

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL 683/2023

In the matter between:

LUSANDA RALPH MAGUMA

Applicant

And

**THE STATION COMMANDER,
FLEET STREET POLICE STATION**

1st Respondent

**SOUTH AFRICAN POLICE SERVICES,
DEPUTY INFORMATION OFFICER**

2nd Respondent

**MINISTER OF THE SOUTH AFRICAN
POLICE SERVICES**

3rd

Respondent

JUDGMENT

ZONO AJ

INTRODUCTION

- [1] The applicant instituted the instant proceedings for a relief in terms of which the first respondent is directed to provide him with copies of the Post Mortem Report of his partner, Thabisa Rasonti who died at Frere Hospital on 09th September 2018. The applicant seeks costs of the application against the respondents jointly

and severally, one paying the other to be absolved, on an attorney and client scale.

- [2] The applicant contends that on 11th April 2022 he requested copies of the Post Mortem Report relating to the death of his partner and that information was never given to him. On 22nd September 2022, after the expiry of (30) thirty days from the date of receipt of the request by the respondents, he lodged an internal appeal. The internal appeal addressed and ostensibly delivered to the second respondent, who is cited as South African Police Service, National Deputy Information Officer (National Deputy Information Officer). The prescribed (30) thirty days has expired without any kind of response relating to the outcome of the internal appeal. The applicant thereafter resorted to this litigation.
- [3] The application is strenuously opposed by the respondents. The application is mainly opposed on legal grounds. The respondents contend that the request did not meet the mandatory standards and requirements prescribed by the enabling legislation. They cite a number of grounds. Consequently, the respondents assert that the application is ill-fated.
- [4] Firstly, the respondents plead non-compliance with the provisions of **Section 34(1) (e) of Promotion of Access to Information Act 2 of 2000 (PAIA)** in that the applicant is not the deceased's next of kin. According to this section a person is entitled to be given information in terms of the PAIA if he or she is *inter alia*, deceased next of kin. Applicant's *locus standi* is placed in issue.
- [5] Secondly, the respondents plead non-compliance with Section 18 of PAIA read with paragraph 5.3(10) of the South African Police Service PAIA manual in that the information so requested is insufficiently particularized and that the information so requested, despite diligent search could not be found. Request for further particulars was made to the applicant which particulars were not given to the respondents.

- [6] Thirdly, long after the expiry of sixty (60) days from the receipt of the request the respondents received the internal appeal and they realized that it is defective as it failed to comply with the provisions of Section 75 (1) (a) (i) of PAIA, in that the internal appeal was lodged after the expiry of the prescribed sixty (60) days.
- [7] Fourthly, the respondents contend that the internal appeal was sent to the incorrect information officer. The respondents do not set out the name and the particulars of the correct information officer. No oral submissions were made to support this assertion.
- [8] The respondents ask that the application be dismissed for non-compliance with the imperative provisions of the PAIA. The defects in the applicant's request and internal appeal are fatal.
- [9] It is therefore common cause that the request for access to information was made and same was received by the respondents. It is common cause further that the internal appeal was lodged outside sixty (60) day period prescribed by section 75(1) (a) of the PAIA.

DISCUSSION

(i) Section 34(2)(e)(i) of PAIA- next of kin- applicant's locus standi

- [10] The high water mark of respondents' reliance on the provisions of Section 34(2) (e) (i) of PAIA is that the applicant, although that he had made request for access to information, is not the deceased's next of kin.
- [11] **Section 34 of PAIA** provides as follows:
"Mandatory protection of privacy of third party who is natural person
34. (1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would

involve the unreasonable disclosure of personal information about a third party, including a deceased individual.

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information—

(a) *about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;*

(b) *that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;*

(c) *already publicly available;*

(d) *about an individual's physical or mental health, or well-being, who is under the care of the requester and who is—*

(i) under the age of 18 years; or

(ii) incapable of understanding the nature of the request, and if giving access would be in the individual's best interests;

(e) *about an individual who is deceased and the requester is—*

(i) the individual's next of kin: or

(ii) making the request with the written consent of the individual's next of kin;

(f) *about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to —*

(i) the fact that the individual is or was an official of that public body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale or remuneration and responsibilities of the 10 position held or services performed by the individual; and

(iv) the name of the individual on a record prepared by the individual in the course of employment.”

