THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 910/10

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD	Appellant

and

PFE INTERNATIONAL INC (BVI)	First Respondent
PFE INTERNATIONAL INC (LIBERIA)	Second Respondent
VAN DYCK CARPETS (PTY) LTD	Third Respondent
MEHDY ZARREBINI	Fourth Respondent
MEHRAN ZARREBINI	Fifth Respondent

Neutral citation: *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* (910/10) [2011] ZASCA 245 (1Dcecember 2011)

Coram: LEWIS, SNYDERS and THERON JJA

Heard: 22 November 2011

Delivered: 1 December 2011

Summary: **Promotion of Access to Information Act 2 of 2000, s (7)1 – Impact of PAIA on the Rules of Court – s7(1) preserves the operation of the Rules of Court in relation to pending litigation.**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Motala AJ sitting as court of first instance):

1 The appeal is upheld.

2 The respondents are ordered, jointly and severally, to pay the costs of the appeal.

3 The order of the high court is set aside and replaced with:

'a The application is dismissed.

b The applicants are ordered, jointly and severally, to pay the costs of the application.'

JUDGMENT

THERON JA (LEWIS and SNYDERS JJA concurring)

[1] The respondents instituted proceedings, in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), against the appellant, the Industrial Development Corporation of South Africa Ltd (IDC) in the high court (Johannesburg) for an order that the IDC furnish certain documents and records to them. On 24 July 2007, the South Gauteng High Court (Johannesburg) granted an order pursuant to the provisions of s 9 of the Supreme Court Act 41 of 2001, for the transfer of the proceedings to the KwaZulu-Natal High Court (Durban). That court (Motala AJ) granted the relief sought, and it is against this order that the IDC appeals, with its leave. The issue on appeal, as in the high court, is the interpretation of s 7 of PAIA and its applicability to this matter.

[2] The first and second respondents, PFE International Inc (BVI) (PFE) and PFE International Inc (Liberia), respectively, are companies in the PFE Group that

carried on various businesses including the manufacture of carpets. Prior to 14 September 2001, the IDC owned approximately 98 per cent of the shares in South African Fibre Yarns Rugs Ltd (SAFYR). On 14 September 2001, an agreement was concluded in terms of which PFE acquired 45 per cent of the issued share capital of SAFYR from the IDC. Pursuant to this agreement, the fourth and fifth respondents (Mehdy Zarrebini and Mehran Zarrebini, respectively), were appointed as directors of SAFYR. The agreement was subsequently terminated and the fourth and fifth respondents resigned as directors of SAFYR. PFE (BVI) re-transferred its shares in SAFYR to the IDC. While the fourth and fifth respondents were still directors of SAFYR, PFE acquired shares in the third respondent, Van Dyck Carpets (Pty) Ltd (Van Dyck).

[3] SAFYR subsequently instituted proceedings in the KwaZulu-Natal High Court (Durban), contending that the fourth and fifth respondents had breached the fiduciary duties they owed SAFYR, as directors, in failing to afford to SAFYR the opportunity to purchase the shares in Van Dyck when those shares were offered to the fourth and fifth respondents. SAFYR sought an order that the respondents 'disgorge' the shares in Van Dyck to SAFYR. These proceedings were referred to trial and after the exchange and close of pleadings, SAFYR requested further particulars for trial.

[4] On 26 January 2007, the respondents, via their attorney, delivered a request, in terms of s 18 of PAIA, to the IDC for information and access to the latter's records. The IDC did not respond to the request. This led to the respondents instituting these proceedings against the IDC in the court below. The main grounds relied upon by the respondents for their entitlement to the records appear from the following paragraphs of the affidavit filed on their behalf:

'the information necessary to respond to some of the particulars requested [by SAFYR] … is contained in the documents requested … and the information in those documents and records is perculiarly within the knowledge of the respondent [IDC] in the sense that in

order to respond to the request for further particulars for trial the applicants require access to the documents requested … so as to be able to obtain the necessary information

….

the applicants also require access to the information and records to prepare for trial but:

(i) as the respondent is not a party to the application, it cannot be compelled to make discovery;
(ii) the identity of the particular books and records is within the peculiar knowledge of the respondent and cannot be identified for the purpose of a subpoena *duces tecum*.'

