

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

CASE NO 699/2018

Reportable	Yes /No
-------------------	----------------

In the matter between:

NTOBEKO GOODMAN MBILINI

Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT

SUSAN SHABANGU

1st Respondent

SUPERINTENDENT GENERAL,

THE DEPARTMENT OF SOCIAL DEVELOPMENT

2nd Respondent

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF SOCIAL DEVELOPMENT

3rd Respondent

THE HEAD OF THE DEPARTMENT,

THE DEPARTMENT OF SOCIAL DEVELOPMENT,

EASTERN CAPE

4th Respondent

JUDGMENT

V NQUMSE AJ:

INTRODUCTION

[1] This is an application founded on the Promotion of Access to Information Act. (hereinafter referred to as the “PAIA”).

[2] The applicant is an employee of the Department of Social Development in the Province of the Eastern Cape. He launched a request with the first and second respondents for access to records pertaining to his salary deductions.

[3] The essence of applicant’s contention that results in this application is that the respondents refused to give him access to the full information that he sought in his request.

[4] As a result he approached this Court for a relief in the Notice of Motion as follows:

4.1 declaring the respondents to forthwith furnish the applicant with the following information relating to the beneficiary / creditor described as “Russell Inc.” with reference number 2322258216;

4.1.1 copy of the judgment and / or Emoluments Attachment Order relating to the entry under heading “Deductions” (description) on the salary advice of the applicant;

4.1.2 copies of the letters and / or statements received from the beneficiaries (judgment creditors) from 1 May 2017 to date;

4.1.3 printouts of payments made to each of the beneficiaries (judgment creditors) for the entire period relating to these deductions;

4.1.4 all details to be supplied in English and in writing to be emailed to nico@tellaw.co.za as referred in the request of 21 May 2018 within 15 (fifteen) days of the order sought being granted;

4.1.5 directing that the respondents to pay the costs of this application.

[5] The first and second respondents do not oppose the application and they have filed a Notice to abide the decision of this Court.

FACTUAL BACKGROUND

[6] It is common cause that the applicant is employed by the Department of Social Development in the Eastern Cape. Upon noticing certain deductions that are made from his salary he sought information to this effect from his employer. Acting on the strength of the Manual of the National Department of Social Development, the applicant directed his Form A request to the National Department of Social Development on 21 May 2018.

[7] Failure by the Deputy Information Officer of the Department to respond to the request in compliance with section 25, the applicant on 28 June 2018 lodged an internal appeal in terms of section 75 with the Deputy Information Officer. On 2 July 2018 the office of the first respondent addressed correspondence to the applicant's attorneys in which they advised that, acting in terms of section 20 of the Act, the request of applicant for information has been transferred to the Eastern Cape Province, Department of Social Development.

[8] On 11 July 2018 applicant's attorneys received a letter from the office of the fourth respondent confirming that applicant's request for information has been transferred to their Department from the National Department of Social Development. On the following day, 12 July 2018 the attorneys of applicant responded and for the sake of the import of their response, I find it necessary to refer to its contents which read as follows:

"We refer to the abovementioned matter and more particularly to your letter dated 11 July 2018. Please note that you might have received the incorrect information

from the National Department. We received correspondence from their office dated 22 June 2018 but only transmitted to the writer on 2 July 2018. We immediately responded to the communication and placed certain aspects on record for urgent consideration. A copy of our correspondence is attached hereto for your ease of reference.

We will however clarify certain aspects directly with yourselves and will highlight that we are in the appeal stage already.

A formal request for access to information of a public body was submitted on 21 May 2018 to addresses and contact details referred to in the Manual for the Department. We wish to highlight that the telefax number provided does not exist or does not faxes to be transmitted. We also submitted the formal request to the email addresses referred to in the Manual but did not receive acknowledgement of receipt mails. The writer personally contacted the National Department (number provided in the Manual) and spoke to Eva Matau who provided her email address as confirmation. We resent the formal request form to the applicable address on 28 May 2018.

