INTERNAL APPEAL TO THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES

FEDERATION FOR A SUSTAINABLE ENVIRONMENT **Appellant**

DEPARTMENT OF MINERAL RESOURCES **Respondent**

ANNEXURE "A": APPEAL PURSUANT TO THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 IN RESPECT OF THE PARTIAL REFUSAL OF A REQUEST FOR RECORDS MADE BY THE FEDERATION FOR A SUSTAINABLE ENVIRONMENT

Appellant

1. The appellant is the Federation for a Sustainable Environment (FSE), a non-profit organisation established in October 2007 with registration number 2007/033134/08 and NPO number 062-986.

2. In terms of its Articles of Association, the main objective of the FSE is promoting the ecological sustainability of development and the wise use of natural resources in South Africa.

3. In this matter, the FSE is represented by Christine Reddell in her capacity as attorney for the Centre for Environmental Rights (CER). The CER is a non-profit organisation with registration number 2009/020736/08, PBO number 930032226 and NPO number 075-863, established for the advancement of environmental rights in South Africa.

Request submitted to the Department of Mineral Resources (DMR) in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA)

4. On 16 April 2015, the CER, acting on behalf of the FSE, submitted a PAIA request ("the request") to the DMR. The request was submitted to the Director General, Dr Thibedi Ramontja, in accordance with the DMR's PAIA Manual and copied to Mr Diphoko Modiselle, Mr Pieter Alberts and Ms Nwabisa Qwanyashe. The request bore the reference number CER-2015-DMR-0001.

5. The covering email dated 16 April 2015, enclosing a cover letter, proof of payment in respect of the R 35.00 request fee, an authorisation letter from the FSE and the completed Form A, is attached as "**A1**".

6. The records requested relate to the proposed Yzermyn underground coal mine project near Wakkerstroom, in the Mabola Protected Environment, in Mpumalanga Province (as more fully detailed in the request form) by Atha-Africa Ventures (Pty) Ltd (Atha). In particular, the following records were requested:

    6.1. A copy of the mining right application submitted by Atha to the DMR;

    6.2. A record of "proper mitigation measures relative to the area in consultation with all other stakeholders/authorities that administer matters affecting the environment at National and Provincial (Mpumalanga) level" formulated by Atha and as required by the DMR in para 6(iii) of its letter to Atha (dated 19 September 2014);

    6.3. "A proper plan/map with a clear depiction of exclusions [of any areas that constitute wetlands]" as required by the DMR in para 6(iv) of its letter dated 19 September 2014;

    6.4. A copy of the executed mining right granted for the Yzermyn Project;

6.5. The approved environmental management programme (EMPR) for Atha's Yzermyn Project; alternatively, a copy of the draft EMPR submitted by Atha to the DMR for approval;

6.6. In the event that these records are not included in the EMPR referred to above, records showing the approved financial provision made in terms of section 41 of the Mineral and Petroleum Resources Development Act, 2002, alternatively in terms of section 24P of the National Environmental Management Act, 1998 including the amount, detailed calculation, form of provision and records that the financial provision has indeed been made;

6.7. The approved social and labour plan (SLP) for Atha's Yzermyn Project; alternatively, a copy of the draft SLP submitted by Atha to the DMR for approval;

6.8. The approved mining works programme (MWP) for Atha's Yzermyn Project; alternatively, a copy of the draft MWP submitted by Atha to the DMR for approval;

6.9. Any correspondence between Atha and the DMR and/or Minister of Mineral Resources contemplated by section 48(1)(b) of the National Environmental Management: Protected Areas Act, 57 of 2003; and

6.10. All correspondence between the DMR and Atha and between the DMR and the Department of Environmental Affairs and/or the Department of Water and Sanitation regarding Atha's proposed Yzermyn Project.

7. As will be set out in more detail below, access was granted, on 29 May 2015, to the records referred to above at paragraphs 6.1, 6.2, 6.3, 6.4, 6.5, and 6.7.

