IN THE SUPREME COURT OF APPEAL

Appeal case no: 69/2014

In the matter between

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA LIMITED First Appellant

ARCELORMITTAL SOUTH AFRICA LIMITED Second Appellant

and

VAAL ENVIRONMENTAL JUSTICE ALLIANCE Respondent

RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION AND BACKGROUND

1. This appeal concerns attempts by the Respondent, the Vaal Environmental Justice Alliance (**"VEJA"**) to obtain access to certain environmental information held by the Second Appellant (**"AMSA**"). VEJA seeks such access in terms of the Promotion of Access to Information Act, 2000 (**"PAIA"**).

2. VEJA is a voluntary association of non-governmental and community-based organisations that advocates for a healthy environment and sustainable development in "the Vaal Triangle". The Vaal Triangle is an area of heavy industry and mining in the south of Gauteng,[1] in which AMSA has two major steel-plants, namely its Vanderbijlpark and Vereeniging sites.[2]

3. AMSA, formerly the wholly state-owned Iscor, is a publicly listed company. AMSA produces over 90% of South Africa's steel products.[3] The steel operations conducted by AMSA include the generation of large quantities of waste, which have the potential of causing serious pollution of ground and water resources and air pollution – such as heavy metals, hydrocarbons, dissolved salts, emissions of carbon dioxide and sulphur dioxide.[4]

4. The records sought by VEJA pertain to the impact of AMSA's operations on the environment at its Vanderbijlpark and Vereeniging sites.[5] It is common cause that AMSA's activities at these two sites have had a significant and serious environmental impact and have caused pollution at and around these sites.

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[1] Founding Affidavit ("FA"), para 4: v. 1, p.7.
[2] FA, para 6.2: v. 1, p. 8.
[3] FA, para 6.1: v .1, p. 8.
[4] FA, paras 6.2 and 6.3: v. 1, pp. 8-9; Answering Affidavit ("AA"), para 43: v. 2, pp. 205-206.
[5] The PAIA requests appear as Annexures SM10 and SM37: v.1, pp. 102-106 and pp. 166-171.

4.1. In respect of its Vanderbijlpark site, AMSA –

4.1.1. admits that *"operations at the Vanderbijlpark Works have historically had a significant environmental impact";*[6]

4.1.2. admits that *"the Vaal Triangle was the first air pollution 'priority area' to be declared by the then national Department of Environmental Affairs and Tourism"*, and that AMSA (formerly Iscor) has been identified as one of "*the main contributing sources of the particulate matter"* causing the air pollution;[7]

4.1.3. does not deny that the groundwater emanating from the plant evaporation ponds at the Vanderbijlpark site is "*a very serious environmental concern in Emfuleni [Municipality]*";[8] and

4.1.4. admits that *"pollution levels in the Vanderbijlpark area are of [public] concern".*[9]

4.2. In respect of its Vereeniging site, AMSA admits that –

4.2.1. In May 2007, upon inspection by the Environmental Management Inspectorate (in the then Department of Environmental Affairs and Tourism, **"the DEAT"**) of AMSA's Vaal disposal site in Vereeniging, the authorities found:

[6] AA, para 60.1: v. 2, p. 211.
[7] AA, paras 61.2 and 62: v. 2, p. 212, read with FA, paras 41.1 and 41.2: v. 1, pp. 27-28.
[8] AA, para 63: v. 2, p. 212, read with FA, para 41.3: v. 1, p. 28.
[9] AA, para 64: v. 2, p. 213, read with FA, para 42: v. 1, p. 29.

"Particulate emissions to air that cause, have caused or may cause significant and serious pollution of the environment"

and

"Significant and serious pollution of surface and groundwater with phenols, iron, oil, fluoride and other hazardous substances".[10]

4.2.2. The authorities also made findings of environmental non-compliance by AMSA, which findings AMSA does not dispute, including *"continued dumping of hazardous waste on an unpermitted site [the Vaal disposal site], despite repeated instructions from the authorities to cease such activity"*.[11]

5. In December 2011 and February 2012, VEJA submitted two requests to AMSA in terms of PAIA.[12]

6. AMSA refused both requests on the basis that VEJA had failed to show that the requested records were "*required for the exercise or protection of any rights*", and had thus not met the threshold requirement under section 50(1)(a) of PAIA.[13] VEJA then launched a High Court application seeking access to the records in terms of section 78(2) of PAIA.

7. The High Court held that the requests had met the threshold requirement under section 50(1)(a) and set aside AMSA's decisions to refuse the requests. AMSA

[10] AA, para 69: v. 2, p. 216, read with FA, para 49.1.2 and 49.1.3: v. 1, p. 33.

[11] AA, para 69: v. 2, p. 216, read with FA, para 49.1.1 and 49.1.4: v. 1, p. 33. See further the findings of environmental non-compliance made against AMSA by the DEA's Environmental Management Inspectorate published in the National Environmental Compliance and Enforcement Reports of 2010/2011 and 2011/2012, cited in the Replying Affidavit ("RA"), paras 20-22: v. 2, pp. 239-240. AMSA did not seek to answer these allegations in a rejoinder affidavit.

[12] The PAIA requests appear as Annexures SM10 and SM37 to the FA: v.1, pp. 102-106 and pp. 166-171.

[13] AMSA's refusals appear as Annexures SM17 and SM19: v 1, pp. 126-127, 129-131.

was directed to supply VEJA with copies of all the records requested. AMSA now appeals against the whole of this judgment.

8. In these submissions, we first address the procedural issues raised by the Appellants pertaining to an application for access to information held by a private body. These are:

8.1. Where a requester contests the private body's refusal to disclose information based on an assessment that the "threshold requirement" under section 50(1)(a) was not met, is a Court limited to the requester's contemporaneous explanation contained in the request itself?

8.2. Where a Court holds that a refusal is unlawful and that the requester has met the requirements of section 50(1)(a), is the private body then entitled to a further opportunity to consider the PAIA request afresh to consider whether any of the grounds of refusal contemplated in sections 62 to 69 of PAIA might apply?

9. We submit that both questions must be answered in the negative. AMSA's contentions on these issues are inconsistent with the text of PAIA, the purposes of PAIA and the approach laid down by this Court and the Constitutional Court in relation to applications in terms of PAIA.

