

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

HEARD: 20 MARCH 2018

GIVEN: 23 APRIL 2018

CASE NO. 5126 / 2017

In the matter between:

KHOLOSANI MKHANGO

Applicant

and

MAGISTRATES' COMMISSION

First Respondent

MINISTER OF JUSTICE

Second Respondent

REASONS FOR THE ORDER DATED 20 MARCH 2018

BODLANI AJ

The legislative background

1. This matter served before me in the court for unopposed applications on Tuesday, 20 March 2018. I made an order dismissing the application with no order as to costs. What follows hereunder are the reasons for the order. These reasons are based on the only version that served before me, the applicant's version.
2. This application was concerned with the consequences of a failure to observe the procedural requirement in s 75(1) read with s 78(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (the Act)

that an internal appeal against a decision of the information officer of a public body to refuse a request for access to the records of that body is a condition precedent to the making of an application to compel access to information in terms of s 82 of the Act.

3. The legislative framework relevant to the issue raised is as follows: The Act gives effect to the constitutional right of access to information. A person (referred to as a requester) has the right to be given access to the record of a public body provided he or she complies with the procedural requirements in the Act¹ and the request is not refused. The relevant official (the information officer) is required to make a decision in accordance with the Act whether or not to grant the request. The decision “must” be made “as soon as reasonably possible, but in any event within 30 days” after the request was received.² If the request is refused the requester must be notified of that decision.³ The notification must not only state adequate reasons for the refusal, the requester must also be informed of his or her right to lodge an internal appeal “and the procedure (including the period) for lodging the internal appeal.”⁴ A request for information is deemed for purposes of the Act to have been refused if the information officer fails to make a decision within the 30 day time period.⁵
4. A requester enjoys a right to lodge an internal appeal against a decision of the information officer of a public body in terms of s 74 of the Act. A public

¹ Section 11.

² Section 25(1).

³ Section 25(1)(b).

⁴ Section 25(3)(a) and (c).

⁵ Section 27.

body is defined in s 1 of the Act. Paragraph (a) of the definition of 'public body' in s 1 refers to –

“any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government.”

5. The “public body” in the present matter is the Department of Justice and Constitutional Development (the Department) and the Magistrates Commission, at least in so far as they have both been cited as the respondents against whom relief is sought. The manner of lodging an appeal is regulated in s 75 of the Act. Subsection (1)(a)(i) requires it to be lodged in the prescribed form, and within 60 days after the decision was taken. It reads: “An internal appeal - (a) must be lodged in the prescribed form - (i) within 60 days.” If the internal appeal is lodged after the expiry of this period, the appeal authority (refer to as “the relevant authority” in the Act) has the authority to condone the late lodging thereof. That authority is found in s 75(2)(a) and (b). It reads as follows:

“(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, he or she must give notice of that decision to the person that lodge the internal appeal.”

6. The internal appeal authority must decide the internal appeal within 30

days after it was received, and notify the requester of its outcome. If the relevant authority fails to give notice of its decision within 30 days, it is, for purposes of the Act deemed to have dismissed the appeal.⁶

7. A requester, whose internal appeal was unsuccessful, or who is aggrieved by a decision not to allow the late lodging of the appeal, may apply to a court for appropriate relief.⁷ A requester referred in s 74 may however only do so after he or she “has exhausted the internal appeal procedure against a decision of the information officer of a public body as provided for in s 74.” The effect of this provision is that a person who, as in the present matter, requested information from a public body as envisaged in paragraph (a) of the definition of a public body in s 1, cannot approach a court in terms of s 78 without first having exhausted the internal appeal remedy provided.

The factual background

8. From October 2000 until his resignation which became effective on 31 July 2015, the applicant was employed by the Department of Justice as a Magistrate. From 03 October 2016 to 31 December 2016 he was appointed as an acting magistrate for the Phuthaditjhaba Magistrates’ Court under the Bloemfontein Cluster. Upon the expiry of his acting appointment, he unsuccessfully applied for his acting appointment in that Court, to be extended (“the application for extension”). A favourable recommendation by his then senior colleague, Mr. H. B. Breyll (Breyll) who

⁶ Section 77(7).

⁷ Section 78.

was an acting senior Magistrate in Phuthaditjhaba did not assist yield a positive outcome for him.

9. Thereafter, the applicant initiated a request for access to the information relating the cause for the refusal of his application for the extension. In this regard, he completed the request of access to information form and delivered same to the respondents. When his request for access to information was refused, the instant application was resorted to.

