REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION-MTHATHA)

CASE NO: 1494/09

In the matter between:

NONTSIKELELO DLUSHA	**APPLICANT**

and

KING SABATA DALINDYEBO MUNICIPALITY	**FIRST RESPONDENT**
THE MUNICIPAL MANAGER	**SECOND RESPONDENT**
CHIEF FINANCIAL OFFICER	**THIRD RESPONDENT**
INFORMATION OFFICER (KSD MUNICIPALITY)	**FOURTH RESPONDENT**

JUDGMENT

MAGEZA AJ:

[1] Applicant is a ratepayer and resident of North Crest, Mthatha, an area which falls under the administration of KSD Municipality (First Respondent).

[2] The Second, Third and Fourth Respondents are all officials employed as such by the First Respondent.

[3] This matter has its genesis in a discontinuation of service notice served on the Applicant by Third Respondent, the Chief Financial Officer of the First Respondent, on 5 March 2009. In this notice, Third Respondent demanded the payment of the sum of R61 098.49 for arrear municipal rates and services.

[4] Pursuant to this discontinuation of service notice and on 1 July 2009, Applicant approached the First Respondent and formally requested information forming the basis of the calculation of the rates said to be outstanding. Applicant was handed a pro forma document headed 'Form For Application of Information' which she duly completed and submitted.

[5] On the face of this document is a stamp purporting to be that of the Second Respondent. This stamp is dated 1 July 2009 and the recipient is one Babalwa Nonyukela, acting on behalf of the Second Respondent. Babalwa Nonyukela received this document at 09h52 on that day.

It is common cause that the Second Respondent never favoured the Applicant with the information requested. In fact none of the Respondents reverted back to the Applicant in any manner of form.

[6] Some (2) two months later on 24 August 2009, Applicant issued and served on the Respondents on Notice of Motion an Application in which the following relief is sought:-

> "6.1 That the respondents' failure to furnish applicant with information requested relating to assessment of rates and other service charges with KSD Municipality be and is hereby declared unlawful and an infringement on applicant's constitutional right to access to information as provided for by the Promotion of Access to Information, Act 2 of 2000;
>
> 6.2 That the respondents be and are hereby ordered and directed to furnish applicant through her attorneys with the following information regarding assessment of rates;
>
> 6.2.1 A copy of a document which shows the valuing system used by the KSD Municipality Valuers to value all properties within its jurisdiction;
>
> 6.2.2 Copies of valuation rolls (at applicant's expense) used to determine rates from 1993/1994 financial year to the 2009/2010 financial year;
>
> 6.2.3 The Government Gazette numbers of the gazettes in which notices of abstracts of estimates of revenue and expenditure forming the basis for rates assessment have been promulgated for all the financial years referred to above;

6.2.4 A copy of the rates policy used all the financial years referred to above;

6.2.5 The provincial Government Gazette numbers in which by-laws have been promulgated giving effect to first respondent's rates policies for all the financial years referred to above;

6.2.6 A copy of the booklet/book which shows the tariffs used to determine rates for all the financial years referred to above (copies at applicant's expense);

6.2.6 A copy of the document from the MEC for Local Government approving an increase in tariff for fixing rates which is higher than the 2 cents in a rand as stipulated by section 82 of the Municipality Ordinance 20 of 1974;

6.3 That the respondents be and are hereby ordered and directed to furnish applicant through her attorneys proof of respondents' attempt to solicit community participation in rates assessments, such proof in the form of newspaper cuttings in which council resolutions of rates assessment for each financial year from 1993/1994 to 2009/2010 was published;

6.4 That the respondents be and are hereby ordered to also furnish applicant through her attorneys with water tariffs and sewerage tariffs from the financial year 1993/1994 to 2009/2010;

6.5 That the respondents be and are hereby ordered and directed to furnish applicant through her attorneys with tariffs for refuse collection and the fire levy from the financial year 1993/1994 to 2009/2010 (or 2013);

6.6 That the respondents be and are hereby ordered and directed to furnish the information referred to in paragraphs above within fifteen (15) days of the issue of this court's order;

