THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 189/2012
Reportable

In the matter between:

BHP BILLITON PLC INCORPORATED	**FIRST APPELLANT**
HILLSIDE ALUMINIUM (PTY) LTD	**SECOND APPELLANT**
and	
JAN GEORGE DE LANGE	**FIRST RESPONDENT**
MEDIA 24 LIMITED	**SECOND RESPONDENT**
ESKOM HOLDINGS LIMITED	**THIRD RESPONDENT**
MOTRACO-COMPANHIA DE TRANSMISSAO DE MOCAMBIQUE SARL	**FOURTH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**FIFTH RESPONDENT**

Neutral citation: *BHP Billiton PLC Inc v De Lange* (189/2012) [2013] ZASCA 11 (15 March 2013)

Coram: Mthiyane DP, Cloete, Mhlantla, Leach and Petse JJA

Heard: **8 November 2012**
Delivered: **15 March 2013**

Summary: Promotion of access to Information Act 2 of 2000 ─ Right of access to information in the hands of Eskom, a public body ─ compliance with s 78(2) ─ point in limine that application to compel out of time dismissed by majority of the SCA.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Kgomo J sitting as court of first instance):

1 The appeal is dismissed save for paragraphs 166.4.1 and 166.4.2 of the order of the court a quo which are set aside and replaced with the following:

'1 The first respondent (Eskom) is ordered to pay the costs of the application including the costs of two counsel.'

2 No order is made as to costs on appeal.

JUDGMENT

MTHIYANE DP (MHLANTLA AND PETSE JJA CONCURRING):

[1] This appeal arises from a successful application by the first and second respondents (Media 24) against the appellants (Billiton) in the South Gauteng High Court (Kgomo J) in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). Media 24 had made a request to Eskom Holdings Limited (Eskom), the third respondent, for information concerning two contracts concluded during the 1990's that Eskom has with Billiton, for the supply of electricity to two smelters that produce aluminium. These smelters are the Hillside smelters of Richards Bay and Mozal smelter of Maputo, Mozambique both of which belong to the Billiton group of companies. In terms of these contracts Mozal is

entitled to receive electricity from the 1990's until March 2026 and Hillside, until 2028, at a lower rate than the standard tariff.

[2] In terms of the Constitution everyone has the right of access to any information held by the State.[1] PAIA is national legislation contemplated in s 32(2) of the Constitution that was introduced to give effect to the right of access to information. Section 11(1)*(a)* and *(b)* of PAIA provides:

'**11 Right of access to records of public bodies**

(1) A requester must be given access to a record of a public body if—

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

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'[2]

The information sought by Media 24 is in the possession of Eskom, a 'public body' mentioned in s 11(1) of PAIA. Because the information is in the possession of a public body, Media 24 is not required to give reasons why the information is sought. The position would be otherwise if the information relating to the two contracts was in Billiton's possession. In that event Media 24 would have had to show that it requires the information for the exercise or protection of its rights.[3]

[3] Although Media 24 was not obliged to give its reasons for requesting the information, given that such information is in the hands of a public body, they can be readily deduced from the extent of the public interest generated by the subject matter of these two contracts. The contracts relate, after all, to the supply of electricity by Eskom and the problems experienced by it.

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[1] See s 32(1)*(a)* of the Constitution.

[2] Chapter 4 sets out various grounds for refusal of access to records which are not relevant to the determination of this matter. As will become clearer later in the judgment access to information relating to the two contracts was refused on the basis of ss 36(1)*(b)* and 37(1)*(a)* of PAIA.

[3] Section 32(1)*(b)* of the Constitution.

[4] To all intents and purposes Eskom is the sole provider of electricity in this country. The two smelters, Hillside and Mozal, consume 5.68 per cent of Eskom's total base load electricity capacity. In 2008 the electricity supply was repeatedly interrupted and the country was afflicted by regular power outages. Eskom was unable to sustain a consistent electricity supply and was obliged to resort to load shedding. Its lack of capacity was compounded by the unhealthy financial situation in which it found itself, as reflected in its financial statements for the year ended 31 March 2009. According to its financial statements for the year ended 31 March 2009, Eskom incurred an operating loss of R3,2 billion. In addition in that same year of its financial statements, Eskom reflected a further loss (on embedded derivatives) of R9,5 billion.

[5] The deponent to Media 24's founding affidavit[4], averred that 'the operating loss of R3,2 billion is an actual loss made by Eskom in the financial year concerned' and stated further that [t]he loss of R9,5 billion on embedded derivatives represents the assessment by Eskom of the likely losses that it will incur due to exposure to embedded derivatives over future years'. Media 24 is of the view that the embedded derivatives arise entirely out of the contracts that Eskom has with Billiton.

[6] In its answering affidavit Billiton, through its deponent,[5] did not deny that Eskom suffered an operating loss of over R3,2 billion. Billiton accepted Eskom's financial statements for the year ended 31 March 2009 and averred that they spoke for themselves. As to 'embedded derivatives', again the loss was not denied but the deponent averred that the 'loss' in respect of embedded derivatives did not arise solely from the contracts.

