THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 69/2014

Reportable

In the matter between:

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA	**First Appellant**
ARCELORMITTAL SOUTH AFRICA LTD	**Second Appellant**
and	
VAAL ENVIRONMENTAL JUSTICE ALLIANCE	**Respondent**

Neutral Citation: *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (69/2014) [2014] ZASCA 184 (26 November 2014).

Coram: Navsa ADP, Majiedt & Saldulker JJA and Mathopo & Mocumie AJJA

Heard: 6 November 2014

Delivered: 26 November 2014

Summary: **Request for environmental related information held by industrial corporation – requirements of ss 50(1) and 53 of the Promotion of Access to Information Act 2 of 2000 (PAIA) – importance of activities of corporation impacting on environment – distinction between obligations of private persons and the State in terms of PAIA discussed– culture of openness and ecological sensitivity emphasised – significance of the involvement of the public in environmental issues – protection and preservation of the environment for present and future generations.**

ORDER

On appeal from: The Gauteng Local Division, Johannesburg (Carstensen AJ sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

JUDGMENT

Navsa ADP (Majiedt & Saldulker JJA and Mathopo & Mocumie AJJA concurring):

[1] This case is adjudicated against the following backdrop. First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations. In South Africa, because of our past, the latter aspect has increased significance. The legislature has rightly seen fit to cater for both aspects in legislation, driven by Constitutional imperatives, some of which will be discussed in due course.

[2] The present litigation stems from a refusal by the second appellant, ArcelorMittal South Africa Limited (AM), one of our country's major industrial corporations producing 90 per cent of South Africa's steel products, of two requests by the respondent, the Vaal Environmental Justice Alliance (VEJA), a non-profit voluntary association (characterising themselves as advocates for environmental justice), for information relating to AM's past and present activities, including the latter's documented historical

operational and strategic approach to the protection of the environment in the Vanderbijlpark and Vereeniging areas, in each of which they operate a major steel plant.

[3] The present litigation represents, in juxtaposition, two competing interests, namely industrial activity and its concomitant significance for the country's development and economy, as against concerns about the preservation of the environment for the benefit of present and future generations. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) para 1, the Constitutional Court spoke about 'the interaction between social and economic development and the protection of the environment'. This tension was brought sharply into focus at the commencement of submissions on behalf of AM in reply, during the hearing before us, when we were urged not to incline against the corporation simply because it obviously emits gasses into the atmosphere and disgorges waste products whilst being a boon to the country's economic development. In the present case there is, in addition, the complicating feature of the asserted entitlement to information held in private hands.

[4] The entanglement of the competing concerns referred to in the preceding paragraph has been recognised by the Constitutional Court. In *Fuel Retailers* para 44, the court noted that whilst s 24 of the Constitution entrenched the right to an environment not harmful to health or wellbeing, upon which VEJA relies, it also explicitly recognised the obligation to promote economic and social development. The Constitutional Court stated the following (para 45):

'The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24*(b)*(iii) which provides that the environment will be protected by securing "ecologically sustainable development and use of natural

resources while promoting justifiable economic and social development". Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.'[1]

[5] The background to the litigation, including the details of the corporation's stance and the applicable legislation, is set out in the ensuing paragraphs.

[6] It is apposite to outline, right at the beginning, the applicable provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA), which regulate requests for information from private persons. This will enable an early appreciation of the statutory basis for VEJA's request, provide the backdrop to an evaluation of the facts and make it easier to follow the chronology of events and the contentions of the parties. Section 50(1) of PAIA sets out the obligation to provide access to information, subject to certain jurisdictional requirements:

'(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.'

[7] The relevant parts of section 53 of PAIA, which must be read with s 50(1)(*a*), provide as follows:

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[1] In para 43 of *Fuel Retailers* the following is quoted from the 'Report of the World Commission on Environment and Development: Our Common Future' (Brundtland Report), http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm, link: General Assembly 42nd Session: Report of the World Commission on Environment and Development, accessed on 4 June 2007. Chapter 1 para 42:

'[E]nvironmental stresses and patterns of economic development are linked to one another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.'

'(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.

(2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned –

. . .

(*d*) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right; . . . .'

[8] On 15 December 2011 VEJA's attorneys wrote to AM (the first request) seeking a copy of its Environmental Master Plan (the Master Plan) which they asserted the corporation had developed for the rehabilitation of its Vanderbijlpark site, together with any progress reports relating to its implementation. In the prescribed private-body request 'Form C', VEJA, after setting out its credentials as an advocate for environmental justice, provided the basis for its request, purportedly in terms of s 53(2)(*d*) of PAIA, stating:

'The requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest. VEJA requires the requested documents to ensure that ArcelorMittal South Africa Limited carries out its obligations under the relevant governing legislation, including the National Environmental Management Act 107 of 1998, the National Environmental Management: Waste Act 59 of 2008, and the National Water Act 36 of 1998. *VEJA seeks to ensure that the operations of ArcelorMittal South Africa Limited are conducted in accordance with the law, that pollution is prevented, and that remediation of pollution is properly planned for, and correctly and timeously implemented.*' (My emphasis.)

[9] On 13 February 2012 VEJA's attorneys wrote to AM (the second request), requiring specified information. A completed 'Form C' sought the following:

'As referred to on page 46 of the National Environmental Compliance & Enforcement Report 2010-11, in relation to the premises of ArcelorMittal South Africa Limited ("ArcelorMittal") in Vereeniging:

1. the reports compiled by the Department of Environmental Affairs ("DEA") and/or the Gauteng Department of Agriculture & Rural Development ("GDARD") in relation to

compliance inspections conducted by DEA and/or GDARD on May 2007 and July 2010 for the Vaal dump site;

2. any representations made by ArcelorMittal in response to the inspection reports referred to in 1 above;
3. any test results, summaries, reports and associated documents relied upon by DEA and/or GDARD in the collation of the inspection reports referred to in 1 above, including registration certificates, waste permits etc;
4. copies of all enforcement notices and pre-notices issued by DEA and GDARD in relation to the Vaal dump site;
5. all closure reports and rehabilitation plans submitted by ArcelorMittal in relation to the Vaal dump site;
6. all approvals of rehabilitation plans in relation to the Vaal dump site;
7. all certificates relating to the disposal of magnetite removed from the Vaal dump site;
8. all progress reports in relation to the Vaal dump site; and
9. all waste management licences or applications for waste management licences relating to the closure and rehabilitation of the Vaal dump site; and
10. all correspondence between ArcelorMittal, DEA, and GDARD relating to the closure and rehabilitation of the Vaal dump site.'