[5] The basis of the IDC's opposition to the application was set out in the answering affidavit, as follows:

'On their own affidavit the applicants seek the information which they have sought "for the purpose of … civil proceedings". Those proceedings commenced a long time before the request was made and the records requested can be obtained by way of subpoena *duces tecum* under Uniform Rule 38(1)(a). The result is that in terms of section 7(1) of the Promotion of Access to Information Act 2 of 2000 ("PAIA") the information requested cannot be sought in terms of PAIA.'

[6] Section 32 of the Constitution confers upon every person 'the right of access to any information that is held by the state'. The section also imposes upon Parliament the obligation to enact national legislation to give effect to this right. PAIA is that legislation. The purpose of PAIA, as stated in the preamble, is 'to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights'. The objects of PAIA are set out in s 9 and these include:

'(a) to give effect to the constitutional right of access to-

(i) any information held by the State; and

(ii) any information that is held by another person and that is required for the exercise or protection of any rights;

(b) to give effect to that right—

(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and

(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;

(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice ….'

[7] It was not disputed that the IDC is a public body as defined in the Act. The issue in the court below, and on appeal, centered on the interpretation of s 7(1)(c) and in particular, whether it excludes the respondents' request for records from the application of the Act on the basis that the Uniform Rules provide for the production of or access to such records.

[8] The right of access to information that is held by the state is, however, limited by PAIA itself. In terms of s 7(1), PAIA does not apply in particular circumstances. The section reads:

'This Act does not apply to a record of a public body or a private body if—

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.'

All three of the requirements of s 7(1) must be met in order to render PAIA inapplicable to the request. On the common cause facts in this matter, the first two requirements of s 7(1), namely, that the records were requested for the purpose of civil proceedings and such request was made after the commencement of the civil proceedings, were satisfied. This appeal turns on whether or not the third requirement was met, namely, that the production of or access to the requested record is provided for in any other law.

[9] The purpose of s 7 is to prevent PAIA from having any impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings.[1] In the event that 'the production of or access to' the record 'is provided for in any other law' then the exemption takes effect. The Legislature has framed s 7 in terms intended to convey that requests for access to records made for the purpose of litigation, and after litigation has commenced, should be regulated by the Rules of Court governing such access in the course of litigation. This was the view of Harms DP in *National Director of Public Prosecutions v King*,[2] where it was held that 'any other law', in the context of s 7, refers to the body of law which includes the rules relating to discovery, disclosure and privilege. The learned judge endorsed the view expressed by Brand JA in *Unitas Hospital v Van Wyk & another*,[3] that PAIA was not intended to have any impact on the discovery procedure in civil cases. Harms DP went on to quote, with approval, the statement by Brand JA that '[o]nce court proceedings between the parties have commenced, the rules of discovery take over'.

[10] In *Ingledew v Financial Services Board: In Re Financial Services Board v Van der Merwe & another*,[4] the Constitutional Court noted that the adoption of the approach that once litigation has commenced discovery should be regulated by the Uniform Rules, can give rise to 'certain anomalies'. Ngcobo J, writing for the court, stated:

'Under the wording of s 32(1)(a), the applicant would prima facie have been entitled to all the documents he now seeks until the day before summons was served on him. Moreover, a third party might have approached another for access to those documents during the course of the applicant's litigation. In the present case, however, it is not

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[1] *National Director of Public Prosecutions v King* [2010] 3 All SA 304 (SCA) para 39; *Unitas Hospital v Van Wyk & another* 2006 (4) SA 436 (SCA) para 19; *Rail Commuter Action Group & others v Transet Ltd t/a Metrorail & others (No 1)* 2003 (5) SA 518 (C) at 587I-J. See also Iain Currie and Jonathan Klaaren *The Promotion of Access to Information Act Commentary* para 4.15.

[2] *National Director of Public Prosecutions v King* [2010] 3 All SA304 (SCA) para 39.

