

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 34976/2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

(4 August 2023)


SIGNATURE
ACTING JUDGE G NEL

In the matter between:

DARREN SAMPSON

Applicant

and

**THE DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

ROCHELLE MAISTRY

Second Respondent

**THE NATIONAL DIRECTORATE OF PUBLIC
PROSECUTIONS**

Third Respondent

J U D G M E N T:

This Judgment is delivered electronically. Regardless of the date appearing on this written Judgment, the deemed date of delivery is the actual date that the Judgment is uploaded to CaseLines.

INTRODUCTION

- [1] The relief sought by the Applicant in this Application is somewhat confusing, to say the least, and in order to decipher, understand, set out and determine the precise relief sought, it was necessary to consider the various Notices of Motion filed, the draft orders, the practice notes filed, and the submissions of the Applicant and the Respondents.
- [2] This Application previously came before Her Ladyship Ms Justice Van der Schyff ("Van der Schyff J"), who also experienced some confusion as to the nature of the relief sought before her on the day, but Van der Schyff J ultimately did not have to determine the relief sought in this Application, for the reason which I refer to below.
- [3] The Notice of Motion dated 15 July 2021, seeks relief in three separate parts, being Part A, Part B and Part C.
- [4] In terms of the Notice of Motion dated 15 July 2021, the Applicant seeks the following relief, as paraphrased by me:

Part A

- [4.1] That a Warrant of Arrest be immediately issued by the National Prosecuting Authority, for the arrest of Rochelle Maistry;
- [4.2] That the criminal matter under CAS number 648/66/2020 be transferred from the Johannesburg Magistrate's Court to the Pretoria High Court;

- [4.3] That "*all and any persons in the employ of the Respondent*" be requested to produce evidence of any criminal wrongdoing on the part of the Applicant, in aiding and abetting Ms Rochelle Maistry to contravene a Court Order;
- [4.4] That the Solicitor-General be compelled to provide a sworn affidavit setting out details of any criminal misconduct by the Applicant, in aiding and abetting Ms Rochelle Maistry to contravene a Court Order;
- [4.5] That "*the Respondent*" provide compelling reasons why the Applicant's requests in terms of the Promotion of Access to Information Act, and in terms of the Promotion of Administrative Justice Act were "*failed, refused or ignored*" by "*the Respondent*"; and
- [4.6] That "*the Respondent*" pay the costs of the Application.

Part B

- [4.7] That it be declared that the Solicitor-General has failed in his mandate to oversee all functions of the office of the State Attorney;
- [4.8] That in the event of the Solicitor-General opposing such relief, that a report should be submitted "*pertaining to the gross misconduct*" of the State Attorneys;

[4.9] That sworn affidavits should be provided by the Deputy Information Officers of the Magistrates' Commission, Police Services and Administration, and "*the Respondent*", "*pertaining to the failure, refusal and neglect of the State Attorneys*" in providing information to the Applicant in terms of the Applicant's Promotion of Access to Information requests;

[4.10] That a declaratory order and a sworn affidavit be obtained relating to reasons or complaints as to why the Solicitor-General failed, refused and/or neglected to investigate gross misconduct in respect of certain contraventions; and

[4.11] A punitive costs order.

Part C

[4.12] That in the event of the relief sought in Part A and Part B being granted, that a return day should be provided for the payment of the costs, and a directive be issued to the Taxing Master to tax all Bills of Costs presented to "*the Respondent*".

[5] It is also recorded in the Notice of Motion that in the event of opposition to the relief sought, the Applicant will request security for costs from "*the Respondent*" in the amount of R1 750 000.00.

[6] The "*Respondent*" referred to in the Notice of Motion is the First Respondent as set out in the citation of this Judgment, being the Department of Justice and Constitutional Development ("the DOJ").

[7] A further Notice of Motion dated 25 July 2021 was filed by the Applicant, relating solely to the provision of security for costs by the DOJ.

[8] An Amended Notice of Motion was thereafter filed, dated 6 September 2021, where relief is sought in terms of Part A and Part B. The relief sought in the Amended Notice of Motion is set out below, also as paraphrased by me.

[9] In terms of Part A of the Amended Notice of Motion, the Applicant seeks:

[9.1] An order that the DOJ be directed to delivery any affidavits, as provided for in Rule 53(5)(b) in response to the allegations made by the Applicant.