The information requested relates to the closure and rehabilitation of AM's Vereeniging site where hazardous materials were once dumped. It is also described as the Vaal Disposal site.

[10] In respect of the second request, Form C, providing the basis for the information sought, is framed in identical terms to the first request as described in para 8 above.

[11] Almost a month after the first request, on 13 January 2012, AM's attorneys, writing in reply to the first request, blamed the delay in responding on the festive season. They relied on the provisions of s 57(1)(*c*) of PAIA in support of the statement in the letter that AM, in order to respond meaningfully, required time to conduct internal consultations.[2]

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[2] Section 57(1)(*c*) of PAIA reads as follows:

[12] On 13 February 2012 AM's attorneys wrote to VEJA's attorneys requiring proof of their mandate to act on behalf of VEJA and sought a copy of VEJA's constitution. Furthermore, they asked for greater clarity and a more precise description of the documents sought. AM's attorneys also asked of VEJA's attorneys how the 'alleged existence' of the requested documentation came to VEJA's knowledge and required an explanation for the basis on which VEJA believed it would be entitled to 'usurp the role of the relevant regulating authorities in ensuring our client's statutory compliance'. AM's attorneys did, however, offer copies of 'all the relevant environmentally-related consents, permits, authorizations and the like in an endeavour to assist VEJA in fulfilling the Purpose'.[3]

[13] On 27 February 2012 VEJA's attorneys wrote to AM's attorneys stating that they had difficulty in understanding how AM could be unaware of the existence of its own Master Plan, since in prior litigation it had relied on that plan and had subsequently repeatedly referred to it in annual and other reports. VEJA's attorneys also pointed out that government departments did not have adequate resources to monitor compliance at all production facilities in the country and that the public, including VEJA, can play an active role in that regard.

[14] On 13 March 2012 AM's attorneys wrote to VEJA's attorneys concerning their request for information. The following is the relevant part of that letter:

'We have provided a copy of your response to our client whom has confirmed that it is consulting internally in order to collate information in respect thereto and will soon thereafter consult with us in order to prepare an appropriate reply.'

'The head of a private body to whom a request for access has been made, may extend the period of 30 days referred to in section 56(1) (in this section referred to as the "original period") once for a further period of not more than 30 days, if –

. . .

(c) consultation among divisions of the private body or with another private body is necessary or desirable to decide upon the request that cannot reasonably be completed within the original period.'

Section 56 provides that ordinarily a party has 30 days to respond to a request for information.

[3] Earlier in the letter 'the Purpose' referred to is described by AM's attorneys as follows:

'[O]f "ensuring" that our client complies with its environmental statutory obligations.'

[15] On 17 April 2012 AM's attorneys wrote to VEJA's attorneys stating that they were consulting with counsel in order to determine whether their inclination, based on their interpretation of s 50(1)(*a*) of PAIA, to reject the requests was justified. On 18 April 2012 AM's attorneys once again wrote to VEJA's attorneys. The relevant part of that letter reads as follows:

'1. We refer to . . . your client's request for information relating to an "Environmental Master Plan" and the Vaal Disposal Site ("Requests") addressed to our client, ArcelorMittal South Africa Limited.

2. You have not set out in your Requests, a right which you are entitled to protect or exercise as required in terms of section 50(1)(a) of the Promotion of Access to Information Act, 2 of 2000. Accordingly, you do not set out grounds which demonstrate that you are entitled to the records requested.

3. In the circumstances, the Requests you have made are refused.'

[16] That refusal led to the application by VEJA in the high court for an order declaring the refusal invalid and directing that the information sought be supplied. It is now necessary to have regard to what is contained in the affidavits in support of and resisting the application.

[17] First, it is necessary to have regard to VEJA's description, in its founding affidavit, of the Master Plan:

'The Master Plan is a comprehensive strategy document, developed by Iscor[4] from 2000 to 2002 (and apparently since updated or amended), which details the results of numerous specialist environmental tests for pollution levels at the Iscor/ArcelorMittal plants, and sets out the second respondent's plans to alleviate pollution and rehabilitate its work sites *over a 20-year period*. The initial estimated cost of implementing the Master Plan was approximately R1,3 billion.'

[18] VEJA went further and referred to an AM executive report in 2003, in which what is set out hereafter was indicated. For a fuller picture, it is necessary to set out those allegations in the detail in which they were presented by VEJA:

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[4] AM's predecessor in title.

'15. The 2003 Executive Report on the Master Plan indicates that:

15.1 A core team of eight specialists was appointed to develop the Master Plan for the Vanderbijlpark Steelworks plant, to address *inter alia*:

- *Documentation of the environmental status quo;*
- *Identification and quantification of all environmental impacts and risks;*
- *Development of options for the improvement of the risk profile;*
- *Collation of an integrated plan of action;*
- *An integrated Environmental Monitoring System.*

15.2 The study area included *"the total Works area of the IVS [Iscor Vanderbijlpark Steelworks] plant"* – that is,

- *The main Works area (South and North)*
- *The residue management facilities (solids, sludges and liquids);*
- *Potentially impacted areas outside the Work's perimeter.*

15.3 The methodology was informed by *"a holistic integrated management philosophy, which concentrated on technologies and measures to bring about pollution prevention".* The following environmental disciplines were covered in the study:

- *Residue characterisation (solids, sediments and leachates);*
- *Soil profiles;*
- *Geology and groundwater;*
- *Surface water*
- *Process effluents*
- *Air quality*
- *Terrestrial and aquatic eco-systems*
- *Noise*
- *Geotechnical properties and land-use.*

15.4 A Consultation Committee was established, which included representatives from the Department of Water Affairs and Forestry (DWAF), the Department of Environmental Affairs and Tourism (DEAT) and the Gauteng Department of Agriculture, Conservation, Environment and Land-Affairs – ostensibly *"to ensure that the study did not proceed in isolation".*

15.5 Baseline studies were conducted to measure pollution levels at and around the Vanderbijlpark plant. According to the Executive Report,

"The baseline studies primarily focused on the IVS plant area, with particular emphasis on the areas where solid, liquid or gaseous residue originate or is impounded. The secondary emphasis was on the plant site to determine potential contamination transgression beyond the plant operational area. In addition, certain areas surrounding the plant were studied, particularly along the watercourses emanating from the site, where potential impacts on the eco-system could best be identified.

