name. The Second Applicant did not request any of the documents in his own name and therefore has no *locus standi* to issue application as was done here. See **Sentrakoop Handelaars Bpk v Lourens and Another 1991 93) SA 540 (W) at 545** where it was held that "*I am therefore of the view that both principle and on the authorities it is not proper for an agent to sue as representing his principal by suing in his own name, where the claim being enforced is that of the principal*".



[39] This request remains unanswered to date of arguing the application. It confirms that the necessary authorisation was never obtained from the Applicant for the general secretary to litigate as the power to institute litigation is not one of the powers listed in clause 5 of its constitution.

[40] The court is of the view that the Applicants have failed to establish its *locus standi* to launch the application and for this reason the application should fail.

### **DID THE APPLICANT ESTABLISH A RIGHT TO ACCESS OF THE RESPONDENTS RECORDS?**

[41] Section 50(1) of PAIA clothes a requestor with the right to access to any record of a private body subject to:

(i) the requestor must aver that the record is necessary to exercise or protect a right;

(ii) such requestor must comply with procedural requirements of PAIA relating to a request for access to information, and

(iii) access to information will not be refused in terms of any ground of refusal contemplated in Chapter 4 of the act.

[42] In **Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA)** in [17] it was held that a requestor cannot show that the information will be of assistance for the stated purpose ... and mere compliance with the threshold requirement of 'assistance' will not be enough. The reasonably required

information is about as precise a formulation as can be achieved. In the matter before the court the applicant merely avers a constitutional right but fails to give a precise formulation of the right.

[43] The court in **Unitas (supra)** in [6] stated that the exercise or protection of any right in the context of section 50(1) gives rise to a fact based enquiry and does not allow for abstract determination.

[44] In **Company Secretary of Arcelormittal SA v Vaal Enviromental Justice Alliance 2015(1) SA 515 (SCA)** in [50] it was held that a requestor should lay a proper foundation for why the documents are reasonably required for the exercise protection of a right. The Applicants have failed to lay such foundation in this matter and as referred to supra and are on a trawling expedition to see what may be caught in the trawl net.

[45] The Applicants have failed to establish and demonstrate that it has a right in the documents sought; failed to identify with sufficient precision the exact documents sought to exercise its right and lastly failed to establish and identify exactly what right they are seeking to protect.

[46] The court cannot allow vague speculative litigation in terms of PAIA.

[47] The volume of documents sought is as such that the request amounts to nothing more than the proverbial fishing expedition hoping to trawl something of value and use. **Annexures "A", "B" and "C"** to the Notice of Motion is clearly a reproduction of an example what documents may be requested but the Applicants failed to indicate with precision why historical documents of some seven years ago will assist in their quest to protect their unidentified right. The list includes "*working papers*" which are not in the possession of the Respondents and legal agreements entered into by the Respondents with

other entities. The volume of documents requested and the vague reference to documents in general by the Applicant makes it unpractical to identify specific documentation needed to protect the vague averred right. On this ground the application is still born.

[48] Regulation 45 of the *Mineral and Petroleum Resources Development Regulations* provide that the holder of mineral rights must submit an annual report on compliance with the approved Social and Labour Plan to the relevant Original Manager. This places a duty on in this instance the First Respondent to adhere to the regulation.

[49] The object of regulation 45 is to determine whether the holder of mineral rights have complied with the regulation. It is not for the Applicants to request these documents from the First Respondent because the Applicants have no right in terms of regulation 45 and it is not for them to determine whether there was compliance with the regulation. They can at most approach the Regional Office of the Department of Mineral and Petroleum Products for the information.

[50] The application in this regard is still born.

#### **APPLICANTS CONTENTION TO BE A BENEFICIERY OF THE TRUST:**

[51] It is clear from the trust deed (annexure "*LTS22*") to the Notice of Motion that the Trustees in their absolute discretion may select one or more beneficiaries to pay these beneficiaries from time-to-time and within their entire discretion so much of the net income of the trust to the beneficiaries. The Applicants have failed to show that they are indeed beneficiaries within the ambit of the discretion of the trustees. Clause 6 of the trust's deed provides for who may be beneficiaries and clause 11 vests the right to decide



on beneficiaries within the absolute discretion of the trustees. The Application should fail in this regard.

#### **LACK OF JURISDICTION:**

[52] It is clear that the First, Sixth and Seventh Respondents are all resident and/or trading in Carolina within the jurisdiction of the Mpumalanga High Court.

[53] Two of the trustees of the Carolina Development Trust are resident in **Carolina** and therefore within the jurisdiction of the Mpumalanga High Court. The other two trustees are resident in the jurisdiction of the Gauteng High Court, but in view of the finding *supra* that there was a misjoinder of parties, the most for the Applicants was to issue application against the trustees in the Gauteng High Court. The main activities of the trust are however within the Carolina District and for practical reasons application should have been issued in the Mpumalanga High Court. As is at present, in view of all the other issues addressed *supra*, the application is not proper and should be dismissed.

#### **COSTS:**

[54] The purpose of an award for costs to a successful litigant is to indemnify him/her for the expense to which he has been put through to initiate or defend litigation.