Your abovementioned letter made mention that the request is transferred in terms section 20(1)(b) of the PAIA Act, but we need raise some concerns regarding the approach adopted. As stated, our formal request was submitted on 21 May 2018. In terms of section 20 of PAIA the information officer must within 14 (fourteen) days transfer the request to the relevant department. This needs to be done prior to the internal appeal process being initiated. You will agree that the time periods have expired. Your transfer is therefore well outside the prescribed time periods and no proper reasons have been supplied. Our client

suffers prejudice as amounts have been and are being deducted to which they have no knowledge. As the appeal was lodged on 28 June 2018 and our client's rights remain reserved should we not receive a response by 28 July 2018. Unfortunately our client cannot withdraw the appeal and allow you to respond to the request on 2 August 2018. The delay will cause immense prejudice should we want to challenge the authorised deduction. We once again highlight that we require the following information, as requested on the formal request in terms of section 18:

1. Copy of the judgment and / or Emolument Attachment Order relating to the above entries;
2. Copies of the letters and / or statement received from the beneficiaries for the past year;
3. Printout of payments made to each of the above beneficiaries for the entire period relating to the deductions;
4. All particulars to be supplied in writing and in English and to be email to nico@tellaw.co.za. We therefore await the above information on or before 28 July 2018.” (*sic*)

[9] In a further response the fourth respondent directed correspondence to the applicant in which it stated:

- 9.1 that they will provide the information by not later than 2 August 2018;
- 9.2 that the Department of Social Development (Eastern Cape) has its own Manual (which is attached on the papers as FA71);

9.3 that they regarded the appeal already lodged with the National Department as premature.

[10] The applicant in annexure FA18 of its founding papers, informed the Department that the applicant cannot suffer prejudice as a result of the internal failures of the various Departments of Social Development or their failure to adhere to time frames to attend to the request as required by PAIA. The applicant further disputed the fourth respondent's allegation that the internal appeal was lodged prematurely. Further, the applicant alerted the fourth respondent to their omission to attach the Eastern Cape Department's Manual as indicated in their letter (FA17). In essence the applicant sought to inform the fourth respondent that notwithstanding the administrative bungling that is apparent between their respective Departments, it was demanding that they should adhere to time frames as provided in PAIA.

[11] Subsequent to another exchange of correspondence between the fourth respondent and the applicant regarding the discrepancies in the various Manuals of the two Departments and the absence of the Provincial Department's Manual on its website, on 30 July 2018 the applicant was informed by the fourth respondent that the requested information was granted. This was done by furnishing copies of the Emoluments Attachment Order, which was served on the Department as well as a printout of all payments that were made to each of the judgment creditors. The applicant was further advised that the fourth respondent is not in possession of copies

of correspondence that may have been exchanged between the creditors and the Department.

[12] On 2 August 2018 the fourth respondent acted on its promise and furnished the applicant with the following information:

21.1 Emolument Attachment Order (“Re-issue” in respect of Maurice Shadrack 12 pages);

12.2 extract of the applicant’s salary advices (18 pages).

[13] Reacting to the information which was furnished, the applicant in annexure FA 25 attached in its founding papers complained that the records which they have received do not provide information as to when payment was made and whether it was actually made to the beneficiaries appearing on the records. The sum total of the applicant’s contention is that they have failed to provide the information they seek and it was the applicant’s view that the fourth respondent has no intention to furnish the required information. According to the applicant the failure to be furnished with the balance of the information constitutes a refusal. Applicant further contends that the first respondent is for the purposes of section 77(7) of the PAIA regarded as having dismissed its internal appeal. It is worth noting that whilst the process was now handled by the Provincial Department more particularly the fourth respondent. The applicant still referred to the National Department as having dismissed his internal appeal.

[14] It is applicant's contention that he is not indebted to the beneficiaries in favour of whom his monies are deducted from his salary and neither has he authorised such deductions. He further contends that the letters of the judgment creditors to the Department, advising them of the breakdown of the payments received and outstanding balance will assist him to know if the deductions are lawful. Further, the list and details of payments will assist him in knowing how much has been paid over to the beneficiaries and to whom it has been paid, should it be found that the deductions were lawful.

[15] Mr Cheriyan who is the acting director – general and deputy information officer of the Provincial Department of Social Development stated in his answering affidavit on behalf of the third and fourth respondents as follows:

[16] That he is the custodian of all the records of the Department. He avers that the request for information was directed to their National Department which subsequently transferred the request in terms of section 20 of the Act to the Provincial Department. He only became aware of the request for the first time on 4 July 2018.

