



**MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA**

Reference: LSA 190924

APPEAL DECISION

**APPEAL IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000
(ACT NO. 2 OF 2000) AGAINST THE REDACTION OF INFORMATION IN THE
REQUESTED GREENHOUSE GAS EMISSION DATA REPORTS, POLLUTION
PREVENTION PLANS AND ANNUAL PROGRESS REPORTS PERTAINING TO A LIST
OF ENTITIES**

Centre for Environmental Rights

Appellant

Department of Forestry, Fisheries and the Environment

Competent Authority

Appeal: This is an appeal submitted by the Centre for Environmental Rights (the appellant) on 12 December 2019, against the decision of the Deputy Director General: Climate Change Air Quality and Sustainable Development of the Department of Environment, Forestry and Fisheries (the Department), on 5 April 2019, to grant an partial access to the requested greenhouse gas (GHG) emission data reports, the Pollution Prevention Plans and Annual Progress Reports pertaining to a list of entities.

1. BACKGROUND AND APPEAL

- 1.1** On 11 February 2019, the Centre for Environmental Rights (the appellant) submitted an application for access to information in terms of section 18(1) of the Promotion of Access

to Information Act, 2000 (Act No. 2 of 2000) (PAIA). The aforementioned request was in respect of access to the following:

- 1.1.1 The database or list of data providers registered in terms of regulation 5 of the National Greenhouse Gas Emission Reporting Regulations, GN 275 of 2017 (the GHG Reporting Regulations);
- 1.1.2 The latest reports submitted in terms of regulation 7(1) of the GHG Reporting Regulations (GHG emission data reports) for the following entities (third parties):
 - 1.1.2.1 Eskom Holdings SOC Ltd.
 - 1.1.2.2 Sasol Ltd.
 - 1.1.2.3 ArcelorMittal South Africa Ltd.
 - 1.1.2.4 Exxaro Resources Ltd.
 - 1.1.2.5 Glencore Plc.
 - 1.1.2.6 African Rainbow Minerals Ltd.
 - 1.1.2.7 Anglo American Plc.
 - 1.1.2.8 Anglo Operations Ltd.
 - 1.1.2.9 South 32 Ltd.
 - 1.1.2.10 Seriti Resources Holdings (Pty) Ltd.
 - 1.1.2.11 Petmin Ltd.
 - 1.1.2.12 Mbuyelo Coal (Pty) Ltd.
 - 1.1.2.13 Kuyasa Mining (Pty) Ltd.
 - 1.1.2.14 Sappi Ltd.
 - 1.1.2.15 PPC Ltd.
 - 1.1.2.16 Gold Fields Ltd.
- 1.1.3 The database of or list of persons that have submitted pollution prevention plans under regulation 4(1) of the National Pollution Prevention Plan Regulations, GN 712 of 2017 (PPP Regulations);
- 1.1.4 The pollution prevention plans submitted for the period up to 31 December 2020 in terms of regulation 3(2) of the PPP Regulations, by the companies (pollution prevention plans);
and

- 1.1.5 The latest annual progress reports, submitted by the companies, in terms of regulation 5(1) of the PPP Regulations (annual progress reports).
- 1.2 On 5 April 2019 and in terms of section 25 (1) of PAIA, the Department notified the appellant of its decision to grant partial access to the requested information.
- 1.3 The Department decided to release the following documents to the appellant:
 - 1.3.1 The list of data providers registered in terms of regulation 5 of the of the GHG Reporting Regulations;
 - 1.3.2 The latest reports submitted in terms of regulation 7(1) of the GHG Reporting Regulations for some of the listed companies, which has been redacted;
 - 1.3.3 A list of persons that have submitted pollution prevention plans under regulation 4(1) of the PPP Regulations; and
 - 1.3.4 The pollution prevention plans submitted for the period up to 31 December 2020 in terms of regulations 3(2) of the PPP Regulations which has been redacted.
- 1.4 The Department indicated that it received the first annual progress reports from certain of the entities listed under paragraph 1.1.2 above, however the appellant's request for those annual progress reports would be deferred for a period of ninety (90) days in terms of section 24 of PAIA as the Department required an opportunity to review those annual progress reports.
- 1.5 Further to the above, the Department indicated that it did not receive GHG emission data reports, pollution prevention plans or annual progress reports for certain of the entities listed under paragraph 1.1.2 above.
- 1.6 In an email correspondence dated 17 May 2019, the Department sent the records with redactions of various portions of the GHG emission reports that have been provided.
- 1.7 Regarding the annual progress reports for the pollution prevention plans, the Department indicated on 9 September 2019 that after careful consideration of the representations

