

SOUTH AFRICA / JUDGMENT

Wabena v Deputy Information
Officer for the Department of Health,
Eastern Cape (EL 1378/2024) [2024]
ZAECELLC 47 (23 September 2024)
[2024] ZAECELLC 47

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL 1378/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE

DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO:

EL 1378/2024

OF INTEREST

In the matter between:

MPHUTHUMI

WABENA

Applicant

and

DEPUTY INFORMATION

OFFICER

Respondent

FOR THE DEPARTMENT OF

HEALTH,

EASTERN CAPE

JUDGMENT

IN RESPECT OF PAIA APPLICATION

HARTLE J

- [1] The applicant sought an order on the unopposed motion court roll on 17 September 2024 for relief in terms of the Promotion of Access to Information Act, No. 2 of 2000 (“PAIA”).
- [2] When the matter was called, Ms. Jozi, who appeared for the applicant, informed me that the information that was the subject of the PAIA request had been provided by the Department of Health (“the Department”) and that she held instructions in the circumstances simply to request an order removing the matter from the roll with a further order directing the respondent to pay the costs of the application and removal “on Scale A”.
- [3] Despite the concession that costs on the party and party scale were acceptable to the applicant (The notice of motion prayed instead for costs on the attorney and client scale) I questioned whether he was entitled to any costs at all given that the papers were in my view not in order, this notwithstanding the email addressed to the relevant State Attorney by the Department on 6 September 2024 stating as follows:

“Good Day Mrs Tongo

Kindly find attached records of Mphuthumi Wabena and liaise with the applicant attorney to remove this matter from the roll and tender reasonable wasted costs. (REF 748/24-P11).”[1]

- [4] Even after I pointed out the respects in which I found the application wanting, Ms. Jozi insisted on arguing that her client was entitled to exact his costs on the basis of the tender.
- [5] Section 18
- (1) of the PAIA dictates the form of a request for access to documentation of a public body in peremptory terms.[2] Sub-Sections (1) and (2) provide as follows in this respect:
- “(1) A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.*
- (2) The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned—
- (a) to provide sufficient particulars to enable an official of the public body concerned to identify —
- (i) the record or records requested; and
- (ii) the requester;
- (b) to indicate which applicable form of access referred to in section 29(2) is required;

- (c) to state whether the record concerned is preferred in a particular language;
- (d) to specify a postal address or fax number of the requester in the Republic;
- (e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and
- (f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the information officer.”

(Emphasis added)

- [6] It is further quite plain from the context of the PAIA and the manner of access provided for therein that the objective of the Act and expectation is that the request form on its own should suffice to generate the documentation requested and that applications in court should be a matter of last resort.[3] Indeed section 78 (1) of the PAIA says so in terms:

“(1) A requester or third party may only apply to a court for appropriate relief in terms of section 82 in the following circumstances—

- (a) after that requester or third party has exhausted the internal appeal procedure referred to in section 74; or
- (b) after that requester or third party has exhausted the complaints procedure referred to in section 77A.”

[7] Section 78

- (2) of the PAIA empowers a requester who has been unsuccessful in an internal appeal to the relevant authority of a public body[4] to vindicate such a situation by way of an application to court, made within 180 days after an actual or deemed unsuccessful internal appeal process has run its course, to seek appropriate relief in terms of section 82.

[8] Section 78 (2) of the PAIA provides as follows in this regard:

“(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);

(d) aggrieved by a decision of the head of a private body—

(ii) taken in terms of section 54, 57(1) or 60; or

(e) that is aggrieved by any decision of the Information Regulator,

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

[9] Apart from the relevant provisions of the PAIA, the Department’s

own PAIA Manual sets out the manner in which a party is supposed to make a request for access to information.

[10] Concerning the first stage of the request, the applicant attached an extract from the Department’s manual which it was suggested was current and which provides as follows regarding the procedural requirements to be met:

“7. HOW TO MAKE A REQUEST FOR ACCESS TO INFORMATION

7.1 The Procedure

7.1.1 A requester must fill out Form 2 attached as Appendix A and submit it, duly completed, to the relevant Deputy Information Officer at the address provided in paragraph 6 above to enable a response to the requester.

