



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2050/2016

In the matter between:-

IZETTE HUIJINK-MARITZ

Applicant

and

THE MUNICIPAL MANAGER:
MATJHABENG LOCAL MUNICIPALITY

1st Respondent

MATJHABENG LOCAL MUNICIPALITY

2nd Respondent

CORAM: MUSI,AJP

HEARD ON: 08 JUNE 2017

DELIVERED ON: 20 JULY
2017

[1] What is the difference, if any, between an actual refusal and a deemed refusal in the context of the Promotion of Access to Information Act (Act)?¹ This judgment is dedicated to this question.

¹ Act 2 of 2000.

- [2] The applicant is an attorney who owns property and lives in the jurisdictional area of the second respondent (municipality).² The first respondent is the Municipal Manager and information officer of the municipality.³ The applicant and the municipality entered into an agreement in terms of which the municipality would render services to her and she undertook to pay for the services. The municipality fulfilled its obligation in terms of the agreement. A dispute arose between them pertaining to the amounts charged by the municipality for supplying her with electricity. The municipality alleged that she owed it; she denied that she was indebted to it. She failed or refused to pay the amount alleged by the municipality, as a result of which the municipality terminated the electricity supply to her property.
- [3] The applicant alleged that the electricity supply was terminated without due process being followed and contrary to the municipality's debt and credit control policy. She insisted that the municipality was not entitled to terminate the electricity supply in the manner that it did. She requested information and documents relevant to the dispute that she would require to establish the incorrectness of the municipality's contention.
- [4] The applicant sent numerous e-mails to the municipality requesting the relevant information. They all remained unanswered.
- [5] On 17 February 2016 she delivered a request for access to information held by the municipality, in the prescribed form, to the municipal manager's office. No response was forthcoming. On 4 April 2016, on counsel's advice, she attempted to pay the prescribed application fee. She was advised, by a

² Matjhabeng Local Municipality, a local municipality established in terms of section 155 of the Constitution of the Republic of South Africa 1996, read with section 2 of the Local Government: Municipal Systems Act 32 of 2000.

³ Section 1 of the Act reads:

“**information officer**’ of, or in relation to a public body–

(b) in the case of a municipality, means the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) or the person who is acting as such....

cashier, that the municipality could not accept the money because their system did not make any provision for receipt of such money. On 5 May 2016 she enquired, via email, from the municipal manager whether any fee was payable. Needless to say, she received no response.

- [6] On 9 May 2016 she launched this application seeking an order that the municipality provide her with copies of the relevant documents, which she tabulated, within 5 days of the date of the order. The municipality filed a notice to oppose on 25 May 2016. It did not file an opposing affidavit but instead filed a notice in terms of Rule 6(5)(d)(iii).⁴ It contended that she did not exhaust her internal remedies and that some of the information sought was not foreshadowed in her founding affidavit.⁵
- [7] At the hearing the parties agreed that only one issue needed to be decided by me: whether the applicant had to exhaust internal remedies when there was a deemed refusal as opposed to an actual refusal.
- [8] Mr Louw, on behalf of the applicant, contended that an internal appeal is not peremptory where the refusal is a deemed refusal. He submitted that a deemed refusal cannot be accompanied by the reasons of the decision-maker and because the Act requires the reasons of the decision-maker to form part of the appeal documents a deemed refusal can therefore not be the subject of an internal appeal. He further submitted that the next step after a deemed refusal is an application.⁶ He relied on the following authorities for his submission: Gabankalafe⁷, Masingi⁸ and Dlusha⁹.

⁴ Rule 6(5)(d)(iii) of the Uniform Rules reads as follows:

“(d) Any person opposing the grant of an order sought in the notice of motion must—

...

(iii) if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

⁵ The matter was set down on 9 May 2017 for 8 June 2017. The reason for the delay is unknown.

⁶ The Act defines ‘**application**’ as an application to a court in terms of section 78.

⁷ Gabankalafe v Member of the Executive Council for Health; Northern Cape Province (649/2016) [2016] ZANHC 40 (9 December 2016).

⁸ Masingi v Greater Giyani Municipality (2679/2016) [2016] ZAGPPHC 1052 (22 December 2016).

⁹ Dlusha v King Sabata Dalinyebo Municipality 2012 (4) SA 407 (ECM).

