IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 36297/2022
Date of hearing: 13 April 2023
Date of judgment: 30 June 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

30/6/23 .....
DATE SIGNATURE

In the application of:

SAKELIGA NPC **Applicant**

and

THE AUDITOR-GENERAL SOUTH AFRICA **Respondent**

JUDGMENT

SWANEPOEL J:

BACKGROUND

[1] Applicant ("Sakeliga") is a non-profit organization with a membership comprised of some 11 000 business persons, companies and business organizations. It aims to promote constitutional rights, constitutional order, the rule of law and a just and sustainable business environment.

[2] Respondent is the Auditor General South Africa (the "AG"), a Chapter 9 institution established in terms of section 181 of the Constitution. It is tasked to fulfil the functions prescribed in section 188 of the Constitution.

[3] This application has its origin in the chaotic state in which much of our local government structures find themselves. In the words of the AG herself, *"The lack of improvement in municipal structures is an indictment on the entire local government accountability ecosystem which failed to act and arrest the decline that continued to be characterized by service delivery challenges in municipalities."* According to the AG, some 28% of municipalities are in such a dire financial position that there is significant doubt whether they would be able to continue operating in future. Many of these municipalities are factually insolvent. Approximately 10% of municipalities received 'disclaimed' audit opinions, which means that they were unable to provide the AG with evidence for most of the disclosures in their audit reports.

[4] This application extensively outlines the financial mismanagement which has ocurred in a significant number of municipalities, some of whom are at a point of total collapse. I daresay that disfunction in local government has a particularly severe and direct impact on the public, and more specifically on the poor who do not have resources to fend for themselves. The importance of a properly functioning local government cannot be over-emphasized. It is therefore laudable that Sakeliga has taken it upon itself to attempt to get to the bottom of the disfunction in local government structures.

[5] The AG is obliged, in terms of section 188 (1) (b) of the Constitution to *"audit and report on the accounts, financial statements and financial management of ..... all municipalities".* Section 4 (1) (d) of the Public Audit Act, 25 of 2004 ("PAA") gives effect to this obligation.

[6] Section 121 (1) of the Municipal Finance Management Act, 56 of 2003 (the "MMFA") requires each municipality to prepare an annual report which includes the annual financial statements of the municipality, and where applicable, consolidated annual financial statements, the AG's report on those statements, the annual performance report, and various other reports which are cumulatively intended to provide a comprehensive overview of the municipality's performance.

[7] Section 126 (3) of the MMFA requires the AG to audit the financial statements, and to submit an audit report to the municipal accounting officer. The section 126 (3) reports are publicly available on the AG's

website. Sakeliga submits that these reports are "largely sterilized" and abridged, and that a typical report does not disclose the underlying causes for the underperformance of the particular municipality to which it relates. Sakeliga says that in the absence of information on the reasons for the underperformance of municipalities, it and its members are unable to protect their interests.

[8] Sakeliga says that in the process of performance review by the AG, a management report is produced for each municipality, which delves into the performance of the municipality. If the municipality has underperformed, the management report provides information on the reasons for the underperformance. These reports contain findings on each municipality's performance, its compliance with legislation, its internal controls and of any emerging risks. The report outlines specific problems which have been identified during the audit, including problems with tenders and infrastructure projects. These reports are not made public.

[9] It is against this background that Sakeliga filed an application in terms of the Promotion of Access to Information Act, Act 2 of 2000 ("PAIA") on 8 December 2021, seeking a vast range of documents relating to the municipal finances of 154 municipalities, spanning seven financial years. It was later clarified in a meeting between the parties that Sakeliga was in fact seeking disclosure of the management reports to which I have referred above. On 10 February 2022 the AG refused access to the management reports on a number of grounds:

[9.1] Firstly, the AG was of the view that section 44 (1) (a) (i) of PAIA entitled it to refuse access to the management reports on the basis that the reports contained an opinion, advice, report or recommendation obtained or prepared in the performance of a duty conferred by law.

[9.2] Secondly, the AG believed that the disclosure of the reports might frustrate the deliberative process between it and the municipality by inhibiting candid discussions of the issues identified in the report.

