REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 16572/2018

6/4/18

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

IN THE MATTER BETWEEN:

SOLIDARITY	APPLICANT
and	
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	FIRST RESPONDENT
NATIONAL DEPUTY INFORMATION OFFICER OF THE SOUTH AFRICAN POLICE SERVICE	SECOND RESPONDENT
MINISTER OF POLICE N.O	THIRD RESPONDENT
SOUTH AFRICAN POLICE SERVICE	FOURTH RESPONDENT

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The applicant approached court on an urgent basis seeking an order that it be furnished with certain information and/or records, relating to the Non-Statutory Forces ("NSF") Project in the South African Police Service ("SAPS"). The information and/or records sought pertain to the planned promotion and/ or re-ranking of NSF members in SAPS. The applicant also seeks an order interdicting the respondents and/or any member of SAPS from proceeding with and/or implementing any further promotion/re-ranking (in the so-called NSF re-ranking process) until such time the sought information/ records are made available to the applicant.

[2] This application is brought on behalf of the applicant's members who are SAPS members and are said to be adversely affected by the NSF-project. It is alleged that the NSF-project has been rolled out without any information provided to the applicant and its members (this is denied by the respondents). The applicant launched the application in the face of the respondents' lack and/or refusal to make available to the applicant the information and/or records requested in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA").

[3] The first and the fourth respondents ("the respondents") are resisting the application. Besides their opposition on the merits, they have raised two points *in limine* on urgency and lack of jurisdiction in that PAIA does not apply in the circumstances of this matter *alternatively* that the application has been launched prematurely. On the merits the

respondents concede that the NSF-project has been launched but contend that the promotion and/or re-ranking of the NSF members are still in the planning and/or developmental phase hence their denial to provide the applicant with the information and/or records requested. Before I deal with the points *in limine* let me set out the factual background as gleaned from the evidence.

FACTUAL MATRIX

[4] The NSF-project was established to redress inequalities of the past by integrating NSF members (former members of the Azanian Peoples' Liberation Army and Umkhonto we Sizwe) into recognised existing structures of service in SAPS, the South African National Defence Force and the National Intelligence Agency. The experience and skills NSF members acquired over the years, before integration, were to be taken into account at integration in order that these members be ranked and placed in correct positions within the respective services. This would have enabled them to be ranked similar to the statutory members with the same experience and skills (who were already within the existing services) and to receive similar benefits like pension, leave, correct ranking, recognition of service and skills development.

[5] When NSF members were integrated in SAPS, they were not credited with the previously acquired experience and skills. They were, as such, not properly ranked instead it resulted in them being placed in marginal roles like security guard posts. More than twenty years later (integration occurred in 1994) the situation has not been rectified

despite repeated public utterances (in parliament and in the media) by the various Ministers of Police and Deputy Ministers of Police, that, the matter is being attended to. The NSF members in SAPS have also put in grievances and many promises were made, to no avail.

[6] As far back as 2013, after a plea was made by the NSF members to the then Minister of Police to attend to their long standing issues, a task team was established to look into their grievance. In their own words the respondents state that a high level task team was established by the Minister of Police to be overseen by the Deputy Minister of Police. The task team is said to comprise of senior human resource officials within SAPS and representatives from the Pensions Administrations Agency. But, to date hereof, the respondents are still grabbling with the implementation of the project without any light in sight.

[7] From the respondents' version it appears as if the task team has, to date hereof, done nothing except to compile a data base and collate the data *re* ranking of qualifying NSF members within SAPS, and former NSF members (who were previously integrated in SAPS) and their beneficiaries. Only 950 NSF members have been identified so far. No re-ranking and/or promotions have been implemented because the data base is not yet complete. Meetings are held regularly with NSF members (reserved only for NSF members) where it is said feedback is given, but nothing concrete emanates from these meetings.

URGENCY

[8] The Applicant's submission is that the urgency in this matter be assessed in the light of the factual background of the events that led to the launch of the application. I am in agreement with the applicant's submission for the following reasons.

[9] The delay in finalising the NSF-project in SAPS has become untenable both for NSF members and for other members of SAPS who require knowing about the position of the project. The project has taken too long: some NSF members have already left the respondents' employ and some have passed on. The delay has caused a lot of uncertainties and suspicion in the NSF members and other ordinary members of SAPS. These reasons, if nothing else makes the application urgent and should be attended to as such.

LACK OF JURISDICTION

[10] The respondents' argument is that this court lacks the jurisdiction to hear this application on the basis that the provisions of PAIA do not apply in the circumstances of this application. According to the respondents, the applicant being a trade union purporting to act for its members in the context of organisational rights, was obliged to utilise the relevant provisions of the Labour Relations Act 66 of 1995 "(the Labour Relations Act") for the relief it seeks.

[11] The applicant's argument, on the other hand, is that the information requested is not required for purposes of collective bargaining or required in the context of organisational rights. As a result, it contends that it was not necessary for the applicant to utilise the provisions of the Labour Relations Act as suggested by the respondents. I agree.

