

**REVISITING THE INTERPRETATION OF
SECTION 50 OF THE PROMOTION OF
ACCESS TO INFORMATION ACT**

***Mahaeeane and Motlajsi Thakaso v AngloGold
Ashanti Limited (85/2016) [2017] ZASCA 090****

1 Introduction

In 2006, the Supreme Court of Appeal adopted a more flexible approach as the standard for the interpretation and application of section 50 (discussed in detail below) of the Promotion of Access to Information Act 2 of 2000 (PAIA) – that is, that access to records held by private bodies should be given to a requester when *reasonably required* (see the case of *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) par 6). Under section 2 of PAIA, a restrictive approach is necessary when interpreting any provisions of PAIA, including section 50, to the extent that an interpretation consistent with the purpose of PAIA must be preferred to interpretations that are inconsistent with it (see s 2(1) of PAIA). In other words, the fact that PAIA is meant to enable people to have access to information held by public and private bodies means that any judicial interpretation of the provisions of PAIA must be guided by its section 2. Where this is not the case, the purpose of PAIA would be misconstrued and thoroughly undermined, thereby giving rise to jurisprudential incongruity, as in the case of *Mahaeeane and Motlajsi Thakaso v AngloGold Ashanti Limited* (85/2016 [2017] ZA (SCA) 090).

It is important to distinguish at the outset between a public body and any other person (including private bodies) holding information that is necessary to exercise or protect a right, as expressed under section 9 of PAIA (see s 9(a)–ii) of PAIA). In alignment with the duty and responsibility of both public and private bodies to disclose relevant information to the public, PAIA requires that the obligations of these bodies be discharged either actively or proactively (for details, see ss 9(b)(i), 11, 15 and 50 of PAIA; Du Plessis “Access to Information” in Paterson and Kotzé (eds) *Environmental Enforcement and Compliance: Legal Perspective* (2009) 205; Currie and Klaaren *The Promotion of Access to Information Act: Commentary* (2002) 59). While public bodies are (actively) obliged to collect and disseminate information to the public without the latter asking for it (s 15(2)), this may not necessarily be for the exercise or protection of a right. On the other hand, private bodies are (proactively) required to disclose relevant information to the public upon request and particularly information relating to their activities that is necessary for the exercise or protection of any rights, including the

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rights in the Bill of Rights (s 50(1)(a); also see Ashukem “A Comparative Analysis of the Right to Access to Environmental Information in Uganda and South Africa” 2017 *South African Journal on Human Rights* 464). From a broader perspective, therefore, the nature, purpose and importance of the right of access to information (as it relates to private bodies) necessitate that relevant information held by them is provided upon request to enable the requester to protect or exercise his or her rights. It is conceivable that private bodies may play an increasingly important role in this regard, and any attempt to withhold requested information is tantamount to a violation of the constitutional and legislative right of access to information. In a nutshell, the provision of section 50 of PAIA must pass constitutional muster if its aims and objectives with respect to private bodies are to be achieved. Be that as it may, in terms of PAIA, the right of access to information must be exercised without interference, except in respect of certain types of information such as confidential information that forms an intrinsic part of the general limitation clause of the right – such information being excluded from the public domain (Ashukem 2017 *South African Journal on Human Rights* 464).

Notwithstanding the above, on 7 June 2017, the Supreme Court of Appeal delivered an incorrect judgment relating to the interpretation and application of section 50 of PAIA in the *Mahaeeane and Motlajsi Thakaso* case. It was an appeal decision from the Gauteng Local Division of the High Court, Johannesburg, concerning the dismissal of an application under section 82 of PAIA compelling the respondent, AngloGold Ashanti, to provide the appellants, Mahaeeane and Motlajsi Thakaso, with access to its records. The parties are henceforth referred to as the appellants and the respondent. In this case, the court was required to determine two questions – namely, (a) whether the appellants satisfied the requirement under section 50 of PAIA relating to the right of access to the records of private bodies (see s 50(1)(a)–(c) of PAIA), permitting them to gain access to the records held by the respondent, and (b) whether, in terms of section 7(1) of PAIA, the commencement of proceedings relating to class action could be invoked to bar the appellants’ right of access to such records, since the action had commenced after the initiation of the proceedings, which, according to the respondent, makes PAIA inapplicable.

The judgment is highly significant in the sequence of South African jurisprudence dealing with the right of access to information and how the court’s interpretation of laws seeks to promote and ensure the right. This note critically revisits the decision of the case, and particularly the normative content of section 50 of PAIA, and argues for the incorrectness of the decision of the court. In doing so, this note relies on earlier jurisprudence on the interpretation and application of the section 50 provision of PAIA. Part 1 provides a brief understanding of the facts of the case and the issues of law raised. Part 2 examines the reasoning of the judge as informed by other previous decisions. Part 3 analyses the judgment through a critical discussion of the normative content of sections 50 and 7(1) of PAIA, and its interpretation and application in other jurisprudence, in order to demonstrate the incorrectness of the decision in the *Mahaeeane* case. The last part of this note is a conclusion.

2 Facts and issues of law

The appellants were previous employees of the respondent and worked in the respondent's gold mine. During their employment as mine workers, they contracted silicosis and were medically boarded on grounds of the illness (par 1). They requested from the respondent a list of ten records (par 6 of the judgment). These included:

- (a) measurements of dust exposure levels for the appellants for their period of employment;
- (b) the record of medical surveillance of the appellants, including x-rays, lung function results and doctor's examination notes along with lung biopsies and CT scan results for the period of their employment;
- (c) the record of incapacity hearings convened in respect of the appellants;
- (d) the hazardous work service records of the appellants for the period of their employment;
- (e) the mine manager's written reports of any investigations into the declared unfitness of the appellants;
- (f) the mine manager's reports on any investigation into silicosis or health-threatening occurrences of breathable silica dust during the period of their employment;
- (g) the mine manager's record of significant dust hazards identified and pneumoconiosis risks assessed by him during the period of their employment;
- (h) the health-and-safety training documentation, policies and educational material used to educate and prepare the appellants for safely working in the mine;
- (i) the Code of Practice prepared by the mine manager concerning the health and safety of employees working with silica dust during the period of their employment; and
- (j) the Health and Safety Policy of the mine relating to dust exposure during the period of their employment.

