

**IN THE HIGH COURT OF SOUTH AFRICAN
EASTERN CAPE LOCAL DIVISION; MTHATHA**

CASE NOS. 5031/2018;

5108/2018; 5689/2018

In the matter between:

NDIPHIWE PAUL

APPLICANT

VS

THE MEC FOR HEALTH, EASTERN CAPE

PROVINCIAL GOVERNMENT

1ST RESPONDENT

CHIEF EXECUTIVE OFFICER,

MTHATHA GENERAL HOSPITAL

2ND RESPONDENT

DEPUTY INFORMATION OFFICER,

MTHATHA GENERAL HOSPITAL

3RD RESPONDENT

And:

SIMANGELE MBOBO

APPLICANT

VS

THE MEC FOR HEALTH, EASTERN CAPE

PROVICIAL GOVERNMENT

1ST RESPONDENT

INFORMATION OFFICER,

BEDFORD ORTHOPEDIC HOSPITAL, MTHATHA

2ND RESPONDENT

And:

KANGELWA NCUMANI

APPLICANT

VS

MEC FOR HEALTH,

EASTERN CAPE PROVINCE

1ST RESPONDENT

SUPERINTENDENT GENERAL,

DEPARTMENT OF HEALTH,

EASTERN CAPE PROVINCE,

DR THOBILE MBENGASHE

2ND RESPONDENT

THE DESIGNATED INFORMATION OFFICER,

BUTTERWORTH HOSPITAL

3RD RESPONDENT

JUDGMENT

JOLWANA J

Introduction

[1] The applicants approached this court in terms of the Promotion of Access to Information Act (PAIA)¹ seeking certain relief against the respondents. Principally the applicants sought orders directing the respondents to furnish them with their hospital records to enable them to institute actions for damages arising from alleged negligent treatment at various hospitals. These matters together with other matters on the roll were initially heard by the Judge President in motion court who, acting in terms of section 14 of the Superior Courts Act 10 of 2013², directed that they shall be heard by a specially constituted court. These matters were selected for hearing as they exhibit features common to all the applications.

¹ Promotion of Access to Information Act 2 of 2000

² Section 14(1) (a) of the Superior Courts Act 10 of 2013 provides that:

“14(1)(a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.”

[2] The decision to constitute a special court was, in part, informed by the fact that PAIA applications in this Division form the bulk of the court rolls in most, if not all motion court sittings. Very few of them comply with PAIA requirements resulting in most of the matters being removed from the roll, only to be re-enrolled without amendment. This is obviously an untenable situation which the Judge President determined would best be addressed by a special court providing comprehensive guidance in respect of PAIA applications.

[3] This judgment only deals with PAIA applications in respect of the right of access to records of public bodies.

The constitutional and legal framework for PAIA applications.

[4] Section 32 of the Constitution³ provides thus:

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

- (a) any information held by the state; and
- (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.”

[5] PAIA is the legislation envisaged in section 32 (2) of the Constitution. It seems to me that ordinarily applications in terms of PAIA need not refer to section 32 or any other provision of the Constitution for that matter. Referring to or quoting the Constitution is to complicate what should be a simple and standard court application for relief directing access to records of a public body where access has either been refused or the so called deemed refusal (discussed elsewhere in this judgment) is applicable.

³ Constitution of the Republic of South Africa, 1996

[6] I am fortified in this view by the sentiments expressed 15 years ago in the unanimous decision of the Constitutional Court in *Bato Star Fishing v Minister of Environmental Affairs and Tourism*⁴. In the context of the Promotion of Administrative Justice Act (PAJA)⁵ the court stated that:

“[25] The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.”

[7] 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.

[8] However, the life experience of ordinary South Africans, at least within the area of jurisdiction of this Division, has shown that requests for access to information, constitutional as they are, are regarded with disdain and are consequently ignored. This attitude by state functionaries has resulted in ordinary South Africans having to resort to the courts, burdening court rolls with court applications which are largely unopposed. This burdens the fiscus with unnecessary costs orders in circumstances

⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

⁵ Promotion of Administrative Justice Act 3 of 2000

where scarce resources are severely challenged by competing needs. The time may have arrived for costs orders in deserving cases to be made against the respective officials who unnecessarily force ordinary citizens, many of whom may be poor, to go to court to enforce a right that is enshrined in the Constitution and incontestable.

The road map in PAIA applications

[9] The starting point in PAIA applications is section 11 of PAIA which reads:

“11. Right of access to records of public bodies

- (1) A requester must be given access to a record of a public body if –
 - (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 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.”

