REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 39646/12

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

10 Sept 2013
DATE

SIGNATURE

In the matter between:

VAAL ENVIRONMENTAL JUSTICE ALLIANCE Applicant

and

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA LIMITED First Respondent

ARCELORMITTAL SOUTH AFRICA LIMITED Second Respondent

JUDGEMENT

CARSTENSEN AJ:

1. The Applicant (the Vaal Environmental Justice Alliance), who both

parties refer to as "VEJA", , seeks an order declaring invalid and setting aside the decision of the Second Respondent Arcelormittal South Africa Limited ("AMSA") to refuse requests for access to information in terms of the Promotion of Access for Information Act 2 of 2000, "PAIA".

2. The first request was made on the 15th of December 2011 in terms of which VEJA sought a copy of the Environmental Master Plan which request included progress reports and updated versions relating thereto.

3. The second request was dated the 13th of February 2012 and related to records in respect of the closing and rehabilitation of AMSA's Vaal Disposal Site, situated in Vereeniging, the compliance inspections by the Department of Environmental Affairs and the Gauteng Department of Agriculture and Rural Development.

4. AMSA refused the requests on the basis that the allegations were speculative and insufficient to demonstrate that VEJA required the information to protect its rights. Consequently, AMSA took the attitude that the Applicant had not met the threshold requirements of Section 50(1)(a) and did not process the requests any further.

5. In terms of the provisions of Section 50(1)(a), read together with Section 53(2)(d) of PAIA the requestor must complete Form C and identify the right which it seeks to exercise and explain, in addition, why the requested record is required for the exercise of the

protection of that right.

6. AMSA's point of view is that if these basic steps are not attended to, then the recipient can reject that request on that basis alone and only once the threshold has been met, may the requestor have access to the record. It must be correct that a failure to meet that threshold entitles a public or private body not to grant access to the information requested.

7. The first question to be answered therefore is whether VEJA has met the threshold requirement under Section 50(1)(a), and this must be considered in light of the nature and scope of the environmental rights which VEJA claims it has in terms of Section 24(a) and/or (b).

8. I am of the view that the use of the word "required" rather than, for example, the use of the word "necessary", in Section 50(1)(a) creates a far lower "threshold" than that contended for by AMSA.

9. In ClutchCo (Pty) Ltd v Davis, 2005 (3) SA 486 (SCA) the court found that *"reasonably required connotes a substantial advantage or element of need, but does not mean necessity ..."*. Unitas Hospital v Van Wyk and Another, 2006 (4) SA 436 (SCA).

10. I am of the view that the Applicant has met this threshold and has indeed put up the facts which *prima facie* establish a right, although open to some doubt. Claase v Information Office, South African Railways (Pty) Ltd, 2007 (5) SA 469 (SCA).

11. The question then is, does the Applicant as an NGO, have a right in terms of Section 24(a). In terms of that section, everyone has a right to an environment that is not harmful to their health or well-being.

12. I am convinced that the Applicant, being an association of persons each of whom have the right in terms of Section 24(a), can band together to enforce their rights and agree with the Applicant's contentions in this regard.

13. Even if I have extended the meaning of Section 24(a), I have no doubt that Section 24(b) is applicable and assists the Applicant, following the sentiments expressed by the Supreme Court of Appeal that there must be a change in ideology to the extent that *"together with the change in the ideological climate must also come a change in the legal and administrative approach to environmental concerns"*. Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others, 1999 (2) SA 209 (SCA) at para. 20.

14. The words of Tip AJ in Petroprops (Pty) Ltd v Barlow and Another, 2006 (5) SA 160 (W) are particularly appropriate similarly, as in that matter, if I refuse this application this would hamper the Applicant in championing its cause, generating public opinion and consequently would dissuade public mobilisation when it has been clearly established that, the participation of public interest groups is vital before the protection of the environment. Biowatch Trust v Registrar

of Genetic Resources and Others, 2009 (6) 232 (CC)

15. I am of the view that Section 24 envisages, and even encourages, public campaigns of this sort.

16. Thus, a community based, civil society organisation such as the Applicant, is entitled to monitor, protect and exercise the rights of the public at least by seeking the information to enable it to assess the impact of various activities on the environment and like-minded individuals must be encouraged to exercise a watch-dog role in the preservation and rehabilitation of our national resources.