[4] Jan George de Lange.
[5] Johanna Smit dated 14 May 2010.

The deponent then went on to disclose that the effect of the pricing formula stipulated in the contract was simply that the price paid by Billiton for electricity in terms of the contract was lower than the standard tariff. Billiton then argued that from 'an accounting perspective', the contracts were 'not loss making' and were contributing towards Eskom's operating profits, albeit at smaller margins than might have otherwise been the case.

[7] The situation in which Eskom found itself and the perceived relationship between these contracts and the problems Eskom experienced gave rise to considerable public interest, which culminated in parliamentary debates, where the appropriateness of these contracts was questioned. Other factors that bothered the public representatives and the public were, according to Billiton:

(a) The gross disparities between the amounts paid by ordinary consumers for electricity;

(b) The effect of these contracts on the substantial losses incurred by Eskom;

(c) The effect of the contracts on the substantial tariff increases, imposed at Eskom's request, on the ordinary South African consumers; and

(d) The relationship between the present contracts and power outages suffered by the public in South Africa since 2008.

[8] Against this backdrop and the heightened public interest regarding these two contracts, Media 24, seeking to inform the South African public on the issue, submitted a request for access to information in terms of PAIA to Eskom on 30 June 2009. In that request it sought the following documents—

'25.1 The bulk purchase agreement for the supply of electricity by Eskom to the Hillside Aluminium Smelter in Richards Bay;
25.2 The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo;
25.3 The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.'

[9] On 29 July 2009 Eskom refused the request, advancing various grounds for its refusal. For purposes of this judgment it is not necessary to discuss these grounds.

[10] Media 24 did not pursue Eskom's refusal of this request. It averred that, notwithstanding, it considered Eskom's refusal to be unlawful and incorrect. It took the view that it would be more 'appropriate and prudent' to submit a 'narrower and more specific' request for information.

[11] This it did on 18 September 2009, and in this request Media 24 sought:

'1. All and any documents, or relevant extracts of documents, evidencing the formula for and/or manner of the determination of the price for the supply of electricity by Eskom Holdings Limited or its affiliates to:
a. BHP Billiton Plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa;
and
b. BHP Billiton Plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.
2. All and any documents, or relevant extracts of documents, evidencing the identities of all signatories to all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:
a. BHP Billiton Plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa;

and

b. BHP Billiton Plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

3. All and any documents or relevant extracts of documents, evidencing the date of commencement and date of termination of all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:

a. BHP Billiton Plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa;

and

b. BHP Billiton Plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.'

[12] On 20 October 2009, Media 24 received a response from Eskom to the effect that Eskom had decided to extend the period in which to reply to its request for access to information.

[13] By letter dated 13 November 2009, Eskom communicated its decision to Media 24 acceding to some of its information and refusing access in other aspects. The relevant portion of the letter reads as follows:

'SECTION A: GRANTING ACCESS

Upon consideration of your request for access to information on behalf of Media 24 (trading as Sake24), we have decided to grant access to the following record(s):

1. Identities of all signatories

1.1 The signatories to the electricity supply agreement for Hillside are Eskom Holdings Limited and Hillside Aluminium Limited.

1.2 The signatories to the electricity supply agreement for Mozal are Eskom Holdings Limited, Mozambique Transmission Company (Motraco), Electricidade de Mocambique E.P and Swaziland Electricity Company.

SECTION B: REFUSAL

Upon consideration of your request for access to information, on behalf of Media 24 (trading as Sake 24), we believe that access to the following records should be refused on the ground set out below:

1. The formula for and/or manner of the determination of the price for the supply of electricity

1.1 Having applied our mind, upon consideration of your request, and after been (sic) declined on consent to release the information, Eskom will not disclose:

1.1.1 any documents or relevant extracts of the documents relating to the formula and/or manner of the price determination for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act); and

1.1.2 any documents or relevant extracts of the documents relating to the formula and/or manner of the price determination for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act).

1.2 The requested documents or the relevant extracts thereof contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its contractual negotiations both in South Africa and Mozambique and prejudice it in commercial competition.

1.3 Should Eskom disclose the documents or relevant extracts of the documents relating to the formula and/or manner of the price determination, Eskom will be in breach of a duty of confidence owed to either Hillside Aluminium Limited or Motraco.

2. The date of commencement and date of termination of all written agreements─

2.1 Having applied our mind, upon consideration of your request, and after been (sic) declined consent to release the information, Eskom will not disclose:

2.1.1 any documents or extracts of documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act); and

2.1.2 any documents or extracts of documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act)

2.2 The requested documents or the relevant extracts thereof contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its contractual negotiations and prejudice it in commercial competition.

2.3 Should Eskom disclose the requested information, Eskom will be in breach of a duty of confidence owed to Hillside Aluminium Limited or Motraco.'

