

SOUTH AFRICA / JUDGMENT

Layer3 Telecom (Pty) Ltd v Rustenburg Local Municipality (M346/2020) [2021] ZANWHC 69 (8 October 2021)

[2021] ZANWHC 69

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M346/2020

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IN

THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAFIKENG

Reportable:

NO

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to Judges: NO

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to Magistrates: NO

Circulate

to Regional Magistrates: NO

CASE

NO: M346/2020

In

the matter between: LAYER3
 TELECOM (PTY)
 LTD
 Applicant
 and
 RUSTENBURG
 LOCAL
 MUNICIPALITY
 Respondent
 DATE
 OF HEARING
 : 29
 JULY 2021
 DATE
 OF JUDGMENT
 : 08
 OCTOBER 2021
 FOR
 THE APPLICANT
 :
 ADV. T MORETLWE
 FOR
 RESPONDENTS
 :
 ADV. NG LAUBSCHER

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by way of e-mail. The date and time of the handing down of judgment is deemed to be 10H00 on 08 OCTOBER 2021.

JUDGMENT

PETERSEN J

Introduction

[1] This is an opposed application in which the applicant seeks relief in the following terms:

“1. That the Respondent is ordered to provide the Applicant with the documents requested by the Applicant as per letter dated 21st February 2020, alternatively as per annexure “OT3” within a period of Ten (10) days of the order;

2. That the Respondent is ordered to pay the costs of this application on the scale of attorney and client;
3. Further and/or alternative relief.”

- [2] It is not disputed that the documents requested in the letter dated 21 February 2020, attached to the founding affidavit as Annexure “OT3” (“the letter”), which are relevant to the applicant’s request, have not been furnished by the respondent.

Application to strike out hearsay evidence in the founding affidavit

- [3] I propose to deal with the respondent’s application to strike out alleged hearsay evidence in the founding affidavit at this point. The respondent has further raised a point in limine, which is dealt with *infra*.
- [4] The respondent places much emphasis on the fact that the confirmatory affidavit of Mr Leboko Jacob Modiboa (“Mr Modiboa”) was not attached to the founding affidavit, which renders the evidence in the founding affidavit mainly hearsay evidence. The contention by the respondent premised on legal advice, is that this defect cannot be cured by a replying affidavit.
- [5] Adv Laubscher expounds on this contention by submitting that the omission in filing a confirmatory affidavit of Mr Modiboa leaves a substantial portion of the founding affidavit comprising inadmissible hearsay evidence, which has given rise to the application to strike out. Adv Laubscher submits that the only remedy to cure the defect was for the applicant to approach this Court in terms of rule 6(5)(e) for permission to file a supplementary founding affidavit to introduce the confirmatory affidavit accompanied by reasons why the same was not filed when the application was launched. An order is consequently sought for the application to strike out to be upheld with costs.
- [6] The applicant takes no issue with the fact that the confirmatory affidavit of Mr Modiboa was not filed with the founding affidavit. In the replying affidavit, the applicant puts forward an explanation for the failure to file the confirmatory affidavit with the founding affidavit. The explanation put forward is essentially that the failure to file the confirmatory affidavit was an innocent mistake and/or oversight on the part of the applicant’s attorney and that the said confirmatory affidavit had already been prepared at the time the application was issued.
- [7] Adv Moretlwa submits that the contention that the evidence of the applicant is hearsay is nothing more than hyperbole, as the founding affidavit clearly refers to the confirmatory affidavit, marked as “OT15”. The innocent omission he submits could not be said to have prejudiced the respondent. Reliance is placed on the judgments of *Rajandran Reddi and others v Mercedes Benz SA Limited*: J3053/14 (LC); *Elias v Minister of Home Affairs* 2020 JDR 1908 (GP) at paragraph 9; *Sifuba v Mario Coetzee Attorneys* 2019 JDR 0288 (GP) at paragraph 27 (4.7) and *Numsa obo Bunu and Others v Aveng Africa Limited*: JS 228-2014 (LC) at paragraph 24.
- [8] It is apposite to have regard to paragraphs 10 to 12 of the founding affidavit read with paragraph 11 of the answering affidavit:

The founding affidavit

“10. On or about the 21st February 2020, the Applicant’s Attorneys (Modiboa Attorneys Inc) requested all the documents referred to paragraph 7 (sic) above, and the letter was hand delivered to the offices of the Respondent. Copy of the letter is attached hereto marked “OT3”.