8. Although not the subject of this appeal, we draw your attention to the fact that although access was granted to these records on 29 May 2015, we have yet to

receive copies of these records. This is despite the fact that we have engaged, on numerous occasions via email and telephonically, with the Mpumalanga Regional Department of Mineral Resources. We attach our email correspondence in this regard as "**A2**".

9. Access to the records referred to above at paragraphs 6.6, 6.8, 6.9 and 6.10 was denied. The decision to deny access to the records referred to above at paragraphs 6.6, 6.8 and 6.9 forms the subject of this appeal.

Background to this internal appeal

10. In the email of 16 April 2015 (**"A1**") the CER advised the DMR that a decision in respect of a PAIA request must be made within 30 days of the request having been submitted. A decision in respect of this request was therefore due on Monday, 18 May 2015.

11. Emails reminding the DMR that a decision was due on 18 May 2015 were sent by the CER on 8 May 2015 and 12 May 2015. The email correspondence in this regard is attached as "**A3**".

12. Given that no decision was received on 18 May 2015, Ms Christine Reddell of the CER telephoned Mr Diphoko Modiselle of the DMR on 19 May 2015 to enquire as to when a decision would be forthcoming. As there was no answer, Ms Reddell left a detailed message on Mr Modiselle's answering machine, and proceeded to email Mr Modiselle. A copy of this email is attached as "**A4**".

13. On 20 May 2015, Ms Reddell again telephoned Mr Modiselle. Mr Modiselle indicated that the request would be responded to by the end of the month. Ms Reddell confirmed this telephone conversation in an email to Mr Modiselle on 20 May 2015, a copy of which is attached as "**A5**".

14. On 29 May 2015, Mr Modiselle emailed the CER, enclosing a decision letter from the Deputy Information Officer. This email and the enclosed decision letter are attached as "**A6**".

The DMR's response to the request

15. As set out above, the DMR responded to the request outside of the legislated 30 days on 29 May 2015.

16. The decision letter conveyed the Deputy Information Officer's decision to refuse the appellant's request for:

    16.1. Records showing the approved financial provision made by Atha in terms of section 41 of the Mineral and Petroleum Resources Development Act, 2002, alternatively in terms of section 24P of the National Environmental Management Act, 1998 including the amount, detailed calculation, form of provision and records that the financial provision has indeed been made (referred to hereafter as "records of financial provision").

    16.2. The approved mining works programme (MWP) for Atha's Yzermyn Project; alternatively, a copy of the draft MWP submitted by Atha to DMR for approval (referred to hereafter as "the MWP").

    16.3. Any correspondence between Atha and the DMR and/or the Minister of Mineral Resources contemplated by section 48(1)(b) of the National Environmental Management: Protected Areas Act, 57 of 2003 (referred to hereafter as "the NEMPAA correspondence").

    16.4. All correspondence between the DMR and Atha and between the DMR and the Department of Environmental Affairs and/or the Department of Water and Sanitation regarding Atha's proposed Yzermyn Project.

17. In refusing access to the abovementioned records, the Deputy Information Officer cited the following grounds for refusal:

"*Request for records listed as 1.f, 1.h, 1.i and 1.j in part "D" of your request is hereby refused in terms of section -:*

36. (1) 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 –

(a) trade secrets of a third party;

(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; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected to –

(i) put that third party at a disadvantage in contractual or other negotiations or

(ii) prejudice that third party in commercial competition

44. (1) Subject to subsection (3) and (4), the information officer of a Public body may refuse a request for access to a record of the body –

(a) if the record contains –

(i) an opinion, advice, report or recommendation obtained or prepared; or

(ii) an account of consultation, discussion, or deliberation that has occurred, including, but not limited to minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law."

