THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 17/19

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST	**APPELLANT**
and	
THE SOUTH AFRICAN RESERVE BANK	**FIRST RESPONDENT**
THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK, L KGANYAGO	**SECOND RESPONDENT**

Neutral citation: *The South African History Archive Trust v The South African Reserve Bank and Another* (Case no 17/19) [2020] ZASCA 56 (29 May 2020)

Coram: CACHALIA, MBHA and SCHIPPERS JJA and MOJAPELO and GORVEN AJJA

Heard: 3 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 May 2020.

Summary: Promotion of Access to Information Act 2 of 2000 – request for records of certain persons – refusal of request – Section 47 applied to records of two persons – failure of information officer to take reasonable steps to inform them of request – access refused – Section 49(2) invoked to make decision – decision to refuse access *ultra vires* – reviewed and set aside and compliance with section 47 directed prior to making decision;
Refusal of access by public body – review of refusal – grounds for refusal sourced in chapter 4 – no basis made out for refusal – decision to refuse reviewed and set aside – access to records to be granted.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where used.

2 The order of the court of first instance is set aside and the following order is substituted:

> '(a) It is declared that the decisions of the respondents to refuse access to the records requested by the applicant in respect of the late Brigadier Blaauw, Mr Robert Hill and Mr Vito Palazzolo in its request for information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) dated 1 August 2014 are unlawful and in conflict with the provisions of PAIA.
>
> (b) The decisions to refuse such access as regards the requested records in respect of the late Brigadier Blaauw, Mr Palazzolo and Mr Hill are reviewed and set aside.
>
> (c) The respondents are directed to provide to the applicant the requested records in respect of the late Brigadier Blaauw.
>
> (d) The respondents are directed to notify Mr Palazzolo and Mr Hill of the request concerning records relating to them in accordance with s 47 of PAIA within 10 calendar days after service of this order on them, and thereafter to comply with the time periods and provisions in Chapter 5 of PAIA.
>
> (e) The respondents are directed to pay the costs of this application, including the costs of two counsel where used.'

JUDGMENT

Gorven AJA (Cachalia, Mbha and Schippers JJA and Mojapelo AJA concurring)

[1] The appellant is a non-governmental organisation. Researchers from the Open Secrets Project are collecting material for a book. The book plans to deal with apartheid era procurement practices and public accountability. It will include analysis of abuses of the financial rand, corruption and foreign exchange transactions under apartheid. This falls within the scope of information archived by the appellant and made available to the public. The research to be undertaken requires documents from that era.

[2] To this end, on 1 August 2014, the appellant lodged a request with the respondents (the SARB)[1] under the Promotion of Access to Information Act 2 of 2000 (PAIA).[2] It requested access to records[3] relating to:

'[A]ny evidence obtained by the bank at any time as part of investigations into any substantial contravention of, or failure to comply with, the law in terms of significant fraud (including fraud through manipulation of the financial rand dual currency, foreign exchange or forging Eskom bonds), gold smuggling or smuggling of other precious metals from 1 January 1982 to 1 January 1995 in relation to the following persons':

(a) The late Mr Giovanni Ricci;

(b) The late Mr Stephanus Petrus (Fanie) Botha (former Minister of Labour/Manpower);

(c) Brigadier Johan Blaauw (believed to be dead);

---

[1] There are two respondents but they shall collectively be referred to as the SARB as was done in the papers.

[2] All references to sections in this judgment are to sections of PAIA unless otherwise specified.

[3] A record is defined in s 1 of PAIA:

'"record" of, or in relation to, a public or private body, means 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.'

In this matter, generally speaking, records exist in the form of documents.

(d) Mr Paul Ekon;

(e) Mr Robert Hill;

(f) Mr Vito Palazzolo;

(g) Mr Craig Williamson; and

(h) Dr Wouter Basson.

[3] The SARB failed to respond timeously but later positively refused access to the records. It stated that it was unable to locate any records for five of the named persons. As regards the remaining three persons, namely the late Brigadier Blaauw, Mr Robert Hill and Mr Vito Palazzolo, the request was refused.