11. On or about the 28th February 2020, the Respondent acknowledged receipt of the said letter and made an undertaking to provide the required or requested

documents within a period of 30 days from date of request conditional upon receiving the payment of R35.00. Copy of the letter is attached hereto marked “OT4”.

12. On or about the 03rd March 2020, the Applicant’s Attorneys effected payment of the R35.00 and sent proof thereof to the Respondent. Copy of the letter is attached hereto marked “OT5”.

The answering affidavit

“11

“AD PARAGRAPHS 10 TO 12 THEREOF

I object to the hearsay evidence contained in this paragraph. Safe (sic) to admit that the Applicant submitted FORM A as annexed to Annexure “OT3” to the Respondent, thereby triggering the provisions of PAIA, I deny the contents of these paragraphs. I reiterate the contents of paragraph 3 above.”

- [9] The respondent admits that FORM A was submitted by the applicant to the respondent, but denies the remainder of the contents of paragraphs 10 to 12 of the founding affidavit, submitting that such content constitutes hearsay. The respondent in essence disavows Annexure “OT4” which purports to emanate from its Municipal Manager, Mr Sello Victor Makona, who coincidentally is the deponent to the answering affidavit. The contents of Annexure “OT4” dated 24 February 2020 addressed to info@modiboaattorneys.co.za and sent under cover of an e-mail to Modiboa Attorneys dated 28 February 2020, reads as follows:

“REQUEST FOR INFORMATION IN TERMS OF SECTION 75 OF THE PROMOTION ACCESS: LAYER3 TELECOM (PTY) LTD

Good day Sir/Madam

1. The Rustenburg Local Municipality hereby acknowledges receipt of your PAIA request dated 21 February 2020.
2. Your matter will be dealt with in terms of Promotion of Access to Information Act (Act No2 of 2000) as the request require copies of some documents.

3. According to the manual on Promotion of Access to Information Act (Act No2 of 2000) in terms of which your request is regulated, you are required to pay a fee of R35.00 for the application to the municipality before the request could be processed further. This amount is payable into vote no 050 017 1168 or ABSA Account Number [...] with ref number PAIA 050 017 1168.
 4. Further take note that the PAIA application is processed within 30 days period as legislated in the Act from the date you have submitted your request.
 5. The total number payable will be determined based on the number of pages of form which are produced i.e. whether electronically or physically.
 6. At this stage you are advised to pay an amount of R35.00 into the above number and upon payment submit the proof of payment to Legal and Valuation Unit office 603, 6th floor to Ms Vuyo Rakumako 014 590 3029 / Mr D Molusi 014 590 3120.”
- [10] Annexure “OT5”, inter alia, makes reference to a Notice of Payment to the respondent under the reference number referred to in annexure “OT4”.
- [11] From the aforementioned, it becomes clear that the respondent save for admitting receipt of FORM A, distances itself from annexure “OT4”, which is purportedly under signature of the municipal manager. In my view, by doing so, it creates the basis for the point in limine which alleges non-compliance with the provisions of PAIA.
- [12] It is further apposite to have regard to paragraph 20 of the founding affidavit read with paragraph 13.4 of the answering affidavit. Paragraph 20 of the founding affidavit reads thus:
- “20. On or about the 10th June 2020, the Respondent’s Attorneys furnished the Applicant’s Attorneys with an e-mail in terms of which email, the Respondent’s Attorneys indicated that the documents attached thereto are in relation to tender number RLM/DCS/0089/2016/17 and RLM/DCS/0059/2018/19 and RLM/DCS/0026/2019/20, the Respondent is unable to locate them. Copy of the email is attached hereto marked “OT9”.*

Paragraph 13.4 of the respondent’s answering affidavit reads:

“13.4 In fact, the contents of Annexure “OT9” which was addressed “without prejudice” to the Applicant’s attorney confirms in paragraph 2 thereof that despite an extensive search certain documents were not found by the Respondent.”

