

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

CASE NUMBER.: 1282/2023

In the matter between:

SKG AFRICA (PTY) LTD

Applicant

And

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION

First Respondent

**THE INFORMATION OFFICER OF THE SOUTH AFRICAN
LOCAL GOVERNMENT ASSOCIATION**

Second Respondent

STHATHU FUNDING (PTY) LTD

Third Respondent

JUDGMENT

Beshe J

[1] Applicant approaches this court on an urgent basis for an order in the following terms:

“1. That the Applicant’s non-compliance with the rules of the above Honourable Court relating to service, time periods and form be condoned, and that the application be disposed of forthwith as a matter of urgency in terms of the provisions of Rule 6(12) read with Rule 2(2) of the Promotion of Access to Information Rules;

2. That the 90-day time period referred to in Section 5(2) of the Promotion of Administrative Justice Act No. 3 of 2000 (“PAJA”) within which the First Respondent is to furnish reasons to the Applicant be reduced, in terms of Section 9(1) of PAJA.

*3. That the First Respondent provides adequate written reasons to the Applicant on or before **5 September 2023**, why:*

3.1 the tender “request for provision of office accommodation for its Eastern Cape office in East London for a period of five years, Bid No.: SALGA/20/2022” (the “tender”) was awarded to a Sthathu Funding (Pty) Ltd.

4. That the First Respondent, alternatively the Second Respondent, further alternatively the First and Second Respondents jointly, be ordered to produce for inspection and collection by the Applicant, within 48 (forty-eight) hours of service of this order on the First and Second Respondents, copies of the following documents in relation to the tender, in terms of Section 82 of PAIA:

4.1 A copy of all bids submitted;

4.2 A copy of all agendas, recordings, minutes, recommendations, and reports of the Bid Specification, Bid Evaluation and Bid Adjudication committees;

4.3 A copy of all evaluation and adjudication reports, including any risk analysis and/or application of objective criteria;

4.4 A copy of the First Respondent’s supply chain management policy;

4.5 A copy of the First Respondent’s internal appeal process, if any;

4.6 The results of the risk analysis, if any, in respect of the Applicant, Sthathu Funding (Pty) Ltd and all other bidders;

4.7 A copy of the results of the site inspections conducted on all bidders; and

4.8 A copy of the letter of award of the tender.

5. That the First Respondent be ordered to pay the Applicant's taxed or agreed costs, unless the Third Respondent elects to oppose this application, in which event the costs of this application shall be paid by the opposing Respondents, jointly and severally, the one paying the other to be absolved, together with the First Respondent.

6. That the Applicant be granted such further and/or alternative relief as this Honourable Court may deem fit."

The Parties

[2] The parties are described in the founding affidavit as being:

"1. The Applicant is **SKG AFRICA (PTY) LIMITED**, a private company, registered in accordance with the company laws of the Republic of South Africa with registration number 2015[...]. It has its registered address and principal place of business within the jurisdiction of the above Honourable Court at 2nd Floor, SKG Building, Beacon Bay Crossing, Beacon Bay, East London.

2. The First Respondent is:

2.1 the **SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION** ("**SALGA**");"

2.2 an autonomous association of all 257 South African local governments, comprising of a national association, with one national office and nine provincial offices;

2.3 established in terms of Section 163 Constitution of the Republic of South Africa 1996 (“Constitution”);

2.4 an “*organ of State*”;

2.5 a “public body” as defined in Section 1 of the Promotion of Access to Information Act No. 2 of 2000 (“**PAIA**”);

3. The Second Respondent is the **INFORMATION OFFICER OF SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION** and is cited herein *nominee officii* in such capacity and situated at Menlyn Corporate Park, Block B, 175 Corobay Avenue, Cnr Garsfontein and Corobay, Waterkloof Glen Ext 11, Pretoria. According to the First Respondent’s PAIA manual, the information officer is Mr Xolile George. His email address is [x\[...\]@salga.co.za](mailto:x[...]@salga.co.za). A copy of the relevant page of the First Respondent’s PAIA manual, reflecting Mr George as the information officer is attached marked “**FA2**”.

4. The Third Respondent is **STHATHU FUNDING (PTY) LTD (“STHATHU”)**, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, with registration number 2004[...], having its registered address at Unit 5G and G6 Stellenpark Business, Corner of R44 and School Street, Stellenbosch, Western Cape, and its principal place of business at 3 Berea Terrace, East London. No relief is sought against the Third Respondent, save for in the event of unsuccessful opposition, and it is cited for its interest in this matter as the successful bidder in bid number SALGA/20/2022.

