REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Before the Hon Mr Justice NJ Yekiso

Case No: 14355/08

In the matter between:

GARDEN CITIES
(INCORPORATED ASSOCIATION NOT FOR GAIN) Applicant

and

THE CITY OF CAPE TOWN 1st Respondent
MR AGMAT EBRAHIM N.O. (City Manager) 2nd Respondent

Coram:	**NJ Yekiso, J**
Judgment by:	**Yekiso J**
Counsel for Applicant:	**Adv Wesley Vos**
Attorneys for Applicant:	**Smuts Kemp & Smal**
Counsel for 1st Respondent:	**Adv Karrisha Pillay**
Attorneys for 1st Respondent:	**Webber Wentzel Attorneys**
Date of Hearing:	**20 April 2009**
Date of Judgment:	**21 May 2009**

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WESTERN CAPE HIGH COURT, CAPE TOWN

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JUDGMENT DELIVERED ON 21 MAY 2009

YEKISO, J

[1]The applicant, in this matter of a request for access to information, is Garden Cities (Incorporated Association Not for Gain) duly incorporated in terms of the company laws of the Republic of South Africa, carrying on business as a property developer at 50 Louis Thibault Drive, Edgemead, Cape.

[2]The first respondent is the City of Cape Town, a municipality established in terms of section 155 of the Constitution of the Republic of South Africa, 1996 which has its address and seat of administration at Civic Centre, 12 Hertzog Boulevard Drive, Cape Town.

[3]The second respondent is Mr Agmat Ebrahim, who is cited in these proceedings in his capacity as the City Manager of the City of Cape Town, as aforesaid, having its seat of administration at 12 Hertzog Boulevard Drive, Cape Town.

[4]By way of notice of motion issued out of this court, the applicant seeks an order compelling first and second respondent to comply with the applicant's request for access to source documents relating to outstanding rates, water, electricity and sewerage accounts in respect of several properties owned by the applicant.

[5]The request for access to such source documents is a sequel to a determination by the City Manager of the first respondent of an appeal lodged with him by the applicant in terms of section 62(4)(a) of the Local Government: Municipal Systems Act, 32 of 2000 (Municipal Systems Act). The appeal, in turn, was a sequel to a declaration of a dispute of several accounts relating to applicant's properties with the first respondent in terms of its Credit Control and Debt Collection Policy. On basis of that determination the City Manager upheld the applicant's appeal in respect of 43 of the disputed accounts and, in respect of the remaining 87 accounts, the City Manager dismissed the appeal and held that outstanding amounts in respect of the remaining accounts were due and payable. The determination by the City Manager was communicated to the applicant, through its attorneys of record, per a "Notice of Decision" dated 28 February 2008.

[6]On 22 April 2008 the applicant, once again through its attorneys of record, requested the respondent to make available to it source documents used in the appeal process on basis of which the City Manager made his determination in respect of rates, electricity, water and sewerage accounts in respect of each property identified in the request for information. The request for access to information was made in terms of section 11 of the Promotion of Access to Information Act, 2 of 2000. As at 4 September 2008 the information sought, as far as the applicant was concerned, had not as yet been furnished despite several demands by the applicant that it be furnished with the information sought. Once the information was not forthcoming, the applicant launched these proceedings out of this court seeking an order compelling the first and second respondents to furnish the applicant with the information sought. The matter was initially enrolled for hearing in this court on 22 October 2008 on which date, so it appears on basis of the record, the matter was postponed to Friday, 17 October 2008. On the latter date, and by agreement between the parties, the matter was further postponed to a semi-urgent roll for hearing on 20 April 2009.

[7]The matter came before me on 20 April 2009. After hearing argument by the parties I made the following order:

> "1. First Respondent is ordered to comply with the Applicant's Request for Access to the Records of the First Respondent (dated 22 April 2008) by allowing the Applicant inspection of the source documents (including invoices) relating to the following items and accounts in the Second Respondent's Notice of Decision dated 28 February 2008.
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> 2. The order relating to the production of documents, included in the order granted in the open court, is hereby deleted.

3. The reasons for the order in terms of paragraph 1 hereof, inclusive of any costs order, will follow shortly."

The items and the accounts referred to in the order are annexed to the Request for Access to Information document and, as such, peculiarly within the knowledge of the parties. As pointed out in the order, I did not give reasons for the order I gave but I pointed out to the parties that reasons therefor would follow shortly. In the judgment which follows is included reasons for the order I gave.

