

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

Case No.: 3327/2018

Date Heard: 1 August 2019

Date Delivered: 3 September 2019

In the matter between:

MAURITZ DE VRIES

Applicant

and

SOUTH AFRICAN TEACHERS' UNION

First Respondent

THE INFORMATION OFFICER

SOUTH AFRICAN TEACHERS' UNION

Second Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks to compel the first respondent, in terms of the Promotion of Access to Information Act, 2 of 2000 (PAIA), to furnish him with an array of documents. The first respondent is a trade union duly registered in terms of the Labour Relations Act, 66 of 1995 (the LRA) and the second respondent is cited as the information officer of the first respondent.

[2] The documents sought as set out in the notice of motion are:

“1.1 The budgets for the SOUTH AFRICAN TEACHERS UNION for the years 2015, 2016, 2017 and 2018 as referred to in its Constitution;

- 1.2 The minutes of all meetings of the SOUTH AFRICAN TEACHERS UNION's National Advisory Committee for the years 2015, 2016, 2017 and 2018;
- 1.3 The minutes of Provincial Standing Committee meetings for the SOUTH AFRICAN TEACHERS UNION for all provinces, in proof of their respective compliance with their constitutional duty to consider new membership applications for the years 2014, 2015, 2016, 2017 and 2018;
- 1.4 All recommendations made to the SOUTH AFRICAN TEACHERS UNION's Standing Committee in respect of finances and the reports in terms of section 13.4 of its constitution for the years 2015, 2016, 2017 and 2018;
- 1.5 Minutes of the Eastern Cape Provincial Executive Committee of the SOUTH AFRICAN TEACHERS UNION, for its meeting of 23 February 2018;
- 1.6 The instruction by the national office of the SOUTH AFRICAN TEACHERS UNION to Provincial Secretaries instructing them as to their choice of sponsors;
- 1.7 The minutes of the meeting/s in which Mr Klopper was authorised or instructed to institute legal proceedings and/or to seek a restraining order against businessman, Mr Michael Pashut, on behalf of SOUTH AFRICAN TEACHERS UNION members, and the resolution authorising such action;
- 1.8 The SOUTH AFRICAN TEACHERS UNION minutes of the meeting in which the decision was taken to appoint security guards at Lombardi in 2018;

- 1.9 All documents relating to the payment by SOUTH AFRICAN TEACHERS UNION for such security guards, identifying the budget section from which such payments emanated;
- 1.10 The mandates obtained from members authorising all proposed amendments to the constitution of the SOUTH AFRICAN TEACHERS UNION and the notices addressed to its provincial branches and to its members in respect of such proposed amendments, since 1997;
- 1.11 All minutes of the meetings of the SOUTH AFRICAN TEACHERS' UNION, authorising the establishment of Finansiële Dienste van Suid Afrika (Pty) Ltd ("FINSA") and the South African Education Foundation ("SAEF") and T.O. Onderlinge Maatskappy ("TOO") which have special group or other relationships with the SOUTH AFRICAN TEACHERS UNION, or being entities holding common management with it, whose members or office bearers may hold personal or other interests in such entities;
- 1.12 Proof of each and every payment of monies made by the SOUTH AFRICAN TEACHERS UNION to TOO, FINSA and SAEF during 2015, 2016, 2017 and 2018, reflecting the dates, amounts and payees and the purpose of the payment;
- 1.13 Proof of each and every payment of monies received by the SOUTH AFRICAN TEACHERS UNION from TOO, FINSA and SAEF reflecting the dates, amounts and payer and purpose of payment in each case;
- 1.14 Proof of each and every payment made by the SOUTH AFRICAN TEACHERS UNION to its management employees and the executive officer bearers for the years 2016, 2017 and 2018, reflecting the dates, amount and name of payees and the purpose of each payment; and

1.15 All agreements concluded between the SOUTH AFRICAN TEACHERS UNION, FINSA and SAEF.’

Background

[3] The applicant is the school principal at the Sunridge Park School in Port Elizabeth, a longstanding member of the first respondent and previously a member of its Provincial Executive Council. It is his perception that the affairs of the first respondent, including the financial affairs, have been mismanaged by its senior office bearers at national level. He was unhappy with the explanations he received in response to enquiries and accordingly he established a pressure group under the name “Forum for Concerned SATU Members”. Thereafter he resigned from the Provincial Executive Council. By virtue of the conclusion I have reached it is not necessary for purposes of this judgment to set out the alleged mismanagement in greater detail. Suffice it to record that shortly after his resignation as aforesaid he submitted a “REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY”, purportedly to the second respondent, on 25 May 2017 under cover of a letter setting out his concerns and advising of allegations of mismanagement. Included in the documentation so requested was all the documents listed above and the “manual” required by s 14 of PAIA. I shall revert to the significance hereof later.

