

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

Case no: 2281/2023

In the matter between:

ZUKISANI SITHETHO

Applicant

and

THE INFORMATION OFFICER FOR THE
Respondent
DEPARTMENT OF HIGHER EDUCATION AND
TRAINING, EASTERN CAPE, KSD TVET COLLEGE
CICIRA CAMPUS

EX TEMPORE JUDGMENT

KUNJU AJ:

[1] The applicant applies for the following relief:

1.1 That the applicant be condoned for his failure to comply with any law of general application and/or other provision of the PAIA relevant to the current proceedings;

1.2 That the respondent should consider and decide on the applicant's application for the access to the contract of employment between the parties and the record of the hearing proceedings of the 16th February 2022 within 30 days from the date of this order;

1.3 Reviewing, correcting and/or setting aside the respondent's decision of failing to pronounce on the applicant's application as set out in paragraph 2 above; and

1.4 Directing that where the respondent has considered and decided the application in issue favorably, an order be issued directing the respondent to furnish the applicant, through his attorneys, within thirty (30) days of such a decision and set out therein the following information:-

i. a copy of the employment contract between the parties and the record of proceedings for the hearing on the 16 February 2022; the reasons why the matter has not been set-down again or finalized.

ii. Granting the applicant such further and/or alternative relief.

1.5 If, for any legitimate reasons, the respondent is of the view that applicant's application cannot be considered favourably, then in that event only and not otherwise, an order directing the respondents to provide decision to that effect as set-out therein with such adequate written reasons as would be necessary or required in law and:-

1.6 Directing respondent to pay the costs of this application on a scale as between attorney and client."

[2] The applicant is the employee of the respondent who is on suspension due to certain allegations against him.

[3] The respondent is described as setout above in the heading and in the founding affidavit the citation is as follows:

"4.3.1 The respondent is the information officer for the Department of Higher Education, within the Republic of South Africa who is employed by the Department of Higher Education. This is the functionary, designated in terms of section 56 of Act 2 of 2000, upon whom it is incumbent to decide on the

request for access to information by the Department on behalf of its client, in terms of PAIA, should be granted or refused; and

4.3.2 The respondent is exercising powers and functions in terms of section 50 to 56 of the promotion of access to information Act no2 of 2000;

4.3.3 The respondent as the employee of the department or their official have in their possession and control the information relating to anyone requesting it which information was sought by my attorneys of record.

4.3.4 The respondent has the capacity to consider and decide my application for access to the information sought, comply and furnish me, through my attorney of record; and

4.3.5 The respondent and/or his officials are, for purposes of section 1(1)(c) of the promotion of Access to information Act No.: 2 of 2000(hereinafter referred to as "PAIA") information officers who are duty bound in terms of the law to disclose, on request, such information as may be sought as is necessary in the circumstances, to members of the public or any other entity; and

4.3.6 Is and/or his officials are legally obliged in terms of Section 56 of the PAIA to share, on request, such information with any other person or establishment as is necessary for any legitimate purpose, within the ordinary course of their employment, scope of their duties and in furtherance of business activities of the employer where such request and/ or discloser is in the interest of the person who is the subject matter of the information so sought; and

4.3.7 Where the respondent has and/ or his officials have considered and decided the application for access to the records in question and are therefore refusing the application, the respondent and/or his officials are required to, in terms of Section 56(2) &(3) of PAIA, notify me through those represent me, of such decision if taken;

4.3.8 In terms of Section 56 (2)(3) of PAIA, the respondent is and/or his officials are obliged to furnish a requester with written reasons underpinned an adverse decision if so taken and they are further legally obligated to advise the requester of his rights to lodge an internal appeal as well as the procedure and time frames pertaining thereto; and

4.3.9 In compliance with rule 3(1) of the rules of procedure for the application to court, in terms of the promotion of access to information Act application papers on the respondent will be served at No 123 Francis Baard Street, Pretoria, 001 c/o The Acting head K.S.D TVET College, R61 Road, Cicira Site/Campus Mthatha.”