[10] One of the things which stand out in section 11 is that compliance with the procedural requirements of PAIA is not optional. If any of the procedural requirements is not complied with, the requester is not entitled to the record. The court is similarly not at liberty to waive the peremptory provisions of section 11(1). On a proper construction of section 11(1) it is clear that both the requester's entitlement to be given access to a record of a public body and the obligation imposed on the requester to comply with all the procedural requirements of PAIA are couched in peremptory terms. In the absence of full compliance with the procedural requirements of PAIA the information officer is entitled to refuse access and to not

provide the record. The court may also not order the provision of the record to the requester unless it is satisfied that there has been full compliance with all the procedural requirements. In *President of the Republic of South Africa v M & G Media Ltd*⁶, the Constitutional Court explained the provisions of section 11 in the following terms:

[9] As is evident from its long title, PAIA was enacted “[t]o give effect to the constitutional right of access to any information held by the state.” And the formulation of section 11 casts the exercise of this right in peremptory terms – the requester “must” be given access to the report so long as the request complies with the procedures outlined in the Act⁷ and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.”

[11] I turn now to deal with some of the procedural requirements prescribed by PAIA. As simple a matter as whether the correct request in the prescribed form was sent to the correct information officer at the correct address can easily turn into a complicated argument in court that does not bring the requester any closer to accessing the required record and increases, unnecessarily, the costs of litigation. These features may well limit access to justice, a constitutional imperative. In order to reduce the occurrence of such barriers the legislature imposed certain obligations on public bodies to direct their information officers to make available clear guidelines to members of the public on how the information they hold is to be availed to requesters.

[12] Section 14(1) provides:

“(1) Within six months after the commencement of this section or the coming into existence of a public body, the information officer of the public body concerned must compile in at least three official languages a manual containing –

⁶ President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)

⁷ My underlining

- (a) a description of its structure and functions;
- (b) the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of the body and of every deputy information officer of the body designated in terms of section 17 (1);
- (c) a description of the guide referred to in section 10, if available, and how to obtain access to it;
- (d) sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject;
- (e) the latest notice, in terms of section 15 (2), if any, regarding the categories of records of the body which are available without a person having to request access in terms of this Act;
- (f) a description of the services available to members of the public from the body and how to gain access to those services;
- (g) a description of any arrangement or provision for a person (other than a public body referred to in paragraph (a) or (b) (i) of the definition of 'public body' in section 1) by consultation, making representations or otherwise, to participate in or influence –
 - (i) the formulation of policy; or
 - (ii) the exercise of powers or performance of duties, by the body;
- (h) a description of all remedies available in respect of an act or a failure to act by the body; and
- (i) such other information as may be prescribed.”

[13] Recently Mbenenge JP had occasion to consider the provisions of section 14 of PAIA in *Makhambi v MEC for Health, Eastern Cape and Another*⁸ and stated that:

“[14] The section must be read together with section 16, which provides:

‘The Director General of the national department responsible for government communications and information services must at that department’s cost ensure the publication of the postal and street address, phone and fax

⁸ *Makhambi v MEC for Health, Eastern Cape and Another* (3262/2018) [2018] ZAECHMHC 63 (20 November 2018)

number and, if available, electronic mail address of the information officer of every public body in every telephone directory issued for general use by the public as are prescribed.'

[15] Upon a proper reading of these sections it is the manual of a public body contemplated in section 14 that sheds light regarding, *inter alia*, the address to which a request and, where applicable, an appeal should be sent; the functionary to whom the request should be made and a description of remedies available to an aggrieved requester before court proceedings can be instituted. All these facts gleaned from the manual must be alleged in the affidavit filed in support of an application challenging the refusal and/or failure to consider and make a decision on a request for access to information. Needless to say the address used to request the information from the information officer must be that referred to in the manual. It would also perfect the cause of action for the applicant to annex the relevant pages of the manual. In this way, it would not be left to a judge to trawl the manual or telephone directory to verify the correctness of the address and the addressee. It is not hard to envisage a situation where a public body has not complied with section 14 and has thus not compiled a manual. In that event, it should be available to the aggrieved person to seek a *mandamus* compelling the public body concerned to compile the manual."

[14] I agree with the sentiments of the learned Judge President in this regard. However, a few remarks are apposite. Firstly, an applicant's cause of action in these circumstances does not become perfect on the annexation of the relevant pages of the manual. All that the annexation does is to make it easy for a judge to verify the information contained in the founding affidavits. In the absence of those pages a judge hearing the application does not have to trawl the manual or the telephone directory to verify the correctness of the address and the addressee. The proceedings under PAIA are no different from other civil proceedings and are founded on our adversarial adjudication system. It is not the duty of a judge to verify the correctness of the information alleged in the founding affidavit. All that is necessary is that "[a]ll these facts gleaned from the manual must be alleged in the affidavit filed in support of an application challenging the refusal and/or failure to consider and make a decision on a request for access to information."