7.1.2 ...

7.1.3 The form submitted to the Deputy Information Officer must contain all relevant information to enable the Deputy Information Officer to identify the specific information requested.”

(Emphasis Added)

[11] As an aside the 2023 ECDoH PAIA Manual[5] has refined the peculiar information required even further. Requests can now be sent via email and be returned on such basis given that the Department has ostensibly embarked on an initiative styled “the centralised electronic management of PAIA” which possibly assists their unenviable mandate to identify, locate and provide meaningful access to public records with greater alacrity.

[12] Paragraph 7.1.1 of the 2023 Manual requires that the Form 2 must now not only be “duly completed” but must also be accompanied by the required annexures in the form of certified copies of identification documents of all the persons showing an interest in asking for the records.[6] A new paragraph 7.2.4 provides that where the request is for medical records certain information is to be provided “to assist the Department to trace the relevant medical records”. These details include the folder number for the patient specifically relating to the incident/s for which the medical records are being requested; the dates pertaining thereto; as well as the “discharge summary.”[7]

- [13] Leaving aside the fact that the Manual is reviewed annually to meet the specific need of the Department to enhance its duty to provide meaningful access to records under its charge, the Form 2 completed on behalf of the applicant in this instance also provides unequivocally under the heading “PARTICULARS OF RECORD REQUESTED” that a requester must:

“Provide full particulars of the record to which access is requested, including the reference number if that is known ..., to enable the record to be located. (If the provided space is inadequate, please continue on a separate page and attach it to this form. All additional pages must be signed.).” [8]

- [14] The description of the record or relevant part of the record applicable to the request, according to those assisting the applicant in this instance, reads as follows:

“Copy of his medical records including x-rays, charts and another other relevant info.”

- [15] Although the applicant is listed in Form 2 as the person on whose behalf the request was made, with his identity number indicated, the form nowhere references even the hospital where he received treatment.

- [16] The same vague information pertains in respect of Form B which is the internal appeal form. Again the applicant is cited as the person on whose behalf the internal appeal is lodged, with his identity number indicated, but the grounds for appeal are simply stated as follows:

“Refusal to grant access”

- [17] So what? said Ms. Jozi. There was a covering letter and regard was supposed to have been had by the information officer to that in order to glean what the applicant’s request on Form 2 was all about. Although this states that the lodgement concerns a “REQUEST FOR HOSPITAL RECORDS // MPHUTHUMI WABHENA // 6[...] DATE OF ADMISSION : 02ND MARCH 2024.” and also references the Frere Hospital in relation to the applicant’s stated admission in its second paragraph, I pointed out to her that the first line of that letter had also mistakenly indicated that the applicant’s attorneys were acting at the instance of one “NELSON MOYENI”, a different person entirely.

- [18] I emphasize further that even in respect of the notice of motion, the order prayed for does not specify the hospital at which the applicant was treated and which institution under the Department’s authority the request concerns. The header of the current application to court gives no hint as to this detail either since only the deputy information officer is presently required to be cited in terms of the Department’s PAIA manual. One therefore has to read the founding affidavit to glean this detail or examine the annexures carefully to get to the bottom of the request even at

this third stage of the requesting process where it has been elevated to a court.

[19] The lack of information in a request to be provided with access to information ironically is further confounded by the fact that when this matter was enrolled pursuant to the provisions of rule 15 (k) of the Joint Rules of Practice,[9] the applicant's representatives failed to properly comply with the provisions of rule 3 of the Practice Rules governing the set down of applications. Although in the notice of set down dated 26 August 2024 the reference number of the State Attorney cited in the notice to oppose is indicated (Practice Rule 23 (m) would have required service in this respect) the notice simply states as follows:

"KINDLY TAKE NOTICE THAT the Plaintiff hereby sets the matter down on the Un-opposed motion roll for the hearing of this matter on Tuesday the 17th day of September 2024 at 09:30 am or soon thereafter as the matter may be heard."[10]

[20] I am pleased to say that something ignited attention to the matter along the arduous way prescribed by the PAIA and produced an outcome in the week before the hearing and almost a month after the State Attorney was served with the court application, but that is not the end of the matter and does not in my view equate to the kind of success contended for by Ms. Jozi that automatically warrants a costs order in favour of the applicant.

