



## 08 RULES 13

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### SUMMARY AND ANALYSIS OF THE ACCESS TO INFORMATION RULES IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000

#### 1. INTRODUCTION

The Promotion of Access to Information Act 2 of 2000 gives effect to the right of access to information set out in section 32 of the Constitution, 1996. The Act applies both to information held by the State and by another person that is required for the exercise or protection of any rights.<sup>1</sup>

The Act sets out the instances when information may be accessed, the limits on the right to access information, the procedure for accessing information and the steps that may be taken when access to information is denied. The Act came into operation on 9 March 2001, with the exception of sections 10, 14, 15, and 51 which came into operation on 15 February 2002.

The Act provides for the instance when an application against the decision of an information officer or head of a private body may be brought to court.<sup>2</sup> The Act directs that the Rules Board make and implement the rules for this process, namely rules for section 78 and section 80(3) of the Act.<sup>3</sup> This paper seeks to provide a summary and an analysis of the Draft Rules.

#### 2. RELEVANT SECTIONS OF THE ACT

Part 4: Chapter 2 of the Act deals with 'applications to court'. Section 78 sets out the basis for applications to court while section 79 stipulates the procedure, by which these applications must be brought.

##### 2.1 Section 78

This section deals with applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies. In terms of the Act, a requester or third party referred to in section 74<sup>4</sup> may only apply to a court for appropriate relief in terms of section 82<sup>5</sup> after the

<sup>1</sup> Section 9(a)(i) and (ii) of the Promotion of Access to Information Act, 2 of 2000 (PAIA). This gives effect to section 32(1)(a) and (b) of the Constitution.

<sup>2</sup> Section 78, PAIA.

<sup>3</sup> Section 79, PAIA.

<sup>4</sup> Section 74: Right of internal appeal to relevant authority

(1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1-

(a) to refuse a request for access; or  
(b) taken in terms of section 22, 26 (1) or 29 (3),  
in relation to that requester with the relevant authority.

(2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1 to grant a request for access.

<sup>5</sup> Section 82: Decision on application



requester or third party has exhausted the internal appeal procedure against the decision of the information officer of a public body provided for in section 74.

In terms of section 78(2), a requester may bring an application within 30 days of a decision, to apply for appropriate relief in terms of section 82 on the following basis:

- An unsuccessful internal appeal to the relevant authority of a public body;
- A decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);
- A decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-
  - to refuse a request for access; or
  - taken in terms of section 22, 26 (1) or 29 (3); or
- A decision of the head of a private body-
  - to refuse a request for access; or
  - taken in terms of section 54, 57 (1) or 60,
  - may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

A third party may bring an application to court within 30 days after a decision on the following basis:

- An unsuccessful internal appeal to the relevant authority of a public body;
- A decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; or
- A decision of the head of a private body in relation to a request for access to a record of that body.

## 2.2 Section 79

Section 79 of the Act provides that the Rules Board for Courts of Law<sup>6</sup> must within four years after section 79 becoming operational, make rules of procedure for a court in respect of applications in terms of section 79 and for a court to receive ex parte representations referred to in section 80(3)(a). Prior to the rules being adopted, applications may only be made to a High Court or a court of similar status.

### a. Parliament's Role

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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 refrain 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; or
- (d) as to costs.

<sup>6</sup> The Rules Board for Courts of Law is established in terms of the Rules Board For Courts of Law Act 107 of 1985.



Section 79(3) directs that any rule made in terms of section 79(1) must be approved by Parliament before being published in the Government Gazette.

### **2.3 Section 80(3)(a)**

In terms of section 80(1), a court hearing an application or appeal may examine any record of a public or private body to which the Act applies, and these records cannot be withheld from the court on any grounds. Section 80(3)(a) provides that a court may receive ex parte representations in this regard.

## **3. SUMMARY OF RULES**

### **Rule 1: Definitions**

Any word that is defined in the Act has that same definition in the Rules. Any word defined in the Rules has that meaning.

- This paragraph could be written in simpler language without losing its meaning. For example: "In these rules, words defined in the Act have the same meaning as in the Act."

### **Rule 2: Procedure in an application to court in terms of the Act**

#### **Rule 2(1)**

Any application brought in terms of section 78 of the Act must follow the procedure prescribed in the Rules.

- At present applications may only be brought before a High Court. Once the Rules come into effect applications may be brought before a Magistrate's Court.

#### **Rule 2(2)**

The procedure to bring an application in terms of section 78 of the Act is set out in the Rules. Where the Rules do not stipulate procedure, the rules of the court where the application is brought will apply.

### **Rule 3: Applications**

#### **Rule 3(1)**

An application brought in terms of section 78 of the Act must be brought on notice of motion. The notice of motion must substantially follow the annexed Form.