[15] It has never been a requirement in our law to annex pages of departmental documents where proper reference is made to them in an affidavit. Were that to be

insisted upon not only would there be a substantial increase in litigation costs, PAIA applications would become unnecessarily cumbersome. Furthermore, it would change the texture of PAIA applications when compared to other ordinary applications. Our adversarial system requires a respondent to resist an application, if so advised, and to point out to the presiding judge that there has been non compliance with the manual and therefore with PAIA. In the end each case should be determined on its own merits and an application should not be refused merely because the relevant pages of the manual are not annexed in circumstances in which the relevant pages or clauses of the manual have been clearly referenced or quoted.

[16] Section 18 of PAIA provides for the manner in which the request for access to information is to be made as follows:

- “18 (1) 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 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
 - (f) 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.”

[17] In order to comply with section 18 proper and full completion of the prescribed form is required. Where a public body has designed and published its own form it follows that the request must be made in that prescribed form. A covering letter cannot be used to supplement information that must be contained in the prescribed form. Alternatively, a request can be made by completing form A⁹ which is a form that applies to all public bodies and is designed in compliance with all the requirements of section 18.

[18] Only once a proper request for access to the record in the prescribed form has been sent to the correct information officer at the address reflected in the manual can the provisions of section 25(1) of PAIA kick in. Section 25(1) provides that, as soon as reasonably possible but within 30 days of receiving a request for access to information, an information officer must decide whether to grant the request or not and notify the requester about his or her decision. Only after the 30 day period has elapsed will the deeming provisions of section 27 apply. 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.”

[19] The provisions of sections 25 and 27 are very important because more often than not requests for access are ignored by information officers. On a proper understanding of the relationship between sections 25 and 27 it is not necessary for numerous letters to be sent to an information officer reminding him or her to respond to the request for access. For the same reason, in a court application in terms of section 78 the prayer frequently inserted in the notice of motion for the court to direct

⁹ Forms A & B are attached as annexure B to the Regulations regarding the Promotion of Access to Information, promulgated in Government Notice 187, Government Gazette 23119 dated 15 February 2002. (Form A is in respect of a Request for Access to Record of Public Body and form B is in respect of Notice of Internal Appeal)

the information officer to make a decision is misplaced. This is so because after the 30 day period has elapsed and the information officer has not responded, there is a decision - that of a deemed refusal in terms of section 27.

[20] The next step is that of an internal appeal. The process for an internal appeal is provided for in sections 75 and 76 of PAIA. The internal appeal process is triggered either in terms of section 25(3), in which case the information officer must provide adequate reasons, or in terms of section 27 which is a deemed refusal where a period of 30 days has elapsed and there has been no response from the information officer.

[21] Section 75 provides as follows;

“75 Manner of internal appeal and appeal fees

- (1) An internal appeal –
 - (a) must be lodged in the prescribed form –
 - (i) within 60 days;
 - (ii) if notice to a third party is required by section 49(1)(b), within 30 days after notice is given to the appellant of the decision appealed against or, if notice to the appellant is not required, after the decision was taken;
 - (b) must be delivered or sent to the information officer of the public body concerned at his or her address, fax number or electronic mail address;
 - (c) must identify the subject of the internal appeal and state the reasons for the internal appeal and may include any other relevant information known to the appellant;
 - (d) if, in addition to a written reply, the appellant wishes to be informed of the decision on the internal appeal in any other manner, must state that manner and provide the necessary particulars to be so informed.
 - (e) if applicable, must be accompanied by the prescribed appeal fee referred to in subsection (3); and
 - (f) must specify a postal address or fax number
- (2) (a) If an internal appeal is lodged after the expiry of the period referred to in subsection (1) (a), the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal.

- (b) If that relevant authority disallows the late lodging of the internal appeal, he or she must give notice of that decision to the person that lodged the internal appeal.
- (3) (a) A requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed fee (if any).
- (b) If the prescribed appeal fee is payable in respect of an internal appeal, the decision on the internal appeal may be deferred until the fee is paid.
- (4) As soon as reasonably possible, but in any event within 10 working days after receipt of an internal appeal in accordance with subsection (1), the information officer of the public body concerned must submit to the relevant authority –
 - (a) the internal appeal together with his or her reasons for the decision concerned; and
 - (b) if the internal appeal is against the refusal or granting of a request for access, the name, postal address, phone and fax number and electronic mail address, whichever is available, of any third party that must be notified in terms of section 47 (1) of the request.”

