THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 85/2016

In the matter between:

MAHAEEANE MAHAEEANE	**FIRST APPELLANT**
MOTLAJSI THAKASO	**SECOND APPELLANT**

and

ANGLOGOLD ASHANTI LIMITED	**RESPONDENT**

Neutral citation: *Mahaeeane v Anglogold* (85/2016) [2017] ZASCA 090 (07 June 2017)

Coram: Maya AP, Fourie, Molemela, Gorven and Mbatha AJJA

Heard: 22 March 2017

Delivered: 7 June 2017

Summary: Promotion of Access to Information Act 2 of 2000 : section 50 : meaning of 'documents required' : right relied upon to claim damages : in the context of litigation, documents must be reasonably required to formulate a claim : test not met in present matter : records requested not reasonably required to exercise or protect right relied upon.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Sutherland J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Gorven AJA (Maya AP and Fourie AJA concurring):

[1] The appellants were previously both employed by the respondent in its gold mining operations. They were also both medically boarded by the respondent on the ground of having contracted silicosis. An application has been launched for the certification of a class action (the certification application). The class relevant to silicosis sufferers is defined as comprising 'current and former mine workers who have silicosis and who work or have worked on the goldmines listed in annexure A to the Notice of Motion'. The mine of the respondent at which the appellants worked is listed. There is another class defined for employees who contracted pulmonary tuberculosis. For the sake of simplicity, I shall refer only to the respondent and not to the other mines. The certification application was granted and is presently on appeal. There were some 56 applicants in the certification application. Although the appellants admittedly fall within the class relating to silicosis, they are not named applicants in that application. The same attorneys represent the appellants and the class.

[2] This appeal concerns records requested under s 50(1) of the Promotion of Access to Information Act (the PAIA).[1] This relates to private bodies and reads:

'(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 . . . .'[2]

The provisions of s 7(1) of the PAIA are relied on by the respondent to exclude the operation of the PAIA. This provides:

'(1) This Act does not apply to a record of a public body or a private body if-

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record for the purpose referred to in paragraph *(a)* is provided for in any other law.'

[3] A list of some ten records was requested in terms of s 50(1) of the PAIA. The respondent reacted to the request in writing, recording that the appellants 'are included in the group of persons on whose behalf the [certification application] has been brought'. It further recorded that the request had been made after the commencement of the certification application. The respondent went on to contend that the PAIA did not apply as a result of the provisions of s 7(1) of the PAIA.

[4] The resultant impasse prompted the appellants to bring an application in the Gauteng Local Division of the High Court, Johannesburg (the high court) before Sutherland J for access to the requested records. The high court found that the appellants were excluded by operation of s 7(1) of the PAIA and, in

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[1] Promotion of Access to Information Act 2 of 2000.

[2] The full section 50(1) reads:

'(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.'

Subparagraphs *(b)* and *(c)* are not in issue in this appeal.

addition, had not satisfied the test in s 50 of the PAIA of showing that the records were required for the exercise or protection of any rights. This appeal is with the leave of that court.

[5] The attorney for the appellants testified that he was instructed to advise whether the appellants have a good claim against the respondent for damages 'in respect of the harm and loss . . . suffered as a result of . . . having contracted silicosis'. The ability to advise, it was submitted, depends largely on whether the respondent complied with its statutory duty of care to its employees. The attorney went on to aver:

'The information requested is required in order for me to assess and advise the [appellants]:

Whether or not the respondent complied with the general duty of care owed by it to the [appellants] to provide and maintain a safe and healthy work environment for its employees as stipulated in section 5 of the [Mine Health and Safety Act 29 of 1996] (the MHSA),

Whether the respondent complied with the provisions of the law and the extent of such compliance.'[3]

The attorney then addressed each of the ten records requested in an attempt to motivate this need.

[6] These ten records can be summarised as:

(a) Measurements of dust exposure levels for the appellants for their period of employment.

(b) The record of medical surveillance of the appellants, including x-rays, lung function results and doctor's examination notes along with lung biopsies and CT scan results for the period of their employment.

(c) The record of incapacity hearings convened in respect of the appellants.

(d) The hazardous work service records of the appellants for the period of their employment.

[3] Paragraph numbering omitted.

(e) The mine manager's written reports of any investigations into the declared unfitness of the appellants.

(f) The mine manager's reports on any investigation into silicosis or health threatening occurrences of breathable silica dust during the period of their employment.

(g) The mine manager's record of significant dust hazards identified and pneumoconiosis risks assessed by him during the period of their employment.

(h) The health and safety training documentation, policies and educational material used to educate and prepare the appellants for safely working in the mine.

(i) The Code of Practice prepared by the mine manager concerning the health and safety of employees working with silica dust during the period of their employment.

(j) The Health and Safety Policy of the mine relating to dust exposure during the period of their employment.

Each of these ten records referred to the specific legislation which, it was averred, gave rise to the statutory duty in respect of that record.

[7] The respondent submits that the application is a stratagem to obtain discovery in advance for the class action. It points in this regard to the sequence of events. The first appellant was certified as having contracted silicosis during September 2004 and the second appellant during September 2009. The two appellants had both instructed their attorneys to investigate a claim against the respondent by November 2011. The certification application was launched by the appellants' attorney, omitting them as applicants, during December 2012. The request under the PAIA was submitted on behalf of the appellants by their attorney in August 2013. The respondent contends that the appellants were

omitted in order to escape the import of s 7(1) of the PAIA which precludes such an application where proceedings are pending.[4]

[8] In addition, the respondent submits that the appellants have not made out a case under s 50(1) for the records. It says that the right asserted to seek compensation in delict for personal injury is not in dispute but the records are not required for that purpose. The stated reason for the request was so that the records could 'assist in determining whether [the respondent] complied with its statutory and/or common law and/or constitutional obligations . . . regarding dust levels, adequate medical care and examinations, proper training and dust exposure' during the period the appellants were employed by it.[5] The respondent submits that the request therefore does not match the right asserted. As mentioned above, the respondent also relies on s 7(1) of the PAIA to preclude the appellants from using the PAIA to obtain the records. The respondent contends in this regard that the appellants are members of the class action, the requested records are required for those proceedings which have commenced and that the rules of court concerning discovery provide for the production of the records requested.

[9] In the papers, the appellants contend that they are not parties to the certification application. They say that, if the class action is certified, they might not become parties to any action arising from the certification if the legal advice they receive is to the effect that there are no prospects of their succeeding in a claim.

