African Human Rights and Access to Justice Programme

Legal Opinion Case No. 69

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South Africa: Access To Privately Held Information In The Context Of The Right To Housing

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SUMMARY OF OPINION:
South Africa is a party to all the major International Human Rights Instruments, many of which guarantee the right to freedom of information to an extent, as well as a qualified guarantee to the right to housing. In the present case, South Africa's domestic legislation provides more protection of both of these rights for its citizens. Under South Africa's Constitution and domestic legislation, the State is obliged to prevent Private actors from denying persons information without reasonable justification where such a denial leads to a violation of the right to housing, the right to freedom of information, or the right to non-discrimination.

ISSUE FOR DECISION: This case, a civil action for the horizontal enforcement of provisions of the bill of rights against a private company, Nedbank, in the South Africa, raises two questions: 1) What is the scope of the right of access to information under international law and the South African Constitution? In particular, can this right support a claim by a borrower for information held by a private bank? 2) What challenges can be mounted against a private bank's internal lending policies where those policies appear to erode the effective realization of the right to housing, a protected right? In this case, does Nedbank's policy of redlining – the designation of certain zones and areas as too risky for making housing loans- amount to a violation of the right to housing protected by both the international covenants and the South African Constitution?

This case presents situation, altogether too rare, where national law offers more protection for a right than international human rights instruments. After analysis, I conclude that the applicant's case is strongest under municipal law. In summary, the key legal propositions developed in this opinion are: 1) A borrower's right of access to information held by a bank is, subject to permissible exceptions, enforceable as such being information collected under contract; 2) in addition, and more instrumentally, the borrower may, in this case, be entitled to information because she needs it in order to effectively exercise the right to housing; 3) Similarly the right to housing is enforceable as such but the more compelling argument in this

case**,** I would think, would be that Nedbank's red-lining policy has a disproportionate impact on the poor and, perhaps also, on black people. These propositions are developed in the three parts of this opinion that follow. In the first part, I briefly review the applicable international standards relative to both the right of access to information and that to housing. In the second part, I look at the South African Constitution as well as the *Promotion of Access to Information Act, 2000*. The third part consists of recommendations.

PART 1: THE RIGHT OF ACCESS TO INFORMATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

Rights are hostage to information. But the relationship is interdependent and complex rather than linear. If individuals do not know what rights they have, those rights become vulnerable to invasion and attack. Yet without rights the ability to gain access to information is ruinously diminished. The UN General Assembly has recognised this mutual re-inforcement between rights and information. In its very first Session on the 14th of December 1946, it declared that "freedom of information is a fundamental human right" and it is "the touchstone of all the freedoms to which the UN is consecrated."[1] In 1998, the UN General Assembly returned to this theme, adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Article 6 of that Declaration recognized that information was essential to respect and enforcement of human rights. It stated that everyone has the right, "to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems."

The recognition that access to information is central to the protection of human rights infuses all the key human rights instruments. Article 19 of the Universal Declaration of Human Rights (UDHR), states that "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive* and impart information and ideas through any media and regardless of frontiers."[2] [Emphasis added]

The right and obligations imposed by article 19 are elaborated in the International Covenant on Civil and Political Rights, ICCPR. Article 19 of the ICCPR says that:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

    a. For respect of the rights or reputation of others;
    b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

[1] Resolution 59(1) of 14th of December 1946
[2] Article 19, Universal Declaration of Human Rights, 1948.

Whereas the UDHR and the ICCPR treat the right of access to information as an adjunct to the freedom of expression and opinion, article 9 of the African Charter on Human and People's Rights treats the right of access to information as distinct from the right to hold and express opinions. Article 9 says:-

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

What exactly is the scope of the right protected by article 19? The ICCPR Human Rights Committee first considered this question in its General Comment on the article in 1983. At that time, however, Committee limited itself to violations of article 19 by the state and did not consider at all whether the article could be enforced horizontally against private violators. It revisited the issue in a more general form in its 80th Session held on the 26th of May 2004.[3] At that Session the Committee was concerned about the nature of the general duty to implement the Covenant under article 2. Saying that reservations to article 2 were incompatible with the objects of the Convention within the meaning of the Vienna Convention on the Law of Treaties, the Committee said:

> 6. The legal obligation under article 2, paragraph 1, is both *negative* and *positive* in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.

But as the Committee saw it, there was a positive duty in article 2 requiring states to make laws to protect individuals from private violations. In the Committee's own words:

> 8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. ….the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, *not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. *There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.* …..The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties *to address the activities of private persons or entities*. For example, the privacy-related guarantees of article 17 must be protected by law. *In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination* within the meaning of article 26. (emphasis added)

Though the General Comment seems clear enough that Covenant rights are, to the extent possible, horizontally enforceable there is a dearth of international and comparative jurisprudence on the exact balance to be drawn between the requirements of the right of access to information and the exceptions that human rights laws permit.