10. Thereafter, we address the issue of whether VEJA requires the requested records in the exercise or protection of the right upon which it relies. This entails determining:

10.1. The meaning and scope of the right upon which VEJA relies – namely the right under section 24 of the Constitution and the legislation enacted to give effect to that right ("the environmental right"); and

10.2. Whether the specific records that VEJA requested are indeed required in order to exercise or protect the environmental right.

11. We submit that on these issues too, AMSA's submissions are untenable. They involve a misunderstanding of the effect of section 24 of the Constitution and the relevant environmental legislation. Moreover, they are not sustainable on a proper consideration of the facts.

12. Before addressing these issues, we set out the factual background pertaining to the PAIA requests and the records at issue.

THE PAIA REQUESTS

The first request: The Environmental Master Plan for AMSA's Vanderbijlpark site

13. In the first PAIA request, submitted on 15 December 2011, VEJA sought access to the Environmental Master Plan developed by AMSA for its Vanderbijlpark site.[14] VEJA requested a copy of the Master Plan, all updated or amended versions of the Master Plan and all progress reports relating to the implementation of the Master Plan.

[14] This request appears as Annexure SM10, v. 1, pp. 102-106. See also FA, paras 18-19: v.1, p. 17.

14. The Master Plan is a consolidation of numerous specialist studies undertaken by external consultants between 2000 and 2002, examining the pollution levels and environmental impacts of AMSA's activities at Vanderbijlpark.[15]

15. In July 2003, an Executive Report on the Master Plan was prepared and circulated by AMSA amongst a group of community members, including representatives of VEJA. These community members were engaging with AMSA in a Licensing Forum process to negotiate AMSA's application for its current water-use licence.[16] The Executive Report indicates that:[17]

15.1. A core team of eight specialists was appointed to develop the Master Plan for the Vanderbijlpark Steelworks site to address the environmental status quo; identify and quantify all environmental impacts; develop options for the improvement of the risk profile; and collate an integrated plan of action to address the identified impacts and the initiation of authorisation processes.[18]

15.2. A consultation committee was established comprising of representatives from a range of regulators, including the then Department of Water Affairs and Forestry (**"DWAF"**), the DEAT, and the then Gauteng Department of Agriculture and Rural Development, (**"GDARD"**).[19]

[15] FA, para 13: v. 1, p. 12; AA, para 32.2: v. 2, p. 193.
[16] FA, para 14: v. 1, p. 12; AA, para 52: v. 2, p. 208; RA, para 37.1: v. 2, p. 245.
[17] The Executive Report appears as Annexure SM6, v. 1, pp. 58-93.
[18] FA, para 15.1: v. 1, pp. 12 – 13. See also the Executive Report (Annexure SM6), paras 2.2 and 2.3: v. 1, p. 62.
[19] FA, para 15.4: v. 1, pp. 13-14; the Executive Report (Annexure SM6), para 2.8: v.1, p.65.

15.3. Baseline studies were conducted to measure pollution levels at and around the Vanderbijlpark plant. These identified various unacceptable pollution risks to the environment.[20]

15.4. A 20 year implementation programme to remedy the pollution and address the environmental impacts of AMSA's Vanderbijlpark site was developed under the Master Plan, at an initial cost estimate of R1,3 billion.[21]

16. In accordance with the environmental governance model adopted under South African law, various fora and committees have been established in which AMSA, the relevant regulators and civil society organisations participate.[22] These multi-stakeholder committees have been established for the negotiation of AMSA's environmental authorisation and licensing processes, and have been specifically tasked with monitoring compliance by AMSA with its licences and undertakings given to regulators. [23]

17. VEJA is a member of two such committees which are engaged in monitoring AMSA's activities in the Vanderbijlpark area:

17.1. The Rietspruit Forum, which meets quarterly to evaluate AMSA's compliance with the conditions of its water use licence and other water-related issues in the Vanderbijlpark area, and

[20] FA, paras 15.5 and 15.6: v. 1, pp. 14-15; the Executive Report (Annexure SM6), paras 4 and 5: v. 1. pp 68-76.

[21] FA, paras 13 and 15.7: v. 1, pp. 12-17. See also para 6.5 of the Executive Report (Annexure SM6), v. 1, p. 81. A subsequent media report estimated the cost of the Master Plan projects as closer to R5 billion. See Annexure SM5: v. 1, pp. 56-57.

[22] FA, paras 17 and 46: v. 1, p.18 and 31; AA, paras 65.1.1 - 65.1.2 and 67: v. 2, pp. 214-216; RA, para 56.1: v. 2, p. 255.

[23] FA, para 17: v. 1, p. 18; AA, paras 55 and 65.1.1: v.2, pp. 210 and 214; RA, para 57.2-57.5: v. 2, pp. 257-258.

17.2. The Vanderbijlpark Waste Disposal Site Monitoring Committee, which monitors and evaluates the air quality, waste and water impacts of AMSA's operations in Vanderbijlpark.[24]

18. While AMSA and regulators, such as the DWAF, have referred to the Master Plan at the meetings of these committees,[25] only the Executive Summary has been disclosed to a small group of community members (including representatives of VEJA).[26] This is despite the fact that AMSA has relied upon the Master Plan to obtain authorisations and licences, including its current water use licence,[27] as well as two waste management licences at Vanderbijlpark, which were then granted on the basis of the Master Plan or parts thereof.[28] Those licences or authorisations remain current.[29]

19. The Master Plan is also referred to in various of AMSA's annual reports, including its 2010 annual report, in which AMSA indicated that it did not intend to release the old Master Plan.[30]

The second request: AMSA's Vaal Disposal site in Vereeniging

20. In the second PAIA request, submitted on 13 February 2012, VEJA sought records relating to the closure and rehabilitation of AMSA's Vaal Disposal site in Vereeniging. The request was premised on the National Environmental Compliance and Enforcement Report, 2010-2011 published by the Department of

[24] FA, paras 17 and 46: v. 1, p.18 and 31; AA, paras 65.1.1 - 65.1.2 and 67: v. 2, pp. 214-216; RA, paras 56 and 57: v. 2, pp. 255-258.
[25] FA, para 17: v. 1, p. 18; AA, para 55: v. 2, p. 210.
[26] FA, para 14, p. 12; AA, para 52: v. 2, p. 208.
[27] FA, para 17: v. 1, p. 18; AA, para 55: v. 2, p. 210.
[28] RA, para 37: v. 2, p. 245.
[29] RA, para 37.4 – 37.5: v. 2, p. 246.
[30] FA, para 16: v. 1, pp. 17-18. The extracts from the Annual Reports are attached as annexures SM7 to SM9: v.1, pp. 94-99.