CHRONOLOGY OF EVENTS

[8]In its Request for Information, the applicant sought to be furnished with certain documents with a view to determining if the decision of the second respondent, communicated to the applicant per its "Notice of Decision" dated 28 February 2008, is reviewable. The information sought related to a full account as regards the rates levied; information as regards the valuation and the method adopted in formulating such valuation in respect of each of the properties indicated in the Request for Information, as well as the method used in the determination of such value. As regards the rates, electricity, water and sewerage accounts, the information sought related to the actual measurement of services rendered and subsequently consumed and the production of documents on basis of which measurements for such consumption of services were taken on the meter installed. As at 24 April 2008 the information sought had not yet been furnished. Further correspondence was addressed to the first respondent demanding that the information sought be furnished without delay. The response by the first

respondent to the request was per a letter dated 15 May 2008 to which was attached a spreadsheet purporting to provide the information sought.

[9]In the spreadsheet referred to in the preceding paragraph is set out balances outstanding in respect of water, sewerage as well as interest due in respect of each account relating to of all those properties reflected in the spreadsheet. In respect of each property there is an accompanying comment indicating a period in which the services were rendered and subsequently consumed. Invariably, in respect of each such properties, it appears, on basis of comments made, that such services were rendered and consumed "Prior to Registration date". The amounts purportedly due are in respect of water and sewerage charges as well as interest due in respect of each such account. No information is given in respect of rates and electricity accounts. No source documents verifying the amount indicated in each such account or any form of invoice was furnished nor any indication as regards how the amount purportedly due, as well as interest thereon in respect of each account, is arrived at.

[10]Once such information was received, and by way of a letter dated 16 May 2008, the applicant's attorneys pointed it out to the first respondent that the documentation furnished did not contain the information required. The applicant states in this correspondence that the information furnished "merely reflects the working notes or comments by the officials" of the first respondent and that the information so given does not meet their client's requirements. In this correspondence the applicant asserts that the information sought relates to source documents on basis of which it could be clearly and objectively established the basis on which the second

respondent took his decision. As regards the rates levied and the valuation of each property, the applicant re-iterates that the information sought relates to the method used in the determination of such valuation and the recordal thereof in any source document in respect of each individual account. As regards the electricity and water account, the applicant re-iterates that the information sought relates to source documents on basis of which the amount billed was entered in the respective accounts. Per its letter dated 6 June 2008, the first respondent advised the applicant's attorneys that the request had been handed over to the relevant department to provide the requested documentation due to the broadness of the request. Numerous subsequent correspondence, with threats of legal action, addressed to the first respondent did not yield any positive results. As at 4 September 2008 no information had as yet been furnished hence the institution of these proceedings.

[11]Once the proceedings were instituted numerous exchanges and meetings took place between the parties' legal representatives. It appears that during some of these meetings and exchanges, further documentation was furnished to the applicant's legal representatives none of which apparently met the applicant's needs. On the other hand, the first respondent was of the view and adopted the position that all the information sought by the applicant had duly been furnished at one or more such meetings. According to the first respondent, it was at one such meetings that it became clear to the first respondent's legal representative that the information sought all along related to original copies of invoices in respect of each such account.

[12] In its answering affidavit, the first respondent re-iterates its position that it had furnished the applicant with all the information sought. The first respondent further contends in its answering affidavit that at no point in the original request for information, nor in any subsequent correspondence, or in the application before this court, did the applicant request the original copies of invoices. As regards copies of original invoices, the first respondent states in its answering affidavit that due to a technical problem in its system, the information relating to original copies of such invoices is not available. The first respondent goes on to annex in its answering affidavit an affidavit of one of its officials, one Trevor Blake, who confirms in his affidavit that the first respondent is unable to furnish copies of original invoices as these either no longer exist or were never duplicated or retained.

[13] This is what Trevor Blake states in paragraph 8 of his affidavit, annexed as it is to the answering affidavit:

> "The information requested by the Requester, which we have subsequently learnt from Mr Kemp, was intended to include copies of the original invoices sent to the Requester. Invoices are routinely generated by the City's billing system. The copies of these invoices are normally available at any time. However, in circumstances where invoices have adjustments we have discovered a technical problem in generating copies. The technical problem is currently being addressed."

Trevor Blake, with regards to copies of invoices, concludes by stating that the technical problem referred to in paragraph 8 of his affidavit, is only applicable to invoices requested by the applicant and that, for this purpose, the first respondent has provided the applicant with account overviews for

each of the accounts which holds an outstanding balance. There is no evidence on record to indicate when the technical problem manifested itself nor precisely what was being done to have the problem solved. All that is being said is that the problem is currently being addressed.