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[3] See *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Human Rights Committee, Eightieth Session.

The European Court of Human Rights has considered this question in a line of access to information cases: *Gaskin* v. *United Kingdom*[4], *Leander* v. *Sweden*[5] and *Guerra and Others*. v. *Italy*.[6] Unfortunately, these cases have little comparative value since the European Convention on Human Rights, ECHR is protects this right from "interference by public authority and regardless of frontiers."[7] Indeed in *Leander v. Sweden*, the ECHR appeared to place the matter beyond doubt when it said:

> "[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access… nor does it embody an obligation on the Government to impart… information to the individual."[8]

This holding reflects the orthodox view in relation to the specific wording of that Regional Instrument. Traditionally, the obligations of the bill of rights have been seen as limits on public power. For this reason, the jurisprudence of horizontal enforcement is a novelty. Yet the global burgeoning of private power have impressed courts with the need to outline some public law limits to what private actors can do. For instance in the US, the bill of rights applies, at least formally, only to state action. Yet in a series of decisions - *Shelly v. Kraemer*,[9] *Marsh v. Alabama* and *Burton*[10] *v. Wilmington Parking Authority*[11] the Supreme Court has been willing to apply the obligations of the bill or rights where the private actor "performs a public function"[12] In Canada, the bill of rights applies to organs of the state but not the judiciary. Yet provincial and national legislation regulating private relations must square with the obligations in the bill or rights.

Trawling through the authorities one comes to the following conclusions: 1) None of the major international covenants protects the right of access to information as a stand-alone guarantee. Of the regional instruments only the African Charter protects this right as an adjunct to the freedom of expression and opinion; 2) Though the obligations imposed by UDHR and the ICCPR are, on the authority of the Human Rights Committee, horizontally enforceable, there is a dearth of authoritative case-law on this question. To the extent that comparative case-law has any provenance, it speaks in uncertain and conflicting voices. 3) Where the court is most active, that is, within the 43 member states of the Council of Europe,

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[4] (1989) 12 EHRR 36, [1990] 1 F.L.R. 167, Ect. HR.
[5] (1998) 26 EHRR, 357, 4 BHRC 63, Ect. HR.
[6] (1987) 9 EHRR 433, Ect. HR.
[7] Article 10(1), The European Convention on Human Rights, ECHR
[8] The circumstances of *Leander* were that the applicant was fired from a job with the Swedish government on security grounds. His applied and was refused access to the private information that was said to have justified his sacking. The court settled the issue not on access to information grounds but on article 8 privacy argument. It said that the actions of the Swedisn government had breached the right to respect for private life. This interference was, however, ruled justifiable as a matter of national security. A decade later Leander's lawyer finally got access to Leander's files and it turned out, much to chagrin of Swedish government, that Leander had never been a security risk.
[9] (1948) 334 U.S. 1.
[10] (1946) 326 U.S. 501.
[11] (1961) 365 U.S. 715.
[12] Justice Black in *Marsh v. Alabama.*

the right of access to information under article 10 of the Convention principally prohibits interferences by public authorities.

Though these conclusions are sufficient to support an arguable case against Nedbank, the provisions of the South African Constitution are more explicit and thus preferable. I shall come to this question presently. But first, I must turn to the question of the right to housing.

The Right to Housing under International Law

Under the UDHR the right to housing is part of the guarantee of a minimum standard of life protected by article 25. That article promises to everyone "a standard of living adequate for the health and well-being of himself and his family."[13] Included in that omnibus entitlement is food clothing, housing, medical care, necessary social services and a right to security in the event of "unemployment, sickness, disability, widowhood or other lack of livelihood in circumstances beyond his control." These entitlements are then set down in greater detail in the International Covenant on Economic, Social and Cultural Rights, ICESCR. Even there, though, the right to housing is not itemized as a discrete entitlement. The relevant provision is article 11(1) which states that:

> "the state parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right…"[14]

The Covenant is unclear about the specific mechanisms through which these rights will be enforced. Under article 2 the obligation is "to take steps, individually and through international co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively* the full realisation of the rights recognised in this Covenant by all *appropriate means*, including particularly the adoption of legislative measures." [emphasis added].

The Covenant is full of hedge words: it leaves open many crucial questions. Is there a minimum entitlement? What is considered an effective remedy against violations of rights in the Covenant? Are Covenant rights horizontally enforceable?[15]

As with the right of access to information, there is scanty case-law on the enforcement of the rights in the ICESCR. In comparative terms, the development of case-law has been stunted by injunctions in the constitution that economic and social rights are intended to guide parliament not independent sources of enforceable rights. This is the case in the Constitution of Ireland, India, Uganda and Italy.

