

SOUTH AFRICA / JUDGMENT

Dastile v Superintendent General for the Department of Health Eastern Cape (1104A/2024) [2025] ZAECBHC 5 (7 February 2025)

[2025] ZAECBHC 5

COURT

Eastern Cape High Court, Bhisho

BEFORE

B Hartle

CASE / FILE NUMBER

1104A/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, BHISHO)

OF

INTEREST LOCALLY

CASE

NO. 1104A/2024

In

the matter between:

NONKULULO

DASTILE

Applicant

and

THE

SUPERINTENDENT GENERAL

Respondent

FOR

THE DEPARTMENT OF HEALTH,

EASTERN

CAPE

In

re PAIA request for records in the possession or custody of the
Stutterheim Hospital.

JUDGMENT**IN RESPECT OF APPLICATION****FOR CONTEMPT OF COURT AS A SEQUEL TO****ORDER GRANTED IN PAIA APPLICATION****HARTLE J**

- [1] The applicant seeks an order declaring the respondent to be in breach of and in contempt of a court order handed down by my colleague, Stretch J, on 8 October 2024 under case number 639/2024 (“the Order”).
- [2] The case number of the present application (“the contempt application”) is different than the one under which the Order was issued (“the PAIA application”).
- [3] When the matter was called, I asked counsel why that was, since the contempt application is naturally incidental to the original application launched in terms of the provisions of the Promotion of Access to Information Act, No. 2 of 2000 of (“PAIA”). Indeed the applicant in her founding affidavit refers to it as “the main application”.
- [4] There were three related contempt of court applications on the unopposed motion court roll for 28 January 2025 initiated at the instance of the applicant’s attorneys against the respondent which are exact replicas of each other but for certain minor nuances that do not detract from the standard template adopted.[1] The concerns that I have in this matter are common to those.[2]
- [5] Counsel firstly did not share my view that the history of the matters was particularly relevant or appreciate why I thought it necessary to have the main application files placed before me. In their absence, I stood the matters down in order to request the original files from the registrar’s office.
- [6] My ruling in each matter was reserved so that I could satisfy myself as to whether the applicants were indeed entitled to the relief sought. I find though for the reasons indicated below that the

applications cannot be entertained and do not succeed.

- [7] In this matter, the original file revealed that the State Attorney had filed a notice to oppose the PAIA application.[3] That application (under case number 639/2024) was ultimately enrolled as an uncontested opposed matter for hearing on 8 October 2024, but the relevant State Attorney’s particulars and file reference number that appear on the notice to oppose were not indicated on the notice of set down of the application.[4] Further, whilst that notice (peremptorily given in terms of Rule 23

(m) of the Joint Rules of Practice) was timeously delivered to the State Attorney with reference to the proceedings of 8 October 2024, it gave no indication of the details of the case, save the name of the applicant reflected in the header together with the case number.[5] Also not indicated is what hospital was implicated in respect of the PAIA request or in fact that it concerned an application under the Act's provisions.[6]

[8] The relevance of this shortcoming and its cascading impact will shortly become apparent.

[9] The Order was thus granted on a default basis[7] ostensibly without any input from the State Attorney who has an obligation to note the interests of the respondent and advise him/her

on the merits of the relevant legal proceedings.[8]

[10] The Order itself cites only the Superintendent General for the Department of Health, Eastern Cape, with no reference number coupled to it whatsoever or any intimation that it relates to a PAIA request or what hospital it concerns.[9]

[11] The order directs the responsible officer to :

"1. ... forthwith furnish the applicant with the following information and/or medical records relating to his (sic)[10] admission on or about 01 June 2023.

1.1 Complete Hospital/Medical records at their disposal;

1.2 Completed Statutory Medical report in the RAF1 form;

1.3 MRI Scans recording, if any;

1.4 CT Scan recordings, X-Rays; and

1.5 Any other medical records in their possession.

Within five (5) Court days of the order having been served in the respondent (sic).

2. Directing that the respondent pays the costs of this application within seven

(7) Court days from the date of taxation."

[12] The notice of motion in respect of the present application was served by the sheriff on the respondent and the State Attorney on 8 and 20 December 2024 respectively.[11]

[13] Since the contempt application was commenced by a notice of motion rather than as an application incidental to the PAIA application under the earlier case number,[12] it was hit by the proviso to Uniform Rule 6 (5)(b)(iii) that recognizes that the days between 21 December and 7 January shall not be counted for purposes of the delivery of a notice to oppose. This period would have expired on 15 January 2025 for the respondent,[13] but service was effected on the State Attorney as well. The applicant states in her founding affidavit that "for further purposes of these proceedings her (meaning the respondent's) other address is the office of the State Attorney ... East London", so the implication is that such service purports to have been in terms of the provisions of Uniform Rule 4 (1)(a)(aA).