[9.3] Thirdly, the AG held the view that the request was "*excessive and therefore vexatious*", and that compliance therewith would substantially and unreasonably divert the resources of the AG.

[10] The AG's view was that the publicly available audit reports provided sufficient information for Sakeliga's purposes.

[11] It is common cause that the AG does not have an internal appeal procedure as provided for in section 74 of PAIA. Consequently, Sakeliga launched this application in which it sought the following relief:

[11.1] That the AG's refusal of Sakeliga's request be set aside;

[11.2] That the AG be ordered to provide all the documents and information requested by Sakeliga in its PAIA application dated 8 December 2021;

[11.3] That the AG's failure to make all her reports public be declared to be inconsistent with the Constitution, and that the AG be ordered to make

all reports on the accounts, financial statements and financial management of all municipalities public;

[11.4] In the alternative to 11.3 above, that an appropriate order be granted in terms of section 172 of the Constitution, "*alleviating the Constitutional infringements, concerns and/or invalidities underlying this application;*"

[11.5] Costs.

JURISDICTION

[12] The AG has taken the point that this Court does not have jurisdiction to entertain this matter in light of the provisions of section 78 (1) of PAIA which reads:

"(1) A requester or third party may only apply to a court for appropriate relief in terms of section 82 in the following circumstances:

(a) After that requester or third party has exhausted the internal procedure referred to in section 74; or

(b) After that requester or third party has exhausted the complaints procedure referred to in section 77 A"

[13] Section 74 (1) of PAIA reads:

"(1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1-

(a) to refuse a request for access; or

(b) taken in terms of section 22, 26 (1) or 29 (3),

in relation to that requester with the relevant authority."

[14] It is evident that section 74 (1) of PAIA only refers to a public body within the meaning of paragraph (a) in section 1 of PAIA. The definition of a 'public body' in section 1 reads as follows:

"'**public body'** means-

(a) any department of state or administration in the national or provincial government or any municipality in the local sphere of government; or

(b) any other functionary or institution when-

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;"

[15] The AG is therefore not a public body within the meaning of paragraph (a), and section 74 (1) is not applicable to it. The AG is a public body as defined in paragraph (b) of section 1.

[16] PAIA was recently amended by the introduction of Chapter 1A (Sections 77 A to K) of PAIA, which took effect on 30 June 2021. In terms of subsection 77 A (2) (c) a requester who has a complaint against a public body referred to in paragraph (b) of section 1 may submit a

complaint to the Information Regulator. The latter subsection reads as follows:

"(2) A requester-

(a) .....

(b) .....

(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) .....

may within 180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Information Regulator in the prescribed manner and form for appropriate relief."

[17] In my view the legislature has envisaged two different scenarios in the amended PAIA. In the case of a public body referred to in paragraph (a) of section 1 (national, provincial and local government), section 74 applies and it requires a requester to file an internal appeal if the request is unsuccessful, before a court is approached for relief. It may then, if the appeal is unsuccessful, complain to the Information Regulator in terms of section 77 A (2) (a), or it may elect to approach a court. In the case of a public body in terms of paragraph (b) of section 1, where there is no internal appeal mechanism, the requester may approach the Information Regulator in terms of section 77 A (2) (c), once the initial request is refused by the Information Officer of the public body.

[18] The AG has argued that section 78 (1) is peremptory, and that a requester may only approach a court once it has exhausted its administrative remedies. This argument is, in my view, correct. In *Huijink-Maritz v Municipal Manager, Matjabeng Municipality and Another*[1] Musi AJP said the following regarding section 78 (as it was pre-amendment):

"[29] When a statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent to launching an application to a court then that condition must first be fulfilled. Section 78 makes it compulsory for an aggrieved requester to first exhaust the internal remedies against a decision of the information officer before approaching a court. It is one of the compulsory mechanisms in the Act which enables persons to obtain information swiftly, inexpensively and effortlessly."

[19] Musi AJP referred to a passage in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*[2] in which Mokgoro J explained the reason why internal remedies should be exhausted before a court was approached:

"Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective remedies cannot be gainsaid."