- [13] The respondent received, save for acknowledging receipt of FORM A from the applicant and then to disavow itself from annexure “OT4” under hand of the municipal manager, and all correspondence thereafter, as constituting hearsay evidence. Very peculiarly, however, the respondent not to disavow itself from annexure “OT9”, with specific reference to paragraph 2. This creates a double edged sword for the respondent. By disavowing itself from annexure “OT4”

and alleging hearsay of all correspondence thereafter, but relying on annexure “OT9”, which emphatically states that the respondent could not find the documents requested, the respondent cannot escape the fact that what it is claims is hearsay is in fact the truth. Why would the respondent, otherwise embark on “an extensive search for certain documents” without a basis for such search and report same to its attorneys of record, who are co-incidentally the instructing attorneys in the present application. The only cogent explanation is that the documents were requested, offered by the respondent and belatedly claimed to be lost. The hearsay argument is accordingly without substance, on the respondent’s own reliance on annexure “OT9”,

paragraph 2.

- [14] A few concluding remarks on the issue of the confirmatory affidavit which was not attached to the founding affidavit. It is clear that reference was pertinently made in the founding affidavit to the confirmatory affidavit. The word “omission” in relation to the confirmatory affidavit is employed by both counsel for the applicant and the respondent. The confirmatory affidavit filed of record clearly demonstrates upon a perusal thereof that it was prepared at the time of the founding affidavit and not at a later stage. It was, on the explanation furnished by the applicant in the replying affidavit, clearly brought about by the omission of the applicant’s attorney who failed to include it with the founding papers as filed.
- [15] The omission was clearly an honest mistake, which I find held no prejudice to the respondent. This is simply a case of less than perfect compliance with the Rules through an omission to attach the confirmatory affidavit, which could have been courteously requested from the applicant. The approach adopted by the respondent which is demonstrated *infra* against the contents of paragraph 13.4 of the answering affidavit, begs more questions than answers, when regard is had to the point in *limine* raised by the respondent.
- [16] The application to strike out accordingly stands to be dismissed.

Background

- [17] I now turn to the background facts, as set out in the founding affidavit, which gave rise to the application. The following facts appear from the founding affidavit, as confirmed in the confirmatory affidavit which was subsequently filed. On 21 February 2020, the applicant’s attorneys caused the letter to be hand delivered to the respondent requesting the documents alluded to in the letter. The respondent acknowledged receipt of the latter on 28 February 2020 and gave an undertaking to provide to the applicant the documents requested within thirty (30) days of the date of request, upon payment of an amount of R35.00 (thirty five rand). The payment of R35.00 was made on 3 March 2020 to the respondent.

- [18] The applicant in the letter further sought a written undertaking from the respondent that the respondent will not proceed with the appointment of a service provider in relation to tender RLM/DCS/0026/2019/20. The respondent nonetheless at the beginning of March 2020 proceeded to appoint a service provider. The applicant in response launched an urgent application on 6 March 2020 under case number UM48/2020, which was struck from the roll for lack of urgency.
- [19] The applicant following the urgent application, which was struck from the roll, next on 5 May 2020 wrote to the respondent, bringing to the respondent's attention that the 30 day period within which the respondent was to provide the requested documents lapsed on 3 April
2020. The applicant extended the period for furnishing of the requested documents by the respondent to 13 May 2020.
- [20] No response was forthcoming from the respondent until 20 May 2020 when the respondent's attorneys made telephonic contact with Mr Modiboa at the applicant's attorneys of record. Mr Modiboa is said to have been informed by the respondent's attorneys that they had received the requested documents from the respondent but could not locate it at their offices.
- [21] The applicant's attorneys accordingly caused a letter to be sent to the respondent's attorneys calling on them to furnish the requested records by 1 June 2020. In response, the respondent's attorneys on 7 June 2020 contacted the applicant's attorneys and informed them that the documents had been received from the respondent.
- [22] On 10 June 2020, in a turn of events, annexure "OT9", which as stated above the respondent does not distance itself from, was sent by the respondent's attorneys by e-mail to the applicant's attorneys. Paragraph 2 on which the respondent does not disavow itself, I re-iterate, alleges that the documents requested, could not be located. On 23 June 2020, applicant's attorneys sent another letter requesting the respondent to provide all the outstanding documents requested; and on 24 June 2020 placed on record with the respondent, the respondent's failure to furnish the requested documents.
- [23] On 24 June 2020, the respondent's attorneys called the applicant's attorneys and informed them that they too had realised that the requested documents were incomplete. An indication was given that they would be consulting with the respondent's officials on 26 June 2020 and 30 June 2020 and would then furnish all the requested documents. On 1 July 2020, the applicant's attorneys were informed by e-mail that their letter of 19 June 2020 was brought to the attention of the respondent, with the respondent giving an undertaking to review the file and furnish its attorneys with specific instructions. No undertaking was given that the outstanding documents would be furnished.

