REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5029/2020

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED. NO

.....
SIGNATURE

DATE: 14 May 2021

In the matter between:

AFRESH BRANDS CAPE (PTY) LTD	First Appellant
AFRESH BRANDS KZN (PTY) LTD	Second Appellant
And	
THE NATIONAL HORSERACING AUTHORITY OF SOUTHERN AFRICA	First Respondent
WENDY WHITEHEAD	Second Respondent
GAVIN VAN ZYL	Third Respondent
TYRONE ZACKEY	Fourth Respondent
DENNIS BOSCH	Fifth Respondent
LOUIS GOOSEN	Sixth Respondent
GLEN KOTZEN	Seventh Respondent

GARY RICH	Eighth Respondent
GRANT MAROUN	Ninth Respondent
LUCKY HOUDALAKIS	Tenth Respondent
BRETT WARREN	Eleventh Respondent
ROY MAGNER	Twelfth Respondent
ANDRE NEL	Thirteenth Respondent
BRETT CRAWFORD	Fourteenth Respondent

JUDGMENT

SIWENDU J (Wepener and Maier-Frawley JJ concurring)

Introduction

[1] This appeal is against the judgment and order of Miltz AJ delivered on 8 August 2019.[1] It follows an unsuccessful attempt by the appellants to compel access to information in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA'), which information included, but was not limited to:

(a) the first respondent's records and findings in relation to tests conducted by it on samples of urine/blood extracted from racehorses trained by the second to fourteenth respondents; and

(b) samples of horse feed produced and supplied by the appellants and consumed by horses who had allegedly tested positive for the presence of caffeine.

[2] The Full Court appeal is with the leave of the Supreme Court of Appeal (SCA) granted on 20 March 2020, following a petition to that court.

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[1] *Afresh Brands Cape (Proprietary) Limited and Another v National Horseracing Authority of Southern Africa and Others* [2019] ZAGPJHC 270.

[3] The first appellant, Afresh Brands Cape (Pty) Ltd, and its associate company, Afresh Brands KZN (Pty) Ltd) (the second appellant) are recognised manufacturers and retailers of premium horse feed as well as livestock and game feed. They supply the South African and international market, with a focus on Southern Africa. They conduct their respective business at Feedpark, Lichtenberg Road, Fisantekraal, Durbanville, Western Cape and at 14 Erwinton Road, Fresnaye. I refer to the appellants collectively as 'Afresh Brands' throughout the judgment.

[4] The first respondent is The National Horseracing Authority of Southern Africa, formerly the Jockey Club of Southern Africa (the 'Association'). Its head office is at Turf Club Street, Turffontein. It is a private body as envisaged in s 2 of PAIA. Its role is to govern the sport of thoroughbred horse racing in Southern Africa. All premium horse races in South Africa (Turffontein, Kenilworth) are conducted under the auspices of the Association.

[5] The Association has, amongst its objects, the promotion and maintenance of honourable practices and seeks to eliminate malpractice which may arise in thoroughbred horse racing in Southern Africa. Part of that function is the responsibility to screen horses for prohibited, forbidden and banned substances in compliance to international racing and quality requirements, policies and guidance. The Association has the mandate to prosecute transgressions.

[6] The second to fourteenth respondents are horse trainers. They reside, carry on business and/or are employed in the Western Cape, KwaZulu-Natal and Gauteng. Afresh Brands claim that they have a substantial interest in the relief sought. There are allegations that caffeine was found in blood/urine samples taken from the horses trained by them, as well as in the horse feed purchased from Afresh Brands. Afresh Brands seek to prevent the disqualification of their horses and forfeiture of their winnings as a result of the horses having allegedly tested caffeine positive. No substantive relief is sought against the second to fourteenth respondents.

[7] I must mention at this early stage that there is a dispute between Afresh Brands and the Association about the testing and methodology used to detect both the presence of caffeine and the source of the contamination. There was also a dispute before the court a quo as to whether the results from the testing samples of horse feed

provided by Afresh Brands were the same as the samples that were obtained from the trainers. However, these disputes form the backdrop of the appeal and need not detain this Court.

