

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: MTHATHA

CASE NO: 1153/11

Heard on: 15/03/12

Delivered on: 16/03/12

In the matter between:

ZANDILE MONICA HLABA

Applicant

and

MEC FOR HEALTH, EASTERN CAPE

PROVINCE

1st Respondent

THE MEDICAL SUPERINTENDENT,

BUTTERWORTH HOSPITAL

2nd Respondent

JUDGMENT

NHLANGULELA J:

[1] In my understanding of the papers filed of the record, the applicant seeks a relief which I paraphrase in the following terms:

- (a) That the applicant be exempted from exhausting internal appeal remedies which are provided for in s 75 of the Promotion Of Access To Information Act No. 2 of 2000 (PAIA); and
- (b) That the respondents show cause why the second respondent's failure to complete the MMF 1 Claim Form of the applicant should not be declared unlawful; and
- (c) That the second respondent should show cause why it should not be ordered to complete the aforesaid form within 30 days; and
- (d) That, if the respondents refuse to complete the form, to furnish the applicant with written and full reasons for refusal within 30 days.
- (e) That the respondents pay costs of the application on a scale as between attorney and client.

[2] The relief sought is opposed by the respondents by way of filing an answering affidavit and heads of argument.

[3] Some few days before the respondents filed an answering affidavit

they delivered the MMF 1 Claim Form, duly completed and signed, as asked for by the applicant. In essence, the *merits* of the application have been settled. The only issue for determination is one of costs.

[4] To decide the question of costs the Court should have regard to the acknowledgement of the respondents that they had a duty to complete the MMF 1 Claim Form, the reasons for which the applicant brought the application, the conduct of the parties prior to and after the application was brought, the legal objection which the respondents raised in the answering affidavit against the granting of the relief sought and any other factors which are relevant to the decision to be made. It is so because all that the Court is being asked to do is to allocate the costs without so much being concerned as to who between the parties would have been successful had the MMF 1 Claim Form (the claim form) not been completed and furnished to the applicant. In this regard see the judgment of Mbenenge AJ, as he was then, in the case of *Nxumalo And Another v Mavundla And Another* 2000 (4) SA 349 (D) at 355F and that of mine in *Westensee v Westensee And Others* (ECG) Case No. 859/09 dated 28 April 2011.

[5] The facts of this case are, to a large extent, not in dispute. On 17 May

2009 the applicant was involved in a motor vehicle accident on a public road. Immediately after the accident he was admitted in Butterworth Provincial Hospital (the hospital) for treatment. He remained there for a considerable period of time whilst he was receiving treatment for serious bodily injuries sustained in the accident. He was ultimately discharged to recuperate whilst being at home. The remaining history about his injuries and treatment for such injuries are not relevant here.

[6] On 14 April 2010 the applicant, duly assisted by his attorneys of record, addressed an application to the hospital asking for the claim form to be completed with medical information extracted from the records of the applicant, sign it and return it so that a claim for compensation under the auspices of the Road Accident Fund Act No. 56 of 1996 could be lodged. There was no response to that letter. On 11 January 2011 a second letter of application was forwarded to the hospital and a response was still not forthcoming. On 23 March 2011 the applicant again addressed a letter of application to the hospital, but in vain. Seeing that the lodgment of a claim with the Road Accident Fund was about to become prescribed, the applicant resorted to bringing this application for a *mandamus* on 19 May 2011. It

would appear that it took approximately 14 months of waiting time for the application to be brought. It was only on 14 September 2011 that the respondents filed an answering affidavit.

[7] The provisions of the Road Accident Fund Act No. 56 of 1996, (the Fund Act) National Health Act No. 61 of 2003 (the NHA) the PAIA, the Promotion of Administration Justice Act No 3 of 2000 (the PAJA), the Constitution Act No. 108 of 2006 and the State Liability Act No. 20 of 1957 are implicated in this application. The applicant alleges that in terms of s 2 of Act No. 20 of 1957 the first respondent is accountable for the administrative acts/omissions of the second respondent; both first and second respondents are in terms of s 14(1) and (3) read with s 25(1) of PAIA obliged to, within 30 days, compile and make available to the public a Departmental Practice Manual for the purposes of regulating the administration and management of the requests and appeal processes and of considering and deciding requests pertaining to access to information. He alleges further that in terms of s 27 of PAIA a failure to handle a request in a manner aforesaid constitutes a “deemed refusal” of the request. Therefore, it is the obligation of the first respondent to make the right to access information a reality in a manner consistent with s 27 of the Constitution.

[8] In terms of s 15(1) of the NHA read with s 25(1) of the PAIA the second respondent is obliged to disclose personal information to the applicant where such access or disclosure is in the interest of the applicant. The provisions of s 24(2)(a) of the Fund Act create an obligation upon the second respondent to complete the claim form in respect of the applicant. Where the respondents have refused access to information they are obliged in terms of s 25(1) of PAIA to furnish the applicant with adequate written reasons underpinning the decision. All these laws being subsumed under the Constitution means that, according to the applicant, the respondents' failure to make available the medical information sought is inconsistent with the provisions of ss 32(1)(a) and 32(1)(b) of the Constitution.

[9] The nub of the respondent's opposition to the relief sought is that the application ought to be dismissed with costs because it was brought prematurely in that, firstly, the applicant never applied correctly for the claim form to be completed and, secondly, he did not exhaust the internal appeal remedy but he merely engaged the respondents through "futile correspondence" and "by-passed internal appeal remedies"

[10] *Mr Hobbs*, who appeared on behalf of the applicant submitted, correctly so, that the respondents' defence that the applicant failed to follow correct procedures cannot be sustained because full particulars of procedures to be followed were not disclosed in the answering affidavit despite a request for the Departmental Practice Manual having been made by the applicant. The respondents admit having received a letter requesting the claim form to be completed as well as that it was due to tardiness and neglect of the letters of request that led to failure to furnish a response. It is also my view that silence on the part of the respondents to a demand for an appeal against refusal of the requests is not being disputed by the respondents. Nevertheless, it was submitted in argument by *Mr Jozana*, who appeared on behalf of the respondents, that in terms of s 78 of the PAIA the bringing of the application should have been preceded by a hearing of the internal appeal.