received in terms of section 47 of PAIA from Anglo Operations Ltd, African Rainbow Minerals Ltd, South32 Ltd, Sappi Ltd and PPC Ltd, the Department decided to release the annual progress reports by those five entities. However, after considering the representations received from Eskom, Sasol and ArcelorMittal, the Department decided to release the annual progress reports of those three entities in redacted format.

- 1.8 The Department stated that *"the reason for redacting the specific portions is due to the fact that these portions would likely cause harm to the financial or commercial interest of the Third Parties, if disclosed"* and that *"the Department is of the view that disclosure of such records, sans the redactions, may compromise any competitive advantage that have (sic) been achieved, or might be achieved by the above stated Third Parties in the future"*. In addition to this there were 8 other entities which the Department did not receive annual progress reports from.
- 1.9 The appellant paid the prescribed access fee in respect of the requested information and was subsequently furnished with the information, in which access was granted on 15 October 2019.
- 1.10 Subsequent to the aforesaid decision of the Department, the appellant lodged an appeal on 12 December 2019 in terms of section 74 of PAIA. The Directorate: Appeals and Legal Review (Appeals Directorate) within the Department only received a copy of the appeal on 17 December 2019. It is the redacted records, namely the redacted copies of the GHG emission data reports, pollution prevention plans and annual progress reports that form the subject of the appeal.
- 1.11 The appeal is premised on the following grounds:
 - 1.11.1 The Department has failed to provide adequate reasons for their decision;
 - 1.11.2 The Department failed to interpret PAIA appropriately;
 - 1.11.3 The Department failed to discharge onus of proof;
 - 1.11.4 Records do not fall within the scope and ambit of section 36 of PAIA; and
 - 1.11.5 Public interest override.

1.12 On 14 February 2020, after considering the appeal, the Appeals Directorate sent an email to all the third parties listed in paragraph 1.1.2 above in accordance with section 76(1) of PAIA. Section 76 (1) of PAIA stipulates that: *“If a relevant authority is considering an internal appeal against the refusal of a request for access to a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), the authority must inform the third party to whom or which the record relates of the internal appeal, unless all necessary steps to locate the third party have been unsuccessful”*.

1.13 The third parties were called up to make written representations by 6 March 2020, on the consideration of releasing of the requested information in an un-redacted manner.

1.14 By 6 March 2020, the following entities made written representations:

1.14.1 Sasol Ltd;

1.14.2 Sappi Ltd;

1.14.3 Seriti Resources Holdings (Pty) Ltd; and

1.14.4 Eskom Holdings SOC Ltd.

1.15 Sasol Ltd and Sappi Ltd indicated that they provided copies of the requested information in an un-redacted format. Sasol Ltd states that such provision of the information is in accordance with their commitment to increased transparency which is balanced against responsible information dissemination.

1.16 Seriti Resources Holdings (Pty) Ltd and Eskom Holdings SOC Ltd have objected to the release of the requested information in an un-redacted manner

2. EVALUATION

2.1 The Department has failed to provide adequate reasons for their decision

2.1.1 The appellant argues that the Department should have provided a justification or explanation setting out precisely what has been redacted and why this information meets the requirements for redaction in terms of sections 28 read with section 36 of PAIA.

According to the appellant, the reasons provided for the redactions of the 3 annual progress reports, for Sasol, Eskom and ArcelorMittal on the basis that disclosing the information *"may compromise any competitive advantage"* are inadequate. The appellant argues that nowhere is it explained how the disclosure of the redacted information would, or could, have such a compromising effect. Nor are reasons given for why this would jeopardize Sasol, Eskom and ArcelorMittal's interests in particular.