[8] The judgment of the court a quo followed an interdict application heard by Mabesele J on 13 March 2018. Afresh Brands approached the urgent court for a two-pronged relief. In Part A, it sought to interdict the Association from disqualifying horses trained by the second to fourteenth respondents pending the Association's response to its PAIA request, and *pending* the Association granting to Afresh Brands the right to procedurally fair administrative action contained in s 3 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Afresh Brands also sought to interdict the Association from publishing what it considered defamatory allegations – that its horse feed resulted in the caffeine positive tests – pending a determination of the relief the final relief in Part B.

[9] The Association conceded the PAJA relief. In essence, it agreed to afford Afresh Brands a right to participate, be heard and present evidence in any planned inquiry proceedings against the horse trainers and owners. Accordingly, the application before Miltz AJ proceeded solely on the question of whether the Association, as a private body, was obliged to respond and comply fully to the written request for access to the records. Given the denial of the relief by the court a quo, it is the issue in this appeal.

Background

[10] Between 18 September 2017 and 29 September 2017, Afresh Brands received information that horses trained by the second and third respondents had tested positive for the presence of caffeine in their blood/urine. Caffeine is classified by the Association as a prohibited 'class 3' substance, having the potential to affect the performance of a horse, with the potential to be abused. This prohibited substance was first found in urine/blood samples taken in June 2017. Further traces of the prohibited substance were reportedly also found during the first three weeks of July 2017. As Afresh Brands supplied horse feed to the trainers concerned, it was concerned by the caffeine positive tests on horses which had consumed its feed products both prior to and during June and July 2017. Afresh Brands claim that, as a

practice, they generally extract samples from each batch of feed manufactured by it and retain these for a period. It commenced investigations, and consulted Dr de Kock, who was responsible for the Association's Laboratory.

[11] In addition to the samples officially confiscated from the trainers by the Association, Afresh Brands voluntarily submitted 12 batches of horse feed samples produced in the period 1 June 2017 to 19 July 2017 (obtained from its KZN Mill) to the Association, for testing. On 29 September 2017 Afresh Brands learnt that several more horses had tested positive for caffeine during the first three weeks of July 2017, all of whose trainers had been supplied with Afresh Brands' feed products in June and July 2017. Afresh Brands assessed its production over the period 1 June 2017 to 19 July 2017 and obtained samples from each batch of feed manufactured during that period. It submitted a sample from each of the 70 batches of feed to the Association for testing on 3 October 2017. There was a dispute on the papers about what was submitted for testing by Afresh Brands, and the exact number of the second batch of samples furnished. The Association claims it received 74 samples, as opposed to the 70 samples Afresh Brands claim it sent. Further, the Association claims that there was no agreement with Afresh Brands about the methodology for testing the samples received from Afresh Brands. On this score, the Association claims that its primary responsibility is to test racehorses and that it does not, in the ordinary course, conduct tests on horse feed.

[12] Simultaneously with the samples sent to the Association, on 5 October 2017, Afresh Brands claim to have sent 70 retained (duplicate) samples to an independent laboratory — the Societe Generale de Surveillance laboratory ('SGS'), headquartered in Switzerland, for caffeine analyses. It instructed SGS to extract 10 'statistically significant' samples from the 70 retained (duplicate) samples, and to test those samples for the presence of caffeine.

[13] Afresh Brands state that on 11 October 2017, it received a report that all of the samples submitted to SGS had tested 'negative' for the presence of caffeine. On the other hand, on the same date Mr Labaschagne (a director at Afresh Brands) received a telephone call from Dr de Kock, advising that all of the 12 samples submitted to the Association on 22 September 2017 had tested *'negative'* for the presence of prohibited levels of caffeine.

[14] Afresh Brands claim that rumours started circulating in the market about the existence of caffeine in its horse feed products. It was concerned that the publication would create an indelible impression in the mind of the reader that its feed had resulted in the racehorses testing positive for caffeine. On 14 November 2017, out of concern for the adverse publicity, Afresh Brands demanded (through its attorneys) that the Association formally indicate whether their sample testing results differed from SGS's negative results; and if so, to provide a copy of its analysis results, and afford Afresh Brands an opportunity to respond to any statement to be made in regard thereto, prior to publication.

