FIGHTING COMPANIES FOR ACCESS TO INFORMATION

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• *How the VEJA v AMSA case in South Africa was a victory for activists* •
and the lessons it provides for future freedom of information battles

ABSTRACT

A recent decision of the South African Supreme Court of Appeal (Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance) represents an important vindication of communities' right of access to information held by the private sector. Access to information is often a necessary precondition to the realisation of other rights, in this case environmental. Communities and civil society organisations need to be properly informed in order to ascertain the nature of environmental harm and how to hold accountable those responsible for causing it. In this case study Lisa Chamberlain reflects on the decision and draws out important lessons for communities and the human rights lawyers that support them.

KEYWORDS

Access to information | Environmental rights | Human rights | Corporations | South Africa | Private sector

1 • Introduction

Consider the following example: large-scale industrial development takes place in a thriving peri-urban agricultural community. Over time, cattle owned by members of the community begin to get sick and die. The community notices a grey haze which has settled over their homes, shops and farms and they begin to suffer from a range of respiratory ailments. They find it increasingly difficult to grow crops, and the water in their taps comes out milky and bitter-tasting. People begin to move away from the once prosperous area. Those that remain suspect that their troubles are as a result of pollution caused by the factories down the road. If they are right, the companies that own and run those factories have violated their right to an environment that is not harmful to their health and wellbeing enshrined in section 24 of the Constitution of South Africa.[1] However, those that remain also know that suspicion alone is not enough to prove a rights violation. They need information in order to establish this.

This story is not just a hypothetical example. It is the story of the struggles of the Vaal Environmental Justice Alliance (VEJA) – an alliance of community-based organisations, affected communities and environmental activists[2] - to obtain documents necessary in their struggles to hold ArcelorMittal (AMSA) accountable for widespread pollution in an area known as Vanderbijlpark in South Africa.[3] It is also a story and a struggle which has resulted in one of the most significant access to information judgments in South Africa in the last two decades. This case study will discuss the judgment and offer some thoughts on lessons that can be learned from it.

2 • The legal context

One of the interesting features of the South African Constitution is that it contains a right of access to information, not just from the state but from the private sector as well. Section 32(1) provides that:

> *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.*

Notably, there is a difference between the right enforceable against a public body and that which communities can exercise against the private sector. If the information you seek is in private hands, then you must establish which other right (other than the right of access to information) you seek to exercise or protect.[4] In the example above, the community would need to demonstrate that the information they seek is necessary for the realisation of their section 24 environmental right. The right to information is thus an "enabling" right in the sense that it enables the realisation of other rights

in the Bill of Rights. Realising the information right can therefore be understood as a necessary precondition for other rights to become a lived reality.[5] In this vein, access to information is also a prerequisite for democracy, open debate and accountability.[6]

In South Africa, the right of access to information is explained in the Promotion of Access to Information Act 2 of 2000 (PAIA). PAIA is the result of the directive in section 32(2) of the Constitution that national legislation be enacted to give effect to the right of access to information. PAIA does not replace the constitutional right, but because it purports to "give effect" to it, parties must now assert the right via PAIA.[7] PAIA sets out the nuts and bolts of the system by providing for the appointment of information officers to process requests,[8] the process for how to submit a request,[9] and what legitimate grounds for refusal may exist.[10]

3 • The story

VEJA has spent more than a decade trying to get hold of the results of an environmental impact study commissioned by Iscor (AMSA's predecessor) in 1999. The results of this study were written up in a document known as the Environmental Master Plan, which mapped pollution levels caused by AMSA's activities as well as the company's plan to remediate this damage over a 20 year period. VEJA sought access to the Master Plan in order to establish the extent to which the health problems and the threats to livelihoods were being caused by AMSA, and to assist them in ensuring that AMSA complied with the pollution remediation measures that the company itself had outlined.