[22] It is clear from the provisions of section 75 (1) that the appeal must be sent to the information officer. There is therefore no legal basis for sending the appeal to any other person or the MEC as is often done in matters that come before this court. Once the information officer receives an internal appeal, subsection (4) gives him or her a maximum of 10 working days thereafter to submit to the relevant authority the internal appeal together with his or her reasons for the particular decision.

[23] It follows that where an internal appeal is sent to the MEC or any authority other than the information officer concerned, the latter is denied an opportunity to follow the process provided for in subsection (4). That process includes the submission of his or her reasons for the refusal, which must be adequate reasons, sending those together with the appeal to the relevant authority. Where an internal appeal is sent directly to the relevant authority the latter is simply unable to apply his or her mind to the appeal itself together with the reasons for the refusal and decide the matter accordingly.

[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. In a court application in terms of section 78 in which the appeal was sent, not to the information officer, but to the MEC or another authority the court is obliged to dismiss the application. That this is so is made even more clear when the provisions of section 77 (1) (a) and (b) are considered. Section 77 reads as follows:

“77 (1) The decision on internal appeal must be made with due regard to –

(a) the particulars stated in the internal appeal in terms of section 75(1) (c)

(b) any reasons submitted by the information officer in terms of section 75 (4) (a)”

[25] The reasons submitted by the information officer to the relevant authority form part of the information that must serve before the relevant authority. In my view the appeal authority has no jurisdiction to consider and decide on an appeal in which the information officer has been side-lined and the appeal was lodged directly with that authority.

[26] In terms of section 77(3) the relevant authority must decide on the appeal as soon as reasonably possible but in any event within 30 days of receiving the internal appeal from the information officer. If this period of 30 days elapses without the relevant authority having decided the appeal and informed the requester about his or her decision, section 77 (7) deems that internal appeal to have been dismissed.

[27] It is only the dismissal of the internal appeal by the relevant authority with adequate reasons being provided together with the notice of dismissal or the deemed dismissal in terms of section 77(7) that paves the way for a court application in terms of section 78.

[28] Section 78 reads in part as follows:

“78 Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.

- (1) A requester or third party referred to in section 74 may 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 on 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) 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)...

[29] Only a requester who falls into one of the categories mentioned in section 78 (2) may approach court for an appropriate relief. PAIA applications have been authoritatively described in our courts. In *President of the Republic of South Africa and Another v M & G Media Ltd*¹⁰ the Constitutional Court said:

“[13] Court proceedings under PAIA are governed by sections 78 to 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. Section 81 provides:

- “(1) For the purposes of this chapter proceedings on application in terms of section 78 are civil proceedings.
- (2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.

¹⁰ Note 6 supra

(3) The burden of establishing that –

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 22, 26 (1), 29 (3), 54, 57 (1) or 60, complies with the provisions of this Act rests on the party claiming that it so complies.”

[14] In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits. The evidentiary burden borne by the state pursuant to section 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.”

[30] In *Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd*¹¹ Howie P expressed the following sentiments which, in my view, remain the correct legal exposition on proceedings in terms of section 78:

“[24] As to the contested issues, it is convenient to begin with a point raised by the appellant which is really jurisdictional in nature. It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right. A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000. It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties’ respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the Legislature’s having catered for the presentation of evidence and the resolution of disputes of fact by reference to an *onus* of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover, it is unlikely that a Court, acting under section 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply.”

[31] While it is so that section 78 proceedings are civil proceedings like any other with the normal and usual Uniform Rules being applicable and the manner in which factual disputes are dealt with being the same as in any other application under Rule 6 of the Uniform Rules, there is one very important proviso. That very important proviso is that unlike all other applications in terms of Rule 6 in which Form 2 (a) is

¹¹ *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA)

applicable, there is a specific form of the Notice of Motion prescribed specifically for section 78 court applications. Rules 2 and 3¹² of the PAIA rules read as follows:

“Procedure in an application to Court in terms of the Act

2. (1) The procedure prescribed in these rules must be followed in all applications contemplated in section 78 of the Act.
- (2) Unless as otherwise provided for in these rules, the rules governing the procedure in the court to which an application in terms of these rules is brought shall apply with appropriate changes, unless otherwise directed by the court.