The Application

[3] This application was placed on the Motion Court roll for hearing on 29 August 2023, papers having been issued on the 16 August 2023 and having been served on first and second respondents on the 17 August 2023. They were required to signify their intention to oppose, if any, on the following day the 18 August 2023 and three court days later file an answering affidavit.

Opposition

[4] The application is only opposed by the first and second respondents.

Applicants' Case

[5] The founding affidavit is deposed to by Ms Riana Odendaal-Botha who described herself as a businesswoman and applicant's Executive Manager. It appears to be common cause that applicant submitted tenders to the first respondent for the provision of office accommodation for first respondent in the Eastern Cape for a period of five years. It is further common cause that the applicant was unsuccessful in its bid tender in respect of which the closing date was 22 December 2022. Applicant was notified on the 30 May 2023 that its proposal was not successful. On the 23 June 2023 first respondent provided the applicant with a screenshot of the award from which it is apparent that the successful tender's pricing was higher than that of the applicant. Giving the applicant the notion that its bid should have been successful. On the 27 June 2023 applicant's attorney addressed a letter to the first respondent requesting various documents and information to be provided to it. The letter is annexed as FA8. Paragraph 6 thereof records that:

*"6. In the circumstances, we address this letter to you in terms of Section 5(1) of the Promotion of Administrative Justice Act No. 3 of 2000 ("**PAJA**") and section 18(1) of the Promotion of Access to Information Act No. 2 of 2000 ("**PAIA**")."*

The list of documents and information required is the full record of the decision as well as items the list of which runs into ± two pages. Paragraph 9 records that:

“9. Whilst SALGA is ordinarily afforded 90 days to provide our client with the written reasons on terms of PAJA, our client nevertheless requests SALGA to agree, in writing, to the reduction of the 90-day period to a period of 7 (seven) days in accordance with Section 9(1) of PAJA. To the extent that SALGA objectively believes that the proposed period of 7 days is insufficient, our client invites SALGA to advise us of suitable period for our client’s consideration.”

[6] FA9 to the founding affidavit contains the formal request for access to the record on terms of Section 18 (1) of the Promotion of Access to Information Act (PAIA)¹. The covering letter of which is dated the 27 June 2023. This was promptly followed by a reminder on the 4 July 2023. It was only on the 17 July 2023 after yet another reminder that respondents responded that their legal department was handling the request for information. Ms Odendaal-Botha asserts that the 30-day period prescribed by Section 25 (1) of the PAIA for a decision to be made expired on the 27 July 2023 and the second respondent is deemed to have refused applicant’s request. On the 1 August 2023 the applicant was advised that a Mr Boshoff was the contact person in respect of the matter. On the 7 August 2023 the respondents’ attorney seemingly gave the applicant an update that they were attending to the matter/request. On the following day, the 8 August 2023, he wrote to the respondents, giving them an ultimatum to provide the information by close of business on the 11 August 2023 failing which the applicant will proceed with this urgent application.

[7] Applicant bemoans the fact that the 30-day period for the provision of the information in terms of PAIA has passed. The 90-days provided for PAJA² in this respect ends on 27 September 2023. Further that there is no indication from the

¹ Act 2 of 2000.

² Promotion of Administration of Justice Act 3 of 2000.

respondents as to when the requested information will be provided. The point is made that the respondents do not have an appeal procedure to be exhausted before a party can approach the court.

[8] It is asserted that applicant requires the information to assess the merits of an application for review and setting aside of the respondents' decision to award the tender to third respondent.

[9] Regarding urgency, it is asserted *inter alia* that:

More than a month and a half have passed since the request was made. The respondents have refused alternatively failed to provide same to the applicant; If the matter proceeds in the normal course and is opposed, it could take up to a year to finalise;

If reviewable irregularities have occurred, applicant is entitled to initiate review proceedings;

If the successful tenderer has begun executing the award, he may be in a position to claim prejudice if the award is set aside;

If the applicant launches the application in long form in the ordinary course, it would be exposed to the prospect of not being in a position to avoid the implementation of the tender by third respondent, despite it being set aside due to lapse of time;

Since the applicant is only entitled to claim damages from first respondent in the case of fraud, applicant is exposed to irreparable financial prejudice if this application is not heard as a matter of urgency.

[10] These grounds, it would appear, also apply in support of applicant's prayer for the reduction of the 90-day period provided for in PAJA for first respondent to provide the information requested.