Environmental Affairs ("**DEA**"),[31] which described the compliance and enforcement action taken by the authorities against AMSA for dumping hazardous substances at this site (**"the Compliance Report"**).[32]

21. VEJA requested various records related to the Compliance Report, including compliance inspection reports compiled by the DEA and/or the GDARD, representations made by AMSA in response to such reports, closure and rehabilitation plans for the site and progress reports submitted by AMSA.[33]

22. The Compliance Report indicated that the authorities had conducted an initial inspection of AMSA's Vaal disposal site in May 2007. It was found that, despite being instructed to cease such activity, AMSA had continued to dump hazardous waste on the unpermitted site. The waste was of a kind that causes significant and serious pollution of the air, surface and ground water.

23. The Compliance Report noted further that the DEA and GDARD Inspectors had issued pre-notices and compliance notices to AMSA in respect of the site. These included notices instructing AMSA to cease dumping hazardous waste on the site and to submit a revised rehabilitation plan for the site, and to implement a major dust emission control project within 18 months, and to submit proposals for interim measures to control fugitive dust emissions.

24. A follow-up inspection of the Vaal Disposal Site was conducted by the GDARD on 27 July 2010. This revealed that AMSA had ceased dumping activities on the site, and had removed 99% of the magnetite from the site. AMSA had submitted a

[31] In 2009, the Department of Environmental Affairs and Tourism was divided into the Department of Environmental Affairs and the Department of Tourism.

[32] A copy of the relevant part of the Compliance Report is attached as annexure "SM36" to the FA, v. 1, p. 164. See also FA, para 49: v.1, p.33 and AA, para 69: v. 2, p. 216.

[33] FA, para 50: v. 1, pp. 35 -36; see also Annexure SM37, v. 1, pp. 165-171.

rehabilitation plan to the GDARD in January 2008, which was resubmitted in March 2010.

25. While the Compliance Report records that, by the time of the follow-up inspection in July 2010, most of the magnetite had been removed from the site, it remains unknown which other serious pollutants and "other hazardous substances" were identified at the dump site in the initial inspection. Various other issues also remain unknown, including: the quantity and concentration of these pollutants and hazardous substances; whether these pollutants and hazardous substances have been removed from the dump site, and if so, where to and how; and the immediate, medium and long-term effects of these pollutants and hazardous substances on the surface and ground-water and air quality at the site and the surrounding vicinity.[34]

26. It also remains unknown whether any waste management applications have been submitted by AMSA, and the basis of such applications; and whether any waste management licences relating to the closure and rehabilitation of the Vaal dump site have been granted to the second respondent, and if so, the conditions of such licences.[35]

27. It is common cause that while dumping at the site has ceased, the site has not yet been rehabilitated by AMSA because, despite repeated instructions from the DEA to AMSA to apply for a waste management licence to close and rehabilitate the

[34] FA, para 56: v. 1, pp. 38-39; AA, para 72: v. 2, p. 218.
[35] Id.

site, AMSA has continued to dispute the requirement for such a licence.[36] This dispute has been on-going since May 2010.[37]

VEJA's motivation for the requests

28. VEJA motivated both requests in the prescribed PAIA forms on the grounds that:

28.1. *"The requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest";*

28.2. *"VEJA requires the requested documents to ensure that ArcelorMittal South Africa Limited carries out its obligations under the relevant governing legislation including the National Environment Management Act, 107 of 1998, the National Environment Management Waste Act 59 of 2008, and the National Water Act 36 of 1998"; and*

28.3. *"VEJA seeks to ensure that the operations are conducted in accordance with the law, that pollution is prevented and that remediation of pollution is properly planned for, and correctly and timeously implemented".*[38]

29. In a letter dated 27 February 2012, and at the express written request of AMSA's attorneys,[39] VEJA's attorneys of record, the Centre for Environmental Rights (**"CER"**), further explained how the Master Plan records would assist VEJA in fulfilling the purpose stated in its PAIA application. The CER also addressed

[36] RA, paras 24-26: v. 2, pp. 241- 242.

[37] AA, paras 24-26: v. 2, pp. 189-190; RA, paras 24-25: v 2, pp. 241-242. See also para 3.4 of Annexure SM53 (letter from the DEA to CER): v. 2, p. 294.

[38] See Annexure SM10 at p. 106 and Annexure SM37 at p. 170.

[39] Annexure SM12: v. 1, pp. 108-109.

AMSA's contention that VEJA was "usurping" the role of the relevant regulating authorities in ensuring statutory compliance.[40] The CER explained that –

29.1. The mission and objectives of VEJA included engagement of role players in government, industry and commerce to promote a healthy, safe and sustainable environment;

29.2. VEJA works with the regulators to ensure compliance with environmental laws;

29.3. VEJA is made up of interested and affected parties who live in the area and, as a result, its members are often the first to be aware of instances of non-compliance and worst affected by it;

29.4. The Compliance Monitoring and Enforcement Units of the relevant regulators are woefully understaffed, with this situation being particularly acute in the Department of Water Affairs. Government lacks the capacity to monitor compliance at all facilities in the country and it is thus crucial for the public to play an active role; and

29.5. Members of the public are invited by the regulators to report contraventions of environmental legislation or permits and environmental crimes and incidents, including by hotlines established specifically for this purpose.[41]

30. Against this background, we turn to address the legal issues enumerated above.

[40] Annexure SM13: v. 1, pp. 111-113.
[41] Paragraphs 8 and 9 of Annexure SM13, v. 1, pp. 112-113.

THE CORRECT APPROACH TO PAIA APPLICATIONS CONCERNING PRIVATE BODIES

The circumstances to be considered by the High Court in relation to section 50(1)(a)

31. Section 50(1)(a) of PAIA involves an assessment of whether the requested record held by a private body is *"required for the exercise or protection of a right".*

32. AMSA contends that, when a Court deals with a section 78 application in relation to a refusal by a private body to furnish information, the Court is limited in what it may consider to determine whether the requirement under section 50(1)(a) is satisfied. It contends that the Court must make this assessment solely on the basis of the explanation provided by a requester on the PAIA request form (Form C)[42] and any contemporaneous correspondence that may have informed the private body's decision.[43]

33. This argument is inconsistent with the now well-established approach laid down by the Courts in relation to section 78 applications. It has been made clear by this Court and the Constitutional Court that such applications entail a *de novo* hearing on the merits of the request and that the Court and parties are not limited to the contents of the initial request or refusal.[44]

34. To sustain its argument, AMSA is thus forced to contend that this approach applies only to section 78 applications where a public body has refused the request on substantive grounds. It contends that a different approach must apply to private

[42] PAIA Regulations, 2002 (Annex B, Form C), published under GN R187 in GG 23119 of 15 February 2002 (and as amended). See also section 53(2)(d) of PAIA.

