

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

CASE NO: 1499/2021
Date heard: 17 February 2022
Date delivered: 1 March 2022

In the matter between

NTSIKELELO WISEMAN DIDODI

Applicant

VS

**THE HEAD OF GOVERNMENT EMPLOYEES
MEDICAL SCHEME (The Information Officer)**

Respondent

JUDGMENT

LOWE J:

INTRODUCTION

1. This application relates, at this stage, only to the costs thereof.
2. The origin of the application is that Applicant brought this application seeking an order that it be furnished with copies of the scheduled medical expenses as well as supporting vouchers relevant to Applicant held by Respondent.
3. The application was launched by service of the application (which had been issued on 7th June 2021) upon Respondent on 21 June 2021.
4. Subsequent to the service of the application Respondent on 29 July 2021 in fact furnished Applicant with the information sought.
5. Applicant's argument was in essence that it was entitled to the documents sought, that these had not been furnished notwithstanding its request therefore, that it complied with the time limits relevant in bringing the application in circumstances where the Respondent had failed and/or refused to do the necessary.

6. Applicant concedes that the chronology of events is crucial to its success on the costs which relate to the merits of the application being in its favour.
7. Respondent, however, argues in the essence that it only became aware of the fact that the documents were sought on service of the application upon it on 21 June 2021, and that having provided these documents in due course, on 29 July 2021, the application ought to be dismissed having been brought prematurely and accordingly that it is entitled to the costs thereof.

THE CRUCIAL ISSUES

8. In argument, upon an examination of the chronology of events, Respondent's counsel was driven, quite correctly, to concede that Respondent had, at the latest (or was deemed to have) received the request for the documents from Applicant upon the day in which the request therefor, sent by registered post, had reached its destination and the registered slip delivered to Respondent, as deemed having regard to the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) as read with section 7 of the Interpretation Act 33 of 1957.
9. The chronology demonstrated that the registered letter request for information was in transit from 19 April 2021 to 11 May 2021, the registered slip notifying Respondent that the letter had been received at the relevant post office provided to Respondent on 11 May 2021.
10. Again, in my view, correctly and having regard to section 56(1) of the PAIA the 30 day waiting period afforded Respondent expired 30 days subsequent to 11 May 2021.¹

¹ PAIA s56(1): Decision on request and notice thereof.—

(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the head of the private body to whom the request is made must, as soon as reasonably possible, but in any event within 30 days, after the request has been received or after the particulars required in terms of

11. Whilst the application had been issued on 7 June 2021, it was not served until 21 June 2021, accordingly the institution of the action fell outside the 30 day notice period. The application for information was deemed, in terms of PAIA² to be refused and having regard to the fact that Respondent is a private body, there is no statutory appeal process required to be followed.
12. In the result, the application, was launched in accordance with the periods prescribed in PAIA, to which Respondent had no defence, and in fact supplied the relevant documents in due course, although only on 29 July 2021.
13. In argument, Respondent, through its counsel and notwithstanding his best efforts, was unable to put up a defence to the merits of the application.
14. The request for access to information was addressed to the correct address chosen by Respondent in its information manual and in one of the manners chosen in the manual. The application to compel was, in my view, correctly launched in terms of section 78, 81 and 82 of PAIA, service having occurred on 21 June 2021.³
15. In the result, the merits of the application fall to be determined in Applicant's favour, a proper case having been made out.

COSTS

16. In the result, it follows that costs should, on the usual basis, having regard to justice and equity, be awarded to Applicant, no defence being disclosed in respect thereof.

section 53 (2) have been received— (a) decide in accordance with this Act whether to grant the request; and (b) notify the requester of the decision and, if the requester stated, as contemplated in section 53(2)(e), that he or she wishes to inform him or her in that manner if it is reasonably possible.

² Paia Section 58: Deemed refusal of request.—

If the head of a private body fails to give the decision on a request for access to the requester concerned within the period contemplated in section 56 (1), the head of the private body is for the purposes of this Act, regarded as having refused the request.

³ *Tladi vs Guardian National Insurance Company Limited* [1992] 1 All SA 168 (T) at 171; *Finishing Touch 163 (Pty) Ltd vs BHP Billiton Energy Cole South Africa Limited and others* [2012] JOL 29082 (SCA) at paragraph 20; *Paul v MEC for Health (EC) Case no 5031/2018, Mthatha*.

17. Applicant, however, goes further and seeks, in the application, and now, costs on the scale as between attorney and client.
18. Upon initially reading the application, it seemed to me that perhaps this request for costs on attorney and client scale was something of a stretch.
19. Having heard argument, and having carefully considered the papers and annexures thereto, I am now persuaded that in this particular matter a costs order on the scale sought would be appropriate.
20. Attorney and client costs are in general awarded in circumstances where the litigation is vexatious, fraudulent or dishonest, or constitutes an abuse of process.⁴ To this one may add that such order is justified where the conduct concerned is “extraordinary” and worthy of the Court’s rebuke.⁵
21. The fundamental basis of the argument in respect of punitive costs surrounds the fact that Applicant contends that not only did Respondent suggest, (wrongly), that it had a defence relevant to Applicant not paying the fee relevant to the request for access but further, in the face of Applicant having brought an application perfectly correctly, threatened Applicant with opposition to the application, threatening to seek a costs order on an attorney and client basis in the circumstances where this was patently unjustified, and further in circumstances in which Respondent had not yet furnished the documents sought when it should have done so as these documents should have been furnished once Respondent became aware of the request therefor and its obligation to act accordingly.
22. The application itself, as I have said, was deemed to have been launched on 21 June 2021, but the documents were only supplied on 29 July 2021, some very

⁴ Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) [8]

⁵ Public Protector supra; Plastic Converters Association of South Africa (PCASA) v National Union of Mineworkers Union of South Africa and Others [2016] 37 ILJ 2815 (LAC) (6 July 2016) [46]

considerable period post Respondent's deemed receipt of the request therefor on 11 May 2021.

23. Perhaps the high water mark is a letter from Respondent's attorneys to Applicant's attorney of 12 July 2021 in which the following appears at paragraph 6:

“However, our client is willing to provide your client with the requested documentation subject to your client's written undertaking that he will withdraw the application within seven (7) days of receiving the aforesaid documentation. Should your client not agree to the above proposal, we hold instruction to oppose the matter and seek a punitive costs order.”

24. To put it mildly this seems to be an attempt , and an unjustified one at that, to avoid the inevitable consequence of the application in circumstances in which Respondent must have well known that it was obliged to and had not yet provided the documentation, with an unwarranted, (and unfortunate) insinuation that unless this was acceded to the documentation would not be provided, this offer being conditional upon an undertaking to withdraw the application, and that if this was not agreed to the matter would be opposed, Respondent seeking a punitive costs order.
25. This is not conduct warranted in matters such as this let alone one where an Applicant legitimately seeks documents which had not been provided within the time limits set out in the PAIA.
26. In my view, in the circumstances taken as a whole a punitive costs order is warranted.

THE ORDER

27. In the result the following order issue:

Respondent is to pay Applicant's costs of the application on the scale as between attorney and client.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Adv. P. Marais
Instructed by: Jaco Hattingh Attorneys, Ms. Gordo-Graham

Appearing on behalf of the Respondent: Adv. Dwayi
Instructed by: Mac Robert Attorneys, Kem Tumba Diong