18. The appellant hereby appeals the Deputy Information Officer's decision to refuse access to the records listed as 1.f, 1.h, and 1.i in part D of the request, namely the decision to refuse access to the records of financial provision, the MWP, and the NEMPAA correspondence.

Grounds of appeal

19. The appellant submits the following grounds of appeal:

A. The DMR did not comply with section 25(3) of PAIA;

B. Given the nature of the information requested and the stated reasons for refusal, the DMR has failed to adequately "apply its mind" to the request;

C. The DMR has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure;

D. The records do not fall within the scope and ambit of section 36(1) of PAIA and cannot therefore be refused on the grounds referred to in this section;

E. The records requested do not fall within the scope and ambit of section 44(1) of PAIA and cannot therefore be refused on the grounds referred to in this section;

F. The records requested consist of an account or statement of reasons required to be given in terms of section 5 of the Promotion of Administrative justice Act 1 of 2000;

G. The DMR had an obligation to apply section 28 of PAIA; and

H. Disclosure of the records is in the public interest.

A. The DMR did not comply with section 25(3) of PAIA

20. Section 25(3) of PAIA provides as follows:

"*25. Decision on request and notice thereof*

(3) If the request for access is refused, the notice in terms of section 1(b) must –

(a) *state adequate reasons for the refusal, including the provisions of this Act relied upon;*

(b) *exclude, from such reasons, any reference to the content of the record; and*

(c) *state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal or application, as the case may be."*

21. In terms of section 25(3)(a), if the request is refused, the refusal letter *"**must** state adequate reasons for the refusal, **including** the provisions of the Act relied upon*." It is therefore insufficient to simply state the provisions of PAIA relied upon, as the decision-maker has done. The appellant is accordingly unable to deduce how and why the DMR relies on the sections quoted in the decision letter. As set out more fully below, it is impossible to ascertain from the decision which grounds for refusal were relied on in respect of the refusal of which records.

22. Given the inadequate reply received from the DMR, it is submitted that there is, in fact, no legitimate reason for the refusal.

B. DMR failed to apply its mind

23. The records requested are set out in paragraph 6 above. The requested records differ in their nature and content. The DMR's refusal does not deal with each requested record separately and does not identify specifically the grounds of refusal relied upon in refusing access to each particular record. Instead, the DMR's refusal simply lists the records refused, and lists the grounds of refusal relied upon. Rather than communicating a blanket refusal, the DMR ought to have traversed, in respect of each requested record, why and how it sought to refuse access.

24. In relation to section 36(1) of PAIA, the harm/disadvantage/prejudice is not identified, and neither are the commercial or financial interests, the contractual or other negotiations or the commercial competition. There is no evidence from

the DMR from which one might conclude that if disclosure takes place it is probable that there will be harm to the commercial or financial interests of Atha.[1] There is also no evidence of the type of harm disclosure would cause, or whether the harm contemplated would be harm to Atha's legitimate interests.

25. In relation to section 44(1) of PAIA, the DMR's refusal does not distinguish whether the record (and which record) constitutes an opinion, advice, report, recommendation, account of consultation, discussion or deliberation, or how the record assisted with the formulation of a policy or a decision taken. The DMR's refusal merely states a conclusion, as opposed to disclosing evidence on the basis of which a Court would be able to assess whether the relevant grounds of non-disclosure have been satisfied.[2]

26. The bald invocation of sections 36(1) and 44(1) is accordingly indicative of the DMR's failure to apply its mind to the request.