[4] This prompted an application by the appellants to the Gauteng Division of the High Court, Johannesburg, based on s 78(2).[4] The relief still relevant in this appeal which was sought in the application was:

'2 Declaring that the decision of [the SARB] to refuse access to the records requested by [the appellant] in its request for information in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA") dated 1 August 2014 ("the request") is unlawful and in conflict with the provisions of PAIA and the Constitution;

3 Reviewing and setting aside the refusal by [the SARB] of [the appellant's] request;

4 Directing [the SARB] to provide the requested records in respect of Brigadier Blaauw, Mr Ricci, Mr Botha and Mr Hill to [the appellant] within 15 (fifteen) days of the grant of this order;

5 Directing [the SARB] to notify Mr Ekon, Mr Palazzolo, Mr Williamson and Dr Basson within 5 days of the date of this order, of the request, in accordance with s 47 of PAIA and thereafter to comply with the time periods and provisions in Chapter 5 of PAIA;

---

[4] Section 78 deals with applications 'regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies'. The relevant part of s 78(2) provides as follows:
A requester—
. . .
(c) aggrieved by a decision of the information officer of a public body referred to in paragraph *(b)* of the definition of 'public body' in section 1—
(i) to refuse a request for access; or
(ii) taken in terms of section 22, 26(1) or 29(3) . . .
may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.'

6 Directing [the SARB] to pay the costs of this application, including the costs of two counsel;

7 further and/or alternative relief.'

The application was dismissed with costs by Matojane J, who subsequently granted leave to appeal to this court.

[5] In this court, the issues were limited to those records which related to the late Brigadier Blaauw, Mr Palazzolo and Mr Hill. The SARB mounted opposition to the appeal on two bases. The first was that Messrs Palazzolo and Hill had not been joined in the application. The second was that it was justified in its refusal to provide the records sought.

[6] It is as well at this point to sketch the contours of PAIA as it applies to the present matter. It was enacted to give effect to s 32(1) of the Constitution,[5] which provides inter alia that '[e]veryone has the right of access to . . . any information held by the state'.[6] As such, the purpose is to promote transparency.[7] The default position is that access to records must be granted unless chapter 4 of PAIA provides one or more grounds for a refusal.[8] Put another way, 'the disclosure of information is the rule and exemption from disclosure is the exception'.[9] It has been held by the Constitutional Court that, 'when access is sought to information

---

[5] Constitution of the Republic of South Africa, 1996. See the legislative mandate in s 32(2).

[6] This is expressed in the preamble to PAIA:
'To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.'

[7] This is specifically stated in the preamble:
'…AND IN ORDER TO—
* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
* 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 ...'

[8] Section 11(1) of PAIA reads:
'(1) A requester must be given access to a record of a public body if—
(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[9] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) para 9.

in the possession of the State, then it must be readily availed'.[10] A refusal constitutes a limitation of the right of access to information. As such, a case must be made out that the refusal of access to the requested records is justified.[11] All public bodies are required to have a designated information officer (IO) who deals with requests.[12]

[7] It can readily be imagined that records sought from public bodies may contain information about third parties. Such third parties would be unaware of the request. Their rights might be affected if access is given. For that reason, PAIA has been carefully crafted to ensure that such a third party is given opportunities to be heard on the request. Our common law requires that parties must be informed if a court order affecting them might be granted:

'because orders granted without notice to affected parties are a departure from a fundamental principle of the administration of justice, namely, *audi alteram partem*.'[13]

It is this *audi alteram partem* principle which finds expression in ss 47 to 49.

[8] The point of departure is s 47, headed '[n]otice to third parties':

'(1) The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.

(2) The information officer must inform a third party in terms of subsection (1)—

(a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the information officer must—

---

[10] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC) para 23.

[11] In terms of s 36 of the Constitution.

[12] See the definition of 'information officer' in s 1 of PAIA.

[13] Per Cachalia JA in *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* [2019] ZASCA 1; 2019 (3) SA 251 (SCA) para 46.

(a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester;

(c) describe the provisions of section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be;

(d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46*(a)* in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and

(e) state that the third party may, within 21 days after the third party is informed—

(i) make written or oral representations to the information officer why the request for access should be refused; or

(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed orally of a request for access in terms of subsection (1), the information officer must give a written notice stating the matters referred to in subsection (3) to the third party.'