[15] The Association disputed that it intended making a public statement about the positive test results. It informed Afresh Brands that it was preparing a report relating to the samples submitted. It claims it had advised Afresh Brands that it found the samples *'negative for the significant presence of caffeine*' in respect of the first batch of 12 samples. On the other hand, it claims that the 74 subsequent samples tested at its laboratory revealed a significant concentration of caffeine in the horse feed samples submitted by Afresh Brands to the Association. I understand from the papers that there was broad agreement between the parties' attorneys that the Association would submit the report it was preparing in relation to the samples submitted by Afresh Brands for testing to Afresh Brands, once completed, and that it would afford Afresh Brands an opportunity to respond thereto, prior to its publication.

[16] The above discussions were followed by a meeting on 4 December 2017. The Association informed Afresh Brands that a number of the samples tested by it had yielded positive caffeine results. A document (described in the papers as a one page 'report') reflecting the results of the testing and the levels of caffeine concentrations was handed to Afresh Brands' representatives at this meeting. Despite such report, on 8 December 2017, Afresh Brands delivered a formal request for access to the records of the Association in terms of s 53(1) of PAIA.[2]

[17] The Association adopted the legal position was that it had no legal or contractual nexus with Afresh Brands, and therefore Afresh Brands had no legal basis

[2] Section 53 of PAIA prescribes the form and manner in which a request to a private body must be made.

to demand the Association's testing methodology or to demand information from it. It claimed to have provided Afresh Brands with a detailed report. It contended further, that in view of the high spate of caffeine positive findings during that period, which was generally indicative of horse feed contamination, it had commenced testing to assist its members. It agreed to test Afresh Brands' horse feed purely because it had commenced doing so and to theoretically obtain accurate samples.

[18] On the other hand, Afresh Brands claimed that it sought the information detailed in its PAIA request to protect its right to just administrative action, its good reputation, freedom of trade and the right to approach a court for damages for any breach of its rights. It was a common cause that the Association did not respond to the PAIA request within the 30-day period provided for in s 56(1) of PAIA, or at any time before the proceedings to compel it to do so were launched. In terms of s 58 of PAIA, a failure to do so amounts to a deemed refusal to provide the records.[3]

The court a quo

[19] Despite finding that the Association had not complied with the provisions of PAIA, the court a quo declined the relief sought. The judgment departed from the premise that the issue before it involved the Association and the horse owners and trainers. The court a quo reasoned that the owners were strictly liable if the predefined residue limits of caffeine were found in horses tested by the Association, and that the source or cause of the caffeine in a horse's blood/urine was irrelevant.

[20] Secondly, the court a quo determined the application on the basis of *locus standi*. It found that Afresh Brands lacked *locus standi*, as there was no relationship between Afresh Brands and the Association. It confirmed that the Association had no jurisdiction over Afresh Brands, which in turn had no standing in matters between the Association and the various players in the horse racing industry. On this basis, in essence, the court a quo concluded that the Association could not assert the right to just administrative action as none was owed to it. In the same breath, the court a quo

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[3] Section 58 of PAIA, titled 'Deemed refusal of request' provides:
'If the head of a private body fails to give the decision on a request for access to the requester concerned within the period contemplated in section 56 (1), the head of the private body is, for the purposes of this Act, regarded as having refused the request.'

reasoned that because there was already a PAJA concession embodied in Mabasele J's court order of 13 March 2018, it was not necessary to consider further submissions on behalf of the Association on whether PAJA applied. The concession rendered the issue moot. It concluded that the rights Afresh Brands sought to assert were a diversion to the real issue in the dispute.

[21] Thirdly, the court a quo dealt with the issue of compliance with PAIA and the request for information. Even though it confirmed the agreement between the parties, namely that the Association would furnish the report and afford Afresh Brands an opportunity to respond thereto before its publication, the court a quo: (1) observed that Afresh Brands subsequently amplified its demands requiring that the report should set out the methodology used by the Association's laboratory; (2) found that Afresh Brands could not prescribe how the Association conducted its business; (3) found favour with the Association's argument that it was not obliged to test the Afresh Brands samples or consult with it before publishing its report and results; and (4) accepted the Association's argument that information was provided by the Association on a 'without prejudice' basis.