C. The DMR has not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure

27. PAIA has its genesis in Section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which provides:

> *"32 Access to information*
> *(1) Everyone has the right of access to*
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and 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."*

28. Section 32, in turn, had its origin in Constitutional Principle IX in Schedule 4 to

[1] *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paragraphs 38-39.
[2] *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at paragraphs 18-19.

the Interim Constitution which required the Constitutional Assembly to produce a Constitution which made provision for "*freedom of information so that there can be open and accountable administration at all levels of government*". Commenting on Constitutional Principle IX, the Constitutional Court emphasised that what the principle required was:

"…not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government".[3]

29. PAIA is constitutionally mandated legislation as envisaged in section 32(2) of the Constitution and captures the spirit of the Constitution. The purposes of PAIA are:

a) to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and

b) 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…".[4]

30. Section 36 of the Constitution provides that this section 32 right may be limited, but only in instances where such limitation is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*…"

31. Section 39(2) of the Constitution provides that:

"When interpreting any legislation… every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

32. Sections 36(1) and 44(1) of PAIA must consequently be interpreted in light of section 32(1)(a) of the Constitution.

[3] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paragraph 83.

[4] Preamble to PAIA.

33. Moreover, regard must be had to section 195(1) of the Constitution, which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including:

"(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

34. The importance of sections 32 and 195 of the Constitution was highlighted by the Constitutional Court in the matter of *Brümmer v Minister for Social Development and others* 2009 (11) BLRC 1075 (CC) where it was said at paragraph 62 that:

"The importance of [section 32 of the Constitution] 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."

35. In other words, making information held by the State available to the public must form the default position, not the other way around.[5] If the State refuses to provide the public with access to information held by it, such refusal must be justifiable in law. Moreover, and in the spirit of the "culture of justification,"[6] the State bears the onus of justifying such refusal; the requester is not obliged to allege reasons why it requires access to information held by the State.[7]

36. The courts have emphasised that PAIA must be interpreted to promote transparency and accountability,[8] and that the grounds of refusal must be

[5] *President of RSA and others v M&G Media Ltd* 2011 (2) BCLR 363 (SCA).
[6] Ibid.
[7] Section 11(3) of PAIA also provides that the requester's right of access is not affected by "any reasons the requester gives for requesting access" or "the information officer's belief as to what the requester's reasons are for requesting access."
[8] *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) at paragraph 18. *MEC for Roads & Public Works, EC v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 21; *Claase v Information Officer, SAA (Pty) Ltd* 2007 (5) SA 469 (SCA) at paragraph 1; *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA); *Centre For Social Accountability v Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) at paragraphs 50-59.

interpreted strictly and narrowly so as to promote the overriding purposes of PAIA.[9]

37. It is manifest from the perfunctory refusal of the requested record, and from the DMR's failure to comply with the procedural requirements of PAIA, that the DMR has not interpreted the provisions of PAIA with a view to promoting transparency and accountability. Sections 36(1) and 44(1) of PAIA have not been interpreted strictly and narrowly and the decision to refuse the request was not taken in consideration of the spirit of promoting the overriding purposes of PAIA.

D. The records do not fall within the scope and ambit of section 36(1)

38. Section 36(1) of PAIA provides:

> *"36. Mandatory protection of commercial information of third party.—*
> *(1) 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—*
> *(a) Trade secrets of a third party;*
> *(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; or*
> *(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected—*
> *(i) to put that third party at a disadvantage in contractual or other negotiations; or*
> *(ii) to prejudice that third party in commercial competition."*

39. It is presumed, given the nature of the information requested, that the DMR's reliance on section 36(1) of PAIA relates to its decision to refuse access to the records relating to financial provision and to the MWP. This must be presumed given the DMR's failure to distinguish between the records requested in relation to the grounds of refusal relied on – as more fully discussed in paragraphs 20 to 26 above.

[9] *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane* NO 2012 (1) SA 158 (ECP) at paragraph 17.

40. The information contemplated in section 36(1) of PAIA must be of a sort that it:

    40.1. is confidential; and

    40.2. is incapable of public disclosure without being likely to cause harm to the commercial or financial interests of a private party.