[17] He contends that the appeal against the National Department is erroneous and there was thus no reason to join the first and second respondents in this application. Upon receiving the request via transfer on 4 July 2018 he calculated the 30 days period within which to furnish the information to be expiring on 2 August 2018. He informed

the applicant's attorney by a letter dated 11 July 2018 that he would provide the requested information on or before 2 August 2018. According to him, the applicant's right of appeal could not accrue after the said date and is therefore premature and not permissible under section 78 of PAIA.

[18] He further stated that he furnished the requested information in a letter dated 30 July 2018 annexed to the founding papers as F 21 as well as in another letter dated 2 August, annexure FA 23. He also furnished the applicant's attorney with an explanatory affidavit in terms of section 23 of PAIA, in which he advised the applicant of those records he could not find despite a diligent search.

[19] He admits the deductions that have been effected in the salary of the applicant. He however, contends that the disclosure of the identity of the judgment creditors which appear on the pay slips should have made it easy for the applicant to obtain the information he requires. He further submitted that the process leading to the issuing of garnishee orders is in the purview of the court, it is not required of Department to consult with the debtor when they effect the implementation of such garnishee orders.

[20] He further stated that the Provincial Department has its own Manual which is available on its website and easily furnished to the members of the public when so requested. It is his contention that the appeal which was addressed to the National

Department was misguided and therefore it is of no relevance to the case against the Provincial Department. He contends that, the appeal was lodged with the wrong body.

[21] Since the information sought related to documents which are older than five years which have been transferred to archives that are not physically located at the main office of the Department, it was time consuming to search for the information and hence their request for the extension of time. His letter of 2 August 2018 addressed to the applicant is a clear demonstration of his transparency, to make the applicant aware of what was being done about his request. He refutes the allegation that he was supine or refusing to reply to the applicant's request.

[22] The fourth respondent submits that in light of the procedure that was unnecessary which was followed by the applicant, the relief he seeks should be dismissed and costs granted against his attorneys *de bonis propriis*. Its application for costs *de bonis propriis* is based on the following reasons:

- 22.1 Applicant's attorneys have served a large number of identical applications on their Departments and other Departments.
- 22.2 The actual information sought in their application is either within the knowledge of the applicant or is easily obtainable from the judgment creditors whose identities are apparent from the pay slips.

22.3 The argument concerning the appeal process against the National Department is patently without merit and has been persisted in the face of explanation by the respondent.

22.4 Applicant's attorneys instituted the present application in full knowledge that the fourth respondent was engaged in finding the required information.

22.5 It is apparent that this application is part of a campaign engaged in by applicant's attorney with the express purpose of gaining costs orders against Departments of state and without the *bona fide* of prosecuting applicant's rights in terms of PAIA.

[23] In his replying affidavit the applicant contends that Eva Motau never advised his legal representatives that his request had not been lodged in the prescribed manner. Consequently he and his legal representative laboured under the impression that his request was being attended to. In the absence of a decision on his request he was entitled to lodge the appeal. It is only during the appeal stage that his request was transferred to the Provincial Department. He further submits that due to the deemed refusal and the appeal procedure that followed, section 20 was no longer applicable and the transfer of his request did not nullify his appeal.

[24] He further stated that it was no longer available to Mr Chariyan to take a decision since by operation of law there was already a deemed refusal.

[25] He further stated that the failure by the second respondent to deal with his request is causing him to suffer prejudice since he is not aware of any judgments against him. Whilst he admits receiving the Emoluments Attachment Order authorising the deductions, as well as copies of his salary advices confirming the deductions, he did not receive any proof of payments made by the Department. It is only the Department and not the creditors that can furnish such proof of payment.

[26] He confirms receiving the section 23 affidavit, however, he disputes that it complies with the provisions of section 23 instead it was intended to mislead. He further contends that the details of the creditor, Russel Inc. lacked the contact details of the creditor and it was therefore impossible to ascertain who the creditor was. He also contends that his employer would be in a better position to know this creditor as they ought to have written authorisation for the deductions.

[27] He further contends that his employer was under an obligation to discuss any issue that may have an effect on his salary. Had his employer done so, he would have been involved in the implementation process and the deductions would not have caused him to be unable to provide for his family. He laments that it is almost 6 months since his request, and is yet to be provided with the records of the actual payments which is the only portion of the records that he regards as still outstanding.

[28] He submits that a punitive cost order against his attorney is an attempt to discourage him from exercising his constitutional right since his attorneys did not act out of malice when they launched this application.