Applications

3. (1) An application contemplated in section 78 of the Act must be brought on notice of motion that must correspond substantially in accordance with the form set out in the Annexure to these rules, addressed to the information officer or the head of a private body, as the case may be.
- (2) The notice of motion must:
 - (a) set out an address within eight kilometres of the court to which the application is brought, where the applicant will accept notice and service of all processes;
 - (b) call upon the respondent –
 - (i) to give notice, within 15 days after receipt of the application, of his or her intention to oppose the application, which notice shall also contain an address within eight kilometres of the court to which the application is brought where notice and service of documents will be accepted; and
 - (ii) to file any answering affidavit within 15 days after service of the notice of intention to oppose the application; and
 - (c) inform the respondent that –
 - (i) if no notice to oppose the application is delivered in terms of subrule (2) (b) (i); or
 - (ii) if notice of intention to oppose has been delivered but no answering affidavit is delivered in terms of subrule 2 (b) (ii), the matter will be placed on the roll for hearing without further notice.
- (3) The notice of motion referred to in subrule (1) must be supported by an affidavit and be accompanied by true copies of all documents upon which the applicant intends to rely.
- (4) The affidavit referred to in subrule (3) must:
 - (a) set out the facts and circumstances upon which the application is based;
 - (b) state whether the internal appeal procedure contemplated in section 74 of the Act has been exhausted and if so, provide particulars of the manner in which and date upon which the internal appeal procedure was exhausted and if not, the reasons for failing to exhaust such procedure; and
 - (c) explain the relevance of each document upon which the applicant intends to rely.

¹² Rules of Procedure for Application to Court in terms of PAIA – published in Government Gazette No. 32622 dated 9 October 2009.

- (5) The information officer or head of a private body, as the case may be, must:
- (a) immediately after receipt of the application, notify, in writing, all other persons affected, of the application and attach a copy of the application to such notice; and
 - (b) within 15 days after receipt of the application –
 - (i) file with the clerk of the court or the registrar, as the case may be, two true copies of the request and the notification sent to the requester in terms of section 25 (1) (b) of the Act,
 - (ii) notify the applicant in writing that the requirements of subparagraph (i) have been complied with; and
 - (iii) serve on the applicant a true copy of the reasons, if they have not yet been provided.
- (6) The applicant may, if the information officer or head of a private body as the case may be, fails to comply with the provisions of subrule (4), request the clerk of the court or the registrar as the case may be, in writing, to place the application before the court for an order in terms of section 82 (b) of the Act.”

[32] What immediately becomes clear from the correct reading of PAIA and the rules is that at no stage does a requester have to communicate with the relevant appeal authority. When the request for access is made it is made to the information officer. When the appeal against refusal, actual or deemed refusal, is made that appeal is sent to the information officer. Finally when the section 78 court application is ultimately launched there is only one respondent and it is still the information officer in terms of subrules 3 (5) and (6) of the PAIA rules.

[33] I pause here to emphasize that the whole scheme of PAIA is such that there is no basis for citing the relevant appeal authority in the court application in terms of section 78. By the same token any relief sought against the relevant appeal authority is inappropriate and should ordinarily result in the dismissal of the application in all cases where the internal appeal was not sent to the information officer. However, in my view, if proper procedure is complied with when the request is made and the internal appeal is sent to the information officer to whom the request for access was made, the court may not dismiss the application simply because the

appeal authority is also cited and some form of relief against him or her, which is obviously incompetent is sought. In this event the court can always refuse to grant that particular relief and make an appropriate order for costs.

The facts

1. *Ndiphiwe Paul v MEC for Health and two Others:*

[34] Mr Paul was involved in a motor vehicle accident on 26 December 2017 in Ngqeleni as a result of which he received medical care and treatment at Mthatha General Hospital. It is in respect of that medical care and treatment that he sought access to the relevant medical records. His attorney addressed two letters dated 18 June 2018, one to the Chief Executive Officer of Mthatha General Hospital (second respondent) and another to the Deputy Information Officer of Mthatha General Hospital (third respondent). The identity of the third respondent vis-à-vis the second respondent is not clear, nor is it clear why both of them are cited, assuming they are different officials.

[35] In both letters the correct prescribed Form A – Request for access to record of a public body is completed and attached. The form is correctly filled in with all the necessary details. It appears that there was no response to this request, which was sent by registered mail to the Chief Executive Officer, Mthatha General Hospital, Private Bag X5014, Mthatha, 5099. The address used for the third respondent is the same and the letter was posted in like manner.

[36] Annexure NP1 referred to in the founding affidavit is a copy of the applicant's identity document. However, in the supplementary affidavit annexure NP1 is a few pages of the manual. This is not explained in the supplementary affidavit.

Furthermore, the address reflected in the attached pages of the manual is the physical address of the second and third respondents which is different to the address reflected in the request for access form, the proof of postage and the covering letter. The supplementary affidavit does not deal with these discrepancies. It also does not explain where the address to which the letters were posted, being Private Bag X5014, Mthatha, 5099 was taken from as it does not appear in the manual at all.

[37] The applicant alleges that a period of 30 days having elapsed with no response having been received from either the second or third respondent he regarded the request as having been refused in terms of section 27 of PAIA, the so called deemed refusal. He thereupon lodged an internal appeal with the first respondent.