When other channels proved unsuccessful, in 2011 VEJA eventually resorted to submitting a request for the Master Plan under the PAIA. The initial PAIA request was refused by AMSA on the basis that VEJA had not indicated which right they needed the Master Plan in order to realise. AMSA also indicated that the Master Plan was technically flawed, out of date and irrelevant.[11] In addition to the case being about securing access to the Master Plan, ultimately the case also became about whether civil society has a role to play in assisting government in monitoring environmental harm caused by the private sector and monitoring compliance with obligations to deal with that harm. This is because, after its other arguments failed, AMSA also took the position that VEJA was not entitled to the Master Plan because they sought somehow to inappropriately usurp the compliance monitoring and enforcement role assigned to government.

4 • The judgment

In September 2013 the South Gauteng High Court ordered AMSA to hand over the requested information.[12] AMSA appealed this decision to South Africa's Supreme Court of Appeal (SCA). In November 2014, the SCA handed down one of the

most significant access to information judgments in democratic South Africa.[13] The court made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct.[14] Regarding the role of civil society, the court confirmed that the regulatory framework applicable to the environmental sector envisages a form of collaborative corporate governance in relation to the environment, based on the notion that environmental degradation affects us all.[15]

The court also emphasised the importance of corporate transparency in relation to environmental issues, stating that "[c]orporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment…there is no room for secrecy and that constitutional values will be enforced."[16] The judgment thus sends a clear message to the private sector, including to multinational corporations operating in South Africa: as envisaged in the South African Constitution, transparency is the default position.

5 • The lessons

So what lessons can we learn from a case like this, particularly as it has played out in a jurisdiction which is one of the few in the world to have a right of access to information held by the private sector.[17] I would like to suggest that there are at least six (but probably more) lessons that we can learn from VEJA's experience.[18]

First, the case clearly confirms the enabling nature of the right of access to information. Without sight of the Master Plan, VEJA was finding it impossible to know the extent of the pollution that had been caused, what action AMSA had undertaken to perform to mitigate the effects of that pollution, and therefore how to hold AMSA to account. The case thus demonstrates how critical it is for communities and civil society organisations to have the ability to compel companies to provide the documentation needed to ensure that other rights contained in a bill of rights (in this case the environmental right) are promoted and protected.

Furthermore, like VEJA, the communities most affected by pollution and other forms of environmental degradation, often do not have the financial resources necessary to brief their own army of scientists to conduct impact assessment studies. Therefore if such studies have already been conducted by experts contracted by either the state or the corporation involved, then an access to information system is an important conduit for accessing the knowledge that already exists.[19]

Secondly, one of the interesting components of the case which has not received much attention is the fact that licences were granted to AMSA by government regulators on the basis of what has turned out to be, according to AMSA's own version of events,

flawed scientific analysis.[20] This must surely bring the credibility of those licences into question. Unfortunately, none of the government departments involved seem to have taken up this issue since the judgment. Nevertheless, the lesson here is that access to information litigation can flush out other important issues which need to be brought to light, as a kind of by-product.

Thirdly, and less positively, the case illustrates just how long it can take to access the kind of information necessary to realise environmental (and other) rights. It has taken VEJA the better part of 15 years to finally get its hands on the Master Plan - and this in a legal system which has a constitutionally enshrined right of access to information enforceable against the private sector, buttressed by dedicated legislation. A conducive regulatory system is therefore not enough. VEJA's experience signals loud and clear that the existence of a right of access to information alone does not change corporate behaviour. More is needed to trigger a shift from a default of secrecy to one of transparency.

The issue of time and delay also has particular implications in the environmental context. In this case, AMSA tried a whole series of arguments to frustrate the process.[21] If access to information requests take too long however, the harm may well occur before the process is resolved. In the environmental sector, there is often a window in which damage to the environment (and thereby to people's health and livelihoods) can be prevented. After that window closes, mitigating the extent of the damage is the best you can do. Timing is thus critical. This is not just a technical matter of legal process.

Perhaps another time-related lesson is to lodge formal requests for access to information as soon as possible (if you have a legal system which allows for that). VEJA tried to access the Master Plan for roughly 10 years before it submitted a PAIA request. This links to the fourth lesson that can be drawn from this case. Even in progressive legal systems with advanced constitutional protections, it remains extremely difficult for communities to realise their rights without access to support from lawyers. In the Centre for Applied Legal Studies' (CALS) experience, lawyerly follow-up to an access to information request significantly increases your chances that the request gets taken seriously.