[10] In terms of Part B of the Amended Notice of Motion, the Applicant seeks the following relief:

[10.1] A further opportunity be provided to the DOJ to make a decision to prosecute Ms Rochelle Maistry, alternatively issue a J175 Certificate, alternatively issue a warrant of arrest, alternatively issue a certificate of *nolle prosequi* with reasons for the refusal to prosecute;

[10.2] Provide reasons for the failure to prosecute;

[10.3] That the National Directorate of Public Prosecutions provide compelling written reasons for the failure to prosecute without fear, favour or prejudice;

- [10.4] That the National Directorate of Public Prosecutions provide sworn affidavits *"pertaining to the failure, refusal and neglect of the National Directorate of Public Prosecutions in providing justice to the Applicant"*; and
- [10.5] An order for costs.
- [11] By 6 September 2021, Ms Rochelle Maistry ("Ms Maistry") and the National Directorate of Public Prosecutions ("the NDPP") had been joined as the Second and Third Respondents, respectively, to this Application.
- [12] An application for the joinder of Film Fun Holdings (Pty) Ltd trading as Teljoy ("Teljoy"), was launched on 21 December 2021. The joinder of Teljoy was set down for hearing on 18 March 2022.
- [13] It is unclear from the documents filed on CaseLines as to whether Teljoy was formally joined to the Application as the Fourth Respondent on 18 March 2022, but a Notice of Withdrawal as against the Fourth Respondent (Teljoy) was filed by the Applicant on 3 August 2022, and I can only assume that Teljoy was indeed joined and thereafter released.
- [14] By the time this Application was heard by me, Teljoy was clearly no longer a party to the Application.
- [15] In addition to the relief sought in the Notices of Motion referred to above, further relief was sought in applications relating to interlocutory relief for discovery, the compelling of the filing of Heads of Argument, interlocutory relief in terms of Rule 30 and the issue of a subpoena to the Legal Practice Council, all of which was uploaded to CaseLines.

- [16] As set out above, the Application came before Van Der Schyff J on 18 May 2022, who commented that: *"The CaseLines file reflects that an amended notice of motion pertaining to the main application and several other applications were also filed under the same case number. The practice note filed by the applicant is long and somewhat inconsistent."*
- [17] Van Der Schyff J also recorded that: *"Because of the extent of the papers filed, and the numerous applications uploaded to CaseLines I pertinently asked the applicant whether I was only to decide the application for security of costs"*.
- [18] The Applicant advised Van Der Schyff J that the Honourable Judge was only to determine the application for security for costs, which application she then considered and determined.

RELIEF SOUGHT IN THIS APPLICATION

- [19] On the morning of the hearing of this Application a draft order was uploaded to CaseLines by the Applicant, seeking the following relief:
- "(i) The Deputy Information Officer decision to refuse the Applicant's access to information in terms of Section 18 of the Promotion of Access to Information Act (PAIA) is set aside;*
 - (ii) The Deputy Information Officer is directed to provide the Applicant with access to specified records within fourteen days;*
 - (iii) The Respondents' answering affidavit/defence be struck off the roll due to refusal to sign the Applicant's joint practice note, as per the Judges Directive and failure to furnish notice to oppose, answering affidavits, heads of argument and practice including furnish security timeously;*
 - (iv) The Third Respondent provide the Applicant with a decision the prosecute the Second Respondent within fourteen days of this matter being heard;*

- (v) *Costs on the scale of attorney and client be awarded to the Applicant;*
- (vi) *Further and/or alternatively relief."*

- [20] The Applicant's original Practice Note dated 21 May 2021 did not set out the relief being sought, and was accordingly not helpful in ascertaining the precise nature of the relief to be determined by me.
- [21] The Joint Practice Note prepared by the Applicant (which the Respondents refused to sign) referred to the "*Nature of the Motion*" and listed the issues to be determined, including issues not raised in any of the Notices of Motion or the Draft Order, thereby causing even further confusion.
- [22] Accordingly, at the hearing of the Application, I raised the nature of the relief being sought with the Applicant, who advised me that he seeks two orders, being firstly that he wants access to documents, and secondly that he wants to know what the National Prosecuting Authority is going to do about charging Ms Maistry, and that the National Prosecuting Authority must provide such decision to him within a period of 14 days.
- [23] The nature of the relief sought, as orally advised by the Applicant related only to paragraphs (ii) and (iv) of the Draft Order filed.
- [24] In seeking certainty as to the precise nature of the relief being sought, I requested further clarity from the Applicant, who then confirmed to me that he seeks only the relief as set out in the Draft Order uploaded on the morning of the hearing, which I have quoted above.

- [25] The Applicant advised me that he did not seek any relief as against Ms Maistry, but that she was joined as she has a direct and substantial interest in the outcome of the Application.
- [26] The counsel appearing for the DOJ and the NDPP informed me that she understood the relief being sought in the Application as being that set out in the Notice of Motion dated 15 July 2021, but that she would also address me on the relief sought in the Draft Order.
- [27] The relief as sought by the Applicant in the Draft Order appears to be a combination of the relief sought in the various Notices of Motion, with certain amendments and omissions.
- [28] I accordingly accepted that the relief sought by the Applicant in this Application is that recorded in the draft Order uploaded to CaseLines on the day of the hearing, and I have confined myself to determining such relief sought insofar as the relief sought could be entertained.