[9] Mr Ayayee, on behalf of the respondents, contended that the application is premature because the applicant failed to comply with a peremptory requirement of the Act. He relied on Sumbana¹⁰, as authority for his submission.

[10] The right to access to information is a constitutional right. Section 32 of the Constitution reads as follows:

“(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.”

The Act gives effect to section 32 of the Constitution. In the Preamble to the Act it is stated that it is enacted, *inter alia*, to foster a culture of transparency and accountability in public and private bodies by giving effect to the right to access to information; and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.

[11] In Brümmer¹¹ the right to access to information was explained thus:

“[62] ... The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to

¹⁰ Sumbana and others v Head of the Department of Public Works, Limpopo Province and others 2009 (3) SA 64 (V).

¹¹ Brümmer v Minister for Social Development and others 2009 (6) SA 323 (CC).

the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. ...”¹²

[12] In Van Niekerk¹³ it was said:

“...In my view, s 23 entails that public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State, including municipal authorities, to a new regimen of openness and fair dealing with the public.”¹⁴

[13] Two of the objects of the Act must be emphasized, firstly, the Act seeks to establish voluntary and mandatory mechanisms or procedures to give effect to the right to access to information in a manner which enables persons to obtain access to records of public and private bodies swiftly, inexpensively and effortlessly as soon as reasonably possible; and secondly, it seeks to promote transparency, accountability and effective governance of all public and private bodies.¹⁵

[14] A public body is defined, in section 1 of the Act as any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government.¹⁶ The municipality is therefore a public body as defined in paragraph (a) of the definition of public body.

¹² At paras 62 to 63.

¹³ Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T). Section 23 of the Interim Constitution dealt with access to information.

¹⁴ At 850A-B.

¹⁵ See sections 9(d) and (e) of the Act.

¹⁶ Section 1 of the Act reads:

“**public body**” means-

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when-

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation;”

- [14] It is common cause that a proper request was directed at the information officer of the municipality. In terms of section 25(1) the information officer was supposed to decide whether to grant or refuse the request within a reasonable time but in any event within 30 days after receiving the request.¹⁷ The requester must be notified of the outcome and the next step that he or she may take.
- [15] The information officer may, seemingly without the consent of the requester, extend the original period of 30 days once, for a period not exceeding 30 days. The information officer must, if he/she elected to extend the period, as soon as reasonably possible but within the original 30 day period notify the requester of that extension. The notice must state the period and reasons for the extension and, explain what the requester may do if he/she is aggrieved by the extension.¹⁸
- [16] However, if the information officer fails to give a decision on a proper request within 30 days, and no extension has been sought, the information officer is, for the purposes of the Act, regarded as having refused the request.¹⁹ Section 27 of the Act reads as follows:

¹⁷ Section 25 reads as follows:

“(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.

[Sub-s. (1) amended by s. 28 of Act 42 of 2001 (wef 7 December 2001).]

¹⁸ Section 26 reads as follows:

“(1) The information officer to whom a request for access has been made or transferred, may extend the period of 30 days referred to in section 25 (1) (in this section referred to as the 'original period') once for a further period of not more than 30 days, if-

(a) the request is for a large number of records or requires a search through a large number of records and compliance with the original period would unreasonably interfere with the activities of the public body concerned;

(b) the request requires a search for records in, or collection thereof from, an office of the public body not situated in the same town or city as the office of the information officer that cannot reasonably be completed within the original period;

(c) consultation among divisions of the public body or with another public body is necessary or desirable to decide upon the request that cannot reasonably be completed within the original period;

(d) more than one of the circumstances contemplated in paragraphs (a), (b) and (c) exist in respect of the request making compliance with the original period not reasonably possible; or

(e) the requester consents in writing to such extension.

(2) If a period is extended in terms of subsection (1), the information officer must, as soon as reasonably possible, but in any event within 30 days, after the request is received or transferred, notify the requester of that extension.

(3) The notice in terms of subsection (2) must state-

(a) the period of the extension;

(b) adequate reasons for the extension, including the provisions of this Act relied upon; and

(c) that the requester may lodge an internal appeal or an application with a court, as the case may be, against the extension, and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

[NB: Para. (c) has been substituted by s. 110 of the Protection of Personal Information Act 4 of 2013, a provision which will be put into operation by proclamation. See PENDLEX.]”

“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.”