Respondents' Opposition

[11] As would appear from what I said earlier in this judgment, the factual background of this matter is common cause between the parties. I understand the main thrust of respondents' case to be that the respondents are intent on providing the applicant with a substantive response as soon as it is reasonably possible and within the 90-day period. This period is provided for in Section 5 (2) of PAJA. Respondents complain that applicant's founding affidavit straddle two pieces of legislation, each prescribing a different manner and period in which a request for information should be dealt with. That as early as 27 July 2023 the applicant threatened to launch an urgent application which they only launched on the 16 August 2023. Respondents contend that applicant is alive to the fact that its request falls within the ambit of Section 5 (2) of PAJA. Even though applicant is aware of this, it made a demand for the information to be provided within seven days of its request. Respondents contend that a large chunk of the information required belongs to third parties. In terms of Section 47 of PAIA the first respondent is required to engage with them before providing the said information.

[12] Respondents deny that a decision has been taken to refuse applicant's request or that applicant's right to just administrative action has been infringed. They further deny that Section 25 (1) of PAIA does not apply to applicant's request.

[13] Respondents also pour water on applicant's reasons for believing that it has *prima facie* grounds to review and set aside first respondent's decision.

[14] Respondents also assert that the applicant has not made out a case for the truncation of the 90-day period it seeks in its second prayer in the notice of motion. The first prayer being the one for condonation of failure to comply with orders of court relating to service of papers etc.

Replying Affidavit

[15] Applicant remains adamant that the second respondent is deemed to have refused the applicant's request in terms of Section 27 of PAIA. Further that Section 5 of PAIA does not find application to the matter because respondents are not private bodies.

Legal Framework

[16] As pointed out by the respondents, applicant's case straddle both PAIA and PAJA. Condonation for failure to comply with the Rules of Court is sought in terms of Rule 6 (12), read with Rule 2 (2) of PAIA. The application for the reduction of 90-day period in terms of Section 9 (1) of PAJA. It is clear which provision the applicant places reliance for prayer 3 namely: that respondents be directed to provide adequate written reasons why the tender was awarded to third respondent. In respect of prayer 4, applicant list documents that the respondents are required to produce in terms of Section 18 (2) of PAIA. Applicant has also asserted that Section 25 (1) of PAIA does not apply in this matter.

[17] The implicated provisions are to the following effect:

Section 5 (1) of PAJA provides that:

“(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.”

Section 9 (1) in turn provides that:

“(1) The period of—

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.”

It is trite that the objective of the PAIA Act is to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights, and to provide for matters connected therewith.

Section 11 (1) (a)-(b) provides:

11 Right of access to records of public bodies

“(1) (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

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

Section 25 (1) of PAIA provides that:

“(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the information officer to whom the request is made or transferred, must, as soon as reasonably possible, but in any event within 30 days, after the request is received—

(a) decide in accordance with this Act whether to grant the request; and

(b) notify the requestor of the decision and, if the requester stated, as contemplated in section 18(2)(e), that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.”

Section 18 (2) provides for the manner in which the request for access should be made. Section 78 (2) (c) of PAIA provides that:

“(2) A requester—

(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) may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.”

Lastly, Section 82 of PAIA provides that:

“The court hearing an application may grant any order that is just and equitable, including orders —

(a) confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action

or to refrain from taking such action as the court considers necessary within a period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation.”

Discussion

[18] As rightly pointed out by the respondents, the application straddles two pieces of legislation albeit both human rights pieces of legislation that are mandated by the Constitution, so as to give effect to the constitutional rights to administrative justice, access to information and equality. This is made plain even in applicant's heads of argument under the heading Nature of Relief Sought paragraph 14 where it is submitted that:

- The applicant requested adequate written reasons in terms of PAJA from first respondent for certain of its decisions in relation to the tender;
- Requested access to certain documentation in the possession of first respondent from second respondent in terms of PAIA.

The time period within which the information requested should be provided is different in terms of each of these acts. A reading of applicant's papers leads one to the conclusion that it is acknowledged that respondents have 90 days within which to provide reasons for the decision hence the prayer for the truncation of the period from 90 days. Once again, a letter was addressed to the respondents which they received on 28 June 2023, at paragraph 6 the following is recorded:

“6. In the circumstances, we address this letter to you in terms of Section 5(1) of the Promotion of Administrative Justice Act No. 3 of 2000 (“PAJA”) and section 18(1) of the Promotion of Access to Information Act No. 2 of 2000 (“PAIA”).”

At paragraph 9 of the same letter applicant acknowledges that first respondent is ordinarily afforded 90 days to provide reasons for its decision and requests first respondent to agree to the reduction of the 90-day period to 7 days. [my underlining]

[19] The reasons cited for urgency and for truncation of the 90-day period within which the information requested should be provided are said to be the same. In other words, the reason why the applicant submits the matter should be heard on an urgent basis and the reasons why the 90-day period should be reduced are said to be the same. They are briefly stated that:

In terms of the PAIA, the respondent is deemed to have refused the requests for information because 30 days has elapsed since the request was made.³ If the matter proceeds in the normal way, it could take up to a year to finalise. If reviewable irregularities have occurred, the applicant is entitled to initiate review proceedings. And if the successful tenderer has begun to execute the award, it may be in a position to claim prejudice if the award were to be set aside. The applicant can only recover damages from first respondent only if fraud has been committed. So, the applicant is exposed to irreparable financial prejudice if the application is not heard as a matter of urgency. The applicant may well be deprived of business which should have been allocated to it.

