

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1154/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

L[....] B[....] obo T[....] B[....]

Applicant

And

**THE MEDICAL SUPERINTENDENT OF
UNIVERSITAS ACADEMIC HOSPITAL**

1st Respondent

**THE CHIEF EXECUTIVE OFFICER OF
UNIVERSITAS ACADEMIC HOSPITAL**

2nd Respondent

MEC: FREE STATE DEPARTMENT OF HEALTH

3rd Respondent

HEARD ON: 2 JUNE 2022

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON:

18 AUGUST 2022

[1] The applicant brought an application contemplated in section 78 of the Promotion of Access to Information Act 2 of 2000, (PAIA), for an order in the following terms:

“1. That the respondents be ordered to provide the applicant’s attorneys with:

1.1 The complete medical records, including, admission records, hospital records, discharge records, clinical notes, neonatal records, antenatal records, maternity records, delivery records, scans, treatment records, and all other supporting documents pertaining to the treatment received by L[....] B[....] (the applicant) with Identity Number: [....] and T[....] B[....] (the minor) with Identity Number: [....] from MAY 2014, within ten (10) days from date of service of the order.

1.2 That the first and second respondents be made to pay the costs of the application on an attorney and client scale.

1.3”¹

[2] In the applicant’s founding affidavit, deposed by the applicant’s attorney, Johann Wilhelm Joubert, it is alleged that the applicant instructed the deponent to investigate a possible medical negligence claim arising out of what is described in paragraph 5 thereof as follows:

“On or about May 2014 the applicant was admitted to Universitas Hospital in a labour with the minor. The minor was born on 14 May 2014 with a disability because of possible medical negligence.”²

¹ Notice of Motion, page 3 of the record.

² Page 9 of the record.

[3] On the 11th February 2020 the applicant requested the records mentioned in para 1 above from the respondents and, upon failure by the respondent to provide same, she noted an appeal in terms of section 74 of PAIA.

[4] On the 17th February 2021 the respondents provided the applicant with the requested records which the deponent, upon his perusal thereof, discovered that they were not the correct records. He thereupon addressed a letter to the respondents alerting them of that fact and the latter did not respond to the letter.³

[5] This application is based on the respondents' said failure to provide the applicant with the requested information.

[6] The respondents oppose the application on the grounds that:

6.1. The respondents do not have *locus standi in judicio* on the grounds that the minor child, T[....] B[....], was born in K[....], in the Northern Cape Province and not at Universitas Hospital, situated in Bloemfontein in the Free State province.

6.2 The applicant's attorneys do not have the authority to act on behalf of the applicant.

6.3 The applicant has been provided with all the documents and information in the possession of the respondents pertaining to the applicant's child's admission and treatment at the Universitas Hospital.

[7] Section 82 of the PAIA provides that a court hearing the application in terms of section 78 may grant any order that is just and equitable, including orders:

“(a) confirming, amending, or setting aside the decision, which is the subject of the application concerned,

³ Para 8.3, 8.4 and 9 of the founding affidavit on page 10 and 11 of the record.

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order,

(c) granting an interdict, interim or specific relief, a declaratory order or compensation,

(d) as to costs...”

[8] PAIA gives effect to the constitutional right of access to information which is held by the state and private bodies. It encourages a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information, enabling those who seek information from the state or private bodies to exercise and protect their rights effectively.

[9] The respondents accept that they have information in their possession relating to the admission of the applicant at Universitas Hospital.⁴ However, in his answering affidavit, the deputy information officer states further that, *“there are no records which exist or could be traced to corroborate the allegation that the applicant was admitted at Universitas Hospital on the 14th May 2014 while she was in labour with a minor child.”* In the replying affidavit, the applicant also confirms, contrary to what was stated in the founding affidavit, that when admitted at the Universitas Hospital, she was with the minor child. She was not in labour.

[10] The applicant requested the following information from the respondent on **Form A: Request for access to record of public body:**

“All general medical records and/or clinical notes and/or admission records and/or scans and/or treatment records regarding treatment the patient received at your hospital.”

[11] The further particulars provided by the applicant in Form A were that:

⁴ Para 8.9, 8.10 and 8.11 of the answering affidavit on page 52 of the record.

“The patient was admitted in May 2014, kindly provide us with medical records from the admission date until the discharge date of the patients including scans, labour records, neonatal records, post-natal records, ante-natal records, maternity case records, NICU records, and all other supporting documents and records.”

