Dispute Resolution

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South Africa

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The delicate balance between commercial confidentiality and right to access public information

Access to information held by organs of state frequently come into tension with claims of commercial confidentiality. This tension is particularly acute where organs of state seek to reject a request for information on the basis of alleged commercial sensitivity. The Supreme Court of Appeal (SCA) in *Eskom Holdings SOC Limited and Another v AfriForum NPC* (1049/2024) [2026] ZASCA 34 (23 March 2026) drew a clear line, reaffirming that public bodies may not invoke commercial confidentiality without proper justification as a shield to evade constitutional obligations of transparency and accountability.

The relevant facts of the case are as follows, AfriForum NPC submitted a request to Eskom Holdings SOC Limited in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) seeking access to Eskom's active coal and diesel procurement contracts, including contracts relating to the transportation and distribution of those commodities. The request was made in the context of ongoing load-shedding, Eskom's precarious financial position and widespread allegations of corruption and maladministration highlighted by the State Capture Commission.

Eskom partially granted the request but refused access to its coal and diesel supply contracts. It relied on sections 42(3)(b) and (c) of PAIA, alternatively sections 36(1)(b) and (c), contending that disclosure would likely prejudice its commercial and financial interests, undermine its position in future price negotiations and cause harm to the commercial interests of third-party suppliers. AfriForum lodged an internal appeal, which was deemed dismissed due to Eskom's failure to respond within the statutorily prescribed period. AfriForum consequently approached the High Court for relief.

High Court

The Gauteng Division of the High Court held that Eskom had failed to justify its refusal of access as required by PAIA. The court found that Eskom merely cited the relevant statutory provisions without providing a factual basis demonstrating how disclosure of the contracts would, in fact, be likely to cause harm to its commercial or financial interests. The High Court emphasised that PAIA establishes disclosure as the default position and that a public body seeking to refuse access bears an evidentiary burden to substantiate the refusal with clear and cogent reasons. It concluded that Eskom's reasons were speculative and insufficient and accordingly ordered Eskom to grant AfriForum access to the outstanding records. Although the High Court later accepted that it had applied a more stringent test than was necessary, it granted Eskom leave to appeal on that limited basis.

Supreme Court of Appeal

The SCA confirmed that the correct test is that articulated in *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* (147/2005) [2005] ZASCA 113, namely that the distinction between the formulations *"would likely cause harm"* and *"could reasonably be expected"* relates to the degree of expectation required, rather than the degree of probability. Applying that standard, the SCA held that Eskom had failed to discharge the evidentiary burden imposed on it by PAIA.

The court observed that coal and diesel prices are largely matters of public knowledge and that Eskom procures these commodities through open, competitive and transparent tender processes. In this context, assertions of confidentiality or commercial sensitivity require proper factual substantiation. Eskom's reliance on generalised allegations of harm fell short of this threshold.

The SCA rejected Eskom's contentions that disclosure would lead to inflated pricing, prejudice future negotiations or facilitate collusion among suppliers. These allegations were found to be speculative and unsupported by evidence. The court noted that bidders are already aware of prevailing market prices and that unsuccessful bidders are, in any event, entitled to access awarded contracts in procurement disputes. Claims of potential harm to third party suppliers were similarly dismissed, particularly given that those suppliers voluntarily participate in public procurement processes that are inherently subject to transparency requirements.

The court further found Eskom's reasoning to be internally inconsistent and insufficient to establish either a probable or a reasonably apprehended risk of harm as contemplated by sections 36 or 42 of PAIA.

Key takeaways

This judgment reinforces several core principles governing the interpretation and application of PAIA and serves as a clear restatement of the demanding standards imposed on public bodies that seek to refuse access to information. First and foremost, it affirms that access remains the default position under PAIA. Refusal is the exception and must be carefully motivated. A public body seeking to deny access is required to engage meaningfully with the request and must justify its decision by reference to the specific facts of the matter, the nature of the record sought and the precise requirements of the exemption relied upon. Bare assertions that disclosure may be harmful, without a clear evidentiary foundation, are insufficient and inconsistent with the purposes of PAIA.

Secondly, the judgment provides important clarity regarding the scope and operation of the commercial-interest exemptions in sections 36 and 42. These provisions do not permit a public body to refuse access merely by repeating the wording of the statute or by invoking commercial sensitivity in the abstract. Rather, PAIA requires public bodies to place before the court evidence demonstrating a rational and fact-based link between disclosure and the specific harm alleged. The court made it clear that hypothetical risks, speculative fears or broadly framed concerns about potential prejudice do not meet the statutory threshold. Each refusal must be grounded in a concrete assessment of the record in question and supported by facts capable of scrutiny.

Taken together, these findings signal a heightened level of judicial scrutiny in PAIA litigation and underscore the courts' unwillingness to defer to unsupported or formulaic claims of confidentiality by organs of state. The judgment affirms that PAIA must be applied rigorously, transparently and in good faith, in a manner that gives effect to its constitutional purpose. Public bodies that approach PAIA requests defensively or treat exemptions as a matter of routine rather than exception, run a significant risk that their refusals will not withstand judicial review.

