



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **649/2016**
DATE HEARD: **02/12/2016**
DATE DELIVERED: **09/12/2016**

In the matter between:

GABANKALAFE, PULANE

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH: NORTHERN CAPE PROVINCE**

Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

- [1.] The applicant, Ms Pulane Gabankalafe, brought an application for an order to compel the respondent, the Member of the Executive Counsel for Health, Northern Cape Province, to comply with a request for access to information

which had been made in terms of the **Promotion of Access to Information Act**¹ (*"the Act"*).

- [2.] It is not in dispute that the information concerned pertains to the death of Mr Jack Gabankalafe (*"the deceased"*) and that access thereto is required for purposes of an action which has been instituted against the Road Accident Fund for loss of support allegedly suffered by the applicant because of the death of the deceased.
- [3.] The applicant's case is that the respondent failed to respond to the request. It is at this stage agreed between the parties that such an order must not be granted, for reasons to which I will revert. The parties have however not succeeded in settling the costs of the application, and that is therefore the only issue at this stage.
- [4.] The applicant contended that the respondent should be ordered to pay the costs of the application on the scale of attorney and client. Mr Olivier, counsel for the applicant, pursued this contention, but not as far as the issue of punitive costs is concerned. The respondent was, and remains, not willing to pay any costs.
- [5.] The applicant has now in reply, clearly as a reaction to the fact that the respondent was not prepared to tender costs, raised the issue that the answering affidavit was filed late and that the respondent never applied for condonation. This while the filing of the replying affidavit was delayed until a few days before the hearing of this application.
- [6.] The answering affidavit was filed as long ago as on 20 July 2016. There is absolutely no merit in this objection and Mr Olivier wisely did not pursue it. It has not been shown that the late filing thereof caused the applicant any prejudice at all. In as far as it may in the circumstances still be relevant and necessary I condone the late filing of the answering affidavit.

¹ 2 of 2000

- [7.] In the answering affidavit Mr S Z Mashilo, the deponent for the respondent and also the appointed Deputy Information Officer for the purposes of the Act, raised several points *in limine*. They were pursued in the heads of argument on behalf of the respondent, but at the hearing Mr Phaswana, the attorney who represented the respondent, abandoned the objections pertaining to the *locus standi* of the applicant and jurisdiction. The remaining objection is that the application is premature.
- [8.] This objection is based, in the first place, on the submission that the respondent's alleged failure to respond to the request was a decision in respect of which the applicant would only have been able to approach a court once the remedy of an internal appeal in terms of the Act has been exhausted, which has not happened here.
- [9.] In terms of section 27 of the Act "*an information officer (who) fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25 (1) ... is regarded as having refused the request*".
- [10.] Section 25 (1) provides that the decision whether or not to grant access to information has to be made and communicated to the requester within 30 days after receipt of the request. Section 26 of the Act does provide for one extension of this period, for no more than a further 30 days, but that would have had to be done in a prescribed manner and did not happen in the present case.
- [11.] Section 78(1) of the Act indeed provides that a "*requester*" can only approach a court for appropriate relief once the remedy of an internal appeal against a particular "*decision*" has been exhausted.
- [12.] In the circumstances of the present matter the "*requester*" would be the "*person making a request for access to a record ...*", as envisaged in section 1 of the Act. In this case the request was submitted by the applicant's mother, and not by

herself, which means that the applicant would not be a “*requester*” for purposes of section 78 (1) of the Act.

[13.] The right of an internal appeal is provided for in section 74 (1), in terms of which “(a) *requester may lodge an internal appeal*” against a “*decision*” of the information officer. The applicant is not the requester and would therefore in any event not have been able to lodge an internal appeal.

[14.] This makes it unnecessary to decide whether a deemed refusal, as envisaged in *inter alia* section 27 of the Act², would be a “*decision*” as envisaged in section 74 (1). Subsection 1 of section 74 provides that an internal appeal may be lodged against a “*decision*”

(a) *to refuse a request for access; or*

(b) *taken in terms of section 22, 26 (1) or 29 (3),...”*.