[14] Media 24's second request concerned the following parts of the agreement:

- The pricing formulae;
- The signatories to the agreements; and
- The date of commencement and dates of termination of the agreements.

[15] It was as a result of Eskom's refusal that Media 24 launched the application in the high court. Eskom elected to abide the decision of the court. In this court, Billiton no longer contends that there was any lawful basis for refusing the request in respect of the signatures and the dates of commencement and termination of the contracts. Despite this, however, it refuses to provide the information concerned by relying on a point in limine to the effect that Media 24's second request was out of time.

[16] In respect of the pricing formulae, Billiton submits that the request was lawfully refused in the light of ss 36(1)(*b*), 36(1)(*c*) and 37(1)(*a*) of PAIA. Media 24 joins issue with Billiton in this regard. First, it asserts that none of the grounds of refusal relied on by Billiton justified the refusal of the request under PAIA. Second, if any of the grounds of refusal had been established, the information still had to be provided pursuant to the 'mandatory disclosure in the public interest' right in s 46 of PAIA. Third, it advances certain interpretations of s 37(1)(*a*) and the public interest override provision in s 46 of PAIA. In the view I take of the matter, it is not necessary to deal with the second and third contentions of Media 24.

[17] The appeal, which is before this court with its leave, raises four issues. The first is the point in limine taken by Billiton. Billiton averred that Media 24's second request was out of time and consequently it was precluded from asserting its right of access to information under PAIA. The second relates to the grounds of refusal in respect of the request in so far as it relates to the disclosure of the signatories to the two contracts and the dates of commencement and the dates of termination of the contracts. The third is the public interest issue. The fourth and final issue pertains to the constitutional challenge.

[18] It follows that if the point in limine is decided in favour of Billiton, that would dispose of the matter entirely. If not, but the arguments advanced by Media 24 in respect of ss 36(1)(*b*), 36(1)(*c*) and 37(1)(*a*) are upheld, it is unnecessary to traverse the issues relating to the s 46 public interest override provisions and the constitutional challenge. I turn to the issues and propose to deal with them in turn.

Point In Limine

[19] In the appeal before us, Billiton persisted in its point in limine. It argued that the application to the high court was launched on 18 March 2010, which is more than 180 days after the refusal of the initial request on 29 July 2009. It contended that the application was out of time and that Media 24 is accordingly time barred. In its turn, Media 24 averred that at the time the application was launched the 180 days had not expired. It argued that the second request was refused in November 2009 and consequently when the application was launched in March 2010, the 180 days had not expired.

[20] The dispute between the parties revolves around whether the second request and the first request is one and the same request. If it is, then it is indeed hit by the 180-day deadline. See *Brűmmer v Minister for Social Development* 2009 (6) SA 323 (CC) para 46. If not, Media 24 is not precluded from asserting its right of access to information in terms of PAIA.

[21] The resolution of the above question is a factual issue and entails examining the contents of both requests. In regard to the contents of the two requests there is, in my view, a marked difference. In the first request Media 24 sought the documents, referred to in para 8 above:

'25.1 The bulk purchase agreement for the supply of electricity by Eskom to the Hillside Aluminium Smelter in Richards Bay;

25.2 The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo;

25.3 The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.'

The second request refers only to the pricing formulae, the signatories to the agreements and the dates of commencement and dates of termination

of the contracts. In my view the two requests are not the same. I therefore conclude that Media 24 was not out of time and accordingly the point in limine falls to be dismissed.

[22] I now turn to Billiton's refusal of access to information based on ss 36(1)(*b*), 36(1)(*c*) and 37(1)(*a*) of PAIA. The first two provisions provide for the mandatory protection of commercial information of a third party. The third - s 37(1)(*a*) - refers to mandatory protection of certain confidential information and protection of other confidential information of a third party. While Eskom abides the decision of the court, it is not prepared to disclose information in its possession relating to the two contracts. If such a disclosure occurs it will lead to the consequences contemplated in the above sections.

[23] In terms of s 36(1) the information officer of a public body (such as Eskom) is obliged to refuse a request for access to a record of the body (here, information relating to the contracts) if the record contains '(*b*) financial, commercial, scientific or technical information, other than trade secrets of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interest of that party' (emphasis added); or '(*c*) information supplied in confidence by a third party the disclosure of which would be reasonably expected' (emphasis added) – '(*c*)(i) to place that party at a commercial disadvantage in contractual or other negotiations'; or '(*c*)(ii) to prejudice that party in commercial competition.'

[24] In s 37(1)(*a*), a public body is obliged to refuse a request for access to a record of the body if such disclosure would constitute an action for breach of a duty of confidence owed to a third party (emphasis added).