6.7 That the respondents pay costs of this application jointly and severally each paying the other to be absolved;

6.8 Granting applicant further and/or alternative relief."

[7] The Respondents following upon service of the Application, filed a notice to oppose on 27 August 2009. This was then followed by a Notice in terms of Rule 6 (5) (d) (iii) raising a special defence in the following terms:-

"7.1 Section 1 of the Promotion of Access to Information Act No 2 of 2000 (*the Act)* defines the Respondent as a public body in that it states 'public body' means:

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

7.2 Section 27 of the Act is a deeming clause. It provides that 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 purpose of this Act, regarded as having refused the request;

7.3 Section 78 (1) of the Act provides that a requester or third party referred to in section 74 of the Act may only apply to a court for appropriate relief in terms of section 82 of the Act 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 given the deemed refusal;

7.4 In the circumstances, first respondent being a public body or functionary, the applicant has failed to exhaust the internal remedies contemplated in section 82 of the Act;

7.5 In the event of the above points do not succeed the respondents will seek the leave of this Honourable court to file the affidavits on merits."

[8] The matter was then set down for argument on 4 February 2010 before this court.

[9] The Respondents' special defence as set out in its rule 6 (5) (d) (iii) is in essence that to the extent Applicant has not, in its view, exhausted internal appeal related remedies in terms of section 74 (1) of the Promotion of Access to Information Act 2 of 2000 (PAIA), Applicant's request for relief in the court is premature.

[10] In sum, that Respondents are of the view that Applicant ought to be directed back to the First or Second Respondent for the information sought.

[11] Section 74 (1) reads as follows:-

> "a requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph of the definition of "public body" in section 1 –
>
> to refuse a request for access."

[12] Section 27 of the Act is a deeming provision which reads as follows:

> "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."

[13] Whilst the Respondents rely on the deeming provision referred to, counsel for the Respondents' heads of argument at paragraph 1.2 of the introduction appear to in fact for the first time, provide the reason why the Applicant's request was met with silence by the Respondents. This paragraph reads:-

> "The applicant's papers seem to reflect that the applicant seeks or demands information which has a potential of crippling and jeopardizing the first respondent's claims against various consumers in the area of jurisdiction of the first respondent."

If this then fairly reflects the real disposition of the Respondents towards Applicant's request for the relevant information, it is somewhat inexplicable as to

why the court is simultaneously invited to rely on the deeming provision. It is difficult to understand the reason why this position was not communicated to the Applicant to enable her to exercise the various options at her disposal including, among others, exercising her right to an internal appeal; abandoning the request if so desired or to approach the court for relief.

[14] Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) entitles all citizens to a just and fair resolution of disputes they may be involved with in a fair public hearing before a court or by an impartial tribunal.

[15] Section 36(1) of the Constitution establishes a right of access to any information held by the state and section 36(2) requires national legislation to effect this right. The Promotion of Access to Information Act 2 of 2000 is such Act.

[16] Section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay.

[17] In *Nouport Christian Care Centre v Minister, National Department of Social Development* 2005 (1) BCLR 1034 (T) at paragraph 28 the court held that:

> "The approach to be followed in matters where the exercise of public power is challenged by way of review proceedings, has been encapsulated in various

decisions by the Constitutional Court. For present purposes I only refer to the judgment in *Pharmaceutical Manufacturers Association of South Africa and Another, in re: Ex parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at 696 E-H (paragraph 45):

> The interim Constitution which came into force in April was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written Constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of Government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed."

[18] In *Armbruster & Another v Minister of Finance and Others* 2007(12) BCLR 1283 (CC) at page 1309 paragraph 81, the Constitutional Court per Mokgoro J stated:-

> "Finally, though nothing untoward in the conduct of the official in this case has been established, it is necessary to underline the fact that officials are constitutionally bound, in the daily operation of their role and functions, to observe the rule of law and promote the spirit, purport and objects of the Bill of Rights. The public administration must always and in every sphere be governed

> by the democratic values and principles enshrined in the Constitution and services must be provided impartially, fairly, equitably, and without bias." (Section 195 of the Constitution).

