IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 217/2015

Reportable	**Yes / No**

In the matter between:

NOMBULELO BEAUTY TWALA **Applicant**

And

THE MEMBER OF THE EXECUTIVE COUNCIL, **1st Respondent**

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

THE HEAD OF THE DEPARTMENT, **2nd Respondent**

DEPARTMENT OF EDUCATION,

EASTERN CAPE PROVINCE

THE MINISTER OF BASIC EDUCATION **3rd Respondent**

THE DIRECTOR – GENERAL **4th Respondent**

DEPARTMENT OF BASIC EDUCATION

JUDGMENT

D VAN ZYL ADJP:

[1] This case is concerned with the consequences of a failure to observe the procedural requirement in section 75(1) of the Promotion of Access to Information Act [1] **(the Act)** that an internal appeal against a decision of the information officer of a public body to refuse a request for access to the records of that body must be lodged within 60 days.

[2] The legislative framework relevant to the issue raised is as follows: The Act gives effect to the constitutional right of access to information.[2] A person **(**referred to as a **requester**) has the right to be given access to the record of a public body provided he or she complies with the procedural requirements in the Act[3] and the request is not refused. The relevant official **(the information officer)** is required to make a decision in accordance with the Act whether or not to grant the request. The decision **"must"** be made **"as soon as reasonably possible, but in any event within 30**

[1]Act 2 of 2000.
[2]Section 32 of the Constitution.
[3]Section 11(1)(a). It reads: **"(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."**

days" after the request was received.[4] If the request is refused the requester must be notified of that decision.[5] The notification must not only state adequate reasons for the refusal, the requester must also be informed of his or her right to lodge an internal appeal **"and the procedure (including the period) for lodging the internal appeal."**[6] A request for information is deemed for purposes of the Act to have been refused if the information officer fails to make a decision within the 30 day time period.[7]

[3] Section 74 of the Act[8] gives a requester the right to 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"**. Paragraph (a) refers to

> **"any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government."**

The **"public body"** in the present matter is the Department of Education of the Eastern Cape Government **(the Department)**.

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[4]Section 25(1).
[5]Section 25(1)(b).
[6]Section 25(3)(a) and (c).
[7]Section 27. It reads**: "If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request."**
[8]Paragraph (1)(a).

[4] Section 75 prescribes the manner in which the appeal must be lodged. Subsection (1)(a)(i) requires it to be lodged in the prescribed form, and within 60 days after the decision was taken.[9] It reads: **"An internal appeal - (a) must be lodged in the prescribed form - (i) within 60 days."** If the internal appeal is lodged after the expiry of this period, the appeal authority[10] (refer to as **"the relevant authority"** in the Act) has the authority to condone the late lodging thereof.[11] That authority is found in section 75(2)(a) and (b). It reads as follows:

> **"If an internal appeal is lodged after the expiry of the period referred to in subsection (1)(a), the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal. (b) If that relevant authority disallows the late lodging of the internal, he or she must give notice of that decision to the person that lodge the internal appeal."**

[5] The relevant authority must decide the internal appeal within 30 days after it was received, and notify the requester of its outcome.[12] Section 77(7) provides that if the relevant authority fails to give notice of its decision within 30 days, it is for purposes of the Act deemed to have dismissed the appeal.[13]

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[9]Paragraph (1)(a)(i).
[10]In the present instance that authority vests in the Member of the Executive Council for Education of the Eastern Cape Provincial Government. (Paragraph (b)(ii) of the definition of **"relevant authority"** in section 1 of the Act.)
[11]Section 75(2)(a).
[12]Section 77(3) and (4).
[13]It reads: **"If the relevant authority fails to give notice of the decision on an internal appeal to the appellant within the period contemplated in subsection (3), that authority is, for the purposes of this Act, regarded as having dismissed the internal appeal."**

[6] Section 78 provides *inter alia* that a requester, whose internal appeal was unsuccessful, or who is aggrieved by a decision not to allow the late lodging of the appeal, may apply to a court for appropriate relief.[14] A requester referred in section 74 may however only do so after he or she **"has exhausted the internal appeal procedure against a decision of the information officer of a public body as provided for in section 74."**[15] The effect of this provision is that a person who, as in the present matter, requested information from a public body as envisaged in paragraph (a) of the definition of a public body in section 1, cannot approach a court in terms of section 78 without first having exhausted the internal appeal remedy provided.

