

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 23/2015

MASIBULELE SOLOMON ZADUNGE

Applicant

and

THE MINISTER OF POLICE IN THE RSA

1st Respondent

THE INFORMATION OFFICER,

MOUNT FRERE POLICE STATION

2nd Respondent

JUDGMENT

BROOKS J

[1] This is an application in which the applicant invoked the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) seeking an order directing the second respondent to produce the content of a docket, the police officer's accident report, witness statements and a police plan and key pertaining to a motor vehicle accident in which the applicant's mother lost her life. The accident occurred on 19 July 1997. Certain additional ancillary relief

is claimed, including an order exempting the applicant in the interests of justice from the obligation to exhaust domestic and/or internal remedies and an order for costs.

[2] Service of the application papers occurred on 11 February 2016 at the office of the state attorney in Mthatha. Pursuant thereto the matter became opposed. On 12 April 2016 the state attorney withdrew as attorney of record for the respondents. On the following day a notice of acting was filed by the respondents' current attorney of record. This notice of acting is dated 15 March 2016.

[3] On 5 May 2016 the respondents filed their answering affidavit. A number of issues are raised therein as a basis for the submission that the application should be dismissed with costs:

3.1 the deponent observes that the applicant's internal appeal was sent on 19 November 2015, whereas in terms of the provisions of PAIA it ought to have been sent to the relevant information officer by 17 November 2015;

3.2 The complaint is also made that the applicant sent the appeal to the Minister of Police rather than to the information officer concerned employed by the South African Police Service at Mount Frere who presumably would then have sent it on internally;

3.3 consequently, it is argued, the application was not filed within thirty days of the appeal as required by the provisions of PAIA; and

3.4 after the application came to the respondents' attention a certain Captain Edward Goniwe stationed at Mount Frere Police Station was tasked with the location of the police docket. The fact that it cannot be located, apparently due to the fact that the accident took place more than fifteen years ago, is attested to in an affidavit deposed to by Captain Goniwe on 8 March 2016, a copy of which is filed as an annexure to the answering affidavit.

[4] In his replying affidavit the applicant confirms that in these circumstances no substantive relief is pursued. The allegation is made to the effect that the communication by the respondents of their inability to produce the documentation constitutes compliance with the substantive relief. This is an appropriate observation.

[5] However, the applicant pursues a costs order. In doing so the applicant relies upon a response received from the state attorney to a proposal made on 20 May 2016 by the applicant's attorney in a letter contemplating the withdrawal of the application with the respondents to pay the costs thereof. This letter had been sent by the respondents' attorneys to the state attorney, presumably, because it was from the state attorney that a written reply dated 24 May 2016 was received by the applicant's attorney. That letter confirms that the matter

may be withdrawn and contains a tender by “the respondent” to pay the costs on a party and party scale.

[6] On 30 May 2016 the applicant’s attorney sent a copy of the letter from the state attorney to the respondents’ attorney of record seeking an indication of their attitude towards the content thereof. On 2 June 2016 the respondents’ attorney of record responded in writing, stating that they had consulted with the South African Police Services, the respondents, who advised that no instructions had been given to tender the costs. In these circumstances, the letter from the state attorney was to be ignored. Moreover, the assertion is made that the application was defective.

[7] Consequently, the only issue for determination is that of an appropriate costs order.

[8] It is clear that no mandate was given by the respondents to the state attorney to tender the costs of the application on 24 May 2016. Indeed, it is common cause that on that date the state attorney did not act as the respondents’ attorney of record.

[9] It is also clear that the first indication that the applicant received from the respondents to his quest for documentation came in the form of the answering affidavit and its annexure, both filed on 5 May 2016. At that stage, the applicant had been obliged, in the face of a lack of response from the respondents, to launch the application. At that stage, too, the application had

become opposed. In my view, it matters not that the applicant's internal appeal may have been lodged two days late. The only response thereto also came in the answering affidavit. Similarly, it matters not that the internal appeal was sent to be the Minister of Police. Mr Mnqandi, who appeared on behalf of the respondents, argued that this meant that the applicant hadn't complied with the internal remedies available before coming to court. This, he submitted, rendered the subsequent application fatally defective. In my view this is not so. In the notice of motion the applicant also seeks an order exempting him in the interests of justice from the obligation to exhaust internal remedies. To the extent that it may be erroneous to direct the appeal to the minister rather than the information officer in his employ, or the fact that the appeal may have been sent out of time, are deficiencies in the applicant's compliance with the obligation to follow an internal appeal process which would be covered by this prayer for condonation. The complaints raised elevate form over substance and in my view would not have defeated the application for substantive relief. The fact that an internal appeal was lodged, albeit with some deficiencies, distinguishes this matter from *SAMBUNA AND OTHERS v HEAD OF DEPARTMENT: PUBLIC WORKS LIMPOPO PROVINCE* 2009 (3) SA 64(V) to which counsel referred the court.

[10] In the circumstances, no reason emerges why the costs should not be paid by the respondents. It was their failure to respond timeously to the applicant's various extra-curial overtures which led to this application being launched. It is through no fault of the applicant that he only received a response from the respondents in the answering affidavit and its annexure. The application was not defective. On the contrary, it was effective in producing a result.

[11] The following order will issue:

“The respondents are directed to pay the costs of this application on the scale as between party and party, jointly and severally, the one paying the other to be absolved.”

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

For the applicant: ADV N R MTSHABE

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Date heard: 8 September 2016

Date delivered: 13 September 2016