

SOUTH AFRICA / JUDGMENT

Kgantsi v Bloem Water (2641/2017) [2018] ZAFSHC 19 (8 March 2018)

[2018] ZAFSHC 19**COURT**

Free State High Court, Bloemfontein

BEFORE

J.P Daffue

CASE / FILE NUMBER

2641/2017

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Source record**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO Of
Interest to other Judges:	NO Circulate
to Magistrates:	NO Application No.: 2641/2017 In the matter between PRINCESS THANDEKA KGANTSI Applicant and BLOEM WATER Respondent HEARD
ON:	1 MARCH 2018

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 8 MARCH 2018

INTRODUCTION

[1] A former employee of Bloem Water is at loggerheads with her ex employer in respect of access to a transcript and audio recordings pertaining to her disciplinary hearing. Reliance is placed on the Promotion of Access to Information Act, 2 of 2000 ("PAIA") in order to claim access.

II THE PARTIES

- [2] Applicant is Princess Thandeka Kgantsi, an unemployed female and former employee of the respondent.
- [3] Respondent is Bloem Water, an organ of state as defined in s 239 of the Constitution, duly established by the Department of Water Affairs.

III THE RELIEF CLAIMED

[4] Applicant seeks the following relief as set out in the notice of motion:

"1.That the respondent be ordered to provide the applicant's attorneys of record with the disciplinary hearing transcript and the audio recordings of the disciplinary proceedings involving the Applicant;

2.That the Respondent be held liable for the costs of this application on a party and party scale."

IV THE DEFENCES

[5] The Respondent's main defence is based on the premise that the application is premature in that the internal appeal proceedings provided for in PAIA were not followed prior to the institution of the application in this court.

[6] Respondent also relies on the fact no disciplinary hearing had taken place, that the parties reached a settlement contained in a written voluntary separation agreement prior to hearing of any evidence in the anticipated disciplinary hearing and that the request for access is frivolous and vexatious.

V COMMON CAUSE FACTS

[7] Several material issues are common cause; the sections referred to are in respect of PAIA:

7.1 Applicant is a former employee of respondent;

7.2 A voluminous charge sheet was presented to applicant in terms whereof she had to appear at a disciplinary hearing arranged by respondent to be held on 30 May 2016;

7.3 The charges were put to applicant, but the hearing did not proceed and no evidence was led;

7.4 The proceedings were recorded;

7.5 On 1 June 2016 a detailed voluntary separation agreement was entered into by the parties, the applicant having been represented by her former legal representative;

7.6 In terms of the agreement the respondent agreed to pay applicant's salary and other benefits until 30 September 2016 although she was not required to offer her services from date of the agreement;

7.7 Since 20 January 2017 therefore about eight months since entering into the agreement email correspondence followed between applicant's new and present attorneys and respondent's attorneys wherein her attorneys sought access to the aforesaid information whilst it was recorded by respondent's attorneys that the matter was being regarded as finalised because of the settlement;

7.8 On 8 May 2017 applicant's attorneys wrote a letter to the respondent's CEO, instructing the CEO to provide the information set out in the attached request for access form on or before 19 May 2017;

7.9 Ex facie the papers before me, there was no reply from the CEO and on 26 May 2017 the present application was issued;

7.10 When the application was issued, the 30 day period referred to ins 25 had not expired;

7.11 Respondent's CEO, or anyone else of that public body, did not request any extension of time within which to respond and as no response was received, no reasons were advanced for its inaction;

7.12 Applicant relied in her founding affidavit on this inaction and therefore that the deeming provision set out in s 27 was triggered;

7.13 Applicant failed to lodge an internal appeal in terms of s 74 prior to institution of this application although she tried to comply with the Act some two months after her replying affidavit had to be filed, apparently in an attempt to cure the defect;

7.14 In her founding affidavit applicant alleged "that there are no internal remedies available to me in terms of the Act....", but in the replying affidavit the mistake was admitted; she then complained that respondent refused to engage her in the internal appeal process;

7.15 In the founding affidavit applicant averred that she needed access "to be able to effectively comply with the terms of the contract and to protect my rights against unauthorised disclosure by the employer or its representatives", but she made an about turn in reply by stating the following: "In actual fact it is the very agreement that I want to challenge and I cannot do that if I do not have the audio recording that led to it."