[25] The information that Billiton seeks to protect from disclosure relates that relating to the 'pricing formulae'. It contends that if this information is supplied to Media 24 it will fall into the hands of its competitors and consequently cause harm[6] to it as contemplated in ss 36(1)(*b*) and (*c*) of PAIA. As I understand the law, a party relying on these provisions must provide a basis to substantiate its reliance. (See *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (CC) para 15. A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in ss 36(1)(*b*) and (*c*). The party upon whom the burden lies, in this case, Billiton, must adduce evidence that harm 'will and might' happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester.[7]

[26] In *Transnet* this court explained the degree of proof that is required as follows:

'[42] It follows that the difference between *(b)* and *(c)* of s 36(1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In *(b)*, that which is likely is something which is indeed expected. This necessarily includes, at least that which *would* reasonably be expected. By contrast, *(c)* speaks of that which "*could* reasonably be expected". The results specified in *(c)* are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.'[8]

[27] In the high court, Kgomo J noted that Billiton's stance 'rests' on the premise that the pricing information requested is ordinarily

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[6] *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 41.
[7] *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (CC) para 15.
[8] Supra note 6 para 42.

unavailable to its competitors. Billiton fears that its disclosure will harm its financial and commercial interests by informing other industry participants of the production costs of the smelters. It concludes therefore that that is the reason why all aluminium producers vigorously protect information relating to their electricity costs. The same line of argument was pursued by Billiton in the appeal before us. But as pointed out by counsel for Media 24, the papers demonstrate that the premise on which this argument is based is false or at the very least, substantially overstated. The record shows, however, that the information Billiton seeks to withhold is not currently unavailable to Billiton's competitors. There is a significant amount of information about electricity and other costs of aluminium that is readily available to those who can afford to pay for it. Media 24 put up a brochure by a company called Brook Hunt, which is dedicated to providing specific and continually updated information about costs of aluminium smelters. The costs of purchasing this information from Brook Hunt would be approximately R200 000 ─ an amount well beyond the means of an average South African consumer of electricity supplied by Eskom, and consumers undoubtedly have a public interest in the information in the hands of Eskom, which affects the payment and consumption of electricity supplied by Eskom.

[28] In the circumstances, if the information of the kind described above is already in the public domain, as Media 24 has demonstrated, I do not see how giving access to it would result in the perceived harm to Billiton. The harm relied on by Billiton is not of the kind that would be 'likely' to occur or 'reasonably' be expected to occur. (See *Transnet* para 42.) Besides Billiton has already admitted that in terms of the pricing formula, it pays less for electricity than the standard tariff.

[29] As to whether the information is protected from disclosure under s 36(1)(*c*), it is my view that the stance adopted by Billiton is without merit. The information requested by Media 24 is not 'information supplied in confidence' as the section requires. Billiton concluded an agreement with the State entity and the specific information sought constitutes a term in an agreement with the State entity. It is significant that Billiton makes no effort in its heads of argument to explain how s 36(1)(*c*) is applicable.

[30] Turning to s 37(1)(*a*) of PAIA, a public body such as Eskom is obliged to refuse access 'if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement'. Eskom is on record as stating that there is no express provision in either of the contracts that imposes a duty of confidentiality in relation to the provisions of the contracts. It relies on its 'general' practice of not disclosing such information and then makes reference to a confidentiality agreement signed between Eskom, Hillside and Billiton. However Billiton appears to accept that the agreement concerned applies only to the supply of electricity to another site. Billiton relies squarely on a statement, in its affidavit, that the 'parties' unanimously and continuously accepted that they owe each other reciprocal duties of confidentiality, not to disclose any commercial or operationally sensitive or confidential information arising from those agreements.

[31] I agree with counsel for Media 24 that this is insufficient to 'constitute an action for breach of a duty of confidence' as contemplated in s 37(1)(*a*) in the event of a disclosure of the records sought by Media 24. There is no reference in any of the agreements to a term to substantiate the 'general practice referred to above'. In my view s

37(1)(*a*) is inapplicable and does not avail Billiton in its attempt to avoid disclosure of the information sought by Media 24 in terms of the provisions of PAIA.

[32] In the event of the appeal being dismissed both counsel were agreed that this is not a case in which the unsuccessful party, in the event of it being Billiton, should be ordered to pay costs. In the result the appeal is dismissed. There will be no order as to costs.

[33] The final issue is costs in the high court. Eskom persisted in its refusal to disclose the information sought. Its counsel advanced argument opposing the application notwithstanding its decision to abide the decision of the court. The high court, however, mulcted Billiton with the costs of suit and merely ordered Eskom to pay costs up to the filing of its answering affidavit. In this court, both parties submitted that the high court ought to have ordered the State entities to pay such costs. I agree.

[34] In the result the following order is made:

1 The appeal is dismissed save for paragraphs 166.4.1 and 166.4.2 of the order of the court a quo which are set aside and replaced with the following:

‘1 The first respondent (Eskom) is ordered to pay the costs of the application including the costs of two counsel.’

2 No order is made as to costs on appeal.

K K MTHIYANE
DEPUTY PRESIDENT

CLOETE JA (LEACH JA CONCURRING):

[35] I have had the advantage of reading the judgment of the learned Deputy President. I regret that (save for the alteration to the costs order made by the high court) I cannot concur in the process of reasoning followed, the conclusion reached or the order made. In my view the point in limine taken by Billiton is decisive; Billiton should in any event succeed on the merits; and the appeal should be allowed.