ISSUES TO BE DETERMINED

- [29] Having regard to the relief sought by the Applicant, the issues to be determined in this Application are the following:
- [29.1] Whether the DOJ's Answering Affidavit and/or defence should be struck out;
- [29.2] Whether the decision of the Deputy Information Officer of the DOJ, refusing the Applicant access to information should be set aside;

- [29.3] Whether the Deputy Information Officer of the DOJ should be directed to provide access to specified records to the Applicant;
- [29.4] Whether the NDPP should provide the Applicant with a decision as to whether Ms Maistry would be prosecuted or not; and
- [29.5] Whether the DOJ and NDPP should be ordered to pay the costs of the Application, and if so, on what scale.

THE APPLICANT'S REPLYING AFFIDAVIT

- [30] At the commencement of the Applicant's address to me, I enquired from him as to whether he had filed a Replying Affidavit or Affidavits in response to the allegations set out in the Answering Affidavits, as I was unable to find any Replying Affidavit on CaseLines. The Applicant advised me that he had not filed any Replying Affidavits, as in his view there were no allegations in the Answering Affidavits that required a response.
- [31] The Applicant advised me that the filing of Replying Affidavits would not take the matter any further, as the contents of any Replying Affidavit would "*just be a bare denial*".
- [32] I then enquired from the Applicant as to whether he was aware of the evidentiary principle as set out in the matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹ applied by the Courts in application proceedings in the event of disputed facts, and I then briefly explained such "evidentiary rule" to him. The Applicant informed me that he was well aware

¹ 1994 (3) SA 623 (A).

of the Plascon-Evans principle, but that he wished to proceed with the Application without the filing of any replying affidavits.

THE FIRST ISSUE: STRIKING OUT OF ANSWERING AFFIDAVIT

[33] In paragraph (iii) of the Draft Order the Applicant seeks the striking out of the DOJ's and the NDPP's Answering Affidavit and/or the DOJ's and the NDPP's defence, on the basis that such Respondents refused to sign the Joint Practice Note as prepared by the Applicant, that they failed to furnish Notices of Opposition, that they failed to file Answering Affidavits, Heads of Argument and Practice Notes, and failed to furnish security for costs timeously.

[34] Although this relief is only sought as paragraph (iii) in the Draft Order, it is necessary to determine such issue first, as if the relief sought in paragraph (iii) is granted, the contents of the Answering Affidavits should not be considered in determining the remaining issues.

[35] Whilst this is not an aspect raised in the Original or Amended Notices of Motion, it is clearly a legal *in limine* aspect, and the Applicant was entitled to raise such aspect.

[36] The Applicant did not specifically address me on any of the aspects raised in the First Issue, but I have considered the Issue and the aspects related to such Issue in any event.

[37] The first aspect to be considered in the First Issue relates to the failure of the DOJ and the NDPP ("the Respondents") to sign the Joint Practice Note.

- [38] The counsel representing the Respondents advised me that no agreement could be reached as to the contents of the Joint Practice Note, which was made more difficult as a result of a "*clash*" between the Applicant and counsel for the Respondents. The Applicant responded that the draft Joint Practice Note prepared by him was simply ignored.
- [39] The Practice Directive requires the holding of a pre-hearing conference by counsel for the parties, and the preparation of a Joint Practice Note. No pre-hearing conference was arranged or held, and the Joint Practice Note as prepared by the Applicant did not, in any event, comply with the requirements as to the contents of a Joint Practice Note.
- [40] It is certainly not uncommon for parties to disagree on the contents of a Joint Practice Note, and in such circumstances the appropriate course of action would be to still prepare a Joint Practice Note, setting out the areas of disagreement, and the parties' respective contentions in respect of the areas of disagreement. As an alternative, each party should prepare and file its own Practice Note, and explain why a Joint Practice Note could not be prepared.
- [41] The purpose of a practice note is to assist the Court in identifying, *inter alia*, common cause facts, disputed issues, the anticipated duration and the portions of the papers that should be read.
- [42] All of the Respondents filed Practice Notes, which read together with the Applicant's Joint Practice Note provided the Court with most of the information as envisaged by the Practice Directives. It is also clear from a reading of the

various Practice Notes why the parties could not agree on the contents of a Joint Practice Note.

[43] I should also mention that a Joint Practice Note would not have been of any particular assistance to me, as the relief sought by the Applicant was only identified on the morning of the hearing of the Application.

[44] In the circumstances, the lack of a Joint Practice Note did not inconvenience the Court or the Parties, and could never justify the striking out of the Respondents' defences or the Respondents' Answering Affidavit.