[9] This means that, when a request is received concerning a record which might fall under s 34(1), s 35(1), s 36(1), s 37(1), or s 43(1), the provisions of s 47 are triggered. The SARB relied on ss 34(1), 36(1) and 37(1) in this matter, so s 47 was triggered. At this stage, it suffices to say that this means that the SARB took the view that the records concerned might contain:

(a) personal information whose disclosure would be unreasonable; or

(b) commercial information whose disclosure may cause harm; or

(c) information supplied in confidence which might breach an agreed confidence or could prejudice the supply of similar information or information from the same source where the public interest requires similar information or information from the same source to be supplied in the future.

[10] The IO of a public body must first consider if a document to which access is requested might fall under one of those sections. The threshold is low, as

denoted by the word 'might'. If of that view, s 47(1) requires the IO to 'take all reasonable steps to inform a third party to whom or which the record relates of the request'.[14] The notice can be verbal or in writing and must contain certain information, including the right of the third party to consent or make representations on the request.[15] The third party may then either make written or oral representations supporting refusal, or consent in writing to disclosure, within 21 days. If the third party obtains knowledge of the request by means other than s 47(1), they may nevertheless make representations or so consent.[16] If consent is given, access to the records may not be withheld.[17]

[11] If a decision is made to afford access despite representations to the contrary, notice must be given to a third party who made representations and must state:

'*(a)* adequate reasons for granting the request, including the provisions of this Act relied upon;
(b) that the third party may lodge an internal appeal or an application, as the case may be, against the decision within 30 days after notice is given, and the procedure for lodging the internal appeal or application, as the case may be; and
(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph *(b)*, unless such internal appeal or application with a court is lodged within that period.'[18]

[12] As can be seen from these provisions, third parties have the right to be notified of a request, if reasonable steps taken by the IO would achieve this. They then have the right to make representations opposing disclosure or to consent thereto in writing. If consent is given, the IO has no discretion to refuse access. Even if a third party is not notified, they may make representations or so consent

[14] Section 47(1).
[15] Section 47(3).
[16] Section 48(2).
[17] See s 34(2)*(a)*, s 35(2), s 36(2)*(b)*, s 37(2)*(b)* and s 42(5)*(b)*.
[18] Section 49(3).

if they become aware of the request. If, despite representations to the contrary, the request is granted, any third party who made representations has the right to be notified of the outcome and of the right of internal appeal available to them. If that fails, the third party has the right to approach a court under s 78(3).[19]

[13] If the third party acts timeously in taking all of the steps to oppose access under PAIA, the records are not to be released to the requester until the submissions have been considered and a decision made.[20] This applies to the initial decision, to a decision on internal appeal, to the outcome of an application under s 78(2) and the determination of any appeal or appeals from the application. Finally, if a decision is made to refuse access, and the requester proceeds with an application to court to review that decision, rule 3(5)*(a)* promulgated under PAIA[21] requires the IO or head of the body to give notice of such application to the third party concerned and to attach a copy of the application papers.[22] PAIA is thus astute to afford third parties the right to *audi alteram partem* at every point of the process. All of this stems from compliance by the IO with s 47.

[14] Decisions on requests to which s 47 applies can be made only under s 49(1) or s 49(2). This is of critical importance. The former provides:

---

[19] The relevant parts of s 78(3) are:
'A third party—
(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
(b) aggrieved by a decision of the information officer of a public body referred to in paragraph *(b)* of the definition of 'public body' in section 1 to grant a request for access …
may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.'

[20] Section 21, which reads:
'If the information officer of a public body has received a request for access to a record of the body, that information officer must take the steps that are reasonably necessary to preserve the record, without deleting any information contained in it, until the information officer has notified the requester concerned of his or her decision in terms of section 25 and—
(a) the periods for lodging an internal appeal, an application with a court or an appeal against a decision of that court have expired; or
(b) that internal appeal, application or appeal against a decision of that court or other legal proceedings in connection with the request has been finally determined,
whichever is the later.'

[21] See the Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000 GN R965 in *GG* 32622 of 09-10-2009.

[22] Rule 3(5)*(a)* has since been amended.

'The information officer of a public body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47—

(*a*) decide, after giving due regard to any representations made by a third party in terms of section 48, whether to grant the request for access;

(*b*) notify the third party so informed and a third party not informed in terms of section 47(1), but that made representations in terms of section 48 or is located before the decision is taken, of the decision; and

(*c*) notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)(*e*), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible, and if the request is–

(i) granted, notify the requester in accordance with section 25(2); or

(ii) refused, notify the requester in accordance with section 25(3).'