41. The test of being "likely to cause harm" to commercial and financial interests in section 36(1)(b) is a more stringent test than that in section 36(1)(c) which refers to information the disclosure of which "could reasonably be expected" to put a private party at a disadvantage in negotiations or to prejudice that party in commercial competition. It requires the party asserting a right to resist disclosure to produce evidence from which a Court can conclude that if disclosure takes place it is probable that there will be harm to the commercial or financial interests of the private party.[10] The harm contemplated by these provisions of PAIA must be harm to the legitimate interests of the private party. By way of illustration, the disclosure of the fact that a company is unlawfully polluting the environment may cause it reputational damage that will result in harm to its financial or commercial interests, but PAIA cannot be interpreted to justify non-disclosure in order to avoid that sort of harm.[11]

42. In respect of each document that the DMR seeks to withhold it must produce evidence that will satisfy a Court that disclosure of that document or any severable part thereof will probably cause material financial or commercial harm to the private party. The evidentiary enquiry relates to probable harm, not to a risk of possible harm.

43. The DMR's decision merely states a conclusion, rather than disclosing evidence on the basis of which a Court will be able to assess whether the relevant grounds of non-disclosure have been satisfied.[12]

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[10] *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paragraphs 38-39.

[11] By way of analogy, see *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd as Amici Curiae)* 2011 (5) SA 329 (SCA) at paragraph 16*; Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at paragraph 31.

[12] *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 (SCA) at paragraphs 18-19.

44. It is not at all clear how disclosing records of financial provision will harm Atha's commercial interests. These records do not in any way reveal the company's profit margins or overall financing. Records of financial provision contain the right holder's obligations to rehabilitate and remediate the environmental degradation caused by the mining operations. The financial quantum attached to the environmental liability, and the process of calculating that quantum, fundamentally determines to what extent the right holder will rehabilitate the land degraded as well as the liability of their own mining operation. The disclosure of records of financial provision is undoubtedly in the public interest, as the public has a right to ensure compliance by Atha with the law and to ensure that adequate provision has been made by Atha for the rehabilitation of the environment in line with its statutory duties.

45. The required contents of the MWP is regulated by Regulation 11 of the Regulations[13] published in terms of the Mineral and Petroleum Resources Development Act[14] (MPRDA). The following categories of information must be included in the MWP:

> *"(a) the full particulars of the applicant;*
> *(b) a plan contemplated in regulation 2(2), showing the land and mining area to which the application relates;*
> *(c) a registered description of the land or area to which the application relates;*
> *(d) the details of the identified mineral deposit concerned with regard to the type of mineral or minerals to be mined, its locality, extent, depth, geological structure, mineral content and mineral distribution;*
> *(e) the details of the market for, the market's requirements and pricing in respect of the mineral concerned;*
> *(f) the details with regard to the applicable timeframes and scheduling of the various implementation phases of the proposed mining operation, and a technically justified estimate of the period required for the mining*

[13] GN R527 published in *Government Gazette* 26275 of 23 April 2004.
[14] Act No. 28 of 2002.

of the mineral deposit concerned;

(g) a financing plan that must contain -

(i) the details and costing of the mining technique, mining technology and production rates applicable to the proposed mining operation

(ii) the details and costing of the technological process applicable to the extraction and preparation of the mineral or minerals to comply with market requirements;

(iii) the details and costing of the technical skills and expertise and associated labour implications required to conduct the proposed mining operation;

(iv) the details and costing of regulatory requirements in terms of the Act and other applicable law, relevant to the proposed mining operation;

(v) the details regarding other relevant costing, capital expenditure requirements, and expected revenue applicable to the proposed mining operation;

(vi) a detailed cash flow forecast and valuation, excluding financing of the proposed mining operation, which forecast must clearly indicate how the applicable regulatory costs will be accommodated therein;

(vii) the details regarding the applicant's resources or proposed mechanisms to finance the proposed mining operation, and details regarding the impact of such financing arrangements on the cash flow forecast; and

(viii) provisions for the execution of the social and labour plan.

(h) an undertaking, signed by the applicant, to adhere to the proposals as set out in the mining work programme."