[29] The issues to be determined as I see them are;

29.1 whether the applicant had complied with section 11 of the Act when he referred his request to the National Department of Social Development;

29.2 whether the applicant was furnished with the required information as envisaged under PAIA. If so, whether there was a need for this application; and

29.3 whether the respondents are entitled to the order dismissing the application with costs on a punitive scale including or alternatively with costs being awarded *de propriis*.

THE LAW

[30] PAIA finds its existence in section 32 of the Constitution of the Republic of South Africa¹ which reads:

“(1) Everyone has the right of access to –

(a) Any information held by the State; and

¹ Act 108 of 1996.

(b) Any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State.

[31] PAIA is the national legislation to give effect to the right of access to information and is the principal legal source that defines the right of access to information.

[32] In *Afriforum v Emadlangeni Municipality*² Makgoka J summarized the purpose of PAIA at paragraph 5 aptly as follows:

“The purpose of PAIA is two-fold: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to promote a society in which the citizens have effective access to enable them to more fully exercise and protect their rights. In the preamble to PAIA, it is recognized that the system of government in South Africa before 27 April 1994, amongst others, resulted in secretive and unresponsive culture in public bodies, which often lead to an abuse of power and human rights violations.”

[33] Section 11 of PAIA reads:

² *Afriforum v Emadlangeni Municipality* Case No. (A286/2015) [2016] ZAGPPHC 1222 (27 May 2016)

“11. Right of access to records of public bodies

- (1) A requester must be given access to a record of a public body of –
 - (a) that requester complies with all the requirements in this Act relating to a request for access to that record; and
 - (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part;
- (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
- (3) A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by –
 - (a) any reasons the requester gives for requesting access; or
 - (b) the information officer’s belief as to what the requester’s reasons are for requesting access.”

[34] In *President of the Republic of South Africa v M & G Media Ltd*³ the Constitutional Court reiterated that compliance with section 11 of PAIA by both the requester as well as the public body who is in custody of the information requested is peremptory.

[35] The crux of the argument of the applicant is that he complied with the requirements set out in PAIA in its request for information and thus followed the procedure laid down in the Manual of the National Department of Social Development,

³ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012(2) SA 50 (CC).

after its search for the Manual of the Provincial Department yielded no positive results. It was only when no response was forthcoming that he lodged the internal appeal. The applicant has further argued that the transfer of the request to the Provincial Department by the National Department, purportedly acting in terms of section 20 of PAIA was well out of time.

[36] He also argued that without the furnishing of the information as to when the monies were paid and whether they were paid to legitimate beneficiaries, the Department has failed to comply with the statutory provisions of PAIA.

[37] In *casu* the applicant, acting on the procedure as laid down in the Manual of the National Department made his request to the National Department. The National Department did not advise him to direct his request to the Provincial Department but instead entertained his request through Ms Eva Motau, who informed his attorneys to direct the request relating to applicant's salary to herself. There appears to be no reason why Ms Motau did not inform the applicant to direct his request to the Provincial Department or point him to the provincial Manual which contains information to whom the request should be directed.

[38] I am inclined to agree with the applicant that upon the failure of the National Department to respond to his request at the expiration of the 30 day period, as prescribed in section 25 of PAIA, he was entitled to lodge an internal appeal with the

National Department that was ceased with his request. I therefore do not agree with the contention that the internal appeal was premature.

[39] The first and second respondent opted not to file answering affidavits to the averments made by the applicant against them. In the result there is no explanation proffered as to why the transfer of the request to the Provincial Department was not done within the 14 days period as required in section 20. Neither is there any explanation why the applicant was only notified on 02 July 2018 after the lodging of the internal appeal, that his request has been transferred to the Provincial Department.

[40] The answering affidavit of the third and fourth respondent has also not addressed these concerns save to submit that what can be inferred from the transfer letter of the National Department is that the request was incorrectly addressed to it. It may be helpful in this regard to recite the letter which reads as follows:

“We acknowledge receipt of your request for information in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000 herein after referred to as PAIA) for access to personal information of the officials mentioned below in terms of section 18(1) of PAIA.

