IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO: 47/2022

Reportable	**Yes / No**

In the matter between:

THE INFORMATION OFFICER C/O **1ST APPLICANT**

THE STATION COMMANDER BHISHO POLICE STATION

MINISTER OF POLICE **2ND APPLICANT**

and

ELALINI LODGE CC t/a ELALINI PROJECTS **RESPONDENT**

JUDGMENT

CENGANI-MBAKAZA AJ

Introduction

[1] In these proceedings, the Information Officer c/o the Station Commander Bhisho Police Station, (the first applicant) and the Minister of Police (the second

applicant) applied for the rescission of the order in terms of Rule 42(1(a) alternatively Rule 31(1)(b) of the Uniform Rules of Court or under common law. This order was granted in favour of Elalini Lodge cc t/a Elalini project (the respondent), a close corporation duly registered according to the Company Laws of the Republic of South Africa and having its principal place of business at 23 Sili Crescent, Gompo Township, East London. On the day of the hearing, the applicants applied that the court should grant the order in terms of Rule 42(1) (a) of the Uniform Rules of Court. The application was opposed by the respondent. In the respondent's opposing affidavit, Mr Ayanda Mbalu (Mr Mbalu) declared that he represented the respondent in his capacity as its legal representative. Rule 42(1) of the Uniform Rules of Court provides,

> "The court may, in addition to any powers it may have mero motu or upon the application of any party affected, rescind or vary:
>
> (a) **An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".**

[2] The respondent's opposition of the application is based on the reasons that will be presented during the course of this judgment.

Factual Background

[3] Between 15 and 27 November 2009, the respondent submitted a bid with the Department of Health (DoH) for accommodation, meals and conference facilities for 31 community care workers who attended the Health Care Bridging Course training in Nelson Mandela Metro. It was successfully awarded the tender. Subsequent to the award of the tender, the respondent concluded an oral agreement with the MEC for

health. According to this agreement, the respondent would submit invoices to the DoH within five days after service completion, and upon receiving the invoice, the DoH would make direct payment to the respondent's bank account.

[4] The respondent submitted the invoice, however, no payment was made by the DoH. On 5 September 2012, Price Water Coopers (PWC) presented a forensic report to the DoH alleging irregularities in the respondent's submitted invoices. Consequently, these alleged invoices and irregularities became the subject of an investigation by South African Police Services (SAPS), specifically the Directorate for Priority Investigation (Hawks). Subsequently, SAPS submitted a criminal case docket to the National Prosecuting Authority, which declined to prosecute.

[5] The respondent instituted a civil action against the MEC for health to recover the monies due to it. Upon consultation with his legal representative, Mr Mbalu contended that obtaining copies of the docket for investigation against him would assist in the civil claim with the MEC for Health. On 25 August 2021, Mr Pythagoras Vuyisile Magqabi (the requester) formally requested copies of the relevant docket from the first applicant in terms of the Promotion of Access to Information Act, 2 of 2000(the PAIA). According to the documents filed, the request was made on behalf of Mr Mbalu in his personal capacity. In a document signed on 01 September 2021, the first applicant informed the requester that he failed to comply with the provisions of the PAIA due to the absence of a prescribed form and indistinct copy of his identity document. Additionally, the first applicant furnished the requester with the prescribed form 'SAPS 512 (n)'.

[6] The requester completed the prescribed form, attached a legible copy of his identity document and submitted his request to the first applicant. In paragraph D (i) of his request, the requester specified the purpose for which the request was sought. He informed the first applicant that the request was related to a pending civil action against SAPS and that the notice under Section 3 of the Institution of Civil Proceedings Against Certain Organs of the State, Act 40 of 2002 was already filed to the SAPS.

[7] In a document dated 14 September 2021, the first applicant notified the requester that his request did not comply with PAIA requirements. According to PAIA, so he was informed, access to information does not apply to records requested for civil proceedings that have already commenced. On 11 October 2021, the requester lodged an internal appeal claiming that 30 days had elapsed without any response or consideration to his request dated 26 August 2021. It was noted that in his application for an internal appeal, the requester used form J751, a form that is prescribed for the Department of Public Service and Administration for the lodgement of the internal appeals in PAIA matters.

The impugned order

[8] On 17 February 2022, the respondent initiated legal proceedings by filing an application, seeking an order in terms of Section 82 of the PAIA at Bhisho High Court (the court) under case number 47/2022. The named parties in the application included the information officer c/o, The Station Commander, Bhisho Police Station as the first respondent and The Minister of Police as the second respondent. The application sought a directive compelling to provide the applicant with copies of the

docket under Cas No: 83/03/2013. Additionally, it sought an order directing the respondent to bear the costs of the application jointly and severally between attorney and client scale.

