

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

20/2/15

CASE NO: 27085A/14

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

20/2/2015

DATE

Elm Bush

SIGNATURE

In the matter between:

AFRIFORUM

APPLICANT

and

EMADLADLENI MUNICIPALITY**RESPONDENT**

JUDGMENT

HEARD ON: 29 JANUARY 2015

JUDGMENT ON: 20 FEBRUARY 2013

KUBUSHI, J

[1] The purpose of this application is to apply, in terms of the Promotion of Access to Information Act, 2 of 2000 ("PAIA"), that the records relating to the qualifications of certain senior managers employed by the respondent be made available to the applicant, in order to determine whether the incumbents comply with the requirements of the Municipal Regulations on Minimum Competency Levels published under GN 493 in Government Gazette 29967 of 15 June 2007 (the regulations).

[2] In terms of the aforesaid regulations, the accounting officers, chief financial officers, senior managers, financial officers at middle management, heads of supply chain management units and the supply chain management managers, employed by a municipality have to comply with certain prescribed minimum competency levels in respect of higher education qualification, work related experience, core managerial and occupational competencies, and competencies in the unit standards prescribed for the said competency areas.

[3] In accordance with the said regulations, no municipality or municipal entity may, with effect from 1 January 2013, employ a person as a financial official or supply chain management official if that person does not meet the competency levels prescribed by the regulations for the relevant position.

[4] Compliance monitoring of the stipulations aforesaid is, in terms of regulation 14 of the regulations, provided as follows:

- "(1) The municipal manager of a municipality and the chief executive officer of a municipal entity must monitor, and take any necessary steps to ensure compliance with the prescribed minimum competency levels for financial officials and supply chain management officials within the time frames set out in regulation 15.
- (2) A municipality must report the consolidated information in respect of the municipality and each of its entities set out in sub-regulation (4) to –

- (a) the National Treasury and to the relevant provincial treasury by 30 January and 30 July of each year, until 30 July Of 2015; and
 - (b) in its annual report, reflecting the information as at the end of the financial year to which the report relates.
- (3) A municipality must report to its parent municipality by 20 January and 20 July of each year, and in its annual report, the information set out in sub-regulation (4). The annual report of the municipal entity must reflect the information as at the end of the financial year to which the report relates.”

[5] In terms of the provisions of PAIA a requester must be given access to a record of a public body. The applicant, in this instance, being a requester as defined in PAIA, lodged a request for information in terms of s 11 of PAIA. The request was accompanied by a covering letter in which the applicant refers to the regulations and states that in terms of the said regulations various municipal officials are required to comply with the criteria pertaining to minimum competency levels. The letter ends with a demand that all persons who do not comply with the criteria as set out in the regulations be removed from their positions and be replaced with persons who comply.

[6] The request is formulated in Part D 1 of the application form, form “A”, as follows:

“D. Particulars of record

- | | |
|--|--|
| <ul style="list-style-type: none"> (a) (b) | <p>Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.</p> <p>If the provided space is inadequate, please continue on a separate folio and attach it to this form. The requester must sign all the additional folios.</p> |
|--|--|

1. Description of record or relevant part of the record:

- (a) Documents indicating compliance with the Regulations on Minimum Competency Levels (Annexure A);
- (b) The report on the compliance with the prescribed minimum competency levels as envisaged in Chapter 7 section 14 (4) of the Municipal Regulations on Minimum Competency Levels.”

[7] The respondent declined the request and in a letter to the applicant provided a response that all officials employed by the municipality meet the minimum competency levels as required by the regulations. The respondent also stated in that letter that in terms of the regulations all appointments of officials by the municipality have to be certified by the MEC Local Government and that this process has been followed.

[8] The applicant thereupon lodged an internal appeal against the refusal. The respondent did not issue a new decision and after expiry of the period within which the respondent was supposed to have responded the internal appeal was deemed to have been dismissed, hence the current application.

[9] The respondent is opposing the application and has raised the following defences, namely;

- (a) That the first part of the request by the applicant is so vague that it would entail producing and allowing the applicant to trawl through the personnel files of the individuals falling within the scope of request and would lead to the invasion of the privacy of those individuals.
- (b) That the second part of the request is equally vague in that it does not specify which report pertaining to which financial year is requested. Regulation 14 provides for the preparation of two reports in each financial year.
- (c) That the individuals to whom the applicant’s request pertain fall into the category of third parties who are natural persons in terms of s 34 (1) of PAIA which provides for the mandatory protection of privacy. (The respondent’s counsel abandoned this defence during argument).