[22] Lastly, despite it being common cause that the Association did not comply with the provisions of PAIA, the court a quo accepted the Association's contention that it was not obliged to do so, and that it had decided to grant Afresh Brands' request and had provided some of the information requested – even though the provision of the information was not in conformance with the requirements of ss 56(1) and (2) of PAIA. It ruled that the information already provided was sufficient. It was not satisfied that any undisclosed part of the records requested was required for the exercise or protection of any of the rights relied upon by Afresh Brands.

[23] It held that Afresh Brands had failed to show that it had the *prima facie* rights claimed, or to demonstrate how the information would assist it in exercising or protecting the rights in question. Significantly, the court a quo held that any departure from the requirements of PAIA could be justified by the fact that the Association provided the response to the PAIA request 'without prejudice'.

[24] Nevertheless, it was common cause before the court a quo that there was a deemed refusal in terms of s 58 of PAIA. Documents were sent to Afresh Brands on 4

and 10 December 2017. Following the interim relief, the Association furnished further analytical reports. Letters sent from the Association's representatives to Afresh Brands, dated 22 March 2018 and 5 April 2018, reveal that more information was sent after the order granted by Mabesele J. The Association had not complied in full, a point conceded in its papers.

[25] The appeal is predicated on a misdirection and error by the court a quo. Afresh Brands seek to enforce its rights in terms of s 50(1) of PAIA,[4] read together with the rights conceded under PAJA. The issue before the court a quo was whether the respondent *properly complied* with the provisions of the Act. It was *not* a question of whether Afresh Brands were entitled to the documents. It remains the issue in this appeal.

[26] Mr Kirk-Cohen (for Afresh Brands) contended that once the Association provided the information, albeit partially, it conceded the underlying rights involved. He criticises the court a quo for adopting what he referred to as a *laissez faire* approach to PAIA, in circumstances where the Act's purpose was to give meaning to a constitutionally protected right in s 32 of the Constitution.[5] He argued that any damaging findings of fact about Afresh Brands would have an adverse effect on its business. Quelling the reports and rumours in a court of public opinion, and after the fact, would not have protected Afresh Brands. He argued further that the court a quo erred in finding that Afresh Brands could only defend itself in proceedings against the owners in due course.

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[4] Section 50(1) of PAIA, titled 'Right of access to records of private bodies' provides:
(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;
  (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
  (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

[5] Section 32 of the Constitution 'Access to information' provides:
(1) Everyone has the right of access to—
  (a) any information held by the state; and
  (b) any information that is held by another person and that is required for the exercise of protection of any rights.
(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measure to alleviate the administrative and financial burden on the state.

[27] The complaint accords with the Constitutional Court's approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,[6] where the Court considered the relationship between the right to lawful, reasonable and fair administrative action under s 33 of the Constitution, the national legislation passed to give effect to the right in PAJA, and the Marine Living Resources Act 18 of 1998. The Constitutional Court found that when legislation exists to give effect to constitutional rights, such legislation must be interpreted and applied in the context of the legislation and the applicable constitutional provision.

[28] Section 9 of PAIA sets out its objectives, which include promoting transparency, accountability and effective governance. It is accepted that the courts have adopted a broad approach to standing where a party is directly and materially affected by an administrative action. Whether the pending disciplinary proceedings against the trainers and horse owners had an adverse external legal effect on Afresh Brands was, by implication, conceded by the Association. By this concession, Afresh Brands was not an external busybody in the proceedings. Its standing was no longer at issue.

[29] In my view, the court a quo misconstrued the import of the PAJA concession. It made conflicting findings, the effect of which was to undo a right already afforded to Afresh Brands, embodied in a court order. It failed to appreciate the intersection between the conceded right to fair administrative action, the rights protected by PAIA, and the right to a fair public hearing before the disciplinary forum planned and designed by the Association. The court a quo erred as a result.

[30] The second aspect pertains to the issue of *full* compliance with PAIA. The complaint of Afresh Brands was that some of the information was not provided in accordance with PAIA. The form and manner of access to information is regulated by Part 2, Chapter 3 and Part 3, Chapter 3 of PAIA.[7]

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[6] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC).

[7] In particular, section 60 of PAIA provides: 'Form of access: If access is granted to a record of a private body, the head of that body must, as soon as reasonably possible after notification in terms of section 56, but subject to section 57, give access in—
(a) such form as the requester reasonably requires; or
(b) if no specific form of access is required by the requester, such form as the head reasonably determines.'