[11] The provisions of s 78(1) and (2) of the PAIA read:

“(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after the requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body

provided for in section 74.

(2) A requester-

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);
- (c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-

- (i) to refuse a request for access;

or

- (ii) taken in terms of section 22, 26 (1) or 29 (3); or

- (d) aggrieved by a decision of the head of private body-

- (i) to refuse a request for access; or

- (ii) taken in terms of section 54, 57 (1) or 60,

...may, by way of an application, within 30 days apply to a

court for appropriate relief in terms of section 82.”

[12] It appears from the provisions of s 78 that the manner in which the appeal is lodged is set out in s 75, which directs that the appeal must be lodged in the prescribed form and, in that form, an applicant must identify the subject of the appeal and state the reasons for the appeal.

[13] It is contended on behalf of the respondents that the applicant did not follow any of the appeal procedures laid down in s 75(2) of the PAIA, with reliance being placed on the *dictum* of the Supreme Court of Appeal case of *Nichol v Registrar of Pension Fund* [2006] 1 All SA 589 (SCA) at para. [16] which goes:

“Exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided“

[14] It was also submitted on behalf of the respondents that the provisions of s 7(2) of PAJA reinforces s 78 of PAIA save that in terms of s 7(2)(c) applicant may be exempted from the obligation to exhaust internal appeal remedy in the interest of justice.

[15] In this case the applicant seeks, amongst other relief, an exemption from following the internal appeal procedure in term of s 75 of the PAIA not because he did not take steps to subject the passive refusal of the respondents to an internal appeal process but because he was refused engagement in that process. On the proved facts, the applicant was totally refused a hearing by the respondent with the result that he resorted to this application. The respondents have testified that they could not respond to the applicant's requests due to pressure under which the hospital operates, the hospital is short-staffed, the only 8 doctors available in the hospital could not cope with a deluge of requests for medical information and, consequently, the medical superintendent could only ignore the requests due to an alleged frustration. This attests to a systemic failure in the Health Department and an admission by the respondents of failing to execute their statutory duties as envisaged in s 6(2)(g) of the PAJA, which reads:

“the action concerned, consists of a failure to take a decision.”

[16] It was held in the case of *Vumazonke v MEC for Social Development, Eastern Cape and Three Other Similar Cases* 2005 (6) SA 229 (SE) that a failure by an organ of State to take a decision is a breach of constitutional obligation. Plasket J puts the matter in the following terms in

Vumazonke at para. [12]

“...the Constitutional Court referred to the values that the public administration is required to adhere to and promote. They are to be found in s 195 of the Constitution. Its provisions that are relevant to this matter are: s 195(1)(a), which requires that a ‘high standard of professional ethics must be promoted and maintained’; s 195(1)(b), which requires that ‘(e)fficient, economic and effective use of resources must be promoted’; s 195(1)(e), which requires that the needs of people ‘must be responded to’; s 195(1)(f), which requires that public administration ‘must be accountable’; and s 195(1)(g), which requires that ‘(t)ransparency must be fostered by providing the public with timely, accessible and accurate information.’”

[17] In this case the respondents have failed to give reality to the applicant’s rights of access to medical information and in terms of s 14 of the PAIA and of appeal in terms of ss 74 and 75 of the PAIA. It is not that the applicant did not lodge an appeal at all because he did so in terms of exhibit “MM 9”, which complied substantially with the requirements of s 75 of PAIA. It cannot be doubted that had the applicant been given the appropriate forms to complete and lodge towards the appeal, he would have

been able to comply fully with s 75. With all avenues for constitutional expression being denied by the respondent, the applicant was correct in bringing an application seeking a *mandamus* to force the respondents to comply with their duties. In my opinion the relief sought in the notice of motion was well considered by the applicant in the light of the bar which is created by the provisions of s 78 of the PAIA.

[18] It is not correct that the applicant by-passed the internal appeal process. The truth of the matter is that the applicant was denied his right to engage into the appeal process. There was a need for the applicant to ask for a *mandamus* in this Court, as it did so in terms of s 82(b) of the PAIA, to force the respondents to execute their obligations in terms of s 77(3) and (7) of the same Act. Such conduct is reasonable. In the circumstances this court would be correct in ordering the respondents to carry out their statutory duties even though there has been no direct refusal on their part to do so- see: *Vumazonke, supra*, at para. [36].

[19] Of the two parties before this Court, the respondents conducted themselves very badly towards the applicant's requests. For this they cannot escape the costs. But when dealing with public offices, especially those of the government, one should not lose sight of the fact that in as much as the

residual blame for an administrative bundle lies at door steps of the Minister concerned, it is the work of administrative officers who are responsible for most of the bundling that we see. In this case the reason for a lack of compliance on the part of the Minister cannot be properly described as being *mala fide* in my view. The same can be said about the second respondent. This factor must be reflected in the order that will be made.

[20] In the result the following order shall issue:

- 1. Paragraphs 1.1; 1.1.1 and 1.1.2 of the *Rule Nisi* dated 11 August 2011 be and are hereby discharged.**
- 2. The respondents be and are hereby ordered to pay the costs of this application on party and party scale jointly and severally, the one paying and the other being absolved from liability.**

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv. J. Hobbs
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