[15] The action which sets in motion a decision under s 49(1) is thus the informing of a third party under s 47. This is why s 49(1) refers to a third party having been 'informed *as required* by section 47'.[23] Section 49(1) also allows a decision where the third party has not been informed but has 'made representations in terms of section 48 or is located before the decision is taken'.[24] This is so that the *audi alteram partem* principle is applied if a record might fall within one of s 34(1), s 35(1), s 36(1), s 37(1) or s 43(1).

[16] A decision made under s 49(1) requires one or both of two actions to have taken place:

(a) A third party must have been informed 'as required by section 47'; or

(b) A third party, despite not having been so informed, must have nevertheless made representations.

If the third party has not been so informed and if no representations have been received, the provisions of s 49(1) do not apply and the IO is not empowered to make any decision in terms of that section.

---

[23] My emphasis.

[24] Section 49(1)*(b)*.

[17] Once third parties have been informed, there are three possible courses of action open to them. They may consent in writing, in which case access must be given. If they do not consent, they may make opposing representations which must be weighed before a decision is made. Finally, they may neither consent nor make representations. A decision can still be made by the IO in this instance. This is made clear by s 49(1)*(a)*, which provides for a decision 'after giving due regard to any representations'. The word 'any' allows for a decision where notice has been given but no representations are forthcoming.

[18] Under s 49(1), accordingly, a decision is required if either representations have been made or if none have been made after the third party has been informed. In other words, third parties do not have a power of veto over the decision of the IO. Their representations must simply be given the weight that they deserve. The only veto in the hands of a third party is to take away the power of the IO to make a decision by consenting in writing. Access to the records must then be given.

[19] PAIA recognises, however, that it may well not be possible to inform all third parties, despite taking reasonable steps to do so. A decision must still be made in those circumstances. As a result, s 49(2) was enacted:

'If, after all reasonable steps have been taken as required by section 47(1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused.'

This provides the one exception to the requirements in PAIA which provide for *audi alteram partem*. Section 49(2) empowers an IO to make a decision without the third party having had an opportunity to be heard. But the exception, as with all exceptions to the *audi alteram partem* principle, must be narrowly construed. The default position at common law and under PAIA is that, if a decision is to be

made which affects the rights of a person, that person must be given an opportunity to be heard on the matter.

[20] The exception allowed under s 49(2) thus arises only if:

(a) All reasonable steps were taken to notify a third party; and

(b) Despite such steps, the third party was not informed; and

(c) The third party did not make representations in terms of s 48.

Only if all three of these apply is an IO empowered to make a decision under s 49(2). This exception applies only where it has not been possible to give effect to the *audi alteram partem* rule despite all reasonable steps having been taken to give notice. It clearly cannot and does not apply if the IO has not taken all reasonable steps to inform the third party concerned.

[21] In the present matter, the SARB claims to have acted under s 49(2) in making the decision to refuse access to records concerning Mr Palazzolo. It simply says that it acted under s 49 in respect of Mr Hill. As has been shown above, it could not have done so under s 49(1) because Mr Hill was not 'informed as required by s 47'. Neither did Mr Hill make any representations. The SARB must therefore also have purported to make the decision under the provisions of s 49(2). Neither of them was informed of the request and neither of them made representations under s 48. The question is, therefore, in both of their cases, whether the SARB 'took all reasonable steps to inform' them. If not, the SARB was not empowered by the provisions of s 49(2) to make a decision on the request. The conditions for making such a decision would not have been present. Any decision made would thus have been *ultra vires* PAIA as the enabling legislation.

[22] It is common ground that the SARB did not give notice to either of them. In the answering affirmation, the SARB explained the reason for its decision not to give notice under s 47:

'At the relevant time, Mr Ellis was under the impression that both Mr Hill and Brig Blaauw had passed away, and that Mr Palazzolo was incarcerated somewhere in Italy. In the premises, Mr Ellis considered that it would be unreasonable to expect from the SARB to cause notices to be delivered to the remaining individuals, as contemplated in section 47 of PAIA.'