[21] At every motion court sitting in East London and Bhisho, I have reason to point out to counsel acting on behalf of similar requesters who have reached the litigious stage, that poorly completed request forms (even if there are covering letters) will not meet the cut to satisfy the requirements for the grant of the relief sought in terms of section 82 of the PAIA. Leaving aside the peremptory provisions of section 18 (2)(a) and the detail demanded by the Department's own Form 2, to my mind it can never amount to a successful exhaustion of internal remedies when the department was not afforded an appropriate opportunity in the first place to go looking for a document which was inadequately described or where no suggestion was offered to the Department as to where it might be located. I have never encountered such a stance (which is commendable), but perhaps the time has come for the Department to adopt a no-nonsense approach by rejecting forms lacking in the required particularity and to require such non-compliant requests to be re-submitted where it is staring down the barrel of prohibitive costs of a court application and the proverbial clock is ticking against it to respond to such requests.

[22] The prejudice to the respondent of accepting an improperly completed Form 2 is vast both in terms of physical resources that are wasted looking for a record, the proper description of which is not given in the form especially crafted to assist its processes and search engines and the notional expanse of litigation costs that it will have to face since it is damned to a deemed refusal at two stages where it cannot effectively meet the request for information in time.

- [23] The forms necessary for a requester to complete are not mere stepping stones to an inevitable entry into the portals of court for an applicant who decides that it is necessary to elevate the request to a litigious level. They are instead vital to assist the Department's processes and to render a timeous response in the administrative realm so that the request does not reach the stage where it is elevated to the third stage, that is of the requester making an application to court.
- [24] Section 11 (1) (a) of the PAIA provides in clear terms that a requester must be given access to a record of a public body only if that requester complies with all the procedural requirement in terms of the Act relating to a request for that record and provided there is no legal ground to otherwise refuse its access.
- [25] In my view it is also not a minor concern that the covering letter in this instance introduced a completely different requester than the applicant. In the context of the sensitive nature of medical records and the legal obligation on the Department to respect a patient's privacy and personal information, this in itself might have warranted the request for access being placed on the backburner as it were whilst care was taken to establish if this was not just a mistake or whether a relevant interest actually existed in having made the request. The point is that adjudged objectively it hardly lies in the mouth of counsel to have suggested that the court should have inferred that the Department was being obtuse in not meeting the request or lacking in sensitivity regarding the applicant's constitutional entitlement to be provided with the record requested within the 30 days that the PAIA stipulates.[11]
- [26] PAIA applications make up a huge number of the applications on the motion court roll every week. It remains the duty of the court in every such application to painstakingly consider whether the applicant is entitled to relief, whether in substantive terms, or even just by way of a costs order. This is not to give the respondent a pass where it has failed in real terms to provide access or has frustrated a requester's constitutional right of access to information, but to avoid an abuse of process and a proliferation of an unfair fiscal burden on the Department that it may never recover from.
- [27] To my mind the proviso in section 82 of the PAIA that the order which this court makes must be one that is "just and equitable" behoves it to take into account the inherent unfairness that prevails in circumstances where the Department's self-standing Request Form is undermined in the most basic of details that it needs to enable it to identify and locate records under its charge.
- [28] The fact that the request, though lacking in particularity yielded up the information in any event does not equate to compliance by the applicant with the peremptory provisions of section 18 (2)(b) of the PAIA entitling him to costs, let alone punitive costs.[12]

[29] What am I to make of the Department's offer to tender "reasonable wasted costs"? As commendable as the tender is I decline to make any order as to costs in these circumstances as this would be tantamount to rewarding the applicant who failed to make out an entitlement on the papers to have elevated his request to this court for relief in terms of section 82 of the PAIA.

[30] I however accede to the applicant's request to remove the matter from the roll, even if for a different reason.