[4] It is not clear to me why is the Information Officer for the department of Higher Education is a party to these proceedings, because:

[4.1] Section 3 (1) of Further Education and Training Act 16 of 2006 (the Act) provides:

- i. “The Member of the Executive Council may, by notice in the Gazette and from money appropriated for this purpose by the provincial legislature, establish a public college;*
- ii. Every public college is a juristic person”; and*

[4.2] Section 5 of the Act deals with consequences of declaration of public colleges. In section 5(1)(b) the Act provides:

- i. “From the date determined in terms of section 4(2)(a)*
 - a) the assets, liabilities, rights and obligations of the institution vest in the public college”*

[5] Also, relevant in these proceedings are the provisions of section 45(1) of the Act. The section provides:

“A college must make information available for inspection by any person in so far as such information is required for the exercise and protection of the rights of such person”.

[6] A point of improper citation and non-joinder of the KSD TVET College is taken by the respondent. Not only that, it also alleges that the Promotion of Access to Information Act is not applicable in this matter because the information sought was demanded after the institution of criminal and civil proceedings or disciplinary procedures. Correctly, sub-paragraph 27.2 of the answering affidavit of the respondent mentions a pending criminal case as a common area between the parties.

[7] These two points are likely to be dispositive of the application and for that reason I address them hereunder as preliminary points of law.

(a) The citation of the respondent

[8] There can be no denying that KSD TVET College is a public College that was established in terms of section 3 and declared as such in terms of Section 4 of the Act.

[9] Section 5 of the Act reinforces what is contained in Section 3(2) of the Act, i.e. that every public college is a juristic person.

[10] All the above taken into consideration, makes it difficult to understand without more why is the Information Officer of another entity is liable for the action of a totally different entity, especially in light of the provisions of section 45(1) of the Act as set out above.

[11] Paragraph 16 at page 96 of the papers has compounded and complicated the problem of the applicant though on the other side, puts credence to the contention of the respondent. The pertinent part of this paragraph records:

“ The argument raised is that the citation is unclear and or ambiguous, fails to appreciate the fact that service of papers was effected on the campus manager who is the Information Officer in that institution for the purposes of access to the requested records”

[12] Section 1 of the Promotion of Access to Information Act no 2 of 2000 (PAIA) defines Information Officer as:

*“(a) . . .
 (b) . . .
 (c) in the case of any other public body, means the chief executive officer, or any equivalent officer, of that public body or the person who is acting as such.”*

[13] On the basis of the papers placed before me I can find no basis for the citation of the Information Officer for the Department of Higher Education. I uphold the point of non-joinder of the College and misjoinder of the Information Officer for the Department of Higher Education.

b) The pending criminal and disciplinary proceedings

[14] Section 7 of PAIA provides:

*“7(1) This Act does not apply to a record of a public body or a private body if-
 (a) that record is requested for the purpose of criminal or civil proceedings;
 (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
 (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.”*

[15] Sub paragraphs 6.1 and 6.2 of the founding affidavit states unequivocally that the applicant is facing criminal charges and he is on bail. A Charge sheet and bail receipt are marked as annexures “zs1” and “zs2” respectively. In response to these

sub paragraphs, respondent joined hands with the applicant in paragraph 50 of its answering affidavit. There the respondent responded as follows:

“AD PARAGRAPHS 1,2,5,6,7,8,9,10 THEREOF

The contents of these paragraphs are noted”.

[16] The allegations relating to criminal charges are made common cause between the parties, both in the founding and answering affidavits.

[17] On the point of pending criminal proceedings, it is known that there is a pending criminal case involving the applicant and as such section 7(1)(a) of PAIA is also met in this case. For this reason it is impossible for the applicant to invoke the provisions of PAIA in circumstances where documents sought will be used during civil or criminal proceedings.

[18] The Constitutional Court in the case of **Competition Commission of South Africa vs Standard Bank of South Africa Limited 2020(4)BCLR 429CC** at in paragraphs 14-17 the court said:

*“[14] Chapter 4 of PAIA envisages various grounds upon which a public body may deny a request for access to information. Chapter 2 of PAIA is headed “General Application Provisions”. The most relevant of these provisions to this matter is section 7. It provides that PAIA **does not apply to information sought for the purpose of civil or criminal proceedings if the request for access is made after the commencement of these proceedings and access to that information is provided for in another law.** This is the position irrespective of whether the information is held by a public or private body.*

*[15] It is significant that section 7 of PAIA does not provide a ground upon which a public body may restrict access to requested information under PAIA. Conversely, it expressly limits PAIA’s scope of application from extending to information requested for the purpose **of court proceedings which have already commenced.** It is also important to note that rules 14 and 15 of the*

Commission Rules did not (at the relevant time) contain similar provisions preventing their application where the information sought relates to litigation.