[45] The second aspect raised in the First Issue relates to the failure of the Respondents to file Notices of Opposition or to file Notices of Opposition timeously.

[46] The Respondents that are already parties to the Application did file Notices of Intention to Oppose. Even if such notices were filed out of time or later than required, such conduct cannot justify the striking out of the Respondents' defences or Answering Affidavits, particularly after the Affidavits have already been filed, and the Application is ready for determination. A failure to file a Notice of Intention to Oppose or to file it timeously has its own repercussions, and essentially become irrelevant after Answering Affidavits have been filed.

[47] There appears to have been two prior separate applications to have the Answering Affidavits of Ms Maistry and the DOJ struck out, neither of which were persisted with.

- [48] In the circumstances, the belated filing of Notices of Intention to Oppose do not justify the striking out of the Respondents' Answering Affidavit or their defences.
- [49] As regards the third aspect raised in the First Issue, relating to the failure to file Answering Affidavits, or the late filing of Answering Affidavits, it is clear that Answering Affidavits were indeed filed. In addition, condonation for the late filing of the DOJ's Answering Affidavit was sought and granted.
- [50] The Respondents' counsel submitted that condonation for the late filing of the Answering Affidavit was sought and was not opposed, that there could be no prejudice to the Applicant, and that the Applicant elected to not file a Replying Affidavit.
- [51] The Applicant did not suggest that he was prejudiced by the late filing of the Answering Affidavit, which was filed by 16 March 2022. The Applicant did not seek a postponement and to the contrary, stated that he did not intend to file any Replying Affidavit in response to such Answering Affidavit.
- [52] In the circumstances, the late filing of an Answering Affidavit would not justify the striking out of the Answering Affidavit or the defences raised in such Answering Affidavit. If the failure to file an Answering Affidavit timeously resulted in any prejudice, such prejudice could have been cured by a postponement and a costs order.
- [53] The fourth aspect raised as part of the First Issue is that the Respondents did not file Heads of Argument or Practice Notes.

- [54] By the time the Application came before me for hearing, Heads of Argument and Practice Notes had been filed. The Applicant had already brought an application to compel the filing of Heads of Argument and Practice Notes prior to the setting down of this Application.
- [55] Accordingly, the fourth aspect raised did not justify the striking out of the Answering Affidavit or the defences in such Answering Affidavit.
- [56] The final aspect raised in the First Issue was that the Respondents failed to furnish security for costs timeously.
- [57] On 20 May 2022, Van der Schyff J dismissed the Applicant's Application for Security for Costs, and there was accordingly no obligation on the Respondents to provide any security.
- [58] In the circumstances, the First Issue raised has no merit, and I find that there is no basis to strike out the Respondents' Answering Affidavit or the defences set out in such Answering Affidavit, and that accordingly the relief sought in paragraph (iii) of the Draft Order must be dismissed.

THE SECOND AND THIRD ISSUES: SETTING ASIDE THE DECISION OF THE DEPUTY INFORMATION OFFICER OF THE DOJ AND ORDERING THE PRODUCTION OF DOCUMENTS

- [59] The Second and Third Issues are interwoven, and will be considered and determined together.
- [60] The Second Issue to be determined is whether the decision of the Deputy Information officer of the DOJ, in refusing the Applicant access to information sought in terms of the Request for Information in terms of the Promotion of

Access to Information Act, Number 2 of 2002, as amended ("PAIA"), should be set aside.

[61] The Third Issue to be determined is whether the Deputy Information Officer of the DOJ should be directed to provide access to specified records to the Applicant.

[62] The relief sought in paragraphs (i) and (ii) of the Draft Order were not sought in such specific terms in the Notice of Motion or the Amended Notice of Motion, and I am of the view that such failure and/or discrepancy would have been sufficient for me to decline to hear and determine the relief as sought in such paragraphs of the Draft Order. As the Applicant appeared in person (albeit that he is legally trained), as the relief sought was an amalgamation of the prior relief sought, and as the Respondents' counsel was prepared to address me on the relief sought in the Draft Order, I decided to hear submissions on the relief sought in paragraphs (i) and (ii) of the Draft Order.

[63] The Second and Third Issues relate to a review of the "decision" of the Deputy Information Officer of the DOJ, and must accordingly be determined together, as the Second Issue relates to whether the "decision" must be set aside, and the Third Issue relates to whether such "decision" must be replaced with an appropriate order by this Court.

[64] The Applicant stated that he had completed a number of requests for information in terms of PAIA, but that his requests were ignored.

[65] The Applicant submitted that he required information in order to assist him in his various matters, and needed documents to access such information.