The simple fact of the matter is that the affirmation does not say that Mr Ellis, or anyone else, took any steps at all. It states simply that he 'was under the impression' as to the persons concerned. It is this impression which made him consider 'that it would be unreasonable' to give notice under s 47(1). No indication is given as to how he arrived at the impression he formed. In effect, the SARB decided to take no steps at all. It excused itself from this peremptory requirement on the basis that to require it to do so 'would be unreasonable'. By no stretch of the imagination can it be said that, without evidence of any steps taken at all, all reasonable steps were taken to inform them. There was simply no compliance with s 47(1).

[23] The failure to do so is exacerbated by the later conduct of the SARB. After the launch of the application, by letter dated 15 April 2016, the attorneys for the SARB indicated that the point would be taken that the three persons concerned had not been joined as parties to the application. This prompted a response dated 22 April 2016. In it, the appellant pointed out that the SARB had been obliged to take all reasonable steps to inform Messrs Palazzolo and Hill under s 47(1). It accordingly called on the SARB to do so at that stage and indicated that, if it did not do so, the appellant would include a prayer for such relief in an amended notice of motion.

[24] This prompted a reply dated 28 April 2016:

'[C]ompliance by our clients with the provisions of the Promotion of Access to Information Act 2 of 2000 ("PAIA") (including section 47 of PAIA) cannot and does not obviate the obligations placed on your client in terms of the Uniform Rules. For the avoidance of doubt,

we, however, confirm that our clients have consistently complied and continue to comply with the provisions of PAIA in so far as the provisions relate to our clients …'

The SARB, after being given the opportunity to comply even at that stage, simply reiterated that it would raise the point of non-joinder if the appellant did not join 'the relevant individuals' in the application.

[25] In the answering affirmation, delivered after this exchange, the SARB said:

'... since the launching of these proceedings, Werksmans managed to trace Mr Palazzolo's whereabouts to a prison in Spoleto, Italy and caused a copy of the application to be provided to him in terms of rule 3(5) of the PAIA Rules ... The SARB has taken the stance that Mr Palazzolo should be joined to the proceedings to the extent that the relief sought by the applicant affects Mr Palazzolo's interests.'

Notice under rule 3(5), with the application attached as required, was given to Mr Palazzolo and his legal representative in Sicily. This was done by registered post sent from a legal firm in Spoleto on 16 May 2016. Similarly, notice to Mr Hill was delivered by email on 29 April 2016.

[26] This means that a week after being invited to comply with s 47, albeit belatedly, the SARB elected not to do so but rather to take the point of non-joinder. This constituted a cynical disregard of its obligations. It was clearly no longer under the impression that Mr Palazzolo could not be contacted or that Mr Hill was dead. There was also clearly no difficulty in complying with s 47(1) at that stage. As a result, the appellant amended its notice of motion to include the relief sought in prayer 5 after the decision refusing access to the records of Messrs Hill and Palazzolo had been reviewed and set aside. This relief was for an order:

'Directing the respondents to notify Mr Ekon, Mr Palazzolo, Mr Williamson and Dr Basson within five days of the date of the order, of the request, in accordance with s 47 of PAIA and thereafter to comply with the time periods and provisions in Chapter 5 of PAIA.'

This prayer was before the court of first instance when the application was argued.

[27] Can it then be said that the SARB took 'all reasonable steps to inform' the two persons of the request? On the most generous approach imaginable, the answer is a resounding 'no'. This means, quite simply, that the SARB was not empowered to make any decision under s 49(2). One of the prior requirements, or empowering provisions, to allow for any decision to be made under that section, had not been met. The SARB accordingly acted *ultra vires* s 49(2). The decision to refuse access to the documents concerning Messrs Hill and Palazzolo thus lacks a valid legal basis.

[28] It follows that this decision should have been reviewed and set aside by the court of first instance. And prayer 5 of the amended notice of motion should have been granted. It was framed to include only Mr Palazzolo. Mr Hill should also have been included on the basis that the appellant also asked for further or alternative relief. The decision concerning him lacks validity for precisely the same reasons.

[29] But, says the SARB, the application is fatally defective since Messrs Hill and Palazzolo were not joined as respondents. It was necessary to do so. The application should be dismissed without further ado.

[30] The test for joinder of necessity was restated by Brand JA in *Bowring NO v Vrededorp Properties CC*:[25]

'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned...'