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[1] 2018 (5) SA 614 (FB)
[2] 2010 (4) SA 327 (CC)

[20] Before PAIA was amended, only decisions of public bodies as defined in paragraph (a) of section 1 could be challenged administratively. It seems to me to have been an anomaly that the decision of one public body could be challenged administratively, and not that of another, where the latter happened to fall within a different subsection of PAIA. The purpose with the inclusion of Chapter 1 A was, in my view, to rectify the anomaly and to provide a path by which the refusal of a public body as defined in paragraph (b) could be challenged administratively, before expensive litigation was commenced.

[21] The wording of section 78 remains peremptory, and the words *"[A] requester or third party may only apply to a court for appropriate relief"* (my emphasis) make it clear that until the administrative remedies provided by PAIA have been exhausted, a requester is precluded from approaching a court.

[22] Sakeliga contended that section 77 A (2) provides that a requester "may" submit a complaint to the Information Regulator. It argues that the use of the word "may" means that the requester does not have an obligation to approach the Information Regulator before it approaches a court, but may, at its discretion, directly seek relief from a court. I disagree. The word "may" only means that if the requester is aggrieved by a refusal of a request it has a choice to make. It may approach the Information Regulator, or it can choose not to pursue the matter. However, section 78 is clear, if a requester chooses not to approach the Information Regulator, it may not approach a court for relief.

[23] Sakeliga also contended that both the AG's and the Information Regulator's respective PAIA Guides, state that a requester may choose to refer the complaint to the Information Regulator, or, at its discretion, to approach a court, without exhausting the remedies created by Chapter 1 A of PAIA. Even if I were to accept Sakeliga's understanding of the respective PAIA guides (on which I express no view), it still does not assist its case.

[24] Section 10 of PAIA obliges the Information Regulator to provide a guide to the manner in which a person's rights in terms of PAIA must be exercised. In particular, section 10 (2) (e) requires the guide to advise persons of the remedies available to them, including the manner in which an internal appeal or a complaint to the Information Regulator must be lodged, and the manner in which an application to court must be brought if a requester is aggrieved by a decision. Sakeliga says that the Information Regulator does not regard it as necessary for a requester to exhaust the section 77 A procedure before an application is brought.

[25] In *Minister of Finance v Afribusiness NPC and Others*[3] the Constitutional Court was concerned with Procurement Regulations that had been promulgated in terms of the Preferential Procurement Policy Framework Act, 2000. The respondent had sought to review and set aside the regulations. The Court explained that regulations are intended to give effect to an Act of Parliament. The Act sets the framework on the specific subject legislated upon, and the regulations provide the detail on how to

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achieve the objects of the Act. The Court reiterated the approach of Bennion [4] which was quoted with approval in *Engelbrecht v Road Accident Fund*[5] and *Road Accident Fund v Makwetlane*[6]:

"Underlying the concept of delegated legislation is the basic principle that the Legislature delegates because it cannot directly exert its will in every detail. All it can do is lay down the outline. This means that the intention of the Legislature, as indicated in the outline (that is the enabling Act), must be the prima guide to the meaning of delegated legislation and the extent of the power to make it. .... The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the Legislature."

[26] The Regulator's guide is simply that: a guide. If regulations cannot go beyond the confines of the enabling Act (as one sees in *Afribusiness* above), then certainly, a guide to the provisions of an Act cannot nullify the express provisions of the Act.

[27] The same is applicable to Sakeliga's contention that the AG is estopped from relying on the provisions of PAIA, on the grounds that her PAIA guide is misleading. This contention was dealt with in *Fuls v Leslie Chrome (Pty) Ltd and Another*[7]. The court said:

"In the case of In re a Bankruptcy Notice 1942 CH. 76 (C.A.) at 97, Atkin LJ says:

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[4] Bennion, Statutory Interpretation 3rd Ed (Butterworths, London 1977) at 189
[5] 2007 (6) SA 96 (CC)
[6] 2005 (4) SA 51 (SCA) (In a minority judgment of Ponnan AJA)
[7] 1962 (4) SA 784 (W)

'Whatever the principle may be, it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle that precluded him from alleging the invalidity of that which the Statute has, on the grounds of public policy enacted shall be invalid'

This passage was quoted with approval in Maritime Electric Co v General Davies., 1937 A.C. 610 at 622. As stated by Lord Maugham (at 620) estoppels cannot prevail if such would result in the nullification of a statute."

