ACCESS TO INFORMATION, COPYRIGHT AND LITIGATION: LESSONS FROM MASHASHANE V SABC

Category: Administrative and Procurement Law,Media and OTT,Privacy Law and POPIA,Privacy Law, Infosec, and POPIA
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In *Mashashane v SABC*[1], the applicant, Marothi Josias Mashashane, sought access to records relating to a television programme broadcast by the South African Broadcasting Corporation ("**SABC**") approximately seventeen years ago. The requested records included a copy of the episode, details of its broadcast history, audience statistics, and a transcript of the allegations allegedly made against him.

The applicant contended that the programme portrayed him as a fraudster involved in irregular transactions relating to the supply of motor vehicles and that the broadcast had caused, and continues to cause, significant reputational harm.

During late 2025 and early 2026, the applicant requested access to these records from the SABC. When informal requests proved unsuccessful, he submitted a formal request in terms of the *Promotion of Access to Information Act 2 of 2000* ("**PAIA**"). On 29 April 2026, the SABC refused the request, relying principally on sections 42(3)(c) and 45 of PAIA, which protects a public body's commercial and negotiating interests, and shields them from abusive or excessively burdensome access requests.

The SABC argued that disclosure of the requested records could prejudice its interests, particularly because the material might be used against it in contemplated legal proceedings. It also relied on its ownership of the copyright in the programme as a basis for refusing access.

The applicant challenged the refusal, contending that the SABC had misapplied PAIA. He argued that

access to the records was necessary to vindicate his rights and to assist him in determining and proving the quantum of damages in related litigation. After indicating that he would approach the High Court if the SABC did not cooperate, he launched an urgent application.

The SABC's Response

Initially, the SABC refused the request on the basis that the requested material would not assist the applicant in the manner alleged and that the programme did not contain the allegations he claimed had been broadcast. It subsequently relied on sections 42(3)(c) and 45 of PAIA, maintaining that granting access would expose the broadcaster to litigation and place its interests at risk.

The court reiterated that the burden rests on a public body to establish that a statutory ground for refusing access exists. A general fear that records may be used in future litigation does not justify refusing access under PAIA.

The court also rejected the SABC's reliance on copyright ownership. It emphasised that the right of access to a record under PAIA is distinct from ownership of copyright. Granting access to a record does not confer a licence to reproduce, publish or commercially exploit the copyrighted work. Copyright therefore does not constitute a lawful ground for refusing access under PAIA.

The Court's Analysis of Urgency

The court held that the matter lacked urgency. The programme had been broadcast approximately seventeen years earlier, and the applicant had long been aware of both its existence and the alleged reputational harm arising from it. Although the SABC's refusal to provide access occurred recently, the underlying information had existed for many years.

The court reaffirmed that an applicant seeking relief under Rule 6(12) of the Uniform Rules of Court must demonstrate more than mere inconvenience. The applicant must establish that substantial redress cannot be obtained in the ordinary course. Urgency is not created simply because a litigant wishes to expedite existing litigation or prefers a quicker resolution of the dispute.

Failure to Exhaust Internal Remedies under PAIA

The court further held that the applicant had failed to exhaust the internal remedies available under PAIA. Section 78 of PAIA permits an application to court only after the prescribed internal appeal or complaint procedures have been exhausted, while section 83 empowers the court to grant appropriate relief once those procedures have been followed.

The applicant argued that he had responded to the SABC's refusal by email. However, the court found that the email merely threatened to lodge an internal appeal and could not itself be regarded as an appeal. Consequently, the applicant had failed to comply with the procedural requirements of PAIA before approaching the court.

PAIA and Pending Litigation

The court also considered the effect of section 7 of PAIA, which excludes the application of the Act where records are sought for the purposes of civil or criminal proceedings that have already commenced and another law provides a mechanism for obtaining those records.

The applicant sought access to the records to assist him in pursuing a damages claim arising from his unlawful arrest. As those proceedings were already pending, the Uniform Rules of Court provided an alternative mechanism for obtaining the records through the discovery process. The court therefore

held that PAIA could not be used as a substitute for discovery in ongoing litigation.

The True Nature of the Application

Although the applicant framed the matter as an application to compel disclosure under PAIA, the court held that the substance of the application was a challenge to the Information Officer's decision refusing access.

The refusal constituted an administrative decision that remained valid and legally effective until set aside by a court of competent jurisdiction. Whether correct or incorrect, the decision could not simply be ignored. Before a court could compel disclosure, it first had to determine the lawfulness of the refusal and, if appropriate, review and set it aside.

Accordingly, the court held that the application was, in substance, one to review the Information Officer's decision rather than an application to compel access under PAIA.

The judgment provides several important lessons for litigants seeking access to information under PAIA. Firstly, public bodies bear the burden of establishing a lawful statutory ground for refusing access, and a general concern that information may be used in litigation does not justify non-disclosure. Secondly, copyright ownership does not prevent access to records under PAIA, as access does not confer any right to reproduce or commercially exploit the copyrighted material.

The judgment also reinforces that applicants must comply with PAIA's procedural requirements by exhausting available internal remedies before approaching a court. Moreover, where litigation has already commenced, PAIA cannot be used to circumvent the ordinary discovery process provided for in the Uniform Rules of Court.

Finally, the case illustrates the importance of correctly identifying the nature of the proceedings. Where an Information Officer has refused access to records, an applicant cannot simply seek an order compelling disclosure while leaving the grounds for refusal unchallenged. The refusal constitutes an administrative decision that must first be challenged and, where appropriate, reviewed and set aside before a court can order disclosure.

The decision therefore serves as a valuable reminder that successful access to information litigation depends not only on the merits of the request but also on careful compliance with the procedural framework established by PAIA.

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[1] Mashashane v South African Broadcasting Corporation SOC Ltd 2016/1117253 ZAGPJHC 694