[66] The Applicant submitted that the documents should be provided for the sake of transparency, and that if the documents do not support the *"fabricated versions"* of impropriety on the part of the Applicant, the persons who *"fabricated"* the *"versions"* must be *"brought to book"*.

[67] The Applicant stated that he had filed a *"plethora"* of applications for information in terms of PAIA, but had not received any responses or information. In an e-mail dated 10 June 2021, a copy of which was attached to the Applicant's Founding Affidavit, the Applicant refers to a *"mountain of PAIA requests I sent"*.

[68] The Request for Access to Information in terms of Section 18(1) of PAIA is attached to the Founding Affidavit as annexure "C". The Request is dated 6 April 2021.

[69] The information sought in the Request for Access to Information is described as being the following:

"Court Order or Judgment indicating Judge Sardiwalla ruled dismissal was both substantively and procedurally fair on 17 April 2020."

[70] The details of the Public Body from which the information is being sought is not set out in the Request, but I can only assume that it was directed at the DOJ, as it is such Respondent which the Applicant alleges did not respond.

[71] It is clear from the contents of the Applicant's Founding Affidavit that the Applicant seeks to review the "decision" of the Deputy Information Officer of the DOJ to refuse access to the information sought, and that the Applicant's cause of action is based on a judicial review.

- [72] In paragraph 4 of the Founding Affidavit, it is specifically recorded that the Application is *“for judicial review of the administrative action (or lack thereof) in terms of Section 6 of the Promotion of Administrative Justice Act ... wherein the Respondent (the DOJ) failed to furnish reasons for not providing information ...”* in terms of PAIA.
- [73] It appears from the Respondents' Answering Affidavit that the Respondents have opposed the relief sought, as if the Applicant's cause of action was based on PAIA, and not PAJA.
- [74] Even though PAIA provides its own remedy for a failure to comply with a Request for Information, it appears from PAJA that any decision taken, or any failure to take a decision in terms of PAIA, is also reviewable in terms of PAJA.
- [75] As regards the merits of the Second Issue, being the review and setting aside of the Deputy Information Officer's "decision", the Applicant did not address me as to why such "decision" should be set aside.
- [76] In the Founding Affidavit, all that is alleged as regards the "decision" of the Deputy Information Officer is that the information requested by the Applicant could not be obtained.
- [77] In the Founding Affidavit it is however stated that the review is based on the DOJ's failure to furnish reasons for not providing the information sought, but there is no allegation in the Founding Affidavit that reasons were sought from the Respondents for the failure to provide the document sought in the Request for Information dated 6 April 2021.

- [78] The “decision” by the Deputy Information Officer only amounts to a decision as there was no response to the Applicant’s Request for Information, and in terms of PAIA, such silence is deemed to be a refusal.
- [79] There is simply no factual basis set out by the Applicant in the Founding Affidavit, in order to justify the setting aside of the Deputy Information Officer’s “decision”. Even if the Deputy Information Officer had responded with a direct refusal, rather than a deemed refusal, there would still be no basis for setting aside such a refusal. There is simply no proof or even allegation that the “decision” falls within any of the categories referred to in Section 6 of PAIA.
- [80] Even though Section 6(2)(g) of PAJA refers to a failure to take a decision, this must be read with Section 6(3) of PAJA which stipulates precisely in which circumstances a failure to take a decision becomes reviewable. The provisions of Section 6(3) of PAJA do not find application in this instance, as Section 27 of PAIA converts the inaction of an information officer into a deemed “decision” of refusal.
- [81] In the circumstances, and for the purposes of considering the review of the conduct of the Deputy Information Officer, it must be accepted that the decision taken was to refuse access to the information sought.
- [82] As already set out above, there is no basis or grounds set out by the Applicant as to why such “decision” would be reviewable, or should be set aside.
- [83] As regards the Third Issue, relating to the relief sought that the Deputy Information Officer should be directed to provide access to “*specified documents*” to the Applicant, I informed the Applicant that I could not make

such an Order, as it would be vague and unenforceable. I enquired from the Applicant whether he had listed the “specified” documents required in an affidavit or a request, and he informed me that he had not, as he did not know what information was available.

[84] Accordingly, the only document that is specifically identified as being required is the Court Order referred to in the Request dated 6 April 2021.

[85] No basis is set out in the Founding Affidavit as to why the Respondents should be ordered to provide such Court Order, nor is it alleged why such Court order is required by the Applicant.

[86] This is not completely surprising, as the relief sought at the hearing of the Application is not the relief that was sought in the original Notice of Motion to which the Founding Affidavit was attached as already explained above. Despite the filing of an Amended Notice of Motion, no Supplementary Affidavit was filed by the Applicant.