[10] As I read these two sections of the PAIA, the appellants bear the onus to show that the request falls within the ambit of s 50. If this onus is discharged,

[4] There are two other requirements as will appear from the section when set out below.
[5] This phrase came from the request for documents delivered to the respondent which was a precursor to the application.

the question arises whether the provisions of s 7(1) exclude any of the requested records from the operation of the PAIA.

[11] The first enquiry is accordingly whether the appellants discharged the onus of meeting the requirements of s 50(1)*(a)*. In this regard, this court has held that an applicant 'need only put up facts which *prima facie*, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect.'[6]

[12] The leading case on s 50 of the PAIA is *Unitas Hospital v Van Wyk & another*.[7] In that matter, the husband of the respondent died while he was a hospital patient. She contended that his death was brought about by the negligence of the nursing staff and that she had an action for damages suffered through his death. She applied under the PAIA for access to a report with a view to instituting that action. This court held that the report was of a general nature and not one relating specifically to treatment received by her husband. It was held that 'it can be accepted with confidence that Mrs Van Wyk did not require the Naudé report to formulate her claim for the purposes of instituting an action.' She did not require it for the exercise or protection of any right. She already had access to whatever information her experts would require to advise her on the formulation and assessment of her claim. She had already been provided with a complete set of hospital records, including the notes made by the nurses who cared for him throughout his time in hospital. This court then went on to find that what was therefore being asserted was a right to pre-action discovery.

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[6] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) para 8.
[7] *Unitas Hospital v Van Wyk & another* 2006 (4) SA 436 (SCA) para 19.

[13] This court has held that what is meant by the phrase, 'required for the exercise or protection of any rights' in s 50(1), gives rise to a fact based enquiry and does not allow for abstract determination.[8] This court has mostly approached the test by deciding what those words do not mean:

'So, for example, it is said that it does not mean the subjective attitude of "want" or "desire" on the part of the requester; that, at the one end of the scale, "useful" or "relevant" for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is "essential" or "necessary" for the stated purpose . . . .'[9]

It involves something more than that the information would be of assistance, which is a minimum threshold requirement.[10] As a positive formulation, the furthest this court has been prepared to go is what was said by Comrie AJA in *Clutchco (Pty) Ltd v Davis*:[11]

'I think that "reasonably required" in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need.'

And the Constitutional Court[12] has approved this approach:

'"Required" in the context of s 32(1)*(b)* does not denote absolute necessity. It means "reasonably required". The person seeking access to the information must establish a substantial advantage or element of need. The standard is accommodating, flexible and in its application fact-bound.'[13]

What must be covered in an application is the following:

'[A]n applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'[14]

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[8] *Unitas Hospital* at para 6.
[9] *Unitas Hospital* para 16.
[10] *Unitas Hospital* para 17.
[11] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA); [2005] 2 All SA 225 para 13.
[12] In the minority judgment of Cameron J in *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31; 2016 (1) SA 132 (CC) para 31. The majority judgment did not deal with this issue.
[13] The references in this passage are omitted. Section 32(1)*(b)* is a section of the Constitution of the Republic of South Africa, 1996 requiring the legislature to enact legislation to give effect to the right of access to information. The cases cited are *Clutchco* and *Unitas Hospital*.
[14] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA) para 28.

[14] With that in mind, I turn to consider the case made out by the appellants on each of these aspects. The facts of their case must be considered. The first aspect is the right relied on which the appellants wish to exercise or protect. In response to the section of the form, 'Indicate which right is to be exercised or protected', the appellants stated:

'Our client requires the requested information to properly assess the merits in exercising his right to claim damages from [the respondent] for the wrongful exposure to harmful levels of noxious dust causing him to develop Silicosis while working for [the respondent].'

The right which the appellants wish to exercise is therefore the 'right to claim damages'. This implicates s 34 of the Constitution which gives a right to access courts. Because the right relied on is narrowly stated, there is no need to consider the nature of the rights which might qualify.[15] The balance of the response to this section goes beyond asserting the right and deals with the third aspect of the enquiry 'how that information would assist . . . in exercising that right'. This aspect of that response is expanded upon in the response to the question as to why 'the record requested is required . . . .' These two aspects have been conflated in the response to the first requirement.

[15] In the application, the attorney representing the appellants who deposed to the affidavit, said the following regarding the right which they assert:

'In order to advise my clients in relation to a possible claim for damages against the respondent I require access to information held by the respondent, which is relevant to any assessment of the merits of the [appellants'] claim.

. . .

Whether or not the [appellants] have a good claim for damages against the respondent turns substantially on the extent to which the respondents complied with the statutory duty of care owed by them to their employees under the mine health and safety legislation applicable at the relevant time.

. . .

[15] As was undertaken in *Bullock NO & others v Provincial Government, North West Province & another* 2004 (5) SA 262 (SCA) para 19.

The information requested is reasonably required to determine whether or not the [appellants] have adequate grounds to seek a remedy against the respondent.

. . .

The information requested is required in order for me to assess and advise the [appellants] . . . [w]hether or not the respondent complied with the general duty of care owed by it to the [appellants] to provide and maintain a safe and healthy work environment for its employees as stipulated in section 5 of the MHSA.

. . .

The information requested is required in order for me to assess and advise the [appellants] . . . [w]hether the respondent complied with the provisions of the law and the extent of such compliance.'

The attorney then dealt with each of the ten requests, saying mostly that the information in question 'will go to show' whether or not the respondent complied with various statutory duties. None of these dealt with the right asserted. They all dealt with the third aspect, being the reason that the records were required.

[16] As was conceded by the respondent, the appellants have a right to seek compensation in delict for personal injury or, as they put it, the right to claim damages. In order to exercise that right, an action must be brought against the respondent. The question is whether the records requested are required for the exercise or protection of that right.

[17] It seems clear that the underlying reasons given for why the records are required do not relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, do not meet the test of the records being required to 'exercise or protect' the right relied upon. This situation can be contrasted with that in *Company Secretary, Arcelormittal South Africa Ltd & another v Vaal*

Environmental Justice Alliance.[16] In that matter, the Environmental Master Plan developed by Arcelormittal was requested on the following basis:

'The requested documents are necessary for the protection of the s 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*.'[17]

The right asserted was that to a non-harmful environment and 'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures . . .'.[18] It can be seen that the right asserted and the reason why the records were required to exercise or protect it accorded with each other.