[10] Section 18 (2) (a) (i) of PAIA provides that:

“The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned –

(a) to provide sufficient particulars to enable an official of the public body concerned to identify –

(i) the record or records requested; . . .”

[11] It is my view that part (a) of the request is not vague as alleged by the respondent. The regulations provide for the monitoring of certain specified officials of the respondent. Annexure “A”, attached to the application sets out those employees very clearly. As such it will be the documents pertaining to only the employees stated in annexure “A” whose documents must be furnished to the applicant. By just reading the annexure, it would have been easy for the respondent to ascertain which employees the applicant is referring to in the request. It is not required of the applicant to have specified the employees by name. The specific officials, as already stated, are easily ascertainable by referring to annexure “A”, namely, accounting officers, chief financial officers, senior managers, financial officers and supply chain management officers. It is not a wholesale enquiry as the respondent seeks to suggest.

[12] Ordinarily I would order that the applicant be given access to the documents requested, but, I am of the opinion that the request is cumbersome and cannot be easily furnished. Section 45 of PAIA stipulates that an information officer may refuse a request for access to a record if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

[13] In supplementation of the applicant's request, the applicant's counsel contended that the applicant requires access to ‘all the documents of all the officials mentioned in annexure “A”. This request, in my opinion, is too wide

and cumbersome. The respondent must go into all its records and search for all the documents pertaining to the specific officials referred to in annexure “A” and determine which of those documents pertain to the request. It is on that basis that I would not grant this part of the request.

[14] It would be easier, however, for the respondent to provide the applicant with the documents requested in part (b) of the request. In terms of this part, the applicant requires access to ‘the report on the compliance with the prescribed minimum competency levels as envisaged in Chapter 7 section 14 (4) of the Municipal Regulations on Minimum Competency Levels’. The report is a consolidated information report on the compliance with the prescribed minimum competency levels of the officials stated in annexure “A”.

[15] Regulation 14 (4) provides that:

“A report on the compliance with prescribed competency levels must be in the format set out in the Annexure hereto and include the following minimum information as at 30 June and 31 December of each year, as may be appropriate – . . .”

[16] The difficulty however is that part (b) of the request lacks sufficient particularity to enable the respondent to determine which report should be made available to the applicant. As already stated, the applicant requires access to the report on the compliance with the prescribed minimum competency levels as envisaged in Chapter 7 section 14 (4) of the Municipal Regulations on Minimum Competency Levels. Regulation 14 provides for two reports to be prepared each financial year. The applicant does not state in its application which of the two reports it requires. It does not specify which report for which financial year does it requires to have access into. The application only refers to the report. It cannot be left to the respondent to speculate as to the report required by the applicant. Sight should not be lost that the regulations were promulgated in 2007 and, on the assumption that the respondent has been compliant since then, the request becomes more vague.

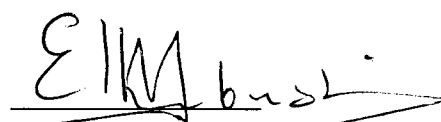
[17] A submission by the applicant's counsel is that the respondent is not entitled to raise a technical defence of this nature at this late stage. According to counsel, the applicant should have raised the defence at the time when it responded to the initial letter requesting access to the documents. In support of his argument he referred me to the judgments in *Ndokweni v Game Stores & Others (2001) 22 ILJ 1398 (LC) par 15* with reference to *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others (2000) 21 ILJ 2382 (LAC)*.

[18] These judgments are not on point. The principle raised in those judgments does not pertain to the argument by the applicant's counsel. The principle in those judgment is that a party who believes that an irregularity is being perpetrated, and allows it to occur without protest, cannot be heard to complain later. This principle does not find application to the defences raised by the respondent.

[19] Based on the order I intend to grant, as will more specifically appear hereunder, I do not think it is necessary to deal with the issue of exemption as raised by both parties.

[20] The applicant applied for costs on a punitive scale on the basis that the application is frivolous and vexatious. I am of the opinion that the respondent has not made out a case in that respect and is entitled to ordinary costs of suit.

[21] In the circumstances, the application is dismissed with costs.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

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