7.16 The respondent's information officer did not respond to the formal request and therefore did not provide any reasons why applicant is not entitled to access, although it must be clear from the email correspondence attached to the answering affidavit, which is not in dispute, what respondent's defence was from the onset: it held the view that the matter was settled between the parties. In the answering affidavit it is also alleged that the request was frivolous or vexatious, apparently having in mind s 45, although the section was not specifically relied on.

VI RELEVANT LEGISLATION

[8] Section 237 of the Constitution stipulates that "(A)II constitutional obligations must be performed diligently and without delay." Section 32 of the Constitution reads as follows:

"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."

[9] PAIA was enacted to give effect to the right contained in s 32 (1) of the Constitution. I quote some of the relevant sections of PAIA:

9.1 An "information officer" in the case of a public body such as respondent, "means the chief executive officer, or equivalent officer, of that public body or the person who is acting as such."

9.2 The purpose and objects of PAIA are set out in the preamble and s 9 of the Act respectively, inter alia to give effect to the right of access to information in the hands of public bodies and private persons; thereby ensuring transparency, accountability and effective governance.

9.3 Section 2(1) stipulates that the courts must, in interpreting the Act, "prefer any reasonable interpretation of the provision that is consistent with the objects of the Act over any alternative interpretation of the provision that is inconsistent with those objects."

9.4 Section 11(1) stipulates as follows:

- (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.

9.5 Section 25 states that the information officer to whom the request is made, must as soon as reasonably possible, but in any event within 30 days after receipt of the request decide whether to grant or refuse

the request. If the request is refused the information officer must state the reasons and that the requester may lodge an internal

appeal. The procedure for lodging the appeal and period within which it has to be lodged must be provided. Sees 25(3).

9.6 Section 45 stipulates that the information officer of a public body may refuse a request for access to a record "if the request is manifestly frivolous or vexatious."

9.7 Section 74 provides for a right of an internal appeal to the relevant authority, whilst s 78 states as follows:

- (1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.
- (2) A requester
 - (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
 - (b) aggrieved by 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);
 - (c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 (i) to refuse a request for access; or
- (ii) taken in terms of section 22, 26 (1) or 29 (3); or
- (d)
- (i)
- (ii),

may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

VII APPLICATION OF THE LEGISLATION AND AUTHORITIES TO THE FACTS

[10] I accept the wellknown proposition that, this being an opposed application, the trite principles enunciated in *PlasconEvans Paints* shall apply. The matter must be considered on the facts alleged by the respondent (unless these are so farfetched and untenable that it could be rejected, which is not the case in *casu*), together with the facts alleged by the

applicant that respondent cannot dispute. See also: *President of the RSA v M & G Media* 2011 (2) SA 1 (SCA) at para [13]. However, the application can effectively be disposed of on the common cause facts mentioned supra.

[11] I accept that it is not required in s 9(a) of PAIA that the requester seeking access from a public body has to advance reasons for the request. See: *M & G Media* supra at para [11]. Clearly, the legislature differentiates between information held by public bodies and private bodies. In the case of information held by private bodies it must be shown that the information is required for the exercise or protection of any rights. Chapter 4 of PAIA sets out the grounds for refusal of access to records. In *casu* s 45 is of particular importance as will be shown infra.