1. -----

2. -----

3. Mr Ntobeko Goodman mbilini

4. -----

5. -----

6. -----

7. -----

This is to bring to your kind attention that the Deputy Information Officer has considered your PAIA request and wish to inform you that the information requested is closely connected to the functioning of the Eastern Cape Department of Social Development. We have therefore transferred your request to the Eastern Cape Department of Social Development in terms of section 20(1)(b) of the PAIA to the address below . . .”

[41] Nowhere in the letter is it expressly mentioned that the request was incorrectly addressed to the National Department. Instead the writer of the letter chose to use the words as they appear in the Act that the information sought is ‘closely connected’ to the Provincial Department of Social Development hence the transfer of the request.

[42] I also find it concerning that the Deputy Information Officer of the third and fourth respondent avers in his affidavit that the transfer was communicated to the applicant’s attorneys by a letter dated 22 June 2018 whereas the applicants were only advised of the transfer by means of an email of Dorothy Mathebula dated 02 July 2018. Once again no reason was proffered as to why was applicant only advised of the transfer approximately 11 days later, since the 22 June 2018 when the transfer letter was signed. This date of 22 June 2018 is very significant in the scheme of things since it was the expiry of the 30 days period within which a decision ought to have been taken

by the first and second respondents whether they are granting the request or not. It is my view that had this letter been dispatched as at the date on which it was signed, whilst it would still be out of time of the 14 days period within which the transfer ought to have been done, this may have prevented applicant from lodging an internal appeal. In essence there may not have been a need to lodge an internal appeal as it would have been nugatory to do so.

[43] As alluded to above that the lodging of the internal appeal by the applicant was reasonable if regard is had to the time periods prescribed in section 25 of PAIA. The third respondent relied on section 20(4) of PAIA, and argued that the time periods envisaged in section 25 were incorrectly calculated by the applicant.

[44] Section 25(1) provides:

“(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 requester 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.

(2) If the requester for access is granted, the notice in terms of subsection (1)(b) must state –

- (a) the access fee (if any) to be paid upon access;
- (b) the form in which access will be given; and
- (c) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the access fee to be paid or the form of access granted, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

(3) If the request for access is refused, the notice in terms of subsection (1)(b) must –

- (a) state adequate reasons for the refusal, including the provisions of this Act relied upon;
- (b) exclude, from such reasons, any reference to the content of the record; and
- (c) state that the requester may lodge an internal appeal or an application with a court, as the case may be, against the refusal of the request, and the procedure (including the period) for lodging the internal appeal or application as the case may be.”

[45] I find it concerning for the first respondent to keep the applicant waiting without making any decision on his request until the expiration of the 30 days period and also failing to transfer his request on time upon realising that the information sought is in the possession of another public body, but only do so when the applicant has taken a further step to lodge an internal appeal.

[46] When the matter was still in the province of the National Department it is my view that section 20(4) did not arise. When the period mentioned in section 25 expired, the deeming provision in section 27 was triggered. Section 27 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), the information officer is, for the purposes of this Act, regarded as having refused the request.” It follows that the next step following a deemed refusal is an internal appeal in terms of section 75. Up until when the applicant was informed of the transfer of his request the steps he took were appropriate and in accordance with the provisions of PAIA.

[47] I now turn to deal with what transpired after the request was transferred to the third respondent (Provincial Department) and when the applicant was informed thereof. It has to be borne in mind that when the request was transferred the internal appeal had already been lodged and was still pending. It is common cause that the third respondent received the transfer request on 4 July 2018 and advised the applicant’s attorney by letter dated 11 July 2018 that they will provide the requested

information by not later than 2 August 2018. It is further common cause that on 30 July 2018 applicant was furnished with the information through a letter dated 30 July attached in the founding affidavit marked FA 21. In addition the third respondent furnished the applicant's attorneys with an explanatory affidavit as envisaged in section 23 of the Act, in which it explained about the records that could not be found despite a diligent search.

[48] At this stage the matter had taken a different turn. It is clear that from this juncture onwards the applicant was now dealing with the Provincial Department and this ought to have had a bearing on how the matter was further handled.

[49] It is not in dispute that the thirty (30) days period within which the first respondent was required to decide on the internal appeal was to end on 28 July 2018. However, on 2 July 2018, applicant was advised that the request had been transferred to the Provincial Department. Upon the Provincial Department becoming aware of the transfer, they did not sit on their laurels and folded their arms. They addressed a letter to applicant's attorneys acknowledging the transfer of the request from the National Department as well as making an undertaking in various letters that they will furnish the applicant the requested information before 2 August 2018.