[4] The first respondent reacted, somewhat belatedly, under the hand of its deputy president, on 13 July 2018. He recorded, *inter alia*:

‘We have perused your request for the documents of (SATU) as set out in Annexure A of your letter.

In terms of Section 50 of the Promotion of Access to Information Act ... to get access to the records of private bodies, a requester must establish that “*the record is required for the exercise or protection of any rights*”.

The (SATU) is a labour union acting on behalf of its members in various capacities. We fail to see what type of right you in your capacity as a member, seek to exercise or protect ...

...

Kindly furnish us with full particulars regarding the right(s) you seek to exercise or protect to enable the National Executive Committee to consider your request.

...

The (SATU) is *prima facie* of the opinion that you are not entitled to any of the information sought and hereby afford you the opportunity to advance arguments/information to the contrary. As far as the PAIA Manual is concerned, the (SATU) is not legally obliged to have such manual.’

[5] This letter elicited an immediate response from the applicant. He declined to provide particulars of the right which he sought to exercise and did not avail himself of the opportunity to explain why the record is required for the exercise or protection of such right. Rather, he recorded:

“The need to obtain the documents which I have requested has already been explained. I do not understand why you believe that I do not have a right to protect, by asking for the documents. There is a reasonable belief, that (SATU), as my union which is required to serve my interests as a member, has acted unlawfully and contrary to my rights to independent, effective and honest union representation, without undue or extraneous

influence or the pursuit of personal gain and conflict of interest. In fact the entire membership has that right and as has already been explained, the activities of the senior membership of (SATU) have been called into question without proper explanations being furnished.

The reluctant approach which you have adopted in your response lends further credence to my concern especially because there can surely be no reason not to furnish the documents.

I have been advised to submit to (SATU) a Notice of Appeal, which I am attaching. I do hope that you will reconsider and that it will not become necessary to request a court to compel compliance.”

[6] This correspondence foreshadowed the central dispute which emerges in the present application. The applicant, in his founding papers, asserts, without ever engaging the merits of the assertion, that the first respondent is a public body and that he is therefore entitled to the documentation requested. In his founding papers he refers to the first respondent's letter dated 13 July 2018 which I have set out earlier. His response thereto is dismissive of first respondent's enquiry. He simply states:

'32. The First Respondent specifically relies on section 50 of the Information Act and suggest that I "... must establish" that I have a right to protect. Firstly, section 50 relates to Private Bodies and not to Public Bodies and would therefore be irrelevant. Secondly, the Information Act does not require that I "must establish" any right, in the sense that I have a duty to convince the First Respondent of the merit of my purpose. As I understand the Information Act, it merely requires that I assert such a right.

33. I respectfully draw attention to section 11(3) of the Information Act which provides that a requester's right of access is not affected by any reasons which the requester gives for requesting access. Accordingly, it is not for the First Respondent to question the reasons for my request.'

[7] The first respondent, on the other hand, contends that it is a private body. A private body does not have an information officer in terms of PAIA and neither s 11(3) nor s 14 (which relates to the manual requested) find application to private bodies.

[8] In the face of this dispute, pertinently raised, the applicant did not file replying papers. Counsel on behalf of the applicant chose to argue the matter on the papers as they stood after filing of the answering papers.

[9] In its heads of argument the first respondent raised a number of points *in limine*. It is necessary to refer to only two of these for the purposes of the present judgment. Firstly, the first respondent contended that this court did not have jurisdiction to adjudicate upon the dispute. In this regard it alleged that the first respondent was a private body having its principle place of business in Garsfontein, Pretoria and was therefore neither resident nor domiciled within the area of jurisdiction of this court. The second issue raised formed the central dispute between the parties before me, namely, whether the first respondent was a public body as defined in PAIA or a private body.

[10] Whilst Mr *Pretorius SC*, on behalf of the first respondent, did not pursue the first of these arguments with any vigour it is necessary to make a determination on the issue in order to assess whether the second issue can be considered.

[11] Section 78 of PAIA provides for an application by an aggrieved requester to a court. To the extent material to this application, “a court”, is defined in s 1 of PAIA to be:

- “(i) a High Court or another court of similar status; or
- (ii) ...
- within whose area of jurisdiction-
- (aa) ...
- (bb) ...
- (cc) the requester or third party concerned is domiciled or ordinarily resident.”

[12] PAIA therefor contains its own jurisdictional provisions. In the circumstances the first respondent’s assertion in respect of jurisdiction cannot be sustained.