[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.

[17.] I must confess that I find it difficult to understand the second ground upon which Mr Phaswana argued that the application is premature, but he seemed to base it on the fact that the request that was lodged does not comply with the provisions

² See section 58 in respect of requests for access to information of private bodies.

of section 18 of the Act, and on the submission that it therefore in fact cannot be regarded as a request in respect of which the court can grant any relief.

- [18.] Section 18 provides that a request for access must be made “*in the prescribed form*”, and it is common cause that the request in this matter is not in the prescribed form.
- [19.] The fact of the matter is, however, that the respondent accepted the request in this form. Mr Mashilo explained that he regarded the deficiencies in the form as the result of an innocent error and that he therefore proceeded to attend to the request, in other words as if it had been in the proper form. This is not surprising, as it is common cause that he had by then over a period of approximately a year been in communication with the applicant’s attorney about the issue and would in all probability therefore have had more particulars of the information concerned than what appeared in the request that had been lodged.
- [20.] Mr Mashilo relied on the judgment in **National Teachers Union v Superintendent General : Department of Education and Culture, Kwazulu-Natal and Another**³, and more specifically on the remark in paragraph [47] thereof that in an application in terms of the Act the applicant must prove that the request had been made on the prescribed form. The remark was clearly made *obiter*, and against the background of what had apparently been merely an “*informal*” request.
- [21.] The failure to file a formal request had not been explained by the applicant in the **National Teachers Union** case, while the applicant’s attorney in the present matter has explained that he had to search for the prescribed form himself and that he could not even locate it on the respondent’s website.
- [22.] Sight must also not be lost of the fact that Mr Mashilo actually had a statutory duty to assist the requester to comply with section 18 of the Act and he would

³ [2008] ZALC 18

only have been entitled to refuse access on the basis of non-compliance with section 18 ⁴ once he had *“as far as reasonably possible, furnished the requester with any information that would assist the making of the request in that form”* and had *“given the requester a reasonable opportunity to confirm the request or alter it to comply with section 18 (1)”*. This Mr Mashilo never did and it would not in the circumstance be equitable to deny the applicant access to court on the basis argued by Mr Phaswana.

[23.] This brings me to the merits of the application. As already mentioned the applicant’s case is based on the respondent’s alleged failure to respond. The case made out in the founding affidavit in this regard is as follows:

23.1 Reference was made to a letter which the attorney of the applicant had sent to the Superintendent of the Kuruman Hospital on 23 September 2014. It was alleged that the letter had been served by the sheriff. The return of service relied upon is titled *“NOTICE OF INTENTION TO INSTITUTE LEGAL PROCEEDINGS”*, and reflects service as having taken place only on 29 June 2015. The return therefore does not appear to have anything at all to do with the alleged letter.

23.2 The applicant furthermore relied on a letter which her attorney had on 3 October 2014 according to her addressed to the Kuruman Hospital. She alleged that the respondent had *“stamped”* the letter on 7 October 2014, but this allegation is not borne out by the copy of the letter annexed to the founding affidavit. Once again it cannot be found, on the basis of the allegations in the founding affidavit, that the respondent had at any stage become aware of the contents of that letter.

⁴ See section 19 of the Act.

23.3 It does appear, however, that Mr Mashilo must at some stage have become aware of the issue, because it is common cause, as already mentioned, that he had been in communication with the attorney of the requester and of the applicant about this for about a year when he, in a letter dated 7 October 2015, informed the attorney of the need for a formal request in terms of the Act. It is also clear from this letter that there must have been communication between the particular attorney and the office of the respondent before that, because the letter refers to a copy of a death certificate that had been made available to the respondent.

