

But first, there is a duty to exhaust internal remedies!

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Before an aggrieved requester can approach a court for appropriate relief, following a decision of refusal for access to a record, such requester must first exhaust all internal remedies. These internal remedies are found in section 78 of the Promotion of Access to Information Act 2 of 2000 (PAIA) which provides that a requester may only apply to court –

- after it has either exhausted the internal appeal procedure referred to in section 74 of PAIA; or
- after it has exhausted the complaints procedure referred to in section 77A of PAIA.

The High Court recently had occasion to interpret section 78 of PAIA in *Elite Plumbing and Industrial Solutions (Pty) Ltd v Casper Le Roux Inc Attorneys and Another* (2022/14821) [2023] ZAGPJHC 226 (6 March 2023).

The facts

The applicant, Elite Plumbing and Industrial Solutions Proprietary Limited, was owed a sum of money by the second respondent, Jadel Development Proprietary Limited, for services rendered. The second respondent apparently did not pay the applicant because it had not been paid by its own creditors, the main culprit being a developer called Malan Developments Proprietary Limited (**Malan**).^[1]

Eventually, the applicant sued the second respondent and obtained a judgement against it for the payment of what was owing together with interests and costs. Sometime later, the applicant heard that Malan had been liquidated and that the liquidator paid the second respondent about R12 million. This money was paid into the first respondent's, Casper Le Roux Inc Attorneys, trust account. The first respondent is a firm of attorneys who had been representing the second respondent in the litigation.^[2]

The applicant, encouraged by this news, wrote to the firm of attorneys requesting details about the money that it had supposedly received on behalf of the second respondent. The firm of attorneys declined to provide the information, claiming that it was protected by attorney-client privilege. The applicant then made two formal requests for access to the information under section 53(1) of PAIA. Those formal requests, too, were refused. This precipitated the applicant approaching the court for an order to compel the firm of attorneys to provide it with the information that it sought.^[3]

The issue

The salient issue before the High Court was whether the applicant, before approaching the court for relief, is obliged to first exhaust an internal remedy.^[4]

The findings of the court

Section 78 of PAIA deals with applications to court and provides that –

"A requester...may only apply to a court for appropriate relief in terms of section 82 in the following circumstances:

(a) after that requester... has exhausted the internal appeal procedure referred to in section 74; or

(b) after the requester... has exhausted the complaints procedure referred to in section 77A."

The court held that section 78 postulates that 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. Therefore, the internal appeal procedure and/or a complaints procedure, if they apply, must be exhausted before the requester can approach a court.^[5]

The court held that the internal appeal procedure does not apply in this case given that the appeal procedure is only applicable to public bodies and not private bodies. To this end, there is no mention in section 74 of the internal appeal procedure applying to a decision taken by the head of a private body.^[6]

The court then considered whether the complaints procedure referred to in section 77A applies to the head of a private body.^[7] The court held that section 77A deals with complaints to the Information Regulator (**the Regulator**) and that where a requester has been refused access to a record by the head of a private body, the requester may, within 180 days of the decision, lodge a complaint to the Regulator.^[8] The court further held that the complaints procedure will ultimately yield a decision from the Regulator.^[9]

Following this, the court took a step back and looked at the wording of section 78 of PAIA which expressly provides that a requester "*may only apply to court... after the requester... has exhausted the complaints procedure referred to in section 77A*", the court found that this wording makes it plain that an aggrieved requester for access to a record of a private body is not entitled to approach a court unless it has first exhausted the complaints procedure referred to in section 77A. To this end, it was held that –

"[19]...When a statute expressly states that an internal remedy must be exhausted before an application to court can be launched, the exhaustion of that remedy is an indispensable requirement for the launching of the application to court...."

Conclusion

It is clear that a requester is prohibited from approaching a court unless the internal remedies provided by section 78 of PAIA are exhausted. A court will turn away a requester if it is not satisfied that the internal remedies have been exhausted.

Footnotes

[1] See paragraph 2 of the judgement.

[2] See paragraph 2 of the judgement.

[3] See paragraph 2 of the judgement.

[4] See paragraph 9 of the judgment.

[5] See paragraph 11 of the judgment.

[6] See paragraph 12 of the judgement.

[7] See paragraph 13 of the judgement.

[8] See paragraph 15 of the judgement.

[9] See paragraph 17 of the judgement.



Ahmore Burger-Smidt

Head of Regulatory

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