[12] Anent to the facts of this case, and from the provisions of Section 34(2)(e)(i) it is plain that a request for access to a record may not be refused if it consists of information about an individual who is deceased and the requester is the individual's next of kin. A prerequisite for provision of information is that the requester must be a deceased's next of kin (individuals next of kin).

[13] Individuals next of kin is defined in the Act¹ to mean-

¹ Section 1 of PAIA (definitions).

- “(a) *an individual to whom the individual was married immediately before the individual’s death;*
- (b) *an individual with whom the individual lived as if they were married immediately before the individual’s death;*
- (c) *a parent, child, brother or sister of the individual; or*
- (d) *if—*
 - (i) there is no next of kin referred to in paragraphs (a), (b) and (c);*
 - or (ii) the requester concerned took all reasonable steps to locate such next of kin but was unsuccessful.”*

[14] I am of the view that paragraph (b) of the definition applies to the facts of this case.² The applicant avers in the founding affidavit that the deceased, Thabisa Rasonti, was his partner. It is important to first examine the meaning of the “*Partner*.” That will be done with reference to established legal principles of interpretation.

[15] In ***Natal Joint Municipal Pension Fund v Endumeni Municipality***³

“[17] The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:

‘A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules.’

Whilst this summary of the approach to interpretation was buttressed by reference to authority it suffers from an internal tension because it does not indicate what is meant by the ‘ordinary meaning’ of words, whether or not influenced by context, or why, once ascertained, this would coincide with the ‘true’ intention of the draftsman. There were similar difficulties in the heads of argument on behalf of Endumeni. In one paragraph they urged us, on the basis of the evidence of the actuary who advised the Fund to adopt the approach, that the proviso was not intended to cater for ‘a Maltman type of event’ and in another cited authorities for the rule that the ‘ordinary grammatical meaning of the words used must be adhered to’ and can only be departed from if that leads to an

² An individual with whom the individual lived as if they were married immediately before the individual’s death.

³ 2012(4) SA 593 at 602-603

absurd result. In view of this it is necessary to say something about the current state of our law in regard to the interpretation of statutes and statutory instruments and documents generally.

[18]...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[16] The oxford dictionary⁴ meaning of the word “*Partner*” is-

“1. A person who takes part in an undertaking with another or others, especially in a business or firm with shared risks and profits.

2. either of two people doing something as a couple or pair.

3.either member of a married couple or an established unmarried couple.”

The word partner refers to either member of an established unmarried couple. Parties who are living their lives as a couple or pair fall within the definition of a partner.

[17] Developing a point about their relationship, the applicant avers in his replying affidavit as follows:

“9 Ad Paragraph 8 and 9 thereof

⁴ South African Concise Oxford Dictionary

The allegations in these paragraphs are noted, I have the necessary locus standi in this matter by virtue of the fact that, the deceased and I prior to her death had been in a relationship since 2009 living as a couple with our children who were born of our relationship. Namely: Philasande Rasonti, who is 12 years old, Linethemba Rasonti who is 10 years old and Liyabona Rasonti who is 5 years old..... The deceased and I had been living together with our children as a family and we had been considering marriage but because of financial inabilities we had put marriage on hold until we were financially stable to continue our lifelong partnership. As partners in a permanent partnership, we had undertaken reciprocal duties and support towards one another....” It is permissible to build on foundational allegations contained in the founding affidavit⁵.

- [18] I find that the applicant is deceased next of kin. There is judicial authority for proposition that “*permanent life partnerships are very much akin to marriages. They are the foundation of family life*”⁶. They must be accorded the respect they deserved so as to avoid unfair discrimination. The courts, as another arm of the state, are enjoined not to unfairly discriminate anyone on the ground of marital status.⁷ Accordingly these kinds of relationships deserve of legal recognition and protection. I therefore cannot uphold the respondents’ point of lack of *locus standi* on the basis of Section 34(2) (e) (i) of PAIA.