Given the text of the Covenant and comparative jurisprudence, this is a case where the South African Constitution offers more protection than international instruments. I turn now to the provisions of the South African Constitution.

PART 2 THE SOUTH AFRICAN CONSTITUTION: APPLICATION OF THE BILL OF RIGHTS

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[13] See article 25(1) of International Covenant on Economic, Social and Cultural Rights, ICESCR

[14] id. 11(1).

[15] Article 5 seems to incorporate a negative duty on the part of everyone to refrain from destroying or limiting the rights in the Covenant. But is it the State only that bears the duty of *progressive* realisation?

The South African constitution is unique in that it makes no distinction between economic, social and cultural rights and civil and political rights. The obligations imposed by both sets of rights are subject to the same general conditions. These are stated in article 8:

> 8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds *a natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

No distinction is made between vertical and horizontal application of social welfare rights. The only limitations that the Constitution countenances are those ones relating to all rights in general and those that are internal to a particular right arising from *the nature of that right* and the *nature of the duty that it imposes*. This means that to determine whether a right imposes a particular obligation or not, one must scrutinize its provisions and assess what interest that right protects and how fundamental to an open and democratic society that right is. This analysis, in turn calls into question, the nature and extent of limitations proposed to a right. Sometimes this can be discerned by scrutinizing the language of the Constitution and sometimes by carrying out a more purposive inquiry. To fix ideas, I look at both the right of access to information and the right to housing.

i. The Right of Access to Information

Unlike the international covenants but more like the African Charter the Constitution of South Africa splits the right of access to information from the freedom of expression. The right of access to information is article 32. It says:-

> 32. (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.

On a plain reading, the Constitution makes a distinction between information held by the state and information held by other persons. Information held by the state is available is available as such. Information held by other persons is available instrumentally, that is, if needed for the exercise and protection of a right. Article 32 requires a law to be enacted and potentially imposes certain additional restrictions on the right of access by permitting "reasonable measures" to alleviate "the administrative and financial burden on the state."

Pursuant to this power the South African Government enacted the *Promotion of Access to Information Act*, 2000. According to the preamble the legislation rests on recognition that South Africa suffered a secretive culture in "public and *private bodies* which often *led to an abuse of power and human rights violations*."[16] Though one of the stated objects of the act is to give effect to the constitutional right of access to information, it allows limitations "aimed at reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance."[17]

The claim in this case is that information is needed in order to effectively exercise the right to housing. Whether Nedbank has a duty to release this information or not depends on the nature and extent of the request. As a matter of contract law, if Pretorious wants information relating to himself as a borrower, that should be relatively straightforward. But if what he wants is information relating to himself or on other borrowers caught by Nedbank's redline? There may be complications. I will first consider the provisions of the Act that Nedbank might use to resist such a request.

First, Nedbank may argue that the information on which its redlining policy rests is "commercial information of a private body" within the meaning of the act. Such information is protected if a) contains trade secrets[18], 2) contains financial, commercial or technical information[19]-which is not a trade secret-but whose disclosure may harm the financial or commercial interest of the company 3) contains information which, if disclosed, would put the company in a contractual disadvantage[20] or prejudice in commercial competition[21] or 4) is a computer program owned by the company.[22] It is likely that the company could find a plausible basis for fitting its red-lining policy in one of these exceptions to disclosure.

Alternatively, Nedbank may fall back on section 69. This section protects information collected by a company conducting research. Such a company may refuse to disclose information if the information consists of research results which, if disclosed, would expose to serious disadvantage 1) the company;[23] 2) a person carrying out research on behalf of the company[24] or 3) subject matter of the research.[25] Nedbank might argue that its redlining policy is based on research results which have commercial value. Releasing this information, the argument could be made, could place it a competitive disadvantage.

To my mind these arguments are plausible but not decisive. Both the preamble to the Act and the provisions of the bill of rights suggest that the court must err on the side of disclosure. As pointed out earlier, the over-riding issue is: what are the interests protected by the right of access to information? How have those interests been sundered by the limitation proposed? If the seriousness of the limitation "is completely disproportionate to any benefits ensuing from [it]"[26] then the limitation must give way to the right. This is clearly the intent of section 70 of the Act. That section mandatorily requires information held by a private company to be

