

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2854/2012

In the matter between:-

KUNATU STEPHEN KOALANE

First Applicant

MASILONYANA LOCAL MUNICIPALITY

Second Applicant

and

M M SENKHE

First Respondent

P L SENKHE

Second Respondent

H D SETHOBA

Third Respondent

HEARD ON:

16 AUGUST 2012

JUDGMENT BY:

VAN DER MERWE, J

DELIVERED ON:

6 SEPTEMBER 2012

[1] This is an application to obtain access to information contained in a video recording.

[2] The first applicant is the mayor of the second applicant, a local municipality. It appears from the sheriff's return of service of the application that the first respondent has passed away. The second respondent is his surviving spouse. The third respondent is cited as an adult male

photographer of 1322 Lusaka Park, Theunissen whose further particulars are unknown to the applicants. Neither the second nor the third respondents oppose the application.

[3] The applicants claim the following orders:

- “1. Declaring that the applicants are, in terms of the provisions of section 32 of the Constitution of the Republic of South Africa, 1996, and section 9(a)(ii) of the Promotion of Access to Information Act, 2 of 2000, entitled to access to the video recording that was made on 1 January 2012 of the funeral proceedings of the late Me. Mariana Senkhe that took place at the Masilo Community Hall, Tehunissen (**the video recording**).
2. In terms whereof the respondents are jointly and separately ordered, the one complying, the other to be absolved, to provide the applicants access to the video recording by delivering a copy thereof to Hewetson Incorporated Attorneys, at their offices at 300 Stateway, Welkom within 14 days from the date of this order.
3. That the applicants are to pay the reasonable costs that the respondents may have to incur in order to obtain a copy of the video recording, the one paying, the other to be absolved *pro tanto*.”

[4] The applicants state that a video recording made by the third respondent at the funeral of the daughter of the first and second respondents, *inter alia* portrays a speech made by one Mr Tshepo Kobane. They allege that during this speech the first applicant was defamed and all other council members of the second applicant were "... insulted and possibly defamed". The applicants state that access to the video recording is required in order to exercise their rights against Mr Kobane. I do not understand what rights the second applicant could exercise against Mr Kobane, but do not find it necessary to make any finding in this regard.

[5] It cannot be found on the evidence that the third respondent is in possession of a video recording as described above and in any event he appears to have made the recording on behalf of the first and second respondents. I do accept however, that the second respondent is in possession thereof. For the reasons that follow however, the application can in my view not succeed, despite the absence of opposition thereto.

[6] Section 32 of the Constitution provides as follows:

- “(1) Everyone has the right of access to-
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

[7] The national legislation envisaged in section 32(2) is the Promotion of Access to Information Act 2 of 2000 (PAIA). It is clear from the long title, the preamble and section 9 of PAIA that the object thereof is to give effect to the constitutional right to access to information in terms of both section 32(1)(a) and (b).

[8] PAIA however only provides for access to recorded information in the possession or under the control of a public body or a private body. The definition of “record” is the following:

“... of, or in relation to, a public or private body, means any

recorded information:

- a) regardless of form or medium;
- b) in possession or under control of that public or private body, respectively; and
- c) whether or not it was created by that public or private body, respectively.”

Section 3 provides that PAIA is applicable to a record of a public body and a record of a private body, regardless of when the record came into existence. Part 2 of PAIA deals with access to records of public bodies and Part 3 thereof with access to records of private bodies. Each part *inter alia* contains chapters in respect of the right of access, manner of access and grounds for refusal of access to records.

[9] “Private body” is defined as:

- “(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
 - (b) a partnership which carries or has carried on any trade, business or profession; or
 - (c) any former or existing juristic person,
- but excludes a public body.”

[10] It follows that PAIA does not provide for access to a record of

a person such as the second respondent, namely a private individual other than in the capacity of carrying on or having carried on a trade, business or profession. This is in my judgment the result of the limitation and/or balancing of rights envisaged in section 9(b) of PAIA.

- [11] In terms of the principle of constitutional subsidiarity, where legislation has been enacted to give effect to a constitutional right, a litigant who does not challenge the legislation as being inconsistent with the Constitution, should rely on that legislation and cannot circumvent that legislation by attempting to rely directly on the constitutional right. See **MEC FOR EDUCATION, KWAZULU-NATAL, AND OTHERS v PILLAY** 2008 (1) SA 474 (CC) at 488 – 489 para [40] and **MAZIBUKO AND OTHERS v CITY OF JOHANNESBURG AND OTHERS** 2010 (4) SA 1 (CC) at 23 – 24 para [73]. See also **INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA AND OTHERS v AFRICAN NATIONAL CONGRESS AND OTHERS** 2005 (5) SA 39 (C) at 48 – 50 paras [14] – [19].

- [12] In the result the application is dismissed.

C.H.G. VAN DER MERWE, J

On behalf of applicants: Adv B Knoetze SC
Instructed by:
Stander and Partners
BLOEMFONTEIN

/sp