[24] On 2 July 2020, the applicant's attorneys informed the respondent's attorneys by e-mail that no further indulgence would be granted as the documents had been requested as far back as 21 February 2020.

The present application was consequently launched.

Point in limine raised by the respondent

Application of the Promotion of Access to Information Act 2 of 2000 ("the PAIA") and non-compliance with the provisions of the PAIA.

[25] The respondent raised a point in limine assailing the applicant's alleged non-compliance with the provisions of the PAIA, which is formulated as follows:

"3.1 This is an application for a final interdict to order the Respondent to provide the Applicant with certain public records. As such, the Court is requested to make a final determination of the rights of the parties to the litigation. The relief requested in the notice of motion also confirms that the Applicant's application in this matter is an application as contemplated in terms of the provisions of Chapter 2 of the PAIA and more specifically one as contemplated in terms of the provisions of section 82 of the PAIA.

3.2 The requirements for the right to claim a final interdict are (a) a clear right, (b) an injury actually committed or reasonably apprehended, and (c) the absence of similar protection by any other ordinary remedy.

3.3 The onus is on the Applicant to satisfy each of the above referred to requirements and the Court cannot come to the aid of an applicant if the requirements are not satisfied by an applicant. The same applies to the jurisdictional facts set for an application of this nature in terms of the provisions of the PAIA.

3.4 More over, and specifically in respect of the requirement referred to in paragraph 3.2(c) above: the Court cannot grant the final relief if there is a prescribed and/or satisfactory alternative remedy and/or relief to the avail of the Applicant.

3.5 Section 3(a) of the PAIA stipulates that the provisions of PAIA applies to a record of a public body regardless of when the record came into existence. The documents requested by the Applicant in casu constitutes "records" of a public body" as defined in section 1 of the PAIA.

3.6 As such, the provisions of the PAIA governs the process in terms of which the Applicant may be granted access to the records of the Responden. Therefore, compliance with the provisions of the PAIA constitutes a so-called jurisdictional fact which the Applicant must set out in fact and in law prior to a Court being able to come to the assistance of the Applicant as requested in the notice of motion.

3.7 In casu, the Applicant has commenced with the correct process in terms of the provisions of section 18(1), read with the regulation 6 of the Regulations regarding the Promotion of Access to Information as promulgated in GNR.187 of 15 February 2002 (as amended) (hereafter "the PAIA Regulations") which prescribes the use of Form A of Annexure "B" to the PAIA Regulation. In this

regard I respectfully refer the Court to the Form A request made by the Applicant and dated 21 February 2020, annexed as an annexure to Annexure “OT3” which was in turn annexed to the Applicant’s founding affidavit.

3.8 As such, the Applicant correctly commenced the process to obtain a public record in terms of the provisions of the PAIA. The Applicant proceeded to conduct the first step in the process for obtaining public records as prescribed by the provisions of the PAIA.

3.9 Annexure “OT3” annexed to the founding affidavit of the Applicant states in paragraph 5 to 8 the following:

“5. For your easy and speedy handling of our client’s request above, we attach hereto Form A which is the request form in terms of section 16(1) of the Promotion of Access to Information Act 2 of 2002 marked “A” with a copy of the identity document of Mr Obakeng Templeton Seleke, the sole Director of our client.

