

OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

Case No: 6047/07

In the matter between:

**PUBLIC SERVICE ACCOUNTABILITY MONITOR
N MKHIZE**

1st Applicant
2nd Applicant

and

**DIRECTOR GENERAL: OFFICE OF THE PREMIER:
EASTERN CAPE PROVINCIAL GOVERNMENT**

1st Respondent

**PREMIER OF THE EASTERN CAPE
PROVINCIAL GOVERNMENT**

2nd Respondent

JUDGMENT

REVELAS J

[1] The applicants brought an application in terms of section 78 and 82 of the Promotion of Access to Information Act, no 2 of 2000 ("the Information Act"), seeking an order to compel the respondents to provide the applicants with a copy of the full, unabridged, 2006 Rapid Assessment Survey ("RAS") of approximately 12 200 households into the Eastern Cape residents' perception of government performance and service delivery as compiled by the University of Fort Hare Institute for Socio-Economic Research ("PHISER").

GOOSEN A.J. 29.05.2008.
JUDGMENT delivered.
(Signature)

[2] Section 78 of the Information Act reads as follows:

- (1) "A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.
- (2) A requester-
 - (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
 - (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);
 - (c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 22, 26 (1) or 29 (3); or
 - (d) aggrieved by a decision of the head of a private body-
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 54, 57 (1) or 60, may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.
- (3) A third party-
 - (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
 - (b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; or
 - (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body, may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82".

[3] Section 82 thereof reads as follows:

"The court hearing an application 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;
- (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 within a period mentioned in the order;
- (c) granting an interdict, interim or specific relief, a declaratory order or compensating; or
- (d) as to costs".

[4] The first applicant is the Public Service Accountability Monitor, (also "PSAM") a voluntary association. The second applicant Nomalanga Mkhize (also the deponent of the founding affidavit in this matter) is a researcher with the PSAM or first respondent. She brings the application in her personal capacity, insofar as she may be regarded the "requester" as defined in the Information Act. In addition the two applicants also bring this application, they say, on behalf of all persons in the Eastern Cape Province who are poor or limited in other respects such as access to resources, and in the public interest as permitted in terms of section 38 of the Constitution, 108 of 1996.

[5] The first respondent, the Director General: Office of the Premier: Eastern Cape Provincial Government, is cited in her capacity as the administrative head of the Premier's office in the Eastern Cape Provincial Government, and as the information officer defined in the Information Act. The second respondent, the Premier of the Eastern Cape, is cited in her capacity as the "relevant authority" as defined in the

Information Act, she being the overall political head of the Eastern Cape Provincial Government.

[6] The PSAM is based at Rhodes University in Grahamstown and is accountable to a management board which is made up of civil society representatives. It researches information on the government's management of public resources and its delivery of public services in specific departments. The research is conducted against the background of the constitutional imperatives that the government must realize a range of socio-economic rights within available resources, which must be utilized efficiently and economically, whilst maintaining a transparent and accountable public administration. The research is aimed at giving parliament and citizens the means to hold the government accountable for the performance of its ministers and public officials. In addition to the aforesaid research function of the PSAM, it also runs a website where ministers of government and government officials may communicate their successes, or explain their less successful service delivery.

[7] To achieve its strategic objective, namely to promote efficiency and accountability in the management of public resources, the PSAM monitors and researches the performance and obligations placed on the following departments in the Eastern Cape Provincial Government: Education; Housing; Local Government and Traditional Affairs; Health and Social Development. In each of these four departments there are the following research outputs: A Budget Analysis Report; a Strategic Plan Evaluation; an Expenditure Tracking Report; a Performance Monitoring Report; a Public Integrity Evaluation; an Accountability to Oversight Report and a Scorecard.

[8] The first two outputs consider the ability of the various departments to implement effective accountability and service delivery in the next financial year and to this end assess the likely impact of policy priorities against budget allocations and consider departmental annual performances plans, operational plans and the laws and factors that govern them. The other outputs are retrospective, and provide an analysis of each department's performance in the previous financial year.

[9] The PSAM also has a sub-programme, called the Advocacy and Civic Empowerment. This programme seeks to disseminate its research findings in order to enhance public participation in governance by making citizens more aware of their constitutional rights, whilst holding public officials accountable for the functions they have been appointed to perform. The applicants contend that these objectives can only be attained by continuously disseminating the research findings of the PSAM and its observations which must be based on evidence, through press releases and interviews on radio and television. In order to ensure the co-ordination of efforts and sharing of ideas, the sub-programme also assists in liaising with fellow civil society organisations and Non-Governmental Organisations.

