IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGE: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

23 October 2024

DATE

SIGNATURE

CASE NUMBER: 6136/2024

In the matters between: approach

NOMPUMELELO NENE Applicant

and

THE AUDITOR-GENERAL OF SOUTH AFRICA 1st Respondent

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION 2nd Respondent

THE NATIONAL LOTTERIES COMMISSION 3rd Respondent

TSU INVESTIGATION SERVICES (PTY) LTD 4th Respondent

NATIONAL TREASURY 5th Respondent

THE COMMISSIONER OF THE NATIONAL LOTTERIES COMMISSION N.O. 6th Respondent

THE MINISTER OF TRADE, INDUSTRY AND COMPETITION 7th Respondent

Heard: 10 SEPTEMBER 2024

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 23 OCTOBER 2024.

JUDGEMENT

LE GRANGE, AJ:

Introduction

[1] This is an application for interlocutory relief, that: -

> '1. [The] First Respondent **[the AGSA]** be compelled in terms of rule 30A of the Uniform Rules of Court ("the Rules") to make available the complete record of decision in terms of rule 53 of the Rules, within 10 days of the order of court; the record to specifically include the following documents: [then a list follows]
>
> 2. [The] Seventh- and/or Second Respondent be compelled in terms of rule 30A of the Rules to make available the complete record of decision in terms of rule 53 of the Rules, within 10 days of the order of court; the record to specifically include the following documents: [then a list follows]

3. Third Respondent [**NLC**], represented by its designated information officer, Sixth Respondent, being compelled to make available to Applicant the information duly requested on her behalf in terms of the *Promotion of Access to Information Act*[1] [**PAIA**], by means of the written request submitted to them both and dated 25 October 2023 [i.e. annexure "FA2" to the founding affidavit containing a list]' [Emphasis added]

[2] It is evident from applicant's notice and consequent application[2] that the first two prayers, based upon r 30A, compelling compliance with a rule in this instance r 53, that compliance is not claimed on the basis that no record was provided but rather on the basis that the record is incomplete as it did not contain the 'listed' documents, the latter which the applicant considers of being of relevance as it may evidence the AGSA's inconsistent auditing method(s) and approach(es) over years, which – it is argued – would entitle the applicant to an order setting aside the impugned decision(s).

[3] This application follows from a review application by the applicant for the setting aside of certain decisions, the relief sought which is necessary to repeat: -

'1. An order *reviewing and setting aside the decisions / findings made by the First Respondent* against the Third Respondent that relates to the consolidation of financial statements which decision / finding was made by the First Respondent against the Third Respondent in its National Lotteries Commission Audit Report for the financial year ended 31 March 2018 audit report.

2. *Reviewing and setting aside the decisions / findings made by the First Respondent* against the Third Respondent in the First Respondent's National Lotteries Commission Audit Report for the financial year ended 31 March 2020 that relates to alleged irregular expenditure allegedly committed by the Third Respondent.

3. *Reviewing and setting aside the decisions / findings made by the First Respondent* against the Third Respondent in the First Respondent's National Lotteries

[1] 20 of 2000.
[2] Caselines 008-3 to 008-23; 010-3; 010-4; 010-7 etc.

Commission Audit Report for the financial year ended 31 March 2021 that relates to alleged irregular expenditure allegedly committed by the Third Respondent.

4. An order declaring that every decision / finding made by the Fifth Respondent based upon the decision / finding of the First Respondent against the Third Respondent as envisaged in prayers 1, 2 and 3 constitute administrative action and supersedes the decision / finding made by the First Respondent as against the Third Respondent.

5. An order declaring that the Third Respondent did not commit "irregular expenditure" as was found by the First Respondent as envisaged in prayers 2 and 3 above.

6. *An order reviewing and setting aside the Fourth Respondent's report* - the TSU Investigation Report - in as far as it is based upon the same decisions / findings made by the First Respondent as envisaged in prayers 1, 2 and 3 above, alternatively an order directing the Third and Fourth Respondents to take this judgment into account in the disciplinary enquiry as between the Applicant and the Third Respondent.