[18] Even if it can be said that the reasons relate to the right, the question is whether the records are reasonably required to exercise or protect the right relied on. In the present matter, the proposed defendant and its details are clearly known to the appellants. So also is the cause of action. At least some of the facts are within the knowledge of the appellants. In the application papers, the respondent admitted that silicosis is a progressive and incurable disease caused by inhaling silica dust. It was also admitted that silicosis is common in

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[16] *Company Secretary, Arcelormittal South Africa Ltd & another v Vaal Environmental Justice Alliance* [2014] ZASCA 184; 2015 (1) SA 515 (SCA).

[17] Paragraph 8. The emphasis is that of the judgment.

[18] Section 24 of the Constitution of the Republic of South Africa, 1996 which reads:

'Everyone has the right-

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

(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.'

gold mine workers who are exposed to harmful quantities of silica dust whilst working underground in mines and that this dust is generated in the course of mining activities. The respondent admits that the appellants were dismissed from employment on the basis that they had contracted silicosis. On a level of causation of the disease in the appellants, the only averment not admitted is that the appellants have not been exposed to silica dust other than while employed on the mine. This is peculiarly within the knowledge of the appellants. This means that the only records which the appellants do not have in their possession are those which will assist in proving whether or not the respondent adhered to its statutory, common law and constitutional legal duties.

[19] In this regard, the draft particulars of claim (the particulars) annexed to the certification application achieve prominence. The substantive part runs to over 65 pages, although approximately half of these deal with the asbestosis claim which does not apply to the appellants. They set out in detail, over nearly three pages, what the respondent 'knew, or ought reasonably to have known' about the harm of being exposed to silica dust and the manner in which silicosis can be prevented. Arising from that knowledge, the duties of the respondent are pleaded, including statutory duties, the common law duty of care and constitutional obligations. These run to over four pages. The particulars go on to plead the basis on which the class action members aver that the respondent breached its statutory duties. These refer in detail to legislation and specific conduct which fell short of the statutory requirements. These breaches run to some 18 pages. Strict liability under the statutes is then pleaded and, in the alternative, a negligent breach of duties which is said to give rise to delictual liability. The particulars go on to plead breaches of the common law duty of care which the class members contend were owed to them by the respondent. These run to some nine pages. The alleged breach of constitutional duties is then pleaded running to one page and incorporating conduct pleaded in

paragraphs 112 to 138 comprising some 35 pages. The particulars then plead the causal connection between the silicosis contracted and the actionable conduct of the respondent. From all of this it can be seen that the appellants are clearly in a position to formulate their claim.

[20] The above deals with the question of whether the records are reasonably required to exercise or protect the right asserted by the appellants, to claim damages from the respondent from their having contracted silicosis. As indicated, a right to claim damages is invoked. This will necessitate court proceedings. It is necessary to avoid the unwelcome spectre of applications under the PAIA being brought to obtain premature discovery. It seems to me that a rule of thumb which will avoid this is to enquire whether, in the context of future litigation to exercise the right relied on, the records requested are reasonably required to formulate a claim. This seems to me to have been the implicit test applied in *Unitas Hospital*. If needed to formulate a claim, it can be said that they are reasonably required under s 50(1) of the PAIA. As I have said, the appellants do not need the requested records to formulate their claim.

[21] It may be argued that some of the records are reasonably required as evidence to prove the formulated claim. Since, however, the machinery of discovery applies in an action, most, if not all, of the records will become available to the appellants in order to exercise the right to claim. After all, discovery is required of documents ‘relating to any matter in question’ in an action. No case has been made out in the present matter that any of the requested records will not be discoverable. The issue whether the obligation to discover is co-extensive with records reasonably required to exercise the right to claim need therefore not detain us in the present matter. As such, I am of the view that the records requested are not reasonably required to exercise the right of the appellants to claim damages from the respondent.

[22] This places the present matter on all fours with *Unitas Hospital* where this court found that Mrs Van Wyk did not require the Naudé report to formulate her claim.[19] It also renders the appellants subject to the dictum in *Unitas Hospital* that they are not –

'entitled, as a matter of course, to all information which will assist in evaluating [their] prospects of success against the only potential defendant. On that approach, the more you know, the better you will be able to evaluate your chances against your opponent. The corollary of this thesis therefore seems to be that the requester will, in effect, always be entitled to full pre-action discovery.'[20]

[23] I have up to now dealt with the case made out on the papers. It must be borne in mind that the launch of the certification application predated the request under the PAIA. In *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others*,[21] it was held that an application for certification of a class action is akin to matters where 'necessary preliminary proceedings have been held to constitute the bringing or commencement of suit'.[22] In that matter, the court of first instance refused the application, including an order sought permitting the issue of summons prior to certification in order to interrupt prescription. This court held that, because a certification application is a necessary precursor to 'proceedings to pursue a class action there is much to be said for the proposition that, for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act'. It

[19] Paragraph 19.
[20] Paragraph 22.
[21] *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA).
[22] Paragraph 89. Footnote 65 cited *The Merak: T B & S Batchelor & Co Ltd (Owners of Cargo on the Merak) v Owners of SS Merak* [1965] 1 All ER 230 (CA) at 238 to the effect that: '[T]o bring suit, it is said, means to pursue the appropriate remedy by the appropriate procedure.' *Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd* 1974 (4) SA 381 (D) at 384A – D; *IGI Insurance Co Ltd v Madasa* 1995 (1) SA 144 (TkA) at 147B – C.

seems to me that, although the dictum above is *obiter*, it accords with principle and must find application here.

[24] The logical corollary is that a certification application must be regarded as the 'bringing or commencement of suit' of the class action. Counsel for the appellants, when confronted with this dictum accepted that to be the position in the present matter. Accordingly, the class action proceedings must be regarded as having commenced with the launch of the certification application. At the time that the request under the PAIA was made, therefore, the class action must be held to have commenced.

[25] But the present position goes even further. The class action has now been certified. The class action is what is termed an 'opt-out' class action. This includes all members of a certified class in the action unless they opt out. In dealing with the significance of this, I can do no better than to cite the words of Professor Silver, quoted in *Children's Resource Centre Trust*, to the effect that a class action is –

'a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake. . . . Class members neither start out as parties nor become parties when a class is certified.'[23]

What is of importance is that, as was said in *Children's Resource Centre Trust*:

[23] Paragraph 17.

'In class actions the party bringing the action does so, on behalf of the entire class, every member of which is bound by the outcome of the action, so that a separate action by a member of the class after judgment can be met with a plea of res judicata.'[24]

It is, of course, for this reason that members falling within a certified class must be given the opportunity to opt out or, if it is an opt-in class action, to opt in.