[10] The application arises from the refusal by the respondents to provide a copy of the full, *unabridged* version of the RAS of 2006, which survey was commissioned by the second respondent (or "the Premier") to record the responses of approximately 12 200 households in the Easter Cape Province relating to their perception of the Provincial Government's general performance with particular regard to service delivery. The research was undertaken over the period 1 November 2005 to 30 June 2006 and the survey was completed before the end of June 2006. According to the Premier the survey was conducted to solicit the views of the poor on service delivery

because it was clear to her that her department needed "to speed up service delivery to the poor people of the Province". It was, as mentioned in its abridged version, document itself, "an internal source document to inform government planning" so that the recommendations conclusions and insights from the RAS could be used to inform the Government's short and medium 2004 term plans. On the grounds that the survey document was "primarily an internal planning document" and was incomplete until factored into "the relevant plans of departments and municipalities", the respondents have steadfastly refused to provide an unabridged copy of the survey to the applicants. The applicants argued, that an abridged copy is not sufficient disclosure.

[11] The applicants explained the purpose of the request for information from the Eastern Cape Provincial Government. A continuous complaint of the PSAM is that there is a lack of up to date "needs analysis" on the part of the Government in the form of epidemiological data and socio-economic indicators for the people that these programmes and policies are intended to serve. The absence of the up to date data hampers meaningful governmental responses to areas in need of service delivery. Consequently the PSAM welcomed the Premier's initiative of commissioning the RAS.

[12] The applicants contend that detailed and up date information on the impact of service delivery in the Eastern Cape Province, as well as the views and perceptions of the citizens of the Province on these issues, is manifestly in the public interest. That view has to be correct. The applicants, in this regard referred to the views of the Premier herself, that without full disclosure of information of this nature, civil society is unable to properly evaluate Government's responses in the form of its medium and

long term planning. These views were expressed in the Premier's State of the Province address.

[13] A request was made for a copy of the survey from the office of the Premier, on 5 March 2007. The response received from the office of the Premier was that the RAS was "unfortunately" an internal planning document which was in the process of being made into "easy-to-read versions of it" and that it was incomplete without the Government's responses which was being "collected as we speak", and that "possibly a copy of the easy-reader" could be available in a month's time. In May 2007 a copy of an abridged version of the survey was received. When the PSAM submitted a formal request for the unabridged document it was refused, the reasons being that the Government needed to thoroughly canvass the report with all the "relevant structures/institutions" within provincial and local government and the process could only be completed within two or three months.

[14] On 21 September 2007 the first respondent's information officer reiterated its refusal to furnish the full survey and relied on section 44(1)(a)(i) of the Information Act. The PSAM submitted an appeal on 27 September 2007 against the information officer's refusal to provide the complete survey. When no response was received by 22 October 2007, the second respondent's office was advised that should no response be forthcoming by 28 October 2007 the appeal would be deemed to have been refused. 28 October 2007 came and went and consequently the appeal was deemed to have been refused.

[15] The respondents, in their opposition to this application, repeated that the provincial departments and municipalities were in the process of taking decisions as

to how to address the challenges identified in the survey. This they say, is to be dealt within two cycles over a period of two years. The first cycle which commenced on July 2008 will end on 30 June 2008, when all the planning documents will be completed and made available for distribution. The provincial government will make the unabridged report available once the planning documents are available. The reason proffered for this decision is that the report or full survey will reflect only half a picture of service delivery challenges and socio-economic conditions in the Eastern Cape Province, without the response of its provincial departments and municipalities, which would make up the other half all in the fullness of time. The respondents also explained that the decision was also taken to prevent premature public disclosure of the whole report and because a reasonable fear that certain aspects raised in the report could be taken out of context if not seen against the full response by the provincial departments and municipalities to the challenges raised in the report a fear that problems raised in the report could also be sensationalized in the media, was also expressed.

[16] The respondents further argued that the decision to stall delivery of the survey is that the provincial departments and municipalities would be given sufficient time to digest the difficulties and gather the necessary resources to deal with the challenges, without having to do so in a rush, which might result in appropriate responses and inhibited (as opposed to candid) discussions or deliberations. Broadly speaking the respondent's case is that the applicants will be entitled to the full report, but for the aforesaid reasons, they will just have to wait until July 2008.

[17] The respondents also raised the question of the applicants' *locus standi* to institute this application, but this point was sensibly not proceeded with, having

regard to the provisions of section 38 of the Constitution which entitle almost any person or body to make a request. In support of their case the respondents relied on section 44(1)(b)(i)(bb) of the Information Act which provides that the information officer of a public body may refuse a request for access to a record of the body, if the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies, by inhibiting the candid conduct of the consultation, discussion or deliberation.

[18] The respondent's submitted that the applicants themselves have emphasized the importance of a governmental response to the survey and therefore it was a further factor to justify its reliance on section 44, for reasons of first obtaining such departmental responses. In my view, the responses can and should be in response to the full report, as disclosed to those who gathered the relevant information to form its contents.