[31] Mr Nel, for the Association, disputed that Afresh Brands are entitled to the records under PAIA. He argued that the Association adopted a 'pragmatic and cooperative approach', providing the information when it had not obligation to do so, in order to avoid litigation. The Association had sought to settle the urgent application with Afresh Brands, hence why some of the information was furnished after 30 days. Aligning with the position before the court a quo, Mr Nel argued that the Association had provided sufficient information and data to enable Afresh Brands to determine the results and provide 'evidence' at any inquiry. He argued that the litigation was a stratagem to delay and/or postpone the Association's disciplinary proceedings. Other than the argument that the Association was not obliged to provide the information, it was not contended that some privilege attaches to the records.

[32] Mr Nel also took issue with the nature of the relief sought, *viz.* that the Association must 'comply fully' with the PAIA request. He argued that Afresh Brands did not ask the Court to determine its rights or to compel the disclosure of documents. I return to this aspect later in the judgment.

[33] Both parties agree that PAIA underpins the rights protected in s 32 of the Constitution. Section 2(1) of PAIA enjoins a court to prefer any reasonable interpretation of the provisions of PAIA that is consistent with the objectives of the Act over any alternate interpretation that is inconsistent with those objectives. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*,[8] the SCA held that the import of 'rights' in s 50(1)(a) is broader than the fundamental rights contained in the Bill of Rights.

[34] Whether Afresh Brands' request fell within the ambit of s 50 to trigger a response, and/or was reasonably required to protect a right, was not placed at issue. Rather, as already said, the main contention concerned the obligation of the Association to provide the information.

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[8] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) para 27. See also *Manuel v Sahara Computers (Pty) Ltd and Another* [2018] ZAGPPHC 864; 2020 (2) SA 269 (GP) para 28.

[35] It is common cause that in reality, the Association departed from its stance that it was not obliged to give the information and granted the request.

[36] In a letter from Rurik McKaiser Attorneys (acting for the Association at the time) dated 10 December 2017, it is stated:

'Dear Sir

WITHOUT PREJUDICE OF RIGHTS

In Re: The NHA Report – Investigation into Spate of Race Day Caffeine Positive Findings

1. ...

2. I have been duly instructed at this stage to share the attached report with you, as has been committed to you, by my Client at or 4 December 2017 "Without Prejudice".

3. Please note that at this stage this report is NOT a public document, and should be treated as confidential and private.

4. ...' [Original emphasis]

[37] In a letter to Afresh Brands, dated 22 March 2018, Fasken Attorneys (representing the Association) stated:

'Dear Sirs

1. ....

2.

3. Our client tenders the documents referred to below *in compliance with its obligations under PAIA.* Some of the documents are in response to more than one request. Not all of the requests are answered in full as your client is not entitled to the information or the information is of a confidential nature and our client has no obligation to disclose it.

4. ....

5. We suggest that rather than file the answering affidavit in accordance with the agreed timeline, your client assess the *documents now provided in response to the PAIA request* and whether it is satisfied that these are adequate for the purposes of protecting its rights as set out in Annexure A and B to its request for information. Please note that we do not, by providing the documentation, agree with the basis on which it asserts its rights, and *our client's rights in this regard are reserved.* To the extent that your client requires additional

documents it should advise our client as soon as possible of the documents it seeks and the basis for its production.

6. ....' [Emphasis added]

[38] In a letter to Afresh Brands of 5 April 2018, from Fasken Attorneys, it was stated:

'Dear Sirs

1. ....

2. ....

3. The proposals deal with what you term PAIA and PAJA relief.

4. *Our client has tendered documents in respect of your PAIA request. The tendered documents constitute compliance with your PAIA request.* The caveat contained in paragraph 4 is to the effect that if after considering the documentation tendered, it appears that there may be **additional** documents required, *your office may advise us what these are and why they should be produced.*

5. The proposal in respect of the Inquiry is set out in paragraph 6 of the letter. It states that your client may attend and present evidence at the Inquiry. The proposal was previously made in our letter of 27 February 2018.