### **Rule 3(2)**

The notice must set out the applicant's service address which must be within eight kilometres of the court where the application is made.

The notice must inform the respondent that the respondent must-

- give notice of their intention to oppose the application 15 days after receiving the application;
- include a service address within eight kilometre of the court where the application is brought in the notice to oppose; and
- file an answering affidavit within 15 days after the notice of intention to oppose is served.

The notice must also inform the respondent that if a notice of intention to oppose or an answering affidavit is not delivered within the prescribed times, no further notice will be given and the matter will be set down on the court roll to be heard.

### **Rule 3(3)**

The notice of notion must be supported by an affidavit and certified copies of any document that is relied on.

- This clause refers to 'true' copies of documents. 'Certified copies' is the term that is used in everyday usage and would be preferable.

### **Rule 3(4)**

The affidavit must set out the facts on which the application is based. It must indicate whether the internal appeal procedure in terms of section 74 of the Act has been exhausted and include details regarding the date on which this procedure was exhausted. If the internal appeal procedure has not been exhausted, reasons for this must be provided. The affidavit must also explain the relevance of each document that is relied on in the application.

- Section 78 of the Act clearly states that an application may only be brought to court once the applicant has exhausted the internal appeal procedure. However, the Rules allow for an application to be brought where the internal appeal procedure has not been exhausted. This application must include reasons stating why the internal appeal procedure was not exhausted. According to the Rules Board, the reason for including such a provision was to cater for instances where the court may condone non-compliance with the section 78 requirements.<sup>7</sup>

### **Rule 3(5)**

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<sup>7</sup> Rule Board Submission 3.4



The rules direct that, after receipt of the notice of motion, the information officer or the head of a private body must notify all persons affected by the application and attach a copy of the notice of motion.

Within 15 days after receiving the notice of motion, the information officer or the head of a private body must deliver two certified copies of the applicant's initial request and the notification sent to the requester in terms of section 25(1)(b) of the Act. After this has been done, the information officer or the head of a private body must, in writing, notify the applicant of this. The information officer or the head of a private body must deliver to the applicant, a certified copy of the reasons why the initial application was not granted, if this was not already done.

#### **Rule 3(6)**

If the information officer or the head of a private body fails to comply with rule 3(4), the applicant may, in writing, request that the matter be set down and that the court make an order in terms of section 82(b) of the Act.

#### **Rule 4: Representations**

An ex parte application made in terms of section 80(3)(a) to a court in terms of section 80(1) must be made in writing, under oath and may be supported by documentary proof. The application must be filed with the clerk of court five days before the application.

The court may take appropriate steps to inform other parties affected by the application, of the application.

#### **Rule 5: Court fees**

Court fees are payable when an application is made. These fees may be waived by the court in appropriate cases.

- This Rule may assist indigent applicants.

#### **Rule 6: Short title**

These Rules will be called the Promotion of Access to Information Rules.

#### **Rule 7: Commencement**



Refers to the date when the Rules will become operational.

#### **Annexure: Notice of Motion**

The annexed form for the notice of motion gives an applicant an example of the information that the motion should contain.

- The Form is more user friendly than its earlier version. However, it is still not accessible enough to an ordinary person making an application to court.
- Archaic legal terms such as thereof and hereof are used.
- The sentences are long and should rather be simple, short and to the point.
- The Form uses the pronoun 'your' when referring to the respondent. This should have been used more often to make the Form easily understandable. For example the notice could read: "You must give notice of your intention to oppose this application 15 days after you receive this application."

#### **4. General Comments**

- The Rules are not written in plain language<sup>8</sup>. This means that an ordinary person attempting to enforce their rights in terms of the Act will not necessarily find the Rules easily understandable. The aim of the Act is to allow a person to access information in an easy and simple manner. The Rules do not assist in furthering this objective.
- The Rules use the word 'shall' at least five times in the document. Most legislative drafters advise against the use of this word.<sup>9</sup> It is pointed out that 'shall' often bears different meaning in the same document resulting in confusion. A word is presumed to bear the same meaning throughout the document unless a different meaning is indicated. In the Rules 'shall' is used to mean different things. It would be clearer if the drafters used words such as 'must', 'may' or 'should'. This eliminates any confusion.
- This version of the Rules and Form is an improvement on the earlier version. However, much more could have been done to make these documents more accessible to the ordinary person.
- Legal language should not be a barrier to the ordinary person accessing their constitutionally protected rights. All legal documents should attempt to be easily understandable for the intended audience.

<sup>8</sup> One of the criteria in determining whether a document is in plain language is the intended audience. A useful example of a definition for plain language can be found in section 64 of the National Credit Act 34 of 2005.

<sup>9</sup> B. Garner. A Dictionary of Modern Legal Usage. pg 113