The larger study area included the Leeuwspruit and the Rietkuilspruit/Rietspruit up to their confluences with the Vaal River . . ."

15.6 In general terms, the risks identified in the baseline studies included the following:

15.6.1 *"[T]he degree of the groundwater contamination is such that it poses an unacceptable risk to the environment within the IVS [Iscor Vanderbijlpark Steelworks] perimeter (if available for consumption). The risk in this regard is a result of inorganic, and to a much lesser extent, organic contamination. The potentially unacceptable risk to the environment extends across the IVS perimeter into the receiving environment . . ."*

15.6.2 *"Sediments of all evaporation dams and the maturation ponds indicate unacceptable potential risk for groundwater contamination, both with regard to inorganic and organic contaminants."*

15.6.3 Surface water risk determinations for the Rietspruit Canal and the Frikkie Meyer Weir (which receive surface water run-off from the IVS plant) indicated that there is *"a potentially unacceptable risk to the environment";*

15.6.4 Soil samples within the plan perimeter *"displayed the potential for unacceptable inorganic contamination risk to the environment";*

15.6.5 *"Waste currently generated by IVS is classified as hazardous according to the Minimum Requirement with resultant potential risk [to] the environment. These risks (due to mobile contaminants and associated volumes) will have to be mitigated by inter alia treatment to reach [a general quality], which would reduce potential risk";*

15.6.6 With regard to air quality, concentrations of sulphur dioxide and fine particulates were found to be *"within the current South African standards and/or guidelines, but with little margin for safety".* In the south-western part of the consolidated plant area, the hydrogen sulphide concentrations were found to *"exceed"* safely limits at times, while *"heavy deposition rates"* of dust were recorded.

15.6.7 The terrestrial ecology of the greater study area showed *"disturbed conditions"* due to a wide range of activities, including industrial activities. All the streams surveyed (Leeuwspruit up to Vaal River, Rietkuilspruit up to Rietspruit and Rietspruit up to Vaal

River) were likewise impacted. The impacts identified include *"water abstraction; flow modification; bed modification; channel modification; inundation; indigenous vegetation removal; solid waste disposal; bank erosion; water quality impairment; and exotic vegetation encroachment."*

15.7 Six priority areas were identified in the Master Plan:

15.7.1 Achieving Zero Effluent Discharge, being a statutory requirement entrenched in the water licence to be implemented by 2005. This required installing new technology for the total reuse of the plant's effluent (including the discharge of process waters, contaminated surface water, leachates and seepage).

15.7.2 Upgrading the Coke Oven and its gas cleaning system to achieve a Zero Effluent Discharge by 2005;

15.7.3 Upgrading the Sinter Plant off gas system, to prevent unwanted atmospheric releases by 2007.

15.7.4 Addressing the current impacts and unacceptable risks to the environment outside the Vanderbijlpark Steelworks perimeter;

15.7.5 Closing the disposal site, and developing of a new waste disposal site;

15.7.6 Clearing the harmful sediments in Dam 10, which was used in the past to collect sludges and waters from the Vanderbijlpark Steelworks plant.'

[19] VEJA pointed out that in subsequent years, namely 2002, 2004 and as recently as 2010, the Master Plan was referred to in AM's annual reports as the driver behind the corporation's environmental strategy. However, the 2010 annual report did state that the original Master Plan had been amended or updated. That annual report explained that this was done because of more stringent environmental controls due to significant changes in the statutory regulatory environment. The annual report went on to record that because of this consideration, AM decided not to release the original Master Plan.

[20] In para 17 of VEJA's founding affidavit, the principal deponent on its behalf stated the following:

'The Master Plan has been a crucial framing document in the second respondent's approach to tackling the pollution in and around its Vanderbijlpark plant, and it has been discussed by the second respondent in public fora. For instance, in the latter half of 2003, I attended a Licensing Forum constituted to negotiate Iscor's new water use license based on the Master Plan. The

forum included Iscor, the Department of Water Affairs (DWA) and community representatives. During discussions at this forum, both the second respondent and the DWA made extensive reference to the Master Plan and its findings. Among other things, [AM] committed to a zero effluent discharge plant, in accordance with its Master Plan, as a condition of the water use licence.'

[21] AM responded to VEJA's assertions concerning the Master Plan. It began by stating the following:

'32. . . . The . . . Annual Report [2010] . . . states that the plan is *"out-dated and irrelevant"*. This statement is correct. For this reason the report cannot assist the applicant in the exercise of its claimed right to monitor AMSA's compliance with environmental legislation. I elaborate on the status of the Master Plan below:

32.1. The Master Plan was compiled as a result of and for the purposes of litigation in which AMSA was involved in 1998-1999 and 2002-2003. It was intended to advise the legal strategy in the litigation.

32.2. The document was based on numerous studies undertaken by external consultants between 2000 and 2002. These studies covered a wide range of environmental issues including air quality, ground, surface and process water quality, solid waste, geology and geotechnical issues, noise risk, visual impacts, archaeological impacts, ecological impacts (including aquatic, terrestrial and ecosystem impacts), land use impacts and socio-economic impacts.

32.3. The Master Plan was finally completed in 2003 and comprises a consolidation of the aforesaid studies. The Master Plan was submitted as a draft with the intention of it being peer reviewed before producing a final version. This was in fact never done and the Master Plan remained in draft form.