[12] In their letter dated the 4th August 2021, the applicant’s attorneys state that they *“specifically requested the medical records of 26th May 2014, specifically the maternity case, labour records, sonar scans, admission, neo-natal records, ante-natal records.”* In response to this the respondent stated that on the 26th May 2014 the minor child, T[....] B[....] was admitted as an outpatient at the Plastic Surgery Clinic and provided the applicant with information relating to that admission. It is important to note that this information does not relate to birth of the child.

[13] The applicant requested records pertaining to the birth and concomitant treatment of T[....] B[....] and L[....] B[....] at Universitas Hospital. The documents in support of the request however disclose that the birth of T[....] B[....] did not occur at Universitas Hospital but at B[....]2, K[....] in the Northern Cape province. The applicant admits this fact in the replying affidavit but allege that the child was transferred to Universitas Hospital on the same day of her birth. This is in conflict with the contents of the letter referred to above wherein the applicant’s attorneys mention that the specific records that were sought were those of the 26th May 2014.

[14] The applicant does not state circumstances whereunder it is alleged that the records of the birth which occurred in K[....], in the Northern Cape would be kept by Universitas Hospital in Bloemfontein.

[15] It also appears *ex facie* the affidavit of Zacharia Mashilo that the records that were requested from Tshwaragano Hospital, regarding the applicant and her minor child related to their treatment at that Hospital during February 2014.⁵ It is not surprising that this file could not be traced at that facility because, based on the date of birth of the minor child, being the 1st May 2014, no records pertaining to her treatment could exist in February 2014, prior to his birth.

⁵ Page 69 of the record.

[16] The respondent's response that, *"the records which the applicants seek in these proceedings do not exist and no such records could be provided by the respondents on the 11th February 2020 or now"*, is supported by all the information and records provided by both the applicant and the respondents.

[17] Save for the date of birth which appears on the birth certificate and the ID number of the minor showing that she was born on the 1st May 2014 in K[....], Northern Cape Province, there is no evidence as to the medical facility whereat she was born. The respondents could not legally be expected to provide to the applicants any more information that the information in their possession based on the request made in terms of section 18(1) of PAIA.

[18] Although the reason advanced for the request for information is irrelevant to the decision whether or not to provide the requested information,⁶ for the reason that the applicants sought the information to pursue a claim for damages for medical negligence which resulted in the disability of the child, occasioned at birth, it is incontrovertible that the respondents are not custodians of that information.

[19] In my view it is sufficient for the respondents to have provided the applicants with the only information that they have pertaining to the applicants. There is no duty on their part to depose to an affidavit stating that they don't have in their possession any other information except the information provided. In any event, the deputy information officer has stated categorically in his answering affidavit that the respondents could not trace any information pertaining to the birth of T[....] B[....] at Universitas Hospital.

[20] For the reasons stated above, I am not persuaded that the applicants have made a case warranting any of the orders sought or contemplated in section 82 of the PAIA. The applicant's application therefore stands to be dismissed.

[21] The founding affidavit was deposed by the applicant's attorney, and it contains certain information which the attorney could not have had personal knowledge of. The

⁶ Section 11(3) of PAIA.

power of attorney that has been granted by the applicant also does not clarify the mandate of the applicant's attorneys. It states that the attorneys are appointed "*to investigate the circumstances relating to the incident in which I was injured and occurred on _____* (no date is mentioned), *and to obtain from the relevant Hospitals and doctors concerned all facts, medical records, accounts, and details relating to my injuries.*" It is because of these issues that the respondent argued that there was no mandate granted to the applicant's attorneys to act on behalf of the applicant in this matter and on that basis the respondents applied for an order of costs *de bonis propriis*.

[22] I am of the view that, considering the later participation of the applicant in these proceedings in the form of deposing to the affidavit attached to the replying affidavit, there is no sufficient cause to order that the applicant's attorneys be ordered to pay the costs *de bonis propriis*.

[23] I am also of the view that an order for payment of costs on a party and party scale will be just and equitable in the circumstances.

[24] In the result I make the following order:

1. The application is dismissed with costs.

M. S. LITHEKO, AJ

For the Applicant:

Instructed by:

Adv. E.G. Lubbe

VZLR Attorneys

Bloemfontein

For the Respondents:

Instructed by:

Adv. A.I.B. Lechwano

State Attorney

Bloemfontein