[43] Appellants' Heads of Argument ("HOA"), paras 17-18; and 24-25.

[44] President of the Republic of South Africa and Others v M&G Media Limited 2012 (2) SA 50 (CC) at para 14; Transnet Ltd v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at para 24.

bodies, at least where the request is refused on the basis of the "threshold requirement" under s 50(1)(a). In support of this argument –

34.1. AMSA relies on what it characterises as the "*fundamental distinction*" in section 32 of the Constitution and PAIA between access to information held by public and private bodies: that the State has general obligations of transparency and accountability, whereas private bodies are obliged only to disclose information that is *"required for the exercise or protection of any rights"*.[45]

34.2. ASMA contends that section 50(1)(a) imposes a "'*need to know' threshold onus"* that must be discharged by the requester in the PAIA application form itself.[46]

34.3. AMSA contends further that, as a matter of *"procedural logic",* in determining whether a private body was correct to refuse a request on the basis that the requester failed to discharge the onus under section 50(1)(a), the Court must consider only the requester's contemporaneous explanation for the request.

35. We submit that AMSA's contentions are wholly at odds with the express provisions and objects of section 32 of the Constitution and PAIA, and accordingly cannot be sustained.

36. There is no debate over whether the so-called "threshold requirements" in section 50(1)(a) of PAIA must be satisfied to entitle a requester to records held by a

[45] Appellants' HOA, paras 22.4 and 22.5, relying on Unitas Hospital v Van Wyk 2006 (4) SA 436 (SCA), para 51.
[46] Appellants' HOA, paras 22.7 and 23.

private body. However, section 50(1)(a) does not impose an "onus" on the requester to prove that the records are required for the exercise or protection of any rights – let alone an onus that may only be satisfied by considering the request form itself rather than the papers as a whole.

36.1. Neither section 32 of the Constitution nor section 50(1)(a) of PAIA contemplate any such onus on the part of the requester. These provisions simply enshrine the right of access to information held by private bodies where such information is objectively "*required for the exercise or protection of any rights*".[47]

36.2. Section 53 of PAIA, which describes the form of the request for access to a record of a private body, also does not require the requester to "*establish*", "*prove*", or even "*demonstrate*" that it requires the requested records for the exercise or protection of a right. Section 53(2)(d) requires only that the requester *"identify the right the requester is seeking to exercise or protect"* and to *"provide an explanation of why the requested information is required for the exercise or protection of that right".*[48]

36.3. Section 81(3) of PAIA, we submit, puts the matter beyond any doubt. This provision governs the burden or "onus of proof"[49] in all applications instituted under section 78 of PAIA – whether against a decision of a public or private body. Section 81(3) makes clear that in these proceedings, "*the burden of establishing that the refusal of a request for access . . . complies*

[47] Section 32(1)(b) of the Constitution states that: "(1) Everyone has the right of access to . . . (b) any information that is held by another person and that is required for the exercise or protection of any rights."
Section 50(1)(a) of PAIA provides that: "(1) A requester must be given access to any record of a private body if–(a) that record is required for the exercise or protection of any rights".

[48] Emphasis added.

[49] Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) para 24.

with the provisions of the Act rests on the party claiming that it so complies." PAIA is thus clear: whenever a request for access is refused, the onus to show that the refusal is justified rests on the body that has refused the request – whether it be a public or private body.

37. This Court's jurisprudence is to the same effect. In ***Claase***, this Court held that, in the application instituted by a requester aggrieved by a private body's refusal of a PAIA request, *"the applicant need only put up facts which prima facie, though open to some doubt, establish that he has a right [for] which access to the record is required to exercise or protect."*[50] This Court found that the traditional standard of proof in applications for an interim interdict was appropriate.

38. AMSA's approach is also not sustainable in light of the objects and constitutional setting of PAIA.

38.1. The objects of PAIA are enumerated in section 9 of the Act. These include the object to *"promote transparency, accountability and effective governance of all public and private bodies".*[51]

38.2. As Ngcobo J explained in ***President of the RSA & Others v M&G Media Ltd***,[52] *"the imposition of the evidentiary burden [under s 81(3) of PAIA] of showing that a record is exempt from disclosure on the holder of the information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of PAIA read in the light of s 32*

[50] Claase v Information Officer, South African Airways (Pty) Ltd 2007 (5) SA 469 (SCA) at para 8.
[51] Section 9(e) of PAIA, emphasis added.
[52] President of the Republic of South Africa & Others v M&G Media Ltd 2012 (2) SA 50 (CC) at para 15.

of the Constitution. This is because the requester of information has no access to contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act".

38.3. Imposing such an onus on requesters, who may well be lay persons with no legal knowledge, would seriously erode the right of access to information held by private bodies.

39. There is simply no basis for contending that a Court faced with a section 78 application is limited to considering the request form itself, rather than the affidavits before it.

39.1. On its own terms, PAIA does not envisage a different procedural approach in judicial proceedings concerning information held by private and public bodies. While the requirements for access and the grounds of refusal that the court must consider differ for public and private bodies, the nature of the judicial proceedings under section 78 remains the same.

39.2. This Court described the nature of section 78 proceedings in ***Transnet***[53] and specifically rejected the contention that the Court had to limit itself to such material as was before the information officer when the request was refused:

> *"It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right. A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000.*[54] *It is much more extensive. It is a civil proceeding like any motion matter, in the*

[53] Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) para 28.

[54] A decision taken under PAIA is expressly excluded from the definition of "administrative action" under PAJA.

course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties' respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the Legislature's having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover, it is unlikely that a Court, acting under s 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply."

40. A further reason for rejecting the AMSA approach, and specifically in respect of refusals based on s 50(1)(a), was identified by this Court in ***Unitas Hospital***. This is that any determination of whether a requested record is indeed "required" for the exercise or protection of a right is a heavily fact-sensitive determination.[55] The Court cannot possibly be expected to make such a determination, which may ultimately have serious consequences for the protection and exercise of rights, without regard to the full conspectus of facts as the parties may put before it.