[16] Section 7 of PAIA reflects the rationale that the right of access to information, as given effect to by PAIA, should not be used to circumvent the particular rules of procedure in litigation – litigants should not be afforded a dual system of access to information. In PFE International SCA, it was held that permitting “a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings”. The Supreme Court of Appeal explained that:

“This anomaly, that [a litigant] may be entitled to information the day before the commencement of proceedings but not the day thereafter, must be seen as a necessary consequence of the intention, on the part of the Legislature, to protect the process of the court. Once proceedings are instituted then the parties should be governed by the applicable rules of court.”

[17] This Court in PFE International endorsed the approach of the Supreme Court of Appeal on the basis of the plain meaning of the language of section 7 of PAIA, and in light of the presumed legislative intent of preventing a dual system of access to documents and information that would be disruptive to court proceedings. Notwithstanding this, the Court recognised that section 7 must be interpreted restrictively:

“When construing section 7(1) it must be borne in mind that the purpose of PAIA is to give effect to the right of access to information. On the contrary, section 7 excludes the application of PAIA. A restrictive interpretation of the section is warranted so as to limit the exclusion to circumstances contemplated in the section only. A restrictive meaning of section 7(1) will thus ensure greater protection of the right.”

[19] There is no dispute that both the criminal and civil proceedings pre-date this application. There is no dispute that section 45(1) of the Act allows the applicant to access the required information. If there is no dispensation available during disciplinary hearing to obtain the required documents, I see no reason why section 45(1) cannot be invoked. It is not my finding that there is none. It is also not the case of the applicant that there is no dispensation available to it.

[20] In these circumstances I do find that in this application there are pending criminal proceedings. It is not the case of the applicant that the pending civil or disciplinary proceedings do not afford him a remedy to get the required documents. As said above, section 45 of the Act instead gives the applicant a right to demand the required information. I see no reason why the applicant cannot request the information during the disciplinary proceedings relying on section 45 as opposed to PAIA.

[21] Taking into account the common cause facts set out in the founding and the answering affidavits, it would seem that the applicable test in motion proceedings as set out in the case of ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** finds application. There the court held:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”

[22] There are new allegations I spotted out in the replying affidavit which seeks to introduce a new matter. Such a new matter may prejudice the respondent. Though not fully explained as one would expect in motion proceedings, it tersely states that the criminal proceedings were dismissed. That is an unusual terminology in criminal proceedings. However, that appears to be disputed in the heads of argument filed by

the respondent. Mr Nkele impressed that the applicant should stand and fall by his founding affidavit. He also submitted that the disciplinary action is still pending.

[23] In light of the common cause facts, the point taken under section 7 of the Act, the improper citation of the respondent and the reasons set out above in this judgment, this application stands to be dismissed.

[24] On costs, it would seem that the applicant sought to champion and vindicate his constitutional right against the organ of the State. Access to information is a right guaranteed in the constitution. Such a cost order would discourage people from asserting their rights such as the one implicated herein. Following **Biowatch** principles (**Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC)**), I am not prepared to order the respondent to pay costs despite the strong argument on costs by Mr Nkele.

[25] I have taken into account the nature of the relationship between the applicant and the college. It is an employee and employer relationship. I would not want to make it more hostile by awarding costs against the applicant.

[26] In the circumstances, the following order shall issue:

[26.1] The application is dismissed.

[26.2] There shall be no order as to costs.

[26.3] The interlocutory application that was postponed on Tuesday, 21 May 2024 to 23 May 2024 is hereby removed from the roll with no order as to costs.

V KUNJU
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr Wakaba

Instructed by: M Wakaba Attorneys
No 158 1st Floor, Cnr York Road and Elliot Street, MTHATHA, 5099

For the respondent: Mr Nkele
Instructed by: T A Nkele & Sons
Ste204 Floor 1 City Centre, York Rd, Mthatha, 5100

Heard: 23 May 2024.

Delivered: 24 May 2024.