Analysis of the evidence

10. In order to provide an appropriate remedy, the Court had to ascertain the real and true nature of the dispute.⁸ In circumstances where the allegations made in the founding affidavit did not advance clearly defined legal propositions and were, sometimes, only tenuously connected with the relief sought, this become a daunting task. It is trite that in conducting the inquiry the court must look at the substance of the dispute,⁹ have regard to various factors including the pleadings, the facts and the relief sought. The characterisation of a dispute by a party is usually not necessarily conclusive.¹⁰ Ascertaining the true nature of the dispute is a necessary exercise for it assists the Court determine in terms of what legal dispensation should the dispute and ancillary issues be determined.
11. As proof that the applicant sought information relating to the reasons for the application for extension being declined, he relied on copies of

⁸ *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 52; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1)* (1998) 19 ILJ 260 (LAC) (*Fidelity*) *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building Workers Union (2)* (1997) 18 ILJ 671 (LAC) (*Ceramic*).

⁹ *Fidelity* above at 269G-H.

¹⁰ *Ceramic* above n 10 at 677H-I and 678A-C.

electronic mail communication (emails) that was attached to the founding affidavit and marked MK2. The attachment comprises (emails) written on 22 March 2016 and another dated 26 April 2016 by Ms. or Mr. Bosman De Villiers (De Villiers) and addressed to Mr. Sakhumzi Nombambela (Nombambela). Nombambela is the applicant's attorney, De Villiers is not.

12. In the email dated 22 March 2016, De Villiers wrote to Nombambela and alleged that:

"Good morning

The contents of your email are noted.

I was out of office last week due to unforeseen circumstances.

Please note that the stipulated timeframe in the Act to respond to requests for access to information is within **30 days** after the request is received.

The request submitted by Mr. Mkhango is refused in terms of section 44(a)(1) of the Promotion of Access to Information Act, 2000 [Act No. 2 of 2000] in that the record requested contains a report and a recommendation."

13. In the email dated 26 April 2016, De Villiers wrote to Nombambela and alleged that:

"Good afternoon

Our Telephonic conversation earlier today refers.

Please see trailing email as requested.

I have forwarded an email to Mr Mkhango dated **12 April 2016** with the following contents”

“Good afternoon Mr Mkhango

I was informed that you have enquired about the matter that was supposed to serve before the Ethics Committee at its last meeting.

Unfortunately, due to time constraints and Mrs Pretorius leaving the Ethics Division with effect from 1 April 2016, the matter did not serve before the EC at its meeting held on 7 April 2016.

The Ethics Divisions will attempt in finalizing the report to serve before the Ethics Committee at its next meeting in **May 2016**. The date of said meeting still needs to be determined.

You will be informed of the outcome of this matter in due course.”

14. From the above quotations, it is clear that it is only in the email dated 22 March 2016 that De Villiers addresses himself to the applicant’s request for access to information. Even there, it is stated in no uncertain terms that the request of access to information was declined. Nowhere in the email dated 12 April 2016 does De Villiers address himself to the applicant’s request for access to information. Accordingly, it is not clear how the applicant came to conclude that annexure MK2 to the founding affidavit was, in fact, a request by him for access to information relating to reasons for his application for extension being declined.

15. Curiously, on the applicant's version it seems that he completed the prescribed form of request for access to information on 04 March 2016 some six months before he was appointed as an acting magistrate and some nine months before the expiry of his acting appointment, on 31 December 2016. This is borne out of annexure MK3 to the founding affidavit in terms of which he sought access to a report emanating from investigations against him.
16. Both documents that comprise annexure MK2 constitute correspondence that was exchanged between De Villiers and Nombambela before the end of April 2016 some five months before the applicant was appointed as an acting magistrate and some eight months before the expiry of the applicant's term of appointment, on 31 December 2016, as an acting magistrate.
17. The founding affidavit, properly construed, makes it clear that the applicant seeks information that he believes is in the respondents' possession. In order to get access thereto, there is only one vehicle to take him there, the Act. In recognition of this fact and in the prosecution of his rights in terms thereof, the applicant initiated a process that, if properly followed, would have entitled him to seek the relief he sought. For reasons that he did not explain in the papers, he did not go the full length.

The reasons

18. When the matter was called, I enquired from Mr. Nombambela why did this court have jurisdiction to entertain the matter. As I understood him, in response he submitted that it is because the applicant resides within the

area of jurisdiction of this court and that the State Attorney has an office in Mthatha as such service had been effected there. In pleading the issue of jurisdiction, the applicant alleged that:

“4.