7. An order *directing the Third Respondent* to take all such steps that are necessary and to comply with the Applicant's request for information as envisaged in the Promotion of Access to Information Act, Act 2 of 2000; which request was served on 25 October 2023, within 10 (ten) days from date of this order.' [Emphasis added]

[4] Considering the relief sought above I may start off by indicating that I cannot phantom on what basis the applicant could have *locus standi* to bring the review application in her person, and for consequential interlocutory relief. However, as correctly pointed out by the AGSA's counsel, *locus standi* should not be considered at this early stage of the review and before the applicant has had the opportunity to file a supplementary affidavit. See the authority on this point at par [19] below.

[5] All respondents, save for the fifth respondent (who was cited but no relief is sought against), have filed answering affidavits, and save for the latter and the fourth respondent, opposed the relief claimed.

[6] The applicant chose not to file a reply to answer to the respondents' allegations but instead amended her notice of motion (without making further allegations) by adding a prayer for alternative relief, i.e. to compel discovery of the listed documents in terms of r 35.

Rule 30A: Non-compliances with rule 53

[7] The main objection to the r 30A application is that: (i) as the AGSA has (admittingly) filed a comprehensive record of proceedings in terms of r 53 and thus complied, therefore the rule cannot be invoked; (ii) the application is nothing but a fishing expedition, which is clear from the fact that it is voluminous in nature and that various of the documents are totally irrelevant to the matter (or rather period at hand), and the fact that the applicant failed to provide any nexus, alleged or apparent, between the documents sought and the decisions taken to be reviewed, leaving the court to guess what is relevant.

[8] To consider whether there was compliance, it needs to be considered what constitutes 'the record of proceedings'. The following was found in *Johannesburg City Council v The Administrator Transvaal*[3] at 91G to 92B:

> 'The words 'record of proceedings' cannot be otherwise construed, in my way, than as a loose description of *the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question*……. *It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it*.' [Emphasis added]

[3] 1970 (2) SA 89 (T).

[9] More recently this has been dealt with in *Helen Suzman Foundation v Judicial Service Commission (Police and Prisons Civil Rights Union and others as amici curiae)*[4] where it was held that:

> '[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule, which is intended to operate to the benefit of the applicant, is an important tool in determining objectively *what considerations were probably operative in the mind of the decision-maker* when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision.' [Emphasis added]

[10] Considering the above and the papers filed, it is safe for me to conclude, that the applicant herself (after considering the AGSA's answering affidavit) realized that she is not entitled to the documents listed or let me rather say the wide-ranging plethora of documents ranging from specific documents to categories of documents, reports, records, correspondence, transcripts, etc. (listed documents), in terms of r 30A.

[11] My conclusion is based upon the following:

[12] The AGSA has provided an extensive initial- and supplementary record of the proceedings, prior to the r 30A application being served.

[13] Further hereto, the AGSA confirmed under oath that as far as she is concerned, she has provided all the documents that she believes she had to provide as part of the record, and further states:

[4] 2017 (1) SA 367 (SCA).

'The documents that I have provided is the documents that served before me at the time my relevant decisions were made and which I am of the view I am obliged to provide.'

[14] Important is the fact that the applicant has not challenged this statement.

[15] In my view, the applicant appreciated that her 'wish list' simply did did not form part of 'the record of proceedings' as it would not have served before the decision-maker at the specific time of the impugned decision(s), but rather documents which are extraneous to and go beyond the record, to what she considers to be relevant to identify and prove the AGSA's inconsistencies spanning over the years. For this reason, the applicant skilfully moved away from r 30A onto r 35.

Rule 35: Discovery

[16] The question then, whether the applicant is entitled to the listed documents under r 35.