[9] The notice of motion was accompanied by a founding affidavit of Mr Mbalu. According to the return of service dated 03 February 2022, Captain Daniso who is stationed at Bhisho Police Station was served with the court process. The court process was also served on the office of the State Attorney and a local office of the Minister of Police at Griffiths Mxenge's building, Zwelitsha on 4 and 17 February 2022 respectively. The notice of set-down was served at the Bhisho Police Station and Office of the State Attorney, East London on 06 and 11 April 2023 respectively.

[10] On 01 March 2022, the court granted an order against the first and the second applicant in the following terms:

> "1. That the first Respondent is ordered to provide the Applicant with the copies of the docket under Case No. 83/03/2013
>
> 2. The Respondents to pay the costs of this Application jointly and severally."

The parties' contentions

[11] The applicants argued that the order was erroneously granted by reason of the fact that incomplete information was presented to the court by the respondent. In support of this assertion, the applicants argued that the order was granted despite the respondent's failure to adhere to the mandatory requirements of PAIA. The applicants further challenged the manner in which the order was sought before court. The second ground for seeking rescission of the order lies with the fact that the order

was granted against the second applicant in circumstances where he was not served with the application papers. In amplification, the second applicant referred to section 2 of the State Liability Act 20 of 1957(the State Liability Act) which provides:

> "the plaintiff or the applicant, as the case may be, or his or her legal representative must – (a) after any court process instituting proceedings and in which the executive authority is cited as a nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department……" (emphasis added)

[12] The respondent resisted the application for the rescission of the order, asserting that the court documents were properly served to the applicants. It was contended that the applicants had the opportunity to participate in the legal proceedings but chose not to do so. Furthermore, the respondent maintained that there was full compliance with the PAIA and when the first applicant failed to accede to his request, he lodged a proper application to the court compelling the applicants to furnish him with copies of the docket.

The law

[13] To be successful, a party seeking an order for the rescission of judgment or order must demonstrate that the default judgment or order was erroneously sought or erroneously granted. In *Bakoven LTD V GJ Howes (PTY) (LTD*[1], Erasmus J held:

> "Rule 42(1) *(a)* of the Uniform Rules of Court is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted', within the meaning of Rule 42(1) *(a)*, when the Court commits an 'error' in the sense of a 'mistake in a matter of law appearing on the proceedings of a Court of record'. It follows that a Court, in deciding whether a judgment was 'erroneously granted', is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule

[1] 1992 (2) SA 466 (E) at 466E-G.

> 31(2) *(b)* or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide defence. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2) (b)* (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show good cause."

[14] The starting point is whether the application in terms of Rule 42(1) (a) was brought to court within a reasonable time. The impugned order was granted on 01 of March 2022. When the applicants were served with the order, they immediately approached counsel for consultation. On 13 May 2022, counsel started to prepare court papers. Considering these facts, which are common cause, I am persuaded that the application for rescission of the order was attended to within a reasonable period. Regrettably, both parties' actions are to blame for the delay in the completion of this application. A judgment is considered erroneously granted if, at the time of granting it, there were facts unknown to the court and these facts, if known, would have barred the granting of the judgment.[2]

Was the order of the 01st March 2022 erroneously sought and granted?

[15] In this Division, there is a wealth of precedent which provides insight on how PAIA applications should be handled. In *Paul v MEC for Health, Eastern Cape Provincial Government and Others; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province*[3] , Jolwana J (with Brooks J concurring) held:

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[2] *Rossiter &Others v Nedbank Ltd (96/2014) ZASCA 196 (1 December 2015) at para 16.*

[3] *[2019] 3 All SA 879 (ECM) at para 9.*

"[9] the starting point in PAIA applications is section 11 of PAIA which 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……..

[10] One of the things which stand out in the section 11 is that compliance with the procedural requirements of PAIA is not optional. If any of the procedural requirements is not complied with, the requester is not entitled to the record. The court is similarly not at liberty to waive the peremptory provisions of section 11(1). On a proper construction of section 11(1) it is clear that both the requester's entitlement to be given access to a record of a public body and the obligation imposed on the requester to comply with all the procedural requirements of PAIA are couched in peremptory terms. In the absence of full compliance with the procedural requirements of PAIA, the information officer is entitled to refuse access and not to provide the record. The court may also not order the provision of the record to the requester unless it is satisfied that there has been full compliance with all the procedural requirements.'(Accentuation added)

[16] The legal framework for court proceedings under PAIA are firmly established through by sections 78[4] to 82[5]. Section 81 provides that the proceedings under PAIA are civil proceedings and the rules applicable in civil proceedings apply.