6. It would appreciated if you can furnish us with all the documents demanded at paragraph 4 above not later than Thursday the 27th February 2020 at 15h00, to enable our client to peruse, scrutinize same, and to ultimately make a decision on whether to file a review application or not, and we must inform you that our client is still within the required time to file review application against the Municipality (e.g. 180 days).
7. We must inform you that should we not have the aforesaid documents by close business Thursday the 27th February 2020, we have instructions to approach the North West Division in Mahikeng on an urgent basis with an urgent application to interdict the Municipality from evaluation, adjudicating and or appointing any service provider in relation to tender number RLM/DCS/0026/2019/20 (fourth tender) pending our client’s review application.
8. For your information, in our aforesaid urgent application we will also seek an order that the Municipality be ordered to provide us with the demanded documents above and be ordered to pay the costs on attorney and client scale occasioned by the bringing of the urgent application.”

3.10 The Applicant did proceed to launch an urgent application against the Respondent and this Honourable Court struck the said application from the role for a lack of urgency and with an order that the Applicant pays the Respondent’s costs.

3.11 Subsequent to the submitting the Form A request on or about 21 February 2020 (annexed as an annexure to Annexure “OT3” to the founding affidavit), the Applicant’s version is that the Respondent failed to provide the Applicant with the requested public records. This evident from the contents of paragraph 26 of the founding affidavit.

3.12 In this regard I also refer the Court to the provisions of section 27 of the PAIA which stipulates that “. . .if an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes [of PAIA], regarded as having refused the request”.

3.12 The provisions of section 74 of the PAIA provide an internal appeal remedy to the Applicant in inter alia an instance where access to the public records were deemed to be refused.

3.13 More importantly for the purposes of the Respondent's point in limine is the peremptory phrased provisions of section 78(1) of the PAIA which stipulates the following: "Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies. – (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." (own emphasis)

3.14 In casu the Applicant has not as of yet exhausted its internal appeal remedy as provided for by section 74 of the PAIA and as such the Applicant is statutorily barred from approaching this Court to request and/or obtain the relief as set out in the notice of motion.

3.15 The Applicant is statutorily directed and obliged to first and foremost exercise the internal remedy as prescribed in terms of the provisions of the PAIA.

3.16 The provisions of the PAIA also do not provide for the Applicant to request condonation and/or exemption from compliance with the applicable provisions of the PAIA, nor did the Applicant endeavoured to make out a case in this regard.

3.17 As such, I respectfully submit that not only did the Applicant not satisfy one of the specific requirements for the final interdictory relief as set out in paragraph 32(c) above, but also one of the jurisdictional requirements which must be present for a court to be seized with jurisdiction to adjudicate this matter (i.e. a completed internal appeal process) was simply not complied with and thus not present. I respectfully submit that this is the end of the matter for the Applicant. In fact, the Applicant launched this seriously flawed litigation process which contained a material and substantive error of law. As such, the Respondent will argue that the Applicant is liable for the costs of the Respondent on a punitive scale.

The provisions of the PAIA are clear and unambiguous and the Applicant simply failed to comply with same. In the premise the Applicant's application should be dismissed with costs, the costs to be calculated on the scale of attorney and client."

Submissions

by Adv Laubscher for the respondent and Adv Moretlwa for the applicant on the point in limine

[26] Adv Laubscher contends that the point in limine deals with the crux of the matter which on a legal point is dispositive of the application as a whole. The contention is specifically that the relief sought by the applicant is premised on the provisions of section 82(c), read with section 78(1) of the PAIA.