[28] Therefore, even if both the Information Regulator's guide and the AG's guide were to create the impression that it is not necessary to exhaust the remedies in section 77 A (on which I express no opinion), it is of no consequence given the express peremptory terms of PAIA.

[29] In the premises, the application for access in terms of PAIA is premature and must fail.

THE CONSTITUTIONAL ATTACK

[30] The initial PAIA application required the AG to produce a whole host of documents, including:

[30.1] All entity specific management reports and/or management letters that deal with and report on all findings, adverse and material findings, root causes and recommendations to senior management and municipal managers, including executive summaries and detail finding reports;

[30.2] All entity specific annual performance reports, annual compliance reports and assessments relating to each 'target' municipality;

[30.3] All specific non-compliance reports, advisories, communications, memoranda, findings and/or reports relating to material or adverse irregularities.

[31] The AG has stated that her office prepares two types of reports on each municipality. Firstly, there is the audit report prepared in terms of section 188 of the Constitution, and which is published for public consumption. Secondly, the AG prepares management reports on each municipality. The management reports are not made public. Sakeliga conceded during argument that it no longer seeks all the documents listed in its PAIA application. Its application is now limited to the disclosure of the management reports relating to the 'target' municipalities.

[32] Sakeliga seeks an order that the AG's failure to make all of her reports public, including the management reports, is unlawful and inconsistent with the Constitution. Sakeliga also seeks an order that all of the AG's reports, including management reports, must in future be made public. In the alternative, Sakeliga seeks an order in terms of section 172 of the Constitution that is just and equitable, and which alleviates the alleged Constitutional infringement.

[33] The central question is what is the AG's constitutional obligation in respect of the publication of reports. The answer to this question commences in section 188 of the Constitution which reads:

"**188 Functions of the Auditor-General**

(1) The Auditor-General must audit and report on the accounts, financial statements and financial management of-

(a) all national and provincial state departments and administrations;

(b) all municipalities; and

(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-general.

(2) .....

(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

(4) The Auditor-General has the additional powers and functions prescribed by national legislation." (emphasis added)

[34] The AG's constitutional function, to audit and report on the audit is affirmed in section 4 of the PAA. Section 20 states exactly what the scope of an audit report should be, and reads as follows:

"**20 Audit reports**

(1) The Auditor-General must, in respect of each audit referred to in section 11 prepare a report on the audit.

(2) An audit must reflect such opinions and statements as may be required by any legislation applicable to the auditee which is the subject of the audit, and must reflect an opinion, conclusion or findings on-

(a) the financial statements of the auditee in accordance with the applicable reporting framework and legislation;

(b) compliance with any applicable legislation relating to financial matters, financial management and other related matters; and

(c) reported performance of the auditee against its predetermined objectives.

(3) In addition, the Auditor-General may report on whether the auditee's resources were procured economically and utilized efficiently and effectively

(4) An audit report may contain recommendations to address any matter raised in subsection (2)"

[35] The central question is, as I have stated above, to what reports does section 188 (3) refer? Does it refer to audit reports only, or does it refer to all reports prepared by the AG, as Sakeliga argues?

[36] In considering the interpretation of section 188, I am guided by the dictum in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8]

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to

[8] 2012 (4) SA 593 (SCA)

which it is directed and the material known to those responsible for its production."

[37] The Constitutional Court restated the above in *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*[9] in the following terms:

"[29] The principles of statutory interpretation are by now well-settled. In *Endumeni* the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to the words used in legislation. This process, it emphasized, entails a simultaneous consideration of-

(a) the language used in the light of the ordinary rules of grammar and syntax;
(b) the context in which the provision appears; and
(c) the apparent purpose to which it is directed.

[30] What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

[9] 2019 (5) SA 29 (CC)

(a) that the statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualized; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions must be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

[31] Where a provision is ambiguous, its possible meanings must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court.'"