23.4 On 12 October 2015 the applicant's attorney lodged the request already referred to.

23.5 On 4 January 2016 the founding affidavit was deposed to, stating that the respondent had not responded to the request at all. The respondent was also blamed for the fact that the trial of the action, which had been set down for 27 November 2015, had to be postponed.

23.6 On 30 March 2016 the application was lodged.

[24.] It is important at this stage to highlight the fact that in all the letters relied upon by the applicant in the founding affidavit, reference was pertinently made of an accident which had occurred on 25 July 2010. As already mentioned they were also all addressed to the Kuruman hospital. They did not mention the date of the death of the deceased.

- [25.] In a letter dated 1 June 2015 and titled "NOTICE OF INTENTION TO INSTITUTE LEGAL PROCEEDINGS IN TERMS OF ACT 40 OF 2002"⁵, attached to the answering affidavit, the attorneys representing the requester (and now also the applicant) once again specifically referred to the date of the accident and to the Kuruman hospital. The respondent was informed that the deceased had been involved in a motor vehicle accident on 25 July 2010 and that he had been in the Kuruman hospital when he died. Once again the date of death was not mentioned.
- [26.] The information in all these letters would obviously have created the impression that the deceased had been admitted to the Kuruman hospital immediately after the accident, and that he had then died there on the date of the accident or possibly relatively shortly thereafter.
- [27.] Subject to what follows it is therefore understandable that, upon receipt of the request, Mr Mashilo forwarded it to Mrs Gloria Mataka at the Kuruman Hospital, and that he made specific reference to the date of the accident.
- [28.] Thereafter Mr Mashilo made numerous telephonic enquiries with Mrs Mataka, until 14 December 2015, when she informed him that no such records could be traced. All of this have been confirmed by Mrs Mataka.
- [29.] According to Mr Mashilo he had still been within the period allowed by the Act for a response to a request for access to information, when the trial was removed from the roll.
- [30.] Mr Mashilo went on to explain that he had on 7 January 2016 deposed to an affidavit as envisaged in section 23(1) of the Act, in which he basically declared that the records to which access had been requested, could not be traced. Mr Mashilo declared that he had dispatched this affidavit to the applicant's attorney during January 2016, but that he had misplaced proof of such dispatch.

⁵ This is probably the letter referred to in the return of 29 June 2015 – See paragraph

- [31.] Mr Mashilo attached a copy of an affidavit, which purports to have been deposed to on 7 January 2016, to his affidavit in substantiation of this. The affidavit was resent to the attorney's concerned on 20 April 2016. By then this application had obviously already been lodged, but the answering affidavit not yet, and of course not the replying affidavit.
- [32.] The applicant sought final relief, which would have meant that the so-called **Plascon-Evans** rule would have applied, in other words final relief could only be ordered on the papers *"if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. This is so unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers"*⁶.
- [33.] There is nothing improbable in the respondent's version and explanation of what transpired after the formal request was lodged. It therefore has to be accepted that Mr Mashilo had, immediately upon receipt of the deficient request, nevertheless taken steps to trace the information, by taking it up with Mrs Mataka, by frequently following it up with her and by eventually informing the attorney, by affidavit, of the position.
- [34.] The denial of the allegation that such an affidavit had been deposed to and had been sent to the attorney concerned, is really no more than a bare denial. The reference to the absence of proof of transmission of the affidavit, and the apparent suggestion that it militates against Mr Mashilo's averment, is no more than speculation. It is in fact completely far-fetched that the copy of the affidavit produced by Mr Mashilo had in some way been falsified specifically for purposes of this application.