41. AMSA's contentions on this issue must therefore be rejected.

A further opportunity to consider possible grounds of refusal

42. AMSA then contends that, where a private body has refused a request solely on the basis that the request failed to meet the "threshold requirement" in section 50(1)(a), and where this refusal is found by a court to be unjustified, the private body must be afforded a further opportunity to consider whether any other grounds of refusal – i.e. those under section 50(1)(c) – apply.

[55] Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA) at para 18 (per Brand JA); para 30 (per Cameron JA); para 56 (per Conradie JA).

43. It argues that to hold otherwise, would impose a "*burdensome*" obligation on private bodies to consider all grounds of refusal in respect of all requests, which is contrary to the scheme of PAIA. AMSA argues that, unlike public bodies, "*private bodies do not have a general obligation to process and consider requests for access to information*" – they are obliged only to do so in respect of those requests that meet the threshold requirement under section 50(1)(a).[56]

44. AMSA thus invites this Court to endorse a three or four-stage process for the determination of requests for information under section 50(1) of PAIA:

44.1. First, that when faced with a PAIA request, the private body is required only to consider the so-called "threshold requirement" that the requested record is required to protect or exercise a right is met.

44.2. Second, if the request is refused, that the requester must then challenge the validity of any refusal on this ground by way of court application, possibly through more than one Court, as this case demonstrates.

44.3. Third, if the Court finds that the threshold requirement is met and the initial refusal was unlawful, the private body is then permitted to consider whether any grounds of refusal listed under Part 3, Chapter 4 of PAIA might apply.

44.4. Fourth, the requester must then return to court to challenge the validity of any refusal on a listed ground by court application.

45. This approach is contrary to the scheme and objects of PAIA and section 32 of the Constitution. In particular, it undermines PAIA's objects of promoting transparency

[56] Appellants' HOA, paras 72-74.

and accountability in private and public bodies through access to information procedures that are "*as swift, inexpensive and effortless as reasonably possible"*.[57]

46. The importance of a "*swift, inexpensive and effortless*" procedure under PAIA has been emphasised by this Court. In ***Claase***, this Court emphasised that it was "*unfortunate*" that PAIA had produced so much unnecessary litigation and delays given that "*one of the objects of the legislation is to avoid litigation rather than propagate it*". It added that the appeal in that matter "*illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this Court having to deal with a matter which should never have required litigation*."

47. We submit that precisely the same result would be produced (and magnified) if AMSA's contentions on this procedural aspect were to be upheld.

48. The effect of the approach proposed by AMSA would fundamentally undermine the affordability, efficiency and ultimately the efficacy of the provisions of section 50 of PAIA. It could thus never have been intended, and should not be countenanced by this Court. Section 2(1) of PAIA provides that, when interpreting a provision of the Act, a court must prefer any reasonable interpretation of the provision that is consistent with its objects over any alternative interpretation that is inconsistent with these objects.

49. In the present case, AMSA had a choice when faced with the section 78 application by VEJA. It must now be held to the choice it has made.

[57] Preamble and section 9(d) of PAIA.

49.1. It could have opposed only on the basis of the threshold requirements or it could have opposed on the basis of the threshold requirements and raised substantive grounds of refusal in the alternative. It elected to adopt the first route. It did not alter its stance, even when the deficiencies in its approach were pointed out in the replying affidavit.[58]

49.2. Our courts have repeatedly recognised that "*litigation in general … can present a minefield of hard choices*" and that there is nothing impermissible about this.[59] But in the present case, the choice for AMSA was not even a hard one – no prejudice at all could have occurred had AMSA elected to plead a case in the alternative to establish a substantive ground of refusal.

50. AMSA's contentions on this issue must therefore also be rejected.

THE RIGHT RELIED ON BY VEJA

51. Section 24 of the Constitution provides that:

> *"Everyone has the right-*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

[58] RA, para 42: v. 2, p. 262.

[59] Eg: S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC) at para 94; Law Society of The Cape of Good Hope v Randell 2013 (3) SA 437 (SCA) at para 32.

52. Various pieces of legislation have been enacted to give effect to this right, including, most notably, the National Environmental Management Act 107 of 1998 ("**NEMA**").

53. AMSA contends that VEJA does not require the requested records to protect the environmental rights under either s 24(a) or 24(b) or the legislation enacted to give effect to these provisions. The crux of its contention is that, while civil society is entitled to report instances of environmental damage to the relevant governmental authorities, civil society is not permitted itself to monitor and enforce environmental laws. For example, AMSA's heads of argument in this Court state:

> *"[T]he model of environmental governance promoted in environmental legislation… encourages civil society to report instances of environmental damage or pollution or instances of non-compliance with environmental laws to the environmental authorities who are then mandated to act against the transgressor. It does not, however, provide or contemplate civil society assuming the regulatory function."*[60]
>
> *"Should it be established … that AMSA has fallen short and the environmental authorities have failed properly to hold it to account for the breach of its obligations, then VEJA intends to act to ensure that AMSA complies with its obligations. The scope of the [section 24] constitutional right does not extend to such a claim."*[61]

54. We submit that this argument is untenable in two respects:

54.1. First, it involves a misunderstanding of section 24 of the Constitution and the environmental legislation enacted by Parliament to give effect to that section. The legislation, in particular, expressly confers on civil society the right to itself enforce environmental laws.

[60] Appellants' HOA, para 33.
[61] Appellants' HOA, para 39.

54.2. Second, even if AMSA were correct that the role of civil society is limited to reporting non-compliance to the relevant governmental authorities, this would itself be sufficient to establish that the information sought by VEJA is required for the exercise and protection of that right.

55. We address each of these issues in turn.

Private parties themselves have a right to enforce environmental compliance

56. The suggestion that monitoring pollution and environmental impacts and compliance with environmental laws is the sole preserve of the State is wrong. This is not the position under South African law.

57. South Africa has adopted an environmental governance model that encourages public participation and relies on civil society to play a role as an effective environmental watchdog. Both the legislature and executive have recognised that the protection of the environment is a matter of fundamental public concern, and that environmental compliance and enforcement is best achieved through the participation of all interested and affected stakeholders. This is evidenced in both legislation and policy.

58. Numerous provisions of NEMA endorse public participation in environmental governance – including the enforcement of environmental laws.