[17] The words “deemed” or “regarded as” are sometimes used in a statute in order to create a legal fiction. If used in that sense it becomes important to consider the purpose for which the statutory fiction was introduced.²⁰ Often it is used in order to extend the denotation of a word or term to a thing or situation it would not in ordinary parlance denote.

[18] In **Rosenthal**²¹, Trollip JA explained it thus:

“The words “shall be deemed” (“word geag” in Afrikaans) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and also its effect, must be ascertained from its context and the ordinary canons of construction... In the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or *rebuttable* is likely to be *supplementary and not exhaustive*.”

[19] Access to information is in most, if not all cases, sought in order to exercise, advance or protect a right. It is in the interest of the requester to receive the information as soon as possible and if such information is not forthcoming, to move to the next step as soon as possible. Section 27 is aimed at overcoming inaction and indecision by imputing a decision whenever there is a failure to act within a particular time period. The imputed decision facilitates the progression of the dispute to a higher administrative level. This also helps to focus the information officer to the urgency of requests and the need for them to be attended to as soon as reasonably possible. The words “regarded as” in the context of the Act means that failure to respond in 30 days (where there

²⁰ See **Muller v Dalgety & Co. Ltd** [1909] HCA 67; (1909) CLR 693 at 696.

²¹ **S v Rosenthal** 1980 (1) SA 65 (AD) at 75F – 76A

was no extension sought) is as a matter of fact regarded to be a decision to refuse. The Act makes it clear that playing dead has consequences.

[20] Section 74(1)(a) provides:

“(1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1-

(a) to refuse a request for access; or...”

[21] Section 74 grants a requester a right to appeal against a refusal of a request by a public body referred to in paragraph (a) of the definition of a public body. I have already said that a municipality is a public body as defined in paragraph (a) of the definition. The imputed decision is a refusal of the request. Section 74(1)(a) does not exclude a deemed refusal.

[22] Internal appeals are regulated by section 75 which provides that:

“(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 appeal 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.”

[23] The relevant authority with respect to municipalities is the mayor; the speaker; or any other person designated in writing by the Municipal Council of the municipality concerned.²² Section 74 and 75 do not differentiate between a deemed refusal and an actual refusal. The internal appeal is an administrative appeal which is, in my view, available to a requester in the case of a deemed refusal and an actual refusal.

[24] In terms of section 75(1) (c) the appellant may, in the appeal papers, include any other relevant information known to the appellant. The only limitation is that the information must be relevant. The requester is not confined, at the appeal stage, to information that was in the original request. Information that came to light after the request was refused as well as information that the requester omitted to include in the original request may be placed before the relevant authority considering the appeal, provided that it is relevant.

[25] The information officer must, as soon as reasonably possible but within 10 working days after receiving the internal appeal, submit the appeal to the relevant authority together with his or her reasons for the decision concerned. A deemed refusal being a decision, the information officer would, in my view, have to explain the reasons for the indecision or inaction. If there are reasons

²² See definition of relevant authority in section 1 of the Act.

to refuse the request, after considering it, those will also have to be stated. If there are no reasons for the “refusal” the information officer would have to say so.

[26] It seems to me that the internal appeal is a total reconsideration of the decision, with or without additional information, after both sides have been given the opportunity to state why the decision should be confirmed or set aside. Internal administrative appeal procedures are not uniform. Different Acts prescribe different review and appeal procedures.²³ The provisions of the particular Act should be considered in order to discern the nature of the administrative appeal. The appeal provisions of the Act, in my view, includes an administrative appeal based on a deemed refusal.

[27] Section 78(1) provides that:

“(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has

²³ I mention a few to illustrate:

Section 77B of the Customs and Excise Act 91 of 1964 reads as follows:

- “(1) Any person who may institute judicial proceedings in respect of any decision by an officer may, before or as an alternative to instituting such proceedings, lodge an appeal-
- (a) to the Commissioner against a decision of an officer; or
 - (b) to the appeal committee contemplated in this Part in respect of those matters and decisions of officers that the appeal committee is authorised by rule to consider and decide upon or make recommendations to the Commissioner.
- (2) If dissatisfied with a final decision as contemplated in (a) or (b) and the Commissioner is of the opinion that the matter is appropriate, such a person may make use of the alternative dispute procedure contemplated in section 771.”

