HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not Reportable
Not of interest to other Judges

In the matter between:

MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC	First Applicant
KARABO RAJULI	Second Applicant
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	First Respondent
THE INFORMATION OFFICER: DEPARTMENT OF DEFENCE	Second Respondent

Heard: 11 May 2017

Delivered: 17 May 2017

Coram: Makgoka J

Summary: Costs – punitive scale – attorney and client – general principles restated - application in terms of PAIA – respondents conceding the application after four years – no explanation for the inordinate delay – costs of the application conceded - scale of such costs in dispute - what factors to consider in the context of PAIA.

J U D G M E N T

MAKGOKA, J

[1] This judgment is about the scale of costs for which the first and second respondents are liable following their concession of the relief sought against them by the first and second applicants. The respondents have also conceded their liability to pay the applicants' costs, but only as between party-and-party. The applicants, on the other hand, persist with their initial prayer for the respondents to pay the costs on a scale of attorney-and-client. On 11 May 2017 when the matter was mentioned, counsel for the parties confirmed the concession referred to above. They argued the scale at which the respondents have to pay the costs. I made an order in terms of paragraphs 1, 2 and 3 of the notice of motion and reserved the scale of costs.

[2] Section 32 of the Constitution of the Republic of South Africa, 1996 guarantees the right of access to information held by the state. It reads:

'(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

[3] In *Brümmer v Minister for Social Development and Others*[1] the Constitutional Court underscored the importance of this right in the following terms:

'The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'. . . . Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.'[2] (Footnotes omitted.)

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[1] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC).
[2] Paras 62-63.

[4] PAIA is the national legislation contemplated in section 32(2) of the Constitution. PAIA was enacted to give effect to the right of access to information. The Constitutional Court has held that where Parliament enacts legislation to give effect to the rights in the Constitution, a litigant must found her or his cause of action on such legislation, and not directly on the Constitution, unless it is alleged that the legislation in question is deficient in the remedies it provides.[3] As a result, PAIA is the principal legal source defining the right of access to information, and the promotion of access to information in South Africa is now almost entirely regulated by the PAIA because of the principle of subsidiarity.[4]

[5] The purpose of PAIA, set out in its preamble, is two-fold: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to promote a society in which the citizens have effective access to enable them to more fully exercise and protect their rights. In the preamble to PAIA, it is recognized that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public bodies, which often led to an abuse of power and human rights violations.

[6] The first applicant, MandG Centre for Investigative Journalism NPC, trading as M&G Centre for Investigative Journalism (MandG Centre) is a not-for-profit company founded to promote open, accountable and just democracy by developing investigative journalism in the public interest. It has a relationship with the *Mail & Guardian* newspaper, which is the primary publisher of its work. The second applicant is the advocacy coordinator of MandG Centre. The applicants brought this application in their own interests (in terms of s 38(a) of the Constitution) and in the public interest (in terms of s 38(e). The first defendant (the Minister of Defence) is a member of the national executive responsible for the department of Defence and

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[3] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC) paras 96 and 434-437. See also *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 51; *MEC for Education: Kwazulu-Natal and others v Pillay* 2008 (1) SA 474 (CC) para 40.

[4] De Vos P and Freedman W (eds) (Oxford University Press 2014) *South African constitutional law in context* 622.

Military Veterans, as well as the records that were requested by the applicants. The second respondent is the information officer of the department.

[7] On 30 April 2013, a private chartered commercial airline from India landed at the Waterkloof Airforce Base in Prertoria, carrying 270 passengers, all of them guests scheduled to attend a Gupta family wedding at Sun City resort near Rustenburg in the Northwest Province. On 13 May 2013 MandG Centre lodged a request in terms of s18(1) of PAIA for access to various documents held by the information officer of the department. Those documents related to the landing of private aircrafts at the Waterkloof Air Force Base. Such records were to include the registration details, passengers, permissions/authorisations, correspondence regarding these landing, dates of arrivals and departures and flight plans.