(ii) Insufficient information provided in the request form-section 18 of PAIA read with paragraph 5.3(10)

- [19] The respondents complain that the records requested are vaguely described, and as a result of that, despite a diligent search on behalf of the information officer, the record requested could not be ascertained. During argument it was said on behalf of the respondents that records were diligently looked for but could not be found. After the launch and service of this application, the respondents requested further particulars of the records requested. No further particulars were given by and on behalf of the applicant. The respondents averred that the

⁵ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636A; *Nkume v Transunion Credit Bureau (Pty Ltd and another)* 2014 (1) SA 134 (ECM) Para 7.

⁶ *Bwanya v Master of the High Court, Cape Town and others* 2022 (3) SA 250 (CC) Para 55-56.

⁷ Section 9(3) of the Constitution: *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including.... Marital status....”*

request lacked key identifiers like reference number from Frere Hospital or CAS Number and that rendered it impossible to ascertain the record.

[20] **Section 18(1) and 2(a)- (f) of PAIA** provides as follows: -

“18. (1) A request for access must be made in the prescribed form to 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 & 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.

(3) (a) An individual who because of illiteracy or a disability is unable to make a request for access to a record of a public body in accordance with subsection (1), may make that request orally.

(b) The information officer of that body must reduce that oral request to writing in the prescribed form and provide a copy thereof to the requester.”

[21] Firstly, respondents’ complaint can be located within the confines of **section 18(2)(a) of PAIA**. It is incumbent upon the requester to provide sufficient

information, in the prescribed form, to enable an official of the public body to identify the record so requested; and the requester⁸. It is further incumbent upon the requester to indicate the applicable form of access required⁹ and to specify postal address or number of the requester; and the manner through which the requester wishes to be informed of the decision.¹⁰ It is necessary to submit proof of the capacity in which the requester is making the request.¹¹

- [22] The respondents assert that the provision of section 18 are couched in imperative terms and they require exact compliance. For that reason, the respondents submit that this application must not succeed as there was no proper and valid request made.
- [23] The applicant countered that argument by submitting that the respondents, too have not complied with imperative provisions of **section 19(2) of PAIA**. **Section 19(2) (a)-(d) of PAIA** provides as follows: -

“Duty to Assist

.....

(2) If a requester has made a request for access that does not comply with section 18(l), the information officer concerned may not refuse the request because of that non-compliance unless the information officer has—

(a) notified that requester of an intention to refuse the request and stated in the notice—

(i) the reasons for the contemplated refusal; and

(ii) that the information officer or another official identified by the information officer would assist that requester in order to make the request in a form that would remove the grounds for refusal;

(b) given the requester a reasonable opportunity to seek such assistance;

⁸ Section 18(2)(a) of PAIA.

⁹ Section 18(2)(b) of PAIA.

¹⁰ Section 18(2)(d) and (e) of PAIA.

¹¹ Section 18(2) (e) of PAIA.

(c) as far as reasonably possible, furnished the requester with any information (including information about the records, other than information on the basis of which a request for access may or must be refused in terms of any provision of Chapter 4 of this Part, held by the body which are relevant to the request) that would assist the making of the request in that form; and

(d) given the requester a reasonable opportunity to confirm the request or alter it to comply with section 18(l)."

[24] Firstly, the operation of this section can only be triggered by requesters non-compliance with the provisions of section 18(1) of PAIA. Section 18(1) of PAIA requires that 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 address. Section 19(2) of PAIA *ex facie* does not generally deal with non-compliance with the general provisions of PAIA or section 18 of PAIA. It appears to be dealing with compliance with section 18(1) of PAIA. However contextual reading of the Act and the SAPS PAIA Manual demonstrates that the Deputy information officer may not refuse request on account of insufficiency of information contained in the request.

[25] Complaint about provision of sufficient particulars in the prescribed form are not outside the scope of operation of section 19(2) of PAIA, regard being had to the provisions of paragraph 5.5 of the SAPS PAIA Manual. Respondents' duty to assist is not limited to the completion of prescribed form and its transmission to the Information Officer. Reliance on the provisions of section 19(2) of PAIA for proposition that the respondents are enjoined to give the requester notice of non-compliance and to seek assistance is not misplaced. Proper characterization of respondents' case in this regard falls four squarely within the ambit of section 18(1) and 18(2) of PAIA. Both subsections must be read conjunctively to give proper context.¹²

[26] Even if I am wrong on my interpretation, I find solace on the provisions of paragraph 5.5 of SAPS PAIA Manual which in relevant parts provides as follows:

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¹² *Cools Ideas CC v Hubbard and another* 2014 (4) SA 474 (CC) Para 28

“The requester must complete a request form ... and the Deputy Information Officer must assist to ensure that the request complies with the requirements of the Act.