Section 62 of the Municipal Systems Act 32 of 2000 reads as follows:

- “(1) A person whose rights are affected by a decision taken by the board in the exercise of its powers under section 8C, 16, 27, 28 or 30 may at any time after he or she became aware of such decision but not later than one month after the board-
- (a) has informed him or her in writing of such decision and upon payment of the prescribed fees, request the board in writing to furnish him or her in writing with its reasons for such decision;
 - (b) has in accordance with paragraph (a) furnished him or her with its reasons for such decision and after notice to the board, appeal to the court against such decision, and the court may thereupon-
- (i) dismiss the said appeal;
 - (ii) if it is of the opinion that the board has not acted in accordance with the relevant provision of this Act, give an order opposite to the decision of the board or amending the decision of the board;
 - (iii) refer the matter back to the board for further consideration; or
 - (iv) give such other order, including any order as to costs, as it may deem fit.
- (2) A court may, on application by the board, order that a decision of, or penalty imposed by, the board not be stayed or suspended pending an appeal to the court under the provisions of this section, if the court considers such an order to be in the public interest.”

Section 31 of the Estate Agents Act 112 of 1976 reads as follows:

- “(1) Any person who feels aggrieved by any decision taken by the board in the exercise of its powers under section 8C, 16, 27, 28 or 30 may at any time after he or she became aware of such decision but not later than one month after the board-
- (a) has informed him or her in writing of such decision and upon payment of the prescribed fees, request the board in writing to furnish him or her in writing with its reasons for such decision;
 - (b) has in accordance with paragraph (a) furnished him or her with its reasons for such decision and after notice to the board, appeal to the court against such decision, and the court may thereupon-
- (i) dismiss the said appeal;
 - (ii) if it is of the opinion that the board has not acted in accordance with the relevant provision of this Act, give an order opposite to the decision of the board or amending the decision of the board;
 - (iii) refer the matter back to the board for further consideration; or
 - (iv) give such other order, including any order as to costs, as it may deem fit.
- (2) A court may, on application by the board, order that a decision of, or penalty imposed by, the board not be stayed or suspended pending an appeal to the court under the provisions of this section, if the court considers such an order to be in the public interest.”

exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.²⁴

- [28] At common law, the existence of internal remedies was not a bar to approach a court for appropriate relief after an administrative decision has been taken. C Hoexter²⁵ states:

“The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted. There must be a clear legislative or contractual intention to that effect. Even then, there is no general principle at common law that an aggrieved person may not go to court ‘while there is hope of extra-judicial redress.’ In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether.”²⁶

- [29] When a Statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must first be fulfilled. Section 78 makes it compulsory for an aggrieved requester to first exhaust the internal remedies against a decision of the information officer before approaching a court. It is one of the compulsory mechanisms in the Act which enables persons to obtain information swiftly, inexpensively and effortlessly.

- [30] In **Koyabe**²⁷ Mogoro J commented on the need to exhaust internal remedies. She said:

“[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a

²⁴ Section 82 sets out the orders that a court may make. It reads:

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

(a) confirming, amending or setting aside the decision which is the subject of the application concerned;
 (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;
 (c) granting an interdict, interim or specific relief, a declaratory order or compensation;
 (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.”

²⁵ Hoexter C: *Administrative Law in South Africa*, 2nd Ed. Juta 2011.

²⁶ At 539.

²⁷ **Koyabe and others v Minister for Home Affairs and others** 2010 (4) SA 327 (CC).

vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action...

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.”²⁸

In **Sumbana** it was correctly stated that:

“[11] The wording of s 78(1) of the Act is, in my view, very clear and unambiguous, and can have only one meaning: where a public body referred to in para (a) of the definition of 'public body' is involved, a requester may only apply to a court for appropriate relief after that requester has exhausted the internal appeal procedure provided for in s 74 of the Act. This provision is clearly mandatory and there is no room for a finding that it is either only permissive or discretionary. Apart from a finding that the words used are per se mandatory, the provisions of s 78(2)(a) of the Act provide further substantiation for the fact that the said provisions are indeed mandatory: the said s 78(2)(a) provides that, if a requester has been unsuccessful in an internal appeal, such requester may apply to a court for relief. A further indication that these provisions are mandatory, where a public body referred to in para (a) of the definition is involved, is the fact that, where a public body referred to in para (b) of the definition is involved, there is no provision for an internal appeal and an aggrieved requester may approach a court directly in terms of the provisions of s 78(2)(c) of the Act.”²⁹

²⁸ At paragraphs 35 to 37. Although that was said with to the Promotion of Administrative Justice Act 3 of 2000 it is also applicable to the Act. In fact section 7(2)(c) of PAJA sanctions dispensing with the requirement of exhausting internal remedies under exceptional circumstances whereas the Act contains no such provision.