[14]As at 11 March 2009, the latter being a date on which the applicant's replying affidavit was deposed, the requested invoices had not yet been furnished. The applicant persisted in his replying affidavit that the information relating to invoices was still being sought, stating that the technical problem relating to the generation of copies of invoices, as had existed during November 2008, could not have been of a permanent nature, moreso, that the problem was being addressed at the time and that, therefore, the problem could merely have been of a temporary nature as it only related to the actual printing of the invoices.

[15]Once the applicant's replying affidavit was served on the respondents, the respondents' attorneys addressed a letter to the applicant's attorneys dated 24 March 2009. In part, this letter states that "(p)ast invoices, such as the ones affecting your client, cannot be printed due to this technical problem. Therefore, the City is not able to print out historic invoices and the technical problem can be addressed for future invoices only. The same holds true for past invoices which cannot be printed for reasons other than adjustments having been effected." A further affidavit by Denzil Albertus, merely confirming what is stated in the letter of 24 March 2009, was subsequently filed.

THE NATURE OF THE RELIEF SOUGHT

[16]In a letter addressed to the first respondent by the applicant's attorneys of record dated 22 April 2008, annexed to the Request for Access to Record of Public Body, the following is stated:

> "The City Manager refers in his decision to accounts that remain due and payable for services and/or rates rendered before the date of transfer of property. The details will appear from the annexed decision by Achmat Ebrahim. In order for the entity liable for the account to assess the correctness of the averment, the source documents from which the decision arose are required.
>
> As such it is required that the Council provide the source documents on which Achmat Ebrahim based his decision to Garden Cities …" Emphasis supplied.

[17]Furthermore, in terms of prayer 2 of the notice of motion, it is specifically stated that the relief sought is for the first respondent to be ordered to comply with the request for access to the records by producing the source documents relating to several accounts stated in the notice of motion. The source documents required to be produced relate to rates, electricity, water and sewerage accounts in respect of each property and account stated in the notice of motion.

[18]Under cover of its letter of 15 May 2008 the first respondent attaches a spreadsheet depicting account overview in respect of the accounts reflected in the spreadsheet. No documentation is enclosed verifying the various amounts, purportedly due and payable, indicated in the spreadsheet nor any form of reconciliation statement indicating how such amounts, purportedly due and payable, are arrived at. No information is communicated to the applicant that the source documents sought are not available or do not exist.

[19]In its prayer, contained in paragraph 2 of its notice of motion, the applicant specifically states the relief sought is an order compelling the first respondent to produce source documents relating to the items and accounts indicated in the notice of motion. The source documents sought are elaborated on in a letter by applicant's attorneys dated 22 April 2008 annexed to the request for information document. In this letter, it is specifically stated that "In order for the entity liable for the account to assess the correctness of the averment, the source documents from which the decision arose are required.

As such it is required that the Council provide the source document on which Achmat Ebrahim based his decision to Garden Cities…".

[20]Now, a source document is what it is: namely, a source document. A source document can be in the form of an invoice; a tax invoice or any document of prime entry no matter what label it carries. The respondent wants us to believe that it only became aware of the kind of information that the applicant seeks at one of the meetings between the parties' respective legal representatives during October/November 2008 and only then did it become aware that such information related to copies of original invoices. One does not need to be a chartered accountant to know and understand that an invoice is nothing other than a source document. The source documents that the applicant had been seeking all along had been invoices and, even on the first respondent's own admission, these have at no stage been furnished to the applicant. To come up with an explanation that it did not occur to the respondents that the source documents could not have related to copies of original invoices is, in my view, beyond comprehension.

