OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No: EL 423/2019

In the matter between:

LINDA CAKWEBE **Applicant**

and

REGIONAL COMMISSIONER: DCS **Respondent**

JUDGMENT

GOVINDJEE AJ:

[1] The applicant is employed by the respondent, who is cited in his official capacity and from whom requests for access to information and internal appeals are lodged.

[2] In essence, the applicant seeks access to information of various details pertaining to amounts paid by the respondent to the beneficiary and argues that it has complied with the provisions of the **Promotion of Access to Information Act**, 2000 (**PAIA / the Act**). The request appears to be motivated by the need to determine whether proper amounts have been deducted from the applicant's salary.

[3] In particular, the applicant seeks copies of the following documentation:

a. Emoluments Attachment Order / Judgment authorising the deductions;

b. Correspondence exchanged between the Respondent and the beneficiary; and

c. Details of the payments made by the Respondent to the beneficiary.

[4] In terms of section 11 of **PAIA**, a requester must be given access to a record of a public body if:

a. The requester complies with all the procedural requirements in the Act relating to a request for access to that record; and

b. Access to that record is not refused in terms of any ground for refusal contemplated in chapter 4 of part 2 of the Act.

[5] It is common cause that the request was correctly submitted and that there was no response to the request during the 30-day period prescribed. As such, the request was deemed to be refused in terms of section 27 of the Act and a notice of internal appeal followed. There was again no response, resulting in the application in this matter being launched during April 2019. The respondent has since granted the applicant partial access to the records requested but has not acceded to the request to provide a breakdown of amounts paid or fees charged. The applicant relies partly on the provisions of the **Basic Conditions of Employment Act**, 1997 in averring that the respondent has a statutory duty to account to the applicant in this respect.

[6] The respondent has not placed reliance on the defence that the records requested cannot be found or do not exist. In terms of section 23 of PAIA, provision is made for the information officer of a public body to notify a requester of that situation by way of affidavit or affirmation.

[7] The crisp point to be determined is whether the request can be said to be manifestly frivolous or vexatious, or amounts to substantial and unreasonable diversion of the resources of the respondent, that being the only basis for opposing the application. In such a case, in terms of section 45 of the Act, the information officer of a public body may lawfully refuse a request for access to a record.

[8] In this regard, the respondent questions various statements appearing in the founding affidavit, namely that the applicant was not aware of any judgment against her, that no credit agreement was entered into, that the purpose of the deductions are unknown to the applicant, that she is not indebted to the beneficiary and that the deductions are unauthorized.

[9] The respondent frames the questions to be addressed in this matter around these statements, to demonstrate bad faith on the part of the applicant and to justify the contention that the request is frivolous and vexatious. It also raises section 65J(4)(*b*) of the **Magistrates' Court Act**, 1944 in opposing the application.

[10] It is perhaps important to note at this point that 'record' is defined in **PAIA**, as follows:

> "'record' of, or in relation to, a public or private body, means any recorded information –
>
> a) Regardless of form or medium;
>
> b) In the possession or under the control of that public or private body, respectively; and
>
> c) Whether or not it was created by that public or private body, respectively."

[11] Although this point was not taken, I am satisfied that the information sought amounts to a 'record' as defined. I am also satisfied that the information provided to the applicant to date, particularly by way of the annexures to the answering affidavit, fall short of the information requested, bearing in mind the stated purpose for the request, which is to ascertain whether excessive amounts have been deducted. To determine this requires a proper breakdown of payments made.

[12] In ***De Lange & another v Eskom Holdings Ltd and others*** [2012] (1) SA 280 GSJ) paras 34-35], the court held:

> 'For public bodies…the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of

its rights. In terms of s11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and *as long as none of the grounds of refusal are applicable*. Those grounds of refusal are set out in Ch 4 of Part 2 of the Act.

[35] Consequently the importance of access to information held by the State or public or State entity as a means to secure accountability and transparency justifies the approach adopted in s 32(1)(a) of the Bill of Rights and in PAIA, namely that, unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the State or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of State believes those reasons to be.'

[13] It is also unnecessary for me to comment on the issue of a manual, and I accept that the request for information was properly submitted to the respondent as Information Officer, together with a subsequent internal appeal.