[38] In *Makhambi*¹³ the court stated that section 14 of PAIA must be read together with section 16. I agree and I add thereto Rule 3 of the Rules of Procedure for Application to Court in terms of PAIA. Without derogating from the importance of the other provisions of PAIA and the PAIA Rules I must emphasize that the three pieces of legislation, namely, sections 14 and 16 and Rule 3 are inseparable, conjoined triplets in all cases where a section 78 application is made. This is not to say that they must be specifically referred to in the affidavit but it must appear from the founding affidavit that there is compliance therewith as explained above.

[39] In this matter the appeal was sent to the first respondent. This might explain why the first respondent is cited in the first place. The reason given in the affidavit for citing the first respondent is said to be the fact that in terms of section 74 (1) of PAIA the first respondent is the relevant authority for decisions on subsequent

¹³ Note 7 supra

appeals. Whilst this may be so, section 75 (1) (b) requires the internal appeal to be delivered or sent to the information officer. In this case the internal appeal was sent to the first respondent contrary to the clear provisions of PAIA. It follows that the internal appeal was incorrectly lodged and therefore PAIA was not complied with in so far as the appeal procedure is concerned, a fatal defect.

[40] This brings me to the citation of the first respondent as a party to these proceedings. Besides the fact that a proper appeal being properly lodged should not be lodged with the first respondent, Rule 3 (1) provides:

“An application contemplated in section 78 of the Act must be brought on notice of motion that must correspond substantially in accordance with the form set out in the Annexure to these rules, addressed to the information officer¹⁴ or the head of a private body, as the case may be.”

There is simply no basis for citing the first respondent in an application contemplated in section 78 of PAIA. Mr Maliwa, counsel for the applicant tried to make some argument based on sections 1 and 2 of the State Liability Act¹⁵. Sections 1 and 2 of that Act provide:

“1. Claims against the State cognizable in any competent court

Any claim against the state which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

2.Proceedings to be taken against executive authority of department concerned

(1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.

(2) ...”

Upon even a cursory reading of these two sections it becomes immediately clear that the executive authority of the department can be and must be cited as nominal

¹⁴ My underlining

¹⁵ Act 20 of 1957 as amended

defendant or respondent in two instances only. The first instance is when a claim arises out of any contract lawfully entered into on behalf of the State. The second instance or cause of action is any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

[41] In my view, PAIA applications are neither founded on any contract nor on any wrong committed. They are an enforcement of a constitutional right of access to information to which, unless the State is legally justified in refusing access to the required record, citizens must ordinarily and without having to resort to court be given access. It might be that the record, once received, is intended to be used to found or prove a claim based on a contract or a wrong committed by a State official. However, PAIA applications are not concerned with what the information is to be used for. That is the very reason why section 11 (3) provides:

“11 (3) any 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.”

[42] Even the request for access form (Form A) does not call for reasons to be given because they are not required. What is required is sufficient particulars to enable an official of the public body concerned to identify both the record or records required as well as the requester.

[43] Therefore any reliance on the State liability Act for citing the executive authority of a public body is, in the first instance misplaced. In the second instance, it seems to be based on a propensity to confuse PAIA applications with applications in respect of PAJA¹⁶. These two types of applications are different and should not to be

¹⁶ Promotion of Administrative Justice Act 3 of 2000.

conflated or confused. PAIA applications must comply fully with PAIA and any provisions or procedure under PAJA are of no assistance in the pursuit of relief under PAIA.

[44] During argument submissions were made suggesting that the citation of and the relief sought against the first respondent is based on the Eastern Cape Department of Health Promotion of Access to Information Manual¹⁷. This submission is similarly misplaced. In part that manual deals with the appeal procedure as follows:

“7.4 Appeal Procedure

An internal appeal in terms of Section 74 and 75 of the Act must be lodged in a prescribed form (Form B) within 60 days of the decision by the Deputy Information Officer.

- The internal appeal in the prescribed form must be delivered or sent to the Head of Department and/or Member of Executive Authority of the Eastern Cape Department of Health in its original appeal form together with an appeal fee supporting the original.
- Note that the Office of the Member of Executive Authority may therefore not be the first port of call or contact when sending the initial request for records. This office is to be utilized only for the purposes of receipt in respect of internal appeal, where the requester is not aware to whom the internal appeal should be delivered.”

[45] The first point to be made is that to the extent that the manual suggests that an internal appeal can be delivered or sent to the Executive Authority like the first respondent, it is incorrect. The drafters clearly misconstrued the provisions of section 75 (1) (b), clear as they are. To the extent that the manual makes provisions which contradict PAIA, it is invalid and therefore its guidance in that regard may not be countenanced. It may therefore not be used as justification for non-compliance with PAIA in sending off the appeal; nor can it be used as the basis for citing the Executive Authority or seeking relief against him or her.