[7] The factual background to this matter is that the applicant was employed by the Department at a school in Queenstown as a senior housekeeping supervisor. In 2011 she was transferred to the Special Youth Care Centre in Bhisho. The applicant asked the Department to convert, or to **"translate",** as it is referred to in the correspondence, her post to that of an educator. In January 2012 the manager of the Youth Care Centre supported and motivated that request on the basis that the applicant is a qualified teacher and was performing teaching duties at the Centre. In September 2013 the learners at the Centre were transferred to another facility in

[14]Paragraph 2(a) and (b).

[15]Section 78(1). It reads: **"A requester or third party referred to in section 4 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 public body provided for in section 74."**

Kirkwood. The applicant and other staff members of the Centre were advised to continue to render their services at the facility there. In September of the following year the Department informed the applicant that her request to have her rank translated to that of an educator was not approved, and that **"the staff at the Centre now belongs to the Department of Social Development."** In response to this decision the applicant proceeded to lodge a request in terms of the Act for access to the documentation upon which the Department relied for its decision not to translate her rank to that of an educator, and for placing her under the authority of the Department of Social Development.

[8] The applicant lodged the request in the prescribed form on 23 October 2013. The Department acknowledged receipt of the request by way of a letter signed on 5 November 2014, advising her that the matter was receiving attention, and that it was referred to office of the district director in King William's Town who will respond to it in writing. No decision was made whether or not to grant the request and the applicant heard nothing further from the Department for more than 30 days. On 16 February 2015 she lodged an internal appeal in the prescribed form against the deemed refusal of the request. On 19 February the Department responded by acknowledging receipt of the appeal, and requesting a copy of the applicant's original request for access to the relevant documentation. On 26

February the applicant's attorney furnished the Department with a copy of the request.

[9] Once again nothing further was heard from the Department. That prompted the applicant to institute these proceedings in this court wherein she seeks an order directing the respondents to grant her access to the documents in question. The applicant cited as respondents the National Minister and his provincial counterpart, as well as the heads of their respective Departments.

[10] The respondents' opposition to the application is on a very narrow basis. They chose not to advance any substantive reason why the applicant's request was refused or should be refused. The request and its merits were not dealt with at all. Instead, the respondents relied on the failure of the applicant to comply with the procedural requirement in section 75 of the Act relating to the time period of 60 days in which the applicant had to lodge her internal appeal. It is common cause that the internal appeal was lodged 20 days out of time. The superintendent general of the Department contended in his answering affidavit that this failure meant that the internal appeal was **"a nullity and does not need to be considered by the relevant authority."** In argument it was submitted in addition that the applicant should first have made an application for condonation for the late lodging of the

appeal as envisaged in section 75(2) of the Act, before approaching the court for relief. That failure, it was submitted, meant that the applicant did not first exhaust all her remedies as required by section 78.

[11] In terms of section 1(hh) of the Promotion of Administrative Justice Act[16] (PAJA) any decision taken, or the failure to take a decision in terms of any provision of the Act, does not constitute **"administrative action".** It is consequently not subject to judicial review in the administrative law sense, which is governed by PAJA. [17] Instead, the Act in section 78 confers on the court a statutory power to grant **"appropriate"** relief on application to it.[18] This provision, according to Hoexter,[19] is an example of what is referred to as a special statutory review. In *Nel & Another NNO v The Master (ABSA Bank Ltd & Others Intervening)*[20] it was said that the precise extent of any statutory review type power **"must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action . . . so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies'."**[21]

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[16]Act 3 of 2000.
[17]*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para [22].
[18]Section 78(1). The rules relating to the form and procedure in proceedings in terms of section 78 of the Act are those promulgated in Government Notice R965 of 9 October 2009. (See **Erasmus Superior Court Practice** at E13-1 to 13-5.)
[19]Hoexter C, **Administrative Law in South Africa** 2 ed Juta Cape Town, at pages 113 - 4.
[20]2005 (1) SA 276 (SCA).
[21]*Ibid* at para 23.