Each of these ten records referred to the specific legislation that it was averred gave rise to the statutory duty in respect of the particular record. The requests were made under section 50(1) of PAIA in relation to the appellants' employment history as well as the cause of their exposure to silicosis (par 3). A certification application for a class action was launched by 56 applicants comprising current and former mine workers who had contracted silicosis and who worked or had worked on the gold mine (par 1). The appellants were not named in the class action. Although the appellants were not named in the application, they fell within the class and accordingly had the right to opt out (par 1). According to the attorneys of the appellants, they had been instructed to advise their clients whether or not they had a good claim against the respondent for damages "in respect of the harm and loss ... suffered as a result of ... having contracted silicosis", which advice depended in part on whether or not the respondent had complied with its statutory duty of care to its employees (par 5). The attorneys to the appellants declared:

“The information requested is required in order for me to assess and advise the [appellants]: Whether or not the respondent complied with the general duty of care owed by it to the [appellants] to provide and maintain a safe and healthy work environment for its employees as stipulated in section 5 of the [Mine Health and Safety Act 29 of 1996] (the MHSA), Whether the respondent complied with the provisions of the law and the extent of such compliance.” (par 5)

The appellants further argued that they were not parties to the certification application, and that should the class action be certified, they might not become parties to any action arising from the certification if the legal advice they received was to the effect that there were no prospects of their succeeding in a claim (par 9).

On the other hand, the respondent argued that the appellants were members of the class action and that since the documents were requested after the commencement of the application, section 7 of PAIA excluded PAIA’s application (par 3). Section 7 of PAIA provides:

“(1) 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. (2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.”

In particular, it was argued, the rules governing the discovery of proceedings excluded PAIA’s application. The respondent further argued that the application was a stratagem to obtain discovery in advance of the class action. According to the respondent there were discrepancies in the class action because the first appellant was certified as having contracted silicosis during September 2004, and the second appellant contracted it only in September 2009. Yet the claim against the respondent had been investigated by the appellants’ attorneys in November 2011, and in December 2012 the same attorneys had launched a certification application in which the appellants had been omitted as applicants (par 7). The respondent also argued that the appellants had been omitted in order to escape the application of section 7(1) of PAIA, which in principle precludes such an application where proceedings are pending (par 7). They also contended that the appellants had not made a clear case, as required by section 50(1) of PAIA, in view of the fact that although the right to seek compensation in delict for personal injury is not disputable, the records were not required for that purpose (par 8). According to the respondent, the reason afforded by the appellants for the request was that the records could “assist in determining whether [the respondent] complied with its statutory and/or common law and/or constitutional obligations ... regarding dust levels, adequate medical care and examinations, proper training and dust exposure” during the period the appellants were employed, and accordingly the request was incommensurate with the right asserted (par 8). The respondent was also of the view that the appellants were members of the class action, the proceedings had commenced and the rules of court concerning discovery required the production of the requested records (par

8). While at the Gauteng Local Division of the High Court, Sutherland J held that section 7 of PAIA precluded the appellants from gaining access to records held by the respondent, and also held that they had failed to satisfy the court that the records were required for the exercise or protection of a right as stipulated by section 50(1) of PAIA (par 4). The appellants were dissatisfied and approached the Supreme Court of Appeal. Here the court had to determine whether the appellants had satisfied the requirement of section 50 of PAIA and if so, if the appellants could be permitted to gain access to records held by the respondent in order to exercise or protect their rights, and also, whether section 7 could be invoked to preclude the appellants' right to gain access to records held by the respondent. The next part of this note provides the court's decision and reasoning in approaching these legal issues.

3 Court's decision and reasoning

It is important to point out that the minority judgments of Mbatha AJA and Molemela AJA differed substantially from the majority judgment. They disagreed absolutely with its manner, reasoning and approach to the interpretation and application of the relevant provisions of PAIA, which led to the rejection of the appeal. If the minority had prevailed, the appellants' appeal would have been upheld, thereby granting them access to the respondent's records (for details, see par 29–74). As said earlier, the reasoning of the court pertained to the questions: (a) whether the appellants' request was within the ambit of section 50 of PAIA, and (b) whether it was necessary to invoke section 7(1) to exclude the appellants' access to the requested records (par 10). These issues are examined below.

3.1 Satisfying the test of section 50 of PAIA

According to the court, in order for the appellants to satisfy the requirement of PAIA's section 50, they needed only to put up tangible facts that *prima facie*, though they could be open to some doubt, would establish that they had a right to exercise or protect, and which was heavily dependent on the records held by the respondent (par 12; also see *Claasen v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) par 8). The court in the *Mahaeeane* case relied on previously decided cases to examine the interpretation and application of the normative content of section 50 of PAIA. The first of these was *Unitas Hospital v Van Wyk* (*supra* par 19), which dealt with section 50 of PAIA (see *Mahaeeane supra* par 12). In line with the decision arrived at in *Unitas Hospital*, the court considered the phrase "required for the exercise or protection of any rights" in section 50(1) as being intended to give rise to a fact-based enquiry without any abstract determination (par 13; also see *Unitas Hospital v Van Wyk supra* par 6). In the opinion of the court, because information sought must be required for the purpose of exercising or protecting a right, it was necessary for the requester to satisfy more than the minimum threshold requirement that the information would be of assistance, and also for the requester (the appellants in this case) to show tangible proof of a causal connection between the information requested and the harm sought to be avoided (par 13; also see *Unitas*

Hospital v Van Wyk supra par 17). Citing the decision in *Unitas Hospital*, the court reiterated:

“So, for example, it is said that it does not mean the subjective attitude of ‘want’ or ‘desire’ on the part of the requester; that, at the one end of the scale, ‘useful’ or ‘relevant’ for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is ‘essential’ or ‘necessary’ for the stated purpose.” (par 13; also see *Unitas Hospital v Van Wyk supra* par 16)

The court relied equally on the decision of *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA); [2005] 2 All SA 225) to determine further the meaning and interpretation of “reasonably required”, as follows:

“I think that ‘reasonably required’ in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need.” (*Clutchco (Pty) Ltd v Davis supra* par 13)

The court further considered the Constitutional Court case of *My Vote Counts NPC v Speaker of the National Assembly* ([2015] ZACC 31; 2016 (1) SA 132 (CC)). This case dealt with the meaning of “required” within the context of section 32(1)(b) of the Constitution of the Republic of South Africa, 1996 as an issue that does not denote absolute necessity. Rather, it means “reasonably required”, the burden of proof of the reasonableness being on the person seeking access to the information, who must establish a substantial advantage or element of need, and the standard needed to be accommodating, flexible and in its application fact-bound (*My Vote Counts NPC v Speaker of the National Assembly supra* par 31). Similarly, the Constitutional Court stated clearly in *Cape Metropolitan Council v Metro Inspection Services* (2001 (3) SA 1013 (SCA)):

“[A]n applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.” (par 28)

The court held that the right that the appellants wished to exercise or protect was the “right to claim damages” against the respondent, and for this, section 34 of the Constitution (access to courts) was relevant, and not the right to gain access to records held by the respondent (s 32). Because the right relied upon – the right to access records – was narrowly framed, it was inappropriate to consider the nature of the rights that could qualify (par 14; also see *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) par 19). In the opinion of the court, the application in support of the appellants’ claims did not in any way deal with the right to be protected. Instead, it dealt with a third aspect of the enquiry – namely, the issue of “how that information would assist ... in exercising that right.” The appellants’ application expanded upon this in response to the question as to why “the record requested is required” (par 14). However, the court was of the view that the two aspects involving what information was required and how it would assist in protecting the right were grossly conflated in the response to the first requirement (to state the right to be protected). Despite claims by the appellants’ attorney that the requested information “will go to show” whether the respondent had complied with its statutory duties, the

court held that the claim did not deal with the right asserted but instead with the third aspect – namely, the reason that the records were required (par 15). According to the court, the central and relevant question was whether the records requested were required for the exercise or protection of the right to seek compensation in delict for personal injury or, as put by the respondent, the right to claim damages (par 16). In this regard, the court held that the underlying reasons for requesting records from the respondent were essentially not related to the exercise of the right to seek damages or compensation for personal injuries, and for this reason they failed to meet the test in section 50 of PAIA – namely, that the records be sought to “exercise or protect” the right relied upon (par 17). The court stated that it was necessary to address:

“[t]he question of whether the records are reasonably required to exercise or protect the right asserted by the appellants, to claim damages from the respondent from their having contracted silicosis. As indicated, a right to claim damages is invoked. This will necessitate court proceedings. It is necessary to avoid the unwelcome spectre of applications under the PAIA being brought to obtain premature discovery ...” (par 20)

According to the court, in order successfully to claim access to information, there has to be a sufficiently justifiable causal connection between the reason for requesting the information and the right that would be protected or exercised (par 17), as was the situation in *Company Secretary, Arcelormittal South Africa Ltd v Vaal Environmental Justice Alliance* ([2014] ZASCA 184; 2015 (1) SA 515 (SCA) par 8). In the present case, the court was of the view that if it can be asserted that the reason is related to the right, it remains to be determined whether the requested records are reasonably required to exercise or protect the right relied upon (par 18). The fact that the appellants averred that they had not been exposed to silica dust other than while employed on the mine meant, in the opinion of the court that the only records that were not in their possession were those that would assist them to prove whether or not the respondent had adhered to its statutory, common-law and constitutional legal duties (par 18–19). The appellants’ right to claim damages in delict was covered in their draft particulars of claim that established the relationship between the silicosis contracted and the actionable conduct of the respondent (par 18–19). In this light, the court ruled in favour of the right to claim damages, and the need to avoid the unwelcome spectre of applications under PAIA being brought to obtain premature discovery in future litigation (par 20). The court expressed an opinion of the matter as follows:

“It seems to me that a rule of thumb which will avoid this is to enquire whether, in the context of future litigation to exercise the right relied on, the records requested are reasonably required to formulate a claim. This seems to me to have been the implicit test applied in *Unitas Hospital*. If needed to formulate a claim, it can be said that they are reasonably required under s 50(1) of the PAIA. As I have said, the appellants do not need the requested records to formulate their claim. It may be argued that some of the records are reasonably required as evidence to prove the formulated claim. Since, however, the machinery of discovery applies in an action, most, if not all, of the records will become available to the appellants in order to exercise the right to claim. After all, discovery is required of documents ‘relating to any matter in question’ in an action. No case has been made out in the present matter that any of the requested records will not be discoverable. The issue

whether the obligation to discover is co-extensive with records reasonably required to exercise the right to claim need therefore not detain us in the present matter. As such, I am of the view that the records requested are not reasonably required to exercise the right of the appellants to claim damages from the respondent.” (par 20–21)

The court held further:

“For the above reasons, therefore, the appellants have not met the threshold test required by s 50(1) of the PAIA to ‘*prima facie* establish that access to the record is required to exercise or protect’ the right relied upon. (par 27; also see *Claasen v Information Officer, South African Airways supra* par 8)

It is necessary to examine also whether it was appropriate to invoke section 7 of PAIA in order to prevent the appellants’ right to gain access to records held by the respondent.

3.2 Application of section 7 of PAIA

Section 7(1) of PAIA deals with circumstances in which PAIA does not apply and particularly for records dealing with criminal or civil proceedings and after the commencement of proceedings. Section 7(1) provides:

- “(1) 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) is 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.”