2.1.2 In evaluating this ground of appeal, I note that the Department has an obligation to provide adequate reasons, in terms of section 25(3) (a) of PAIA, particularly as adequate reasons are being requested by the appellant. Section 25(3) (a) of PAIA provides that: *"If the request for access is refused, the notice in terms of subsection (1)(b) must-(a) state adequate reasons for the refusal, including the provisions of this Act relied upon"*.

2.1.3 As a result thereof it is simply not enough to quote the provision relied on. PAIA is clear that adequate reasoning must accompany the quoted provisions. Evaluating the matter at hand I am aware that on 5 August 2019, the Department informed the appellant that *"After giving due regard to all representations received from third parties in terms of section 48 of PAIA, the Department redacted certain portions of the records, as these portions would likely cause harm to the financial or commercial interest of the third parties, if disclosed. The Department is of the view that disclosure of such records, sans the redactions, may compromise any competitive advantage that have been achieved, or might be achieved by third parties in the future."*

2.1.4 The question is therefore whether such reasoning is adequate. In the case of *President of the Republic of South Africa and Others v M & G Media Limited 2012 (2) SA 50 (CC)*, the constitutional court held that a mere bald assertion by an information officer that the requested record falls within a particular ground for refusal or the recitation of the words of the claimed ground for refusal is not sufficient to discharge the evidentiary burden of the body. Instead, the body must provide sufficient information to bring the record within the exemption claimed. Bearing this in mind, I am inclined to find that the Department's reasons for the redactions are insufficient in that it lacks substance and detail. The reason provided by the Department is simply not satisfactory so as to enable the appellant to

understand why the requested information is protected by section 36 of PAIA. As a result thereof, I find that adequate reasons for the redactions have not been provided as required by section 25(3)(a) of PAIA.

2.1.5 In light thereof, this ground of appeal is upheld.

2.2 The Department failed to Interpret PAIA appropriately

2.2.1 The appellant contends that the courts have emphasized that PAIA must be interpreted to promote transparency and accountability and that grounds of refusal must be interpreted strictly and narrowly so as to promote the overriding purposes of PAIA. It is further argued that the Department has not interpreted the provisions of PAIA with a view to promoting transparency and accountability. On this note, the appellant argues that it is in the interests of transparency and accountability that all data and records regarding companies' GHG emissions be made available.

2.2.2 In evaluating this ground of appeal, I am aware that in the matter of the *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA*, the Court confirmed that: *"It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment"; and "Corporations operating within our borders... 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"*.

2.2.3. I have decided to evaluate the redactions in the GHG emission data reports, pollution prevention plans and annual progress reports separately.

2.2.4 Regarding the GHG emission data reports, which the appellant seeks full access to, I note that the numerical values of the company's GHG emissions are provided, but the unit

activities giving rise to such GHG emissions are redacted. I find that the numerical values of the company's GHG emissions, for which access has been granted, is vital in ensuring transparency and accountability in relation to the environment. GHG emissions are of relevance to the public in terms of climate impacts in South Africa and also in terms of the country's GHG emission reduction targets and thus I am satisfied with the Department's decision to provide access to the numerical values of the company's GHG emissions.

- 2.2.5. What has been redacted in the GHG emission data report is the value of activity data in the reports. This activity information includes information such as raw material used in production processes, fuel consumed in energy related activities, plant-specific parameters in cases where plant-specific methodologies are used as well as production rates. I find that the redaction of the activity information was justified because it provides process related information which may be related to competition issues such as company investment decisions, market share, competitive advantage and trade secrets. The impact of the release of the redacted information in the GHG emission data report will weaken competitive advantage as well as expose trade secrets of the entities in question. I am thus inclined to confirm that the redaction of information the GHG emission data reports was correct and justified.
- 2.2.6. Regarding the pollution prevention plans, the records relating to the GHG emissions of the preceding years were released however the projected emissions were redacted and were therefore not released. In addition to this, records that related to personal information of officials working within the entities were redacted. While I agree with the redaction of the various individuals' personal information, I cannot find justification why the data on the anticipated projected emissions have been redacted. I find that the projected emissions is fundamental to the basic equation of GHG emissions and thus should have been released.
- 2.2.7. Regarding the annual progress reports, I note that the Department released the overall total GHG emissions reported for 2018 and the overall total actual reductions for period 2015-2021. However, the Department did redact the breakdown of the annual anticipated emission reductions and annual actual emissions reductions achieved. Similarly I cannot find justification why the anticipated and actual emission reductions have been redacted

from the annual reports. I find that this information should have been released in an unredacted manner.