[8] There were considerable delays in dealing with the request. For example, it took eight months for the department to merely acknowledge receipt of the request, such acknowledgment only coming on 14 January 2014. After that, there was no substantive response to the request, despite various letters between MandG Centre and the department. In terms of s 27 of PAIA, the request was deemed to have been refused. As a result, MandG Centre lodged an internal appeal to the Minister on 31 July 2014, who was required to respond within thirty days, which she did not. The period for the response to the internal appeal having expired during early September 2014, MandG extended that period to 17 September 2014 and placed the Minister on terms to make a decision by the extended deadline. Still there was no response to the internal appeal. On 19 September 2014, after the applicants had telephonically contacted the respondents, the respondents stated in a letter that they were awaiting legal opinion on the request, and could not commit to a final date.

[9] Again, after another telephone enquiry by the applicants, the respondents adopted the same stance on 7 October 2014. After yet another enquiry by the applicants, on 21 October 2014, the respondents reported that the Minister was awaiting an opinion from the legal department, and undertook that the Minister would make a decision by 31 October 2014. On 2 November 2014 the respondents informed the applicants that the requested information was confidential and the

Minister could not commit to a precise date by which to respond. On 18 November 2014 the applicants placed the respondents on terms to respond to the internal appeal by 27 November 2014. On 20 November 2014 the Minister dismissed the internal appeal on the basis that she believed that 'the disclosure of the requested record could reasonably be expected to cause prejudice to international relations of the Republic.'

[10] On 13 May 2015 the applicants launched this application seeking an order: declaring unlawful and unconstitutional, the decision to refuse the request for information; reviewing and setting aside the decision; and ordering the respondents to supply the applicants with a copy of the requested information within 15 days of the granting of the order. The applicants also sought a costs order against the respondents on an attorney-and-client scale. The respondents filed their answering affidavit on 13 August 2015, in which the respondents repeated, as a basis for refusing the requested information, the reason it had stated earlier, namely prejudice to international relations. After the applicants had filed their replying affidavit, they also filed their brief written submissions on 17 June 2016, in terms of the practice directive of this division. The respondents did not file theirs. The matter was set down for the week 8 -12 May 2017, and allocated to 11 May 2017. On 6 May 2017 the respondents notified the applicants that they would no longer oppose the relief sought by the applicants.

[11] It is against this brief background that the applicants' request for a punitive costs order should be determined. Generally, an attorney-and-client costs order is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.[5] As such, an award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to

[5] *Nel v Waterberg Landbouwers Ko-operatiewe Vereneging* 1946 AD 597 AT 607; and *Waar v Louw* 1977 (3) SA 297(O) at 303.

penalize a party who has exercised a right to obtain a judicial decision on any complaint such party may have.[6]

[12] On an overview of the authorities, the grounds on which the court may order a party to pay an opponent's attorney-and-client costs, are confined to special circumstances indeed, for example where a party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious, or frivolous motive or committed grave misconduct either in the transaction under enquiry or in the conduct of the case. See a comprehensive, but not exhaustive, list of instances where the court may order attorney-and-client costs, in Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* (5ed) at pp 971-973.

[13] In the context of cases arising from the refusal to furnish information in terms of PAIA, such as the present, the objectives of PAIA should be borne in mind. Among those, is to afford the public a simple and inexpensive mechanism of obtaining information held by public bodies. Clearly, that objective has been frustrated in this case. As explained by the Supreme Court of Appeal in *Claase*,[7] one of the objects of PAIA is to avoid litigation rather than propagate it. I have set out the chronology of matter in paras [9] to [11] above from which I gain a distinct view that the respondents were unresponsive at best, and obstructionist, at worst. I accept that some latitude should be given to state departments given the obvious and inevitable bureaucratic bottle-necks. Having said that, delay of eight months to simply acknowledge a simple request is unpardonable. A delay of more eighteen months before a decision is made, is unconscionable. To aggravate matters, the respondents, without any explanation, conceded to the applicants' relief on the eve of the hearing. As stated earlier, before then, they had not even bothered to file written submissions in terms of the practice directive of this division.