It follows therefore that section 7 applies only where the rules relating to the discovery and compulsion of evidence in civil and criminal matters regulate access to a record. Because a certification application serves as a necessary precursor to proceedings needed to pursue a class action, such an application was highly relevant in the case under scrutiny inasmuch as a certification application is considered as the bringing or commencement of a class action (par 23, 24). The court’s reasoning relating to the certification action was therefore to the effect that the possible impact of the class action (that of negating the appellants’ claim to gain access to records held by the respondent) should not be overlooked since the certification application that the appellants were contesting had commenced at the time the request under PAIA was made by the appellants (par 24). Relying on the opinion of Professor Silver and the decision in *Children Resource Centre Trust v Pioneer Food (Pty) Ltd* ([2012] ZASCA 182; 2013 (2) SA 213 (SCA)), the court held that because the class action was certified, it was important and necessary for all members who fell within a certified class to decide either to opt out or opt in (par 25), something that in the opinion of the court the appellants had failed to do (also see par 26). In this light, the court held:

“All of this means that, at present, the appellants are included in the class action which has been certified. This much was correctly conceded by their counsel at hearing. It also means that the proceedings relating to the class action in question have commenced. As such, the documents cannot be said to be required to exercise or protect the right to damages since the class

action to do has commenced on their behalf. It seems to me that the substratum of the application brought by the appellants accordingly no longer exists. Counsel accepted that events had overtaken the application when certification had taken place. He sought, however, to submit that the appellants now require the information to determine whether they should opt out. But this was not the case made out on the papers. It is also doubtful, in the light of the approach in *Unitas Hospital* mentioned above, whether this would bring the claimed rights within the ambit of s 50(1) of the PAIA.” (par 26)

Be that as it may, it must be noted that section 7 has been interpreted as a necessary check to the right of access to information. In the Constitutional Court case of *Industrial Development Corporation of South Africa Ltd v PFE International Inc* (2012 (2) SA 269 (SCA) 9 par 21, confirmed on appeal by the CC), it was held that section 7 of PAIA serves:

“[t]o prevent PAIA from having any real impact on the law relating to discovery or compulsion of evidence in civil and criminal proceedings. In the event that the production of or access to the record is provided for in any other law then the exemption takes place. 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 the litigation.”

Clearly the rationale behind section 7 is to prevent the operation of PAIA to the extent that it acts as an implicit limitation to the right of access to information, and particularly with respect to private bodies. To be sure, the Constitutional Court warned in *Industrial Development Corporation of South Africa Ltd v PFE International Inc* (*supra*) that:

“When constructing section 7(1) it must be borne in mind that the purpose of PAIA is to give effect to the right of access to information. On the contrary, section 7 excludes the application of PAIA. A restrictive interpretation of the section is warranted so as to limit the exclusion to circumstances contemplated in the section only. A restrictive meaning of s 7(1) will thus ensure greater protection of the right.” (par 18)

It was important for the court to adhere to this warning prior to delivering its judgment. However, it did not do so as the court upheld the court *a quo*'s decision and stated that:

“[i]n the light of this, I consider it unnecessary to deal with the respondent's further defence to the application by way of s 7(1) of the PAIA. There is accordingly no basis on which to interfere with the order granted by Sutherland J. The appeal must fail.” (par 27)

Notwithstanding the above, the next section analyses the judgment through a critical evaluation of the normative content of section 50 of PAIA and its minimum threshold to determine if it was necessary to invoke section 7 of PAIA.

4 Analysis

In guaranteeing the right of access to private records, section 50 of PAIA provides:

“(1) A requester must be given access to any record of a private body if–

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- (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.
- (2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a) or (b)(i) of the definition of 'public body' in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.
- (3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made."

The wording of section 50 of PAIA is clearly peremptory and subsection 1 provides three clear-cut requirements (see s 50(1)(a)–(c)) that in principle need to be satisfied before a claim for a right of access to records against private parties can be successful (also see Burns *Administrative Law under the 1996 Constitution* (2013) 62). Each of these threshold requirements is discussed below.

4 1 *Record required for the exercise or protection of any right*

This section considers separately the words "required", "exercise or protect" and "any rights" for a comprehensive understanding of the normative content of section 50 of PAIA and its application to consideration of a request for information to gain access to records.

4 1 1 Meaning of "required"

The right of access to information is one of the most important rights in the new constitutional dispensation of South Africa. The right is essential to ensure the establishment of the ideals of government, which include the need and commitment to encourage, promote, facilitate and ensure government's accountability, responsiveness and openness as expressed in section 1(d) of the Constitution (see De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 619). The Constitutional Court in the case of *Brummer v Minister for Social Development* ([2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC)) explained the importance of the right of access to information as follows:

"To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'. Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas ... The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a

democratic state. This carries with it the responsibility to report accurately. The consequence of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.” (*Brummer v Minister for Social Development supra* par 62–63)

Respecting and protecting the right of access to information provides a possible and certainly appropriate way to ensure the exercise or protection of any of the rights in the Bill of Rights of the Constitution (also see Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 692; De Vos and Freedman *South African Constitutional Law in Context* 619). Section 32 of the Constitution 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 or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.” (see s 32(1)–(2) of the Constitution)

PAIA is national legislation giving effect to the constitutional right of access to information (see the Preamble and s 9 of PAIA). For the purposes of constitutional subsidiarity, a claim citing the violation of the right of access must be based on PAIA (also see Burns *Administrative Law under the 1996 Constitution* 54; De Waal, Currie and Erasmus *The Bill of Rights Handbook* 3ed (2000) 439). PAIA bestows a right on the public to have access to both publicly held and privately held records on condition that the records held by private bodies are required for the exercise and protection of any right (also see s 9(a)(ii) of PAIA). The same terminology is clearly repeated in section 9 of PAIA and supported by its section 3, which delimits the scope of application of the Act to include records held by both public and private bodies (see ss 3(a) and (b) of PAIA). It follows clearly that private bodies have a concomitant obligation to disclose requested records to the public (see s 50 of PAIA) except if the refusal to honour the request is permitted or mandated by one or more of the grounds of refusals (see ss 33–46 of PAIA). In the Constitutional Court decision of *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* ([2012] ZACC 21; 2013 (1) SA 1 (CC)), the rationale of PAIA was explained:

“In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. Ordinarily, and according to the principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA.” (*PFE International v IDC South Africa supra* par 4)

Although there are several ways to interpret “required” (De Waal *et al The Bill of Rights Handbook* 442; also see the cases of *Tobacco Institute of Southern Africa v Minister of Health* 1998 (4) SA 745; *Van Huysteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) par 299D–330F), it has been argued that there should be a restrictive approach to the interpretation, which is to the effect that the record requested must be shown to be necessary or essential to the exercise of or to protect a right,

and without which record the right cannot be exercised or protected (Currie and De Waal *The Bill of Rights Handbook* 703; De Waal *et al The Bill of Rights Handbook* 442).

