

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2722/2017
Date heard: 10 May 2018
Date delivered: 26 June 2018

In the matter between

LEENDERT DIRK MULCKHUYSE

Applicant

And

THE MINISTER OF POLICE

Respondent

JUDGMENT

GOOSEN, J.

[1] This is an application for access to information brought against the respondent in terms of the provisions of the Promotion of Access to Information Act, Act 2 of 2000 (hereafter 'PAIA'). The information sought is that contained in a police investigation docket. The application is opposed. The principal basis upon which it is opposed is that the requested information was furnished prior to the commencement of the application and that the launch of the application was unnecessary.

[2] At the hearing of the matter it was common cause that the applicant has been furnished with all of the requested information. Accordingly, the only issue to be determined by the court is the question of the costs of the application.

- [3] The applicant lodged his request for information in terms of PAIA on 9 February 2017. It is common cause that on that day the Information Officer to whom the request for information was addressed, sent a letter to the applicant's attorney requesting certain information and documents which were required in order to process the application. It was further common cause that the applicant supplied the requested information on 24 February 2017.
- [4] The applicant contends that he received no response to the request for access to the requested records within the 30-day period prescribed in s 25 (1) of PAIA. He accordingly filed a notice of appeal, in terms of ss 74 and 75 of the Act, on 16 March 2017.
- [5] On 3 May 2017 the applicant's attorneys received a request from the respondent for payment of the fees in respect of the information sought. The applicant states that the request was complied with on 30 May 2017. Thereafter, on 6 June 2017, the respondent allegedly partially complied with the applicant's request for information by furnishing the A section of the requested docket to the applicant's attorneys. However, since the respondent had failed to furnish the B and C sections of the docket the applicant was compelled to bring the present application, in terms of s 78 (2) and to seek an order in terms of s 82 of PAIA.
- [6] The applicant launched the present application on 16 August 2017. When the respondent's answering affidavit was filed on 19 October 2017, the full extent of the information sought by the applicant was then furnished.

- [7] There is, on the papers, a dispute in regard to the above chronology of events. The principal dispute concerns the question whether the appeal lodged by the applicant was lodged prematurely. There is also a dispute in regard to the date on which the respondent requested payment of the prescribed fee and, furthermore, a dispute in relation to the provision of the requested information, in particular sections B and C of the requested docket.
- [8] The respondent contends that the applicant's request for access to the record, lodged on 9 February 2017, was incomplete, and that it was only completed upon receipt of the necessary documents which were supplied on 24 of February 2017. On this basis it is submitted that the time period within which the respondent was required to respond to the request for information only expired on 24 March 2017. It is therefore submitted that the lodging of an internal appeal, on 16 March 2017, was premature.
- [9] The respondent further alleges that on 3 March 2017 a letter, dated 2 March 2017, was telefaxed to the applicant's attorneys giving the applicant notice of the prescribed fee payable in respect of the request. This document was again sent by telefax on 3 May 2017. It only received payment of the prescribed fees on 30 May 2017.
- [10] On 6 June 2017, having received payment of the prescribed fee, the information officer at the Somerset East Police Station forwarded a copy of the requested docket to the applicant's attorneys by telefax. The respondent states that it included all of the documents requested and that the transmission was successful.

[11] Attached to the applicant's papers is a copy of the covering letter dated 2 March 2017 and two fax transmission reports. One fax transmission report indicates a fax transmission on 3 March 2017. The other indicates a fax transmission on 3 May 2017. These documents provide support for the contention that the respondent directed its request for payment of the prescribed fee to the applicant on 3 March 2017. This was at a time prior to the applicant's launch of an internal appeal based on the deemed refusal to provide the requested documents.

[12] It is significant that following the further request for payment of the prescribed fee on 3 May 2017 and the payment thereof on 30 May, that the requested documents were furnished on 6 June 2017. The respondent asserts in its answering affidavit that all of the documents requested were dispatched to the applicant's attorney on that date. The respondent thereafter heard nothing further from the applicant's attorney until the application was commenced on 11 August 2017, two months after the respondent had furnished the documents to the applicant.

[13] These being motion proceedings in which final relief is sought by the applicant the well-known rule regarding the resolution of disputes of fact, as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (30 SA 623 (AD)) applies. It must therefore be accepted that on 6 June 2017 the respondent furnished the requested documents to the applicant.

[14] In my view, it is significant that following the furnishing of the documents to the applicant on 6 June, no further correspondence was addressed to the respondent. If, as alleged by the applicant, only section A of the police docket was furnished, then it might have been expected that the applicant's attorneys would have addressed correspondence to the respondent pointing out that it had received

only some of the documents requested. It might also have been expected that the applicant would have sought reasons for the purported refusal to furnish the B and C sections of the docket, since, so far as the applicant was aware, the decision to provide the documents was consequent upon a successful appeal lodged by the applicant. There is, however, no such communication. Nor is there a communication of any demand pointing out that the failure to furnish all of the requested documents would, in the absence of delivery of such documents, necessitate an application to this court.

[15] In the circumstances, it must be accepted that the launch of these proceedings was precipitous and not warranted. In the light of this finding it is not necessary to deal with the contention raised by the respondent's counsel that the internal appeal was premature and that the review proceedings are accordingly defective. It suffices to treat the matter on the basis, as I have indicated, that the respondent alleges that it dispatched all the documents sought on 6 June 2017 and that it is common cause between the parties that on that day the respondent did furnish certain documents to applicant.

[16] It follows from what is set out above and the findings made in relation to the issues in dispute between the parties, that the applicant was not entitled to approach the court for the principal relief sought. In the circumstances the respondent was successful in the opposition to the application. It follows that the appropriate order will be that the costs should follow the result. I am aware that the applicant is seeking to vindicate a constitutional right of access to information. Ordinarily it would be entitled to the costs of the application where such right is vindicated in the process of the litigation.

However, I am not aware of any authority which suggests that even in circumstances where a party is not entitled to seek the relief, that such party is entitled to its costs.

[17] In the result the following order will issue:

The applicant is ordered to pay the respondent's costs of the application.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant
Adv. A. C. Moorhouse
Instructed by RJM Attorneys

For the Respondent
Adv. B. Ndamase
Instructed by the State Attorney