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[16] See Preamble, *Promotion of Access to Information Act*, 2000
[17] id. Section 9(b)(i)
[18] Section 68(1)(a)
[19] Section 68(1)(b)
[20] Section 68(1)(c)(i)
[21] Section 68(1)(c)(ii)
[22] Section 68(1)(d)
[23] Section 69(2)(a)
[24] Section 69(2)(b)
[25] Section 69(2)(c)
[26] See Rautenbach & Malherbe, Constitutional Law. p. 316

disclosed if that disclosure would reveal 1) substantial contravention of the law[27] or imminent and serious public safety or environmental risk[28] or 2) where the public interest in disclosure outweighs the harm that would be caused the company.[29]

These provisions suggest two possible arguments: First, it could be argued that in this case the public interest in disclosure far outweighs the harm that Nedbank would suffer and second, that the policy of red-lining constitutes, in terms of its impact, discrimination prohibited by the Constitution.

ii. Redlining, The Public Interest and the Right to Housing
The right to housing is protected by article 26 of the Constitution in the following terms:-

26. (1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation* of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Sub-clause 2 imposes a positive duty on the state to ensure progressive realisation of this right. What obligations does this article impose on private companies and individuals? Under international human rights laws and the South African Constitution, Nedbank is free to choose not to lend to the housing market. However, if it chooses to lend money for housing, it may not do so on a discriminatory basis since the anti-discrimination clause is horizontally applicable.

There are at least two ways in which an anti-discrimination claim attached to the right to housing may be made in this case.

First, the redlining policy may be based on a reasonable economic risk culled from actuarial analysis of ability and willingness to pay of those who live in the affected neighbourhood. But that does not settle the matter. If the implementation of the redlining policy overwhelmingly affects one racial group or class of people and not another, it may be struck down for discriminatory impact. This principle was settled by the US Supreme Court in *Gregg v. Duke Power*.[30] In that case, the employer had replaced its policy of not hiring blacks with a requirement that job-seekers have a high school certificate or pass a literacy test. But neither requirement was a bona fide occupational qualification. The jobs advertised did not require it. Moreover, discrimination against blacks in schools had led to a situation where few had the requisite qualifications. Thus although blacks and whites were being subjected to the same tests, blacks were routinely failing to qualify and Duke Power's workforce was therefore overwhelming white. The Supreme Court recognized what was going on and held that equal treatment could be discriminatory if the results was that fewer blacks could qualify.

If *Duke Power* is to apply in this case, one must be prepared to collect results showing that red-lining is overwhelmingly discriminatory in the allocation of housing loans.

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[27] Section 70(a)(i)
[28] Section 70(a)(ii)
[29] Section 70(b)
[30] 401 US 424 (1971)

In the second place one might attack red-lining without attacking its discriminatory impact. Assuming of course that it has any discriminatory impact. It could be argued that to the extent that the effect of red-lining is deny people in certain neighbourhoods access to housing credit, to that extent does red-lining impair the right to housing. On this view even if Nedbank could not be compelled to lend to people that it considers a commercial risk, it may still have a duty under the promotion of access to information act to release the information on which it has based its red-lining policy. The information on which the policy rests is useful to the exercise of the right to housing in at least two ways. One, it helps the right-holder know what behavioural or living arrangements he must make it he or she wants to be eligible for a housing loan. Two, at a municipal level it helps the local authorities determine the infrastructure needs it must put in place in order to assist in the "progressive realisation" of the right to housing.

On both accounts, the exceptions in section 70 of the Promotion of Access to Information Act apply and Nedbank would be required to reveal the information on which its red-lining policy is based.

PART 3: RECOMMENDATIONS

As indicated from the onset, this case presents the unique situation where local law offers more opportunities than international human rights law. For this reason, it is a case in which the role of the national lawyer and the international expert are reversed. To the extent that there may be unique local remedies known to the national lawyers, these remedies ought to be pursued. For instance, under the Promotion of Access to Information Act, private companies must give reasons for their refusal to grant access to the information requested and they must specify which sections of the act they relied on. Has Nedbank done this?

Having stated the necessary caveats, my recommendations would be that the following orders be sought:-

1. If Pretorious has been denied access to his own records, an order that such a denial is unlawful. There may be compelling arguments for protecting third party information but there is none for denying one information relating to him.

2. A Declaration that the information used by Nedbank to draw its red-line is information needed by Pretorious for the exercise of a constitutional right, namely, the right to housing and that Nedbank's refusal violates both the Constitution and the Promotion of Access to Information Act.

3. A Declaration the Nedbank's red-lining policy impairs the right to housing by:-

    a. Disportionately, under the *Duke Power* test, affecting people living in very poor neighbourhoods, a majority of whom are blacks.

    b. Rendering ineffectual the ability of residents in red-lined neighbourhoods to enforce the right to housing. Unaware why their neighbourhoods cannot qualify for housing loans, they are at a loss as to what changes they need to make in their neighbourhoods in order to become more attractive borrowers.