[87] This aspect is further complicated by the allegation in the Answering Affidavit that there is no Court Order in existence dated 17 April 2020, granted by His Lordship Mr Justice Sardiwalla (“Sardiwalla J”) in the terms as set out in the PAIA Request, and that the *“Applicant is fully aware that such a court order does not exist”*.

[88] Whilst it would seem strange that a litigant would seek production of a document which such litigant believes does not exist, it appears that the Respondents are correct. In annexure “A” to the Applicant’s Founding Affidavit, the Applicant records the following:

"The main issue of concern is this utterance of the existence of a phantom court order justifying my continued unfair dismissal. Kindly attend to include in the affidavit confirming no such court order exists"

and

"...I have been informed that there is a court order which supports my dismissal. There is no existence of same ...".

[89] It is clear that the Applicant is of the firm view that no such court order exists, yet he files a PAIA Request seeking the production of such document and seeks a court order compelling the production of such document by way of a judicial review.

[90] In the circumstances, the Applicant has not made out a case based on judicial review in terms of PAJA for the granting of the relief sought in paragraphs (i) and (ii) of the Draft Order.

[91] As already indicated, the Respondents opposed the relief sought in paragraphs (i) and (ii) of the Draft Order on the basis that the Applicant did not comply with the requirements of PAIA. Even though I considered the relief sought on the basis of a review, and have found that there is no merit in such review, I have also considered whether the Applicant was entitled to the document sought in terms of PAIA, despite the clear indications that the document sought does not exist.

[92] The Applicant alleged that he was advised that he did not file an internal appeal in terms of PAIA, and in response to my question as to whether he followed any internal remedies, he first advised me that he was not told about

any internal remedies, and then advised me that he had lodged an internal appeal process.

[93] Respondents' counsel stated that the information sought by the Applicant relates to events surrounding the granting of a judgment by Sardiwalla J, but that the Applicant did not lodge an internal appeal process.

[94] In the Founding Affidavit, the Applicant alleged that all internal remedies have been exhausted in seeking the information required in terms of the Applicant's Request for Information in terms of PAIA.

[95] A Notice of Internal Appeal Form, in terms of Section 75 of PAIA, is attached to the Applicant's Founding Affidavit, relating to an appeal against a "*Refusal of request for access*". The Internal Appeal relates to a Request made "*on or about 4 February 2021*", and clearly does not relate to the Request attached to the Founding Affidavit as annexure "C".

[96] I read an e-mail dated 10 June 2021, attached to the Founding Affidavit (which I was not referred to) from the Office of the State Attorney requesting the Applicant to provide a copy of the Request in terms of PAIA relating to the Applicant's current appeal/s. It appears from the trailing e-mail response that a Request was provided, but it is not attached to the copy of the e-mail attached to the Founding Affidavit, and I am unable to identify which Request was referred to.

[97] The Respondents alleged in the Answering Affidavit that the Applicant has not alleged or provided any proof that he lodged an internal appeal in terms of

Section 74 of PAIA against the refusal by the Deputy Information Officer of the DOJ.

[98] The Applicant did allege in the Founding Affidavit that he pursued all internal remedies, but no copy of an internal appeal document was attached to the Founding Affidavit.

[99] The Respondents alleged in the Answering Affidavit that in the absence of proof that an internal appeal was lodged the Applicant is precluded by Section 78(1) of PAIA, from seeking relief in this Court.

[100] It is not alleged in the Answering Affidavit that there was any response to the PAIA Request dated 6 April 2021, and I accordingly accept the Applicant's statement that there was no response to this Request.

[101] The Applicant correctly submitted that the failure to respond amounted to a deemed refusal.

[102] I considered all of the correspondence attached to the Affidavits, but was unable to find any response from the Deputy Information Officer of the DOJ to the PAIA Request dated 6 April 2021.

[103] The correspondence attached to the Founding Affidavit clearly relates to a number of issues, and not only the PAIA Request of 6 April 2021. The correspondence is not separated or explained in the Founding Affidavit.

[104] It is clear from the responses from the Office of the State Attorney that the Respondents were also confused as to precisely what was being sought by the Applicant.

- [105] The Applicant's election not to file a Replying Affidavit, which may have clarified disputed issues, on the basis that "*nothing was said in the Answering Affidavit*" certainly did not assist.
- [106] Section 27 of PAIA stipulates that the failure by an information officer to provide a decision on a request for access to information, within a period of 30 days after receipt of the request will constitute a deemed refusal of the request. In the circumstances, it must be accepted that the Information Officer of the DOJ refused the Applicant's request for information.
- [107] In terms of Section 74 of PAIA, a requester who is dissatisfied with a decision of an information officer, including a deemed refusal, may lodge an internal appeal against such decision.
- [108] As set out above, the Applicant alleged that he had exhausted the internal appeal process, whilst counsel for the Respondents submitted that there was no internal appeal in respect of the PAIA Request of 6 April 2021.
- [109] There is certainly no proof that the internal appeal process had been followed, other than the allegations in the Founding Affidavit that all internal remedies had been pursued.
- [110] In the Answering Affidavit it is however alleged that the Applicant failed to comply with the provisions of Section 74 of PAIA. This is in direct conflict with the Applicant's allegation of compliance with all internal remedies.
- [111] On such basis, counsel for the Respondents submitted that the claim for disclosure of documentation sought in terms of PAIA was premature.

