

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

Case No. 3262/2018

[Reportable/of interest]

In the matter between:

NOLUSIZO MAKHAMBI

Applicant

And

MEC FOR HEALTH, EASTERN CAPE

1st Respondent

THE CHIEF EXECUTIVE OFFICER,

BUTTERWORTH HOSPITAL

2nd Respondent

JUDGMENT

MBENENGE JP

[1] This application purports to be in terms of section 78(2) read with section 82 of the Promotion of Access to Information Act 2 of 2000¹ as read with “*the provisions*”² of the Promotion of Administrative Justice Act 3 of 2000.³ The applicant seeks, in the main, an order declaring unlawful and in conflict with the provisions of the PAIA and the PAJA the respondents’ refusal and/or failure to consider and take a decision on the applicant’s request for access to medical reports and records relating to her admission at the Butterworth Hospital for treatment of bodily injuries she sustained in a motor vehicle accident that took place on 29 March 2018.

¹ The PAIA

² The sections relied on have not been identified by the applicant in her founding affidavit

³ The PAJA

[2] Section 78 (2) gives a person who made a request for access to a record of a public body, to no avail, and who is aggrieved by the refusal and/or failure to allow such access the right to approach a court for appropriate relief. In terms of section 82 the court hearing the application may grant any order that is just and equitable, including orders confirming, amending or setting aside the decision which is the subject of the application concerned.

[3] Cited as the first and second respondents in this application are the Member of the Executive Council for Health in the Eastern Cape Provincial Government and the Chief Executive Officer of the Butterworth Hospital, respectively. The first respondent is cited in his official capacity as the political head of the Eastern Cape Department of Health and the second respondent as the functionary upon whom it is incumbent to decide “*whether requests for access to information [held at the] Butterworth Hospital, in terms of [the] PAIA, should be granted or refused.*”

[4] The applicant alleges that she sustained bodily injuries for which she was admitted for two days at the Butterworth Hospital for treatment and care. Upon her discharge, in her quest to claim from the Road Accident Fund, she instructed her attorneys to lodge a request for accessing the relevant duly completed RAF1 form and her medical records pertaining to the injuries she sustained. This claim is said to have been lodged with “*offices of the second respondent.*”

[5] The applicant further alleges that her quest to access the records that are the subject of this application attracted no response from the second respondent. As a result thereof, she mandated her attorney of record, in terms of section 75 of the PAIA read with clause 11 of the respondents’ department’s manual, to

lodge an appeal with the Superintendent-General of the Health Department. The appeal process, too, yielded naught, hence the current application.

[6] Both the initial request for access and the resulting internal appeal were addressed to:

“The Superintendent-General
Department of Health, Eastern Cape
Private Bag X0038
Bisho
5605”.

[7] The relevant registered slip annexed to the founding papers as proof that the letters reached the addressee refers to:

“The Deputy Information Officer
Nqamakwe Police Station
PO Box 13
Nqamakwe
4990”.

[8] The matter served before Malusi J on 16 October 2018. On that occasion it was removed from the roll, and the applicant granted leave to deliver a supplementary affidavit. The order sheds no light regarding why it was necessary to supplement the founding papers, but the reason therefor is not far to seek. More about this later.

[9] Without any supplementary affidavit having been delivered, the application was re-enrolled for hearing and served before me on 13 November 2018.⁴ Counsel who had appeared before Malusi J still held instructions to move the application, and she did, submitting that “*the papers [were] in order.*” Nothing was said about the concerns that Malusi J had expressed, and that had resulted in the matter being removed from the roll. For counsel it seemed business as usual.

⁴ It was enrolled as an uncontested opposed application, with the State Attorney, Mthatha having delivered a notice to oppose and not pursued such opposition

[10] I drew the provisions of section 14 of the PAIA to the attention of counsel, requiring to know whether the allegations foreshadowed in that section had been made in the founding affidavit and a *nexus* established that the request for access to records and the resulting appeal had been duly and properly served. Counsel disavowed any reliance on the PAIA, this, despite the allegations made in the founding affidavit that the application had been predicated on the PAIA. When pointed to the relevant paragraphs in the founding affidavit wherein pertinent reference is made to the PAIA, counsel pressed no further with the contention.

[11] There were no less than 66 similar applications enrolled for hearing before me. Only in few of those cases was faint reference made to some departmental manual; in the majority of the applications there was no reference to the manual contemplated in section 14. Applications where reference had been made to a manual were removed from the roll with each one of the applicants therein granted leave to file a supplementary affidavit wherein the allegations foreshadowed in section 14 should be made.⁵ The applicants in the remaining applications were granted leave to withdraw the same with no order of costs.