[19] In *University of Western Cape v MEC for Health and Social Services* 1998(3) SA 124 (C) at 1301, Hlophe J, *(as he then was),* stated:-

> "Our courts have repeatedly laid down that they do not want to usurp the powers of the authorities to whom the legislation has vested the powers to decide one way or the other. To do otherwise would constitute an unwarranted usurpation of the powers entrusted to the public authorities by the relevant statute. Therefore in the ordinary course the Courts will refer the matter back because the Court is slow to assume a discretion which has by statute been entrusted to another functionary or repository of power. It is only in exceptional cases that this principle will be departed from. Over the years, South African Courts have recognised that in exceptional circumstances the Court will substitute its own decision for that of a functionary who has a discretion under the Act. Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary. Our Courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction."

[20] In *MEC for Roads and Public Works, EC v Intertrade Two (Pty) Ltd* 2006(5) SA 1 (SCA), Maya JA para (8) observed:

> "Section 32 of the Constitution confers upon every person a general and unqualified right of access to any information held by the State and its organs. It then requires the enactment of national legislation to give effect to the right, which legislation 'may provide for reasonable measures to alleviate the administrative and financial burden on the State'. The Promotion of Access to Information Act is that legislation. The right to obtain information is conferred also, albeit for the limited purpose of litigation, by Uniform Rules 53 and 35, which regulate review proceedings and the discovery procedure, respectively."

The learned Judge of the Appeal went on to say at para 20:

> "There is another issue that requires comment. The appellant's resistance to Intertrade's request for documentation on technical grounds was, in my opinion, most reprehensible. Important issues are at stake here. Intertrade seeks to establish the truth about an extraordinarily extended tender process to exercise and protect its rights. The appellant's knew precisely what documents it required from the outset. They did not raise any impediment which would prevent them from producing the documents. Neither did they deny that they had the documents in their possession. Their response is rendered more deplorable by the report contained in the department's own correspondence which shows that, whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable citizens were suffering and children were dying in poorly maintained hospitals as a direct result of their failure to comply with their constitutional obligations."

[21] I refer to the aforegoing decision in an effort to send the clear message that an Applicant who has in good faith and as of right requested information in

terms of PAIA ought to be dealt with in a rational, fair and just manner by public authorities. In an open and democratic society, government must be accountable for its decisions and its actions should be informed by rational considerations that are explicable to those affected. Public access to information is fundamental to encouraging transparency and accountability in the way in which government and public authorities operate. Executive action must not be arbitrary. Arrogant disregard and failure to positively engage the public is not one of those values contemplated in the Constitution. There is no room for a policy of 'don't ask, don't tell'.

In this case, there seems to exist an apparent lack of insight by Respondents of their legal position as a body that is there in order to serve citizens and ratepayers. I still do not understand why, if the reason Applicant was not furnished the information arose out of the Respondents' perception to be gathered from counsel's heads, this was not communicated to Applicant as Applicant is entitled to be told by law.

[22] The nature and extent of a public body's obligation where the right of access to information is involved is eloquently expressed in *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T). There, Cameron J, *(as he then was)* dealing with a claim brought under section 23 of the interim Constitution (the precursor to section 32 of the Constitution) said at 850 A-C:-

> "In my view, section 23 entails that public authorities are no longer permitted to 'play possum' with members of the public where the rights of the latter are at

> stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in section 23, is to subordinate the organs of State. . . to a new regimen of openness and fair dealing with the public."

[23] The election by the Respondents not to simultaneously file answering affidavits is also a matter of concern in light of the unwarranted additional costs to be incurred by the Applicant where Respondents are given leave to file. This matter could have been concluded but for the Respondents' conduct. The duty of the Respondents is always to facilitate rather than to obstruct the dissemination of reasonably requested information.

[24] Where the manner in which an Applicant was dealt with and both the decision to oppose and the way in which the case was conducted represented unconscionable conduct on the part of any sphere of government, the court can express its displeasure by an award of costs on a punitive scale. **See:** *Njongi v MEC Department of Welfare, Eastern Cape* 2008(4) SA 237 (CC).

[25] In the result the following shall issue:

1. The Respondents' special plea is dismissed;

2. The Respondents are ordered to file their answering affidavits within fifteen (15) days of this order;

3. The Respondents are ordered jointly and severally, to pay Applicant's costs on a scale as between attorney and client, the one paying the others to be absolved.

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P T MAGEZA

ACTING JUDGE OF THE HIGH COURT

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Heard on:	4 February 2010
Delivered on:	18 March 2010