32.4. Accordingly, the report was never finally adopted by AMSA [AM] to principally guide its environmental management for the following reasons:

32.4.1. Firstly, upon re-evaluation of the Master Plan for the purposes of obtaining various licences and permits in subsequent years, the findings contained in the various studies which form the basis of the report were found to be scientifically and technically flawed.'

[22] AM went on to allege that subsequent to the completion of the Master Plan in 2003, it implemented numerous environmental management measures which required new licences or permits or amendments to existing licences or permits. During this

process it found that the information contained in the Master Plan was out-dated and could no longer be relied on to support new licence applications. Consequently, new studies were commissioned which replaced the studies comprising the Master Plan and a new dynamic environmental management process was embarked upon to accord with stricter environmental legislation binding on AM at that time and this process then served to substitute the out-dated Master Plan.

[23] AM explained what it regarded as the scientific and technical flaws in its own Master Plan. It stated that one of the main reasons was that inappropriate standards were used to assess environmental quality in and around the Vanderbijlpark Works. Those standards, it was explained, were derived using various national and international standards and were selected by choosing the worst-case scenarios and the most stringent tests. The selection of the worst case scenario as *the* standard to determine whether a particular impact posed an acceptable or unacceptable risk resulted in impacts frequently being identified as unacceptable in terms of human health or the environment, when, in fact, the impacts were well within the limits imposed in terms of South African law.

[24] AM provided, as an example of the flawed nature of the Master Plan, a groundwater study that identified the chloride concentration in the groundwater in and around the Vanderbijlpark site as being harmful to human health because it exceeded the worst-case scenario threshold set in the study. However, in terms of the South African drinking water quality standard, the concentration of chloride in the groundwater identified in the report is regarded as posing no risk to human health.

[25] AM provided, as a further example of conclusions contained in the Master Plan that were scientifically unfounded, a groundwater assessment which identified more human health impacts than any other specialist study that was made, using one grab sample instead of using more data to increase the reliability and accuracy of the assessment. As a result, risks such as those posed by elements like manganese and iron were identified as posing unacceptable human health risks. According to AM, from

the wealth of data presently available it is now known that the concentration and location of these elements do not necessarily pose a risk to human health.

[26] In respect of surface water, AM acknowledged that the Master Plan identified effluent discharged into the Rietspruit canal and the Leeuspruit as the main risk to surface water, which was said to have an unacceptable impact on human health. Since the compilation of the report, however, so AM stated, the Vanderbijlpark Works became a zero effluent discharge facility and the impacts identified and assessed in the Master Plan therefore do not accurately reflect the current position.

[27] In respect of the Master Plan's geological report, it was contended that although it accurately described the geology underlying AM's Vanderbijlpark Works and its surrounds, many of the conclusions reached in the report were speculative. In this regard it referred to the solid waste study that identified the waste streams emanating from the slag produced at the site as being extremely hazardous. The study accordingly recommended the re-use of the slag as opposed to its disposal. This conclusion was based on the assumption that manganese (the main element of concern) would leach from the slag into the environment. In reaching this conclusion, the consultant did not take cognisance of the fact that the pH level of the disposal site is high and that at a high pH level, manganese is not mobile and would therefore not leach out of the slag and into the environment.

[28] In respect of the Master Plan's air quality study, the conclusion was reached that air quality is not a major concern at the site. The study concluded that fine dust (PM10), sulphur dioxide and other gasses were within acceptable standards in the areas surrounding the plant. AM adopted the attitude that VEJA was correct when it pointed out that deteriorating air quality is a significant issue in the Vaal Triangle, and emphasised that it is presently AM's top environmental priority. There was accordingly no scientific basis for the conclusion contained in the report that air quality is not a major concern at the site. According to AM, the Master Plan, because it was completed in 2003, does not take cognisance of various projects undertaken by AM since then that

'significantly altered and mitigated the impacts identified by the various consultants who contributed to [its] compilation'.

[29] Towards the end of para 32 of its answering affidavit, AM referred to a number of studies and reports commissioned by it from 2006 onwards to provide information on and mitigate it's operational impact on the environment. AM is insistent that priority areas identified in the Master Plan are not present priorities. So, for example, it asserted emphatically that it has achieved a zero effluent discharge at its Vanderbijlpark Works which contention, it suggests, is substantiated by a water use licence granted in respect of the works. AM concludes that since the information contained in the Master Plan is out-dated and inaccurate, and thus no longer informs the corporation's current environmental practices, there can be no connection between the right VEJA seeks to protect and the Master Plan.

[30] VEJA, in its reply, was adamant that AM's stated basis for refusing the Master Plan, namely that it was out-dated, is entirely without merit. It contended that the Master Plan would provide what it calls a 'valuable baseline of data' in respect of the pollution levels at the Vanderbijlpark site, derived from at least two years of numerous specialist environmental tests and investigations conducted by AM. VEJA goes on to state the following:

'Both the focus and findings of the more recent studies allegedly conducted by AMSA, and the subsequent rehabilitation measures it has taken, can only properly be assessed in the light of a baseline of scientific data. Given the manifest scope of the Master Plan, and the scientific investigations that informed it, it remains a vital source of data against which the applicants can make such assessments. Thus, even if it is accepted that the Master Plan is "outdated" (which is not accepted given that the applicants has not had sight of the Master Plan), it does not follow that it is "irrelevant".'

[31] In respect of AM's statements that some of the information in the Master Plan contained scientific and technical flaws, VEJA pointed out that the explanations provided, as set out above, lead to the ineluctable conclusion that it is not the data that

was flawed but rather that the evaluation of and the conclusions drawn from the data were scientifically unfounded.

[32] VEJA contended that there is not a shred of evidence that AM ever gave any indication to its own shareholders that the Master Plan was inaccurate. On the contrary, as noted above, everything points to the Master Plan having being fundamental to and having driven AM's environmental strategy. VEJA is adamant that it is self-evident that the Master Plan was relied on by AM when it obtained authorisations and licences to conduct its activities.

[33] I now turn to VEJA's assertions in its founding affidavit as to the importance of the information requested in relation to the Vaal Disposal site. In this regard VEJA relied on a report by the Department of Environmental Affairs (DEA) which, it alleged, demonstrated compliance and enforcement action taken by the authorities against AM. It appears from what is stated by VEJA that the report flowed from an inspection of the disposal site by authorities during May 2007, when the following findings were made:

'49.1.1 "Continued dumping of hazardous waste on an unpermitted site, despite repeated instructions from the authorities to cease such activity."