[50] On 30 July 2018 before the 2 August on which the third respondent had set to furnish the information, the applicant was furnished with the necessary information.

The question arises whether the applicant had a reason to still pursue the appeal lodged with the National Department in light of this development. Section 77(3) of the Act, provides that the relevant authority must decide on the appeal as soon as reasonably possible but in any event – within 30 day of receiving the internal appeal from the Information Officer. If the 30 days lapses without there being a decision made, in terms of section 77(7) the internal appeal is deemed to have been dismissed. The next available remedy will be for the applicant to seek relief by way of an application in terms of section 78 from the court.

[51] Section 78 of PAIA provides:

“(1) A requester or third party referred to in section 74 may only apply to 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 the 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 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) or

(d) Aggrieved by a decision of the head of a private body –

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57(1) or 60;

May by way of an application within 180 days apply to a court for appropriate relief in terms of section 82.

(3) . . .”

[52] Admittedly, the transfer in terms of section 20 took place well outside the 14 day period. However, it has to be borne in mind that when the transfer took place the *dies* within which a decision for the internal appeal had to be made had not yet lapsed. The applicant was now well aware that the information sought is to be obtained from the Provincial Department. I find it inconceivable why the applicant saw it necessary to keep the appeal process running against the first and second respondent. This is further complicated by the fact that the appeal could not run against the third and fourth respondents since it was not lodged with them. Even if it was, it is my view that it had for all intents and purposes complied with the request, when it furnished the applicant with the information on 30 July 2018.

[53] Before I express my view on how the applicant should have dealt with this matter post the transfer of the request, I find the remarks expressed by Jolwana J in *Ndiphiwe*

*Paul v the MEC for Health, Eastern Cape and Others*⁴ very instructive where the learned Judge stated: “It is demonstrably clear from the provisions of PAIA that the legislature has gone to great lengths in codifying a user friendly legislative road map for applications under PAIA. This road map starts when an initial application for access to information is made to an information officer long before a court application in terms of section 78 of PAIA is made or even conceptualised. It is evident from PAIA that the legislature had in mind an uncomplicated and inexpensive procedure in which a request for information is made and access thereto is given administratively, a court application being the exception rather than the rule.” (my underlining for emphasis) The principle laid down above, in conjunction with the objects of PAIA should be borne in mind by both the requester and the public or private body from which the information is sought.

[54] What is borne out in the facts of this matter is that the court application was precipitated as a result of the inadequate information received by the applicant from the Provincial Department. The inadequacy or otherwise of the information that was furnished can be better explained when regard is had to the founding affidavit wherein the applicant states that the information sought refers to deductions made from his salary and paid to beneficiaries that are unbeknown to him and he is not indebted to those beneficiaries. Neither has he authorised the deductions from his salary.

⁴ *Paul v The MEC, Health, Eastern Cape Provincial Government and Others; Mbobo v MEC, Health, Eastern Cape Provincial Government and Others; Ncumani v MEC, Health, Eastern Cape Provincial Government and Others* (5031/2018, 5108/2018, 5689/2018 [2019] ZAECMHC (29 March 2019).

[55] However, applicant admits that he has been furnished with copies of Emoluments Attachment Orders (EAO's) that disclosed the names of the beneficiaries. Accompanied to the EAO's were the payslips which showed the deductions from the salary of the applicant. Notwithstanding this information the applicant insists that it still requires the printouts of the deductions made to assist him in ascertaining how much has been deducted, as well as any letters from the judgment creditors in which the Department is advised of the breakdown of payments and the outstanding balances. According to the applicant he seeks the letters from creditors on the breakdown of payments in order for him to know whether the deductions are lawful. The failure of the third and fourth respondent, so he argues, to furnish the outstanding information is a demonstration of a refusal which attracts the step as envisaged in section 77(7) of PAIA.

[56] Upon receipt of the Emolument Attachment Order / garnishees, there appears to be nothing preventing the applicant from either approaching the firm of attorneys mentioned in the orders or approach the clerk of the court from where the order(s) was issued. Similarly I cannot find any reason why the applicant is unable to compute and calculate the amount that has been deducted from his payslips which were made available to him. I also fail to appreciate the reasoning of applicant that he will only be able to ascertain the lawfulness or otherwise of the deductions upon receipt of correspondence which sets out the breakdown of payments and balances that are still outstanding.