The Deputy information officer may not refuse the request if it is not fully or correctly completed. The deputy Information officer will notify the requester by means of a notice of intended refusal form [SAPS S129(0)] of his or her intention to refuse the request. In such an event the requester may then provide more detailed information regarding the request.”

It is therefore not opened to the respondents to refuse request for information (such to include deemed refusal) on account of insufficient particulars provided in the prescribed request form. Insufficiency of information is not a ground for refusing the request. On this ground respondents’ point cannot be upheld.

- [27] Provisions of Section 19(2) of PAIA are couched in peremptory terms. If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.¹³ In ***Moroka v Premier of the Frere Stat Province and others***¹⁴ the SCA pronounced on the usage of the phrase “may not” as follows:

“[22] I agree with the first respondent’s submissions that as a general rule the word ‘may’ in a statute confers the power to exercise a discretion. However, in the present matter the power to exercise a discretion is couched in the negative which, in my view, in effect, takes away the power to exercise a discretion. Simply put, on a purposive and contextual construction of s 25(5), the phrase ‘may not’ means that the Commission did not have the necessary authority to deal with the dispute referred to it after six months of coming into operation of the Amendment Act.”

- [28] The word “may” in Section 19(2) of PAIA is coupled with the word “not” which is a clear indication that the refusal of request is prohibited in circumstances where the requester has not been given a notice to either seek assistance to comply with the Act or provide more detailed information regarding the request. The prohibition operates to nullify the act, (in this case refusal to access to

¹³ G.M Cockram: Interpretation of Statutes, 3rd Ed, Page 163; LAWSA, 2ND Ed Vol 25, Part 1, Page 399.

¹⁴ (295/20) [2022] ZASCA 34 (31 March 2022) Para 22.

information) performed contrary to it. Similarly, failure to do what the provisions of section 19(2) of PAIA require of the respondents is a nullity.

- [29] What is done contrary to the prohibition of the Law is not only of no effect, but must be regarded as never having been done-and whether the Law giver has expressly so decreed or not; the mere prohibition operates to nullify the Act.¹⁵ Alternatively, respondents' failure to give applicant the required notification and refused access to record is null and void.
- [30] The test applicable to examine whether the particulars provided by the requester is sufficient is an objective one. For one to know if the information required is sufficient or not, he must have regard to what is contained in the prescribed request form and accompanying documents.
- [31] Part B of the prescribed request form is completed. Part B is the apart that requires information about the particulars of the requester. The requester Sinethemba Madikazi, who provides his identity number postal and email addresses, together with his contact numbers. In Part C he states that he makes the request in his capacity as an attorney of the applicant.
- [32] Part C of the prescribed form is not fully completed. There is no certification by the person on whose behalf the request is made. The certificate provides a space for the identity number of person on whose behalf the request is made, as well as his full names. However, the certificate is required to be completed only if the person on whose behalf the request is made has orally authorised the requester or by means of a letter to make the request on his or her behalf; or if the documentary proof of capacity to act on behalf of another person cannot be attached or is not attached to the form.

¹⁵ *Cools Ideas 1186 CC v Hubbard and another* 2014 (4) SA 479 Paragraph 53,90 and 91; *Schriehout v Minister of justice* 1926 AD 99 at 109.

- [33] In the prescribed request form there is no indication that there was a documentary proof of capacity attached thereto. A letter dated 11th April 2022¹⁶ lists in its penultimate paragraph documents that were attached to it. The following documents were attached thereto: special power of attorney, consent form, client's ID copy and PAIA request form. Special power of attorney and consent form¹⁷ authorised the requester to obtain the documents on behalf of the person on whose behalf the information is requested. Accordingly, a certificate was not necessary to be completed.
- [34] Part D concerns the particulars of record. It requires the description of record or relevant part of the record. In dealing with that the requester filled in only the following words: **Post-Mortem**. No other information is given in the prescribed form concerning the description of the record. It must be borne in mind that no information is given in the prescribed form about the particulars of the deceased, the medical institution in which she was admitted or attended to, her identity numbers or date of birth etcetera.
- [35] However, the letter dated 11th April 2022, under cover of which the prescribed request form was submitted to the respondents, discloses the name of the deceased, Thabisa Rasonti in the first paragraph thereof. The same paragraph states that the deceased passed away at Frere Hospital on 11th September 2018 after having given birth to a child at Notyatyambo Clinic Mdantsane on 17th July 2018. There was no identity number or date of birth of the deceased.
- [36] The respondents cite circumstances which rendered production of information impossible. They cite as a reason the unavailability of CAS Number in the request form. That was the main reason. Regarding the particulars of record and description thereof, the prescribed request form in Part D provides as follows:

“(a) Provide full particulars of the record to which access is requested, including the reference number, if that is known to you, to enable the record to be located.”

¹⁶ This date is the same date on which the prescribed form was signed.

¹⁷ Read in context and purposively.

The respondents record their complaint in their Answering affidavit around this as follows: -

“16..... the omission of the reference number or any key identifier either from the Frere Hospital or the CAS Number rendered it cumbersome and impossible to ascertain the record and information sought.”

The answering affidavit was deposed to by Samantha Slater, who describes herself as *“an adult female employed as Commander: Civil Litigation Centre: East London.”* On that basis she is duly authorised to attest and depose to the answering affidavit.

[37] SAC D Openshaw, who describes herself as an adult female employed as the Station Deputy Information Officer at the East London: Fleet Street Police Station, states in her confirmatory affidavit as follows:

“6. The first difficulty I encountered in processing the request for information was that there was no CAS Number written on the request for information albeit the prescribed form provides for such reference.”

According to Ms Openshaw, the only hindrance to the processing of request was lack of CAS Number. She specifically did not confirm that unavailability of reference number from Frere Hospital was her impediment in processing the request. Accordingly I do not accept those allegations as evidence before this court¹⁸.

[38] Part D (a) of the prescribed form contemplates that reference number of any kind, including CAS Number, may not be known to the requester. Unavailability of reference number does not vitiate a request made in terms of the empowering provision. The proviso in Part D (a) of the request form envisages that a request may successfully be made without a reference number, if sufficient particulars are provided to enable the record to be located.

¹⁸ Section 3(1) of Law of Evidence Amendment Act 45 of 1988.

- [39] It is true that the information provided in the prescribed request form is far from being sufficient. However, the prescribed form in Part D (b) thereof provides for a separate folio to be used, setting out sufficient information and be attached to the request form. In this case, a letter dated 11th April 2022 which I regard to be the separate folio, referred to in the prescribed request form was used. The letter bears the SAPS date stamp of 11th April 2022, acknowledging receipt thereof, which is the same date of signature of the prescribed request form. As demonstrated above it provides information about the full names of the deceased, Hospital where she passed away, the date of death, the name of the clinic where she gave birth. That information or those particulars are sufficient to enable the information officer to locate the record. On this ground too respondents' point cannot succeed.
- [40] It is apparent from the respondents' confirmatory affidavit that the information officer was in possession of the death certificate. The complaint about conflicting dates of death cannot avail the respondents of any defence. I therefore find that the respondents were in possession of the relevant information that would enable the information officer to locate the required record.
- [41] In a nutshell the respondents' point about insufficiency of particulars provided in the prescribed request form cannot be upheld. The respondent cannot sit still and do nothing because he or she perceives the information given in the prescribed request form to be insufficient. The legislative requirement permits of an engagement and deliberative process once the information officer perceives that the provided information is insufficient. The stance taken by the respondents is contrary to the intention of the legislature and purpose of the legislation and therefore untenable. I agree with applicant's submission that relevant provisions of PAIA provide an assistive than adversarial mechanism to obtain record or information in the possession of public body.
- [42] Respondents' defence about insufficient information is an afterthought and opportunistic. It was available to the respondents to communicate with the

applicant the alleged difficulties. That would be in line with the very purpose of the legislation (PAIA), namely, an assistive mechanism that creates an engagement and deliberative process.¹⁹ I find support for this proposition in paragraph 5.5 (4) of SAPS PAIA Manual which provides as follows:-

“If a requested record cannot be found or does not exist the deputy information officer will in an affidavit or in a statement under affirmation give full account of all steps taken to find the record in question or to determine whether the record exists including all communications with every person who conducted the search on behalf of the information officer.” No affidavit or statement under affirmation was ever prepared by the respondents in line with this provision.