[36] Section 78(2) of PAIA provides that a requester such as Media 24 has 30 days to apply to a court for the sort of relief it seeks in these proceedings. The reported judgment of the Constitutional Court in *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC) reflects that the court ordered, inter alia, that:

'*(e)* The words "within 30 days" in s 78(2) of the Promotion of Access to Information Act 2 of 2000 are declared to be inconsistent with ss 32 and 34 of the Constitution and s 78(2) is declared to be invalid for that reason.

(f) The declaration of invalidity made in para *(e)* above is suspended for a period of 18 months from the date of this order [13 August 2009] to enable Parliament to enact legislation to correct the inconsistency which has resulted in the declaration of invalidity.

(g) Pending the enactment of legislation by Parliament or the expiry of the period referred to in para (*f*) above, whichever occurs first, the words "within 30 days" in s 78(2) of the Promotion of Access to Information Act 2 of 2000 shall be replaced by the words "within 180 days from the date when the requester receives notice of the decision on internal appeal".

(h) Pending the enactment of legislation by Parliament or the expiry of the period referred to in para *(f)* above, whichever occurs first, a court considering an application contemplated in s 78(1) of the Promotion of Access to Information Act 2 of 2000 shall have the power to extend or condone non-compliance with the period of 180 days referred to in para *(g)* above.'

I have obtained a copy of the judgment filed at the Constitutional Court and it appears from p 47 thereof that para *(g)* of the order does not contain the words 'on internal appeal'. It would further appear from the judgment itself that the reference to 's 78(1)' in para *(h)* of the order should have been, or should have included, a reference to 's 78(2)' and the appeal was argued by both sides on that basis. Parliament did not enact the legislation contemplated in the order within the period of suspension laid down in para *(f)* of the order and has not done so since.

[37] The first request by Media 24 to Eskom was made on 30 June 2009 and it was refused on 29 July of the same year. The full and exact terms of the request were for:

'a) The terms and Conditions (ie "The Bulk Purchase Agreement") between Eskom Holdings and its affiliates, and Gencor/Alusaf for the supply of electricity by Eskom Holdings and its affiliates, to Alusaf, an affiliate of BHP Billiton plc, formerly Gencor, for the operation of the Hillside aluminium smelter in Richards Bay, South Africa.

b) The Terms and Conditions (ie "The Bulk Purchase Agreement") for the supply of electricity by Eskom Holdings to Mozal, an affiliate of BHP Billiton plc, for the operation of the Mozal aluminium smelter in Maputo, Mozambique.

c) The total and final invoices containing the total and final amounts due by BHP Billiton plc or its affiliates for the supply of electricity to the said Hillside aluminium smelter and the Mozal aluminium smelter for the financial years ending March 2007, March 2008 and March 2009.'

Shorn of verbiage, Media 24 wanted access to the contracts between Eskom and Billiton for the supply of electricity and the invoices in respect thereof for three years.

[38] The second request was made on 18 September 2009 and refused some two months later on 30 November. The terms of this request are set out in para 11 of the judgment of the Deputy President. What was

requested was the pricing formula in the contracts for the supply of electricity by Eskom to Billiton together with the duration of, and the identity of the signatories to, the contracts.

[39] The reason for the second request, preceded by some background, is given in Media 24's founding affidavit as follows:

'On 30 June 2009, I submitted a request for access to information in terms of PAIA to Eskom. I refer to this as the "initial request". I stress that this initial request is not the subject of the present application and I mention it simply by way of background. A copy of the initial request is attached . . . . In that request I sought the following documents:

1 The bulk purchase agreement for the supply of electricity by Eskom to the Hillside Aluminium Smelter in Richards Bay;

2 The bulk purchase agreement for the supply of electricity by Eskom to the Mozal Aluminium Smelter in Maputo;

3 The total and final invoices containing the amounts due by Billiton to Eskom in respect of the electricity for the smelters for a period of three years.

On 29 July 2009, Eskom refused this initial request. A copy of its letter refusing the request is attached . . . . It relied on a variety of grounds for its refusal.

Notwithstanding the fact that I and the second applicant considered Eskom's refusal to be unlawful and incorrect, we ultimately took the view that it would be more appropriate and prudent for a narrower and more specific request for information to be filed. Accordingly, we did not pursue any review in respect of Eskom's decision in relation to the initial request.'

[40] Billiton dealt with these allegations in the answering affidavit as follows:

'I deny that, properly analysed, the initial request is not the subject of the present application.

On a perusal of the two request documents, it is clear that the only difference is in the wording used to describe the record sought by [Media 24]. That difference however is illusionary ─ what is sought in [the second request] is inseparably part of

and included in [the first request]. Put differently, [the first request] sought all the terms of [the electricity supply agreements] while [the second request] seeks some, but not all of, those self same terms.

In the circumstances I respectfully submit that the application is out of time and should be dismissed on that basis alone.'

