



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT KIMBERLEY)**

Case number:	1750 / 2015
Date heard:	04 / 12 / 2015
Date delivered:	22 / 01 / 2016

In the application between:

NICHOLE JUANLY KOUTER

Applicant

and

**THE MEC FOR HEALTH : DEPARTMENT
OF HEALTH: NC PROVINCE**

First Respondent

**THE HOD : DEPARTMENT OF HEALTH:
NC PROVINCE**

Second Respondent

**THE CHIEF EXECUTIVE OFFICER:
KIMBERLEY HOSPITAL COMPLEX**

Third Respondent

Coram: Erasmus, AJ

JUDGMENT

ERASMUS, AJ

INTRODUCTION

[1] On 19 June 2015 the applicant was granted an order under case number 1061/2015 in terms of which the respondents

were ordered to provide copies of the medical records held in respect of the pregnancy and the delivery of the applicant's minor child, as well as the medical records of the minor child born at the Kimberley Hospital Complex on 14 July 2014, within 14 (FOURTEEN) days from the date of the order.

[2] The applicant herein now seeks an order

2.1 declaring the respondents to be in contempt of the abovementioned court order,

2.2 that the respondents be committed to such period of imprisonment as the Court deems fit, which imprisonment is to be suspended on condition that the respondents comply with the initial court order dated 19 June 2015 within 10 (TEN) days from date of this order, and further

2.3 that the respondents be ordered to pay the costs of this application on a scale as between attorney and client.

FACTUAL BACKGROUND

[3] The applicant, through her attorney, lodged an application in terms of the Promotion of Access to Information Act, No.

2 of 2000 ('PAIA') on 19 February 2015, requesting access to and copies of the relevant hospital records in respect of herself and the minor child. Save for written requests by Mr. Mdunge and Mr. Mashilo for payment of the initiation fee and costs for the copies, dated 2, 5 and 17 March 2015 respectively, there was no written response to the request for the records.

- [4] On 27 March 2015 the applicant proceeded to lodge an internal appeal in terms of section 74 and 75 of PAIA. Copies of the relevant forms were also served at the offices of the respondents on 7 and 8 April 2015.
- [5] During April 2015 the applicant's attorney was informed that the requested records could be collected from the Kimberley Hospital. When he attempted to do so, he was informed that the relevant file could not be traced. After several further attempts to obtain copies of the records, a bundle of documents was eventually handed over to the applicant's attorney at the end of April 2015. It is common cause that these did not constitute the full hospital records.
- [6] The failure to respond to the request to provide access to and copies of full the hospital records led to the application which served before Pakati, J. This application was lodged on 28 May 2015. The respondents did not oppose that application.

- [7] On 18 June 2015 the State Attorney delivered a letter to the applicant's attorney, stating that copies of the medical records of the Kimberley Hospital Complex were attached. Again these documents did not constitute the complete hospital records sought. As a result thereof the applicant proceeded with the application on 19 June 2015 and the order was granted by Pakati, J.
- [8] The State Attorney was informed on 25 June 2015 that the order had been granted and was requested to ensure compliance. On 9 July 2015 the State Attorney delivered additional documents referred to in the court order. These documents had not previously been supplied and no explanation was given as to why they were not filed earlier. Unfortunately these records pertained only to the minor child and not to the applicant. The respondents had thus by then still not fully complied with the court order.
- [9] On 10 July 2015 the applicant's attorney caused a copy of the court order to be delivered to the offices of the respondents. On 14 July 2015 the State Attorney delivered a further letter to the applicant's attorney, undertaking to supply the outstanding documents by close of business on 15 July 2015. No mention was made of any problems pertaining to the tracing of the relevant documents.