¹⁷ PAIA Manual 2015/16

[46] In addition to seeking relief that the second and third respondents be directed to furnish him with the relevant hospital records, the applicant also seeks other forms of relief that have nothing to do with PAIA. For instance relief is sought for the exemption from exhausting internal remedies. Being exempted from exhausting internal remedies is not provided for in PAIA and the applicant does not explain in his affidavit the basis on which this relief is sought. The internal remedies from which the applicant seeks to be exempted are not disclosed nor is the basis for seeking to be exempted. The applicant refers to section 75 without specifying on which of the four subsections this relief is based. In any event the heading to section 75 refers to the manner of internal appeal and appeal fees. As the heading clearly anticipates, all the subsections deal with the process and procedure of lodging of an internal appeal. There is no suggestion of a possible exemption, certainly not in section 75.

[47] The applicant also seeks relief directing the respondents to furnish adequate reasons for the refusal. This is another example of incompetent relief based on a misconstruction of PAIA in general and the relief competent in terms of section 82 in particular. Section 82 reads as follows:

“82 Decision on application

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 the 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;
- (d) as to costs; or
- (e) condoning non-compliance with the 180 day period within which to bring an application, where the interests of justice so require.”

[48] None of the relief contemplated in section 82 includes the respondents being directed to furnish adequate reasons for a refusal nor can that relief be based on a concept of just and equitable orders that a court may grant. This is more so in an application such as this one in which no reasons were provided whatsoever and PAIA deems the application for access to have been refused.

2. *Simangele Mbobo v The MEC for Health, Eastern Cape Provincial Government and Another.*

[49] The notice of internal appeal is on its face addressed to the Information Officer, Bedford Orthopaedic Hospital, Private Bag X5106, Mthatha 5100. There is no explanation in the affidavit why this address has been used. According to page 11 of the manual, the address for the second respondent is Bedford Orthopaedic Hospital, Private Bag X5103, Mthatha 5099. Clearly the address used on the internal appeal form (Form B) is not the address reflected in the manual. However, at paragraph 11 of the supplementary affidavit the applicant says he sent the internal appeal to the first respondent. The internal appeal as it appears at page 28 of the papers is addressed, not to the first respondent but to the second respondent. On the applicant's own showing she is not entitled to the relief sought as the internal appeal was not sent to the second respondent, if her supplementary affidavit is anything to go by.

[50] The covering letter of the internal appeal is addressed to the first respondent at Private Bag X 0038, Bhisho, 5605. Proof of postage by registered mail at page 34 of the papers shows that the letter is addressed to the same address. None of these glaring discrepancies is dealt with in the supplementary affidavit. It is also not explained why there is no proof of postage of the notice of internal appeal (form B) to

the Information Officer of Bedford Hospital to whom on the face of the form, the appeal is addressed. After all, it is to the second respondent that the notice of internal appeal must be sent.

[51] In the notice of motion the following relief is sought:

- “1. The second respondent be and is hereby directed to consider and decide upon the applicant's request for access to the copies of, but not similar to, patient's admission records, history, clinical findings and doctor's progress notes, x-ray results, anaesthetic, operation and recovery room records, in-patient medication management chart, case sheet, continuation sheet, hospital clinical card including discharge summary and thereafter notify the applicant in accordance with section 25 (1) (b) of the Promotion of Access to Information Act 2 of 2000, through her attorneys of record, of the decision, within 30 (thirty) days from the date of service of this order by the applicant's attorneys upon the second respondent.
2. In the event of the second respondent refusing to furnish the applicant with the requested genus of documents specified in paragraph 1 *supra*, the second respondent be and is hereby directed to furnish the applicant with adequate reasons, through her attorneys of record within 30 [Thirty] days from the date of service of this order by the applicant's attorneys upon the second respondent.
3. The applicant be and is hereby exempted, in the interest of justice, from first exhausting such internal remedies as may exist in law.
4. The respondents be and are hereby directed to pay costs of this application on a party and party scale, jointly and severally, the one paying the other to be absolved from liability.
5. Granting the applicant such further and/or alternative relief.”

[52] All of these prayers, save for prayer 4 are incompetent. Prayer 4 wrongly seeks costs against more than one respondent. It follows that even if the papers had been properly drawn, which they were not, and did not suffer from the many fatal defects which are present, the application would still fail because the relief set out in all the prayers may not be granted in a PAIA application.

3. *Kangelwa Ncumani v The MEC for Health, Eastern Cape & 2 Others.*

[53] In this matter I will not deal with the citation of the parties as it was the same as in the other two applications and was sufficiently dealt with therein. Although some competent relief is sought, the applicant also sought some incompetent relief. I do

not intend to deal with this aspect as it has been sufficiently dealt with in the other applications.