[12] Chapter III of the Labour Relations Act provides for the collective bargaining of trade unions. The collective bargaining process comprises of organisational rights and collective agreements. In my understanding, organisational rights means the rights a registered trade union is entitled to in organising itself in the workplace. Organisational rights, as such, refers to the rights of a trade union to recruit members, to communicate with members, to meet members in dealing with the employer, to hold meetings of employees on the premises, to establish a field branch in a workplace and rights to get leave for trade union activities.

[13] The right of disclosure of information in terms of the Labour Relations Act is dealt with in section 16 thereof. In accordance with section 16 (2) of the Labour Relations Act an employer must, subject to subsection (5), disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14 (4). Section 14 (4) stipulates the functions which a trade union representative has the right to perform in the workplace.

[14] It is quite clear from this exposition that the information requested by the applicant in this instance does not have anything to do with collective bargaining or organisational rights and/or information that will allow a trade union representative to perform functions referred to in section 14 (4) of the Labour Relations Act. The information requested is specific and involves promotions and/or re-ranking of NSF members in SAPS. The provisions of the Labour Relations Act are thus not applicable. The applicant correctly utilised PAIA.

APPLICATION PREMATURE

[15] The submission by the respondents is that in approaching this court, the applicant has bypassed the provisions and timelines provided by section 78 of PAIA, which is aimed at providing the respondents with an adequate opportunity to address the case made by the applicant. The application is accordingly premature as the applicant has other legal remedies which it failed to pursue, in the ordinary course, so it is argued. I understand this submission to mean that the applicant failed to exhaust all the internal processes as envisaged in section 78 of PAIA.

[16] Section 78 of PAIA provides as follows:

> "78. **Applications regarding decisions of the information officers or relevant authorities of public bodies or heads of private bodies**
>
> (1) A requestor or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision

of the information officer of a public body [any department of state or administration in the national or provincial sphere of government . . .] provided for in section 74.

(2) A requestor –

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(i) To refuse a request for access; or

(ii) . . .

(b) . . .

may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82."

[17] On the facts before me, it is evident that on 30 August 2017, the applicant (on behalf of its members) brought an application in terms of PAIA, demanding access to detailed information and/or records of the planned promotion of and/or re-ranking of NSF members in SAPS. On 3 November 2017 the application for access to the records was denied on the basis that the request may cause prejudice to the effective functioning of SAPS.

[18] On 22 November 2017, the applicant addressed a letter to the Acting National Commissioner ventilating its grievance that its application in terms of PAIA was refused. A follow up letter was sent on 23 November 2017 to the (newly appointed) National Commissioner of the South African Police Service ("the National Commissioner") with the same content as the letter addressed to the Acting National Commissioner. No response to the two letters was received. A further letter was addressed by the applicant to the

National Commissioner on 28 November 2017 reiterating that the applicant maintains its intention to place in dispute the lawfulness and fairness of any preferential treatment of NSF members measured against other career members of SAPS, including preferential promotion, should it occur.

[19] When it appeared that no response was forthcoming, on 18 December 2017, the applicant launched a Notice of Internal Appeal against the decision of the information officer taken on 3 November 2017. The applicant received a response thereto on 4 January 2018 dismissing the appeal.

[20] On 6 February 2018, the applicant addressed another letter to the National Commissioner requesting access to records of SAPS in line with PAIA. The letter not only reiterated the history of the request, but further sought to demand response and access to the information which is said remains denied to today. A final letter was addressed to the National Commissioner and the National Access Manager of the SAPS on 23 February 2018. This letter explicitly records that should no answer be forthcoming by Monday, 26 February 2018, the applicant would have no other recourse available than to launch an urgent application.

[21] Despite all the demands and requests, it came to the applicant's attention that yet another meeting was called for on 28 February 2018. The meeting was exclusively reserved for NSF members, to the exclusion of all other SAPS members. No response was received and the applicant opted to launch the application.

[22] On the basis of the aforesaid I find myself constrained to can agree with the respondents that this application is premature. The internal processes were exhausted before the launch of this application. The internal appeal having been dismissed on 4 January 2018, the applicant had no other avenue but to approach court in terms of section 78 of PAIA.

THE RELIEF SOUGHT BY THE APPLICANT

[23] I turn now to the merits. The applicant seeks the disclosure of a plethora of information and/or records as stated in its notice of motion. This information and/or records are in regard to the NSF-project said to be under implementation. The respondents are refusing to disclose the information and/or records mainly on the basis that the project has not been completed and is not about to be completed since consultative meetings still have to be held and applications for eligibility from NSF members and others are still being received and there is no closing date set.

[24] This submission does not appear cogent to me. The NSF-project has been in existence, as I have already said, for well over twenty years. It is just unbelievable that over this period of time SAPS has nothing to show that was done in respect of this project. A task team was established in 2013, we are now in 2018 and the respondents still insist that the project is incomplete. I am of the view that interest of justice requires that whatever available information there is should be disclosed in order to reveal what is holding up the project from progressing. The information and/or records requested do not require that the project be completed before the information could be disclosed. Since the projects appears to be work in progress, whatever available information, that form part of the project, if so requested, should be disclosed in order to foster a culture of transparency and accountability.