6. ....' [Emphasis added]

[39] In a further letter from Fasken Attorneys, dated 28 February 2019, it was stated:

'Dear Sirs

1. We refer to:

   1.1. your client's request for information delivered under the provisions of the Promotion of Access to Information Act, Act 2 of 2002 ("PAIA") dated 8 December 2017 (the "PAIA Request");

   1.2. your letter dated 14 June 2018; and

   1.3. your letter dated 26 October 2018.

2. *Our client remains of the view that your client has all the information and documentation it requires to protect its rights and to meaningfully participate in any inquiry in respect of the affected horses.*

3. *Nonetheless and in preparation for the hearing of this matter our client reviewed your client's PAIA request, the answers and documentation provided and any potential*

omissions. As a consequence our client has produced a Table which is attached. The items in black have already been produced. The items in red are clarification or additional items. These include:

...

which are tendered in response to 2(f), 3(e), 3(h), and 7(d), respectively, of the PAIA Request; ...

4. ....

5. .... Accordingly that portion of your client's High Court application is clearly moot.

6. .... Notwithstanding that this letter contains a settlement proposal, it is written with prejudice.' [Emphasis added]

[40] The above correspondence reveals that when Afresh Brands requested documents under PAIA, the Association provided some documents in various batches. On 10 December 2017, the batch contained the report discussed by the parties at the meeting held on 4 December 2017 under cover of the Association's attorney's letter. It purports to provide the report 'without prejudice'. It tendered the documents 'in compliance with obligations under PAIA' and in response to the PAIA request. In other instances, it provided the documents on the basis that they constituted 'compliance with PAIA'. The Association also proceeded on the basis that there is a 'caveat' to the provision of the documents and that if there were additional documents required, Afresh Brands would advise the Association what the documents were and why they should be produced.

[41] Section 50 of PAIA expresses the obligation to grant information in imperative terms, in that a private body must grant a requester access to a record if: (1) the record is required for the exercise or protection of any rights; (2) the requester has complied with the procedural requirements in the Act; and (3) access is not refused under one of the grounds for refusal. Accordingly, a body can either grant or refuse the request once the jurisdictional facts in (1) and (2) are met. The Association did not refuse the request as it was entitled to do by s 50(1)(c) of the Act. There is no room for partial compliance in the construction of the provision.

[42] The Association made the election to grant access to the records, which was confirmed by the court a quo. It follows that the question of whether Afresh Brands

had a right to the records was no longer in issue. Once the Association took the decision to provide the documents requested in terms of PAIA, it was not open to it to evoke the right in s 50(3), and with the same breath refuse the records. The correspondence above indicates the it accepted the duty and obligation to comply with the Act. Accordingly, Afresh Brands had a right to have access to the records. The court a quo erred and misdirected itself in this respect.

[43] The above conclusion is consistent with the decision of this court in *Manuel v Sahara Computers (Pty) (Ltd)*,[9] which held that once a requester has met the jurisdictional facts in ss 50 (1) and (2), the only other basis upon which a private body may legally refuse access to records is if those records are not in its possession or do not exist. I pause to observe that in *Midi Television v DPP, Western Cape*,[10] the Supreme Court of Appeal found the procedures in PAIA are mandatory. It held that a court was not authorised to bypass those procedures. Even though the finding in *Midi Television* pertained to the conduct of a requester, the converse obligation must apply to the body providing the information. The finding by the court a quo is a departure from established authority by the SCA and this court.

[44] It is not necessary to recite all the instances of non-compliance, some of which were common cause before the court a quo. As an indication, the manner in which the Association was required to respond in terms of PAIA is prescribed in s 56. Once more, the provisions of the section are couched in imperative terms. The response to a request must be on affidavit, in this case, by the Head of the Association. None of the engagements above were made on oath or affirmation, as prescribed. In terms of s 56(3),[11] if records are refused, reasons together with the provision of the Act relied on to justify the refusal must be furnished to a requestor.

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[9] *Manuel v Sahara Computers* (note 8 above) para 25.
[10] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA) para 26.
[11] Section 56(3) of PAIA: '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 on;
(b) exclude, from any such reasons, any reference to the content of the record; and
(c) state that the requester may lodge an application with a court against the refusal of the request, and the procedure (including the period) for lodging the application.