46. The DMR has not demonstrated how these categories of information fall within the ambit of section 36(1) of PAIA. In particular, the DMR has not demonstrated how disclosure of this information could reasonably be expected to put Atha at a disadvantage in negotiations or prejudice Atha in commercial competition. It is submitted that these categories of information contain neither trade secrets nor information that might cause harm to legitimate private party interests. Even if we

are incorrect in this assertion, and the DMR can adduce evidence to show that Atha will be prejudiced by the disclosure of certain categories of the abovementioned information, it is quite clearly impossible to adduce such evidence in respect of all of the abovementioned categories – such as "*a registered description of the land*" (being one example). As will be discussed in more detail below, the DMR, in the event that it was able to adduce evidence to show that certain of the categories of information above required legitimate protection from disclosure in terms of section 36(1) of PAIA, had an obligation to sever any part of the MWP which could be disclosed (through an exercise of redaction, for example).

47. The MWP and the records of financial provision will be of huge assistance to the FSE in assessing environmental protection during and after Atha's operations. The MWP is a critical document for interested and affected parties in that it establishes what the intended mine works are. It is impossible for organisations such as the FSE to understand the efficacy of other plans and programmes, such as Atha's Environmental Management Programme, without knowledge of the intended mine works.

48. The importance of information such as the MWP and records of financial provision to organisations such as the FSE was highlighted in recent litigation between the Vaal Environmental Justice Alliance and ArcelorMittal South Africa Limited, where Judge Carstensen (in the High Court) remarked that:

> "*Thus, a community based, civil society organisation such as the Applicant, is entitled to monitor, protect and exercise the rights of the public at least by seeking the information to enable it to assess the impact of various activities on the environment and like-minded individuals must be encouraged to exercise a watch-dog role in the preservation and rehabilitation of our natural resources*".[15]

In the Supreme Court of Appeal, Navsa J, endorsing the High Court's judgment, commented further that:

[15] Unreported matter of *Vaal Environmental Justice Alliance v Company Secretary of Arcelormittal and another* (South Gauteng High Court, case number 39646/12, 10 September 2013), at paragraph 16.

"Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced".[16]

E. The records requested do not fall within the scope and ambit of section 44(1)

49. Section 44(1)(a) of PAIA provides that:

> "*44(1) Subject to subsections (3) and (4), the information officer of a public body may refuse a request for access to a record of the body –*
>
> *(a) if the record contains –*
>
> *(i) an opinion, advice, report or recommendation obtained or prepared; or*
>
> *(ii) an account of consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,*
>
> *for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.*"

50. It is presumed, given the nature of the information requested, that the DMR's reliance on section 44(1)(a) of PAIA relates to its decision to refuse access to the NEMPAA correspondence. Again, this must be presumed given the DMR's failure to distinguish between the records requested in relation to the grounds of refusal relied on – as more fully discussed in paragraphs 20 to 26 above.

51. In terms of section 48(1)(b) of NEMPAA, no person may conduct commercial mining in a protected environment without the written permission of both the Minister of Mineral Resources and the Minister of Environmental Affairs.

[16] *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184, at paragraph 82.

52. Since the Yzermyn underground coal mine project is to be undertaken by Atha on properties falling within the Mabola Protected Environment in Mpumalanga, Atha would have required written permission from both Ministers. The Mabola Protected Environment falls in an area of immense hydrological importance. It is the source of three major rivers in South Africa and is composed mostly of wetlands, wetland clusters and pans. It has been classified as a Strategic Water Source Area, a National Freshwater Ecosystem Priority Area and an Aquatic Critical Biodiversity Area. The NEMPAA correspondence was accordingly requested by the FSE to ascertain what information was placed before the Ministers, what information was taken into account and whether or not permission from both Ministers was duly obtained.