49.1.2 "Particulate emissions to air that cause, have caused or may cause significant and serious pollution of the environment";

49.1.3 "Significant and serious pollution of surface and groundwater with phenols, iron, oil, fluoride and other hazardous substances"; and

49.1.4 "Failure to lodge audit reports".'

[34] The departmental report noted that there had been 'pre-notices' and 'compliance notices' issued to AM by regulatory authorities instructing it to cease dumping hazardous waste on that site. On 27 July 2010 an inspection of that site revealed that AM had stopped all activities at the site and in March 2010 had re-submitted a rehabilitation plan for approval. The Gauteng Department of Agriculture and Rural Development (GDARD) found that 99 per cent of the element magnetite was removed from the site and disposed of, and that monthly progress reports in regard to the

removal of magnetite had been submitted. The status of the enforcement process is described in the GDARD report as follows:

'Dumping at the site ceased and GDARD approved the revised rehabilitation plan. ArcelorMittal Vereeniging has been informed that it must apply to DEA for a waste management license to close and rehabilitate the site.'

[35] In its answering affidavit, AM did not dispute what VEJA stated about the Vaal Disposal site, as set out in para 33 above. However, AM stated that VEJA has been selective in quoting from the GDARD report. In that regard, AM referred to the inspectorate's conclusion that it 'currently believes that ArcelorMittal has made every effort to comply with authorities' requirements'. The last two sub-paragraphs of AM's clarification, in its answering affidavit, of the status of the disposal site are set out hereafter:

'69.4. In 2004 the Gauteng Department of Agriculture and Rural Development ("GDARD") granted AMSA authorisation to close and rehabilitate the site. In 2007 the national Department of Environment Affairs issued a directive to AMSA requiring it to cease all disposal activities at the site. AMSA complied with this directive. Pursuant thereto an amended rehabilitation and closure plan was submitted to the GDARD in January 2008 for which approval was granted by the GDARD in 2011. This amended rehabilitation plan is yet to be approved by the National Department of Environmental Affairs.

69.5. At this stage 99% of the magnetite disposed of at the site has been removed and the site is in the final stages of closure.'

[36] In the replying affidavit the principal deponent on behalf of VEJA denied that he had been selective in quoting from the GDARD report in relation to the Vaal Disposal site. He had, he said, acknowledged that the enforcement activity by GDARD yielded positive results and that AM was complying with the regulator's directives. VEJA is adamant that information pertaining to levels of pollution and its impact on the environment are not publicly accessible. In essence, VEJA adopted the position that the information it seeks in relation to that site is required for it to establish that it poses no risk to the environment.

[37] It is necessary to record that VEJA's efforts to obtain the requested documentation from regulatory authorities proved unsuccessful.

[38] That then is the factual matrix against which the matter fell to be decided in the high court. Before us, the submission on behalf of AM, which can safely be assumed to have been a repeat of the argument in the high court and is also reflected in the answering affidavit, was to the effect that the threshold requirement was not met by VEJA by merely declaring, in general terms, that the requested information is relevant to its performance as an advocate for environmental justice and that in this regard it relied on its s 24 constitutional rights. Nor, it was contended, does it assist VEJA to state that it seeks to monitor and ensure compliance by AM of its obligations in relation to the prevailing statutory regulatory regime, which is not the object of PAIA. In short, in relation to the latter submission, AM adopted the attitude that VEJA, in seeking the information, was setting itself up as a parallel regulating authority in relation to the environment, which the legislation does not sanction.

[39] The high court dealt with each of those submissions in turn. First, Carstensen AJ considered the use of the word 'required' as it appears in s 50(1)(*a*) of PAIA:

'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.' (My emphasis.)

He went on to say the following:

'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.'

In support of that conclusion he had regard to decisions of this court, namely *ClutchCo (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) and *Unitas Hospital v Van Wyk & another* 2006 (4) SA 436 (SCA).

[40] The high court took the view that in order for it to answer the question whether the threshold requirement of s 50(1)(*a*) had been met by VEJA, it had to have regard to the primary basis supplied by VEJA in Form C, namely the asserted right in terms of s 24 of the Constitution, which provides:

'24. Everyone has the right –

(*a*) to an environment that is not harmful to their health or well-being; . . . .'

[41] Carstensen AJ said the following:

'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.'

Section 24(*b*) reads as follows:

'24. Everyone has the right -

(*b*) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[42] The high court stated that a refusal of VEJA's application would hamper the organisation in championing the preservation and protection of the environment. With reference to the decision of the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC), it concluded that it has clearly been established that the participation of public interest groups is vital for the protection of the environment.

[43] Carstensen AJ, having reached the conclusions set out above, went on to reject AM's contention that VEJA was usurping the state's role in order to directly enforce regulatory provisions of environmental legislation.

[44] The high court had regard to the further submissions on behalf of AM that the Master Plan was out-dated, could not be relied upon and was consequently irrelevant. It agreed with VEJA that the Master Plan provided a baseline and was a result of years of environmental tests and investigations which, on AM's version, led to further tests and investigations. Carstensen AJ said the following:

'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.'

[45] In assessing the Master Plan's significance and relevance, the high court considered, in VEJA's favour, that it had been published and communicated to AM's shareholders and repeatedly mentioned in its annual reports, where it was referred to as a primary strategic tool. In addition, the reports had been submitted to state authorities. Carstensen AJ concluded that it would be naïve for the court to find that this plan need not be at least considered, assessed and critically analysed by entities such as VEJA.

[46] In respect of the information sought by VEJA in relation to the Vaal Disposal site, the high court noted that the relevance of the information was not disputed by AM but rather that the corporation's resistance to producing the information sought was based on its assertion that VEJA had not met the threshold requirement of s 50(1)(*a*).

[47] Having made the findings referred to above, the high court found itself unable to accede to AM's suggested approach, namely that in the event of the court holding that VEJA had met the threshold requirement, the corporation should be afforded a further opportunity to consider anew the two requests for information.