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[6] *Van Wyk v Millington* 1948 (1) SA 1205 (C) at 1215; *Moosa v Lalloo* 1957 (4) SA 207 (D); *De Goede v Venter* 1959 (3) SA 959 (O) at 963; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 272G-H.

[7] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) 469 (SCA) para 1.

[14] The conduct of the respondents, and its effect, is similar to that of the respondent, the South African Airways, in *Claase*, which Combrink AJA aptly summarised:

'[11] In *MEC for Roads and Public Works* (*supra*) this court expressed the view that where a record of information is requested in terms of s 50 and the State body or private person or institution obdurately and unreasonably refuses to furnish it in circumstances where it obviously should have, the court may make a punitive award of costs to mark its displeasure (paras [20] and [21] of that judgment). The conduct of SAA in this case in my view warrants such an order. Section 9 of the Act states that one of the objects of the Act is:

"(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; . . . ."

I emphasize the words 'swiftly' and 'effortlessly'. How did SAA give effect to these objects? From the 25th August 2004 and until he launched the application in February 2005 the appellant by means of 10 e-mail letters requested the information referred to earlier in the judgment. He was variously told in return e-mails by SAA officials that they were unable to furnish the information, that for security reasons the information could not be given, that the official concerned was on leave and eventually he was told how many passengers went on board in business class and economy class on the particular flight – information which was of no assistance to him. Appellant in an e-mail dated 8th September 2004, in the prescribed form submitted on 21 November 2004 and again in his founding affidavit stated that the information on record he sought was on the computer of Brewis. As stated earlier, this was never disputed by SAA. By the simple expedient of furnishing appellant with the computer print-out this whole issue could have been resolved. Even if SAA's conduct in persistently refusing to make the record available was not intentionally vexatious, it had that effect. (*In Re Alluvial Creek Ltd* 1929 CPD 532 at 535.) As a mark of this court's displeasure at SAA's conduct a punitive costs order will be made in respect of the proceeding in the court below.'

[15] In my view, the above remarks are most apposite. The applicants were given all sorts of explanations why the requested information could not be furnished timeously, and each time only after enquiry and prompting from the applicants. When eventually the request was substantively addressed, there was nothing in the response which suggested that the reason for the refusal to furnish the information could not have been made earlier. The applicants had to resort to litigation to

exercise their rights. The respondents opposed the application, and only on the eve of the hearing, they withdrew their opposition to the application. As stated earlier, no reasons were furnished for this about-turn. This is after four years of a simple request which, ordinarily, and in the scheme of PAIA, should have taken a few months, at most, to dispose of. There could well be a plausible reason for the respondents' change of heart. But in the absence of an explanation, one can only assume that it was based on the realisation of the futility of its opposition to the application. The litigation was totally unnecessary, and should have been avoided by the respondents taking a pro-active approach to the applicants' request, instead of the supine one they adopted.

[16] The request, it must be borne in mind, was made approximately thirteen days after the landing of the Gupta chartered airline at the Waterkloof Airforce Base. That matter, a very controversial one indeed, had generated considerable public interest – the landing itself, and how government, in particular the Ministry of Defence, responded to it. Therefore, when the information was sought at that time, the controversy generated by it was still very much in the public space. Now, four years later, as Mr *Budlender*, counsel for the applicants put it, 'the delay means that the information has lost a considerable amount of currency.'

[17] Given all the above considerations, and in particular the conduct of the respondents, and the fact that the applicants conduct investigative journalism, which is pivotal to a vibrant democracy, a punitive costs order is warranted. Such costs should include the employment of two counsel, which I am of the view, was prudent, given the nature of issues involved.

[18] In the result, in addition to the order made on 11 May 2017, I make the following order:

1. The costs payable by the first and second respondents, as ordered on 11 May 2017, shall be paid on a scale as between attorney-and-client.

TM Makgoka
Judge of the High Court

APPEARANCES:

For the Applicants:	S Budlender (with M Sibanda) Instructed by: Webber Wentzel, Johannesburg Friedland Hart Solomon Nicholson, Pretoria
For Respondents:	Z Gumede Instructed by: State Attorney, Pretoria