- [27] In expounding on the contention that the application is premised on the provisions of section 82(c), read with section 78(1) of the PAIA, Adv Laubscher contends that it is a jurisdictional fact for an application in terms of section 78, read with section 82(c) of the PAIA that the applicant must have “...exhausted the internal appeal procedure...” provided for in terms of the PAIA.
- [28] Adv Laubscher with reference to the applicant’s evidence that a Form A request was submitted to the respondent on 21 February 2020 (annexure “OT3” to the founding affidavit), and that the respondent failed to provide the applicant with the requested public records, contends that this failure on the part of the respondent “...triggered the express statutory presumption as clearly set out in section 27 of the PAIA which reads as follows: “...if an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25 (1), the information officer is, for the purposes [of PAIA], regarded as having refused the request.” On this basis, the contention is that section 74 of the PAIA finds application, which provides an internal appeal remedy to the
- applicant, as access to the public records were deemed to have been refused.
- [29] The contention is further that the provisions of section 74(1) of the PAIA is relevant when a requester wishes to approach a court of law in terms of section 78(1) of the PAIA to obtain, inter alia, relief provided in section 82(c) of the PAIA. Emphasis is placed on the applicant not having exhausted the internal remedy in the PAIA in section 74(1), with the implication that the applicant is statutorily barred from approaching this Court to seek final relief in terms of section 82(c) of the PAIA.
- [30] Adv Laubscher concludes that the applicant has not only failed to satisfy the last requirement for final interdictory relief, but also the jurisdictional requirement that it had to exhaust the internal appeal process which is fatal to the application.
- [31] Adv Moretlwe, on the contrary, submits that the application is not premised on the provisions of section 82(c), read with section 78(1) of the PAIA. The contention is essentially that the respondent has made a decision to grant access to the documents and the applicant accordingly has no reason to appeal that decision, and that there is no decision which must or ought to be taken on appeal.
- [32] In expounding of this contention, Adv Moretlwe, contends that the gravamen of the respondent’s case, being a failure to exhaust the internal appeal procedure provided in section 74 read with section 27 of the PAIA, because the respondent is deemed to have refused the request for records, is wrong.
- [33] In amplification of this contention, Adv Moretlwe submits that the appeal process would only have been triggered if the respondent failed to give a decision on the applicant’s request for access. The submission underscores that an appeal in terms of section 74 of the PAIA lies against a decision of an information officer to, inter alia, refuse a request for access. Adv

Moretlwe contends that the internal appeal procedure is not applicable in the present application as the applicant does not fall within the categories of persons listed in section 78(2) of the PAIA.

[34] By way of summons, Adv Moretlwe contends that the respondent's contention that the deeming provision in section 27 finds applicability, the submission is that reliance thereon by the respondent is misplaced as the deeming provision is only applicable when the information officer fails to give the decision on an application for access to the requester concerned within a period of 30 days. The information officer in casu in fact made a decision to grant access within the 30 day period, on 24 February

2020. The respondent it is further submitted when granting access requested payment of the prescribed fee of R35 (thirty-five rand) and six (6) months later persisted in giving an undertaking to look into its file.

The applicable legal framework and case law

The Constitution

[35] In adjudicating this application, this Court remains mindful of the *raison d'être* for the existence PAIA. Section 32 of the Constitution of the Republic of South Africa provides that:

"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 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."

[36] The Object and Preamble to PAIA further succinctly underscores the constitutional imperative enunciated in section 32 of the Constitution. The object of PAIA is "To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith." The Preamble 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;..." PAIA was accordingly enacted "to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information

and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights."

[37] In *Brümmer v Minister for Social Development and Others*[1] in the context of section 78(2) of PAIA, the Constitutional Court said the following, which in my view is applicable to the right of access to information in general:

“62. As I have held above, section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short time period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

[38] In *Paul v MEC for Health, Eastern Cape Provincial Government and Others; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province and Others*[2] Jolwana J writing for the Full Court succinctly captured the rationale of PAIA:

“[7] It is demonstrably clear from the provisions of PAIA that the legislature has gone to great lengths in codifying a user friendly

legislative road map for applications under PAIA. This road map starts when an initial application for access to information is made to an information officer ... It is evident from PAIA that the legislature had in mind an uncomplicated and inexpensive procedure in which a request for information is made and access thereto is given administratively, a court application being the exception rather than the rule. (my emphasis)

[8] However, the life experience of ordinary South Africans,..., has shown that requests for access to information, constitutional as they are, are regarded with disdain and are consequently ignored.

This attitude by state functionaries has resulted in ordinary South Africans having to resort to the courts, burdening court rolls with court applications which are largely unopposed. This burdens the fiscus with unnecessary costs orders in circumstances where scarce resources are severely challenged by competing needs. The time may have arrived for costs orders in deserving cases to be made against the respective officials who unnecessarily force ordinary citizens, ... , to go to court to enforce a right that is enshrined in the Constitution and incontestable.” (my emphasis)

[39] In adjudicating this application, it is apposite to have regard to sections 25, 27, 74 and 78 of PAIA, as raised in submissions. The sections are quoted for ease of reference.

[40] Section 25(1) of PAIA provides that:

“25. Decision on request and notice thereof

(1) ...the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received –

(a) decide in accordance with this Act whether to grant the request; ...”

