

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

Case no. 3388/2014

In the matter between:

NTOMBIZANELE SEKU

Applicant

and

**THE MEC FOR THE DEPARTMENT OF
HEALTH, EASTERN CAPE PROVINCE**

First Respondent

**THE INFORMATION OFFICER,
ST BARNABAS HOSPITAL**

Second Respondent

JUDGMENT

STRETCH J:

[1] The applicant launched an application against the respondents for access to information, which information has now been furnished. The issue is whether a costs order should follow, and if so, in favour of which party.

[2] In order to determine this question, a time line of factual events during 2014 and 2015 is a good start:

- 22 AUGUST: The applicant despatches its request for information from the second respondent by way of registered mail, allowing the recipient the prescribed 30 days to respond.
- 13 OCTOBER: The applicant despatches an internal appeal to the first respondent by way of registered mail, by virtue of the fact that the first

respondent, not having replied within the requisite 30 days, was deemed to have denied the request. Therein, the first respondent is granted another 30 days to respond, calculated from the date of receipt of the appeal, failing which the applicant would approach court for appropriate relief including a costs order, without further notice to the first respondent. This letter was available for collection at the Bhisho Post Office as from 20 October. The letter was collected by the respondents' representative on 28 October.

- 25 NOVEMBER: Having had no response from either of the respondents, the applicant serves the threatened court application on the respondents, together with her founding affidavit.
- 8 DECEMBER: The information sought is released to the applicant.
- 13 DECEMBER: A letter from the first respondent addressed to the applicant by way of registered mail is recorded as having been in transit at the Mthatha (hub) Post Office branch, having left the Bhisho Post Office on 12 December. The letter is the first respondent's acknowledgment of receipt (dated 11 November 2014) of the applicant's first letter dated 13 October. In this acknowledgment, the first respondent states that she only received the applicant's first letter on 30 October.
- 14 JANUARY: The aforesaid (uncollected) letter is returned by the Mthatha Post Office to the first respondent.
- 21 JANUARY: The applicant confirms in writing that the substantive relief which she had sought, had been complied with, and tenders a withdrawal of her application provided the respondents paid her wasted costs.
- 10 FEBRUARY: The applicant receives a letter from the respondents' attorneys referring to the aforesaid uncollected letter. The letter states

that the applicant was telephonically advised about the contents of the aforesaid uncollected letter, and that there had been no need for the applicant to launch the application (the applicant denies having received this call). The letter furthermore states that the applicant's appeal letter was received on 30 October and that the respondent replied thereto on 11 November. The letter fails to mention that although the response may have been dated 11 November, it was only posted on 11 December. The letter requests that the application be withdrawn, with each party to pay its own costs, failing which, the respondents' answering affidavit would be filed and that punitive costs would be sought.

- 17 FEBRUARY: The respondents receive a letter from the applicant. Therein the applicant denies having received the aforesaid call, and proposes withdrawing the application on the basis that the respondents pay her cost to date (being up until 17 February). The applicant points out that this will be far more cost effective as only the founding application papers had been filed at that stage. The respondents are invited to consider the proposal and to revert by 24 February, failing which the applicant would set the matter down for the issue of costs to be determined.
- 17 APRIL: The respondents deliver their answering affidavit.
- 11 MAY: The applicant delivers her replying affidavit. Therein she points out that the information sought was made available to her on 8 December 2014, and that the only remaining issue is that of wasted costs. She also points out, significantly to my mind, that even if the respondents did telephone the applicant (which she does not admit), it is the respondents' version that the call (ostensibly made to dissuade the applicant from taking legal action) was made after the undelivered letter had been returned to the respondents (that is after 14 January

2015), and accordingly almost seven weeks after the application papers had already been served on the respondents.

[3] It is not in dispute that the applicant despatched her request for information on 22 August. It is common cause that the respondents furnished this information on 8 December (i.e. three and a half months after the initial request). This amounts to a delay of six weeks over and above what is envisaged in the Promotion of Access to Information Act 2 of 2000 (“the Act”).¹ The Act specifically provides for eventualities where an information officer or relevant body is unable to abide by the time constraints imposed by virtue of the provisions of the Act (being 30 days to furnish the information, failing which a further 30 days to deal with the internal appeal, failing which the applicant is deemed to have exhausted her internal remedies and may approach the court for relief).² Section 57 of the Act makes provision for a request for an extension of a further 30 days in certain circumstances. However the applicant must be notified of the request for an extension within 30 days of having received the original request.³ This too, did not happen.

¹ Section 56(1) of the Act reads:

“(1) Except if the provisions regarding third party notification and intervention contemplated in Chapter 5 of this Part apply, the head of the private body to whom the request is made must, as soon as reasonably possible, but in any event within 30 days, after the request has been received or after the particulars required in terms of section 53 (2) have been received;

(a) decide in accordance with this Act whether to grant the request; and

(b) notify the requester of the decision and, if the requester stated, as contemplated in section 53 (2) (e) , that he or she wishes to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.”

(c)

² See sections 56 – 8 of the Act.

³ Section 57 of the Act, in relevant parts, reads as follows:

“1. The head of a private body to whom a request for access has been made, may extend the period of 30 days referred to in section 56 (1) (in this section referred to as the 'original period') once for a further period of not more than 30 days, if-

...

2. If a period is extended in terms of subsection (1), the head of the private body must, as soon as reasonably possible, but in any event within 30 days, after the request is received, notify the requester of that extension, the period of the extension and the reasons for the extension.”

[4] Even if the respondents only received the applicant's first letter of request on 30 October (as contended for by the respondents), it was incumbent on the respondents if they intended assisting the applicant, to either comply with the request before 30 November, or to bring to the applicant's attention (also before 30 November) that an extension of time was required. It does not assist the respondents to pen a response on 11 November which is only posted a month later, and more than two weeks after the court application had already been delivered. Differently put, if the applicant had waited until 30 November had come and gone before launching the application, the respondents' case would not have been fortified on the issue of prematurity, regard being had to the fact that they only made an effort to bring their response to the attention of the applicant on 11 December. It also does not assist the respondents when they attempt to rely on alleged telephonic communication on their part which is either a fabrication, or which was made long after the horse had bolted.

[5] For all these reasons I am of the view that the applicant did not deliver her court application prematurely. This is, however, not the end of the matter.

[6] The applicant's founding affidavit (*sans* annexures) comprises 19 pages. During the course of this affidavit the applicant, as a layperson, embarks on a detailed discourse of the applicable law, a treatise on constitutional rights and repeats herself on the facts (which are simple) at least three times. In my view, and in the exercise of my discretion, the costs of at least half of this affidavit serve to be disallowed.

[7] The same applies to the applicant's heads of argument. The applicant had, to my mind, set out her argument clearly and concisely in the first six pages of these heads. Notwithstanding this, she continued to repeat the argument with lengthy and superfluous extracts from various cases and bodies of law,

extending the heads to 19 pages altogether. Here too, I intend disallowing half of the costs.

[8] In the result, the following order is made:

The respondents are (jointly and severally, the one paying the other to be absolved) directed to pay the wasted costs of this application, such costs to exclude 50 per cent of all costs associated with the drafting of the applicant's founding affidavit, and to exclude 50 per cent of all costs associated with the drafting of the applicant's heads of argument.

I.T. STRETCH
JUDGE OF THE HIGH COURT

13 October 2015

APPEARANCES:

For the applicant:

Mr S.R. Mhlawuli

SR Mhlawuli & Associates

Mthatha

For the respondents:

Mr T.H. Melane

Instructed by the State Attorney

Mthatha