[17] Rule 35(1) provides:

'(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. *Such notice shall not, save with the leave of a judge, be given before the close of pleadings*.' [Emphasis added]

[18] The difference between r 35 and r 53 was dealt with by the court in the *Helen Suzman matter* which held at para [26]:

'It is helpful to point out that the Rule 53 process differs from normal discovery under rule 35 of the Uniform rules of court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. *So, under the rule 35 discovery process, asking for information not relevant to the pleaded case*

would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. *So, relevance is assessed as it relates to the decision sought to be reviewed*, *not the case pleaded in the founding affidavit*.' [Emphasis added]

[19] The Court in *Cape Town City Council Cape Town City Council v South African National Roads Authority and* Others[5] also considered the difference and stated:

'While there is a similarity between trial discovery and review proceedings, inasmuch as in both a party is compelled to make disclosure for the purposes of litigation, there are fundamental differences between the two. Unlike rule 53, *discovery is only undertaken after the pleadings have closed*. The object of mutual discovery is to give each party, before trial, all the documentary material of the other party so that each, *after the contours have already been drawn*, can consider its effect on his own case and his opponent's case and decide whether to carry on at all and, if so, how to carry on the proceedings. *Discovered documents do not form part of the record, and are not before the court unless a party decides at the trial to make use of them*. It is therefore quite possible, even likely, that many of the documents which were discovered will never see the light of day in court… Review, on the other hand, usually arises from the exercise of a statutory or public power. When an applicant in review proceedings files its supplementary affidavit, after having had sight of the record*, it is, in effect fully stating its case for the first time*.' [Emphasis added]

[20] In the premises, discovery should only be considered once the contours of the dispute have been drawn and relevance can be assessed through knowledge of what is in dispute, what needs to be proven, and what not.

[21] For example, considering the facts herein. The applicant argues (at paras 26 and 27 of the heads of argument) that:

'[t]he dispute thus encompass the simple question as to whether the AGSA consistently applied and interpreted the audit standards or whether she adopted a materially different approach in previous audit reports, for which reason she acted in

[5] 2015 (3) SA 386 (SCA).

breach of the auditing body's statutory and constitutional duty to maintain a predictable and consistent approach when auditing accounting practices.

In order for the Applicant to show the abrupt change in the AGSA's practices, criteria and standards, *she needs to show the trend prior to the qualified reports, then the change, then the course of the change approach and lastly whether the AGSA persisted with the changed approach. In order for the Applicant to do this she needs to get access to the information stretching over a few years*, especially before 2018 and thereafter; this information the extended periods for which information is sought. Absent this information Applicant *might not be able to show the AGSA's changes stance*, which will serve to prejudice her in the pursuance of the review application.' (Emphasis added)

[22] For this reason, the applicant casted her net overreaching wide and over many financial periods in an effort to prove inconsistency – which would according to the applicant entitle her to the relief claimed in the review.

[23] Leaving for the moment the argument that rationality is the test in a review and not inconsistency, the AGSA may in answer to the review application admit having been inconsistent, which will leave the bulk of (if not all) the listed documents now sought on that basis, totally irrelevant for purposes of the review.

[24] For this reason, discovery is best left for after the close of pleadings when the contours of the dispute have been drawn.

[25] Applicant's counsel has referred me to the matter of *Makate v Joosub NO and Another*[6] in her argument to justify an order in terms of r 35. The court therein held as follows:

'[57] Many of those factors present themselves in the main review – this is a claim for a substantial amount, the *only issue in dispute is the manner and method by which the*

[6] (57882/19) [2020] ZAGPPHC 248 (30 June 2020)

compensation was determined and generally speaking even in the absence of answering affidavits, it is clear if regard is had to the proceedings before the first respondent as well as the papers in this interlocutory application that *the method of determining the compensation and the revenue base to be used are central to the dispute* between the parties.' [Emphasis added]

[26] This matter is however clearly distinguishable from the *Makate matter* in that the documents requested therein were central to an already clear and single issue which was the product of years of litigation, whereas the contours of the dispute has not nearly been drawn in this matter – currently leaving the request to either constitute fishing or a futile exercise.

[27] I may add, that there is an exception to the rule that discovery is only undertaken after the pleadings have closed as provided for in r 35, this was however not the approach which the applicant sought to take herein.

[28] In the premises, I find that the applicant is not entitled to the relief sought neither in terms of r 30A nor in terms of r 35.

PAIA

[29] It is common cause that the applicant in terms of PAIA delivered a request for information to the NLC on 25 October 2023 and that NLC has failed to answer thereto within the time provided, i.e. on or before 25 November 2023, or at all.