[45] It is impermissible to merely state that the documents are not required, without providing reasons. The rationale for requiring the documents to be provided under oath by the Head is not to place precedence of form over substance, as the court a quo found. The aim of the provision is to bind the relevant institution, on oath, to uphold the constitutional values underpinning PAIA. A provision of records in a manner other than as envisaged would defeat the purpose of the requirement.

[46] Further, in terms of s 60, where a requester specifies the form of access, the private body must grant access in the form reasonably required. Apart from breaches of the above provisions, Mr Kirk-Cohen demonstrated to the Court that the Association furnished records which were unrelated to the request. It did not identify which of the documents were missing. These indicative breaches were acknowledged, but overlooked, by the court a quo. There is no absurdity in requiring full compliance with the provisions, as suggested.

[47] I now turn to the finding that the documents could be provided *'without prejudice'* with a *'reservation of rights'* under PAIA. Mr Nel persisted with this view on the basis that the concession did not include the concession of the right to the documents.

[48] It is not clear what the purpose of providing the records 'without prejudice' was. I discern, based on Mr Nel's argument, that it seems that the Association believed it could tender the records 'without admission of liability' under PAIA. Alternatively, it believed it could 'reserve its rights' to later argue it was not obliged to furnish the records to Afresh Brands. The assertion of a common law right to privilege is misplaced for two reasons. Firstly, it conflicts with the purpose and objects of PAIA. Secondly, it conflicts with the longstanding principle that once rights are conferred by a statute they may not be taken away. The only means available to the Association for asserting its right to privilege was to evoke the right afforded in PAIA and decline the request, or portions thereof, with reasons. I find the court a quo erred in this respect too.

[49] There is no cognisable legal right to supply information with a reservation of rights under PAIA.

[50] Another bone of contention was whether the disclosure was deficient in so far as information was sought pertaining to the chain of custody, and the Association's standard operating procedures, amongst others. Afresh Brands challenged the finding that the information provided was sufficient. Mr Kirk-Cohen complained that the finding was made without regard to the Table presented to the court a quo and this Court, which details the various instances of non-compliance. Allied with this, was the reliance by the court a quo on the opinion evidence of Mr Hyde (who was an employee of the Association) to find that there was substantial and sufficient disclosure. The latter issue was not raised sharply in the appeal. Given the finding, it is not necessary to address the same.

[51] In *M&G Media v 2010 FIFA World Cup Organising Committee South Africa Limited,*[12] the court held that proceedings under s 78(2) are not a review or an appeal, but are *original proceedings* to be considered *de novo* for the enforcement of the right the requester has to the records held. On this score, Mr Nel contended that it was permissible for the court a quo to revisit Afresh Brands' claim to the right to the information. For reasons already stated above, I disagree. The issue was no longer live on the facts.

[52] Lastly, concerning the relief sought, in terms of s 82(b) of PAIA, a court has wide powers to grant a relief that is just and equitable, including an order directing the head of a private body to take such action as the court considers necessary with a specified period. Even though Mr Nel complains that the application was not brought to compel respondent to supply documents, it is permissible for this Court to compel the respondent to fully comply with the provisions of PAIA, given the wide orders that a court may grant.

[53] The appeal succeeds with costs.

The following order is made:

1. The order of the court a quo is set aside and substituted with the following:

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[12] *M&G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another* [2010] ZAGPJHC 43; 2011 (5) SA 163 (GSJ).

'1. The first respondent is directed to comply fully with the applicants' written "Request for Access to Record of Private Body" made in terms of the Promotion of Access to Information Act 2 of 2000, dated 8 December 2017.

2. The first respondent is ordered to pay the costs of the application (including the wasted costs of the postponement of 13 March 2018), such costs to include the costs of two counsel where so employed.

3. Each party shall bear its own costs in respect of the interlocutory proceedings.'

T SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

L WEPENER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This revised judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 14 May 2021.

Date of hearing:	3 March 2021
Date of judgment:	14 May 2021

Appearances:

Counsel for the appellants:	Kirk-Cohen SC; J Ord
Attorney for the appellants:	Liversage Attorneys
Counsel for the first respondent:	GJ Nel SC; CT Picas
Attorney for the first respondent:	Faskin Martineau