



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

CASE NO: 2023-066724

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

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SIGNATURE

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DATE

In the matter between:

VELAPHI NKOSI

Applicant

And

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Respondent

JUDGMENT

SENYATSI J

Introduction.

- [1] This is an opposed application brought in terms of the Promotion of Access to Information Act, No: 2 of 2000 (“PAIA”) in terms of which the applicant requests access to Job evaluation and re-grading records.

Background

- [2] The South African Municipal Workers Union (“SAMWU”), requested without success the records from the respondent on behalf of the applicant Mr Velaphi Nkosi, relating to a job evaluation process. SAMWU is a trade union established in terms of the laws of the Republic and is a juristic person in terms of its constitution.
- [3] The respondent is City of Johannesburg Metropolitan Municipality (“the employer”), a municipality and local government with full legal capacity in terms of the laws of the Republic.
- [4] It is common cause that on 13 March 2018, the employer promoted and /or appointed the applicant’s colleague, Mr. Lengwasa to the position of Assistant Director Labour Relations. Before his promotion, Mr Lengwasa was employed as a Labour Relations Specialist. On 13 November 2018, Ms Jiyane was also appointed and/or promoted to the position of Assistant Director Labour Relations.

[5] Following the promotions, the applicant launched a grievance procedure on 2 September 2019 with the respondent relating to the process that was followed for the promotion of his two colleagues. He contended that the promotions were unprocedural and irregular. The grievance was considered and thereafter dismissed by the respondent. Dissatisfied with the dismissal, the applicant referred an alleged unfair labour practice dispute to the South African Local Government Bargaining Council (“Council”) on 8 April 2021. The dispute was set down for 31 May 2021 for conciliation and remained unresolved. It was also referred to arbitration on 17 June 2021. On 9 February 2022, the dispute was heard and argued before the arbitration. On 21 February 2022 the Commissioner made findings and held that only a court of law can declare the alleged unprocedural and irregular promotions unlawful.

[6] Following the award by the Commissioner, the applicant launched a PAIA request, requesting to be furnished with the record of the Job Evaluation process that was followed relating to the disputed promotions.

[7] The respondent, after asking for several extensions to provide the record to the applicant, failed to do so. Whilst these steps were taken the litigation to compel the respondent to grant access in accordance with PAIA commenced.

[8] Mr Gwebu on behalf of the applicant contended that the access to the required documents was not done in the course of litigation as no civil or criminal proceedings are pending.

[9] Mr Omar on behalf of the respondent contended that access to the required documents was done in the course of civil litigation given the history of the case between the applicant and the respondent pertaining to the promotion of two of his colleagues.

Issue for determination.

[10] The issue for determination is whether the request for access to the documents required by the applicant is done in circumstances where the respondent is not obliged to provide the information because of the exclusion of access to information as contemplated by section 7 of PAIA.

The legal principles

[11] The Constitution of the Republic of South Africa guarantees the right of access to all information held by the private bodies in terms of section 32 of the Constitution, which reads thus:

"Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that

information is required for the exercise or protection of any of their rights."

[12] The parliament brought into existence the promulgation of PAIA to give effect to section 32 of the Constitution. The applicable provisions of PAIA regulate requests for information from public bodies and private companies.

[13] PAIA provides for the right to access to information and section 11 states thus:-

“11 Right of access to records of public bodies

(1) A requester must be given access to a record of a public body if

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by

(a) any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access”.

It is therefore apparent that the information is requested as of right subject to other provisions of PAIA itself.

[14] There is a limitation to the information that the requester has the right to access. Therefore, section 7 of PAIA contemplates instances where PAIA will not apply and provides as follows:

“7. Act not applying to records requested for criminal or civil proceedings after commencement of proceedings-

(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 request that 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 any other law.

(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.”