[57] This brings me to the question whether the allegation is well founded that the third and fourth respondents demonstrated a refusal to grant the request. If the conduct of the third and fourth respondent is viewed objectively, there is no support for the contention that the request had been refused. Neither do I find that the explanatory note made in terms of section 23 was an attempt to frustrate and deny the applicant the information he required. I therefore do not agree with the assertion that the conduct of the third and fourth respondents was demonstrable of a refusal of the request.

[58] In the result I find that this application was unwarranted and ought to be dismissed.

[59] I now turn to deal with the aspect of costs. In the initial stages of this matter the applicant acted in accordance with the provisions of PAIA namely section 11. The tardiness of first and second respondents can undoubtedly not be countenanced in their ineptness of handling of the request. However, when the request was transferred to the Provincial Department, the matter had another complexion which required in my view, for the applicant to change course and not pursue the internal appeal which was no longer necessary. It was ill-considered for the applicant to pursue the appeal, and equally imprudent for his attorney to pursue a court application under those circumstances. The sensible approach was for the applicant to deal with the Provincial Department only and according to the time frames as provided in section 25(1) of PAIA. In my view, it is only when the applicant did not derive any joy from the Provincial

Department or when it had ignored all its obligations as prescribed in PAIA, would it be necessary for applicant to launch this court application.

[60] Mr Paterson SC for the third and fourth respondent argued that the conduct of the applicant's attorney warrants an order for costs *de bonis propriis*.

[61] In *Multi-Links Telecommunications Ltd v Africa Prepaid Service Nigeria Ltd, Telkom SA Soc Limited v Blue Label Telecoms Limited & Others*⁵, the principles relating to costs *de bonis propriis* were re-stated as follows:

“[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket . . . [T] her obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interest fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at prevailing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the

⁵ [2003] 4 All SA 346 (GNP).

professions demand absolute personal integrity and scrupulous honesty of each practitioner . . .

[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of the court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, *per se* ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such as their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, abstraction of the interest of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court and gross incompetence and a lack of care.”

[62] In *Addendorffs Boerderge v Shabalala & Others*⁶ Mathopo JA agreed with what was said by Le Grange J in *Thunder Cats Investments 49 (Pty) Ltd & Others v Fenton & Others* 2009 (4) SA 138(C) at para 30 where it was said “an order to hold a litigant’s legal practitioner liable to pay costs of legal proceedings is unusual and far-reaching. Cost orders of this nature are not easily entertained and will only be considered in exceptional circumstances.”

⁶ *Addendorffs Boerderge v Shabalala & Others* 997/2015) [2017] ZASCA 37 (20 March 2017).

[63] Whilst the attorney of the applicant did not acquit himself with the necessary astuteness and cannot escape criticism on how he handled this matter, I am not persuaded that his conduct warrants a punitive cost order. It cannot be said that he displayed gross negligence or recklessness or gross incompetence to attract a punitive cost order. In my view, it is sufficient to express my displeasure in the lack of astuteness on his part without necessarily ordering a punitive cost order.

[64] That being of out the way, I have to consider whether the applicant as an unsuccessful party needs to be mulcted with the costs of this application.

[68] Relying on the principle laid down by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*⁷ and *Biowatch Trust v Registrar, Genetic Resources and Others*⁸ this is a matter where the applicant as an unsuccessful party ought not to be mulcted with costs. In my view, this is a matter where an appropriate cost order is for each party to pay its own costs.

ORDER

[65] In the result the following order is made.

1. The application is dismissed.

⁷. *Affordable Medicine Trust and Others v Minister of Health and Others* 2006(3) SA 505 (SCA).

⁸ *Biowatch Trust v Registrar, Genetic Resources and Other* 2009 (6) SA 232 (CC).

2. Each party to pay its own costs.

V NQUMSE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Mr Du Plessis
Instructed by: NJ Du Plessis & Associates Inc.
No. 6 Batting road
Beacon Bay
EAST LONDON

For the 3 & 4 Respondents: Adv. TJM Paterson, SC and Adv. M Mayekiso
Instructed by: The State Attorney
No. 17 Fleet Street
EAST LONDON

Date Heard: 6 June 2019

Judgment Delivered: 10 September 2019