



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO.

206/2023

In the matter between:

HENRY LOYISO KOBO

APPLICANT

and

**THE MEC FOR THE DEPARTMENT
OF EDUCATION, EASTERN CAPE
PROVINCE**

FIRST RESPONDENT

**THE HEAD OF DEPARTMENT,
DEPARTMENT OF EDUCATION,
EASTERN CAPE PROVINCE**

SECOND RESPONDENT

JUDGMENT

Rugunanan J

[1] The real issue for adjudication in this matter is whether the applicant has made out a case for relief in terms of section 78(2)(d)(i) read with section 82 of the Promotion of Access to Information Act 2 of 2000 (hereinafter 'PAIA' or 'the Act') for information held by the respondents pertaining to the documents set out in paragraph 1 of his notice of motion.

[2] The application is opposed, primarily on technical grounds that can only be described as overbearing in its remoteness from the notions of accountability, fairness and transparency envisioned by the preamble to the Act.

[3] I do not intend dealing with the grounds of opposition raised *in limine* as I consider this to be an instance in which it is eminently sensible for this Court to exercise its inherent powers to curtail what would otherwise be a superfluous process intended to divert attention from the main issue. A court is entitled to base its judgment on the substantial issue/s it has identified for determination flowing fairly from the material before it.¹

[4] In the realm of the Act a court should not shut its eyes to what may be a patent injustice and a deprivation of substantive rights where public officials, for tactical reasons, raise technical points and, in so doing, attempt to avoid addressing matters of substance.

[5] Litigants such as the respondents have a constitutional and a legal duty to litigate responsibly and honourably. They are agents of the Constitution and on

¹ This is in keeping with the approach adopted in *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7, wherein Harms JA remarked: 'The court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the court will not be able to function.'

whom there is a higher duty to respect the law, to fulfil procedural requirements and tread respectfully when dealing with rights².

[6] A reading of the PAIA and its preamble makes it plain that the Act is an instrument designed to give effect to the right of access to information held by the State or by another person where information is required for the exercise or protection of rights. The right of access to information unveils the ‘secretive and unresponsive culture’ of the pre-democratic era and obliges the State and private corporations to act in an accountable and transparent manner that fosters a culture of justification and promotes the enhancement of relations between people and those occupying positions of authority and power.

[7] The applicant is a school principal attached to the post establishment of the Inxu Primary School in Maclear. He avers that during various periods in 2021 and 2022 he exhausted his sick leave and resorted to applying for temporary incapacity leave in terms of the Policy for Incapacity Leave and Ill-health Retirement which is applicable to the public service. During September 2022 and without mention being made of the outcome of his applications for temporary incapacity leave, he received written communication from the district director of the Department of Education in which he was informed that leave without pay had been implemented.

[8] The applicant avers that he is currently booked off sick. This follows a series of personal setbacks involving his mental health and a physical injury to his leg and spinal column that necessitated surgery. In seeking clarity on the status of his application/s for temporary incapacity leave he attended meetings on 6 April 2022 and 19 April 2022 with certain departmental officials. One official threatened to terminate his services. Another official informed him that he should either return to work, or resign, or apply for ill-health retirement. The

² *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 50.

applicant's recollection of 19 April 2022 is that minutes of the meeting were taken by a female administrative assistant who was in attendance. In a telephonic discussion between the applicant and a departmental official on 10 November 2022, the applicant avers that he was again threatened with a dismissal.

[9] Following the events aforementioned the applicant consulted attorneys Randall & Associates during November 2022 whereupon they dispatched a Request for Access to Record of Public Body (hereinafter interchangeably referred to as 'Form A' or 'the request') to the second respondent.

[10] In the request the appellation *Randall & Associates* appears under the heading 'Particulars of person requesting access to the record' (Part B of Form A).³ Elsewhere, under the heading 'Particulars of the person on whose behalf request is made' (Part C of Form A) are the applicant's full names and surname *Henry Loyiso Kobo*.

[11] In the respondents' heads of argument the concession is made that:
'The Act also recognises *Randal & Associates* (sic) as being the requester – in the sense that it is alleged that they were acting on behalf of the applicant in making the request for access.'

[12] Quite apart from this concession there can be no question that *Randall & Associates* fall within the definition of 'requester' in the Act. It is thus inconceivable that the respondents have opposed this application – and have persisted in doing so – on the technical basis that sans a power of attorney the request has not been properly made.

[13] In the part of the request entitled 'Particulars of record' (Part D of Form A) a full description of the documentation requested is set out. The description accords with the detail in the notice of motion.

³ Annexure L to founding affidavit.