However in *M & G Limited v 2010 FIFA World Cup Organising Committee South Africa Limited* ([2010] ZAGPJHC 43; 2011 (5) SA 163 (GSJ)), Morison AJ held:

“The words ‘*required for the exercise or protection of any rights*’ should not be interpreted or applied restrictively. There is no basis for a concern that privacy, commercial confidentiality, trade secrets and the like would be in jeopardy if s 50(1)(a) is given a meaning, or is applied in a manner, that sets a relatively low threshold.” (*M & G Limited v 2010 FIFA World Cup Organising Committee South Africa Limited supra* par 364)

According to Currie and De Waal (*The Bill of Rights Handbook* 703), “required” could also be synonymous with “relevant”, proof of which would entail the showing of a causal connection between the information requested and the envisioned right that needs to be exercised or protected. Another interpretation is that of “reasonably required” as expressed in *Unitas Hospital v Van Wyk* (*supra* par 6). However, it has been suggested that the *Unitas* case represents a more flexible approach to interpreting section 50 in terms of which compliance must be assessed on a case-by-case basis (*Unitas Hospital v Van Wyk supra* par 6; Currie and De Waal *The Bill of Rights Handbook* 703). Currie and De Waal have provided an illustrative and convincing account of this case-by-case basis. They stress that the purpose of the need-to-know condition relating to the right of access to information in private hands needs to be kept in mind when attempts are made to interpret and apply the relevant provision(s); there is a need for requesters of information to demonstrate clearly a substantial advantage to be gained from accessing information or an element of need to have the requested information. There is also the need for a requester for information to establish that the requested information is required in an objective sense for the exercise or protection of rights; and that the requested information must be of assistance to the requester (see Currie and De Waal *The Bill of Rights Handbook* 704).

In the present context, the appellants’ request for records establishes a striking causal connection between the harm/injuries suffered by the appellants as mine workers and the request for, access to relevant information held by the respondent. This was a reasonable and justifiable request as the information was necessary to their effort to exercise or protect their right. Conversely, without access to these records the appellants would find it difficult to formulate their claims based on the violation of their constitutionally enshrined human rights. It may be apposite to argue that if the right of access to information as espoused in PAIA and the Constitution is meant *inter alia* to enable people to exercise or protect their constitutional rights, then a glaring situation of harm/injury suffered (such as in this instance) should arguably be treated as a *prima facie* justifiable reason for requesting records; and an established causal connection between the requested information and the appellants’ ability to formulate a claim based on the harm they suffered. Conceivably, the right of access to information invokes an element of need with respect to a requested information that is

information required to protect a right, as in the case under scrutiny (also see the case of *Shabalala v The Attorney-General of Transvaal* 1994 (6) BCLR 85 (T) 101A–B). The court undermined the operation of PAIA in this case, and by so doing denied the appellants their right to access information. To be sure, the minority judgment by Mbatha AJA was to the effect that the appellants had satisfied the threshold requirements of section 50 of PAIA and that it was unnecessary to invoke the application of section 7 of PAIA because civil proceedings had not commenced (par 30). On the other hand, Molemela AJA was of the view that inasmuch as “required”, in the context of section 32(1)(b) of the Constitution, does not denote absolute necessity, but means “reasonably required”, the same rhetorical meaning should be ascribed to the section 50(1)(a) of PAIA – that a requested record be “required for the exercise or protection of any rights” (par 74). In this view, the appellants’ claim for access to the respondent’s records is justifiable and legitimate.

Section 1 of PAIA does not define “reasonably required” for the purpose of section 50. In terms of the Constitution, every court has a duty to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (see s 39(2) of the Constitution). In fact, section 2 of PAIA obliges courts to prefer any reasonable interpretation of a provision that is consistent with the objects of the Act over any alternative interpretation that is inconsistent with those objects (see *MEC for Roads and Public Works Eastern Cape v Intertrade Two (Pty) Ltd* [2006] ZASCA 33; 2006 (5) SA 1 (SCA) par 11). It would have been commendable had the court applied the purposive and restrictive approach of PAIA to permit the appellants to gain access to records held by the respondent in order to protect their rights. Yet this was not the case, as the interpretation and application of section 50 was in direct contrast to and inconsistent with the object of PAIA to the extent that it further undermined both the operation of PAIA and the appellants’ constitutional and legislative right of access to information. It is hard to imagine how the appellants could exercise or protect their rights against the respondent without proper access to these important records.