[26] All of this means that, at present, the appellants are included in the class action which has been certified. This much was correctly conceded by their counsel at the hearing. It also means that the proceedings relating to the class action in question have commenced. As such, the documents cannot be said to be required to exercise or protect the right to claim damages since the class action to do so has commenced on their behalf. It seems to me that the substratum of the application brought by the appellants accordingly no longer exists. Counsel accepted that events had overtaken the application when certification had taken place. He sought, however, to submit that the appellants now require the information to determine whether they should opt out. But this was not the case made out on the papers. It is also doubtful, in the light of the approach in *Unitas Hospital* mentioned above, whether this would bring the claimed right within the ambit of s 50(1) of the PAIA.

[27] For the above reasons, therefore, the appellants have not met the threshold test required by s 50(1) of the PAIA to '*prima facie* establish that access to the record is required to exercise or protect' the right relied upon.[25] In the light of this, I consider it unnecessary to deal with the respondent's further defence to the application by way of s 7(1) of the PAIA. There is accordingly no basis on which to interfere with the order granted by Sutherland J. The appeal must fail.

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[24] Paragraph 16.
[25] *Claase* fn 6, para 8.

[28] The following order is made:

The appeal is dismissed with costs.

T R Gorven

Acting Judge of Appeal

Mbatha AJA:

[29] I have had the benefit of reading the judgment of my colleague, Gorven AJA, from which I differ in several respects. He reaches the conclusion that the appeal stands to be dismissed. He bases this conclusion on the finding that the appellants have not satisfied the criteria set out in s 50(1) of the Promotion of Access to Information Act 2 of 2000 (the PAIA).

[30] In my respectful view, the appellants have satisfied the criteria set out in s 50(1) of the PAIA, and the civil proceedings in question have not commenced for purposes of s 7(1) thereof. The appeal should accordingly succeed and my conclusion is founded on the reasons set out below.

[31] The appeal centres around the dismissal of an application brought in terms of s 82 of the PAIA[26] to compel the respondent to provide access to

[26] The court hearing an application may grant any order that is just and equitable, including orders─
(a) confirming, amending or setting aside the decision which is the subject of the application concerned;
(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to retrain from taking such action as the court considers necessary within a period mentioned in the order;
(c) granting an interdict, interim or specific relief, a declaratory order or compensation;
(d) as to costs; or
(e) condoning con-compliance with the 180-day period within which to bring an application, where the interests of justice so require.

records to the appellants. Its determination rests upon the interpretation of the provisions of ss 7(1) and 50(1) of the PAIA.

[32] The application was dismissed by the high court on the basis that the appellants did not meet the threshold set out in s 50(1).

[33] As pointed out in the main judgment which sets out the background facts from which the dispute arose, the first and second appellants instructed their attorney (Mr Richard Spoor) on 14 September 2011 and 14 November 2011, respectively, to investigate the merits of their claims for damages against the respondent. Their applications for access to information in terms of the PAIA were submitted to the respondent on 18 September 2013. On 22 October 2013 the respondent refused both applications. During December 2012 Mr Spoor had also launched an application for the certification of a class action on behalf of current and former mineworkers, excluding the appellants, against the mining industry in respect of silicosis and tuberculosis related injury. The certification judgment in *Nkala v Harmony Gold Mining Company Limited*[27] was delivered by the Gauteng Local Division, Johannesburg on 13 May 2016, almost three years after the submission of the request for information by the appellants.

[34] The appeal is opposed on the basis that the appellants failed to meet the threshold in s 50(1) of the PAIA. The right to request access to the records of a private body is governed by s 50(1) of the PAIA. The provisions read:

'(1) A requester must be given access to any records of a private body if—

(*a*) that record is for the exercise or protection of any rights;

(*b*) that person complies with the procedural requirements of this Act relating to a request for access to that record; and

[27] N*kala & others v Harmony Gold Mining Company Limited & others* [2016] ZAGPJHC 97; 2016 (5) SA 240 (GJ).

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

As appears from their wording, the provisions are peremptory if the criteria in subsections (a) to (c) are met.

[35] The initial right which the appellants sought to protect was the right to assess their potential claims for damages against the respondent for having contracted silicosis at the respondent's mines during the tenure of their employment. However, when the matter was argued before us, the appellants' argument had shifted in that they requested the information for purposes of making a decision of whether or not to opt out of the class action. But this is understandable as their appeal had been overtaken by the events. Certification had since been granted in the *Nkala* judgment which also stipulated a date by which they should opt out of the class action, should they so wish.

[36] The right of access to information is guaranteed by s 32 of the Constitution, which provides:

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

(a) any information held by the state; and

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

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[37] The PAIA is the national legislation that gives effect to the right of access to information as contemplated in s 32 (2) of the Constitution. Its purpose was explained by Jafta J in *PFE International Inc*[28] as follows:

'In accordance with the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the

[28] *PFE International Inc (BVI) & others v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC) para 4.

hands of a public body or a private person. Ordinarily, and according to the principle of constitutional subsidiarity, claims for enforcing the right of access to information must be based on PAIA.'

[38] Transparency and access to information are required in order to allow people to enjoy other fundamental rights. Thus, for example, the preamble of the PAIA recognises that:[29]

'The system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;

Section 8 of the Constitution provides for the horizontal application of the 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.'

[39] Both the Constitution, in s 32(1)*(b)* and the PAIA (in s 50(1)*(a)*) refer to 'any rights'. In my view, this could be 'any right' in terms of the Bill of Rights in Chapter 2 of the Constitution, or 'any right' created in common law. In construing these words, the court should, as far as the language of the PAIA permits, adopt a generous and purposive interpretation that gives people the full measure of its protections and that promotes the values of the Constitution. As the Constitutional Court held in *S v Mhlungu*:

'A constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining it's Government.'[30]

[40] The provisions of s 2(1) of the PAIA also bear relevance. They read:

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[29] The Preamble 'Promotion of Access to Information Act 2 of 2000.'

[30] *S v Mhlungu & others* [1995] ZACC 4; 1995 (3) SA 867 para 8. See also *Government of the Republic of Namibia & another v Cultura & another 2000 & another* 1994 (1) SA 407 at 418.

'When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation of the provision that is inconsistent with those objects.'