[41] Media 24 in the replying affidavit in turn responded as follows:

'I deny the contents of this paragraph. [Media 24] persist[s] in their view that the first request is not the subject of the present application. As is explained in . . . the founding affidavit, [Media 24] took the view that it would be more appropriate and prudent for a narrower and more specific request for information to be filed than the first request. Accordingly the second request was drawn up and filed.'

[42] An analysis of the terms of the first and second requests shows that despite different wording, all of the information requested in terms of the second request, and more particularly that requested in paragraph 1 thereof (which, I emphasize, is the only information with which this appeal is concerned), was also requested in terms of the first request. Counsel representing Media 24 specifically and correctly conceded in oral argument that this was so; to use counsel's own phrase, 'the signatures, duration and pricing formula were embraced by the first request'.

[43] Media 24 was only entitled to obtain the information refused if it brought court proceedings to compel the furnishing of the documents within 180 days of the refusal. The refusal was communicated on 29 July 2009. The court proceedings culminating in this appeal were commenced more than 180 days later, on 18 March 2010. There was no application for condonation as contemplated in para *(h)* of the order in *Brümmer*. That to my mind is the end of the matter.

[44] I wish to emphasise that the second request cannot be categorized as a new or a different request. The documents requested were more limited than the documents requested in the first request ─ but it is common cause that they were covered by the first request. That being so, refusal of the documents sought in the first request of necessity entailed refusal of the documents sought in the second request. The greater includes the lesser. And the lesser must be taken to have been refused not only as a matter of plain logic, but also because of the provisions of s 28(1) of PAIA which provides:

'(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which─

(*a*) does not contain; and

(*b*) can reasonably be severed from any part that contains,

any such information must, despite any other provision of this Act, be disclosed.'

[45] What Media 24 should have done, if it considered that it required only part of the documents that it had requested in terms of the first request, was to limit the application to compel ─ not make another but limited request. If the position were otherwise, it would defeat the time limit which the Constitutional Court laid down in *Brümmer* ─ for a requester could then make a series of requests for progressively narrower categories or portions of documents, and thereby obtain successive periods of 180 days in respect of each request. That would be manifestly absurd.

[46] The fact that Eskom treated the second request as an independent request cannot redound to the disadvantage of the appellants or serve to circumvent the provisions of PAIA. Media 24's counsel relied on the following dictum in *Millennium Waste Management (Pty) Ltd v*

Chairperson, Tender Board: Limpopo Province 2008 (2) SA 481 (SCA) para 17:

'Moreover, our law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted . . . .'

(The principle is discussed in more detail in *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G-50D.) The argument was that Eskom had by its conduct tacitly waived compliance with the 180-day period. But the time period was not enacted solely for the benefit of the public body (in the present matter, Eskom) but also for the benefit of the third party (in the present matter, Billiton) so that after the lapse of the period, the third party could legitimately assume the danger to have passed and regulate its affairs on that basis, without having thereafter again (and possibly repeatedly) to seek, in terms of chapter 5 of PAIA, to prevent disclosure of information that had already been refused by the public body.

[47] The objects of the Act are spelt out in s 9, and include the following:

'(*a*) to give effect to the constitutional right of access to—

(i) any information held by the State; and

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

(*b*) *to give effect to that right* —

(i) *subject to justifiable limitations*, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance . . . .' (Emphasis added.)

One of the limitations is the time period for compelling the furnishing of the information sought by court proceedings. By amending the period of the time limit in PAIA, the Constitutional Court in *Brümmer* necessarily

recognised the constitutionality of this very provision as amended. I repeat that in this matter there was no application for condonation. Media 24's attitude therefore amounts to this: We have not brought ourselves within the constitutionally justifiable parameters laid down in PAIA for compelling information that has been refused; we make no excuse for that; but we want the information anyway.

[48] I am perfectly conscious of the public debate that surrounds the provision of electricity by Eskom to Billiton. It is already known that Eskom supplies about six per cent of the electricity generated by it to Billiton, and at a rebated rate. It is not necessary to consider what access to the precise manner of determination of the price paid by Billiton to Eskom for electricity would contribute to that debate. A refusal to allow access to that information is not to stifle the debate, but rather to enforce a specific requirement of a statute that (I say yet again) the Constitutional Court has held passes constitutional muster (once amended) , and thereby to uphold the rule of law.

[49] Although it is strictly speaking unnecessary for me to do so, I would briefly record my respectful disagreement with the majority judgment on the merits as well. No argument was addressed to this court based on s 35(1)(*c*) and it can therefore be ignored.