- [10] On 15 July 2015 the State Attorney delivered a letter to the applicant's attorney, alleging that file number 31396823 (the minor's file) could not be traced. This was the first time any mention was made that the file could not be traced and no explanation was provided as to what could have happened to the said file. It was also alleged that the maternity records had been provided to the applicant (which is denied by the applicant), although no proof of such delivery was attached.
- [11] As there had still not been full compliance with the court order, the applicant proceeded to lodge the current application on 28 August 2015.
- [12] The respondents opposed the application. Mr. Mashilo, the Senior Legal Admin Officer of the Department of Health, Northern Cape Province ('the Department') deposed to the answering affidavit. Mr. Mdunge, an administrative clerk in the revenue department of the Kimberley Hospital Complex, deposed to a confirmatory affidavit. The respondents did not file confirmatory affidavits.
- [13] From the answering papers it appears that the respondents take issue with the citation of the third respondent. Their defence is based on the premise that the first and second respondent are in no position to personally provide the requested documents and that they acted *bona fide* in their

interaction with the applicant's attorney. It is denied that the non-compliance with the court order was wilful and *mala fide*. It was alleged that a diligent search was conducted and that the applicant was provided with all the documents in possession of the Department.

CITATION OF THE THIRD RESPONDENT

[14] In the answering affidavit, Mr. Mashilo stated that the chief executive officer is the head of the Kimberley Hospital Complex and that there exists no position such as that of a manager in the employ of the Department of Health. It was submitted that there is a misjoinder and that the application be dismissed on this basis.

[15] In the replying papers the applicant responded that if Mr. Mashilo's allegations were accepted as correct, then the citation amounts to a mere mistake in the description and does not constitute a misjoinder.

[16] Adv. Manye, on behalf of the respondents, persisted with the issue pertaining to the citation of the third respondent during argument despite the fact that he had not dealt with it in his heads of argument.

[17] Adv. van Niekerk SC, on behalf of the applicant, requested an amendment to the effect that any reference to the third

respondent as “the Manager” be substituted with “the Chief Executive Officer: The Kimberley Hospital Complex”. I granted the request and my reasons follow below.

- [18] The third respondent was cited in both applications as the manager of the Kimberley Hospital Complex and described as the administrative head of the said hospital as per address Kimberley Hospital Complex. The third respondent is referred to as such in the court order of Pakati, J. There could have been no doubt that the applications were directed to the administrative head of the Kimberley Hospital Complex, especially so if there exists no post of manager.
- [19] Service and knowledge of the applications have never been disputed. I accept that the papers were served on the administrative head of the hospital. If the administrative head is referred to in the hospital as the Chief Executive Officer, the applications would surely have come to his attention. There is no allegation in the answering affidavit that the Chief Executive Officer, being the administrative head of the institution, was unaware of the applications. The amendment merely has the effect that the papers will reflect the correct post description of the administrative head of the Kimberley Hospital Complex.

CONTEMPT OF COURT

[20] In terms of section 13 of the National Health Act, No. 61 of 2003 (the 'NHA') a person in charge of a health establishment must ensure, subject to PAIA, that a health record containing such information as may be prescribed, be created and maintained for every user of health services.

[21] Section 23 of PAIA reads as follows:

“Records that cannot be found or do not exist.—

(1) If—

(a) all reasonable steps have been taken to find a record requested; and

(b) there are reasonable grounds for believing that the record—

(i) is in the public body's possession but cannot be found; or

(ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

(3)”

[23] It is common cause that certain records were kept in respect of the applicant and her minor son and that the procedures to gain access to such records, as envisaged in PAIA, were followed and exhausted. No affidavit in terms of section 23 of PAIA has been filed.

[24] The legal position pertaining to civil contempt proceedings was summarized by Cameron JA in **FAKIE NO v CCII SYSTEMS (PTY) LTD**¹ at par [42] to be as follows:

- “(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- “(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.*
- “(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- “(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*
- “(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”*

¹ 2006 (4) SA 326 (SCA); See also **MEADOW GLEN HOME OWNERS ASSOCIATION AND OTHERS v TSHWANE CITY METROPOLITAN MUNICIPALITY AND ANOTHER** 2015 (2) SA 413 (SCA) at par [19]

[25] In this instance the applicant has proved the order; service or notice and non-compliance beyond reasonable doubt.

25.1 A court order was granted by Pakati J on 19 June 2015 in terms of which the respondents had to provide copies of certain records;

25.2 The respondents had knowledge of such order; and

25.3 Certain of the records and/or documents referred to in the order have still not been provided by the respondents.

[26] The only question that remains to be answered is whether the applicant proved beyond reasonable doubt that the respondents' failure to comply with the order of Pakati J was wilful and *mala fide*.