²⁹ At para [11].

[31] In now turn to consider the authorities relied upon by Mr Louw. Although **Masingi** and **Dlusha** dealt with a failure to respond and therefore deemed refusals; both judgments do not consider the effect of a deemed refusal and the need to exhaust internal remedies before approaching the court. The relief, in both cases, was inexplicably granted without considering those relevant factors. They are both of no assistance to the applicant. They were, in my view, wrongly decided.

[32] In **Gabankalafe** Olivier J said the following:

“[15.] Section 27 is not specifically mentioned in the list of decisions in paragraph (b) and the question would be whether a deemed refusal would be a “*decision ... refuse*”, as envisaged in paragraph (a).

[16.] Mr Phaswana argued that it would, but could not refer me to any authority in this regard. Such an interpretation would result in the anomaly of an appeal against a “*decision*” which has never in fact been taken and in respect of which there could not be “*reasons*”, as envisaged in section 75 of the Act. It is also difficult to conceive how a deemed “*decision*” could be argued to have been wrong if it had in fact not been taken. As already mentioned it is not, however, necessary to decide this point.”³⁰

It is clear that Olivier J had to decide costs and not the merits of the application. His views are *obiter dicta*. Olivier opines that an interpretation that a deemed refusal is a decision to refuse would result in the anomaly of an appeal against a “*decision*” which has never in fact been taken and in respect of which there could be no reasons.

[33] The failure to take a decision, in the context of the Act, migrates into a refusal of the request. It is an *ex lege* refusal.³¹ It is therefore *ex lege* and conclusively adjudged to be a decision to refuse. The fact that it has never in fact been taken is irrelevant. It is deemed because it was not actually taken. In **The Queen (R) v Norfolk County** Cave J defined a deeming provision, in impressive legalese, as follows:

³⁰ At paras [15] and [16].

³¹ See **Centre for Social Accountability v The Secretary of Parliament and others** Safflii ZAECHGHC 2011/33 at para 28.

“When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless it is to be deemed to be that thing.”³²

[34] The culture of justification permeates the Act. The mere request for a record of information held by a public body obliges the information officer to produce it or justify withholding it.³³ If during the appeal the information officer cannot justify the refusal, the decision ought to be reversed. The internal appeal is not against the failure to give information but against the “refusal” to give information. A deemed refusal is wrong because it has not been justified.

[35] It is axiomatic that where there is a deemed refusal because of inaction, it would be impossible to give notice in terms of section 25(3)(c) of the Act. Section 25(3)(c) of the Act can only be applied when there is an actual decision to refuse and not in cases of a deemed decision. The provisions of section 25 clearly deal with an actual decision to grant or refuse the application.

[36] In **Sumbana** it was said that:

“[17]...The provisions of ss (c) are very clear: if one has regard to the totality of this subsection, and in particular to the words 'as the case may be', it is clear that the purpose of this subsection is to inform a particular requester whether he may lodge an internal appeal, 'as the case may be', that is, where a public body referred to in para (a) of the definition is involved, or apply to a court where the said public body is not a public body referred to in the said para (a) of the definition, and the procedure (including the period for the lodgement of the internal appeal or the application) to be followed. This means that the said notice must, inter alia, refer to the provisions of ss 74, 78(1) and 78(2) of the Act. There is, in my view, no room whatsoever for a finding that the provisions of s 25(3)(c) are contradictory to the provisions of ss 74 and 78.

[18] The applicants *in casu* cannot in any event rely on the provisions of s 25(3)(c) of the Act. This section is only applicable where there is a de facto refusal of a request

³² (1891) 60 LQB 379..

