

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022-049174

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

18 February 2026

DATE

SIGNATURE

In the matter between:

TM BUSINESS SOLUTIONS (PTY) LTD

Applicant

And

**THE INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA LIMITED**

First Respondent

TSHOKOLO PETRUS NCHOCHO

Second Respondent

JUDGMENT

MALINDI, J

Introduction

[1] On 18 October 2024, I granted an order as follows:

- 1.1. Condonation for the late filing of the respondent's answering affidavit is granted;
 - 1.2. The review application is dismissed with costs.
- [2] These are the reasons therefore.

Condonation

- [3] The respondents seek condonation for the late filing of their answering affidavit. The application is opposed.
- [4] The application is deposed to by the attorney of the Industrial Development Corporation (the IDC), Ms Mphala.
- [5] The answering affidavit was due on 22 December 2022 but was only filed on 13 February 2023. Some one and a half months late.
- [6] The cause of the delay was given as the unavailability of persons necessary for consultation with counsel appointed by the IDC, the first respondent. In January 2023, counsel got involved in a trial from 16 to 19 January 2023.
- [7] After 20 January 2023 the applicant for condonation states that more employees needed to be consulted with. The TM Business Solutions, the applicants in the main application challenge the reasons stated by the first respondent in the main application as inadequate. However, it must be noted that state owned entities (SOE's) such as the IDC, are notoriously known for delays in litigation caused by unavailability of necessary personnel for consultation with attorneys and counsel. Almost always the reason given is that they needed to be granted the mandates to do so by their superiors. I am mentioning this not to condone the conduct but to indicate that the Court should not likely ignore the intricacies and the bureaucratic difficulties that lawyers usually experience when they seek to consult with employees of SOE's or even government departments.
- [8] The TM Business Solutions lawyers were requested for the indulgence in filing the answering affidavit, but it was not granted.
- [9] The papers were ready on or about 6 February 2023 and were filed and delivered on 13 February 2023.
- [10] The applicant for condonation, that is, the respondent in the main application contends that no prejudice to TM Business Solutions was caused to whom an

explanation was necessary. I agree that no real prejudice was caused by the delay in filing the answering affidavit. In fact, this was to facilitate the speedy resolution of the application itself as TM Business Solutions needed answers thereto so that the status of pending arbitration proceedings could be resolved as quickly as possible.

- [11] For the reasons that there is some explanation given for the delay in filing the answering affidavit and that no real prejudice was caused to TM Business Solutions, the application for condonation is granted.
- [12] As to the merits of the application, that is, the main application. The reasons for the order are the following.
- [13] The applicant, TM Business Solutions brought an application in terms of Section 78 (2) read with Section 82 (2), of the Promotion of Access to Information Act of 2000 to review the first and second respondent's failure to grant it access to the requested information or record.

The Merits

- [14] The first respondent, the IDC and second respondent responded by raising certain defences to the claim, in particular that after a diligent search for the requested information such information was found not to exist.
- [15] The primary relief sought by TM Business Solutions is that the IDC be directed to disclose and supply it with a copy of the record requested in its request dated 28 July 2022 within 15 days of the court order. It is submitted that the relief sought to be granted should be upon the finding by the Court that the IDC's deemed refusal to provide the record is unlawful and in conflict with PAIA. Alternatively, that the IDC's assertion that the record does not exist is untruthful.
- [16] The record sought is for purposes of establishing that an SLA, that is, service level agreement exists between the parties. If the SLA is found and supplied to TMBS it would be able to show an arbitration agreement clause which is relevant to pursue arbitration proceedings under the auspices of AFSA, the Arbitration Foundation of Southern Africa.

Background

- [17] On 3 August 2022 and 23 August 2022, the IDC's attorney wrote letters to the parties stating that according to the IDC's records there is no copy of a signed SLA concluded between the parties and that there was no SLA entered into between the parties respectively.
- [18] TMBS submits that IDC has failed to discharge its onus to prove that the record does not exist by its failure to comply with Section 23 of PAIA. The section requires the IDC to have made this case by affidavit of the Information Officer and not by the attorney's letters referred to above.

Conclusion

- [19] That the IDC made this contention by letter of its attorney's and by answering affidavit in these proceedings does not detract from the fact that whether a record exists is a factual inquiry and the outcome of a failed search having to be confirmed in terms of Section 23 of PAIA. In my view, it will serve no purpose for the IDC to repeat what is contained in its answering affidavit in an affidavit in terms of Section 23 of PAIA. Neither party provided any authority on point on the issue whether the failure to comply to Section 23 by a party requested to provide a record and claiming that the record does not exist may be cured in the answering affidavit. I have come independently across two or three authorities dealing with the requirements of Section 23 and have found them not entirely helpful. I therefore make a finding that the requested record does not exist. There is no need under the circumstances to traverse IDC's other grounds of opposition.
- [20] The IDC contends that there was no SLA entered into between itself and TMBS pursuant to TMBS's appointment to provide business support services to MYA Marketing. When Mr Lucky Dladla agreed at the prehearing meeting of AFSA to locate an SLA between the parties in a dispute referred by TMBS. He did so with the assumption that an SLA existed. However, he was told by Ms Louise Stander that there was no SLA arising out of TMBS's engagement in the above agreement. Despite this, a diligent search was made, and it proved futile because in fact none existed.

- [21] I am of the view therefore that TMBS is unnecessarily technical when it insists that because Section 23 of PAIA was not complied with by IDC in asserting that the record of the SLA does not exist. The Court should find that it has failed to discharge its onus and by implication to find that the averments made in its answering affidavit are untruthful and that therefore the Court should make a declaration that the SLA existed. This will be tantamount to declaring that a non-existent document does exist. A Court cannot make an order that will not be effective. It will be so because on the evidence before Court the SLA contended for does not exist.
- [22] For what it is worth the parties are advised to enter into a separate arbitration agreement in order to resolve their dispute before AFSA. In my experience it is not necessary that an arbitration clause should be contained in the contract itself entered into between the parties as such an arbitration agreement may be entered into outside of such an agreement if not contained therein or for some other reason. The Court is not trying to give legal advice to the parties, but certainly their legal representatives would explore this possibility so that the matter pending before AFSA may be resolved without the intricacies of litigation.
- [23] In the circumstances the order made on 18 October 2024 is repeated herein. The order reads as follows:
1. Condonation for the late filing of the respondent's answering affidavit is granted.
 2. The review application is dismissed with costs.


G MALINDI

Judge of the High Court of South Africa,
Gauteng Local Division, Johannesburg

Appearances

For the Applicant:

Adv P Sekati

Instructed by:

Sangela Attorneys

For the 1st & 2nd Respondent's: Adv L Matsiela
Instructed by: Poswa Incorporated

Date of Hearing: 11 March 2024
Date of order: 18 October 2024
Date of *ex tempore* judgment: 28 March 2025
Date of written judgment: 18 February 2026