[50] So far as s 36(1)(*b*) is concerned, the brochure produced by Brook Hunt refers to 'details of power source and energy costs variables' and 'comprehensive cost leagues and graphs showing historic and forecast costs . . . to allow clients to assess change in costs', and the spreadsheet annexed to the Deutsche Bank report entitled 'Aluminium: Where is fair value?' (also annexed to the replying affidavit) gives as its source of

information 'Brook Hunt, DB estimates'. That indeed is what Brook Hunt produces ─ information on which *estimates* can be based. That is a far cry from the precise manner in which the cost of electricity from Eskom paid by Billiton has in the past been and will in the future be calculated, which is the information Media 24 seeks. Nor do I believe that Media 24 can remotely be said to have rebutted the detailed and motivated evidence of Dr Von Szczepanski of Billiton that in the aluminium business globally, the prices paid for inter alia electricity are a closely guarded secret because otherwise the producer would be at a severe competitive disadvantage. The very fact that Brook Hunt produces estimates of such prices (and it is not the only company that does so) that it sells at a considerable cost, bears out this statement and negates any conclusion that the prices are 'in the public domain'.

[51] In any event, these being motion proceedings, Billiton's evidence must be accepted: *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) paras 13 and 14. The rule applies equally to the situation where the onus is on the respondent, in casu, Billiton, as this court has repeatedly said in at least 15 reported judgments spanning the last quarter of a century ─ starting with *Ngqumba v Staatspresident*; *Damons NO v Staatspresident*; *Jooste v Staatspresident* 1988 (4) SA 224 (A), and continuing, most recently, with *President of the RSA v M & G Media Ltd* that was decided in the context of PAIA and is therefore directly in point. The rule is dictated not by the incidence of the onus but by the nature of the proceedings the applicant, in casu, Media 24, has chosen to institute. Therefore whilst I accept, as pointed out by the Deputy President in para 26 of his judgment, that a party who relies on s 36(1)(*b*) of PAIA has a burden of establishing that it will suffer harm as contemplated in the section; and whilst I also accept the degree of proof

required as set out by the Deputy President in para 27 of his judgment, the position is this: in the event of a conflict of fact (and save in exceptional circumstances as mentioned in *President of the RSA v M & G Media Ltd*, para 13, that are not present here) the question whether Billiton has discharged the onus must be decided on the facts put forward by it. It has manifestly discharged the evidential burden to allege sufficient facts that will justify refusal of the information sought by Media 24, as required by *President of the RSA v M & G Media Ltd*, para 14; and as Media 24 did not seek a reference to evidence or to trial on this (or any other) point, the veracity of Billiton's evidence must be accepted.

[52] So far as s 37(1)(*a*) is concerned, the requirements of that section were in my view satisfied by the following evidence. Eskom said:

'Eskom owes a duty of confidentiality to its customers in relation to information concerning the contractual arrangements between them.'

Billiton said:

'The parties unanimously and continuously accept that in respect of the [electricity supply agreements] they owe each other reciprocal duties of confidentiality, not to disclose any commercially or operationally sensitive or confidential information arising from those agreements. More particularly, Eskom has since inception of the agreements acknowledged that, particularly the pricing information is extremely sensitive and confidential and that disclosure thereof would be severely detrimental to Billiton.

Eskom has at all times been aware that all aluminium producers protect, as far as possible, information as to their electricity costs. This practice applies to all aluminium producers, across the globe and has done so for decades.'

This evidence was met in each case by Media 24 with a bald denial in the replying affidavit. There was accordingly no genuine dispute of fact and I repeat that these are motion proceedings. The principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-

635C is therefore applicable and ─ there being no suggestion that the evidence of the appellants is inherently not credible, or so far-fetched or clearly untenable that the court would be justified in rejecting it merely on the papers ─ that evidence must be accepted: *President of the Republic of South Africa v M & G Media Ltd*, para 13.

[53] For these reasons I would allow the appeal and alter the order of the court a quo to read:
'The application is dismissed'.

T D CLOETE
JUDGE OF APPEAL

PETSE JA (MHLANTLA JA CONCURRING):

[54] I have had the advantage of reading the judgments of my colleagues, Mthiyane DP and Cloete JA. I respectfully agree with the order proposed by the learned Deputy President and his reasoning. I am, however, with equal respect, unable to agree with either the reasoning or the conclusion reached by Cloete JA.

[55] Regrettably I have found it necessary to add my own observation in relation to the point in limine. The difference in the approaches of my colleagues seems to me to lie in their interpretation of the content of the first and second requests by Media 24 to Eskom made on 30 June 2009 and 18 September 2009 respectively.

[56] My colleague Cloete JA is of the view that since the information required in terms of the second request was embraced by the first request it would defeat the time limit which the Constitutional Court laid down in *Brummer* 'for a requester to then make a series of requests for progressively narrower categories or portions of documents, and thereby obtain successive periods of 180 days in respect of each request'.

[57] To my mind the question whether repeated requests for information in terms of PAIA would constitute abuse or amount to substantially the same request and thus calculated to circumvent the provisions of s 78(2) of PAIA is an issue which can only properly be determined on a case-by-case basis in the context of the facts of each case.

[58] Although the information covered by the second request would have been encapsulated in the first request had Eskom not declined the latter one should, however, not lose sight of the fact that the former required limited information and was not as extensive as the first request.