[54] At paragraph 7.1 of the founding affidavit, the applicant makes a bald allegation that the third respondent is the designated information officer in terms of the manual. Thereafter the whole manual which consists of 33 pages is annexed. This is simply wrong and is to be frowned upon. This court's decision in *Makhambi* makes it clear that all the relevant facts which are gleaned from the manual must be alleged in the affidavit. Simply annexing the whole manual is not only poor draftsmanship but also the sort of conduct that seeks to unjustifiably and unnecessarily increase costs.

[55] In this application the whole factual background which may be relevant to the case which the applicant may institute against the first respondent in due course is given, which is unnecessary. Furthermore, a number of the provisions of the Constitution are referred to as having been infringed. All of this is totally unnecessary and only serves to turn a simple PAIA application into a complex, bulky and expensive one. To illustrate this penchant for citation of unnecessary and often times irrelevant constitutional provisions the applicant makes the following allegations in the founding affidavit:

“38 Respondents’ conduct complained of, herein, constitutes an infringement of my right:-

38.1 envisages section 32 (1) (a) and 32 (1) (b) of Act 108 of 1996,

38.2 to access personal information in terms of section 15 (1) of the National Health Act 61 of 2003 read with section 1 of the Promotion of Access to Information Act No.2 of 2000;

38.3 to human dignity enshrined in section 10 of the Constitution Act, (No. 108 of 1996).

38.4 to a fair and just public administration as provided for in section 195 of the Constitution Act, (108 of 196) read with a national legislative framework promulgated to ensure the promotion of the values and principles provided for in section 195, aforesaid.”

[56] None of these constitutional provisions needed to be referred to in this application. This is besides the fact that some of them are not even remotely relevant in this case nor are there averments in the affidavit that presage any reference to them.

[57] The notice of internal appeal (form B) is addressed to the first respondent which is incorrect as already stated above. In addition to that, the grounds of appeal are stated as “failure to furnish the relevant documentation”. This is obviously woefully inadequate and does not comply with section 75 (1) (c) of PAIA which provides:

“75 (1) An internal appeal –

- (a) ...
- (b) ...
- (c) Must identify the subject of the internal appeal and state the reasons for the internal appeal and may include any other relevant information known to the appellant.”

[58] All three applications argued before this court did not comply with the prescribed notice of motion in differing degrees. In most PAIA applications in this Division this has been a problem. Rule 3(1) of the PAIA rules requires an application contemplated in section 78 of PAIA to be brought on notice of motion that must substantially correspond with the form of notice of motion annexed to the rule. Therefore the wanton use and adaptation of Form 2 (a) annexed to the Uniform Rules is in violation of PAIA and the PAIA rules. There is no legal basis for granting

any relief in an application brought on notice of motion in terms of section 78 where the form of the notice of motion is not in substantial compliance with the prescribed form.

[59] Two of these applications were on the roll as uncontested opposed matters whereas the first one was not opposed at all. The respondents had not filed any answering affidavit in respect of either of the last two applications and no notice to oppose was filed in respect of the first application. No notice of opposition should be given unless it is the intention of the respondent in a PAIA application to oppose it in a constructive manner. The practice of filing a notice of opposition only, thereby creating an uncontested opposed application for no apparent reason, leads simply to unnecessary delays in achieving access and an unnecessary increase in the costs of litigation and is to be discouraged in the strongest terms.

[60] The parties, including the state attorney, were invited to prepare comprehensive heads of argument at very short notice. Indeed very useful heads of argument were filed. Mr Jikwana, Mr Maliwa and Mr Siwahla all appeared for the applicants and Mr Mapoma appeared for the respondents. The comprehensive heads of argument that they filed at very short notice, the thoroughness of their preparation and their incisive submissions made the work of dealing with these matters a great deal easier. A debt of gratitude is owed to all of them.

[61] All three applications are unsuccessful. Therefore, the following order shall issue:

1. The applications are dismissed
2. There shall be no order as to costs.

JOLWANA J

M.S. JOLWANA

JUDGE OF THE HIGH COURT

BROOKS J

I agree:

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: S. H. MALIWA WITH M. SIWAHLA

Instructed by: POYO SIWAHLA INC.

MTHATHA

AND

Counsel for the Applicant: T.M. JIKWANA

Instructed by: LUTANGO SIGCAU ATTORNEYS

IDUTYWA

Counsel for the Respondent: S.X. MAPOMA

Instructed by: STATE ATTORNEY

MTHATHA

HEARD ON: 26 FEBRUARY 2019

DELIVERED ON: 29 MARCH 2019