[48] The high court made the following order:

'33.1. The First Respondent's decision to refuse to grant the Applicant's requests for access to information dated 15th [December] 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.'

It is against those orders that the present appeal is directed. I turn to deal with the correctness of the material conclusions reached by the high court.

The PAIA threshold requirement

[49] In considering whether the threshold requirement of s 50(1)(*a*) has been met, it is important to bear in mind what was said by this court in *Unitas* (para 6):

'Generally speaking, the question whether a particular record is "required" for the exercise or protection of a particular right is inextricably bound up with the facts of that matter.'[5]

[50] Thus, the word 'required' in s 50(1)(*a*) of PAIA should be construed as 'reasonably required' in the prevailing circumstances (see *Clutchco* para 12). A scrutinising court should determine whether an applicant for information did 'lay a proper foundation for why that document is reasonably "required" for the exercise or protection of his or her rights'. See *Clutchco* para 12 and *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T).

[51] Before us, it was rightly conceded by counsel on behalf of AM that, in adjudicating VEJA's claim to the information sought, and in considering whether the threshold requirement had been met, the high court and concomitantly this court, were entitled to consider not only the basis provided in Form C referred to above, but also the evidence adduced by the parties. In this case that consists in the details that emerge from the affidavits filed in support of or resisting the application in the high court.

[52] As part of the evaluation of the factual background, I agree with the submission on behalf of VEJA that AM's acknowledged history of operational impact on the

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[5] See also *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA) and *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA).

environment is important. This is not an aspect touched on by the high court. AM's industrial activities, impacting as they do on the environment, including on air quality and water resources, has an effect on persons and communities in the immediate vicinity and is ultimately of importance to the country as a whole. Translated, this means that the public is affected and that AM's activities and the effects thereof are matters of public importance and interest. Put differently, the nature and effect of AM's activities are crucially important. AM is a major, if not *the* major, polluter in the areas in which it conducts operations.

[53] In addition, AM's publicly stated commitment to engage with environmental activists is not without importance. AM itself, in its, 2010 annual report under the title 'Engaging with stakeholders on environmental issues', stated the following:

'We remain committed to engaging with key stakeholders on issues of environment. These include environmental NGO's, government, communities and the media.'

Equally important is the following part of AM's 2010 annual report:

'We continue to engage with GroundWork, VEJA and other local and international NGOs on compliance in terms of the new environmental legislation, and environmental projects in our areas of operation.'

Nothing in the evidence adduced in this case militates against VEJA being anything other than genuine advocates for environmental justice.

In light thereof it is difficult to understand AM's accusation that VEJA is setting itself up as an alternative regulatory authority. It calls into question AM's stated commitment to collaborative corporate governance in relation to the environment, as well as its bona fides in resisting the request for information.

The Master Plan

[54] That brings us to the point concerning the relevance of the Master Plan or, from AM's asserted perspective, its obsolescence.

[55] It is clear from what is set out above that when the Master Plan was being formulated it was seen as a forward looking document, informing action not only in the present but setting out a strategy for the future – a 20 year plan. It was seen as a

seminal document and was repeatedly proclaimed as such. Whilst the 2010 annual report does state that the Master Plan was not being released because of updates and more stringent legislative controls, it had never, until then, been disavowed publicly nor, as far as can be ascertained, to AM's board. It also appears to have been of some importance in the acquisition of regulatory approvals.

[56] I agree, as found by the court below, that the Master Plan has importance as a baseline document. Historically extensive data, even disputed standards and testing methodology, must be valuable. The asserted flaws can be examined and/or challenged. The veracity of AM's justifications can be measured. Contemporary knowledge can be compared to historical practises and present-day data can be contrasted or aligned with what was recorded in the past. There is some justification for the submission on behalf of VEJA that the explanations concerning technical and scientific flaws provided by AM, properly analysed, lead to the compelling conclusion that it is not so much the data that was flawed but rather the conclusions drawn from the data. This appears to be so, at least in some respects.

Environmental legislation

[57] Furthermore, it was submitted on behalf of AM that such rights as VEJA might have ought to be located in and enforced through the provisions of the National Environmental Management Act 107 of 1998 (NEMA) rather than by seeking information through s 50(1)(*a*) of PAIA. Section 32(1) of NEMA, under the title 'Legal standing to enforce environmental laws', provides:

'(1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources –

(*a*) in that person's or group of person's own interest;

(*b*) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(*c*) in the interest of or on behalf of a group or class of persons whose interests are affected;

(*d*) in the public interest; and

(*e*) in the interest of protecting the environment.'

[58] It was submitted on behalf of AM that there were thus specific statutory mechanisms at VEJA's disposal that provided a conduit through which a regulatory authority could be compelled to ensure compliance by persons engaged in any activity, operation or undertaking which has a detrimental effect on the environment. In this regard, reliance was placed on s 28(4) read with s 28(12) of NEMA, the provisions of which are set out hereafter:

'(4) The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who fails to take the measures required under subsection (1) to –

(*a*) investigate, evaluate and assess the impact of specific activities and report thereon;

(*b*) commence taking specific reasonable measures before a given date;

(*c*) diligently continue with those measures; and

(*d*) complete them before a specified reasonable date;

Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable.

. . .

(12) Any person may, after giving the Director-General or provincial head of department 30 days' notice, apply to a competent court for an order directing the Director-General or any provincial head of department to take any of the steps listed in subsection (4) if the Director-General or provincial head of department fails to inform such person in writing that he or she has directed a person contemplated in subsection (8) to take one of those steps, and the provisions of section 32(2) and (3) shall apply to such proceedings with the necessary changes.'

[59] The submissions referred to in the immediately preceding paragraphs miss the point. Information sought by parties contemplating litigation to vindicate asserted rights is conventionally sought in order for it to be useful in that litigation, or, to put it in constitutional and statutory terms, the information is 'required for the exercise or protection of any rights'. In this regard, AM is putting the cart before the horse.