[59] Moreover Eskom itself regarded and understood the second request to be distinct from the first one. It requested more time to deal with it and consulted Billiton in regard thereto. Thus Billiton could not have been under any illusion that Media 24 was still pursuing the matter albeit to a limited extent only. Accordingly there would have been no basis, as my colleague Cloete JA suggests, for Billiton (as the third party) to legitimately assume the danger to have passed and regulate its affairs on that assumption.

[60] The proposition by my colleague Cloete JA that Media 24 could and should have instituted proceedings to compel Eskom – once its first

request had been declined – but limit such application to only part of the documents it had requested in terms of the first request, with respect, pays insufficient regard to one of the cardinal objects of PAIA which, in terms of s 9*(d)* thereof, is to establish voluntary and mandatory mechanisms or procedures to give effect to that right [right of access to a record of a public or private body] in a manner which enables persons to obtain access to records of public and private bodies *as swiftly, inexpensively and effortlessly as reasonably possible*. (Emphasis added.)

[61] I therefore conclude that, on the facts of this case, Media 24 should not be penalised for adopting a pragmatic approach which, to my mind, accords with the objects of PAIA when it made the second (but limited) request rather than bringing an application in court to compel which would not have been a swift, inexpensive and effortless manner of gaining access to the information required. Hence my concurrence in the judgment and order of the learned Deputy President.

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X M PETSE

JUDGE OF APPEAL

LEACH JA (CLOETE JA CONCURRING):

[62] Having enjoyed the benefit of reading the judgments prepared by my colleagues in this matter I find myself unable to agree with the reasoning and conclusion of Mthiyane DP and Petse JA in regard to the objection in limine. And although I agree with Cloete JA on this issue, I am constrained to set out reasons of my own for reaching a contrary conclusion.

[63] It is accepted by all that the information to which these proceedings relate, namely, certain of the information contained in the request of 18 September 2009, had been amongst that sought by way of the original request of 30 June 2009. The refusal on 29 July 2009 of the original request thus resulted in the information sought in the second request, and particularly that to which these proceedings relate, having been refused at that stage. Consequently, while my colleague Petse JA is perfectly correct in his finding that the second request related to information 'encapsulated in' and was not 'as extensive' as the first request, this leads me to a contrary conclusion on the point in limine.

[64] The point in limine can only be dismissed if the limited information sought by way of the second request had not already been sought and refused. As I have said, everyone accepts that the information in the second request was contained in the first request and I can see no basis for finding that this information was not refused along with the other information sought in the first request. The more limited nature of the second request cannot alter that simple fact. Accordingly the expiry period for the bringing of an application under s 78(2) of PAIA started

running on 29 July 2009, and was still running when, some six weeks later, the second request was lodged seeking certain of the information originally refused.

[65] Furthermore, the fact that Eskom requested more time and consulted with Billiton after the second request had been lodged does not mean that Billiton was not entitled to assume that the period under s 78(2) which commenced to run on 29 July 2009 would lapse after 180 days. Billiton knew that the information sought in the second request had earlier been refused. The fact that certain of that information had again been requested does not mean that it had to treat the matter as if the period for an application under s 78(2) had not commenced to run in respect of such information. It must be remembered that Billiton's interest in the information asked for differed from that of Eskom. Billiton feared that disclosure would harm its financial and commercial interests in a competitive industry and it was entitled to have those interests protected to the extent that PAIA required persons seeking information to do so within the time period that Act prescribed. Eskom's attitude to the second request was irrelevant to that issue.

[66] Furthermore I do not see how the objectives of s 9(*d*) of PAIA should lead to the mechanisms and procedures prescribed by that Act being ignored. The question is not whether there had been an abuse of the procedures laid down by the Act calculated to circumvent s 78(2) but whether there had been compliance with the Act. Not only did Media 24 not comply but, in addition, by repeating part of its request for information already refused rather than proceeding to seek such information by way of an application under s 78(2), it disregarded the remedy PAIA provided. I fail to see how this can be regarded as a

'pragmatic approach' in line with s 9(*d*) of PAIA to seek that information swiftly, inexpensively and with less effort. The opposite seems to me to be the case.

[67] For these reasons and those set out by Cloete JA in his judgment, I would uphold the objection in limine and, for that reason alone, uphold the appeal. Strictly speaking that conclusion renders it unnecessary to venture an opinion on the remaining issues raised in the appeal but, for completeness, I should record that I find myself in respectful agreement with the reasoning of Cloete JA set out in paras 50 to 52 of his judgment.

[68] For the above reasons I, too, would allow the appeal and alter the order of the court a quo in the manner suggested by Cloete JA.

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L E LEACH

JUDGE OF APPEAL

APPEARANCES

For Appellants:	FA Snyckers SC (with him KS McLean) Instructed by: Mervyn Taback Incorporated, Johannesburg bbers, Bloemfontein
For Respondents:	GJ Marcus SC (with him S Budlender) Instructed by: Willem de Klerk Attorneys, Johannesburg Honey Attorneys, Bloemfontein