[17] The relevant Rules 2 and 3 of PAIA[6] (the Rules) are as follows:

"Procedure in an application to Court in terms of the Act

[4] Application regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.
(1) A requester or third party referred to in section 74 may only apply to 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 provided for in section 74……..(my underlining)

[5] Decision on application.
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 the period mentioned in the order; (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or
(c) as to costs

[6] Rules of Procedure for applications to Court in terms of PAIA- published in Government Gazzette No. 32622 dated 09 October 2009.

(2)(1) The procedure prescribed in these Rules must be followed in all applications contemplated in section 78 of the Act.

(2) Unless as otherwise provided for in these rules, the rules governing the procedure in the court to which an application in terms of these rules is brought shall apply with appropriate changes unless directed by the court.

Applications

3. (1) An application contemplated in section 78 of the Act must be brought on notice of motion that must be correspond substantially in accordance with the form set out in the Annexure to these rules addressed to the information officer or head of a private body as the case may be

(2)……:

(a)……-

(i)……

(ii)……..

(3) The notice of motion referred to in subrule (1) must be supported by an affidavit and be accompanied by true copies of all documents upon which the applicant intends to rely.

(4) the affidavit referred to in subrule (3) must:

(a) state out the facts and circumstances upon which the application is based;

(b) state whether internal appeal procedure contemplated in section 74 of the Act has been exhausted and if not, the reasons for failing to exhaust such procedure; and

(c) explain the relevance of each document upon which the applicant intends to rely'.(my underlining)

[18] I now proceed to deal with the first error that was highlighted by the applicants. When the application for default order was heard on 01 March 2022, the respondent's affidavit was very thin, to the extent that it partially failed to adhere with Rules 2 and 3 of the PAIA. A reading of the court record revealed no indication that the respondent was granted an exemption from complying with these Rules. Presented below is an excerpt from the affidavit sworn in by the respondent in his application pursuant to Section 82 of PAIA:

"10. *Thirty (30) days has prescribed by the PAIA lapsed with no response forthcoming from the office of the Deputy Information Officer.*

11. My legal representative advised me that the Respondent's failure or refusal to access information his/her disposal (sic) is a deemed refusal in terms of PAIA and that the recourse available to me is to appeal the decision.

12. On the 12th of October 2021, my attorneys of record acting on my instruction, lodged and served an internal appeal, via e-mail. Copies of the cover letter with enclosures thereto and from 'B' for internal appeal are annexed hereto marked; 'EL5' and 'EL 6' respectively.

13. On the 15th of October, the first Respondent served my attorneys of record with a notice of Intended Refusal via email, a copy of which is annexed hereto marked 'EL 7' respectively."(Italics added)

[19] Paragraphs 10, 12 and 13 of the respondent affidavit partially contradict the full conspectus of facts and the circumstances surrounding the request to the first applicant. Considering the background of this case, it is clear that the first applicant raised concerns about Mr Mbalu's request multiple times through his legal representative. Gleaning from the record, it is evident that the requester encountered difficulties in adhering to the proper procedural aspects of PAIA and thus the first applicant provided guidance on potential solutions, advising him on the option to seek assistance, free of charge, from his office. When the request was refused, he was advised that the PAIA is not applicable in circumstances where civil or criminal proceedings have already commenced[7]. In order to overcome this barrier, counsel for the respondent argued that the civil case that had already commenced when the request was made, was against MEC for health and not SAPS. With respect, this

[7] Section 7 of PAIA provides:

"Act not applying to records requested for criminal or civil proceedings after commencement of the 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 requested 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 purpose referred to in paragraph (a) is provided for in any other law."**

argument is misleading. In his application for the request, the requester averred that a case was pending against SAPS. The belated letter that the respondent's legal representative wrote to the first applicant, where he indicated that there would be no legal proceedings pending against SAPS is irrelevant for purposes of compliance with the requirements of PAIA. Our courts have emphasized that a cover letter cannot be used to supplement information that must be contained in a prescribed form.[8] I am privy to the provisions of Section 11 (3) of the PAIA which provides,

> 'A requester's rights 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.'

In my considered opinion, the relevance of this point lies with the fact that in the affidavit in support of the application for an order in terms of Section 82 of the PAIA, the respondent ought to have declared that there was a civil case that had already commenced in respect of the same set of facts. By so doing, the court contemplating an order by default, would have had an opportunity to consider the provisions of Section 7 of the PAIA in its entirety. Default judgment proceedings bear similarities to ex parte proceedings, which imply that there is a duty of disclosure. This duty requires counsel to disclose even the adverse factors in the case. If the court's decision would have been affected by such material factors, then there has been a breach of the duty to disclose. Whether the breach was wilful or mala fide is

[8] S *Paul v MEC for Health, Eastern Cape Provincial Government and Others; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province* (fn 19 supra) at paragraph 17.