17. A further objection of the AMSA was that VEJA's approach envisages VEJA usurping the State's role in order to directly enforce a regulatory provision of environmental legislation, I cannot agree, for the reasons set out above.

18. The participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of the public, the dissemination of information does not usurp the role of the State but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives.

19. I have also no doubt that should VEJA seek to bypass statutory mechanisms, rather than to ensure the effectiveness thereof, AMSA, the State and the courts will express their disapproval.

20. The next point which is essentially raised by the Respondents is that the Master Plan is outdated, obsolete, cannot be relied upon and consequently irrelevant.

21. It may be so, but on the facts of the matter it has been established, at least for the purpose of this application, that there were serious environmental violations and consequent pollution, and, one cannot ignore the fact that the "Master Plan" was compiled for the purpose of conducting operations.

22. Clearly it was (and is) required, provided a baseline and was a result of years of environmental tests and investigations and indeed led to further tests and investigations.

23. For any assessment of the operations it would be essential for persons whose rights may have been infringed to review the baseline and assess those against the information and studies conducted at the time, the rehabilitation and measures adopted and current studies and investigations. It cannot, therefore, be labelled as irrelevant.

24. The fact that the plan may have been scientifically and technically flawed as contended for by AMSA, emphasises its relevance and importance.

25. Furthermore, as pointed out by VEJA, the underlying information such as the sources and levels of pollution and the data from which

the plan was drawn, (whether scientifically unfounded or erroneous) were relied upon by AMSA, and repeatedly referred to in various publications and consequently it would be naïve for the court to conclude that this plan need not be at least considered, assessed and critically analysed by entities such as VEJA.

26. It must be remembered that:

26.1. the plan was published to AMSA's shareholders;

26.2. it was mentioned in AMSA's annual reports and relied upon as a primary management strategy tool;

26.3. it was also submitted to state authorities;

26.4. it is required by VEJA, at least for the purpose of monitoring AMSA's compliance through multi-stakeholder committees formed to evaluate such compliance.

27. The last aspect which I need to deal with, and which does not appear to be disputed by AMSA, relates to the Vaal disposal site records. It is not disputed that these records are relevant, but only that VEJA does not have the right under Section 24. This has consequently been dealt with above.

28. In adopting the approach which I have, I cannot endorse or approve VEJA's request that if I find that the threshold requirement is met, (which I have), AMSA is then entitled to a further opportunity to

consider the application.

29. AMSA has already declined VEJA's request and I am of the view that it did so wrongfully.

30. The fact that it did not apply its mind to the request does not afford it to further "bite the cherry". In any event, I have serious concerns that should I do so, I would negate the objectives of PAIA. Rather, I am called upon to follow common sense and reasonable approach and to discourage litigation.

31. In addition, I have concerns that in light of the papers already before the court that should I adopt the approach suggested by the Respondent, this court will be faced with a further application. Rather, I would thus seek to endorse the reasoning of BHP Billiton PLC Inc. and Another v De Lange and Others, 2013 (3) SA 571 (SCA) in order to ensure that access to the records are giving swiftly, inexpensively and effortlessly as soon as reasonably possible.

32. The Respondent has, in any event, not demonstrated any real prejudice which it may suffer, should the order be granted.

33. In the result, I grant the following order:

33.1. The First Respondent's decision to refuse to grant the Applicant's requests for access to information dated 15th 2011 and 13th February 2012, is invalid and set aside;

33.2. The First Respondent is directed to supply the Applicant with copies of all the records requested in the Applicant's requests for access to information dated 15th December 2011 and 13th February 2012 within 14 (FOURTEEN) days from date of this order;

33.3. The Second Respondent is to pay the costs of this application, including the costs of two counsel.

P L GARSTENSEN
ACTING JUDGE OF THE HIGH COURT

HEARD: 3 JUNE 2013
DELIVERED: 10 SEPTEMBER 2013

COUNSEL FOR APPLICANT:	S BUDLENDER AND J BLEAZARD
INSTRUCTED BY:	CENTRE FOR ENVIRONMENTAL RIGHTS
COUNSEL FOR RESPONDENTS:	CDA LOXTON SC AND P LAZARUS
INSTRUCTED BY:	EDWARD NATHAN SONNENBERGS

(jmt.3.9.13)