

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, EAST LONDON CIRCUIT DIVISION)**

Case no. EL 282/14
ECD 582/14

In the matter between:

SIYABONGA SOGAXA

Applicant

and

**MINISTER OF POLICE
INFORMATION OFFICER, DUNCAN
VILLAGE POLICE STATION**

First Respondent

Second Respondent

JUDGMENT

MBENENGE J:

[1] The applicant was arrested on 13 January 2013 for allegedly committing rape, robbery and murder.¹ He appeared before the magistrate's court and was formally charged on 4 February 2013, on which date the criminal case was postponed to 5 February 2013 for a bail application to be launched. Bail was refused and the matter was postponed on several occasions for further investigations.

[2] On 27 July 2013 charges against the applicant were "*provisionally withdrawn*" by the State, pending further investigations. This resulted in the applicant being released from custody, on the same day.

[3] On 22 November 2013 the applicant mandated his attorneys of record to, *inter alia*, investigate the circumstances relating to his arrest and to consider instituting an action for damages against any person, entity, establishment and organ of State suffered consequent upon his arrest.

[4] On the same day (22 November 2016) the applicant's attorneys lodged a request with the Information Officer of the Duncan Police Station (the SAPS)

¹ The details of the charges are not relevant for present purposes.

requesting to be furnished with a copy of the relevant police docket. The request was accompanied by the relevant J750 form.²

[5] The request attracted a response letter from the SAPS dated 19 August 2013 in terms whereof the applicant was advised that the “*docket is still under investigation therefore it is not available as yet*”. Receipt of the SAPS’s letter was acknowledged by letter dated 19 December 2013. In the letter (of 19 December 2013) the SAPS was also called upon to inform the applicant’s attorneys as to what was outstanding regarding the investigation and an enquiry was made as to when finality on such investigation could be expected.

[6] As the applicant seemed to be receiving no joy, the applicant’s attorneys duly lodged an appeal against the failure to provide the information sought by the applicant, on 27 January 2014. The letter was accompanied by the relevant J751 form.³ It is timely to interpose here and mention that in terms of section 77(3) of the PAIA the functionary vested with the power to consider and decide on the appeal should have made the decision within 30 days from the date of receipt of the appeal. There having been no decision taken within the said period, in terms of section 77(7) of the PAIA, the appeal authority was regarded as having dismissed the internal appeal.

[7] Meanwhile, the instant proceedings were resorted to on 12 March 2014, with the applicant seeking, in the main, an order reviewing and setting aside the decision taken by the second respondent not to provide the applicant with the relevant police docket. Relief consequential to the review is a *mandamus* directing the second respondent to furnish the applicant with the relevant docket within a stated period from the date the order sought being granted. The respondents’ notice to oppose the application was delivered on 9 April 2014.

[8] The response to the applicant’s notice of appeal was furnished by letter penned by the National Deputy Information Officer (Col. Brooks), dated 27 May 2014. The letter, in so far as relevant hereto, reads:

“Please note that the relevant case still ‘open case’ (ie not closed docket or investigation) and in terms of section 7 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000) (hereinafter referred to as the “Access Act”), this Access Act is not applicable to your request. This means that the Internal Appeal procedure in terms of the Access Act is also not applicable to your request.

² Form A (request for access to record of public body in terms of section 18 of the Promotion of Access to Information Act 2 of 2000 (the PAIA)).

³ Form B (notice of internal appeal in terms of section 75 of the PAIA).

Section 7 of the Act provides that the Act does not apply to a record if it is requested for the purpose of criminal or civil proceedings after the commencement of such proceedings and access is provided for in any other law...

You may directly request access to the content of this docket from the National Prosecuting Authority (ie the prosecutor for the case) as that is the relevant person who may make the decision with regards to access to records contained in the docket. You may also in writing request the investigating officer to refer the docket to the prosecutor for such decision and to inform you of the prosecutor's decision."

[9] Two objections *in limine* have been raised in opposition to the application, these being-

- (a) that there has been a non-joinder of the relevant functionary in the National Prosecuting Authority (the NPA) alternatively, the prosecutor who handled the related criminal case; and
- (b) that, in view thereof that the relevant appellate authority has decided that the PAIA is not applicable to the applicant's request, the relief sought has become legally incompetent.

[10] The application is being opposed on the merits on the grounds that the request and resulting appeal are hit by the provisions of section 7 of the PAIA alternatively, section 39(1)(b)(ii) and (iii) of the PAIA. The investigation of the case, goes the respondents' case, "*is ongoing and the outcome thereby will be determined by the relevant court.*"

[11] The *in limine* points shall be dealt with first, *seriatim*.

[12] The respondents contend, in the first place, that, much as the relevant police docket is in the possession of the investigating officer in the related criminal case, the NPA is the relevant Office vested with the authority to conduct and manage the institution of the criminal proceedings, and thus the decision whether or not to grant or refuse access to the docket. It is the view of the respondents that there has been a non-joinder of the NPA alternatively, the prosecutor allocated the handing of the related criminal case. I disagree.

[13] The prosecution took a decision to withdraw the charges that the applicant had been facing, pending further investigations. The case thereupon reverted to the police for them to conduct the further investigations. The power to conduct investigations in criminal matters is vested in the SAPS,⁴ and not in the NPA. The NPA is empowered

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Section 205(3) of the Constitution; it provides:

to *inter alia* institute criminal proceedings.⁵ That power does not include conducting investigations. In any event, on the respondents' own showing, the relevant police docket is still in the possession of the police because "*investigation is on-going*". Therefore, I do not see how the NPA or any of its functionaries within that Office features in these proceedings. They do not have a direct and substantial interest in any order the court might make.⁶

[14] It is so that the initial decision of the second respondent has been subsumed by that of the National Deputy Information Officer (the NDIO), either because he did not decide on the appeal within the requisite period and is thus regarded as having dismissed the internal appeal in terms of section 77(7) of the PAIA, or because he eventually made the decision that the provisions of the PAIA are not applicable to the applicant's request. In either event, the decision of the appellate authority stands unless and until set aside on review.⁷ In my view, this simply renders the application bad for non-joinder, than otherwise.

[15] In light of the above, it is not available to this court to entertain the merits of the application without the NDIO being joined as a further respondent in these proceedings. The NDIO has a direct and substantial interest in the order that this court might grant in the final analysis.

[16] It is appropriate in this matter for costs to be reserved for determination by the court that will eventually entertain the application. I do not see any prejudice being suffered by the respondents by granting of such cost order.

[17] In the results, I order as follows:

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

⁵ Section 179(2) of the Constitution, read with section 20(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act). Section 20(1) of the NPA Act provides:

"(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings, vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

⁶ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty)* 2014 (3) SA 481 (CC); *Camps Bay Ratepayers' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); at para [46]; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*; 2004 (6) SA 222 (SCA); *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the Republic of South Africa and Others* [2011] 3 All SA 610 (SCA) at para [46].

- (a) There has been a non-joinder of the National Deputy Information Officer, South African Police Service as a further respondent in these proceedings.
- (b) The proceedings are stayed pending such joinder, and the application is hereby postponed *sine die*.
- (c) In the event of the applicant failing to apply for such joinder within 14 days from today, the respondents are hereby granted leave, on the application papers duly amplified as may be necessary, to seek an order for dismissal of the application.
- (d) Costs of the hearing on 12 May 2016 shall stand over for determination by the court that will hear the application on the merits.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the applicant : Mr S Khalimashe
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Counsel for the respondents : Mr D T Young
Instructed by State Attorney
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Date heard : 12 May 2016

Date delivered : 24 May 2016