[19] The applicants argue that the respondents are not entitled to rely on section 44 of the Information Act and the respondents' refusal to furnish the report is in breach of section 32 of the Constitution, 1996 which guarantees the right of access to *inter alia* information held by the State.

[20] Section 44(1) of the Information Act reads as follows:

"Subject to subsection (3) and (4), the information officer of a public body may refuse a request for access to a record of the body-

(a) if the record contains-

- (i) an opinion, advice, report or recommendation obtained or prepared; or
- (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,

for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(b) if—

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid-

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy”.

[21] It would seem that the respondent relies on the latter part of section 44. It does not want candid communication and consultation to be inhibited by premature disclosure.

[22] The Information Act was enacted to be able to give expression to the fundamental right to access to any information held by the State contained in section 32 of the Constitution, 108 of 1996. Section 44 of the Information Act upon which the respondents rely, curtails that right. This section ought to be restrictively interpreted because of its curtailment of the aforesaid fundamental right. One would also prefer to avoid curtailment of access to information for reasons such as an alleged inhibited debate and an alleged reasonable expectation of frustrating a deliberative process, when such reasons are not supported by evidence. Section (2)1 of the Information Act provides that when interpreting its provisions a reasonable interpretation consistent with the objects of the Act is to be preferred. (See: *Minister*

for Provincial and Local Government v Unrecognized Traditional Leaders, Limpopo Province 2005 (2) SA 110 (SCA) at 116 D-F paragraph 17).

[23] Transparency is a prerequisite for the justification of administrative and executive decisions. This principle was emphasized in *Nextcom (Pty) v Funde NO and Others* 2000 (4) SA 491 (T) at 510 B-C where Bertelsman J observed that a free flow of information was the very essence of transparency. (See also: *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 867 E-F and 870).

[24] Given the aforesaid, it stands to reason that information should only be withheld in exceptional circumstances. The provisions of section 44 of the Information Act may not to be invoked for purposes of convenience, or because full disclosure would attract criticism, cause embarrassment or because it is believed that a sanitized version of the report in question would better serve the interests of all concerned. There must also be sufficient grounds to pronounce the release of a document or information as "premature". I fail to understand how a survey on perceptions of service delivery can be prematurely released to those who gather, and those who imparted with that information.

[25] The respondents appointed an independent body to conduct the survey amongst a group of people to whom the respondents are accountable. The focus of the survey was service delivery by Government, which is the responsibility of the respondents. The respondents' refusal furnish the full report does not find justification in section 44 of the Information Act. Sensationalizing by the media of the contents of the full report is not a proper ground for its non-disclosure. Service delivery is in the interests of everybody. No grounds were advanced as to why an

apprehension of media mischief was justified or so serious as to warrant non-disclosure of information which, by its nature, belongs in the public domain. That the suppression of people's views can be the very catalyst to inhibit a candid debate on a problem. Our history had many examples of just how the non-disclosure of the views of the citizens of this country served as a catalyst to destroy, let alone inhibit, candid debate on problems which concerned all.

[26] What can be predicted, with reasonable certainty, is that if the unabridged report is held back, there may be, added to the existing perceptions of service delivery, also be perceptions of a cover-up. That should be avoided. One also has to ask oneself how the first applicant would find it possible to monitor objective government responses if these are obtained before the release of the document in question.

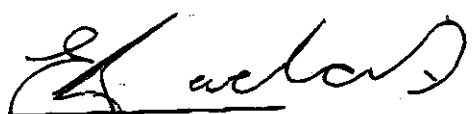
[27] It is further unclear how the recommendations incorporated in the RAS would interfere with the deliberative process and policy formulation, given the fact that they are presented by an independent body and based on empirical data. As pointed out by Mr Kruise, the Programme Head of Monitoring and Research, (in the replying affidavit), the RAS does not foreshadow government policy. In any event, the respondents had eighteen months to do what they say they wanted to do before releasing the report. According to Mr Kruise, it would appear that July 2008 will also come and go without the full report.

[28] The respondents, who bear the onus to prove that they are entitled to stall delivery on the full unabridged document, have not discharged that onus.

Accordingly, I must grant the relief as prayed for in the applicants' notice of motion and order the respondents to pay the costs of this application.

[29] It is ordered that:

1. The respondents are to provide the applicants with a copy of the full, unabridged, 2006 Rapid Survey of approximately 12 200 households into the Eastern Cape residents' perception of government performance and service delivery as compiled by the University of Fort Hare Institute for Socio-Economic Research, within 10 (ten) days of this order.
2. The respondents are to pay the costs of this application, the one paying the other to be absolved.


EREVELAS
Judge of the High Court