[55] The awarding of costs is within the discretion of the presiding judge. This discretion needs to be exercised reasonably on the grounds upon which a reasonable person could have arrived at the conclusion of the matter. See



**Union Government (Minister of Railways and Harbours) v Heiberg 1919 AD 477 at 484.**

[56] The general rule of departure to make an award of costs is that costs are normally awarded to the successful party. Success is determined by in whose favour judgment was given depending on the issues [57] A successful party may under certain circumstances be deprived of costs where the court, as a measure of displeasure with the conduct of a party, decides to penalise it with costs despite success. A court will however inform a party of its intention before making such order to allow the party to address the court why this should not happen.

[58] The court took into account that the Applicants failed to adhere to the procedural prerequisites of PAIA as well as the failure to indicate with precision the right they seek to be protected. The list of information sought (as per annexures A, B & C) amounted to nothing more than a wild goose chase to see what may be found from the documents.

[59] The procedure was nothing more than an abuse of process resulting in the Respondents to oppose an application doomed to fail from the outset. In **Public Protector v South African Reserve Bank 2019(6) SA 253 CC** in [8-9] it was held that costs on an attorney and client scale be awarded where the conduct amounts to vexatious conduct abusing court process.

[60] The difference between attorney-and-client scale and party-and-party scale costs in the high court generally does not differ much because the tariff is much the same but for a few items that are not allowed on a party-and-party scale. See **Albert Kruger /Wilma Mostert Taxation of Costs in the Higher and Lower Courts: A Practical Guide p 14.**

[61] I am of the view that a costs order on the party-and-party scale will be the correct order in this matter.

**ORDER:**

The application is dismissed with costs, the Applicants ordered to pay the costs of the Respondents, jointly and severally, the one paying the other absolved, the costs to be on a party-and-party scale including the costs of senior counsel on Scale C.



HOLLAND-MUTER J

Judge of the Pretoria High Court

Matter heard on 6 September 2024

Judgment handed down on 13 February 2025

Appearances:

On behalf of Applicants: Counsel: Adv B Lukhele

Instructed by: Ledwaba Mazwai Attorneys

Ref: LIT.49/2021/BLS/

Email: [mlm@law.co.za](mailto:mlm@law.co.za)/[bongais@lmz.co.za](mailto:bongais@lmz.co.za)

On behalf of Respondents: Counsel: Adv R Groenewald SC

[advreinhard@gmail.com](mailto:advreinhard@gmail.com)

Instructed by: VZLR Atoorneys ( Mr Waldo Snyman)

Ref: MAT 168060/TW SNYMAN/WSP

Email: [waldo@vzlr.co.za](mailto:waldo@vzlr.co.za) [megan@vzlr.co.za](mailto:megan@vzlr.co.za)

**CAROLINA DEVELOPMENT TRUST: REQUEST FOR INFORMATION**

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1. Accounting records, for the past seven years, in respect of:
  - 1.1. Annual financial statements;
  - 1.2. General ledger;
  - 1.3. Subsidiary ledgers (receivables, payables);
  - 1.4. Bank statements, cheque books, cheques;
  - 1.5. Customer and supplier books, cheques;
  - 1.6. Deposit slips;
  - 1.7. Cash books and petty cash books;
  - 1.8. Tax returns and assessments;
  - 1.9. Budgets and business plans;
  - 1.10. Insurance record;
  - 1.11. Investment records;
  - 1.12. Auditor's reports;
  - 1.13. Accounting officer's reports;
  - 1.14. System documentation;
  - 1.15. Management review;
  - 1.16. Capital expenditure;
  - 1.17. Record of assets;
  - 1.18. Record of liabilities;
  - 1.19. Records of loans to related parties;
  - 1.20. Record of liabilities and obligation;
  - 1.21. Record of revenue;
  - 1.22. Record of expenses.
2. The auditing documents listed below for the past seven years:
  - 2.1. Working papers;
  - 2.2. Correspondence between the Trust and the auditors.
3. Credit provider's agreements for the past seven years.
4. Insurance documents listed below for the past seven years:
  - 4.1. Claim records;
  - 4.2. Details of coverage, limits and Insurers;
  - 4.3. Insurance policies.
5. All legal agreements entered into with third parties for the past seven years.
6. Reports presented at an annual general meeting of the Trust, for a period of seven years after the date of such meeting;
7. Notice and minutes of a trustee meetings, including all resolutions adopted by them, for seven years after the date of each such resolution was adopted.
8. The following information in relation to tax, for the past seven years:
  - 8.1. Income tax returns;
  - 8.2. Provisional tax returns;
  - 8.3. Tax assessments;
  - 8.4. Records relating to taxable gain or assessed capital loss.

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ILIMA DEVELOPMENT AGENCY REQUEST FOR INFORMATION

1. Reports presented at an annual general meeting of the company, for a period of seven years after the date of any such meeting;
2. Annual financial statements in terms of the Companies Act, for seven years after the date on which each such particular statements were issued.
3. Notice and minutes of all shareholders meetings, including—
  - 3.1 all resolutions adopted by them; and
  - 3.2 any document that was made available by the company to the holders of securities in relation to each such resolution,for seven years after the date each such resolution was adopted;
4. Copies of any written communications sent generally by the company to all holders of any class of the company's securities, for a period of seven years after the date on which each such communication was issued; and
5. Minutes of all meetings and resolutions of directors, or directors' committees, or the audit committee, if any, for a period of seven years after the date—
  - 5.1 of each such meeting; or
  - 5.2 on which each such resolution was adopted.
6. Securities register or its equivalent



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