4 1 2 Meaning of “exercise or protection”

It has been pointed out that the phrase “exercise or protection” should not be read as confined to the exercise or protection of rights by way of litigation (Currie and De Waal *The Bill of Rights Handbook* 705). This is so because a right can also be exercised or protected through informal means before administrative bodies, in front of political forums, or even through the media (Currie and De Waal *The Bill of Rights Handbook* 705; also see De Waal *et al The Bill of Rights Handbook* 443; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) 642; *M & G Media v 2010 FIFA World Cup Organising Committee* 2011 (5) SA 163 (GSJ) 354 par 328 and 360). According to the minority judgment by Mbatha AJA, the fact that the appellants were dismissed from their employment after contracting silicosis indubitably suggests that the magnitude of the illness was such that it was appropriate to determine its cause, and that access to the respondent’s records was relevant and necessary since such access would enable the appellants to protect or exercise their rights (par 43). Molemela AJA corroborated this

view, holding that the nature of the appellants' enquiry under section 50 of PAIA was fact-based and included, among other matters, information pertaining to the measurement of the level of their exposure to silica dust during their employment, and information on measures employed by the respondent to protect the appellants from contracting silicosis (par 65). The relevance of, and purport underpinning, the request for information was clearly set out by the decision of *Nkala v Harmony Gold Mining Company Limited* ([2016] ZAGPJHC 97; 2016 (5) SA 240 (GJ); for details see par 77 of the *Nkala* judgment), according to which the onus was on each plaintiff in the class action to prove his/her claim in its entirety in order for the claim to be successful (par 65). Arguably, honouring a request for access to relevant information held by the respondent provides the only basis and appropriate platform for a justifiable, reasonable and fair remedy for the appellants to exercise or protect their rights. This was particularly so as the appellants had no way of accessing the requested information other than to gain access to the relevant personal records held by the respondent.

4 1 3 Meaning of “any rights”

The formulation “any rights” in section 50 of PAIA clearly denotes that no particular right is *prima facie* at issue. This suggests that it is unnecessary and inappropriate to use a particular effect on a right to justify a claim for access to a record, as in the present case. Like “required” above, the word “rights” could be interpreted in three ways. Currie and De Waal (*The Bill of Rights Handbook* 705; also see De Waal *et al The Bill of Rights Handbook* 444) outline these three ways.

“Rights” could mean rights in the Bill of Rights of the Constitution. It could also mean rights emanating from private law as a result of contractual or delictual obligations or legislative rights held by an individual against the state or against an organ of government. Finally, it could also mean all legislative and private-law rights, including those held against private citizens, as indicated in *Van Huysteen NO v Minister of Environmental Affairs and Tourism* (1996 (1) SA 283 (C); De Waal *et al The Bill of Rights Handbook* 444; also see *Balmoral Investments v Minister van Energiesake* 1995 (9) BCLR 1104 (NC)), where “rights” were interpreted by the court as including statutory rights enforceable against the state.

According to Currie and De Waal, the first interpretation places the narrowest scope on the right to access information, and the third interpretation places the most generous (Currie and De Waal *The Bill of Rights Handbook* 705; also see De Waal *et al The Bill of Rights Handbook* 444). It is important to bear in mind that the overall purpose of PAIA could best be served by and through a narrow reading and interpretation of the word “rights” as contained in PAIA and the Constitution. It has been submitted that section 50 of PAIA serves to ensure private-sector transparency and accountability to prevent harm to fundamental rights, which arguably are the rights in the Bill of Rights and those other rights that are in the general law that could be regarded as deriving from the rights in the Bill of Rights, including, for example, rights in the law of delict or statutory rights (Currie and De Waal *The Bill of Rights Handbook* 705). However, whether PAIA should apply to rights created by the voluntary

assumption of obligations such as contractual rights (Currie and De Waal *The Bill of Rights Handbook* 705) is another debatable issue (see the contrasting opinion of Cameron J in *Van Niekerk v Pretoria City Council* (1997 (3) SA 839 (T) par 844–845).

The phrase “any rights” as used in the Constitution and PAIA relates essentially to the protection or exercise of any right in the Bill of Rights for which a right of access to information explicitly establishes a *prima facie* link between the information requested and the right that needs to be protected. It follows that the inclusion of a right of access to information in the Constitution was meant primarily to protect the exhaustive fundamental rights enshrined in the Constitution’s Bill of Rights. Thus, “any rights” does not denote any particularity, and a generalised grievance could be just as effective as a request that is predicated on the desire and need to protect the rights of the general public. In other words, “any rights” could mean either one’s own rights or those not necessarily of the requester as was correctly pointed out by the court in the *Arcelormittal* case (*supra* par 17; also see Currie and De Waal *The Bill of Rights Handbook* 702). A right to access to information is relevant to enable and facilitate the exercise or protection of a right. Yet the court in the matter under scrutiny did not see any link between the information requested and the right sought to be protected or exercised. It is submitted that the majority judgment should have upheld the appeal to permit the appellants access to the respondent’s records in order to protect their violated right, which had caused them to contract silicosis – clearly a sufficient justification to permit the release of the requested information.

4.2 Compliance with the procedural requirement

None of the grounds of refusal in sections 66, 67 or 68 of PAIA were raised by the respondent, and there was similarly no indication in the respondent’s papers that the appellants’ requests for information had ever been considered (par 50). According to the minority judgment of Molemela AJA, even though the appellants conceded that the requested information was for the purpose of civil proceedings under section 7 of PAIA, such a concession does not in any way preclude or cannot be used to preclude them from requesting information under section 7 of PAIA (par 70). This is predicated on the fact that the requirements under section 7(1)(a), (b) and (c) are cumulative, and all three must co-exist for the operation of the Act to be excluded, as was the situation in *MEC for Roads and Public Works Eastern Cape v Intertrade Two (Pty) Ltd* (*supra* par 12, 58). As all three requirements of section 7(1)(a–c) were not met, it was wrong and unnecessary for the court to have invoked the provision of section 7(1) of PAIA (also see par 70). In this light, the decision in this case was wrong and prejudiced the appellants’ right of access to information as stipulated in the Constitution and PAIA. It would be an anomaly if the right of the appellants to exercise or protect their rights might be curtailed by a certification application that might not even materialise in a class action or might be abandoned (par 53). In addition, the appellants’ request for information was strictly confined to their personal information (see s 50(3) of PAIA) relating to their employment history with respect to medical surveillance during the course of their

employment, including information on the level of their exposure to silica dust and measures taken by the respondent to protect them from contracting silicosis, and information relating to the respondent's mining operation and its safety and health practices (par 44 and 65). This means that the respondent was in possession of all the relevant material facts and information necessary to enable the appellants to exercise or protect their rights. It would therefore have been only reasonable for the court to uphold their appeal and grant them access to the respondent's records.