2.2.8 The objectives of PAIA, set out in section 9 of the Act, include promoting transparency, accountability and effective governance. I am inclined to conclude that the redaction of information in the GHG emission data reports is justified and correct. However the redacted information in the Pollution Prevention Plans and Annual Progress Reports, namely the data on the anticipated projected emissions and the data relating to anticipated and actual emission reductions, is not in accord with PAIA's object of transparency, accountability and effective governance and thus should have been released.

2.2.9 In view of the above, this ground of appeal is upheld. The Department is to provide access to the anticipated projected emissions in the Pollution Prevention Plans and the data relating to anticipated and actual emission reductions in the Annual Progress Reports only. Such access must be provided within seven (7) working days from date of the conclusion of the national lockdown period.

2.3 The Department failed to discharge onus of proof

2.3.1 The appellant contends that in keeping with the purpose of PAIA, a party seeking to justify refusal of access to a record bears the onus of proving that the information requested falls within a ground of refusal under PAIA. Further to this, the appellant contends that a party relying on section 36(1) of PAIA must provide a basis to substantiate its reliance and must adduce evidence that harm "will and might" happen if it provides access to the requested information. On this basis, it is argued that the Department must identify every document which is being withheld and the basis upon which the document is being withheld in terms of PAIA.

2.3.2 In evaluating this ground of appeal, while I note that section 81 (3) (a) of PAIA provides that *"the burden of establishing that-(a) the refusal of a request for access... complies with the provisions of this Act rests on the party claiming that it so complies"*, this section is only applicable in review proceedings in court. Section 81(3)(a) and particularly the "burden of

proof argument does not apply to a decision taken in terms of PAIA and to expect that the Department bear the burden of proving that section 36(1) of PAIA is applicable will be unwarranted according to PAIA. PAIA does however require that the Department state adequate reasons for the refusal as well as the provisions of PAIA relied upon. This is in keeping with section 25(3)(a) of PAIA.

2.3.3 As already alluded in paragraph 2.1.4 above, I cannot find that the Department has discharged its duty of providing “adequate reasoning” for its decision. However I find that the Department need not adduce evidence that harm “will and might” happen if it provides access to the requested information. This is indeed separate from the duty to provide adequate reasoning.

2.3.4 In light thereof, this ground of appeal is dismissed.

2.4. Records do not fall within the scope and ambit of section 36 of PAIA

2.4.1 The appellant contends that the content of the information requested does not contain trade secrets of the companies; is not likely to cause harm to the commercial or financial interest of the third parties; nor was information supplied in confidence with its disclosure reasonably expected to put the third parties at a disadvantage in contractual or other negotiations, or prejudice their commercial competition. As a result, the appellant argues that the Department cannot rely on these grounds to refuse the information requested.

2.4.2 According to the appellant, the Courts have taken a fairly robust attitude to claims of justification under this ground of refusal and there are no judgments of which the appellant is aware of which a right to refuse disclosure was upheld on this basis. In addition to this, it is contended that section 36 of PAIA does not apply because reports submitted in terms of the GHG Regulations and PPP Regulations do not relate to contractual or other negotiations or commercial competition.

2.4.3 Further to the above, the appellant individually discusses the GHG emission data reports, the Pollution Prevention Plans and Annual Progress Reports so as to prove that there is no

acceptable basis upon which anticipated emissions could be withheld as being confidential, particularly given that Eskom, Sasol and ArcelorMittal are three of the largest emitters in South Africa and globally.

2.4.4 In evaluating this ground of appeal, I have again noted the Department's reason for redacting information from the GHG emission data reports, the Pollution Prevention Plans and Annual Progress Reports, namely because to release the reports as is, would likely cause harm to the financial or commercial interest of the third parties, particularly the competitive advantage that the entities have established.

2.4.5 I reiterate that the provision of access to the GHG emission data report in an unreacted manner, is likely to cause harm to the commercial or financial interest of the third parties. This is due to the fact that the activity information in the GHG emission data provides process related information which may be related to competition issues such as company investment decisions, market share, competitive advantage and trade secrets. The impact of the release of the redacted information in the GHG emission data report will weaken competitive advantage as well as expose trade secrets of the entities in question.