53. In keeping with its general lack of specificity, the DMR's decision letter fails to indicate whether the refusal is based on section 44(1)(a)(i) or section 44(1)(a)(ii). Insofar as reliance is placed on section 44(1)(a)(i), such reliance is misplaced given that the word "obtain" in section 44(1)(a)(i) must be interpreted restrictively to mean "procure or gain, as a result of purpose and effort."[17] It is submitted that "prepared" must similarly be restrictively interpreted, in the light of section 32(1)(a) read with section 39(2) of the Constitution, to exclude those documents compiled by internal parties in the fulfilment of a statutory obligation. The NEMPAA correspondence is accordingly not information which was "obtained" or "prepared" and the DMR was not entitled to place any reliance on section 44(1)(a)(i) of PAIA.

54. Furthermore, it is clear that the object of section 44(1) of PAIA is to protect the deliberative process and operations of a public body. The deliberative process that took place in the DMR is now complete as the mining right has been issued to Atha. There is therefore no reason for withholding the records of correspondence.

[17] *Minister for Provincial and Local Government of RSA v Unrecognised Traditional Leaders of the Limpopo Province Sekhukhune Land* [2005] 1 All SA 559 (SCA) at paragraphs 15-17.

55. It is trite law that when the rationale for a rule falls away, the rule must also no longer be valid: *cessante ratione legis, cessat et ipsa lex.*[18] This maxim states that if the ratio of a statutory provision is discernible, and that ratio is not obtained by that statutory provision under a "*specific set of concrete circumstances*," then that statutory provision is not applicable under those circumstances.[19]

56. Because the deliberative process is now complete, there is no longer any reason to invoke the provisions of section 44(1)(a) of PAIA to protect the deliberative process of the State.

57. It is therefore submitted that the Deputy Information Officer unlawfully refused the FSE access to the record.

F. The record consists of an account or statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act 1 of 2000 (PAJA)

58. The proviso in section 44(1) of PAIA, "*[s]ubject to subsections (3) and (4)*," means that an information officer may not refuse a record in terms of section 44(1)(a)(i) or 44(1)(a)(ii) of PAIA if the record held by the public body in question –

> *"(3) … came into existence more than 20 years before the request concerned;" or*
> *(4) … consists of an account or a statement of reasons required to be given in accordance with section 5 of the Promotion of Administrative Justice Act, 2000."*

59. Section 5 of PAJA provides that an administrator responsible for administrative action must furnish a person whose rights have been materially and adversely affected by such administrative action with written reasons for such administrative action upon request from such a person.

[18] See for example *Gaming of SA Gauteng Division and another v Minister of Safety and Security and others* [1996] 4 All SA 336 (W).
[19] Ibid at p344.

60. Decisions by the Minister of Mineral Resources and the Minister of Environmental Affairs to grant or refuse permission to conduct commercial mining in a protected environment in terms of section 48(1)(b) of NEMPAA falls within the scope of section 44(4) of PAIA. Such decisions are "administrative action" as contemplated in section 1 of PAJA. And as such a decision may have an adverse impact on the environment, everyone's right to an environment that is not harmful to health or well-being and right to have the environmental protected through conservation[20] stand to be "materially and adversely affected" by such a decision.

61. As the NEMPAA correspondence informs a decision by the Ministers of Mineral Resources and Environmental Affairs to permit mining in a protected area, or not, it forms part of the "record of decision." The reasons for a decision are justified by the record of decision and therefore must be provided, in terms of section 5 of PAJA, to the person requesting reasons for an administrative action.

62. By analogy, the record of a decision which is the subject-matter of review proceedings in court, must be made available to the applicant. The rationale for this compulsory disclosure is the importance of attaining administrative justice. Similarly, in this matter, the requester is seeking to enforce its constitutionally enshrined right to administrative justice.

63. It is therefore submitted that the requested record is an account or a statement of reasons required to be given in accordance with section 5 of PAJA as contemplated in section 44(4) of PAIA and that the Deputy Information Officer was consequently not entitled to refuse access to the record.