[30] Such failure constituted a deemed refusal under s 27 of PAIA; and the respondents are of the view that the applicant (as dissatisfied requester) was obliged to follow the internal remedies provided for in PAIA and more specifically Part 4 thereof before she would have a right of audience in this Court.

[31] S 78(1)(b) of PAIA provides as follows:

'A requester or third party *may only apply to a court* for appropriate relief in terms of section 82 in the following circumstances:

(a) After that requester or third party has exhausted the internal appeal procedure referred to in section 74; or

(b) after that requester or third party has exhausted the complaints procedure referred to in section 77A.' [Emphasis added]

[32] In *Elite Plumbing and Industrial Solutions (Pty) Ltd v Casper Le Roux Inc Attorneys and Another*[7] the Court held that:

'The wording of section 78(1) is clear. A requester may only apply to court after it has first exhausted the internal appeal procedure referred to in section 74 or after it has exhausted the complaints procedure referred to in section 77A. Stated differently, an aggrieved requester who has not exhausted the internal appeal procedure referred to in section 74 or the complaints procedure referred to in section 77A may not approach a court for relief in terms of section 82. There is thus an internal appeal procedure and a complaints procedure. These, if they apply, must be exhausted before the requester can approach a court.'

[33] The Constitutional Court confirmed this approach in *Koyabe and Others v Minister for Home Affairs and Others*[8] but warned that it is not absolute. It held as follows:

'[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[7] 2023 JDR 0756 (GJ) at par 11
[8] 2010 (4) SA 327 (CC) at paras 35 – 36.

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution.

…

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. *PAJA recognises this need for flexibility, acknowledging in s 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless*. *Under s 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute*.' [Emphasis added]

[34] The question then before this Court is whether there are any exceptional circumstances to alter the default position.

[35] Dealing with this aspect, the only statement tendered by the applicant was the following:

'I can add in this regard that no internal appeal process is at my avail for which reason I was entitled to approach the Court for its intervention.'[9]

[36] This is a bold unsubstantiated statement, and must I agree with counsel for the second, third, sixth and seventh respondents, that the applicant has failed to allege any fact(s) or made out any case to condone non-exhaustion of the

[9] Caselines 010-5 par 3.4.

internal process as contained in Part 4 – I may add, for this court to even consider deviating from the default position.

[37] For the reasons above, the application must fail with costs.

[38] I have been requested by all the respondents to grant costs on a punitive scale and some even suggested a *de bonis propriis* order. I cannot say that I have not been tempted due to the applicant's unreasonable persistence with the application, which may also have as basis an ulterior purpose. I am however of the view that I should not grant such order at this early stage of litigation, especially due to the fact that the applicant is an individual who does not have access to state funds as the majority of the respondents and who seems genuinely affronted by the decisions taken, which seems to implicate her in person and may (or may not) have led to her suspension.

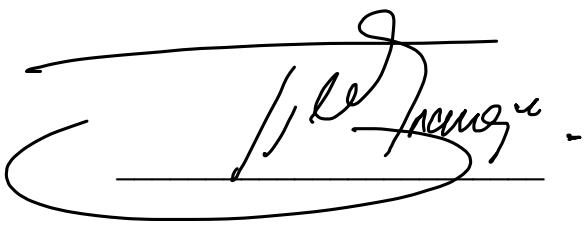
[39] I however hope that 'passion does not persist gaineth the mastery over reason'.

Order

[40] In the result the following order is made:-

1. The application is dismissed with costs.

2. The applicant is ordered to pay the costs of the first, second, third, fourth, sixth and seventh respondents, to include costs of two counsel where so employed on scale B.



A J LE GRANGE

ACTING JUDGE

APPEARANCES:

COUNSEL FOR APPLICANT:	CA Kriel instructed by Buthelezi Vilakazi Inc.
COUNSEL FOR FIRST RESPONDENT:	P Pretorius SC and A Govender instructed by Fairbridges Wertheim Becker
COUNSEL FOR SECOND, THIRD, SIXTH AND SEVENTH RESPONDENT:	MS Baloyi SC and Leon Peter instructed by Cheadle Thompson & Haysom Inc.
COUNSEL FOR FOURTH RESPONDENT:	A Milovanovic-Bitter instructed by Lapin Attorneys