[112] In terms of Section 78 of PAIA, a requester may only approach a Court for relief in terms of Section 82 of PAIA, if the requestor has exhausted the internal appeal procedure.

[113] Applying the test as set out in the *Plascon-Evans* matter², I must therefore find that the Applicant has not established that an internal appeal was lodged and finalised, in respect of the Request dated 6 April 2021.

[114] Accordingly, even if the Applicant's cause of action for the relief sought in paragraphs (i) and (ii) of the Draft Order was founded on the provisions of PAIA, the relief sought cannot be granted.

[115] In the circumstances, and for the reasons set out above, there is no basis to set aside the "decision" of the Deputy Information Officer of the DOJ relating to the PAIA Request dated 6 April 2021, and there is no basis to order the production of such document.

[116] As already set out above, it would be improper and inappropriate to grant an order that "*specified*" documents must be disclosed, when such documents are not listed or described. Any such order would be unenforceable.

[117] In the circumstances, I am satisfied that the relief sought in paragraphs (i) and (ii) of the Draft Order should not, and cannot, be granted.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), as read with *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

THE FOURTH ISSUE: PROVISION OF A DECISION RELATING TO THE PROSECUTION OF MS MAISTRY

[118] In terms of paragraph (iv) of the Draft Order, the Applicant seeks an order that the NDPP provide the Applicant with a decision to prosecute Ms Maistry within 14 days. The relief as framed, is clearly of a mandatory nature.

[119] Whilst the relief sought is not precisely set out, the Applicant clarified the relief sought during his address, and he advised me that he wanted to know what the NDPP was going to do about prosecuting Ms Maistry.

[120] The relief now sought in respect of Ms Maistry was not sought in either the Original Notice of Motion, or the Amended Notice of Motion, although different relief relating to Ms Maistry was sought in such Notices of Motion.

[121] For the reasons already set out above, in considering the relief sought in paragraphs (i) and (ii) of the Draft Order, I decided to also hear submissions on the relief sought in paragraph (iv) of the Draft Order.

[122] I do not intend to set out the relationship, interactions and disputes as between the Applicant and Ms Maistry in any detail, but briefly set out certain relevant aspects which resulted in the relief being sought by the Applicant.

[123] Ms Maistry was previously the attorney of record for the Applicant in a different matter or matters. Ms Maistry was struck from the Roll of Attorneys for reasons that are not relevant to this Application.

[124] Ms Maistry stated that she informed the Applicant of being struck off the Roll of Attorneys, and informed him that she could no longer represent him. The

Applicant alleges that Ms Maistry did not tell him that she was struck from the Roll of Attorneys, and that she continued to appear in Court.

[125] Ms Maistry stated that she did attend a pre-hearing meeting with the Applicant, but not as his attorney, and she attended as his friend. Ms Maistry stated that she assists at a firm of attorneys, but does not practice as an attorney.

[126] The Applicant blames Ms Maistry for the situation he finds himself in, being that he cannot practice as an attorney and cannot "*make a living*".

[127] It is clear that there is animosity between the Applicant and Ms Maistry.

[128] The Applicant alleges that Ms Maistry was struck from the Roll of Attorneys on 28 January 2020, but only filed a Notice of Withdrawal as his attorney in March 2020. I was not advised as to the nature of the harm caused in such period, but the Applicant stated that the issues that he currently has, were caused by Ms Maistry being struck off, but continuing to practice.

[129] On 11 June 202 the Applicant lodged a complaint with the Legal Practice Council against Ms Maistry.

[130] On 30 June 2020 the Applicant laid a criminal charge of fraud against Ms Maistry with the South African Police Services, based on the statement that she continued practising as an attorney after being struck off.

[131] The Applicant states that the State Attorney believed that the Applicant was aware that Ms Maistry had been struck off, and that despite such knowledge he persisted on relying on her legal services. The Applicant states that he informed the State Attorney that he was not aware of her striking-off. Whilst it

is entirely irrelevant for this Application, Ms Maistry confirmed that the Applicant was not aware of her striking-off. The Applicant became aware thereof on 26 June 202, when advised by the Legal Practice Council.

[132] The Applicant alleges that he has taken many steps to ensure that Ms Maistry faces justice, including collecting and delivering affidavits to the Senior Public Prosecutor.