Issues raised in court

- [43] The court raised an issue about the non-payment of request fee which was admittedly not paid. The applicant contended that no notice was given to him for payment of the fee. The applicant relied on the provisions of Section 22 (1) of PAIA which read as follows: -

“(1) The information officer of a public body to whom a request for access is made, must by notice require the requester, other than a personal requester, to pay the prescribed request fee (if any), before further processing the request.”

- [44] Paragraph 5.5(3) of SAPS PAIA Manual makes it abundantly clear in the following words: -

“The deputy information officer will, upon receipt of a request for access made on a properly completed request form, unless the request is transferred, complete the notice of fee payable-form [SAPS S12(b)] and informed in this manner of the requester fee payable (only where applicable) and the place where the fee must be paid, before the request will be processed any further.” No request fee was

¹⁹ Section 19(2) of PAIA; Paragraph 5.5(1) of SAPS PAIA Manual.

therefore necessary to be paid as no notice in terms of the empowering provision was made to the applicant for such payment.

(iii) **Defective internal Appeal-Section 75(1) of PAIA**

[45] The respondents contend that the applicant's internal appeal is defective as it was lodged way outside the prescribed 60-day period. Section 75 (1) (a) (i) of PAIA provides as follows:

"75. (1) An internal appeal —

(a) must be lodged in the prescribed form—

(i) within 60 days..."

This is not in dispute. However, the applicant in reply makes out a case founded on the provisions of Rule 27 of the Uniform Rules. In the founding affidavit, there is no case made out founded on the provisions of Rule 27 of the Uniform Rules. Simple put, no allegations made in the founding affidavit to support a relief sought in the notice of motion for condonation of time limits prescribed by the Rules of this court.

[46] **Diemont JA** in the *Director of Hospital Services v Mistry*²⁰ put this point aptly as follows:-

*"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the compliant is. As was pointed out by **Krause J** in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and has been said in many other cases. ".....An applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated*

²⁰ 1979 (1) SA 626 (A) at 635H-636A.

therein, because those are the facts which the respondent is called upon either to affirm or deny."²¹.

It is impermissible to make out a case in reply as that amounts to litigation by ambush.

- [47] Even if I may be found to be wrong on the above finding, the application would still not succeed on other grounds. No good cause has been shown. The applicant should have furnished an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motive²².
- [48] Firstly, Rule 27 of the Uniform Rules caters for situation where the applicant seeks an order extending or abridging any time **prescribed by the Uniform Rules** or by an **order of court**. This case is not about the time prescribed by the Rules of this court (Uniform Rules of court), but the time frames statutorily prescribed by the section 75(1)(a)(i) of PAIA. PAIA does not provide for condonation of appeal period prescribed by section 75(1)(d)(i) of PAIA by the court. There must be an application where a good cause is shown to the appeal authority for the late lodging of internal appeal to be allowed.²³ In *Casu* there was no application or affidavit where a good cause was shown to the relevant appeal authority to allow late lodging of the internal appeal.
- [49] Where a statute provides that something must be done within a certain time, and no power of extension is given to the court, it is presumed that the requirement is peremptory, and everything done after that time is null and void.²⁴ Allowing late lodging of internal appeal is subject to the good cause having been shown to the appeal authority by the applicant. No power is given to court to allow the internal

²¹ *Nkume v Transunion Credit Bureau (Pty) Ltd and another* 2014 (1) SA 134 (ECM) Para 7 and cases referred to therein.

²² *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353 A.

²³ Section 75(2) (a) of PAIA: Only appeal authority can allow late lodging of the internal appeal on good cause shown.

²⁴ G.M Cokram: Interpretation of Statutes, 3rd Edition, Page 161.

appeal to be lodged out of time. **Joubert**²⁵ echoes the same sentiments in the following words:—“(F) provisions imposing time limits and restrictions (without giving court a power of extension) are as a Rule peremptory.” He further stated that “as a general Rule non-compliance with peremptory provisions results in a nullity.”²⁶ Peremptory provision requires exact compliance for it to have the stipulated legal consequences, any purported compliance falling short of that is a nullity²⁷.