Unfortunately, the need for legal assistance plays out not only in the PAIA request protest, but also should it become necessary to challenge a decision. Although PAIA provides for an internal appeal against a refusal by a *public* body to grant access, there is no equivalent internal appeal mechanism if your request is denied by a *private* body. In that instance, your only recourse is to approach the courts, as VEJA did. While in theory it should be possible to do so without the assistance of a lawyer, in reality courtrooms and legal processes remain inaccessible and intimidating in South Africa. For a country that has been committed to access to justice for 21 years, this is a disquieting reality that is slowly suffocating rights realisation.

Thankfully, this problem may soon be somewhat mitigated. For several years, civil society activists in South Africa have been calling for some kind of information ombud to make accessing information a quicker, cheaper and generally more accessible process. The Protection of Personal Information Act 4 of 2013 has now introduced an Information Regulator which will have jurisdiction to hear appeals against unsuccessful PAIA requests.[22] The Regulator is currently in the process of being established with a public call for nominations having closed in August 2015. Hopefully, the Information Regulator will operate in such a way that communities are able to challenge attempts by either government or the private sector to block access to information, without the need for assistance from a lawyer.

The fifth lesson that I would like to highlight is also about lawyers – but this time about the forms of collaboration that are possible between human rights lawyers. VEJA is represented by a non-profit organisation called the Centre for Environmental Rights (CER).[23] However, CER is based in Cape Town and the litigation took place in Johannesburg. VEJA needed local assistance because, in South Africa, litigants are required to appoint an address within a few kilometres of the court at which they will accept service of court papers. This is referred to as acting as a "correspondent attorney". In this case CALS acted as correspondent attorneys for VEJA and the CER.[24] Taking on the private sector can often feel like a David and Goliath battle with power skewed in favour of multinational corporations. In CALS' experience, one of the ways to deal with this is to team up with other social justice organisations. Importantly, in social justice work, the possible forms of such collaboration are many and human rights lawyers and activists should think creatively about the possibilities.[25]

Lastly, it is important to remain conscious of the fact that accessing the information you seek is the beginning rather than the end of the process. Subsequent to the judgment, VEJA received and analysed the Master Plan. It is a voluminous document consisting of much scientifically technical material. In addition, it was delivered by AMSA in such a disorganised format that it took several weeks just to organise and index. At the time of writing, VEJA had sent vast sections of the Master Plan to a team of experts to assist them and their lawyers to make sense of the material. Only then will they be able to ascertain the most strategic next step. VEJA has been fortunate to be assisted by a whole range of experts (both technical and legal). Not all communities suffering from the effects of pollution caused by large corporations are in that position.

6 • Conclusion

Cases like this one bring refreshing relief to communities and the human rights lawyers that support them. Such conclusive legal victories are few and far between, and usually take years to build. So when they do come around, they should be celebrated. But in addition to celebration, it is important that we reflect on the

strategies and processes involved in order to extract lessons for the next battle, and to share these with comrades and colleagues involved in similar struggles in other parts of the world. This case has many lessons to offer: about the limits of progressive legal systems, timing, collaboration, access to justice and keeping your eye on the end game. Fundamentally, although the journey to obtaining information may be an arduous one, a right of access to information, particularly one enforceable against the private sector, has the potential to play a powerful enabling role in the quest to realise environmental rights.

NOTES

1 • Section 24 of the Constitution of the Republic of South Africa, 1996 provides that:

"Everyone has the right

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

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

(a) prevent pollution and ecological degradation;

(b) promote conservation; and

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

2 • For more information on Vaal Environmental Justice Alliance (VEJA) see https://www.facebook.com/pages/Vaal-Environmental-Justice-Alliance-VEJA/322703054542182, accessed September 7, 2015.

3 • ArcelorMittal is one of the world's largest steel suppliers.

4 • See Jonathan Klaaren and Glenn Penfold "Access to Information," in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop, 2 ed (Claremont: Juta & Co., 2003), chapter 62.7.