[38] Section 188 (3) provides that "all reports must be made public" On a simple reading of the words alone, it may be argued that every report that the AG prepares must be made public. However, if one were to read the text of section 188 (3) within the context of the rest of section 188, and within the context of section 20 (2) of the PAA, it becomes clear that not every report of the AG is an audit report within the meaning of section 188, and that the Legislature did not intend for every report of any nature to be made public.

[39] Section 188 (1) requires the AG to "audit and report" on the accounts of municipalities (inter alia). Section 188 (3) obliges the AG to

submit "audit reports" to a legislature which has a direct interest in the audit. The scope of an audit report is specifically dealt with in section 20 of the PAA. When section 188 (3) then requires all "reports" to be made public, it must be seen within the context of the preceding words in the same subsection, which refer to audit reports.

[40] An audit report is one that meets the requirements of section 20 (2) of the PAA. It is those reports that the AG is obliged to make public. In contrast, a management report is, on the AG's version, a communication tool between the AG's office and a particular municipality. Once the AG has completed a preliminary investigation of the affairs of the municipality, it communicates its initial findings to the municipality. Those findings, and the responses by the municipality, are then contained in a draft management report, which is provided to the municipality. The issues dealt with in a typical management report are threefold: firstly, matters to be dealt with in the audit report, secondly, matters that ought to be addressed in order to prevent misstatements in the annual financial statements, and, thirdly, administrative matters that would not be reported in an audit report.

[41] The AG says that audit reports and management reports have different purposes. An audit report is intended to fulfil the Constitutional imperatives in section 188 of the Constitution, in accordance with the provisions of section 20 of the PAA. A management report does not have that function.

[42] I am bound, in motion proceedings to determine the matter on the facts put forward by the applicant where they are not contested, together with the facts put forward by the respondent. I must accept respondent's version where it conflicts with the applicant's version, unless it is so clearly untenable that it can be rejected. That is not the case in this instance. I accept the AG's version regarding the difference in between management and audit reports in both content and purpose.

[43] Consequently, I find that the management reports prepared by the AG are not "reports" within the meaning of section 188 of the Constitution and section 20 of the PAA. It follows then that the AG was not under a Constitutional obligation to make the management reports public. It may be that once Sakeliga has exhausted its remedies in terms of section 77 A, that it is found to be entitled to the management reports in terms of PAIA, but that is not for me to decide.

[44] Given the fact that I have found that the application in terms of PAIA is premature, and that the AG was not constitutionally obliged to publish the management reports the application must fail.

COSTS

[45] As I said at the outset, Sakeliga's motivation with this application, to cast a light on the disfunction which besets our municipalities, is laudable. I accept that Sakeliga is acting in the public good, and not for its own purposes. It may well be that once it has brought a further application, after having exhausted its administrative remedies, that it is

found to be entitled to access to the management reports. I accept that Sakeliga was led by its legal representatives in the interpretation of the provisions of PAIA with regard to the new Chapter 1 A, and that it acted on that advice in bringing the application without first approaching the Information Regulator.

[46] In *Affordable Medicines Trust and Others v Minister of Health and Others*[10] the principle was established that in litigation in which a party is seeking to assert a constitutional right, ordinarily, if the government loses, it should pay the costs, and if the government wins, each party should pay its own costs. That principle was reasserted in *Biowatch Trust v Registrar, Genetic Resources and Others*[11]. I do not find anything in Sakeliga's conduct of the matter to warrant a deviation from this principle.

[47] Consequently, I make the following order:

[47.1] The application is dismissed.

[47.2] Each party shall pay its own costs.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

[10] 2006 (3) SA 247 (CC)
[11] 2009 (6) SA 232 (CC)

COUNSEL FOR APPLICANT:	**Adv. G Egan**
ATTORNEY FOR APPLICANT:	**Kriek Wassenaar & Venterlnc**
COUNSEL FOR RESPONDENT:	**Adv. J Bambamia SC Adv. G Singh**
ATTORNEY FOR RESPONDENT:	**Macroberts Attorneys**
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