The objects of the PAIA are contained in s 9 of the Act, which provide in relevant part:

'*(e)* … to promote transparency, accountability and effective governance of all public and private bodies…'

Access to information is a constitutionally entrenched right. Any refusal of access to information is a limitation of that right and must therefore be approached as the exception rather than the rule. In his minority judgment in *Unitas Hospital*,[31] Cameron JA said:

'We must in my view consider the extent to which it is appropriate, in the case of any private body, to further the express statutory object of promoting "transparency, accountability and effective governance" in private bodies. This statutory purpose suggests that it is appropriate to differentiate between different kinds of private bodies. Some will be very private, like the small family enterprise in *Clutchco*. Effective governance and accountability, while important, will be of less public significance. Other entities, like the listed public companies that dominate the country's economic production and distribution, though not "public bodies" under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective governance.'

[41] Regarding the approach a court should adopt in determining whether a record is 'required for the exercise or protection of any rights' Morison AJ said in *M & G Limited* held:[32]

'The words "*required for the exercise or protection of any rights*" should not be interpreted or applied restrictively. There is no basis for a concern that privacy, commercial confidentiality, trade secrets and the like would be in jeopardy if s 50(1)(a) is given a meaning, or is applied in a manner, that sets a relatively low threshold.'

In *Clutchco (Pty) Ltd v Davis* Comrie AJA said:[33]

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[31] *Unitas Hospital* para 30; *M & G Limited v 2010 FIFA World Cup Organising Committee* [2010] ZAGPJHC 43; 2011 (5) SA 163 (GSJ) para 356.

[32] *M & G Limited & others v 2010 FIFA World Cup Organising Committee South Africa Limited & another* [2010] ZAGPJHC 43; 2011 (5) SA 163 (GSJ*)* para 364.

'I think that "reasonably required" in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the legislature in s 50(1)(a).'

In *Unitas Hospital v Van Wyk & another*, Brand JA said:[34]

'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.'

And para 18:[35]

'I respectfully share the reluctance of Comrie AJA to venture a formulation of a positive, generally applicable definition of what "require" means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term "require" with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: the question whether the information sought in a particular case can be said to be "required" for the purpose of protecting or exercising the right concerned, can only be answered with reference to the facts of that case having regard to the broad parameters laid down in the judgment of our courts, albeit, for the most part, in a negative form.'

I respectfully agree with these remarks.

[42] The respondent asserts that the provisions of s 7(1) of PAIA come into play because proceedings have commenced with the granting of the certification application by the high court in the *Nkala* judgment and that the appellants can have access to the requested documents in terms of Rule 35 of the Uniform Rules of Court. I hold a different view. Class actions are *sui generis* in nature, and should not be considered as the ordinary issuing of proceedings. Section 38 of the Constitution provides that 'anyone listed in the section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened'. It can be an individual person or anyone acting as a member of a class. This is a dualistic approach which allows individual persons to exercise their rights and approach the courts in their own regard or as a class.

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[33] *Clutchco (Pty) Ltd v Davis* [2005] ZASCA 16; 2005 (3) SA 486 (SCA) para 13.
[34] *Unitas Hospital v Van Wyk & another* [2006] ZASCA 34; 2006 (4) SA 436 (SCA) para 6.
[35] *Unitas Hospital v Van Wyk & another* para 18.

In the latter instance, a member of a class is automatically a co-plaintiff in a matter, which may affect his rights, of which he may have no knowledge. The process may become known to him only after the certification application has been granted or later, when he is invited to exercise the right to opt out. A certification application should therefore not be a bar to individuals from approaching the courts in the exercise and protection of their rights.

[43] The appellants were both dismissed from employment on the grounds of medical incapacity for having contracted silicosis. The extent and nature of such an illness and the cause thereof need to be determined. This information will assist the appellants in exercising and protecting their rights.

[44] The appellants' requests related to the personal information of their employment experiences in terms of their medical surveillance during the tenure of their employment, and more general information about the respondent's mining operations, and their safety and health practices. They were all qualified by the use of the words 'including but not limited to *personal* dust exposure levels'. This gave the respondent the option to exclude what it perceived as irrelevant for the appellants' purposes. The requests were in line with the provisions of s 50(3) of the PAIA as they constituted a request for access to the records containing personal information[36] of the requesters. This cannot be said to have been a so-called fishing expedition,[37] as it is information concerning the appellants and relating to a specific period during which they worked for the respondent. The first appellant was employed by the respondent from 3 January 1987 until 19 August 2003. The second appellant was employed by the

[36] Section 1 of PAIA defines personal information as information not limited to the following:
'(*a*) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved…'.
[37] See *Van Wyk v Unitas Hospital* paras 44 – 46.

respondent from 13 August 1988 until 30 March 2006. In the *Nkala* judgment, the duration of the class period has been certified to commence from 12 March 1965.[38] This information in my view is reasonably required by the appellants for the exercise or protection of their rights as envisaged in s 50(1).[39]

[45] Class actions are a novelty in our jurisprudence. There is no legislation in place that regulates the legal processes in such mass actions. To illustrate this point, the requirements for a certification of a class action were recently laid down by this Court in the *Children's Resource Centre Trust* judgment.[40]

[46] In my view, not all interlocutory applications give rise to the commencement of civil proceedings. So whilst civil proceedings may commence either by way of summons or applications instituted by a person with the necessary locus standi, there are the exceptions to the general rule. For example, in *IGI Insurance Co Ltd v Madasa* it was held:[41]

'An order to serve summons by edictal citation is not an ancillary steps to the commencement of an action. This is illustrated by decision that an application to sue *in forma pauperis* does not constitute the commencement of an action. Kriek J deals with this aspect in the case of *Dave Zick Timbers* (supra at 384 A-D):

"I was referred by Counsel to the cases of *Behr v SA Railway & Harbours* 1924 OPD 309 and *Brummer v SA Railway & Harbours* 1930 OPD 106. Both judgments consider the provisions of section 64 of Act 22 of 1916 which provided that no action shall be brought against the Railway Administration 'unless the same commenced within 12 months after the cause of action arose',

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[38] *Nkala v Harmony Gold Mining Company Limited* para 51.

[39] In particular South African labour law protects employees, and this is even more important in the mining sector due to the conditions that employees are still exposed to for inadequate wages. For example, see the recent Constitutional Court judgment *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa & others* [2017] ZACC 3; 2017 (3) SA 242 (CC) where Cameron J stated, 'Behind that question, with its lawyerly remoteness, lies the grievous struggle for better wages and conditions for the generations of mineworkers who have laid the foundations for this country's wealth. And at its fore is an increasingly intense contest between unions about which will represent the workers in that struggle now.'

[40] *Trustees for the time being of Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) para 26.