³³ See **President of the RSA v M&G Media** [2010] ZASCA 177 at para 11.

and not where there is a deemed refusal in terms of the provisions of s 27 of the Act. This is apparent from the provisions of s 25(3)(c) read with the provisions of s 25(1)(b) - an information officer must give notice in terms of this section (where there is a de facto refusal), and such notice means notice in writing (see the definition of 'notice' in s 1 of the Act). There was *in casu* a deemed refusal in terms of the provisions of s 27 of the Act and it follows that there was no notice as is envisaged in s 25."³⁴

I agree.

[37] The failure to make a decision within a reasonable time is in itself a review ground. The failure to take a decision is administrative action. Administrative action is, inter alia, defined as any decision taken, or any failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of any legislation.³⁵ It is common cause that the information officer of a municipality performs a public function. Section 6(2)(g) read with sections 6(3) and 8(2) of the Promotion of Administrative Justice Act (PAJA)³⁶ regulates reviews based on a failure to take a decision. These sections read as follows:

"6(2) A court or tribunal has the power to judicially review an administrative action if-

...

(g) the action concerned consists of a failure to take a decision;...

6(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

- (a) (i) an administrator has a duty to take a decision;
- (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
- (b) (i) an administrator has a duty to take a decision;

³⁴ At para [17] and [18].

³⁵ See section 1(i)(a)(ii) of the Promotion of Administrative Justice Act 3 of 2000

³⁶ Act 3 of 2000.

- (ii) a law prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period...

8(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

- s(a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the decision;
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- (d) as to costs."

[39] If the Act did not have a deeming provision section 6(3) of PAJA would be applicable whenever there was a failure to take a decision. In terms of section 8(2) the review court or tribunal has wide powers to order a public body that failed to take a decision to give the requester access to the required information.

[40] Since a failure to take a decision is already a ground of review, why would the legislature invoke a deeming provision to achieve that which PAJA already regulates? The deeming provision is meant to achieve something more than what PAJA regulates. It imputes a decision (the refusal) and thereby obviates the need for the requester to apply to a court to compel the information officer to make a decision.

[41] As stated above, one purpose of the deeming provision in the Act is to give the requester the right to take the next procedural step. The next procedural step is in my view, an internal appeal. The interpretation advanced by Mr Louw does not promote swift and inexpensive access to information but encourages a process that is notoriously slow and expensive: court applications. An allied disadvantage for impecunious requesters is that the information officer can ignore the request in the hope that the requester

does not have the resources to launch a court application. The interpretation that the deemed refusal is internally appealable gives the requester a cheaper and faster remedy and, it gives the public body an opportunity to self-correct. Section 2 of the Act enjoins a court to prefer an interpretation that is consistent with the objects of the Act over any alternative interpretation which is inconsistent with those objects. Mr Louw's interpretation is inconsistent with the objects of the Act.

- [42] There is in my judgment, in the context of the Act, no substantive difference between a deemed refusal and an actual refusal. In both cases the requester does not receive the information. In each case the requester may utilize the internal appeal procedure set out in the Act. The only difference between an actual refusal and a deemed refusal is procedural, in that, in the case of an actual refusal the requester is entitled to a notice setting out the reasons for the refusal and the right and procedure to prosecute an internal appeal.
- [43] I do not agree with the approach in **Masingi** and **Dlusha**. The reasoning in **Gabankalafe** is not persuasive. The latter renders the deeming provision superfluous. The Act is clear a requester may not approach a court before exhausting her/his internal remedies. In my view the applicant did not exhaust her internal remedy of appeal as provided for in the Act. The application is therefore premature and must fail.
- [44] Mr Ayayee submitted that the applicant should pay the costs, because as an attorney she ought to have known that she must exhaust her internal remedies. I disagree. Firstly she acted on legal advice. Secondly, and more importantly, if the public body did what it was supposed to do, she would not have launched this application. The conduct of the municipality is disconcerting.
- [45] Public bodies have a constitutional duty to give people access to information so that they can exercise their rights. When they try to subvert a person's constitutional right by being unresponsive and playing possum their conduct should be deprecated.

[46] This is a case in which the **Biowatch**³⁷ principle should be applied: In **Biowatch** it was said:

“[56] I conclude, then, that the general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the State should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the State that had control over its conduct.”³⁸

[47] I make the following order:

The application is dismissed.

C.J. MUSI, AJP

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³⁷ **Biowatch Trust v Registrar, Genetic Resources, and Others** 2009 (6) SA 232 (CC).

³⁸ At para 56