[31] In conclusion I make the following order:

1. The matter is removed from the roll.
2. There is no order as to costs.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING

: 17 September 2024

DATE OF JUDGMENT : 23 September 2024

Appearances:

For the applicant : Ms. V Jozi, instructed by T C Tshona Attorneys Inc., East London (ref. Mr Tshona).

For the respondent : Nil appearance, but represented by the State Attorney, East London (ref. Ms. Tongo).

[1] The reference in parenthesis accords with the State Attorney's reference number indicated on a notice to oppose filed by the respondent dated 14 August 2024. As is the custom, such notices seem to be filed perfunctorily by the State Attorney to gain more time to deal with PAIA requests once they are elevated to the court. The founding papers were served on the State Attorney on 8 August 2024.

[2] See *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* (5031/2018; 5108/2018; 5689/2018) [2019] ZAECHMC 18; [2019] 3 All SA 879 (ECM) (29 March 2019) at par [10] and [17]. ("Paul & Others"). This judgment was delivered by a specially constituted bench of this Division pursuant to the provisions of section 14 (1) (a) of the Superior Courts Act, No 10 of 2013.

[3] *Paul & others*, *Supra*, at par [7].

[4] This is made provision for in sections 74 - 77 of the PAIA.

- [5] This Manual was signed off by the Head of Department on 30 June 2023. It appears that the Manual is required to be reviewed annually. The 2023 Manual may already have been overtaken by a new manual but this is of no real moment for present purposes.
- [6] Paragraph 7.3.3 reads differently in the 2023 Manual.
- [7] The reference to a discharge summary is probably a reference to the prescribed discharge report made provision for in section 10 of the National Health Act. No. 61 of 2003.
- [8] The imprimatur that additional pages must be signed confirms that every part of the request is required from the Department's

perspective to be a properly sanctioned one. It would violate the patient's privacy if documents asked for in a covering

letter or in any additional document provided do not also confirm by the person's signature on whose behalf the request is being initiated that he agrees and is amenable to the Department releasing the information to the nominated requester.

- [9] This practice rule allows an applicant to enrol an opposed matter on the unopposed motion court roll where although the respondent had filed a notice to oppose, he or she has not timeously filed an answering affidavit.
- [10] It is a lost cause it seems. I constantly point out to counsel in motion court that a notice of set down, especially one served pursuant to the provisions of Practice Rule 23 (m), must draw to the attention of the relevant government department what relief exactly will be sought at the proposed hearing so that it can make an election whether there is a need to appear in court to make any input at all, or to truly relinquish any further interest in the matter and to let it go on a default basis with whatever costs order is at risk of being granted. The State Attorney is a unique litigator whose office is also under huge pressure by the sheer multitude of applications brought against the State. The State attorney is duty bound (in terms of section 3(4) of the State Attorney Act, No. 56 of 1957) to represent the interests of its client Department even when applications are enrolled on a default basis, hence the significance of the notice required in terms of Rule 23 (m). In terms of policy developed pursuant to the provisions of section 3(4) of the State Attorney Amendment Act, No. 13 of 2014, concerning its initiating, defending and opposing of matters on behalf of the State, its office is required at any stage of the proceedings to alert the Client Department to the court's discretion in relation to an award of costs and the likely triggers of adverse costs orders. It appears to me that the client and the State Attorney are stymied when dealing with cryptic notices. In my view the obligation on the requester to be quite specific about the

information he or she seeks must continue into the third, litigious stage of the requesting process with a view to enabling the

information requested to be identified and located at its source. The right of access to information is one-sided where the information officer is not made aware by a clear description of what exactly is being asked for and where that information is likely to be sourced from. The third stage of the process should be a last resort, and in that event the founding papers comprising the court application should provide a justified basis to say why the errant or tardy information officer ought to be mulct in costs because that stage was even reached at all.

[11] The court was never asked to condone any shortcomings in the request form but it was conversely suggested that it should draw an inference as to the respondent's disdain.

[12] It is a pity because the applicant's papers were otherwise well crafted and exemplary for applications of this kind.

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