4 3 Access to records must not be refused

The last requirement of section 50 – that a request to gain access to records held by private bodies must not be refused – presupposes that any requested information must be made available to enable the requester (the appellants, in this case) to exercise or protect their right. Presumably, any interpretation and application of section 50 must be consistent with and not contrary to this requirement to the extent that it serves to promote and ensure the spirit of PAIA. Apparently, the requirement addresses the reason for the enactment of PAIA – namely, to enable people to have access to information (see the Preamble and s 9 of PAIA; also see s 32(2) of the Constitution). In light of the above, it would have been sensible and reasonably expected of the court to read this requirement in conjunction with the overall purpose of PAIA prior to delivering judgment. Had this been the case, the purpose and aim of PAIA would have been enforced, as it is in other decisions (see for eg, the Constitutional Court decision of *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17 CCT 249/17). It would also have served to uphold the appellants' appeal and would otherwise have permitted them to gain access to the respondent's records in order to exercise or protect any of their constitutionally entrenched rights violated as a result of working at the respondent's mines. Regrettably, this was not the case and the appeal was denied.

In light of the above, it is appropriate to submit that the court failed critically and correctly to consider the necessary elements of section 50 of PAIA as well as the underlying aims and objectives of the Act (also clearly explained by the minority judgments of Mbatha AJA and Molemela AJA) when delivering its judgment (for details on the minority judgments by Mbatha AJA and Molemela AJA, see par 29–74).

5 The issue of class action under section 7

A certification application for a class action had been launched on behalf of other mine workers, without the appellants, and had commenced before the request for information under PAIA was made. It may be relevant to note that in 2016 a certification judgment was delivered in the *Nkala* case, which clearly provided a date for the appellants to opt out of the class action should they wish to do so (par 35). Presumably, therefore, and per the minority judgment of Molemela AJA, the appellants were not part of the class action at the time of the judgment, and it was therefore inappropriate to invoke section 7 to bar their constitutional and legislative right of access to information as against the respondent (also see par 66). According to the

minority judgment of Mbatha AJA, a class action is *sui generis* in nature and in principle should not be perceived as the ordinary issuing of proceedings (par 42). Thus, where members of a class have excluded themselves from being part of a class action, as was the case with the appellants, the class action should not be invoked (by the court) to bar the appellants' right to gain access to relevant information in order to exercise or protect their rights (par 42 and 66). Instead, the appellants' right should be respected and protected, as they have individual rights. Allowing a certified class action to bar an appellant's right of access to information restricts people's right of access to court, which is contrary to the rules of court, which, in principle, should facilitate and not hinder access to court. The minority judgment by Mbatha AJA was to the following effect:

"The process of certifying a class action has similar traits to proceedings *in forma pauperis* as it gives the member of the class action an opportunity to claim damages irrespective of the indigency of the class members ... In the light of the nature of such proceedings, it cannot be said that they have commenced before an opportunity is extended to members of the class to make an informed decision whether to continue to be part of the class or opt out. A fair balance needs to be achieved in line with the rights of the individual members as enshrined in the Bill of Rights." (par 48)

Cognisant of the fact that the application in the *court a quo* had been based on a premise different from that now presented (the information was now needed to advise the appellants whether or not to opt out of the class action), Mbatha AJA held that courts have a discretion in dealing with issues not pleaded provided that they do not adversely affect the gist of the application and the outcome of the case concerning the exercise and protection of rights (par 61). In the absence of legislation governing class actions, Mbatha AJA was of the view that courts should take into consideration the legitimate interest of the litigants and protect (not curtail) their constitutionally entrenched rights (par 52) when dealing with or developing laws on class action. Mbatha AJA was also of the opinion that the majority judgment could have applied a restrictive interpretation to section 7(1) of PAIA (par 49). In alignment with the above, Molemela AJA also held that a refusal to deny the appellants' request for access to records that they purported to need to decide whether to opt out of the class action on the basis that this was not the case made out in their original papers completely ignored the fact that the appellants' request for information had been made prior to the granting of the certification action. It was only logical that appellants' request should be granted since this would enable them to exercise or protect their right to claim damages arising from the respondent's statutory duty of care owed to the appellants (par 66). This was predicated on the assumption that the requested information clearly established an element of need with respect to the records that were being sought by the appellants. In addition, the certification order had been accompanied by an opting out clause for the appellants, and accordingly the information was necessary to assist them in their decision whether or not to opt out of the class action, as this would help them to formulate individual claims should they opt out (par 66).

Initially the appellants had appealed on the basis that they sought access to the records held by the respondent to enable them to assess the potential

damages caused by their contracting silicosis as a result of working at the respondent's mine (par 35). This initial appeal preceded the certification application for a class action, a fact noted in the minority judgments (par 58). Although it is apparent that the appellants' arguments later changed to the effect that they were requesting the information in order to be able to decide whether to opt out of the class action, the minority judgment of Mbatha AJA was of the view that such a change in argument was understandable, particularly as the appeal in question had been overtaken by numerous events (par 35). Class action proceedings are a novelty in South African jurisprudence, and the appellants' doubt in relation to such an action might be compounded by the lack of legislation stipulating the legal processes to be followed in such an instance (par 45).

Notwithstanding the above, although the *Unitas* decision could be hailed as providing a basis for the interpretation and application of section 50 of PAIA, it must be borne in mind that the decision provided an open-door approach to the interpretation of section 50, the application of which would now be determined on a case-by-case basis. This approach could significantly undermine the purpose of PAIA in some cases, as in the present one. Arguably, the courts have failed to set a needed and appropriate standard for lower courts to follow and adopt when dealing with section 50 of PAIA.

The *Unitas* decision could be criticised for interpreting "required" as "reasonably required" given that PAIA does not even define "required", let alone "reasonably required". Though it may be argued that such an interpretation is possible and thus permissible, one may remember that in terms of PAIA any interpretation of its provisions must be consistent with its objectives as well as the purpose of section 2. Consequently, it is inappropriate to define "required" in a way that is inconsistent with the objective of PAIA. To be sure, the flexible approach to definitional interpretation developed in the *Unitas* case and later in the *Mahaeeane* case is contrary to the purpose of section 2 to the extent that it serves only to undermine the primary objective of PAIA.