⁶ **ABSA Bank Ltd v Collier** 2015 (4) SA 364 (WCC) para [39]

- [35.] It is therefore accepted, not only on the basis of the **Plascon-Evans** rule but also on the probabilities, that the affidavit had been sent to the attorney.
- [36.] It is not the applicant's case that she or her attorney had, after lodging the request, ever as much as attempted to follow it up with Mr Mashilo, or any other representative of the respondent, which is strange, given the seemingly frequent contact that there had been before then with Mr Mashilo. The applicant simply proceeded to lodge this application.
- [37.] If the transmission of the affidavit had been successful, it would have come to the attention of the applicant's attorney long before this application was lodged. Even after it was been annexed to the answering, the applicant chose to persist with the application on costs.
- [38.] This while it now appears that the particulars that had initially been supplied to the respondent regarding the information concerned were completely misleading. It now appears, from the applicant's own replying affidavit, that the deceased had after the accident not been admitted to the Kuruman hospital. He was in fact examined or treated at the Vryburg hospital. He only died much later, on 10 December 2012. According to the death certificate he died in Kuruman, and therefore possibly at the Kuruman hospital.
- [39.] The death certificate must have come to Mr Mashilo's attention sometime after he had on 14 July 2015 requested a copy thereof, but before he forwarded both the request and the death certificate to the Kuruman hospital. The date of death was also for the first time mentioned in that letter to Mrs Mataka.
- [40.] The death certificate reflects the cause of death as "*NATURAL CAUSES*". This in itself could have led to further confusion. How was Mrs Mataka expected to know what the fact that the deceased had been involved in a motor vehicle accident on 25 July 2010 on the face of it had to do with the fact that he died almost a year and a half later, of natural causes? How was she supposed to know

that the deceased had in fact not been admitted to the Kuruman hospital after the accident, but rather at some stage before his death?

- [41.] The respondent's attempt, in terms of Rule 35, to obtain from the applicant *inter alia* proof of the admission of the deceased to hospital elicited no response. Such proof would most probably have revealed not only particulars of the hospital concerned, but also of the date of admission. This was in May 2016, once again before even the answering affidavit was filed. One does not know if further particulars like that may have led to the discovery of information relevant to the death of the deceased.
- [42.] Against this background one can understand that the parties eventually, and after by way of the answering and replying affidavits obtaining a lot more particulars about the information to which access is needed, agreed that an order compelling the respondent to comply with the request that had been submitted, would not be appropriate.
- [43.] The conduct of the respondent, however, is also not free of blame. The respondent had 30 days within which to respond to the request⁷, in other words until approximately middle November 2015. On the other hand, respondent surely cannot in the circumstances be blamed for waiting for Mrs Mataka to finalise her search of the records, particularly not while constantly contacting Mrs Mataka in this regard.
- [44.] There is, however, no indication that Mr Mashilo had, before the prescribed time for a response to such a request had expired, or even at any stage thereafter, taken any steps to keep the applicant's and requester's attorney informed of the progress and of the steps that had been taken, and were being taken, to trace the records.

⁷ See section 25 (1) of the Act.

- [45.] There is also no indication that steps had ever been taken to extend the 30 day period, but even if there had, the response in the form of the affidavit of 7 January 2016 would have been outside the maximum extended period allowed by the Act⁸.
- [46.] There is, in my view, on the available information no reason whatsoever why a costs order should be made against the respondent, let alone a punitive costs order.
- [47.] By persisting with the attitude that the respondent should pay costs, and on a punitive scale, even after becoming aware of the affidavit of 7 January 2016, the applicant caused the respondent to incur costs.
- [48.] On the other hand, however, the respondent has in my view in its own way caused unnecessary costs by raising technical objections which really had no merit at all. In my view the just result would be for each of the parties to pay their own costs.
- [49.] In the premises the following orders are made:
1. **NO ORDER IS MADE IN RESPECT OF THE RELIEF SOUGHT IN PARAGRAPHS 1 AND 1.1 OF THE NOTICE OF MOTION.**
 2. **IT IS ORDERED THAT THE PARTIES WILL EACH PAY THEIR OWN COSTS IN THE APPLICATION.**



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

⁸ See section 26 of the Act.

For the Appellant:

**ADV. D OLIVIER
(Duncan & Rothman Inc.)**

For the Respondent:

**ADV. K PHASWANA
(Office of the State Attorney)**