The question is therefore whether Messrs Hill and Palazzolo might be prejudicially affected by a judgment on the application.

[25] *Bowring NO v Vrededorp Properties CC and Another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.

[31] As has been clarified, the application does not reach the point where any relief granted could have a prejudicial effect on them. The only relief competent on the papers which concerns them is the grant of an order in terms of paragraph 5 of the amended notice of motion, after reviewing and setting aside the decision of the SARB. The relief which should have been granted concerning the request is that, prior to any decision being made, they must be afforded the *audi alteram partem* rights contained in ss 47 to 49. A decision that the SARB is obliged to do so before any competent decision is made by it can in no way prejudicially affect their legal interests. It simply restores the *status quo ante* prior to the decision concerning them. It was not necessary to join them in the application for that relief.

[32] It remains to consider the request concerning the late Brigadier Blaauw. In order to do so, I shall briefly analyse the reliance by the SARB on various sections of PAIA which they say justified the refusals. It is useful to include the refusals concerning Messrs Palazzolo and Hill since there is some overlap.

[33] Chapter 4 begins with a section on the interpretation of the provisions that follow. The chapter contains exceptions to the rule that access to records must be granted. They constitute the *numerus clausus* of circumstances in which access may or must be refused. Unless they apply, access must be given in furtherance of the default position of transparency and access.

[34] The initial general complaint of the SARB was that the request was vague and could thus not be given effect to. But, despite this complaint, the IO said that he understood the request to mean:

'[R]ecords obtained by the SARB through formal investigations recorded in the register of investigations conducted by the FinSurv Department[26] into significant fraud (in the context of

[26] The SARB refers to its Financial Surveillance Department as the FinSurv Department.

contraventions of exchange control regulations), to the extent that the records relate specifically and directly to the listed persons.'

And when the SARB went about identifying records, it identified those containing evidence obtained through formal investigations into contraventions of exchange control regulations. This is clearly what was intended by the somewhat clumsily worded request, as was confirmed by the appellant in argument before us.

[35] The search through the records did not identify any investigations into five of the persons named in the request. It did identify investigations during the period in question into those three persons dealt with in this appeal. These are recorded in what was referred to as the red book. In that book, investigation V.136 relates to Mr Palazzolo. The records gathered in it are contained in one lever arch file. Investigation B.266 relates to the late Brigadier Blaauw. The records comprise two standard and one small lever arch file. Investigation H.164 relates to Mr Hill. The investigation threw up 43 archive boxes, each with an average of five lever arch files.

[36] Some comment must be made on the overall approach taken by the SARB. I think it is fair to say that the answering affirmation is long on stock phrases which merely repeat parts of this chapter of PAIA. The affirmation falls woefully short on fact, detail or proper application of the provisions of PAIA. It must be borne in mind that, under s 47, the test was whether the records to which access was requested 'might' fall within one of the exclusionary sections of PAIA. At the stage of deciding whether or not to actually refuse access, however, the test is totally different. The SARB had to establish that the records did meet the criteria to refuse access on one of the grounds set out in PAIA.

[37] For each of the persons concerned, the SARB gave the stock answer that the records 'constitute personal information [concerning the named person and are], therefore, protected from disclosure in terms of section 34(1)'. But s 34(1) provides:

'Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.'[27]

It is clear that the prohibition requires that the disclosure of personal information would be unreasonable. Not all personal information is protected from disclosure. It depends on the facts. If an IO decides that the disclosure would be unreasonable, two aspects must be dealt with. First, it should be asserted that the disclosure would be unreasonable. Secondly, some facts which cause the records to fall within the ambit of the section should be put up in support. The SARB did neither. It was conceded in argument that, in those circumstances, the SARB could not have recourse to s 34(1). The decision to refuse access to the records on this ground was accordingly reviewable.

---

[27] Subsection (2) does not apply here. It reads:
'A record may not be refused in terms of subsection (1) insofar as it consists of information—
(a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;
(b) that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;
(c) already publicly available;
(d) about an individual's physical or mental health, or well-being, who is under the care of the requester and who is—
(i) under the age of 18 years; or
(ii) incapable of understanding the nature of the request,
and if giving access would be in the individual's best interests;
(e) about an individual who is deceased and the requester is—
(i) the individual's next of kin; or
(ii) making the request with the written consent of the individual's next of kin; or
(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to—
(i) the fact that the individual is or was an official of that public body;
(ii) the title, work address, work phone number and other similar particulars of the individual;
(iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and
(iv) the name of the individual on a record prepared by the individual in the course of employment.'