[20] Respondents highlight the fact that even though applicant had threatened to launch an urgent application for respondents to be ordered to provide the information requested as far back as the 27 June 2023, the urgent application was only launched on the 16 August 2023. Presumably suggesting that the urgency is self-created.

[21] As indicated earlier, respondents assert that Section 25 (1) of PAIA is not applicable to the application, namely the 30-day period. This being so, so it was

³ As provided for in Section 27 of PAIA which provides that "If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), information officer is, for the purposes of this Act, regarded as having refused the request."

submitted due to the fact that part of documents or information that is required by the applicant relates to third parties. Namely that the applicant requires information / documents of other bidders. This necessitates that they be notified of applicant's request. See in this regard Section 47 of PAIA.⁴ Applicant also describes first respondent as a public body.⁵

[22] It may be so that the application straddles two pieces of legislation, but it would seem applicant seeks both the reasons for first respondent's decision to award third respondent with the tender in question. This is provided for by PAJA. In particular Section 5 thereof and these have to be provided within 90 days after the date upon which that person became aware of the action / decision. We know that the 90 days has not yet expired. Hence the prayer that the court directs a truncation period within which the respondents should provide the reasons. The request for documents falls under the ambit of Section 25 (1) of PAIA read with Sections 11 and 18. As indicated earlier in terms of Section 27 if the information is not provided within 30 days as provided for in Section 25 above, the information officer, in this case second respondent is for purposes of this Act deemed to have refused the request.

[23] In my view, the applicant was justified in approaching the court for its intervention in this regard. Applicant has complied with the procedural requirement of the Act relating to a request for access to the record. I have already alluded to the objectives that I meant to be served by the Act to enable the requester of the information to exercise or protect their right to fair administrative action. The information will enable applicant to make an election whether to apply for the review and setting aside of first respondent's decision to award the tender to third respondent. The applicant is thus entitled to an order in terms of prayer 4 for the notice of motion.

Urgency

⁴ Section 47 provides that "The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1) must take all reasonable steps to inform a third party to whom or which the record relates of the request."

⁵ Paragraph 6.7 of founding affidavit page 9 of the indexed papers.

[24] Due to the failure to provide the applicant with the requested documents / information, it is difficult for the applicant to tell how imminent the implementation of the award is. But common-sense dictates that every day that goes by brings the implementation of the award closer. That in my view renders the matter to be urgent. This is the case in particular to the provision of the information that the applicant is entitled to, barring valid reasons for refusal, within 30 days of becoming aware of the decision concerned.

The Condonation Application

[25] Applicant contends that it will be in the interest of justice that court reduces the 90-day period in terms of Section 9 (1) of PAJA because the matter is urgent. Applicant acknowledges that the reasons must indicate how the decision was arrived at and must not only amount to conclusions. And that full reasons will enable the person affected thereby to decide whether or not the decision was justified.

[26] We know that the respondents have undertaken to substantively respond to applicant's request as soon as it was reasonably possible but within the 90-day period. We know that they have appointed legal representatives to deal with applicant's request although respondents seem to deal with applicant's request as one.

[27] I am however not persuaded that the applicant has shown that it will be in the interest of justice to truncate the 90-day period the respondents are entitled to make use of to provide full and adequate reasons for the decision to award the bid to third respondent.

Costs

[28] As far as costs are concerned, I am not aware of any reason or conduct on the part of the respondents that warrants a punitive costs order. In light of the order that I propose to issue the appropriate order for costs to make will be for each party to pay its own costs because applicant only succeeded partially.

Order

[29] Accordingly, the following order will issue:

1. That the applicant's non-compliance with the rules of the above Honourable Court relating to service, time periods and form be condoned, and that the application be disposed of forthwith as a matter of urgency in terms of the provisions of Rule 6(12) read with Rule 2(2) of the Promotion of Access to Information Rules.

2. That the first respondent, alternatively the second respondent, further alternatively the first and second respondents jointly, be ordered to produce for inspection and collection by the applicant, within 48 (forty-eight) hours of service of this order on the first and second respondents, copies of the documents listed in paragraph 4 of the notice of motion, in terms of Section 82 of PAIA.

3. Each party to pay its costs.

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

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