

REGULATORY

# The publication of information by the Auditor General in terms of PAIA

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In the High Court judgment of *Sakeliga NPC v The Auditor-General South Africa (36297/2022) [2023] ZAGPPHC 501 (30 June 2023)* penned by Swanepoel J, various determinations were made with regard to the Promotion of Access to Information Act 2 of 2000 ("PAIA").

The crux of the matter centred around what level of disclosure would be appropriate, as well as the due process which ought to be followed prior to approach the court.

The applicant contended that the publicly available audit reports provided by the *Auditor-General* did not constitute sufficient information under PAIA. The court had to determine on the one hand, whether the applicant had exhausted its internal remedies available to them before approaching the court and secondly, whether the *Auditor-General* was constitutionally obliged to publish its management records along with its audit reports.

The applicant is a non-profit organisation that took issue with the financial mismanagement which is occurring in a significant number of municipalities. This is largely due to the fact that approximately 10% of municipalities have received 'disclaimed' audit opinions, which means that they were unable to provide the AG with evidence for most of the disclosures in their audit reports.

In terms of section 188 of the Constitution the *Auditor-General* is obliged to audit and report on accounts, financial statements and financial management of all municipalities. Section 4(1) of the Public Audit Act, 25 of 2004 ("PAA") gives effect to this obligation. Section 126(3) of the Municipal Finance Management Act, 56 of 2003 ("MMFA") requires the *Auditor-General* to audit the financial statements and to submit an audit report to the municipal accounting officer. These reports are publicly available on the *Auditor-General's* website. The applicant submitted that these reports are sterilized and abridged and that the report fails to disclose certain information such as the reasons for underperformance of municipalities. It and its members are therefore unable to protect their interests. It was under this premise that the applicant sought a vast range of documents relating to municipal finances from the *Auditor-General*.

The *Auditor-General* contended that the reports did not have to be disclosed under PAIA because the reports contained opinion, advice, or recommendations obtained in the performance of a duty conferred by law. It was also contended that the disclosure of the reports might frustrate the deliberative process between it and the municipality by inhibiting candid discussions of the issues identified in the report. The *Auditor-General* argued that the request was excessive and vexatious as compliance therewith would substantially and unreasonably divert the resources of the *Auditor-General*.

More importantly, it was alleged by the *Auditor-General* that the court did not have jurisdiction to hear the matter in light of section 78(1) of PAIA which states that a requester or third party may only apply to a court for appropriate relief in terms of section 82 after they have exhausted the internal procedures or after that have exhausted the complaints procedure referred to in section 77A.

The applicant rebutted this with various arguments, one of them being that the Information Regulator is obliged to provide a guide to the manner in which a person's rights in terms of PAIA must be exercised. The applicant notes that in this guide, the Information Regulator does not regard it as necessary for a requestor to exhaust the section 77A procedure before the application is brought.

However, the court disagreed with the applicant's argument in light of the fact that the Regulator's guide is simply that: a guide, which cannot nullify the provisions of an Act, such as PAIA. The court therefore held that the application for access in terms of PAIA was deemed premature and was therefore dismissed.

Another argument pertained to whether the *Auditor-General* had a constitutional obligation in respect of the publication of reports. In particular, section 188(3) states that "*all reports must be made public*". The central question was whether these reports merely pertain to audit reports or if it refers to all reports prepared by the *Auditor-General*, including management reports.

The court concluded that if one were to read the text of section 188(3) of the Constitution within the context of the rest of section 188 and within the context of section 20(2) of the PAA, it is clear that not every report of the *Auditor-General* is classified as an audit report and nor did the legislature intend for every report of any nature to be made public. The *Auditor-General* alleged that audit reports and management reports have different purposes in that management reports are merely a communication tool between the *Auditor-General's* office and a particular municipality.

Under this premise, the court accepted that the *Auditor-General's* version regarding the difference between management and audit reports and concluded that management reports were not "reports" within the meaning of the legislation.

Therefore the court came to the final finding that the application in terms of PAIA was premature and finally that the AG's publication of the audit reports was sufficient in light of their constitutional duty.

Probably the most significant aspect of this judgment, and an aspect clients should bear in mind, is that the internal remedies provided for in PAIA *must* be exhausted before approaching a court. Not only will this save time and money, but may also avoid protracted litigation. Finally, parties must be conscious of the fact that the guide issued by the Information Regulator does not supersede the provisions of PAIA and therefore approaching a court should come as a last resort.



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