As indicated above, the Constitution and PAIA are clear on the right of access to information. The phrase denotes specifically the right to gain access to information held by public and private bodies in order to exercise or protect a right (also see Devenish *A Commentary on the South African Constitution* (1998) 78; Devenish *A Commentary on the South African Bill of Rights* (1999) 442). Thus, the inclusion of the right of access to information in the Constitution is specifically intended to enable people to access and enjoy their constitutionally entrenched rights and freedoms enunciated in the Bill of Rights of the Constitution (also see Devenish *A Commentary on the South African Bill of Rights* (1999) 444, 452; De Vos and Freedman *South African Constitutional Law in Context* 619; Currie and De Waal *The Bill of Rights Handbook* 692–693; Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2ed (2013) 64–50). The Constitution and PAIA do not categorise the rights that a right to information depends on. Instead, the right of access to information relates to and serves to protect any right in the Bill of Rights. Suffice it to say here that the appellants' right of access to records held by the respondent is needed to

fulfil not only the constitutional and legislative guarantee, but also the provision of section 50 of PAIA, because one can exercise or protect a right only if one has access to the relevant information. It is submitted that the appellants' request was genuine and satisfied the requirements of section 50, and it was unnecessary for the court to have invoked section 7 of PAIA. It is hoped that this case is seen to be a wrong interpretation and application of section 50 of PAIA and that the court, particularly the Supreme Court of Appeal, should in future try to develop and apply appropriate standards that have the potential to strengthen and promote the respect for, protection of, and fulfilment of people's constitutionally enshrined rights, including the right of access to information.

6 Conclusion

In the context of legislative interpretation, this note has clearly illustrated the wrongness of the decision of the Supreme Court of Appeal in interpreting and applying section 50 of PAIA in the *Mahaeeane* case. As argued above, the purpose of PAIA, which gives effect to the constitutional provision on the right of access to information, is to enable people to gain access to relevant information held by both public and private bodies. It has been clearly distinguished that while the right to access to records held by public bodies does not essentially relate to or concern the protection or exercise of rights, the need to protect or exercise a right constitutes the principal purpose of gaining access to relevant information held by private bodies, as is clearly expressed in section 50(1)(a) of PAIA. Consistent with the statutory obligation imposed on private bodies, it is only logical that they should grant a request for access to information to enable a requester to exercise or protect his/her rights, and a court of law is seemingly expected to enforce such a right of access. The courts have a duty to uphold the aims and objectives of PAIA (spelt out in section 9) and particularly with regard to private bodies. As argued above, any interpretation and application of the provision(s) of PAIA, and particularly those that relate to private bodies, must in principle not deviate from the peremptory provision of section 50(1)(a) of the Act, because any deviation such as in the *Mahaeeane* case would not only be a violation of the statutory right of access to information, but also contrary indication to the aims and objectives underpinning PAIA (par 60). This much was illustrated in the above critical analysis, as it is in the minority judgments of Mbatha AJA and Molemela AJA.

Although the respondent claimed that the appellants were part of the certification application for a class action and that the appellants' request to gain access to records held by them was therefore irrelevant and inappropriate as they were part of the class action itself, it is necessary to underline here that a certification application for a class action is *sui generis*. The minority judgment of Mbatha AJA warned that it should not be construed as being the ordinary issuing of proceedings, since that would only help to distort the strict interpretation and application of the relevant provision(s) of PAIA (at least concerning section 50, which was the bone of contention).

It is worth noting that the appellants' initial application to the High Court had been an application to gain access to relevant information held by the respondent, and that this was rejected by the court, which rejection was the

basis for the appeal. It was therefore necessary for the Supreme Court of Appeal to consider the basis of the appeal, and not rely on the issue of the class action and invoke section 7 of PAIA to justify rejecting the appellants' appeal. As discussed above, the *Nkala* judgment stated categorically and unequivocally that the appellants in that case had the right to opt out of the class action if they so desired, which supposedly they did, as their only intention had been to gain access to the respondent's employment records in order to protect their constitutional rights. They had not been requesting information with reference to opting out of the class action. Their right to opt out of the class action presupposes that the appellants were excluded from any legal consequences that might ensue from their involvement in the class action. However, the majority judgment failed to consider this and instead invoked section 7 of PAIA, which as indicated above is meant to prevent its application in particular circumstances. It is safe to say that the court seems to have misconstrued the basis of the appeal, and in so doing failed correctly to consider the facts of the case, which clearly established the appellants' right of access to the information held by the respondent that was needed to assess their claim for damages against the respondent as a result of their contracting silicosis during the course of their employment in the respondent's gold mine. Yet, the court held that the appellants failed to meet the threshold requirements of section 50 of PAIA. It is rather unusual that a court of law is unable to apply constitutional and legislative instruments geared to protect people's fundamental rights. The failure to uphold the appellants' right only prevented them from exercising or protecting their rights that would otherwise have been protected had they been granted access to the information in the respondent's possession, as is clearly required in section 7(3) of PAIA.

It is on this basis that the author critiques the court's decision relating to the interpretation and application of section 50 of PAIA. Coincidentally, the author's critique resonates with the minority judgments, which completely disagree with the court's reasoning and its interpretation and application of the relevant provisions of PAIA (par 29 and 63) to the extent that they would have upheld the appellants' appeal (par 62 and 74).

In light of the above, it is fair to say that the majority judgment incorrectly applied the relevant provisions of PAIA to the extent that the outcome of the decision (the rejection of the appellants' appeal) infringes on the appellants' right of access to information and their ability to exercise or protect their rights as against the respondent. In essence, the decision was wrong and it is hoped that if the matter is taken to the Constitutional Court, the appellants may be afforded appropriate judicial relief.

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