2.4.6. Further to the above, I have, in terms of section 76 (1) of PAIA, received objections from Seriti Resources Holdings (Pty) Ltd and Eskom Holdings SOC Ltd to the releasing of commercially sensitive information. As a result thereof, I find that the Department's decision to redact information in the GHG emission report was correct, and therefore confirmed accordingly.

2.4.7. However, as I have found in my ruling under paragraph 2.2 above, the redacted information in the Pollution Prevention Plans and Annual Progress Reports, particularly the data on the anticipated projected emissions and the data relating to anticipated and actual emission reductions, is not in accord with PAIA's object of transparency, accountability and effective governance and thus should have been released

2.4.8 In view of the foregoing, this ground of appeal is upheld. The Department is to provide access to the anticipated projected emissions in the Pollution Prevention Plans and the

data relating to anticipated and actual emission reductions in the Annual Progress Reports only. Such access must be provided within seven (7) working days from date of the conclusion of the national lockdown period.

2.5. Public Interest override

2.5.1 The appellant argues that the public is entitled to know the extent of companies' GHG emissions; whether or not polluting activities are being lawfully conducted; and whether or not emission reduction efforts have been put in place and are being carried out. According to the appellant, withholding of information seriously hampers the appellant's ability to monitor and evaluate the extent of GHG emissions and on-going impacts of the emissions resulting from the companies' operations.

2.5.2 In evaluating this ground of appeal, I am aware that PAIA provides that even where a ground for refusing access to a record exists, the public interest in certain information is paramount. Accordingly, where the public interest override, the record must be released, irrespective of an applicable mandatory or discretionary ground for refusal. Section 46 (b) of PAIA provides:

"Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if...the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question".

2.5.3 Taking into consideration section 46 (b) of PAIA, I find that the overall purpose of the administration of justice, requires the disclosure of the anticipated projected emissions and the data relating to anticipated and actual emission reductions. I am satisfied that public interest outweighs any harm that the releasing of this information may have. In other words, I cannot find that the redaction of the data on the anticipated projected emissions and the data relating to anticipated and actual emission reductions is justifiable nor that the provision of limited access to the requested information is in the public interest. The full access to this information will foster and contribute towards transparency and

accountability which is owed to the public more so in matters pertaining to the environment.

- 2.5.4. In view of the foregoing, this ground of appeal is upheld. The Department is to provide access to the anticipated projected emissions in the Pollution Prevention Plans and the data relating to anticipated and actual emission reductions in the Annual Progress Reports only. Such access must be provided within seven (7) working days from date of the conclusion of the national lockdown period.

3 DECISION

- 3.1 In reaching my decision on the appeal lodged against the decision to redact information in the GHG emission data reports, the Pollution Prevention Plans and Annual Progress Reports, I have taken the following into consideration:

3.1.1 The appeal lodged on 12 December 2019 and received by the Appeals Directorate on 13 January 2020;

3.1.2 The information contained in the project file with specific reference to the decision dated 5 April 2019 and the letter from the Department to the appellant dated 9 September 2019;

3.1.3 The comments received from the Department on 3 March 2020;

3.1.4 The responses received in terms of section 76(1) of PAIA from Sasol Ltd, Sappi Ltd, Seriti Resources Holdings (Pty) Ltd, and Eskom Holdings SOC Ltd;

3.1.5 The relevant provisions of PAIA; and

3.1.6 The applicable case law.

- 3.2 Having carefully considered the above mentioned information, I have decided to uphold the appeal. The Department is to provide access to the anticipated projected emissions in the Pollution Prevention Plans and the data relating to anticipated and actual emission reductions in the Annual Progress Reports only. Such access must be provided within seven (7) working days from date of the conclusion of the national lockdown period.

- 3.3 In arriving at my decision on the appeal, it should be noted that I have not responded to each and every statement set out in the appeal, and where a particular statement is not directly addressed, the absence of any response thereof should not be interpreted to mean that I agree with or abide by the statement made.
- 3.4 Furthermore, should any party be dissatisfied with any aspect of my decision, it may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted in accordance with section 78 of PAIA.



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 5/4/2020