The abovementioned Honourable Court has jurisdiction to entertain this matter in that I first had challenges with the Department of Justice when I approached the Mthatha Cluster Head Mr Botha about application to act as a Magistrate in any magisterial districts under his supervision.

19. The founding affidavit is unsurprisingly not a model of clarity as to why was the applicant's challenges with the Department of Justice, when he approached Mr Botha in order for him to act as a magistrate in Mthatha and anyone of the magisterial districts that fall under Mthatha, ever relevant to the issue with which the application that served before me was concerned. It is unsurprising because there is no nexus between these. The applicant's challenges with the Department of Justice, when he approached Mr. Botha in Mthatha so he could be appointed as an acting magistrate there is an irrelevant consideration to the issue whether he is entitled to information relating to reasons for the refusal of his application for extension of appointment as a magistrate in Phuthaditjhaba.

20. Assuming the applicant had a cause of action, of which I found he did not, same would not have changed the fact that the respondents are neither residing, domiciled, nor carrying on business within the area of jurisdiction of this Court. The relief sought by the applicant concerned no cause arising within the area of jurisdiction of this Court. At the same time, the

respondents were not joined as a third-parties to any cause in relation to which this Court has jurisdiction, and have not by virtue thereof become party to such cause. Also, there was nothing in the papers to suggest that the respondents had consented to the jurisdiction of this Court.¹¹ By reason of these facts, some of which I debated with Mr Nombambela, it should have been clear that this Court did not have territorial jurisdiction to entertain the applicant's application. In fact, when I engaged with Mr. Nombambela on some of these issues, he conceded that this Court does not have territorial jurisdiction. To this end, he proposed to have the matter removed from the roll so a fresh application on similar terms and for the same relief could be instituted before a Court with jurisdiction to entertain it. However, the matter could not just be removed from the roll as same would have meant that if the same relief is sought in another Court, as it was submitted would be done, the fresh application would have had a problem of *lis pendense*.

21. I considered that even if I was wrong on the issue of jurisdiction, there was yet another reason why the applicant's application had to fail. It was clearly prematurely instituted with the result that the applicant did not have a cause of cause of action for adjudication by a Court.

22. The term "cause of action" was defined in *McKenzie v Farmers' Co- operative Meat Industries Ltd*¹² as

"every fact which it would be necessary for the plaintiff to prove, if

¹¹ Section 21 of the Supreme Court Act, 2013 (Act No. 10 of 2013).

¹² 1922 AD 16 at 23.

traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

23. In *Evins v Shield Insurance Co Ltd*,¹³ it was said that:

"cause of action "... *is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action.*"

24. Section 78 of the Act determines who has legal standing to bring an application such as the present one. The section recognises only a "*requester*" and "*third party*" as persons who may bring a s 78 application. For purposes of the Act, the applicant would be a requester. A requester is defined under the definitions in s 1 of the Act as follows:

"*'requester', in relation to-*

(a) a public body, means-

(i) any person ... making a request for access to a record of that public body; or

(ii) a person acting on behalf of the person referred to in subparagraph (i);

25. The wording of s 78(1) of the Act is clear and unambiguous in its terms. It is mandatory and confers no discretion on judicial officers. A requester may only bring an application predicated upon the provisions of the Act, for appropriate relief, in terms of s 82 after the requester has exhausted the internal appeal procedure against a decision of the information officer

¹³ 1980 (2) SA 814A at 825G.

of a public body provided for in s 74.¹⁴ Before then, the right of access to Court on a cause of action founded on s 82 of the Act is unavailable.

26. Put differently, absent (i) an appeal against the decision that was communicated to the applicant per email dated 22 March 2016 by De Villiers to his attorney refusing a request for access to information and (ii) an unfavourable decision on the appeal, as is the case in this matter, the applicant did not have a cause of action to approach Court for relief in an application for access to information because he did not have every fact which it would be necessary for him to prove, if traversed, in order to support his right to a judgment of this Court. Accordingly, the application was prematurely instituted, much against the provisions of s 78 of the Act.

Costs

27. The costs that required a decision were the costs of the application. In the exercise of my discretion and regard being had to the fact that the respondents did no more than file a notice to oppose, I deemed that an order that there be no order as to costs would be appropriate.
28. On these reasons, I dismissed the application with no order as to costs.

AM BODLANI

ACTING JUDGE OF THE HIGH COURT

Attorney for the Applicant : Mr. N. S. Nombambela
Instructed by : Messrs N. S. Nombambela Inc. Attorneys

¹⁴ *Sumbana v Head of Department of Public Works, Limpopo Province* 2009 (3) SA 64.

Counsel for the Respondents : No appearance