[41] Section 27 read with section 25(1)(a) provides that:

“If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request.”

[42] Section 74(1) reads as follows:

“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.”

[43] Section 78 of PAIA, in relevant part, provides:

“78 Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.

(1) A requester or third party referred to in section 74 may 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 on 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) aggrieved by a decision of the head of a private body –

(ii) taken in terms of section 54, 57 (1) or 60, may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

(3) ...”

Discussion

- [44] It is clear that when regard is had to annexure “OT9” and paragraph 2, in particular, that the respondent made a decision to grant access to the public records held by it, as requested by the applicant. The decision was not only made accordance with the prescripts of section 25(1)(a) of PAIA to grant access to the public records requested, but the prescribed fee payable for the record was requested from the applicant and duly paid.
- [45] A decision having been made by the respondent to grant access pursuant to section 25(1), which is echoed emphatically by paragraph 2 of annexure “OT9”, section 27 finds no applicability. The submissions of Adv Laubscher on deemed refusal in terms of section 27, is defeated on the evidence of the respondent itself. Further, the fact that the respondent supplied records which were not requested and omitted to supply the records as requested by the applicant, cannot reasonably be construed as constituting deemed refusal. In fact, the respondent comes before this Court against the backdrop of withholding public records, which it is constitutionally bound to provide access to, by raising technical points, when access was granted in terms of section 25. On another construction, the fact that the respondent at a later stage after granting access, fails to provide the records requested, does not ex post facto bring such refusal within the ambit of section 27. That would be too broad an interpretation of section 27. If anything can be deemed in this application, in the absence of evidence to the contrary, and with only technical points raised by the respondent, it is that the respondent, for some clandestine reason, following the decision to grant access, subsequently does not want the applicant to have insight into the records requested.
- [46] In light of the findings as aforesaid, section 74 and 78 accordingly finds no applicability.
- [47] The procedure in PAIA could never have been construed by the legislature in giving effect to the constitutional right to information, to entail the necessity for those who wish to exercise their rights to approach the Court, in circumstances other than those envisaged after an unsuccessful internal appeal in terms of the PAIA, as the peculiar circumstances of this application demonstrates. The attitude of the respondent in this matter, however, necessitated this application which is exacerbated by the applicant being hamstrung by technicalities raised in opposition, designed to prevent access which is fundamental to the right to information as entrenched in the Constitution.
- [48] The application accordingly stands to be granted.

Costs

- [49] The opposition sadly comes at great cost to the ratepayers of the respondent, where scarce resources could have been utilised for more pressing needs in service delivery to the ratepayers. In the ordinary course this Court would mark its displeasure with a punitive cost order. However, that would entail costs essentially being borne by the ratepayers. I align myself with the sentiments expressed in the Full Court decision of the Eastern Cape supra that: “The time may have arrived for costs orders in deserving cases to be made against the

respective officials who unnecessarily force ordinary citizens, ... , to go to court to enforce a right that is enshrined in the Constitution and incontestable.” In the exercise of my discretion, however, I have decided that costs shall be costs on a party-party scale. The former statement should serve as a stern expression by this Court that it would not in future hesitate to grant punitive cost orders against officials who seek to circumvent constitutional rights of affected parties, by raising indefensible technical arguments.

Order

[50] Consequently, the following order is made:

- (i) The respondent is ordered to provide the applicant with the documents requested by the applicant as per Annexure “OT3” within a period of ten (10) days of the order.
- (ii) The respondent is ordered to pay the costs of this application on a party-party scale.

AH PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

Date of Hearing

: 29 July 2021

Judgment

Handed Down on

: 08 October 2021

Counsel for the Applicants

: Adv T. Moretlwe

Counsel for the Respondent

: Adv N. G. Laubscher

Attorneys for the Applicants

: Motshabi & Associates Inc.

(Instructed by Modiboa Attorneys Inc.)

Attorneys for the Respondent

: M E Tlou Attorneys & Associates

[1] 2009 (6) SA 323 (CC) at paragraph 62

[2] (5031/2018; 5108/2018; 5689/2018) [2019] ZAECHMHC 18; [2019] 3 All SA 879 (ECM) (29 March 2019)

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Prepared on 9 October 2026 · Esheria