[41] *IGI Insurance Co Ltd v Madasa* at 119.

and in both the court came to the conclusion that an application for leave to sue *in forma pauperis* did not constitute the commencement for of an action. In the former case McGregor J said that such an application is not a proceeding—

'… introduced in order to obtain redress or the recognition of a right. But, in order to be put in a position to prosecute the proceedings for redress, or the like. So that the interlocutory, or rather ancillary and preliminary, proceeding does not appear to be a commencement of the action as contemplated by the section.''''

[47] In terms of Rule 40(1)(*b*) of the Uniform Rules of Court:

'*(a)* a person who desires to bring or defend proceedings in forma pauperis, may apply to the registrar who, if it appears to him that he is a person such as is contemplated by paragraph (a) of subrule (2), shall refer him to an attorney and at the same time inform the local society of advocates accordingly.

(b) such attorney shall thereupon inquire into such person's means and the merits of his cause and upon being satisfied that the matter is one in which he may properly act in forma pauperis, he shall request the said society to nominate an advocate who is willing and able to act and upon being so nominated such advocate shall act therein.'

In terms of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa:[42]

'15(1) Any party who is a natural person and who is of the opinion that he or she is indigent may request the registrar for leave to prosecute or defend an appeal *in forma pauperis*.'

The Legal Dictionary[43] describes the phrase '*in forma pauperis*' as one 'that indicates the permission given by the court to an indigent to initiate a legal action without having to pay for court fees or costs due to his or her lack of financial resources.'

[48] The process of certifying a class action has similar traits and purpose to proceedings in *forma pauperis* as it gives the members of the class action an opportunity to claim damages irrespective of the indigency of the class members. It requires the court to safeguard the interests of the class members

[42] SCA rule 15(1).

[43] The Free Dictionary by Farlex '*In Forma Pauperis'* Available at: http://legaldictionary.thefreedictionary.com/In+Forma+Pauperis (accessed on 25 May 2017).

by way of requirements like those set out in the *Children's Resource Centre Trust* case, which must be met before it can grant the certification order. It is unlike other interlocutory applications where it is a mere pre-requisite or a process to establish *locus standi* to proceed with an action. It also gives an opportunity to a class member to decide whether or not to opt out. When a court deals with such matters the ambit of justice should not only be limited to substantive relief but it must also be extended to procedural justice as well. In light of the nature of such proceedings, it cannot be said that they have commenced before an opportunity is extended to members of the class to make an informed decision whether to continue to be part of the class or opt out. A fair balance needs to be achieved in line with rights of the individual members as enshrined in the Bill of Rights.

[49] A restrictive interpretation of s 7(1) of the PAIA should be applied in this case, as advocated in *PFE International v IDC* where the Constitutional Court held:

'When constructing section 7(1) it must be borne in mind that the purpose of PAIA is to give effect to the right of access to information. On the contrary, section 7 excludes the application of PAIA. A restrictive interpretation of the section is warranted so as to limit the exclusion to circumstances contemplated in the section only. A restrictive meaning of s 7(1) will thus ensure greater protection of the right.'[44]

[50] There is no indication on the respondent's papers whether the requests for information by the appellants were ever considered, save that the refusal was because of 'the proceedings' which had commenced. None of the grounds of refusal appearing in ss 66, 67 or 68 of the PAIA were raised by the respondent.

[44] *PFE International Inc (BVI) & others v Industrial Development Corporation of South Africa Ltd* para 18.

[51] I conclude that counsel for the appellants wrongly conceded that proceedings had commenced with the certification application. It is trite that the courts are not bound by wrong legal concessions.[45]

[52] As previously stated, there is no legislation governing class actions in South Africa. The applicable rules to class actions are being developed by our courts. In their quest to develop the law on class actions, courts should take into account the legitimate interest of the litigants and protect their constitutional rights instead of curtailing them. This in my view was not the intended result by this court in the *Children's Resource Centre Trust* case.

[53] It would be an anomaly that the rights of appellants to exercise or protect their rights may be curtailed by a certification application which may not even materialise in a class action or may be abandoned. In the event that it materialises, they may be placed in a position where they should be able to make an informed decision, whether to opt out or not. In *Ferreira v Levin NO & others*, O'Regan J at para 229 stated:

'Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the Plaintiff is both victim of the harm and the beneficiary of the relief.'[46]

The appellants therefore need to be well-versed and informed as to the consequences of a failure to opt out in a class action.

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[45] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5 para 34.
[46] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* [1995] ZACC 13; 1996 (1) SA 984 (CC) para 229.

[54] A similar sentiment was expressed in *Mukaddam* where the court held that the rules of court must facilitate and not hinder access to courts.[47] A pragmatic approach, in particular to the development of the law in relation to class actions, should be adopted in line with the rights enshrined in the Constitution.

[55] I align myself with the persuasive views of Mojapelo DJP in *Goldfields Ltd & others v Motley Rice*[48] where he states:

'The certification application is thus a jurisdictional hurdle or threshold which mineworker applicants must overcome before they may institute the class action. 'The two proceedings, i.e. the class certification application and the class action proceedings, are separate and distinct, although the one may lead to the other. Each has its own legal requirements and will lead to its own judgment.'[49]

[56] As I have said, s 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. This Court in *Children's Resource Centre Trust* was developing the common law. It cannot be accepted that in developing the common law, it disregarded the individual rights of the members of the class action by stating that the certification application amounts to the commencement of civil proceedings. In *Dendy v University of Witwatersrand*[50] this Court stated as follows:

'That courts are enjoined to develop the common law, if this is necessary, is beyond dispute. That power derives from ss 8(3) and 173 of the Constitution. Section 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to "promote the spirit, purport and objects of the Bill of Rights."'

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[47] *Mukaddam v Pioneer Foods (Pty) Ltd & others* ZACC 23; 2013 (5) SA 89 (CC) para 32.
[48] *Gold Fields Limited & others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited & others* [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ).
[49] *Gold Fields Limited and Others v Motley* Rice para 16–17.
[50] *Dendy v University of the Witwatersrand & others* [2007] ZASCA 30; [2007] 3 All SA 1 (SCA) para 22.

[57] In *MEC for Roads and Public Works Eastern Cape*[51] this court emphasized what Chaskalson J stated in the *Amod* judgment. It held that –

'It is abundantly clear, therefore, that the interpretation of the provisions of PAIA must be informed by the Constitution (see s 39(2) of the Constitution), which obliges every court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.'[52]

This court further stated that the requirements of Section 7(1)*(a), (b)* and *(c)* are cumulative and all three must co-exist for the operation of the Act to be excluded.[53]

[58] Having found that the proceedings have not commenced with the launching of the certification application, it is unnecessary to address the other requirements of s 7(1) of the PAIA.