G. The DMR had an obligation to apply section 28 of PAIA

64. Section 28(1) of PAIA provides:

[20] Section 24 of the Constitution

"28(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which –

(a) does not contain; and

(b) can reasonably be severed from any part that contains,

any such information must, despite any other provision of this Act, be disclosed."

65. Even if the requested records contained information requiring protection in terms of sections 36(1) and/or 44(1) of PAIA, which is in any event disputed, it is submitted that the DMR should have relied on section 28(1) of PAIA to sever those portions which could reasonably be severed. In terms of section 28(1), the DMR was obliged to disclose the balance of the records.

H. Disclosure of the records is in the public interest

66. Section 46 of PAIA provides as follows:

"*Despite any other provision in this Chapter, the information officer of a public body must grant a request for access to a record of a body contemplated in section…36(1)…[or] 44(1)…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."

Substantial contravention of, or failure to comply with, the law

67. The FSE, as part of a coalition of eight civil society organisations, appealed against the granting of the mining right to Atha. The following allegations are made *inter ali*a in this appeal:

67.1. All available evidence indicates that the mining will result in unacceptable pollution, ecological degradation or damage to the environment, contrary to the peremptory requirement of section 23(1)(d) of the MPRDA;

67.2. The grant of the mining right contravenes several National Environmental Management Principles arising from section 2 of the National Environmental Management Act, 1998;

67.3. The grant of the mining right is in conflict with NEMPAA and the Constitutional duty to promote conservation through reasonable legislative and other measures; and

67.4. The grant of the mining right is also in conflict with stated national policy in relation to mining in Mpumalanga.

68. There are thus strong grounds for believing that the administrative decision to grant a mining right to Atha was unlawful. This decision was in turn informed by the records requested. Consequently, the records may contain evidence of a substantial contravention of, or failure to comply with, the law and therefore may not be refused by a decision-maker.

69. Alternatively, if the records do not contain evidence of the decision being unlawful, then it is submitted that the records were lacking in vital information that the decision-maker needed to take into consideration when making the decision to grant or refuse a mining right to Atha.

70. Administrative action can be set aside on account of the action having been taken "*because irrelevant considerations were taken into account or relevant considerations were not considered.*"[21] Put differently, such decisions are unlawful. Any record relating to such decisions may therefore not be refused to a requester.

[21] Section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 2 2000.

Public interest in disclosure of the record

71. As it is of extreme importance that the environment that stands to be impacted on by mining is conserved, for the benefit of current and future generations, it is of significant public importance that a public interest stakeholder such as the FSE is granted access to the requested records.

72. In the preamble to the National Environmental Management Act, 1998, it is stated that *"… the law should facilitate the enforcement of environmental laws by civil society*." This sentiment is echoed in the comments made by Carstensen J, in the judgment referred to at paragraph 48 above, that "*the participation of public interest groups is vital before [sic] the protection of the environment*."

Appellant's compliance with PAIA

73. The appellant hereby submits this internal appeal of the refusal in accordance with section 75 of PAIA:

    73.1. The appeal is submitted within 60 days of the refusal;
    73.2. The subject of this appeal and the reasons for the appeal are identified; and
    73.3. As per the appellant's obligations under section 75(1)(b) of PAIA and the DMR's PAIA manual, the internal appeal is duly submitted to the Director General of the DMR, Dr Thibedi Ramontja, in his capacity as the information officer.

Relief sought

74. It is submitted that access to the requested records should not have been refused by the DMR.

75. The decision to refuse access to the requested record does not fall within the grounds for refusal set out in PAIA. In terms of section 11 of PAIA, the appellant has the right to the requested information because it complied with all of the

procedural requirements in PAIA relating to a request for access, and there is no ground to refuse the information.

76. The appellant calls on the responsible authority to uphold this internal appeal and grant access to the information requested.

SIGNED at **CAPE TOWN** on this the 21st day of **JULY 2015**

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