[14] The respondents say that the applicant is on leave without pay. Although their answering affidavit raises disputes of fact regarding the nature of the applicant's leave, these are inconsequential to the main issue identified for decision. Insofar as that is relevant to the present application it is common cause that the request was made. It is also common cause that the second respondent did not respond to the request. On this point the parties have differing contentions. The applicant argues that it amounts to a deemed refusal of the request whereas the respondents take the view that 'there was no request for access or alternatively since there was no power of attorney submitted'. What is also not disputed is that the request contains sufficient particulars to identify the documentation/records requested⁴. The respondents, however, resist disclosure and dispute their legal obligation to do so primarily on the basis that the request was not made in the name of the applicant – and where it indicates that it is made by the applicant's attorneys *Randall & Associates*, the respondents contend that a power of attorney authorising the attorneys to do so is wanting as proof of the capacity in which they made the request. They do not contend that such proof is required 'to the reasonable satisfaction of the information officer'⁵. They contend rather that the applicant did not comply with the procedural requirements of the Act relating to a request for access to information. The argument carries the implication that the Act requires a power of attorney given the circumstances and the manner in which the request was submitted.

[15] In argument the applicant contended that a proper request was made – there has been compliance with the Act in that the request clearly indicates the name of the applicant as the person on whose behalf his attorneys have made the request, and that the request must be read in conjunction with his attorneys'

⁴ PAIA, section 18(2)(a).

⁵ Section 18(2)(f).

covering correspondence⁶ that accompanied its transmission to the second respondent as information officer.

[16] My sense of the matter is that the objection that the applicant's attorneys did not state their capacity is excessively technical.⁷ The PAIA does not in any terms, express or otherwise, lay down that a power of attorney is required in the circumstances contended for by the respondents. The appellation *Randall & Associates* under the heading 'Particulars of person requesting access to the record' (Part B of Form A)⁸ leaves no uncertainty that *Randall & Associates* are representing the applicant as the person on whose behalf the request is made (Part C of Form A). Common sense would reasonably alert the recipient of the request as to the role of *Randall & Associates* when regard is had to the covering the correspondence and the contents of the request itself. Put another way, and considered objectively, the request by itself, or read in conjunction with the covering correspondence offers sufficient indication that it is made on behalf of the applicant from which it may be concluded that proof of the capacity in which the request is made has been forthcoming with reasonable satisfaction.

[17] I am of the view that the request submitted on behalf of the applicant by his attorneys is a request properly made in terms of the Act and that the second respondent's failure to respond thereto within the stipulated timeframe amounts to a 'deemed refusal'.⁹ This is of importance because the Act obliges the requester, before approaching a court, to challenge a decision by way of an internal appeal when no decision has been made by way of a refusal or a deemed refusal.¹⁰ This is precisely the course adopted by the applicant's

⁶ Letter dated 28 November 2022, Annexure K to founding affidavit.

⁷ *Moses Fortuin v Cobra Promotions CC* [2010] ZAECPEHC 40 para13.

⁸ Annexure L to founding affidavit.

⁹ Section 25(1) read with section 27.

¹⁰ Section 78(1).

attorneys (acting on his behalf) prior to the launch of this application, and within the stipulated timeframe for lodging an appeal.¹¹

[18] In my judgment therefore the basis on which the respondents have sought to oppose these proceedings is legally unsustainable. To hold otherwise would effectively render the Act a blunt instrument.

[19] The Act confers on the court the discretion to make ‘any order that is just and equitable’¹².

[20] In the circumstances I make the following order:

1. The respondents are directed, within 20 (twenty) days from the date of this order and in accordance with the provisions of the Promotion of Access to Information Act 2 of 2000, to furnish the applicant with copies of the following documents:

- 1.1 All medical reports, submitted to the Department of Education, Eastern Cape Province by the applicant in support of his applications for temporary incapacity leave, including the relevant occupational therapist’s report and psychiatric reports in support thereof.

- 1.2 All correspondence by the Department of Education addressed to the applicant relating to his illness and inability to attend at his workplace as school principal at the Inxu Primary School, Ugie, Maclear.

¹¹ Section 75(1)(a)(i).

¹² Section 82.

- 1.3 All documents relating to the applicant's grievance, including documents reflecting the manner in which the said department dealt with his grievance, including the minutes of the meetings of 6 April 2022 and 19 April 2022 attended by the applicant, his union representative and representatives of the Department of Education, Eastern Cape Province, all of which related to the applicant's inability to attend his work.
2. The respondents are directed to pay the applicant's costs of the application jointly and/or severally the one paying the other to be absolved.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *A M Maseti*, Instructed by O'Brien Inc., c/o Hutton and Cook, King Williams Town, Tel: 043-642 3410 (Ref: Mr G C Webb).

For the Respondents: *P Dukada*, Instructed by The State Attorney, East London, Tel: 043-706 5100 (Ref: 245/23-P8 (Mr Spondo)).

Date heard: 07 September 2023.

Date delivered: 28 November 2023.