irrelevant. The important thing to remember is the fact that a material breach occurred, and that would legally warrant the rescission of the judgment.[9]

[20] Furthermore, in contrast with the provisions of Section 75(1) (a) of PAIA[10], the form used to lodge an internal appeal was not the one prescribed in the first applicant's manual. According to the first applicant, the prescribed form to lodge an internal appeal is form SAPS 512(o) which the requester never used for this purpose. This fact was never placed in dispute by the respondent. Although it is possible to argue that the use of form J751 (form B) was an alternative route to pursue an internal appeal, the documentation, in particular EL7 which is attached to the form is irrelevant for purposes of an internal appeal that was lodged to the information officer. It is imperative to note that an internal appeal was lodged on 11 October 2021. The document dated 25 August 2021 is a 'notice of intended refusal'. This is a document where the first applicant advised the requester to use form SAPS '512(n)' and to provide a clear copy of Mr Mbalu's identity document in his request for access to information. Clearly, the process of the lodgement of the internal appeal requires proper ventilation.

[21] Another highlighted error by the applicants' counsel pertains to the manner of serving the court processes to the Minister of Police/the second applicant. Counsel's reference to Section 2(a) of the State liability Act is misplaced. The executive authority of the department can and must be cited as a nominal defendant or respondent in two instances, namely when a claim arises out of any contract lawfully entered into on behalf of the State. The second instance is where any servant of the

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[9] *Hyundai Motors Distributors (Pty)Ltd and Others v Honourable Mr Justice JMC Smit and Others* [2000] 1 All SA 259 (T).

[10] Section 75 of PAIA provides, '(1) An internal appeal-(a) must be lodged in the prescribed form……..

State commits any wrong while acting within the scope of his authority as a servant of the State.[11] In *Paul v MEC for Health, Eastern Cape Provincial Government and Others; Mbobo v MEC for Health, Eastern Cape Provincial Government and Others; Ncumani v MEC for Health, Eastern Cape Province*[12] the court addressed this issue and held:

> "In my view, PAIA applications are neither founded on any contract nor any wrong committed. They are an enforcement of a constitutional right of access to information to which unless the State is legally justified in refusing access to the required record, citizens must ordinarily and without having to resort to court be given access"

[22] In my considered opinion, the citation of the Minister of Police as a second respondent before the court granting an order by default was erroneous. Rule 3(1) provides:

> "An application contemplated in terms of section 78 of the Act must be brought on notice of motion that must correspond substantially with the form set out in the Annexure to these rules, addressed to the information officer or the head of the private body, as the case may be."(my underlining).

[23] The underlying issue of this case demonstrates that the issue of the request for access to information in terms of the PAIA was between the first applicant and the requester. The communication was confined to Sgt Mjandana (the deputy information officer) and not the Minister of Police. Furthermore, the fact that the respondent opted to cite the second applicant in his application for default judgment

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[11] The State Liability Act 20 of 1957 (as amended) provides, ''1. Any claim against the state which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.'

[12] [2019] 3 All SA 879 (ECM) at para 41.

is incomprehensible. This enigma resulted in an erroneous order being granted against the Minister of Police /the second applicant.

CONCLUSION

[24] In my view, had the court been appraised of these errors, the application for the default order would not have been granted. For all the reasons stated above, the order dated 01 March 2022 was erroneously sought and granted. The application for rescission of the order must succeed.

COSTS

[25] As a general rule, the costs follow the result. Over the years, the Supreme Court has developed a flexible approach to cost orders. There are instances where, at the discretion of the court, a successful party may be deprived of his or her costs.[13]

[26] In *Ferreira's* case[14], the court held:

> "without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation"

[13] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (2) SA 621 (CC) (1996 (4) BCLR 441; [1995] ZACC 2).

[14] 1996 (2) 621 at para 3.

[27] The first applicant is a public body that has a Constitutional obligation to provide access to information to the respondent.[15] Considering the facts of this case, it is apparent that the success of the applicants was technical in nature. Therefore, it is my view that the proper exercise of judicial discretion requires that I make no order as to costs.

ORDER

[1] The application for the rescission of the default order dated 01 March 2022 is granted.

[2] No order as to costs.

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N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

Counsel for the Applicants	:	Adv H.N Miya
Instructed by	:	The State Attorney 17 Fleet Street Old Spoornet Building

[15] Section 32 of the Constitution, Act 108 of 1996 provides: (1) Everyone has the right to access information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights.

East London

Counsel for the Respondent	:	Adv L. Rusi
Instructed by	:	Magqabi Seth Zitha Attorneys No.9 St George Street Southernwood East London
DATE HEARD	**:**	**2 November 2023**
DATE DELIVERED	**:**	**30 January 2024**