59. We draw attention to the preamble of NEMA, which explicitly recognises that it is desirable –

59.1. *"that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance";* and

59.2. *"that the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society"*.[62]

60. Also worthy of particular emphasis is section 32 of NEMA. It provides:

> *"Legal standing to enforce environmental laws*
>
> *(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources-*
>
> *(a) in that person's or group of person's own interest;*
>
> *(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;*
>
> *(c) in the interest of or on behalf of a group or class of persons whose interests are affected;*
>
> *(d) in the public interest; and*
>
> *(e) in the interest of protecting the environment.*
>
> *…*
>
> *(3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application-*
>
> *(a) award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and*
>
> *(b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings."*

[62] Emphasis added.

61. Similarly, section 33(1) of NEMA provides that private parties are entitled to engage in private prosecutions in respect of environmental breaches:

> *"Any person may-*
>
> *(a) in the public interest; or*
>
> *(b) in the interest of the protection of the environment,*
>
> *institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal bylaw, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and the breach of that duty is an offence."*

62. In the light of these provisions, it is difficult to understand how AMSA can seriously contend that private parties are precluded from monitoring and enforcing environmental laws:

62.1. Sections 32(1) and 33(1) expressly give private parties the right to themselves approach the courts for appropriate civil relief or via a private prosecution for "*any breach or threatened breach*" of environmental laws. They make quite plain that private parties are <u>not</u> limited only to raising these issues with governmental authorities.

62.2. Moreover, section 32(3)(b) in effect recognises the value of private parties engaging in the "*investigation*" of such matters, prior to launching such civil proceedings and entitles them to claim costs in this regard. It is, in part, precisely such attempted investigations by VEJA that are being stymied by AMSA's refusal to provide the information requested.

63. On this basis alone, AMSA's contentions on this score are simply unsustainable.

In any event, private parties have a right to assist and require governmental authorities to enforce environmental compliance

64. Even if AMSA were correct that the role of civil society is limited to raising environmental concerns with governmental authorities and in other forums, this does not assist it. VEJA then has still established a right – to raise environmental concerns regarding AMSA with governmental authorities and in other forums – and the information sought is required for the exercise and protection of that right.

65. Indeed, it could scarcely be contended that civil society groups have no role to play in this regard.

65.1. Section 28(12) of NEMA expressly empowers any person to apply to a competent court for an order compelling governmental officials to take action against environmental breaches.

65.2. Several statutes addressing specific sectoral environmental concerns provide for public participation in environmental governance – including in monitoring, administrative decision-making and localised management structures.[63]

65.3. Further, a number of policies and environmental management strategies enacted in terms of these Acts as subordinate legislation have explicitly adopted a model of "*partnership and co-regulation"*, which encourages civil

[63] See, for example, the National Water Act 36 of 1998 (ss 10(2)(c), chs 7-9 and 14); the National Environmental Management: Protected Areas Act 57 of 2003 (ss 2(b) and (f), 5, 31(d), 32(d), 39-42); the National Environmental Management: Biodiversity Act 10 of 2004 (ss 2(c), 7, 11(n), 43-45, 47, 49, 74(1), 99, 100); the National Environmental Management: Air Quality Act 39 of 2004 (ss 5, 8(c), 19(4) and (6), 38(3), 39(h), 56, 57); the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ss 5, 23, 42, 43, 53, 93); and the National Environmental Management: Waste Act 59 of 2008 (ss 2(b), 5, 11(7), 60, 61, 64, 72, 73, 75).

society, NGOs, and local communities to play an active role in environmental governance. For example:

65.3.1. The 2012 National Waste Management Strategy (NWMS)[64] states:

> *"Implementing the waste management hierarchy and achieving the objects of the Waste Act will require coordinated action by many players, including households, businesses, community organisations, NGOs, parastatals and the three spheres of government. This means that a consultative and partnership based approach is essential for realising the NWMS: government action alone cannot be effective. Therefore, government is committed to following a co-regulatory and consensual approach that brings different actors on board and allows scope for local initiative and creativity. . . .*
>
> *Even in the more traditional government area of regulatory compliance, partnerships are needed for compliance monitoring. Both business and civil society play a crucial role in identifying areas of risk and alerting government to the need for enforcement or legal action."*[65]

and

> *"While the Waste Act creates a comprehensive legal framework for waste management, its provisions would be meaningless without measures to monitor and, where necessary, enforce compliance. Government cannot do this alone. Business and civil society have a vital role to play in creating a culture of compliance, and in reporting instances of non-compliance."*[66]

65.3.2. The National Framework for Air Quality Management, 2007[67] states:

> *"The public may be directly affected by air pollution. The public and civil society groups therefore contribute local*

[64] Promulgated in terms of section 6 of the Waste Act, GN 344, GG 35306 of 4 May 2012.

[65] Pages 19-20 (emphasis added)).

[66] Page 33 (emphasis added)).

[67] The National Framework for Air Quality Management, 2007, GG 30284 of 11 September 2007, GN 1138.

perspectives and also have an important watchdog role to play in bringing to the attention of the authorities through their municipal AQO[68], matters of concern or of non-compliance."[69]

66. Our courts, too, have recognised the important role that civil society and the public play in environmental governance, and have done so to give meaning and effect to procedural rights. In ***Biowatch***,[70] the Constitutional Court observed that:

> *"A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this Court's jurisprudence . . . Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest."*

67. Under international law too, it is well recognised that the exercise and protection of environmental rights requires public participation and public access to information on pollution, hazardous material and activities, and environmental impacts. The Constitution requires that a court interpreting the Bill of Rights must consider international law and may consider foreign law.[71]

67.1. Principle 10 of the Rio Declaration on Environment and Development, adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, laid the foundation for a right of access to environmental information. It states:

> *"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including*

[68] Air Quality Officer.

[69] Page 22. The Framework was reviewed and updated under *GG* 37078 of 29 November 2013, GN 919. It contains the same statement on p. 29.

[70] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), para 19. See also: Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA) at para 20 and

[71] Section 39(1)(b) and (c).

information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

67.2. At the same 1992 Rio Summit, the UN member states adopted an "action plan and blueprint for sustainable development", called Agenda 21. Chapter 27 of Agenda 21 commits states to strengthening the role of NGOS as "partners for sustainable development". It recognised, inter alia, that –

"27.2. One of the major challenges facing the world community as it seeks to replace unsustainable development patterns with environmentally sound and sustainable development is the need to activate a sense of common purpose on behalf of all sectors of society. The chances of forging such a sense of purpose will depend on the willingness of all sectors to participate in genuine social partnership and dialogue, while recognizing the independent roles, responsibilities and special capacities of each.