[59] As pointed out above, the respondent contended that the request for information by the appellant was a fishing expedition, as Mr Spoor's firm was involved in the certification application as well and that they already had sufficient information to advise the appellants as they had submitted draft particulars of claim in the certification application. The respondent extensively relied on the *Unitas* judgment which discouraged fishing expeditions or pre-litigation discovery.[54] However, this Court in *Unitas* held that, it was not appropriate to formulate a positive, generally applicable definition of 'require' because ultimately whether or not information was required depended on the particular facts of the case. The facts in *Unitas* are distinguishable from the facts in this matter as the respondent is in possession of all the material that the appellants require to exercise their rights unlike Mrs Van Wyk in *Unitas*. The

[51] *MEC for Roads and Public Works Eastern Cape & another v Intertrade Two (Pty) Ltd* [2006] ZASCA 33; 2006 (5) SA 1 (SCA).
[52] *MEC for Roads and Public Works Eastern Cape* para 11.
[53] *MEC for Roads and Public Works Eastern Cape* para 12.
[54] *Unitas Hospital v Van Wyk & another* above.

knowledge of the attorney or his involvement in a class action is knowledge to a broader claim of the member of the class action, but not sufficient to give legal advice to these particular clients. There is no alternative source for the appellants, save for the PAIA process to access their personal records from the employer.

[60] As stated above, s 9(e) of the PAIA sets out the objects of the Act as being 'generally, to promote transparency accountability and effective governance of all public and private bodies.' The lives of multitudes of indigent mine workers are at stake, including the appellants. A general refusal will not be in line with the objects of the Act.

[61] The application in the court a quo was based on a different premise other than that the information was requested for purposes of being advised whether to opt out or not. This Court has the discretion to deal with an issue that was not pleaded, as long as it does not materially affect the gist of the application and it will lead to the same conclusion as it relates to the exercise and protection of rights. This route has been followed in our courts as in *Middleton v Carr*[55] where the court said:

'…as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground to thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done, if the issue is treated as being before the court.'

[55] *Middleton v Carr* 1949 (2) SA 374 (A) at 385–386.

[62] For these reasons, I would uphold the appeal.

YT Mbatha
Acting Judge of Appeal

Molemela AJA:

[63] Like my sister, Mbatha AJA, I respectfully disagree with both the outcome of the appeal and the reasoning of the judgment of Gorven AJA (the majority judgment), albeit for slightly different reasons. The facts of this matter and the issues to be decided have been eloquently set out in the majority judgment and need not be repeated here.

[64] I must point out from the outset that I agree that 'required' in the context of s 32(1)(*b*) of the Constitution does not denote 'absolute necessity' and means 'reasonably required'.[56] Indeed, the same meaning can also be attributed to the phrase 'required for the exercise or protection of any rights' set out in s 50(1)*(a)* of the PAIA. It is crucial to bear in mind that s 2(1) of the PAIA enjoins courts to, when interpreting a provision of PAIA, prefer a reasonable interpretation that is consistent with the objects of the Act. Furthermore, the objects of the PAIA stipulate that 'courts should generally encourage transparency, accountability and effective governance in private institutions'.[57]

[65] In paragraph 17 of the main judgment it is stated that ' …the underlying reasons given for why the records are required do not relate to the exercise of

[56] *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31; 2016 (1) SA 132 (CC) para 31.
[57] Section 9 of the PAIA.

the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, do not meet the test of the records being required to "exercise or protect" the right relied upon.' I disagree with that view because it, with respect, pays lip service to the fact that the nature of the enquiry envisaged in s 50(1) of the PAIA is fact-based.[58] The information that was requested on behalf of the appellants is set out in detail in the majority judgment and I need not repeat it. Significantly, the requested records included, inter alia, information pertaining to the measurement of the appellants' exposure to silica dust levels during the period of their employment, including measures taken by the respondents to protect the appellants from contracting silicosis. The importance of this information is illustrated by the fact that in the *Nkala* judgment, the High Court recognised that 'ultimately each class member must prove his claim in its entirety if he is to succeed….in other words, even after the common issues are dealt with and finalised there nevertheless remains the issue of each mineworker having to prove his own case.'[59]

[66] In argument before us, it was contended on behalf of the appellants that they require the records in question for purposes of deciding whether to opt out of class action. To deny the appellants' request on the basis that this was not the case made out in their papers simply fails to take into account that the appellants' request for the information was made prior to the granting of the certification order. When the certification order was granted, it was coupled with an opting out clause stipulating a certain deadline. In my view, the information sought by the appellants relates to the exercise of the right to claim damages arising from, inter alia, the statutory duty of care owed by the respondents to them as their employees. The appellants have, in my view,

[58] *Unitas Hospital v van Wyk & another* above para 18.
[59] *Nkala & others v Harmony Gold Mining Company Limited & others* above para 77.

'established an element of need' in respect of the records they are seeking.[60] I therefore agree that the requested information is critical to the appellants' decision regarding whether or not to opt out of the class action. Such information will undoubtedly assist them in the formulation of their own individual claims should they decide to opt out.[61] An important consideration is that class members who have opted out have actively excluded themselves from being members of the class and are therefore no longer allowed to be part of the class action.[62] It is therefore imperative that a member of a class faced with a choice of opting out of a class action by a certain date be afforded the opportunity to make an informed decision. As I see it, this necessitates that the class member be granted such documents as would assist him or her, as the requester, to either avoid being part of the litigation or in the formulation of the requester's separate claim.

[67] The seriousness of a decision whether or not to litigate and the importance of granting access to the information requested were aptly described by Cameron J in the following terms in his minority judgment in *Unitas* (The majority judgment did not take issue with the dicta expressed in the passage below):

'[I]nstitution of proceedings is an immense step. It involves a massive commitment in costs, time, personnel and effort. And it is fraught with risk. Where access to a document can assist in avoiding the initiation of litigation, or curtailing opposition to it, the objects of a statute suggest that access should be granted.'[63]

I echo these sentiments.

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[60] *My Vote Counts NPC v Speaker of the National Assembly & others* (supra) at para 31.
[61] That class members who opt out can still pursue their claims individually is evident from the Amended Notice which is Annexure B(1) of the certification court order. Also see the requirements prescribed in Federal Rule 23(b)(3) and 23(c)(2) of the Federal Rules of Civil Procedure in the United States of America; Sherman EF (1987) "Class Actions and Duplicative Litigation", *Indiana Law Journal* Vol 62: Issue 3, Art 2.
[62] *Cannon v Funds for Canada Foundation*; 1250264 *Ontarion Inc. v Pet Valu Canada Inc*.
[63] *Unitas Hospital v Van Wyk* above para 48.