[12] The Act provides that application proceedings in terms of section 78 are regarded as civil proceedings to which the rules of evidence apply.[22] Further, the burden of establishing that the refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies.[23] Section 80 of the Act in turn gives the court hearing the application the power to examine the records of a public or private body, to receive representations *ex parte*, and to conduct hearings in camera. In terms of section 82 the court has the power to grant any order that is just and equitable.[24] These provisions, coupled with the scope of the remedies which the court may grant, strongly suggests that application proceedings as envisaged in section 78 fall within the first category of proceedings referred in the above extract from the *Nel* case.[25]

[13] The question is what the legal consequences are of non-compliance with the 60 day period in section 75(1)(s)(i) of the Act. The respondents' contention is essentially that this provision is peremptory, and that a failure to comply therewith

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[22]Section 81(1) and (2).
[23]Section 81(3)(a).
[24]It reads: **"The court hearing an application may grant any order that is just and equitable, including orders – (a) confirming, amending or setting aside the decision which is the subject of the application concerned; (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order; (c) granting an interdict, interim or specific relief, a declaratory order or compensation; (d) as to costs; or (e) condoning non-compliance with the 180 day period within which to bring an application, where the interests of justice so require."**
[25]*Supra.*

renders the internal appeal a nullity. The section says that the appeal **"must"** be lodged within 60 days. The language suggests that it is peremptory, as opposed to being merely directory. This traditional way of categorising statutory provisions tends to distract from the real question of what the legislature must be adjudged to have intended should be the consequences of non-compliance with a statutory requirement. As was cautioned in *Nkisimane and Others v Santam Insurance Co Ltd,*[26] care must be exercised **"not to infer merely from the use of such labels [peremptory or directory] what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular."**[27]

[13] What must therefore be decided is whether it was the intention of the legislature that a failure to observe the obligatory time period in section 75(11)(a)(i) must render the appeal a nullity. The intention of the legislature must be ascertained by considering context and the language in the Act together.[28] The context is firstly provided by section 32 of the Constitution which confers on everyone the right of access to information. The interpretation which the

[26] 1978 (2) SA 430 (A).
[27] *Ibid* at 433H – 434A. See also *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) at para [13].
[28] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs supra* at para [90] and *Natal Joint Municipal Pension Fund v Endameni* 2012 (4) SA 593 (SCA) at paras [18] and [19].

respondents seek to place on section 75(1)(a)(i) places a restriction on the exercise of this fundamental right. The Act was enacted to give effect to this right, which means that it can only be exercised via the Act.[29] Section 39(2) of the Constitution in turn introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the **"spirit purport and objects of the Bill of Rights."** It means that **"all statutes must be interpreted through the prism of the Bill of Rights."**[30]

[14] Further, the section does not pertinently make provision for the consequences of non-compliance with the 60 day procedural requirement. It does not provide for a sanction if the appeal is not lodged timeously. On the contrary, it empowers the relevant authority to condone a failure to comply with the time period. The power to remedy such a failure is in itself inconsistent with an intention that the appeal is rendered a nullity or void if not lodge timeously. The intention of the legislature must further be ascertained in the context of the purpose which the procedural requirement serves. It is clearly intended to expedite the finalisation of a request for information and to facilitate the functions of the authority tasked with considering the appeal. Administrative convenience must not lightly be allowed to override the exercise of a Constitutional right. The

[29] *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) at paras [16] to [17]. By way of analogy see *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para [96].
[30] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para [21]. Also *Bato Star Fishing (Pty) Ltd supra* at para [91].

cumulative effect of these considerations compels me to conclude that the applicant's failure to timeously lodge her appeal did not without more render it a nullity.

[15] The question is then whether the applicant was barred from approaching the court for relief in terms of section 78 of the Act without first having made application to the relevant authority to condone the late lodging of her internal appeal. Section 75(2) on which the respondents places reliance for this argument provides as follows:

> **"(a) If an internal appeal is lodged after the expiry of the period referred to in subsection (1)(a), the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal. (b) If that relevant authority disallows the late lodging of the internal appeal, he or she must give notice of that decision to the person that lodged the internal appeal."**

The use of the word **"shown"** in paragraph suggests that a requester who is dissatisfied with the decision of public body to refuse a request for access has a duty to convince the relevant authority that good cause exists to allow the late lodging of his or her appeal.

[16] The problem is that the Act itself does not say how that must be done. It does not lay down any procedural requirements, and the **"prescribed"** form as envisaged in section 75(1)(a) is similarly silent in this regard.[31] In the absence of the enabling legislation determining a procedure for the exercise of a power or a right, it may be open to the relevant authority tasked with taking a decision to determine the manner in which its will exercise its authority. The department's submission that the appeal must be accompanied by an application for condonation suggests that such a procedure exists, that it is a procedure separate to the appeal, that it must be in writing, and that reasons must be advanced in addition to what is required in terms of the prescribed form.