[12] In *Basson v Hugo & others* (986/16) [2017] ZASCA 192 (01 January 2018) the SCA had to consider an appeal by the appellant whose review application was dismissed in the court a quo. The central issues to be adjudicated were the obligation contained in s 7(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") to exhaust an internal remedy provided for in s 10(3) of the Health Professions Act, 56 of 1974 and whether

exceptional circumstances were shown to exist to exempt the appellant from this requirement. See paras [11] and [12]. The SCA found that, for reasons immaterial to this application, several factors mentioned constituted exceptional circumstances and upheld the appeal. This judgment was relied upon by Mr Mene for the submission that the applicant should be afforded redress notwithstanding the failure to exhaust the internal appeal process set out in s 78 of PAIA. I do not agree. This is not a review application and PAJA, and particularly s 7 thereof, is not applicable. Contrary to the provisions of PAJA, PAIA does not contain a similar exception. I refer to s 78(1) quoted supra. Therefore the *Sasson* judgment is not authority in *casu*.

[13] I am mindful of the following dicta by the SCA in *Mahaeane and another v Anglogold Ashanti Ltd* 2017 (6) SA 382 (SCA):

[38] Transparency and access to information are required in order to allow people to enjoy other fundamental rights. Thus, for example, the preamble to PAIA recognises that:

'The system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;

Section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons.'

[39] In construing these words, the court should, as far as the language of PAIA permits, adopt a generous and purposive interpretation that gives people the full measure of its protections and that promotes the values of the Constitution. As the Constitutional Court held in *S v Mhlungu*:

'A constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.'

The dicta have been expressed in not too dissimilar terms in *Brummer v Minister for Social Development and others* 2009 (6) SA 323 (CC) at paras

[62] and [63].

[14] Mr Mene reiterated the dictum by Molemela AJA (as she then was) in her minority judgment in *Mahaeane* at para [67]:

"The seriousness of a decision whether or not to litigate and the importance of granting access to the information requested were aptly described by Cameron J in the following terms in his minority judgment in *Unitas* (the majority judgment did not take issue with the dicta expressed in the passage below):

'Institution of proceedings is an immense step. It involves a massive commitment in costs, time, personnel and effort. And it is fraught with risks. Where access to a document can assist in avoiding the initiation of litigation, or curtailing opposition to it, the objects of the statute suggest that access should be granted.'

I echo these sentiments."

[15] In *Dlusha v King Sabata Dalindyebo Municipality and others* 2012

(4) SA 407 (ECM) the court was severely critical of the attitude of the municipality's officials and had the following to say:

"[21] I refer to the foregoing decision in an effort to send the clear message that an applicant who has in good faith and as of right requested information in terms of PAIA ought to be dealt with in a rational, fair and just manner by public authorities. In an open and democratic society, government must be accountable for its decisions and its actions should be informed by rational considerations that are explicable to those affected. Public access to information is fundamental to encouraging transparency and accountability in the way in which government and public authorities operate. Executive action must not be arbitrary. Arrogant disregard and failure to positively engage the public are not values contemplated in the Constitution. There is no room for a policy of 'don't ask, don't tell'. In this case there seems to exist an apparent lack of insight by respondents into their legal position as a body that is there in order to serve citizens and ratepayers. I still do not understand why, if the reason that applicant was not furnished the information arose out of the respondents' perception to be gathered from counsel's heads, this was not communicated to applicant as applicant is entitled to be told by law.

[22] The nature and extent of a public body's obligation where the right of access to information is involved is eloquently expressed in *H Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) ([1997] 1 All SA 305). There Cameron J (as he then was), dealing with a claim brought under s 23 of the interim Constitution (the precursor to s 32 of the Constitution), said at 850A C:

'In my view, section 23 entails that public authorities are no longer I permitted to play possum with members of the public where the rights of the latter are at stake. Discovery procedures and commonlaw claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in section 23, is to subordinate the organs of State ... to a new regimen of openness and fair dealing with the public.'