[68] The majority judgment found that the draft particulars of claim annexed to the certification application are detailed and tend to show that 'the appellants are clearly in a position to formulate their claim'. As correctly argued by the appellants, there are no facts relating to the present appellants in the draft particulars of claim. I am of the view that even if it were to be accepted that the draft particulars of claim as they stand are indeed detailed in relation to all class members, the detailed nature of such draft particulars would be a neutral factor. Draft pleadings are not cast in stone and may be amended.[64]

[69] In taking the facts of this particular case into account, due consideration must be paid not only to the fact that this is a class action potentially involving up to 500 000 class members[65] whose date of employment could date back to as far back as 1965, with only 56 mineworkers being applicants in the certification applications, but also to the fact that the deadline for exercising the right to opt out was 31 January 2017.[66] More importantly, thousands of class members would depend on the attorneys of the 56 representative plaintiffs to timeously invoke the discovery procedures envisaged in Rule 35 of the Uniform Rules of Court[67] on their behalf. This brings me to the provisions of s 7 of the PAIA.

[70] It is common cause that the records requested by the appellants are requested for the purpose of civil proceedings as contemplated in s 7 (1)*(a)* of the PAIA. The majority judgment correctly points out that during the hearing of the appeal, counsel for the appellants conceded that proceedings have

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[64] Ibid para 43.
[65] *Nkala & others v Harmony Gold Mining Company Limited & others* para 7.
[66] Clause 9 of the order made by the court in *Nkala* states: 'It is ordered that the members of the classes will be bound by the judgment or judgments in the first stage of the class action against the mining companies, unless they give written notice to Abrahams, Spoor, or the LRC by 31 January 2017, that they wish to be excluded as members of any of the classes against each or any of the respondents.'
[67] In their article with the title *Limiting Relitigation by Defendant Class Actions from Defendant's Viewpoint*, published in *The John Marshall Review* Volume 4 Issue 3, Theodore and Anderson observe that 'if the class member's exposure is great enough, he may be less than content at not being in control of his destiny and at being "foreclosed by" the ideas of other class members who are participating representatives'.

commenced as contemplated in s 7(1)*(b)* of the PAIA. Significantly, an acceptance that this concession was correctly made does not necessarily lead to a conclusion that the appellants are precluded from requesting information in terms of the provisions of s 7 of the PAIA. It merely takes us to the next leg of the enquiry envisaged in s 7(1)*(c)* of the PAIA: whether the production of or access to the requested record is provided for 'in any other law.' This is so because s 7(1) of the PAIA bars the provision of requested records only if all the three criteria specified in that section have been met. The crucial question is whether the Uniform Rules of Court provide mechanisms in terms of which the appellants may request the records and thus equate to any other law as contemplated in s 7 (1)*(c)* of the PAIA. In my view, the answer is in the negative for the reasons that follow. First, the relatively long time that it may take for a class action case to reach trial should not be under-estimated.[68] Secondly, as correctly argued by the appellants, the certification of class action does not oblige the representative plaintiffs to institute action. It must be borne in mind that in terms of Rule 35 of the Uniform Rules of Court, discovery notices are normally filed after *litis contestatio.* In this particular case, the court in the *Nkala* judgment expressly acknowledged that given the magnitude of the class action, the stage when *litis contestatio* would be reached was still 'a very long way off'.[69] It is therefore not inconceivable that even if the representative plaintiffs did decide to institute action, they could file the discovery notices just before or well after the deadline for opting out. The potential prejudice for the appellants and the rest of the class members is self-evident.

[71] The respondents' contention that the representative plaintiffs have the right , with leave of the court to seek earlier discovery of documents in terms of Rule 35(1) of the Uniform Rules of Court, does not detract from the fact that

[68] In *Mandeville v The Manufacturers Life Insurance Company* 2014 ONCA 417 (CanLII) the certification application was argued in 2002 but the trial was only finalized in 2008.
[69] *Nkala & others v Harmony Gold Mining Company Limited & others* above para 210.

they are not obliged to do so. In my view, the discovery procedures open to the representative plaintiffs in terms of Rule 35 of the Uniform Rules of Court should not serve as a bar to the thousands of class members who may, immediately upon receiving notice of a class action, wish to request access to records for purposes of assessing the viability of their claims with a view to deciding whether or not to opt out. Put differently, the representative plaintiffs should not have the exclusive right to request information on behalf of all class members before the deadline for opting out has passed.

[72] Having considered the objects of the PAIA and all the circumstances of this case, including the magnitude of the class action, the unprecedented range of legal representatives involved in the matter,[70] the narrow parameters pertaining to the exercise of the right to opt out in this particular case and the demonstrable lack of assurance that invoking Rule 35 would yield the result sought by the appellants, I agree with the appellants' argument that the provisions of Rule 35 do not equate to procedure 'provided for in any other law' as contemplated in s 7 of the PAIA. Consequently, even if it were to be accepted that the records, which are reasonably required by the appellants, are for the purpose of civil proceedings which have already commenced, there is no legal impediment to the appellants' request and they are therefore fully entitled to the requested information.

[73] For all the reasons mentioned above, I am of the view that the request for the records meets the threshold envisaged in s 50(1) of the PAIA and that such a request is not precluded by the provisions of s 7 of the PAIA. In my view, the facts of this case illustrate the inadequacy of the current discovery procedures provided by the Uniform Rules of Court for purposes of class action proceedings. This emphasizes the need to heed the Law Commission's

[70] *Nkala & others v Harmony Gold Mining Company Limited & others* supra para 9.

recommendation of the promulgation of legislation that will lay down the procedure applicable to class actions in South Africa.[71]

[74] For all these reasons, I would uphold the appeal with costs.

MB Molemela

Acting Judge of Appeal

[71] South African Law Reform Commission Project 88 '*The Recognition of Class Action in South African Law'* at para 3.1.2; Cilliers et al, Herbstein and van Winsen, *Civil Practice of the High Court of South Africa* (2009) 199 – 201 submit that appropriate legislation and rules of court are needed for class actions.

Appearances

For the Appellants:	A Bester (with him R Itzkin) Instructed by: Richard Spoor Incorporated, Johannesburg Webbers, Bloemfontein
For the Respondent:	P Kennedy SC (with him I Currie) Instructed by: Edward Nathan Sonnenbergs, Johannesburg Honey Attorneys, Bloemfontein