[3] *Unitas Hospital v Van Wyk & another* 2006 (4) SA 436 (SCA) para 19.

[4] *Ingledew v Financial Services Board: In Re Financial Services Board v Van der Merwe & another* 2003 (4) SA 584 (CC).

necessary to deal with these issues or the different views expressed in the decided cases and I prefer to leave those issues open.'[5]

This anomaly, that an applicant may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court.[6]

[11] The IDC contends that the Uniform Rules relating to subpoenas are laws that provide for 'the production of or access to' the records sought by the respondents. Rule 38(1), which regulates the procedure compelling the production of documents by a witness for purposes of litigation, reads as follows:

'(1) (a) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.

If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial.

(b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape recording and make copies or transcriptions thereof, after which the witness is entitled to its return.'

In terms of this rule, the production of a document by a witness is obtained by the issuing of a subpoena *duces tecum*. It must be borne in mind that rule 38(1) is contemplated by s 30 of the Supreme Court Act 59 of 1959, which provides that a

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[5] Para 29.

[6] *CCII Systems (Pty) LTD v Fakie & others NNO (Open Democracy Advice Centre, As Amicus Curiae)* 2003 (2) SA 325 (T) para 21.

party to civil proceedings 'may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of court'.

[12] Section 7(1)(*c*) does not stipulate, as a condition for the application of the ouster provision contained in that section, that the 'other law' should provide for the production of or access to the record concerned at the time when it might be obtained if the provisions of PAIA were to apply. The section simply requires that the 'other law' (in this instance rule 38(1)) should provide for the production of or access to the record. Rule 38 achieves that purpose. The rules of court relating to subpoenas, are laws which provide for 'the production of or access to' records and these include records held by persons who are not parties to the litigation. To find otherwise would be contrary to the basic principle established in *Unitas Hospital* that PAIA was not intended to have an impact on court procedure. It is so that the court in *Unitas Hospital* was dealing with discovery while this matter concerns the issue of a subpoena. However, both of these procedures are provided for in the Uniform Rules.

[13] It was argued that there is a distinction because of the timing: discovery is required after close of pleadings whereas a witness is generally subpoenaed only when the trial is about to commence. But there is no reason why a party should not serve a *subpoena duces tecum* at any stage of the procedure. The documents, tape recordings, computer records and other material required may be deposited with the Registrar, under rule 38(1)(b), before the trial commences, and the party who has issued the subpoena may inspect and copy the material so required. While it is true that the provisions of rule 38(1) are not designed to enable a party to identify the material to be made available, they nonetheless may serve that purpose. There is no reason to distinguish between discovery and securing documentary evidence from a third party. This is in accordance with an intention to leave intact the existing body of rules designed to facilitate the conduct of trials.

[14] It is also so that the application was brought against a body not party to the litigation itself. The distinction makes no difference given the provisions of rule 38. This case then falls within the exclusion of the application of PAIA by s 7(1), as interpreted by this court in the cases referred to above.

[15] The contention advanced on behalf of the respondents that PAIA was intended to supplement the rules of court, cannot be sustained. First, s 7 does not express such an intention. In fact, the section says the opposite. Second, and as has already been mentioned, and on this court's interpretation of s 7, it was the intention of the Legislature that requests for access to information made for the purpose of litigation, and after litigation has commenced, should be regulated by the applicable court rules. Third, to create a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings, as is evidenced by this matter.

[16] For these reasons, the following order is made:

1 The appeal is upheld.

2 The respondents are ordered, jointly and severally, to pay the costs of the appeal.

3 The order of the high court is set aside and replaced with:

'a The application is dismissed.

b The applicants are ordered, jointly and severally, to pay the costs of the application.'

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L V THERON

JUDGE OF APPEAL

Appearances:

Appellant:	P J Olsen SC
	Instructed by: Deneys Reitz Inc, Durban
	Webbers, Bloemfontein
Respondents:	D J Shaw SC (with A W M Harcourt SC)
	Instructed by: Bakers Attorneys, Durban
	Matsepes Inc, Bloemfontein