[60] It will be recalled that AM's fundamental resistance to the requests by VEJA was that the basis provided in Form C was too generalised and vague and did not meet the threshold requirement set by s 50(1)(*a*) of PAIA. It was contended on behalf of AM that, in order for VEJA to pass the threshold requirement, more was required than just a general statement that the information was required 'for the protection of the section 24 constitutional rights and are requested in the public interest'. It was submitted that the right had to be more specifically identified so as to be recognisable and enforceable. Furthermore, it was contended that, based on the principle of subsidiarity, the asserted right had to be located in the statutes that were enacted to give effect to the constitutional right, rather than based on the constitutional right in general terms. AM was adamant that VEJA, in Form C, in asserting the right upon which they relied in the manner described above, were on a 'fishing expedition' and did not meet the criterion set by s 50(1)(*a*).

[61] In respect of its attitude reflected in the preceding paragraph, AM ignores the fact that additionally, in Form C, reliance was placed by VEJA on three statutes which it describes as being part of 'the relevant governing legislation' namely NEMA, the National Environmental Management: Waste Act 59 of 2008 (NEMWA) and the National Water Act 36 of 1998 (NWA). I intend, in the following paragraphs, to deal with the relevant provisions of those enactments.

[62] NEMA recognises, in s 2(2), that '[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'.

[63] Furthermore, NEMA acknowledges in s 2(3) that '[d]evelopment must be socially, environmentally and economically sustainable'.

[64] Importantly, s 2(4)(*b*) of NEMA provides:

'(*b*) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on

all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.'

[65] Even more significantly, s 2(4)(*f*) of NEMA states the following:

'(*f*) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.'

[66] Of particular importance in relation to PAIA is what is set out in s 2(4)(*k*) of NEMA. That section reads:

'(*k*) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.'

I accept that this relates principally to the state. However, the same must, in principle, apply to corporate decisions and activities that impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval.

[67] Parts of the preamble to the NEMWA bear repeating:

'WHEREAS everyone has the constitutional right to have an environment that is not harmful to his or her health and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that –

(*a*) prevent pollution and ecological degradation;

(*b*) promote conservation; and

(*c*) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

AND WHEREAS waste management practices in many areas of the Republic are not conducive to a healthy environment and the impact of improper waste management practices are often borne disproportionately by the poor;

AND WHEREAS poor waste management practices can have an adverse impact both locally and globally;

AND WHEREAS sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of;

AND WHEREAS the minimisation of pollution and the use of natural resources through vigorous control, cleaner technologies, cleaner production and consumption practices, and waste minimisation are key to ensuring that the environment is protected from the impact of waste; . . . .'

[68] Two of the objects of the NEMWA are set out in s 2(*b*) and 2(*c*), namely:

'(*b*) to ensure that people are aware of the impact of waste on their health, well-being and the environment;

(*c*) to provide for compliance with the measures set out in paragraph (*a*); . . . .'

Section 2(*a*) read with s 2(*c*) is designed to put measures in place to minimise the consumption of national resources, to avoid and minimise the generation of waste and to provide statutory tools to ensure compliance. Section 2(*d*) indicates that the general object of the Act is 'to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being'.

Sections 72 and 73 provide for local and provincial authorities to engage in consultation with the public and to ensure public participation.

[69] The NWA in s 2 sets out, as one of its purposes:

'[T]o ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors –

(*a*) meeting the basic human needs of present and future generations.'

[70] Section 3(1) of the NWA provides:

'(1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.'

Conclusion on the threshold requirement

[71] It is clear, therefore, in accordance with international trends,[6] and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment. In *Biowatch* para 19 the Constitutional Court said the following:

'A perusal of the law reports shows how vital the participation of public-interest groups has been to the development of this court's jurisprudence. Interventions by public-interest groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless. There has also been pioneering litigation brought by groups concerned with gender equality, the rights of the child, cases concerned with upholding the constitutional rights of gay men and lesbian women, and in relation to freedom of expression. Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but also on the existence of a lively civil society willing to litigate in the public interest. This is expressly adverted to by the National Environmental Management (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.'

[72] In *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government* [2013] 3 All SA 416 (SCA), this court (para 61), in dealing with what ultimately was a failed attempt by conservationists to set aside a decision granting environmental authorisation for the construction of a hotel and conference centre, nevertheless said the following about the importance of the efforts of conservationists:

'We should all laud the efforts of conservationists such as the MPA. It is beyond dispute that the MPA has a genuine concern about the environment and that they generally act to preserve and protect the environment for the benefit of present and future generations.'

This court continued as follows (para 63):

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[6] See *inter alia* Principle 10 of the Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I) [31 ILM 874 (1992)]; the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters 2161 UNTS 447 [38 ILM 517 (1999)]. See also B Gemmill and A Bamidele-Izu 'The Role of NGOs and Civil Society in Global Environmental Governance; in D C Esty and M H Ivanova *Global Environmental Governance* (2002).

'In my view, the court below was a trifle harsh in criticising the MPA for persisting in the final relief sought by it. It did not take into consideration that the MPA was an organisation which genuinely has the concerns and objectives set out in paragraph 61 above. Accordingly, it should not have awarded costs against the MPA. Kgaswane might be aggrieved in having to pay its own costs but it should not be forgotten that the malfeasance that led to all the trouble and the subsequent costly litigation was of its own making.'

[73] The hallmark of our Constitution is proportionality. A balance has to be struck between the competing concerns referred to at the beginning of this judgment and our courts will be astute to adopt a common sense approach to how far, in any set of circumstances, the principle of public participation and collaboration extends.

[74] It appears to me to be clear that VEJA, as advocates for environmental justice, was entitled to place reliance on the statutes referred to above in requesting the information from AM. Furthermore, in doing so VEJA met the threshold requirement for obtaining the requested information.

AM as a private body

[75] In argument before us, AM sought to set up yet another hurdle. We were urged by counsel on behalf of AM, in their efforts to persuade us to overturn the high court's order, to not ignore the distinction drawn in PAIA between the obligations of the state in dealing with requests for information, and the obligations of private parties. It was submitted that the obligation on the state to produce information is much more stringent. In this regard s 11(1) of PAIA is relevant. That section provides:

'A requester must be given access to a record of a public body if –

(*a*) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(*b*) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[76] The grounds for refusal contained in Chapter 4 of PAIA relate principally to the protection of information related to the privacy, confidentiality and safety of third parties

and individuals who are natural persons. There is also protection of information privileged from production in legal proceedings and for certain categories of commercial information. These exclusions are not relevant to the present dispute. As can be seen from the provisions of s 11, public bodies are obliged, subject to what is stated in the preceding two sentences, to accede to a request for information.