Whether

in terms of the Rule or the provisions of section 2 (2)(b) of the State Liability Act, No. 20 of 1957 (“the SLA”), however the service on the State Attorney, following after service on the executive authority of the department (who just so happens to be the designated Deputy Information Officer as well), was aimed to serve the important purpose of the State Attorney being able, in the interests of its client, to provide legal advice to the respondent on the merits of the legal proceedings.[14] Since the State Attorney was served over the recess period, it would have enjoyed the respite afforded to it by the provisions of the proviso to Rule 6 (5)(b)(iii) aforesaid to give effect to its statutory mandate, which would have extended to 28 January 2025 whereas the applicant had enrolled the matter on the unopposed roll on the 17th of January 2025 already for hearing before me on the 28th.[15]

[14] The matter was therefore to my mind prematurely enrolled for hearing in the first place.[16]

[15] Moreover, the notice of set down enrolling the present application again comes with no State Attorney’s reference neither does it indicate that it concerns a PAIA application or which hospital’s records are implicated.[17] If this purports to be the required notice to the State Attorney in terms of Rule 23 (m), it in my view fails the purpose thereof under the rule of practice quite spectacularly as it does not inform the State Attorney adequately what the set down concerns so that it can advise its client, the respondent, what measures to take or elect whether to appear or not.[18]

[16] The applicant put up proof of the service of the order on the not-less-than 16 year old responsible employees of the respondent and the State Attorney on 28 October and 11 November 2024 respectively.[19]

[17] It is evident from the sheriff’s returns of service in this regard that only the court order itself was served which appears to have been an exercise in futility since it says very little about the performance expected from the respondent. One might possibly read into it that it concerns a PAIA matter, but concerning which hospital? And which person, since even the gender of the requester is misstated in the Order and no identity number for that person is provided.[20] It begs the question how the respondent or the State Attorney could have been expected to react to it when the latter’s reference number is also not indicated in it to have equipped the State Attorney to carry out its statutory function of advising its client on the merits thereof.

[18] It therefore rings hollow to assert in the contempt application that the respondent was properly served and has not complied with the Order despite the proper service thereof.[21] Indeed it appears ironic, given the perfunctory service and pithy details provided in the Order (some of which are patently wrong), for the applicant to assert that “there is no apparent reason whatsoever, that causes the Respondent to refuse to comply with the (Order)”.

- [19] As an aside I should note further that the respondent is directed in the Order to provide a “Completed Statutory Medical report in the RAF 1 form”. Read together with the Form 2 request in the PAIA application, it is evident that such a document is not (yet) in existence, but the applicant’s attorneys have used the Form 2 request to the respondent to compel its provision.
- [20] It is regrettable that a practice seems to have developed in this court pursuant to which such a record is tagged on to the list of information requested under a PAIA application for records anticipating Road Accident Fund claims without regard to the very objective of the Act which is to facilitate access to a “record” that factually exists and is in possession or under the control of, in this instance, a public body.[22]
- [21] Thus where the document is not yet in existence, an order in terms of PAIA that it be provided to the requester self-evidently cannot be performed under its provisions.
- [22] As far as I am concerned I need not consider the matter any further. It is so that in contempt of court applications, once it is shown that an order was granted and the respondent has disobeyed it or neglected to comply with it (both objectively established on the face of it in casu) wilfulness will normally be inferred and the respondent will bear the evidential burden to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide,[23] but it hardly appears necessary or in the interests of justice in this instance to put the respondent to such an explanation.
- [23] Without being prescriptive, the applicant ought in my view to make use of the provisions of Rule 42 to remedy the lack of important details appearing in the Order and to serve again before she can complain that there is no reason that causes the respondent to refuse to comply with its terms.
- [24] I should add my concern that in all four applications the commissioning of the founding and confirmatory affidavits do not meet the requirements of the Justices of the Peace and Commissioners of Oath Act, No. 16 of 1963 and the regulations promulgated thereunder. Despite counsel being warned upfront that I would not lightly countenance such shortcomings, he did not remove the matters from the roll as I suggested generally to the practitioners appearing before me on 28 January 2025 in order to rectify their papers.[24]
- [25] In all the circumstances I issue the following order that will apply to the other three matters as well:
1. The application is dismissed.
 2. There is no order as to costs.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING

: 28 JANUARY 2025

DATE OF JUDGMENT : 7 FEBRUARY 2025*

Appearances:

For the Plaintiff : Mr. M Mhambi instructed by M Tshaka Attorneys, East London (ref. Mr. Tshaka).

For the Defendant : no appearance.

State Attorney's reference in PAIA applications are:

1. 1104A/2024 – Nonkululo Dastile v The Superintendent General for the Department of Health, Eastern Cape – 747/24-P11(Ms. Tongo)
2. 1105A/2025 – Nceba Mnyande v The Superintendent General for the Department of Health, Eastern Cape 742/24-P11 (Ms. Tongo)
3. 1108A/2025 – Princess Hombakazi Galela v The Superintendent General for the Department of Health, Eastern 367/24-P4 (Ms. Yoba)
4. 1109A/2025 – Khulile Holly-Gate Sompali v The Superintendent General for the Department of Health, Eastern Cape 406/24-P11 (Ms. Tongo)

*Judgment delivered to the parties electronically on this date by email.