FIRST RESPONDENT'S SUBMISSIONS

[21]*Ms Pillay,* for the first respondent, in her submissions moves from the premise that the information sought by the applicant does not constitute a "record" in terms of section 1 of the Promotion of Access to Information Act in that such information is neither "in the possession" nor "under the control" of the first respondent, nor does it constitute "recorded information". She basis her argument on basis of the definition of "record" defined in section 1 of the Promotion of Access to Information Act where a record is defined as any recorded information (a) regardless of form or medium; (b) in the possession or under the control of a public or private body; and (c) irrespective of whether it was created by that public or private body. She concludes her submissions by submitting that the information sought by the applicant does not constitute a "record" as defined in section 1 of the Promotion of Access to Information Act in that it is neither "in the possession" nor "under the control" of the first respondent nor does it, for that matter, constitute "recorded information" to which the applicant would otherwise be entitled. Her submission, and indeed, her arguments in court when the matter was argued, is premised on the fact that due to a technical problem, as has existed in the first respondent's system, the copies of original invoices requested by the applicant are incapable of being generated; and because the first respondent's system, due to this technical problem, is incapable of generating copies of original invoices requested, that therefore the information or records so requested, do not exist; and that because the records requested do not exist, there is no recorded information in the possession of or under the control of the first respondent to which the applicant is entitled.

[22]*Ms Pillay's* submissions and argument cannot be considered in a vacuum or in isolation. Such submissions have to be considered in the light of the first respondent's duties and obligations in terms of its constitutive legislation: the Local Government: Municipal Systems Act. Section 95 of the Municipal Systems Act, amongst others, enjoins municipalities, such as the first respondent, where the consumption of services has to be measured, to take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering system. The municipalities are further enjoined to take reasonable steps to ensure that users of services are informed of the costs involved in service provision, the reason for the payment of service fees and to provide accessible mechanisms for the consumers to query or verify accounts and metered consumption; and for consumers to recover prompt redress for inaccurate accounts. There is thus a duty on municipalities to adopt measures and systems that are designed to fulfil these obligations.

[23]The problem in the matter before me here seems to be that, due to a technical problem in a system devised and adopted by the first respondent, the latter is unable to access the records required by the applicant. Trevor Blake states in his affidavit that the first respondent is unable to furnish the applicant with further documents as these documents either no longer exist or were never duplicated or retained. Trevor Blake goes on to state in his affidavit that the invoices requested by the applicant are routinely generated in the first respondent's billing system, but that in circumstances where invoices have been adjusted the first respondent has discovered a technical problem in generating copies of invoices and that the problem is being

addressed. The statement does not say that the required documents are not available or that copies thereof cannot be made available because they have been destroyed. The first respondent, on the face of it, seems unable to provide the information sought through failure by its system and not that the records required no longer exist or are no longer in its possession or under its control. The first respondent itself does not seem to be certain as regards what the state of the required documentation is. All that the first respondent says is that either the documentation no longer exists or was not duplicated. There is no certainty since the documentation cannot be accessed. The first respondent cannot assert that the records no longer exists or are no longer in its possession or under its control when its problem clearly is system failure. It may well be that such documents are available but that due to inadequacy in the first respondent's system, the required documents cannot be readily accessed. I am thus unable to accept the submission by *Ms Pillay* that the information sought by the applicant does not constitute a record in terms of section 1 of the Promotion of Access to Information Act when the information sought appears inaccessible because of system failure.

[24]Access to information is a fundamental right in the Bill of Rights. The state, as well as organs of state such as the first respondent, is under a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. It is unfortunate that in decisions such as *Geyser & Another v Msunduzi Municipality* 2003(3) BCLR 235(N); *Mkontwana v Nelson Mandela Municipality* 2005(1) SA 630(CC), as also this matter before me, organs of state appear to be wanting in fulfilling this right. There is thus a duty on organs of state, in adopting systems and measure that are meant to

facilitate service delivery, not to adopt measures, such as in the present case, that are likely to compromise the citizens' rights of access to information.

[25]I accordingly find that the first respondent is unable to furnish the kind of information sought by the applicant, not because such information does not exist or no longer exists, but that the first respondent is unable to access such information, if not due to sheer incompetence, due to failure by its system. In the order I gave on 20 April 2009 whilst sitting in open court, I included in such order, over and above the order that applicant be allowed to inspect the documents sought, an order that the applicant be furnished with copies of original invoices to the extent such documents do exist. However, when I was sitting in my chambers formulating the order I gave in the open court in writing, I had reservations about the effectiveness of this leg of the order due regard had to failure of the first respondent's system. I accordingly deleted this aspect of the order in the order I formulated in chambers.

[26]It is for the reasons stated in this judgment that I gave the order I did on 20 April 2009. Shortly before the date of hearing of this matter on 20 April 2009 the applicant amended its notice of motion in line with the order I gave. To the extent that the applicant was successful in obtaining the relief sought, in its amended form, the applicant is entitled to its costs. The first respondent is accordingly ordered to pay the applicant's costs on a scale as between party and party, duly taxed or as agreed.

N J Yekiso, J