[38] As regards the late Brigadier Blaauw, it was said that records concerning the company of which he was a director '[constitute] commercial information of the company as contemplated in section 36(1)*(b)*'. This section provides:

'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—

...

(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…'

There was no assertion that the disclosure would be likely to cause harm to the commercial or financial interests of the company, let alone facts put up in support of such an assertion. In fact, the SARB excused its failure to comply with s 47 on the basis that it would be unreasonable to expect it to 'trace the whereabouts of the company.' This is an astonishing averment when official records which can be easily accessed contain that information. What it does mean, however, is that the SARB clearly had no information concerning the company in question at all. It could accordingly not have come to any proper view concerning potential harm. It was likewise conceded in argument that what had been put up in the answering affirmation did not place the records concerned within the ambit of s 36(1)*(b)*. The decision to refuse access to those records on this basis was likewise subject to review.

[39] In regard to Mr Palazzolo and Mr Hill, the stock answers were:

'[G]iven the lapse of time, it is not known as to how the documents came to be in the possession of the SARB, but given that they comprise mostly of accounting and corporate documentation, it is likely that these documents were supplied in confidence to the SARB or under the provisions of regulation 19 of the Exchange Control Regulations. I have been advised that, in the absence of a compelling public interest override, the SARB may justifiably refuse the information as contemplated in sections 37(1)*(b)* and/or 42(1)'.

Section 37(1)*(b)* reads:

'(1) Subject to subsection (2), the information officer of a public body—

...
(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.'

[40] Section 37(1)*(b)* gives rise to a discretionary refusal as opposed to a mandatory one. The discretion must be based on facts before it can be said to have been properly exercised. First, the record must consist of information which was supplied in confidence by a third party. Secondly, it must be proved that the disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source. Thirdly, it must be in the public interest that such information, or information from the same source, should continue to be supplied.

[41] The first requirement is that the information was supplied in confidence. There was no unequivocal assertion to this effect. The SARB said only that it was 'likely' that this was the case. It did not provide any evidence, even in general terms, to support even this assertion. On the contrary, the affirmation made it clear that it could not do so, saying that 'it is not known as to how the documents came to be in the possession of the SARB'. This demonstrates that its refusal simply arose from speculation without enjoying any factual basis.

[42] The second requirement is that, if the information were supplied in confidence, the disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source. No assertion to this effect was made. In addition, evidence would be required in general terms such as that the person or persons concerned were still alive and could potentially

supply similar information in the future. It can hardly be contended, for example, that if those who supplied the information were dead, the disclosure could prejudice the future supply from those persons. Once more, the affirmation comes nowhere near to making out the case that this requirement was met.

[43] The third requirement is that it is in the public interest that similar information or information from the same source should continue to be supplied. Again, no assertion to this effect was made and no evidence put up which could support such an assertion. If the information related only to a particular individual or to transactions which can no longer be entered into such as financial rand manipulation, this could not qualify. The SARB, not knowing the source of the information, once again resorted to a bare assertion that the section applies. This is clearly not sufficient. The provisions of s 37(1)*(b)* cannot be relied upon. This was also conceded in argument. This, too, rendered the refusal on this ground subject to review.

[44] The alternative basis was said to arise from s 42(1), which reads:

'The information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic.'

The test is whether a case has been made out that the disclosure of any information in those records identified by the SARB 'would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy'. Once again, an assertion to that effect is required. In addition, although particularity which would itself cause the harm guarded against in the section is not required, some evidence in general terms should be led which enables a court to evaluate whether the

ground has been appropriately relied upon. None was forthcoming on either score. This ground for refusal was also correctly abandoned in argument.