[77] On the other hand, s 50 of PAIA, in relation to private persons, as can be seen from its provisions set out above, requires justification in the form of a requester, having to show that the information requested is required 'for the protection of any rights'. That issue has already been dealt with.

[78] What should, however, not be lost sight of is that PAIA, in its preamble, recognises that the system of government in South Africa, before the advent of a constitutional democracy, 'resulted in a secretive and unresponsive culture in *public and private* bodies which often led to an abuse of power and human rights violations'. Furthermore, it also expressly recognises the horizontal application of rights in the Bill of Rights to juristic persons 'to the extent required by the nature of the rights and the *nature of those juristic persons*'. (My emphasis.)

[79] Section 32(1)(*b*) of the Constitution also comes into play. It provides:

'(1) Everyone has the right of access to –

. . .

(*b*) any information that is held by another person and that is required for the exercise or protection of any rights.'[7]

[80] I am mindful of the caveat in *Clutchco* that one must guard against forcing corporates to throw open their books on claims of alleged minor errors or irregularities. The basis provided by VEJA for its application does not fall into the category of trivial or frivolous. It concerns us all. In my view it is clear that VEJA supplied an adequate basis

[7] Section 32(2) provides: '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'. PAIA is the envisioned legislation.

for its requests and is entitled to the information sought; it is entitled as an advocate for environmental justice to monitor the operations of AM and its effects on the environment. This additional obstacle raised by AM is, in the circumstances, without any merit.

The approach of AM leading up to and including this litigation

[81] I now turn to AM's attitude, reflected in the correspondence leading up to the commencement of litigation. AM was disingenuous in claiming ignorance of the existence of its own Master Plan. Feigning ignorance is probably a more accurate description. It dithered and appeared at one stage to be gravitating towards disclosure before resisting the request altogether. From a purely public relations perspective it ought to have considered more carefully the consequences for its image. Counsel on behalf of AM urged us to guard against the simplistic view embodied in the question of what harm would be caused by the disclosure of the information. I am prepared to be accused of that 'simplistic' attitude. From AM's stated perspective it can explain away any concerns that anybody might have concerning the applicability, accuracy or relevance of the Master Plan. The disclosure of the information will enable either a verification of AM's stance or might cause us to have even greater concerns about environmental degradation. That it will be a valuable controlling tool can afford of no doubt. Insofar as the information related to the Vaal Disposal site is concerned, the public is entitled to be assuaged as to the safety of that site.

[82] Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.

[83] AM in its 2002 annual report was emphatic that it was adopting a modern day progressive approach in the following terms:

'Our environmental management is being expanded progressively from a legislative compliance activity, to become an all-inclusive business sustainability strategy. In this regard, we have employed specialist consultants to evaluate and produce holistic environmental management

plans using internationally recognised best practice. These environmental master plans drive our entire environmental management strategy.'

It is not to AM's credit, espousing, as it does, a commitment to environmental sensitivity and asserting a collaborative approach to ensuring that environmental degradation is limited, to then assume an obstructive and contrived approach to a request for information which can only assist that collaborative effort.

[84] As we continue to reset our environmental sensitivity barometer, we would do well to have regard to what was said about planet Earth by Al Gore, a former vice-president of the United States and an internationally recognised environmental activist engaged in educating the public about the dangers of global warming and those steps to be taken in response to reduce carbon emissions (for which he was a joint recipient of the 2007 Nobel Peace Prize):

'You see that pale, blue dot? That's us. Everything that has ever happened in all of human history, has happened on that pixel. All the triumphs and all the tragedies, all the wars, all the famines, all the major advances . . . It's our only home. And that is what is at stake, our ability to live on planet Earth, to have a future as a civilization. I believe this is a moral issue, it is your time to seize this issue, it is our time to rise again to secure our future.'[8]

On the importance of developing a greater sensitivity in relation to the protection and preservation of the environment for future generations, Gore had the following to say:

'Future generations may well have occasion to ask themselves, "What were our parents thinking? Why didn't they wake up when they had a chance?" We have to hear that question from them, now.'

We would, as a country, do well to heed that warning.

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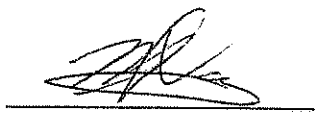
[8] Al Gore has written a book on environmental topics, namely *Earth in the Balance: Ecology and the Human Spirit* (1992, Houghton Mifflin). During his time in the Clinton administration he pushed for the implementation of a carbon tax to encourage energy efficiency. This was partially implemented in 1993. Although he helped procure the 1997 Kyoto Protocol (Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998)), an international treaty to curb greenhouse gasses, ironically it was not ratified in the United States of America after a 95 to 0 vote in the Senate. The objections appear to have been based on exemptions in the treaty given to China and India whose carbon footprints have grown rapidly and American fears that they were thereby given a competitive advantage. After his defeat in the 2000 presidential election to George W. Bush, Mr Gore returned his focus to the environment, presenting more than one thousand times in the US and across the world. That slide-show was made into an Academy Award-winning (2006) documentary film called 'An Inconvenient Truth', from which the quotes are derived. Although it has been included in the curriculum of colleges and schools, it has received some criticism for not being 100 per cent scientifically accurate.

[85] To sum up, I can find no material flaw in the essential reasoning of the court below. For all the reasons set out above the following order is made:

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.



NAVSA ADP

FOR APPELLANT:	Adv. A E Franklin SC (with him P Lazarus SC) Instructed by: Edward Nathan Sonnenbergs, Sandton Webbers, Bloemfontein
FOR RESPONDENT:	Adv. S Budlender (with him J Bleazard and C de Villiers) Instructed by: Centre for Environmental Rights, Cape Town McIntyre & Van der Post, Bloemfontein