27.3. Non-governmental organizations . . . possess well-established and diverse experience, expertise and capacity in fields which will be of particular importance to the implementation and review of environmentally sound and socially responsible sustainable development, as envisaged throughout Agenda 21. The community of non-governmental organizations, therefore, offers a global network that should be tapped, enabled and strengthened in support of efforts to achieve these common goals.

27.4. To ensure that the full potential contribution of non-governmental organizations is realized, the fullest possible communication and cooperation between international organizations, national and local governments and non-governmental organizations should be promoted in institutions mandated, and programmes designed to carry out Agenda 21. Non-governmental organizations will also need to foster cooperation and communication among themselves to reinforce their effectiveness as actors in the implementation of sustainable development.

. . .

27.8. Governments and international bodies should promote and allow the participation of non-governmental organizations in the conception, establishment and evaluation of official mechanisms and formal procedures designed to review the implementation of Agenda 21 at all levels."

67.3. In 1998, the UN Economic Commission for Europe passed the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (otherwise known as the Aarhus Convention). The preamble of the Convention recognised that,

> *"in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns"*

and further recognised –

> *"the importance of the respective roles that individual citizens, non-governmental organisations and the private sector can play in environmental protection".*

67.4. The European Parliament and Council likewise acknowledged in their 2003 Directive on Public Access to Environmental Information[72] that,

> *"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*

68. In light of all of the above, we submit that it is simply incorrect to suggest that a community-based, civil society organisation such as VEJA is not entitled to protect and exercise its right to an environment not harmful to health or well-being under section 24(a) by seeking information to enable it to assess the impact of AMSA's activities on the environment, and to exercise a watchdog role in respect of the preventative and rehabilitative measures taken.

[72] Directive 2003/4/EC of 28 January 2003.

69. The exercise and protection of the right to an environment not harmful to health or well-being properly entails civil society organisations playing an active role in environmental governance. This includes, at the very least, assessing the compliance status of any enterprise or facility that carries on activities that impact on the environment. This role is *complementary* to the duties and functions of the State. It does not entail civil society "usurping" the role of the State, but rather the exercise of the statutory powers and responsibilities afforded civil society and the public at large, and *collaboration* with the authorities to protect the environment.

Conclusion on section 24 and the related legislation

70. On any basis then, VEJA has established the requisite right under section 24 and the related legislation. Indeed it has established the right both to directly enforce environmental compliance itself and, in any event, the right to do so indirectly via governmental officials and other forums.

71. This renders it unnecessary for this Court to pronounce on the question of whether section 24(b) of the Constitution applies only vertically or horizontally as well. We persist in submitting that section 24(b) applies horizontally. However, even if AMSA were correct that it only applies vertically, that would not change the ultimate analysis. In that event, VEJA has still established the requisite right, because it is then entitled to contend that the information is required for it to enforce its rights against the State.

72. Against this backdrop we now turn to the records themselves.

THE REQUESTED RECORDS ARE REQUIRED FOR THE EXERCISE AND PROTECTION OF ENVIRONMENTAL RIGHTS

73. The Appellants have summarised the case law on the meaning of "required" in s 50(1)(a) of PAIA, and we do not repeat that here.[73] We emphasise only that this Court has correctly been wary of not undermining the scope and objects of the constitutional right of access to information and that of PAIA by setting the bar in s 50(1)(a) too high. Thus –

73.1. In ***Cape Metropolitan Council***, this Court characterised the question as being whether the information would "*assist*" in the exercise or protection of the right.[74]

73.2. In ***Clutchco***, this Court emphasised that 'required' *"does not mean necessity, let alone dire necessity"*.[75]

73.3. In ***Claase***,[76] this Court held that the applicant need only *"put up facts which prima facie, though open to some doubt, establish that he has a right which access to the record is required to exercise and protect."*

74. It should be borne in mind that a requester is seeking access to information that is not currently possessed. As a result, a requester will not usually know its contents, and accordingly cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision.

[73] Appellants' HOA, para 52.
[74] Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) at paras 28 – 29.
[75] Clutchco (supra), para 13. See also Unitas Hospital (per Brand JA) at paras 16-17.
[76] Claase (supra) at para 8.

The Master Plan

75. The Appellants contend that the Master Plan is "*outdated and irrelevant*" and further that it is *"scientifically and technically flawed",* and thus cannot be "required" for the exercise or protection of environmental rights.

76. On the first allegation – that the Master Plan is "outdated and irrelevant" – AMSA points to the fact that the Master Plan was based on studies conducted between 2000 and 2002, which it contends have been "replaced" by more recent studies conducted for licensing purposes. This answer simply does not address VEJA's reasons for requiring the Master Plan.

77. As VEJA indicated,[77] the Master Plan will provide a valuable baseline of data in respect of the pollution levels at the Vanderbijlpark site, derived from at least two years of numerous environmental tests and investigations conducted by AMSA. Both the focus and findings of the more recent studies allegedly conducted by AMSA, and the subsequent rehabilitation measures it has taken, can only properly be assessed in the light of a baseline of scientific data. Given the manifest scope of the Master Plan, it remains a vital source of data against which VEJA can make such assessments. Thus, even if it is accepted that the Master Plan is "outdated" (which is not accepted, given that VEJA has not had sight of the Master Plan), it does not follow that it is "irrelevant".

78. On the second allegation, AMSA suggests that the Master Plan was "scientifically and technically flawed" for two reasons:

[77] FA, para 44: v 1, p. 30. See also RA, para 30: v 2, p. 243.

78.1. *"Inappropriate standards*" were used to quantify the level of risk - in particular, reliance was placed on international standards based on overly stringent 'worst-case' scenarios;[78] and

78.2. *"The studies upon which the Master Plan was based reached conclusions that were simply scientifically unfounded"*.[79]

79. Neither of these explanations suggests that the underlying information – i.e. *the sources and levels of pollution* identified and recorded in the Master Plan – is flawed or inaccurate. AMSA's explanation suggests only that the *conclusions* drawn from the data were skewed by the application of erroneous standards, or were otherwise "scientifically unfounded".