[133] The Applicant states that despite his efforts, the NDPP has not been able to provide him with progress of any criminal prosecution as against Ms Maistry.

[134] Ms Maistry, in turn, in her affidavit accuses the Applicant of fraudulent conduct whilst she represented him.

[135] The Applicant alleges that he met with the prosecutors tasked with considering the criminal charge as against Ms Maistry on 5 separate occasions, and that on one occasion the “*docket*” was missing.

[136] Whilst it is clear that the Applicant is dissatisfied with the conduct of the National Prosecuting Authority (“the NPA”), the factual allegations made in such regard are scant and devoid of any detail.

[137] The National Prosecuting Authority Act³ (“the NPA Act”) (together with other related legislation and regulations) regulates the affairs of the NPA.

[138] In terms of Section 21(1) of the NPA Act, the National Director is required to issue policy directives relating to, *inter alia*, the institution of prosecutions.

³ Number 32 of 1998, as amended.

- [139] The current Prosecution Policy issued by the National Director is extensive, and includes chapters on the Role of the Prosecutor, Case Review, Trial Process and Prosecutorial Policy.
- [140] It should be mentioned that the NPA is required to observe the United Nations Guidelines on the Role of Prosecutors in determining and exercising its prosecution policies.
- [141] The Prosecution Policy issued by the National Director sets out the way in which the NPA and individual prosecutors should exercise their discretion.
- [142] One of the discretions that a prosecutor must exercise, is whether or not to institute criminal proceedings against an accused. In exercising such discretion prosecutors must not allow their judgment to be influenced by, *inter alia*, the views of the victim.
- [143] The Policy Directives of the NPA stipulates that reasons for a decision to prosecute or not prosecute, as the case may be, should be given upon request, to a person with a legitimate interest in the matter. The extent of the information provided with such reasons is limited, and will depend on the particular facts of each matter.⁴
- [144] As already set out above, the relief sought by the Applicant is based on a review in terms of Section 6 of PAJA, which provides for judicial review of an administrative action.

⁴ Section 22(6)(a) of the NPA Act.

- [145] PAJA however excludes a decision to prosecute or not to prosecute a criminal complaint from the definition of “administrative action”.⁵ This does not mean that prosecutorial decisions cannot be reviewed, merely that such decisions cannot be reviewed in terms of PAJA, but would be limited to grounds of rationality and legality.⁶
- [146] In the circumstances, the relief sought in paragraph (iv) of the Draft Order cannot be granted based on judicial review in terms of PAJA.
- [147] In terms of Section 7(2)(a) of PAJA, no court or tribunal may review any administrative action unless all internal remedies have been exhausted.
- [148] The NDPP has established internal remedies relating to any review of a prosecutorial decision. The procedure to be followed is set out in the document titled “*Procedure to Follow for the Review of a Decision in a Criminal Matter*”.⁷
- [149] In addition to setting out the manner in which representations (reviews) should be formulated, the Procedure Document stipulates the course to be followed:

“Where a decision of a lower court prosecutor to prosecute or not to prosecute is the subject matter of the representation, the request for the review must be directed to the Senior Public Prosecutor. When there is dissatisfaction with the decision of the Senior Public Prosecutor the representations should be escalated to the Chief Prosecutor or the Director of Public Prosecutions. The final appeal to the office of the National Director should only be made once a Director of Public Prosecutions has reviewed the decision of the Chief or Senior Public Prosecutor.”

⁵ Section 1(ff) of PAJA, as read with *National Director of Public Prosecutions v Freedom Under Law* 2014 (2) SACR 107 (SCA) at paragraph [27].

⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph [27].

⁷ See *Sibiya v National Director of Public Prosecutions and Others* (2292/2020) [2021] ZAMPMBHC 41 (8 September 2021).

[150] It is clear that the Applicant has not exhausted all internal remedies and cannot seek the relief in paragraph (iv) of the Draft Order based on PAJA.

[151] In the circumstances, the relief sought in paragraph (iv) of the Draft Order has no merit and must be dismissed.

THE FIFTH ISSUE: COSTS

[152] The Fifth Issue to be determined is costs.


[153] I can find no reason as to why the costs order should not follow the result, and accordingly I find that the Applicant must pay the costs of the Respondents.

THE ORDER

[154] I accordingly make the following Order:

[154.1] The Application is dismissed;

[154.2] The Applicant is to pay the costs of the Application.



G NEL
[Acting Judge of the High Court,
Gauteng Division,
Pretoria]

Date of Judgment: **4 August 2023**

APPEARANCES

For the Applicant: Mr D Sampson (in person)

For the First and
Third Respondents: Adv N R Lekgetho
Instructed by The State Attorney

For the Second Respondent: Ms R Maistry (in person)