5 • Note that there are other rights which may also be understood as "enabling" rights such as the right to protest and the right to participate in decision-making. Likewise the rights which access to information "enables" extend far beyond just the environmental right. However, this case study will focus on the way in which the right of access to information can facilitate the realisation of the environmental right.

6 • Jo-Marie Burt and Casey Cagley, "Access to Information, Access to Justice: The Challenges to Accountability in Peru" SUR 10 (2013).

7 • Cora Hoexter, *The New Constitutional & Administrative Law*, vol II (Johannesburg: Juta, 2001), 57.

8 • South Africa, *Promotion of Access to Information Act 2 of 2000 (PAIA), February 2000*, sec 17.

9 • South Africa, PAIA, secs 11, 18, 50-53.

10 • Ibid., secs 33-46, 62-70.

11 • This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights Commission and One Way Up Productions which is available at https://www.wits.ac.za/cals/about-us/law-and-film/, accessed April 14, 2016.

12 • South Gauteng High Court, *Vaal Environmental Justice Alliance v Company Secretary of Arcelormittal South Africa Ltd and Another*, Case n. 39646/12.

13 • Supreme Court of Appeal (SCA), *Company*

Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance, 2015 (1) SA 515 (SCA).

14 • For more information and discussion of this case, see http://cer.org.za, accessed September 11, 2015.

15 • SCA, *AMSA v VEJA* (n 13 above) para 71.

16 • Ibid., para 82.

17 • The other jurisdictions in which this is the case include Antigua and Barbuda, Angola, Armenia, Colombia, Czech Republic, Dominican Republic, Estonia, Finland, France, Iceland, Liechtenstein, Panama, Poland, Peru, South Africa, Turkey, Trinidad and Tobago, Slovakia, and the United Kingdom. See Mazhar Siraj "Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective," *Journal of Alternative Perspectives in the Social Sciences* 2, no. 1 (2010): 211.

18 • VEJA is represented by the Centre for Environmental Rights (CER), a civil society organisation working in the environmental justice sector to provide legal and related support to environmental CSOs and communities. See further http://cer.org.za/. Because the litigation took place in Johannesburg, and CER is based in Cape Town, CER has been supported by the Centre for Applied Legal Studies (CALS) who acted as correspondent attorneys in the case. CALS is a human rights organisation based at Wits University's Law School which engages in research, advocacy and impact litigation across its five programmes namely Basic Services, Business and Human Rights, Environmental Justice, Gender and Rule of Law. More information on CALS can be found at http://www.wits.ac.za/law/cals/16858/home.html.

19 • Of course the problem of the independence of experts contracted by a corporation remains, but that is a discussion for another day.

20 • See AMSA's admission in para 32.4.1 of its answering affidavit in the High Court case referred to in SCA, *AMSA v VEJA* (n 12 above) at para 21 and reference to the water use license that was granted on the basis of the Master Plan in VEJA's answering affidavit at para 37.

21 • These included that CER was not properly authorised to represent VEJA, that the Master Plan was flawed and out of date and therefore irrelevant, and that VEJA was not entitled to the Master Plan because in seeking access to it they were trying to usurp a government function.

22 • See South Africa, *Protection of Personal Information Act 4 of 2013* (Popi), November 2013, chapter 5.

23 • CER is a civil society organisation working in the environmental justice sector to provide legal and related support to environmental CSOs and communities. See further http://cer.org.za/.

24 • CALS is a human rights organisation based at Wits University's Law School which engages in research, advocacy and impact litigation across its five programmes namely Basic Services, Business and Human Rights, Environmental Justice, Gender and Rule of Law. More information on CALS can be found at https://www.wits.ac.za/cals/.

25 • For another innovative model pioneered by CALS and CER, see University of the Witwatersrand, Johannesburg, *The Mapungubwe story: A campaign for change*, available at https://www.wits.ac.za/cals/our-programmes/environmental-justice/mapungubwe-watch/ accessed April 14, 2016.

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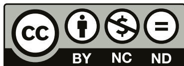

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