80. The Appellants' characterisation of the flaws in the Master Plan thus does not address VEJA's reasons for requiring this record: to obtain information on the level and sources of pollution in and around AMSA's Vanderbijlpark site in order effectively to monitor and evaluate the pollutions levels, and to assess the remedial measures undertaken by AMSA. VEJA seeks access to the Master Plan, because there is a critical paucity of publicly-available information on the sources and degree of pollution at and around the Vanderbijlpark site.[80]

81. Further, the Appellants' complete disavowal of the relevance of the Master Plan is unconvincing in that:

81.1. It appears that AMSA never gave any indication to its own shareholders that the Master Plan was scientifically inaccurate. On the contrary, the

[78] AA, para 32.5: v 2, p. 195.
[79] AA, para 32.6: v 2, p. 196.
[80] FA, para 43: v 1, p. 30; RA, paras 30-31: v 2, p. 243.

Master Plan has been mentioned regularly in the AMSA's Annual Reports and these reports indicate that the Master Plan constituted AMSA's primary environmental management strategy document. While AMSA insists that the Master Plan *no longer* informs its environmental management strategy (as indicated in its 2010 Annual Report), it does not deny that it was indeed a crucial framing document for AMSA's environmental strategy as indicated in its 2002 and 2004 Annual Reports.[81]

81.2. AMSA submitted the Master Plan to regulatory authorities, and has relied upon the Master Plan to obtain authorisations and licences. The regulatory authorities in turn relied upon the Master Plan in providing authorisations and licences.[82] This is not denied by AMSA.[83]

81.3. Moreover, VEJA seeks the Master Plan as a member of multi-stakeholder committees, specifically the Rietspruit Forum and the Vanderbijlpark Waste Disposal Site Monitoring Committee. As a member of these committees, VEJA is tasked with monitoring the immediate and ongoing impacts of certain of AMSA's activities and the effectiveness of its remediation and rehabilitation efforts at its Vanderbijlpark site, as well as developing plans to resolve significant environmental issues arising there. However, its lack of information on the sources and levels of pollution at and around Vanderbijlpark seriously hampers its ability to perform these functions effectively.[84]

[81] FA, para 16: v 1, pp. 17-18; RA, para 54: v 2, pp. 254-255.
[82] FA, para 18: v 1, p. 18.
[83] AA, para 55: v 2, p. 210.
[84] RA, paras 56.1 – 56.2: v 2, pp. 255-256.

82. Moreover, it is difficult to understand how AMSA can seriously contend that VEJA is not entitled to access to the Master Plan in circumstances where:

82.1. AMSA relied on the Master Plan to obtain authorisations and licences, including its current water use licence[85] and two waste management licences at Vanderbijlpark;[86] and

82.2. Those licences or authorisations remain current.[87]

83. In the circumstances, it is simply untenable to suggest that VEJA is prevented from accessing the Master Plan because AMSA now has other plans or information or because AMSA has now changed its mind about the reliability and veracity of the Master Plan.

84. In view of the above, the court *a quo* correctly found that the Master Plan cannot be labelled as irrelevant, and that VEJA indeed requires the Master Plan to exercise and protect the right under s 24 of the Constitution.

The Vaal Disposal Site Records

85. Unlike the Master Plan, AMSA does not dispute the relevance of the Vaal Disposal Site records sought in VEJA's second PAIA request.[88] It disputes only whether VEJA has established the application of the section 24 right in relation to the Vaal

[85] FA, para 17: v. 1, p. 18; AA, para 55: v. 2, p. 210.
[86] RA, para 37: v. 2, p. 245.
[87] RA, para 37.4 – 37.5: v. 2, p. 246.
[88] Appellants' HOA, paras 66 – 67.

Disposal site. AMSA contends that in seeking these records, VEJA is improperly attempting to "usurp" the monitoring and enforcement powers of the State.[89]

86. We submit, for the reasons given above, that this contention is incorrect and unfounded. VEJA is seeking to protect the right to an environment not harmful to health and well-being and to exercise its entitlement to participate in environmental governance in the exercise of the right under section 24 of the Constitution.

87. AMSA alleges further that VEJA's second request amounts to "a fishing expedition" and is based on "speculation" as to the environmental risks at the Vereeniging Waste Disposal Site.[90] These allegations are also spurious:

87.1. VEJA's concern over the rehabilitation of the Vaal Disposal Site is not based on "pure speculation". The risk of "*serious pollution of the environment*" following AMSA's illegal dumping of hazardous substances at the site is recorded in the Compliance Report issued by the Department of Environmental Affairs.[91]

87.2. Moreover, the application is plainly not a "fishing expedition". VEJA seeks the information in order to take effective steps to ensure that the environment at and around the Vaal Disposal Site is not harmful to the health and well-being of the communities in the vicinity. VEJA's concerns over the impact of AMSA's activities at the Vaal Disposal Site are of a serious nature, and the requested information would afford it a substantial advantage, and may indeed be decisive, to its exercise and protection of the right to an environment that is not harmful to health or well-being.

[89] AA, paras 14.4-27: v 2, pp. 185-191 and AA, paras 69-75: v 2, pp. 216-220.
[90] AA, para 73.3: v 2, p. 219.
[91] Annexure SM36, v 1, p.165. See also FA, para 49 and 55: v 1, pp. 33- 35, 38.

CONCLUSION

88. We therefore submit that this Court should dismiss the appeal in its entirety.

89. In relation to costs, the High Court was correct to award costs to VEJA.

89.1. The attempt by AMSA to rely on the ***Biowatch*** decision does not assist it. That case concerned the award of costs in constitutional matters involving the State. This is not such a case.

89.2. In relation to constitutional litigation such as this between two private parties, the approach to costs is laid down in ***Bothma v Els***.[92] It is to the effect that:

89.2.1. The general principle is that costs will follow the result.[93]

89.2.2. In "*exceptional cases*", the Court will make no order as to costs. In particular, no order as to costs will be made where "*the pursuit of public interest litigation could be unduly chilled by an adverse costs order*".[94]

89.3. In this case, AMSA has established no exceptional circumstances justifying a departure from the general principle that costs will follow the result. In particular, it has certainly not established that a costs award in VEJA's favour will unduly chill public interest litigation.

[92] Bothma v Els 2010 (2) SA 622 (CC).
[93] Id at para 91.
[94] Id at para 93.

89.4. Sections 32(2) and (3) of NEMA address the issue of costs awards within the context of environmental litigation, and provide that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief.

90. We therefore submit that the appeal should be dismissed with costs, including the costs of two counsel.

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21 July 2014

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