[15] Furthermore, PAIA also provides for instances where though the information is protected, it may under certain circumstances, become mandatory to provide to the requester such information. Accordingly, section 46 of PAIA states instances were if it is in the public interest, information must be provided and provides as follows:-

“46 Mandatory disclosure in public interest

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body

contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44(1) or (2) or 45, if

(a) the disclosure of the record would reveal evidence of

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”

[16] Section 50 of PAIA also regulates the right of access to information from private bodies and provides as follows:-

“50 Right of access to records of private bodies

(1) A requester must be given access to any record of a private body if

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a) or (b) (i) of the definition of 'public body' in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it

must be acting in the public interest.

(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made. ”

[17] Our courts have pronounced on the aims of section 7 of PAIA. In *Unitas Hospital v Van Wyk and Another*¹ Brand JA on behalf of the full bench held as follows where a pre-litigation discovery was a controversy:

*“ [21]I find myself in respectful disagreement with this sentiment stop I do not believe that open and democratic societies would encourage what is commonly referred to as fishing expeditions, which could well arise if section 50 is used to facilitate pre action discovery as a general practice(see *Inkatha Freedom Party and Another v Truth and Reconciliation Commission and Others*²). Nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any case is launched. The deference shown by Section 7 to the rules of discovery is coma in my view, not without reason. These rules have served us well for many years. They have their own built in measures of control to promote fairness and to avoid abuse. Documents are discoverable only if they are relevant to the litigation, while relevance is determined by the issues on the pleadings. The difference shown to discover rules is clear indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery... as a matter of course.”*

¹ 2006 (A) SA 436(SCA) at 21

² 2000(3) SA 119 (C) at 137C

[18] In the instant case, the applicant has been involved in litigation with the respondent and requested the documents after the arbitrator ruled that the declaratory order on the alleged irregularity of the applicant's colleagues could only be made by Court. No steps other than the requested documents were taken by the applicant to make the said declaratory order by the Court ? . Mr Gwebu submitted that since there is no pending litigation, the provisions of section 7 of PAIA do not find any application. I disagree with his submission.

[19] Section 7 clearly covers instances where the documents are sought prior to litigation. This is so given that when the requester makes an application, he or she must state the right that he or she wishes to enforce. In his request for the job evaluation records, the applicant mentioned four items but is silent on the reasons motivating for such a request. This Court has no difficulty in seeing through the veiled requested document that it is for the purpose of the ongoing litigation. There is no other reason to request the job re-evaluation documents.

[20] Even if my conclusion may be incorrect, I am fortified by the decision of this Division in *Maamach Pty Ltd v Air Traffic Navigation Service SOC Ltd*³, where my brother Manoim J held as follows on pre-litigation discovery:-

³ (21/11114)[2022] ZAGPJHC 283(3 May 2022) at paras 36 and 37

“[36] Textually, the exclusion only applies after the “commencement” of proceedings. However, the courts have held that the exclusion can apply as well to attempts to obtain “pre-action discovery.”

[37] In *Unitas Hospital v Van Wyk and Another* [2006] ZASCA 34; 2006 (4) SA 436 (SCA) Brand J explained in discussing the purpose of section 7 of PAIA that:

The deference shown to discovery rules is a clear indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course. I [22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule;

[38] It must be noted that Brand JA was dealing with section 50, a request for information from a private body where the legal threshold to obtain access to information is higher than for a state body under section 11. Nevertheless section 7(1)'s litigation exclusion applies equally to the records of both private and public bodies. There is therefore no reason not to follow this approach in the present matter.”

[21] Accordingly, I am not persuaded that the applicant has succeeded in proving his entitlement to the documents and his application must therefore fail.

Order

[22] The following order is made:-

(a) The application is dismissed with costs.

SENYATSI M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 11 March 2024.

Appearances:

For the Applicant: Mr E Gwebu
Instructed by: Madlela Gwebu Mashamba Inc

For the Respondent: Adv A B Omar
Instructed by: Salijee Govender Van der Merwe Inc

Date Judgment Reserved: 12 February 2024
Date of Judgment: 11 March 2024