[12] I was concerned that a culture had developed in this court for practitioners to remove a matter from the roll of a judge who had raised a concern and thereafter reinstate the matter so as to serve before another judge, even without any supplementary papers having been filed, in the hope that the judge hearing the matter on the subsequent occasion might not pick up the shortcoming and grant the order sought without ado. This conduct is despicable

⁵ There were 5 out of the 67 applications

and disregards the pivotal duty of legal practitioners towards the court, which is aptly stated in *Incorporated Law Society v Bevan*⁶ as follows:

“Now practitioners, in the conduct of cases, play a very important part in the administration of justice... The practitioner shall say or do nothing, **shall conceal nothing or state nothing, with the object of deceiving the court**, shall quote no statute which he knows has been repealed, and shall put forward no fact which he knows to be untrue, shall refer to no case which he knows has been overruled. If he were allowed to do any of these things the whole system would be discredited. Therefore any practitioner who deliberately places before the court; or relies upon, a contention or a statement which he knows to be false is in my opinion not fit to remain a member of the profession”⁷ (emphasis added).

[13] This application, purporting as it does to be in terms of the PAIA, does not pass muster. Section 14 of the PAIA, in so far as relevant hereto, reads:

- “(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
- (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

⁶ 1908 TS 724 at 731-2

⁷ Also see S M Mbenenge “A Dead Horse Need Not Be Fogged: The Duty Not To Pursue Unmeritorious Causes” SAJEI Journal, Vol. 1, Issue 1, 2018 p98; also see OL Rogers, “To Give and To Gain: Judicial Involvement in Advocacy Training”, *ibid*, p31, where the following is stated:

“Competent counsel can be expected to make responsible submissions about the evidence and to direct attention to the relevant legal principles and authority, whether for or against their case. They will use court time efficiently by focusing on the important issues and by ensuring that evidence unfolds coherently. All of this helps the bench to administer justice promptly and reliably.”

- (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...”

[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 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.⁸ 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.

[16] In the instant matter the request was, on the applicant's showing, addressed to the Superintendent-General of the Department of Health, yet in

⁸ Cf *Port Nolloth Municipality v Xhalisa and Others* 1991 (3) SA 98 (CPD) at 111B-I, which makes it incumbent on an applicant in motion proceedings to not merely annex a document to the founding affidavit without specifically directing the respondent(s) to the relevant parts of the annexure.

terms of section 1 of the PAIA, “*information officer*” in the case of any public body (other than those mentioned in paragraphs (a) and (b) of the definition of “*information officer*”) is the Chief Executive Officer, or equivalent officer, of that public body or the person who is acting as such. What further compounds matters in this case is that the registered letter founding the request was sent to the Deputy Information Officer of Nqamakwe Police Station, who has nothing to do whatsoever with the Health Department.

[17] These anomalies suggest that counsel did not bother to read the papers before submitting that they were “*in order*”. The practitioner who drafted the papers either resorted to cutting and pasting or was utterly remiss as to the content of the papers that were being drawn. At this juncture, I am reminded of the remarks made by Wallis J (as he then was) in *Sibiya v Director General: Home Affairs & Others and 55 related cases*⁹, albeit in the context of charges levied by practitioners not reflective of the work actually done. He said:

“I have considerable reservations whether any such consultation or process of taking instructions or drafting actually occurs beyond perhaps a clerk recording the name and some minor routine personal particulars about the applicant in order to feed them into the computer program and print off the application papers.”¹⁰

[18] In *hoc casu* the applicant spurned the opportunity she had been afforded to supplement her founding papers so as to disclose a cause of action. The application therefore falls to be dismissed.

[19] The way in which this application was handled demonstrates lack of professionalism on the part of the applicant’s legal representatives. They are not entitled to recover any fees from the applicant for handling this case.¹¹ Any fees

⁹ 2009 (5) SA 145 (KZP)

¹⁰ Cited with approval in *Tagese Hilafo Tekalign v Minister of Home Affairs & Others* (unreported judgment by Goosen J, Eastern Cape Local Division, Port Elizabeth, under case nos. 2774/2015; 410/2018 and 578/2018 delivered on 22 May 2018).

¹¹ *Enslin v Nhlapho* 2008 (5) SA 146 (SCA)

as may have been debited by the legal representatives from the applicant must be refunded.

[20] I mentioned earlier on that the State Attorney did deliver a notice to oppose the application, hence it was enrolled as an uncontested opposed application. Had they not merely delivered the notice, but actually participated in the proceedings in accordance with their duty to assist the court to administer justice promptly and reliably, the court would, in all probability, have made a cost order against the applicant

[21] In the result, **the application is dismissed.**

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the applicant	:	Ms V Nqabeni
Instructed by	:	AR Ngqongwa Inc. Butterworth c/o Mgcotyelwa Krewu Inc. Mthatha
For the respondents	:	No appearance
Respondents' attorneys of record	:	The State Attorney Mthatha
Date heard	:	13 November 2018
Date Judgment delivered	:	20 November 2018