- [1] In all four matters the applicants were injured in motor vehicle collisions. Pursuant thereto they were treated at public

hospitals. Each of them needed to access records from these institutions, requests for which were lodged on their behalf under the provision of PAIA. These were followed by appeals that did not yield up the records and ultimately there was a resort to court for relief in terms of section 82 of the PAIA by each one of them.

- [2] The reasons for the orders granted in each of those matters will thus appear from this judgment. The other three matters

concerned are the following: 1. 1105A/2025 – Nceba Mnyande v The Superintendent General for the Department of Health, Eastern Cape (“Mnyande”); 2. 1108A/2025 – Princess Hombakazi Galela v The Superintendent General for the Department of Health, Eastern Cape (“Galela”) ; and 3. 1109A/2025 – Khulile Holly-Gate Sompali v The Superintendent General for the Department of Health, Eastern Cape (“Sompali”). I will relate the minor differences between the cases as I go.

- [2] The reasons for the orders granted in each of those matters will thus appear from this judgment. The other three matters

concerned are the following:

1. 1105A/2025 – Nceba Mnyande v The Superintendent General for the Department of Health, Eastern Cape (“Mnyande”);
2. 1108A/2025 – Princess Hombakazi Galela v The Superintendent General for the Department of Health, Eastern Cape (“Galela”) ; and
3. 1109A/2025 – Khulile Holly-Gate Sompali v The Superintendent General for the Department of Health, Eastern Cape (“Sompali”).

I will relate the minor differences between the cases as I go.

- [3] This was a common feature for each matter.
- [4] Mnyande’s prior application was made under case number 636/2024 and enrolled for hearing on 8 October 2024. Galela and Sompali were launched under case numbers 267 and 342/2024 respectively and enrolled for hearing before Poswa AJ on 13 August 2024.
- [5] In the case of each matter the standard notice reads that the “above matter” is set down for hearing before the court on the separate dates on (13 August 2024 in the case of Galela and Sompali) at 9.30am or as soon thereafter as the matter may be heard. A common feature of all the matters is that the notice in terms of Joint Rule of Practice 23
- (m) does not speak to what the matters concern at all and the State Attorney’s reference provided in the respective notices to oppose were not indicated therein for their convenience.
- [6] See my criticism in Wabena v Deputy Information Officer, Department of Health, Eastern Case, Bhisho Case No. 1378/2024 (“Wabena”) at para [19].
- [7] The same applies in the other three matters except in Galela and Sompali this happened on 13 August 2024 before Poswa AJ.
- [8] Any cases in which judgment by the defendant is sought against the State (regardless whether it has filed a notice of opposition or its opposing papers) requires a notice of set down to be served on the State Attorney at least five days prior to the hearing. The objective of this practice rule is so that the State Attorney can advise its client regarding the proceedings so enrolled. See Wabena, Supra at
- [19] read with footnote 10.
- [9] See Wabena as to the relevance of the necessary detail needing to be maintained throughout the information requesting process so that the designated information officer can oblige by locating and providing meaningful access to records that are properly identified, described and referenced in the relevant request and appeal forms. The same must in my view apply in respect of any sequel to a PAIA order otherwise it makes a mockery of the objectives of the PAIA.

[10] The gender is wrong. This would have led the respondent further from away finding a record relating to a man, although the name in the Order is ostensibly that of a woman. The same applies to Galela's case in which the gender is misrepresented in the Order. Other obvious errors appear which should have been corrected before

resorting to contempt of court applications.

[11] In the other three matters the dates of service were 9 and 20 December 2024.

[12] The same applies to the other three matters.

[13] In the case of the other three matters this would have taken the dies to 16 January 2024.

[14] Section 2 (2) of the SLA. See also section 3 of the State Attorney Act, No. 56 of 1957. The significance of the State Attorney being kept in the loop is also a theme of Wabena, Supra.

[15] The same enrolment date applies to the other three matters.

[16] The same obstacle applies in the cases of Mnyande, Galela and Sompali.

[17] This shortcoming is common to all the matters.

[18] Wabena supra at par [21] and footnote 10 especially. My sentiments about its deficiency extend to the other three matters as well.

[19] The dates of service for Galela and Sompali differ. They are 18 September and 30 October 2024 respectively.

[20] This gremlin does not apply in the cases of Mnyande and Sompali.

[21] This was a standard refrain in each application.

[22] See definition of "record" in section 1 of the PAIA.

[23] Fakie N.O. v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006

(4) SA 326 (SCA) at 345.

[24] See attached the exhortation to practitioners in re various matters enrolled on the unopposed motion court roll at Bhisho High Court on 28 January 2025 that I issued before the commencement of the court proceedings.

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Prepared on 9 October 2026 · Esheria