[14] To the extent that it is suggested that the request may be refused due to the time it would take to respond to the request, this may be rejected *in casu* (***Paruk & Partners v eThekwini Municipality*** **[**2005] JOL 16287 (D)). That leaves consideration of 'frivolous' or 'vexatious', the former having been held to refer to something with 'no serious purpose' and the latter meaning to cause 'annoyance or distress' or taking actions 'purely to cause trouble or annoyance.' ***[(CC II Systems (Pty) Ltd v MGP Lekota NO*** 2005 JDR 0471 (T) para 34 cited in ***Panday v UKZN and others*** (D8171/2019) para 35.] For this defence to succeed, it must 'manifestly' be that this is the case, and it is accepted that this is generally difficult to prove. The burden is unquestionably on the respondent to put forward sufficient evidence for a court to conclude that, on the probabilities, the information requested falls to be labelled in this fashion (***President of the RSA v M&G Media Ltd*** [2012] (2) SA 50 (CC) par 23).

[15] On the approach I take to the matter, it is not open for the respondent to raise that aspect before court when the information officer has not complied with the provisions of s 45 by indicating that the reason for the refusal is vexatiousness. Instead, in the case at hand there is only a 'deemed' refusal of request in terms of s 27 and I am unable to find that this amounts to a *refusal* in terms of a ground for refusal contemplated in chapter 4 of part 2. It would have been easy for the respondent's officials to have refused the requests on that basis but they chose not to do so and to ignore the requests. The deemed refusal is, then, in fact one for no reason and might suffice for purposes of allowing the applicant to move on to provide notice of internal appeal. It cannot extend to an indication that the request has been refused on the basis of frivolity or vexatiousness on my interpretation of the Act.

[16] As such, the requestors should have been given access to the records sought from the outset, alternatively an affidavit could have been filed in terms of the Act indicating that the balance of information sought (after the initial provision of information) was non-existent.

[17] I might add as an aside that I have considered many of the various judgments emanating from this court in similar matters, and that there is clearly a need for the full bench of the division, at some time in the future, to express its views on the issues raised in matters of this nature.

[18] I remain concerned as to why the applicant has chosen to go to these lengths to obtain such basic information from the respondent via a **PAIA** application and this affects my view in respect of costs. The judgment creditor could have been sought and approached on reasonable reflection and following basic enquiries, and failing that the applicant could easily have at least made enquiries from the names reflected on the payslip provided to the applicants each month.

[19] The position might have been different if the applicant had experienced difficulties in approaching the judgment creditor or its attorneys, or approached this court with a *bona fide* explanation as to why this information was being sought from the respondent instead of the judgment creditor or Russell Inc (the name appearing on the payslip). Instead, the applicant implausibly claims no knowledge of its

judgment creditor or, seemingly, Russell Inc, and denied the existence of any judgment or emoluments attachment order authorising salary deduction.

[20] The respondent's payslip makes it clear that a reference number is linked to 'Russell Inc' and that an amount of R600 was deducted. There is no explanation why the applicant did not make enquiries from that firm, or indeed why the applicant's representative could not do so when briefed.

[21] This conduct becomes particularly remarkable when considering that the applicant 'notes' in her replying affidavit, that she signed an acknowledgement of debt and consented to judgment in respect of a loan on 9 September 2016 (par 9.3 of answering affidavit). A pre-agreement statement and quotation for small and intermediate credit agreements pertaining to the loan and credit agreement was also signed by the applicant with African Bank in 2009 reflecting a R600 instalment. It is also clear from the applicant's founding affidavit that she had made enquiries with the respondent's officials responsible for salaries at an early stage, and was then informed that the deduction was in terms of a court order. Cumulatively, and as was the case in ***Wolela v The Minister of Social Development and Others*** (unreported case no. 716/2016, ECD, Bhisho), it is these circumstances that justify the conclusion that each party should pay their own costs.

[22] I accordingly make the following order:

1. **The respondent is directed to forthwith furnish the applicant with the balance of the records which include the printout of all payments made to the beneficiary for the entire period involving the deductions in favour of Russell Inc with reference number 23216232017 within 15 (fifteen) days.**

2. **Each party should pay their own costs.**

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A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant : Mr N.J du Plessis, NJ du Plessis & Associates

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Heard:	*:*	*25 March 2021*
Delivered:	*:*	*25 March 2021*