[13] I turn to consider the second dispute between the parties, namely, whether the first respondent is a public body, as defined in PAIA, or a private body. The significance of the dispute arises from the provisions of s 50 and 53 of PAIA. Section 50 provides:

- “(1) A requester must be given access to any record of a private body if-
- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”

[14] The entitlement to information in possession of a private body is dependent on the compliance with the procedural requirements in PAIA. In order to comply with the procedural requirements as envisaged in s 50(1)(b) the request must be submitted in the form prescribed. Section 53 prescribes the form thus:

- “(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.
- (2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned-
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right;
 - (e) ... “

[15] It is these provisions which were raised by the Deputy President of the first respondent in the letter of 13 July 2018. It is not in dispute that the request submitted to the first respondent did not identify the right which the requester is seeking to exercise or protect and therefore did not provide an explanation as to why the requested record was required for the exercise of the rights identified. Before me, Ms *Bands*, on behalf of the applicant, acknowledged that in the event that I find that the first respondent is not a “public body” as defined in PAIA the application must fail.

[16] A “public body” is defined in PAIA as:

- “(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.”

[17] The first respondent clearly does not fit into (a) or (b)(i) of the definition, nor did the applicant contend that it did. Ms *Bands* did not argue that the applicant performs a public power in respect of any legislation. The argument on behalf of the applicant is that it is a public body as it performs a public function in terms of the LRA. The argument flows from the *obiter dicta* of Conradie JA in *Mittalsteel South Africa Ltd (Formerly Iscor Ltd) V Hlatshwayo* 2007 (1) SA 66 (SCA) where he postulated, with reference to English jurisprudence, that in an era in which privatisation of public services and utilities has become common place, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.

[18] In his discussion of the English law, Conradie JA referred to *De Smith, Woolf and Jowell: Judicial Review of Administrative Action* (1995) 5ed at 167 where they say:

'For a great many years, the way in which the courts have identified the activities which are subject to public law is by deciding whether or not they are activities to which the High Court's supervisory jurisdiction of judicial review may be invoked by aggrieved persons. In the past, this was mainly done by asking what was the *source of the power* being exercised by the decision-maker whose action was impugned. Where the power was statutory or, more recently, derived from the prerogative, then that jurisdiction could be invoked. Where, however, powers were conferred solely by a contract (such as an arbitration agreement or an agreement governing the relationship between members of an unincorporated association), judicial review generally was not available. Today, the courts recognise such an approach is too restrictive and they are now influenced by the type of *function performed* by the decision-maker whose action is challenged. Where a body is carrying out a public function (such as that undertaken by a non-government regulatory organisation in relation to the area of activity which is subject to its control), the courts will consider intervening to require compliance with the principles of judicial review. This is the case even if the body is non-statutory, exercising powers which are not derived either from legislation or the prerogative.

A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation.'

[19] On the strength hereof it was argued that the first respondent seeks to achieve some collective benefit for a section of the public (being its membership) and its

membership accepted that it has the authority to do so. In doing so, so the argument goes, it dispersed public funds, being the subscriptions fees of its members. These functions, it was contended, are performed in accordance with the LRA.

[20] Attractive as the argument may appear at first glance, I consider that it is misguided. The first respondent does not perform its functions in terms of the LRA. It is true that the first respondent is a registered trade union as provided for in the LRA. That does not mean that it carries out its operations in terms of the LRA, on the contrary, it does so entirely independently in the interest of its members. The LRA merely regulates the registration of trade unions, it does not regulate the operation of the trade union. Whatever functions the first respondent may perform are therefore not performed in terms of any legislation.

[21] I do not consider that De Smith *et al* had in mind the membership of a voluntary organisation when referring to a section of the public. It seems to me that every voluntary organisation seeks to achieve some collective benefit for its membership and its members, invariably, accept that it has the authority to do so. That does not render their management functions “public functions”.

[22] The Supreme Court of Appeal in *Mittalsteel* proceeded, after the reference to De Smith *et al*, at para [21] to explain that:

“The authors also discuss various tests employed by English courts to determine whether a body is subject to judicial review of its actions. They are, in summary:

1. whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question;
2. whether the government has encouraged the activities of a body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government;
3. whether the body was exercising extensive or monopolistic powers.”

First respondent does not appear to me to fall into any of these categories and certainly it does not carry out functions which are traditionally government functions.

[23] Moreover, the funds dispersed by the first respondent are raised by the subscriptions paid by its members. It is not derived from taxation and can hardly be described as public funds.

[24] In the circumstances the first respondent is a private body. In order to obtain documentation from the first respondent the applicant is required to comply with the provisions of s 50 and 53 of PAIA. He was alerted thereto by the first respondent in its letter of 13 July 2018 and he consciously resolved not to do so. In these circumstances the application must fail.

[25] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv I Bands instructed by Randell & Associates,
Port Elizabeth

For Respondents: Adv G C Pretorius SC instructed by Erasmus
Inc, Pretoria c/o Annali Erasmus Inc, Port Elizabeth