[50] On the facts of this case I find that, the lodging of the appeal outside time limits prescribed by the empowering provision, namely section 75(1) (a)(i) of PAIA, is null and void and it constitutes a nullity.

[51] In addition to the above, I am of the view that the use of the word “**must**” in the provision is a strong indication that the provisions are peremptory. The provision is couched in peremptory terms and consequently requiring exact compliance.

[52] About provisions of section 75(1) the full bench in **Paul**²⁸ authoritatively remarked as follows:-

“[24] Where the appeal has been lodged in a manner contrary to the clear provisions of section 75 (1) it follows that no valid appeal has been lodged.”

I am constrained to follow this judgment. Non-compliance with the provisions of section 75(1) must invariably lead to the dismissal of this application.

[53] The doctrine of precedent which requires courts to follow the decision of coordinates and higher courts on the judicial hierarchy, is an intrinsic feature of the Rule of law, which is in turn fundamental to our Constitution. It obliges courts

²⁵ LAWSA, 2ND Edition, Vol 25, Part 1, Page 401, Para 366.

²⁶ LAWSA(Supra) Page 399.

²⁷ **Shabalala v Klerksdorp Town Council and Another** 1969 (1) SA 582 (T) at 587A-C.

²⁸ **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** 2019 (3) ALL SA 879 (ECM) Para 24.

of equivalent status and those subordinate in the hierarchy to follow only the binding basis of a previous decision.²⁹

[54] In the circumstances I would dismiss this application. However, during argument parties agreed that, if I find against the applicant, I must still direct the respondents to submit the appeal records or papers to the appeal authority for determination. The applicant insisted on costs against the respondents. The agreement was subject to the fact that there is a valid appeal lodged by the applicant.

[55] I have found that there is no valid appeal lodged, therefore I cannot direct that it be submitted to the appeal authority for processing. In this regard it is pivotal to refer to the provisions of section 78 of PAIA which provides as follows:

“78 (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.

(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) in terms of section 22, 26(1) or 29(3); or

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

(i) to refuse a request for access; or

²⁹ **True Motives 84 (Pty) Limited v Mahdi** 2009 (4) SA 153 SCA Para 100-101; **Makhanya v The University of Zululand** 2010 (1) SA 62 SCA Para 6.

(ii) ten in terms of section 54, 57(1) or 60, may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

(3) A third party—

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) 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 to grant a request for access; or

(c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body, may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.”

Accordingly, this application must fail, as internal appeal procedure has not been exhausted.

[56] With regards to costs, there is no innocent party herein. The conduct of the respondents is not that of an innocent party. They failed to assist the applicant when he was making the request for access. They did that contrary to peremptory provisions of Section 19(2) of PAIA read with the paragraph 5.5 of SAPS PAIA Manual. Had the respondents done what was expected of them, perhaps this application could not have been instituted. There is a higher duty on the state to respect the Law, to fulfil procedural requirements and to tread respectfully when dealing with rights.³⁰

[57] The respondents did not respect applicant’s rights in terms of Section 32 of the Constitution. PAIA and its Manuals give effect to these provisions when conferring rights to citizens and imposes obligations upon public bodies like respondents. It is those obligations that the respondents failed to perform.³¹ Accordingly I find the respondents liable to pay 50% of applicant’s costs.

[58] In the result I make the following order.

³⁰ *MEC for Health, Eastern Cape and another v Kirland Investment (Pty) Ltd* 2014 3) SA 481 Para 82.

³¹ Section 237 of the Constitution.

58.1 The application is dismissed.

58.2 The respondents are directed to pay 50% of applicant's
party and party costs.

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : **ADV. NYANGIWE**

Instructed by : **MADIKAZI ATTORNEYS' INC**

Applicant's Attorneys

2185 N.U.7

Mdantsane

East London

5219

Tel: 072 084 948

Red: **MA-INC/LMLMED-091221**

E-mail: **madikazisine@gmail.com**

Respondent's Counsel : **ADV. MATI**

Instructed by : **STATE ATTORNEY**

Respondent's attorneys

Old Spoorinet Building

17 Fleet Street

East London

Date heard : **22nd February 2024**

Date Delivered: : **19th March 2024**