[25] The respondents' contention that the information required by the applicant in prayer 2.1 of the notice of motion is sensitive and cannot be divulged is not entirely correct. The respondents submit, properly so, that the information required about the personal details of NSF members cannot be divulged without the consent of the members. What however, the respondents forget to mention is whether the members involved were informed about the request.

[26] The provisions of PAIA prohibit the unreasonable disclosure of personal information about a third party unless the third party having been informed of such request consents to

the disclosure of that information.[1] This principle is also reiterated in the Manual of the South African Police Service in accordance with Section 14 of the Promotion of Access to Information Act 2 of 2000 ("the Manual").

[27] Clause 5.5 (4) (e) of the Manual stipulates the procedure that must be followed by the deputy information officer of SAPS on receipt of a request of information pertaining to a third party. The clause provides that when the requested record relates to a third party the deputy information officer must inform such third party of the request. The third party may in writing submit representations that access of such record not be granted to the requestor. On receipt of the representations from the third party, the deputy information officer will consider it and a decision will then be taken whether to disclose the requested information.

[28] It does not appear as if, in this instance, the NSF members were informed about the request made by the applicant for their personal information or whether they were requested to make representations. Absent such representations the respondents have no right to deny the applicant the requested information. As it is, the information can only be granted with the consent of third parties, that is, the NSF members involved. The respondents must first inform them. I would in the circumstances grant the order but

[1] Sections 34 (1) and (2); Sections 47 and 48 (1).

conditional upon the process required in clause 5.5 (4) (e) of the Manual being complied with. [2]

[29] To the extent that the respondents' information officer sought to claim that the information could not be released because it was sensitive, that response was unsubstantiated because the information officer had not complied with the requirements of PAIA or the respondents' own Manual. The response was as such unprocedural as it was made without the relevant input, either for or against disclosure of the information, of the third parties. [3]

[30] Prayer 2.1 also seeks disclosure of the total number of all SAPS employees that are recognised as NSF members. The total number must be disclosed. This must be inclusive of the total number of members who were and/or are part of the Division Crime Intelligence, if any.

[31] All the other information and/or records sought by the applicant are to be disclosed save that where such information and/or records are not available the applicant must be informed accordingly.

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[2] See National Union of Metal Workers of South Africa v City Power Johannesburg (Pty) Ltd & Another case number 36915/2013 Gauteng Local Division.
[3] See National Union of Metal Workers above para 15.

[32] The applicant has not specifically made out a case for an interdict in its founding papers. It, however, in its replying affidavit relies on the provisions of section 82 (c) of PAIA, which empowers the court to grant an interdict, for the interdict prayed for in its notice of motion. In amplification the application states further that it is well established that a final interdict can only be granted "in the absence of similar protection by any other ordinary remedy." The applicant's submission is that given the unique facts of this case, there is no other remedy that will ensure the same protection of the applicant's members.

[33] It is indeed so that in terms of section 82 (c) of PAIA the court has the power to grant an interdict, interim or specific relief or a declaratory order. However, such an order is not there for the taking. A case must be made out for such a relief in the papers. As is trite, the case must be made out in the founding affidavit and not in the replying affidavit, as is the case in this instance. The applicant is, thus, not entitled to the relief sought in prayer 3 of the notice of motion.

COSTS

[34] The applicant as the successful party is entitled to the costs of these proceedings. Such costs to include costs of two counsel. The applicant had prayed for costs on an attorney and client scale. I do not think that the applicant has made out a case for a punitive cost order. The applicant has not shown in its papers that the respondents was vexatious or frivolous and can thus not be entitled to costs on an attorney and client scale.

[35] I make the following order –

1. Prayers 1, 2 (excluding prayer 2.1), 4, 5, and 6 are granted.

2. Prayer 2.1 is referred back to the information officer for compliance with clause 5.5 (4) (e) of the Manual of the South African Police Service in accordance with Section 14 of the Promotion of Access to Information Act 2 of 2000 ("the Manual").

3. The applicant is granted leave to approach court on these papers, which may be amplified if so desired, should it not be satisfied with the decision of the information officer.

4. The first and fourth respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, including the costs of two counsel.

E. M. KUBUSHI

APPEARANCE:

HEARD ON THE	**: 15 MARCH 2018**
DATE OF JUDGMENT	**: 05 APRIL 2018**
APPLICANT'S COUNSEL	**: ADV. W.P. BEKKER**
	: ADV. JOOSTE
APPLICANT'S ATTORNEY	**: SERFONTEIN VILJOEN & SWART.**
RESPONDENT'S COUNSEL	**: ADV. T. SKOSANA**
	: ADV. S. RAWAT
RESPONDENT'S ATTORNEY	**: THE STATE ATTORNEY - PRETORIA**