[17] The difficulty with this argument is two-fold: the first is that one must be careful not to measure administrative type decision-making by reference to judicial decision-making and its procedures. To suggest that the appeal must to be accompanied by an application for condonation, which is a procedure associated with judicial proceedings, may only obfuscate matters. It can only lead to distract attention from the particular features of the tribunal at hand. Procedures in judicial proceedings must in other words not be used as a prism through which questions about procedure in administrative type decision-making is viewed. The starting point is the statutory provisions itself and the nature of the proceedings. Secondly,

[31]Form B in the Regulations issued in terms of the Act and published in Government Notice No. R187 of 15 February 2002 (Government Gazette No. 23119) as amended.

the constitutional principle of legality[32] must in the context of, and in the circumstance of the exercise of the power in section 75(2) require that the requester must be informed and made aware of any procedural requirements which may exist for the exercise of his or her fundamental right. In the wider context of the fact that the relevant authority is exercising a statutory authority, that its exercise affects the exercise of a fundamental right, and that the curtailment of that right lies within the actual decision-making process, the principle of legality must include the common law right of natural justice and its component of procedural fairness.

[18] The respondents do no say whether procedural requirements have been laid down for the exercise of the power of the relevant authority and the correlative right of the requester as envisaged in section 75(2), and that the applicant was aware, or should have been aware of such requirements. If procedural requirements do exist, the practical difficulty that presents itself on the facts of the present matter, is that the information officer failed to make a decision on the request, and he or she was deemed to have refused it, with the result that the applicant was not advised, as required by section 25(3)(c), of the procedure for the lodging of the internal appeal. Procedural fairness demands that any procedures outside those prescribed by the Act and the regulations issued pursuant thereto,

[32]See generally *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (A) SA 374 (CC) at paras [56] and [57].

should form part of such a notice, failing which the requester must be notified of it after he or she had lodged the internal appeal.

[19] In the absence of the relevant authority having determined procedural requirements for the exercise of its power in section 75(2), and the prescribed form being silent about the provisions of section 75(2), fairness requires that the requester must be afforded a reasonable opportunity to place information before the relevant authority to enable it to exercise its jurisdiction, if it is unable to do so on the material before it. Either way it must decide the matter. It cannot simply do nothing and ignore the appeal as it effectively has done in this matter. The scheme of the Act, in laying down time limits within which action is required to be taken by the requester, the information officer and the relevant authority at each stage, and the legal consequences of a failure to do so, such as the deeming provisions in sections 27 and 77(7),[33] do not support such a conclusion. Failing a decision in terms of section 75(2), and advising the requester of its decision in the appeal, the relevant authority must be taken to have impliedly condone the late lodging of the internal appeal thereby allowing the process to continue to move forward to the next stage.

[33]See footnotes 7 and 13 above.

[20] What relief must be granted? As stated, section 78(2) provides that a requester who is aggrieved by any of the decisions referred to may apply to court for appropriate relief, and the court may grant an order that is just and equitable, including but not limited to any of the orders contained in paragraphs (a) to (e) of that section. What is just and equitable must be determined on the facts and in the circumstances of each particular case.[34] As stated, the Department has not advanced any substantive reasons for the refusal of the applicant's request to have access to the relevant documentation, and *prima facie* none exists. Considering the relatively short period by which the applicant's internal appeal was lodged late, that there does not exist any demonstrable prejudice to the Department as a result, and that no justifiable reason has been advanced for denying the applicant access to the required documentation, I am satisfied that the applicant's failure to comply with section 75(1)(a)(i) of the Act should be condoned, and that she be granted access to the documentation requested.

[21] That brings me to the question of costs. I agree with the applicant that the indifferent manner in which the relevant decision-maker of the department dealt with her request, and the failure to make a decision in terms of section 75(2) when it could and should have done so on the information before it, calls for censure.

[34] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras [29] to [30] and *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 (CC) at paras [82] and [83].

The attitude adopted by the Department in its handling of the matter is inconsistent with its constitutional and statutory obligations and is regrettable.

[22] For these reasons the application is granted and an order is issued in terms of paragraphs 1 and 2 of the notice of motion. The respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of this application on an attorney and client scale.

D VAN ZYL

ACTING DEPUTY JUDGE PRESIDENT

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Date Heard: 5 November 2015

Judgment Delivered: 13 November 2015