Charles Green and Nompumelelo Ndwandwe

Defamed? A modest proposal to soothe your reputation (and save your wallet)

Every litigation lawyer has experienced a client storming into their office, enraged at something insulting that someone has said about them on X, in a WhatsApp group, in a newspaper or at some public occasion. "*I want to sue for millions*" they declare with righteous fury. The sensible lawyer listens. Nods sympathetically. Orders the client a cappuccino and some biscuits. Then gently suggests that their client considers an alternative use of their funds.

Running the arithmetic of outrage is a worthwhile but often neglected preliminary step before issuing summons. Imagine that someone has called you "*dishonest and incompetent*" in your local ratepayers' association annual general meeting. Naturally, you are neither dishonest nor struggling more than most with the challenges of your job. You are irate. You want vindication. You want your day in court. You want the world to know the truth.

Excellent! Here is what those things will cost you.

First, the attorneys' fees. Defamation litigation is not a sprint; more like the Comrades Marathon in formal attire. There will be consultations, elegantly drafted letters of demand, pleadings, interlocutory applications, discovery and, if you are particularly unlucky, your matter will run all the way to a trial. By the time you have had your day in court and the judge has decided the matter, you will have spent enough money to buy a lovely German sedan. Top of the range. With heads up display. And heated seats. Seats that massage you. And blow your choice of hot or cold air up your shirt.

Second, let's talk about all those damages you want to claim. Even if you win (with that "*if*" doing more heavy lifting than the Springbok front row in a week of gym sessions), South African courts are nothing like their US equivalent in defamation awards. You are likely to receive (once you have deducted your legal costs) just enough to take yourself out for a modest dinner. At Nando's. Without extra Peri Peri or sides.

Third, remember the Streisand Effect[1] where attempts to suppress embarrassing information causes the exact opposite. The defamatory statement that was heard by 17 people on a Tuesday evening at the local MOTH hall could, once you have issued your summons, be reported in your local newspaper with a readership of 20,000 and shared far and wide on social media. Congratulations! You have just ensured that a few hundred thousand people will hear the very insult you wanted to silence.

There is a radical alternative though. Instead of rushing to your lawyer, consider this two-step programme for the restoration of your dignity.

[1] *In 2003 Kenneth Adelman took aerial photographs of the California coastline for an environmental documentation project. One of the photographs happened to include Barbara Streisand's Malibu mansion. She sued Adelman for $50 million and for an order that the image be removed from his publicly available collection. Before she went to court the photograph had been downloaded a handful of times. The publicity generated by the legal action resulted in hundreds of thousands of downloads. Streisand lost the case and had to pay Adelman's legal costs.*

Step one

Take the money you would have spent on litigation (a serious chunk of change) and drive it straight to a dealership. Select something with at least two turbos, a panoramic sunroof and a sound system with 28 speakers (Twenty-Eight!), each speaker hand-tuned by Bavarian monks who have abandoned their vows of silence specifically for this purpose. Every time the phrase *"corrupt and incompetent"* surfaces, turn up the music and accelerate (within the speed limit, of course). You will find that the sting of *"corrupt and incompetent"* fades considerably when you are cruising, cossetted delightfully in pristine sound while the smell of new leather is being blown up your shirt.

Step two

With the remaining funds in your litigation budget (and there will be remaining funds, because cars are cheaper than trials) find a competent psychologist. Discuss your feelings of injustice. Explore the childhood experiences that make you so sensitive to criticism. Develop coping mechanisms. Learn to breathe. Practice mindfulness. After 12 months of weekly sessions, when you again attend your local ratepayers' association annual general meeting you will feel nothing more than a faint, benevolent pity for the uncouth loudmouth who attempts to insult you. Surely this is a far more satisfying victory than a court order that your opponent will probably not pay anyway.

We hear you cry: *"But what about justice?"*

We hear you. We do. And we acknowledge that there are cases - genuine, serious cases - where defamation litigation is both necessary and appropriate. Where a person's livelihood has been destroyed, where the insults are outrageous and persistent, where the defendant has lots of assets and the evidence is overwhelming. The law is there for a reason and the right cases should be pursued with vigour.

But for the ordinary insult, the social media slight, the business rival who has said something unkind at a dinner party, the vulgar neighbour at the local ratepayers' association annual general meeting - we counsel restraint. The greatest revenge, as the saying goes, is living well. And living well is substantially easier when you have not spent your children's university fund on a defamation action that settles on the court steps for an apology that nobody will ever read.

So, the next time someone says something terrible about you, take a deep breath. Close your laptop. Step away from your telephone. And ask yourself a simple question: *"Would I rather have a High Court judgment; or a new car and a healthy relationship with my emotions?"* You know already which one has better resale value.

The views expressed in this article are intended to be humorous and do not constitute legal advice. If you have been genuinely defamed, we will gladly assist, and we will give you a realistic estimate of the cost before you make any decisions.

Tim Fletcher

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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