[45] In addition, recourse was sought to s 45 as regards the records concerning Mr Hill. The SARB had investigated him for 'serious' fraud and, in fact, instituted forfeiture proceedings and referred the matter for prosecution. However, Mr Hill left South Africa before his trial was concluded. Forty-three boxes of an average of five lever arch files are in the possession of the SARB. Thirty of these contain the records and results of a forensic investigation into his affairs. These have information filed systematically but they are not indexed. They also contain the papers filed in extradition proceedings and the litigation against the SARB by Mr Hill. The SARB claimed that to consider whether access should be granted, an expert person would be required. This person would require approximately 131 days to do so. Such persons employed by the SARB are already 'overstretched'. This would constitute a substantial and unreasonable diversion of the resources of the SARB. Section 45 reads:

'The information officer of a public body may refuse a request for access to a record of the body if—

…

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.'

Given the finding that the request in respect of Mr Hill must await a decision by the SARB after the outcome of the s 47 process, it would not be appropriate to deal with this response.

[46] Finally, the SARB sought to invoke the provisions of s 46 to prevent access in respect of all the records sought. This provides:

'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1),

37(1)*(a)* or *(b)*, 38*(a)* or *(b)*, 39(1)*(a)* or *(b)*, 40, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—

(a) the disclosure of the record would reveal evidence of—

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

This is referred to as the 'public interest override'. It relates to records which, in the present matter, are found to fall within the provisions of s 34(1), s 36(1)*(b)*, s 37(1), s 42(1) and s 45*(b)*. Only if one or more of these sections applies to a specific request does s 46 come into play. If none of them applies, there is no basis to refuse access and the two factors, including the 'public interest override', need not be considered. Since it was correctly conceded in argument that none of the records satisfied the requirements of any of the named sections other than possibly s 45*(b)*, s 46 does not apply. Section 45*(b)* was said by the SARB only to apply to Mr Hill. As indicated, it is not appropriate to deal with this contention. For present purposes, accordingly, s 46 cannot be resorted to.

[47] The appeal must thus be upheld. As regards Messrs Palazzolo and Hill, the order of the court of first instance dismissing the application must be replaced with one in terms of paragraph 5 of the amended notice of motion. As regards the late Brigadier Blaauw, the order of the court of first instance must be substituted with one directing that access be given to the records referred to by the SARB in its answering affirmation.

[48] The question of costs of both the appeal and the application must now be considered. The appellant has been substantially successful, both in the court of first instance and on appeal. Access to all of the records was refused. Those concerning the late Brigadier Blaauw must be allowed. The review of the decisions concerning Messrs Hill and Palazzolo also constitutes success. The

blanket refusal by the SARB on entirely spurious grounds which do not even assert the elements entitling them to withhold access supports a costs order being made against it. That response has bordered on the obstructive and is certainly not in keeping with the purpose of PAIA in its outworking of the provisions of the Constitution to promote openness and transparency. As was submitted by the appellant, the approach was redolent of the dark days of apartheid, where secrecy was routinely weaponised against a defenceless population. The costs must therefore follow the result.

[49] In the result, the following order issues:

1 The appeal is upheld with costs, including the costs of two counsel where used.

2 The order of the court of first instance is set aside and the following order is substituted:

> ‘(a) It is declared that the decisions of the respondents to refuse access to the records requested by the applicant in respect of the late Brigadier Blaauw, Mr Robert Hill and Mr Vito Palazzolo in its request for information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) dated 1 August 2014 are unlawful and in conflict with the provisions of PAIA.
>
> (b) The decisions to refuse such access as regards the requested records in respect of the late Brigadier Blaauw, Mr Palazzolo and Mr Hill are reviewed and set aside.
>
> (c) The respondents are directed to provide to the applicant the requested records in respect of the late Brigadier Blaauw.
>
> (d) The respondents are directed to notify Mr Palazzolo and Mr Hill of the request concerning records relating to them in accordance with s 47 of PAIA within 10 calendar days after service of this order on them, and

thereafter to comply with the time periods and provisions in Chapter 5 of PAIA.

(e) The respondents are directed to pay the costs of this application, including the costs of two counsel where used.'

_____

GORVEN AJA

ACTING JUDGE OF APPEAL

Appearances

For Appellant:	G Budlender SC, with him F Hobden
Instructed by:	Lawyers for Human Rights, Johannesburg
	Webbers, Bloemfontein

For Respondents:	NGD Maritz SC, with him E Muller
Instructed by:	Werksmans Attorneys, Johannesburg
	Symington De Kok Attorneys, Bloemfontein.