[16] Although I generally agree with the sentiments expressed in *Dh/usa* referred to supra and which I shall touch on again infra, I do not agree with the court's dismissal of the special plea based on the failure to lodge an internal appeal. I am with respect

in full agreement with the reasoning of Musi AJP (as he then was) and his conclusion that non compliance with the internal appeal procedure is fatal for an applicant launching an application in terms of s 82 of PAIA. See: *IH Maritz v Matjhabeng Local Municipality* case no 20150/2016, an unreported judgment of this Division delivered on 20 July 2017. Like Musi AJP, I am also in respectful agreement with the reasoning in *Sumbana and others v HOD, Department of Public Works, Limpopo Province* 2009 (3) SA 64 (V). No doubt, the wording of s 78(1) is clear and unambiguous. The provision is mandatory. This must be so, even if the provisions of s 2(1) and the purpose and objects of PAIA are taken into consideration. Even a broad, liberal and purposive interpretation cannot lead one to a different

conclusion.

[17] Mr Mene also submitted that the application should succeed insofar as respondent had frustrated appellant's right to an internal appeal procedure. He relied on *Hlaba v MEG for Health, Eastern Cape* 2012

(4) SA 401 (ECM) at para [15]. In fact, the dictum in this paragraph was merely echoed in the replying affidavit insofar as applicant said the following at paragraph 4.4: "...and the fact that annexure C was met with silence, I submit that I was refused engagement in the appeal process". The applicant is facing three difficulties with this attitude. Firstly, it is clearly an afterthought, bearing in mind that she held the view in her founding affidavit that no internal remedies were available to her notwithstanding the fact that she brought her application in terms of PAIA. Secondly, the attempt to rely on the internal appeal procedure several months after receipt of the answering affidavit cannot cure the problem she was facing at the time and is still facing now. The application was and is premature and it could not be rectified. The application is also premature for another reason. The respondent's information officer was not allowed the 30 days stipulated in s 25 for consideration of the

request as mentioned supra, but a mere 11 days. Thirdly, Hlaba is distinguishable in that the applicant unsuccessfully tried to follow an internal appeal process which was refused.

- [18] The conclusion that the application is premature is really the end of the case, but the following comments are made on the basis that it might be found that I was wrong in coming to the above conclusion. I accept that respondent and its attorneys held the view that the disputes between the parties had been settled and therefore the request for access was considered to be frivolous or vexatious. Settlement is a compromise as defined and discussed by Christie and Bradfield, Christie's The Law of Contract in South Africa, 6th ed at 473 and further. Compromise, being a contract, is binding on the parties thereto. When concluded, it disposes of the pending

proceeding and disputes between the parties. See also: *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at para [10]. A contract may be set aside on various grounds such as fraud, iustus error, duress, undue influence and a few other grounds. Although, generally speaking, applicant did not have to provide reasons for access to the information officer, I would have expected her to explain why access was required in casu in light of the written settlement agreement and the correspondence received from respondent's attorneys prior to the formal request for access. In my view respondent could not be faulted for the stance taken in the answering affidavit.

- [19] Not only was the request filed at a late stage some eleven months after the settlement agreement was entered into but this application was also filed at the end of May 2017 and therefore about a year after the settlement was reached. Instead of acting swiftly and in a cheap manner, applicant elected to do nothing for several months and then embarked on a slow expensive process such as court action. If applicant intended to set aside the agreement or take steps to amend or vary it, she should have done so much earlier. In any event, it is still unclear on what grounds she wants to attack the settlement agreement and why the transcript and audio recordings are required before appropriate action is taken.

VIII COSTS

- [20] I mentioned supra that respondent's CEO did not even have the decency to acknowledge the letter of applicant's attorneys with accompanying request for access to information. He/she bluntly refused to respond to the request. The earlier email correspondence was between the attorneys. Respondent's attorneys were apparently instructed by the Executive: Human Resources at that stage, the same person that deposed to the answering affidavit. At all times the CEO, he/she being the information officer as defined in s1 of PAIA, remained as silent as the grave. In my view such arrogant behaviour is sufficient reason not to award costs to respondent as the successful party.

IX ORDER

- [21] Consequently the following order is issued:

The application is dismissed, each party to pay her or its own costs.

J.P DAFFUE, J

On behalf of the applicant: Adv B S Mene

Instructed by:

Mudzusi & Partners

Bloemfontein

On behalf of the respondent: Adv W A van Aswegen

Instructed by:

Kramer, Weihmann & Joubert

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