[27] Mr. van Niekerk submitted that the respondents failed to provide any explanation for their failure to comply with the court order of Pakati, J. They had thus had not discharged the evidential burden and established reasonable doubt in relation to wilfulness and *mala fides*. If this is so, contempt has been established beyond reasonable doubt.

[28] Mr. Manye, on behalf of the respondents, submitted that I should find that there exists reasonable doubt as to whether the non-compliance was wilful and *mala fide*.

[29] Cameron JA also stated in **FAKIE** *supra*:²

“These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.”

[30] Although there has been non-compliance with the court order and also the provisions of section 23 of PAIA, it may be said that the conduct of the respondents was unreasonable. I must be convinced however, beyond reasonable doubt, that the respondents' non-compliance with the court order was deliberate and *mala fide*.

[31] It is common cause that officials, acting on instructions of the respondents, conducted a search and provided the applicant with certain copies of the records under control of the hospital over a period of time. In the answering affidavit it was also stated that there are no further records in possession of the health establishment. On the evidence before me I cannot find that the respondents deliberately

² **FAKIE** *supra* at par [10]

and intentionally violated the Court's dignity, repute or authority. If this is so, the application stands to be dismissed.

COSTS

[32] It is trite that in the awarding costs, the court has a discretion which is to be exercised judicially upon consideration of the facts of each case and in fairness to the parties involved.³

[33] There are no hard and fast rules for guidance to a court to which it will be expected to conform. In **CRONJE v PELSER**⁴ Van Blerk JA stated the position to be as follows:

“Dit kan nie sterk genoeg beklemtoon word nie dat die dogmatiese toepassing van ander gewysdes, as sou dit geykte beginsels vir kostebevele voorskryf, die ongewenste uitwerking het dat dié diskresie waarmee die Hof a quo bekleed is aan bande gelê word. Vgl. die aanmerkings van Regterpresident DE VILLIERS in Fripp v. Gibbon & Co., supra op bl. 364. Al sou die graad van skuld 'n oorweging wees, wat in aanmerking geneem behoort te word, volg dit nie noodwendig dat, indien dit hier verontagsaam is, daar geen ander gronde bestaan wat die beslissing regverdig nie.”

[34] The court is entitled to deprive a successful party of his costs and to order such party to pay the costs of the unsuccessful party. The circumstances of this case warrant

³ **FRIPP v GIBBON & CO** 1913 ad 354

⁴ 1967(2) SA 589 (A) at 593

a deviation from the general rule that the successful party is entitled to its costs.

[35] The Department, through its officials, neglected their duties conferred upon them in terms of the NHA and PAIA. They failed to respond to the application for access to the records and the internal appeal of the applicant, lodged in terms of PAIA. Although copies of certain documents were provided to the applicant, these were provided in drips and drabs over a period of time. The copies were provided after the applicant had approached the Court with the initial application and further after the court order was granted on 19 June 2015.

[36] The information officer of the Department could have prevented further litigation by merely complying with the provisions of section 23 of PAIA. The respondents opposed this application on 7 September 2015. At best for the respondents it can be found that the first attempt at compliance with section 23 was made on 30 September 2015, when the answering affidavit was filed. Only then was it stated under oath that a search had been conducted, that the health establishment was not in possession of any other documents and that the applicant could not be provided with any further documents. The answering affidavit does not constitute compliance with section 23 of PAIA though.

[37] The officials of the Department disregarded the rights of the applicants and those of her minor child and there was a serious dereliction of their statutory duties. It necessitated the litigation the applicant had to embark on to enforce their rights. It would thus only be fair and just that the respondents should be held responsible for the costs of the application.

I make the following order:

- 1. THE APPLICATION IS DISMISSED;**
- 2. THE RESPONDENTS, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHER TO BE ABSOLVED, ARE ORDERED TO PAY THE COSTS OF THE APPLICATION ON A SCALE AS BETWEEN PARTY AND PARTY.**

**SL ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

On behalf of the Applicant: Adv Van Niekerk SC oio Elliott Maris Wilmans & Hay

On behalf of the Respondents: Adv Manye oio the State Attorney (oio Mr. Phaswana)