Belwana v Eastern Cape MEC for Education and another; Langeveldt v Eastern Cape MEC for Education and another

EASTERN CAPE LOCAL DIVISION, BHISHO
IT STRETCH J

Date of Judgment: 18 MAY 2017 Case Numbers: 306/16; 349/16

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Constitutional law – Right of access to information – Section 32 of the Constitution of the Republic of South Africa, 1996 – Right to information is not absolute, and may be limited in terms of section 36 of the Constitution – Refusal is compulsory if access involves the unreasonable disclosure of a non-consenting third party's personal information, and if access would result in a breach of confidence owed to a third party in terms of an agreement – Section 45 of the Promotion of Access to Information Act 2 of 2000 permits refusal of a request for access to a record of the body if the request is manifestly frivolous or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the public body – Section 44(2) protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material.

Editor's Summary

Two applications brought by educators employed by the respondents were consolidated by the court.

The applicants sought relief in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (the "Act"), in respect of information held by the respondents pertaining to their unsuccessful applications for certain posts within the Department of Education.

Held – Section 32 of the Constitution, which establishes, *inter alia*, the right of access to information held by the State, requires national legislation to give effect to such right. The Promotion of Access to Information Act was enacted as a result of that requirement. The right to information is not absolute, and may be limited in terms of section 36 of the Constitution. In recognition of the limitation clause in the Constitution, the Act devotes an entire chapter to grounds for refusal of access to records. Refusal is compulsory if access involves the unreasonable disclosure of a non-consenting third party's personal information, and if access would result in a breach of confidence owed to a third party in terms of an agreement. Refusal is discretionary in various circumstances as set out in the Act.

The Court then turned to consider the respective applicants.

In the case of Ms Belwana, she had applied for two head of department posts but was not shortlisted nor advised of the outcome of the process which was followed in the filling of the posts. She wrote to the relevant school governing body ("SGB") requesting reasons why she was not shortlisted and asking the school to explain to her the criteria used by its governing body in its short-listing process. Although no response was received, Ms Belwana did nothing for

several months, and then approached an attorney who liaised with the department on the applicant's behalf. When that failed to bring about a result satisfactory to the applicant, she launched the application before this Court, seeking an order directing the respondents to furnish her with the information which she had originally requested from the SGB and the second respondent. The applicant was seeking an order which compelled the Department to furnish her with certain information, which relief she had failed to obtain from the Department. Section 82 of the Act states that the court may grant any order that is just and equitable, including an order requiring the information or relevant officer of the public body to take such action as the court considers necessary within a period mentioned in the order. One of the provisions on which the Department relied in opposing the application was section 45 of the Act. That section permits refusal of a request for access to a record of the body if the request is manifestly frivolous or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the public body. The respondents correctly pointed out that the applicant was not shortlisted for the contested posts and as such did not even make it to the interview process. She now requested to be furnished with the score-sheets, minutes and the deliberations of an interview panel presiding over a process in which she did not participate. The Court agreed that the information sought by the applicant did not relate to her. She was eliminated at the outset on the basis of what was contained in her application form. The information which she sought did not relate to her as a requester, but related to interviews from which she was excluded. It related to meetings where she was not the subject of discussion, and opinions about and recommendations with respect to candidates who were interviewed and candidates who were shortlisted. Moreover, much of the record sought was bound to contain evaluative material about other applicants as envisaged in section 44 of the Act. Section 44(2) protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material. The Court concluded that the application was manifestly frivolous and vexatious and fell to be dismissed.

The remaining case was that of Ms Langeveldt, who had applied for the vacant post of head of department of the foundation phase at the school at which she was already employed. She was shortlisted and was invited to attend an interview, which she did, on 29 April 2015. On 5 May 2015, she wrote a letter to the Department's district director expressing her concern regarding perceived irregularities committed before, during and after the interview process. She stated that the "recommendation" of the SGB was based on undue influence. In August 2015, the applicant escalated her grievance by formally referring it to the Department's bargaining council. During the grievance process, the applicant sought access to all the relevant documents relied upon by the SGB and the Department to procure the appointment of the successful candidate. Her request was refused and an internal appeal failed. That led to the application before this Court, for an order compelling the respondents to furnish the specified information. The application was opposed on the grounds that it was manifestly frivolous and vexatious in that the applicant had abandoned any previous intention she might have had to challenge the outcome of the interviews; that the information she sought contained personal information about parties and would amount to a breach of confidentiality in that the other

applicants had not consented to disclosure of their personal information; and that the minutes, records of deliberations and the recommendations which she sought would compromise confidentiality. In placing strict reliance on the confidentiality clause signed by panellists, the Department had successfully resisted those aspects of the applicant's application which sought the provision of evaluative material prepared by panellists for the purpose of determining the suitability, eligibility or qualifications of the other applicants for the post, including the identities of the persons who furnished and obtained such evaluative material. The application fell to be dismissed in respect of such evaluative material, but was successful to a limited extent. The Court set out the information which the Department was required to provide to the applicant.

Notes

For Constitutional law (Bill of Rights) see:

- *LAWSA* Second Edition Replacement Volume (2012, Vol 5(4), paras 1–215)
- Cheadle MH; Davis DM and Haysom NRL *South African Constitutional Law: The Bill of Rights* (2ed) Durban, LexisNexis 2005 Service Issue 36 (last updated in November 2016)

Case referred to in judgment

Rubuluza and the Eastern Cape MEC for Education and another, unreported, case number 643/15 (ECB) – **Referred to** 40

Judgment

STRETCH J:

[1] These two applications have been consolidated for practical purposes. Both applications were launched by educators in the employ of the respondents on similar grounds. Both were argued before me by the same Counsel. The same law applies to both.

[2] The applicants seek relief in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 ("PAIA") for information held by the respondents pertaining to their unsuccessful applications for certain posts within the Department of Education (the "Department"). It is common cause that the Department is a public body as defined in section 1 of PAIA.

[3] PAIA was enacted in compliance with section 32 of the Constitution, which reads as follows:

> "(1) Everyone has the right to access to:
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[4] This right to information is not absolute. It may be limited in terms of section 36 of the Constitution, which reads as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and

justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[5] This takes me to PAIA. The intention behind the promulgation of this legislation is expressed at the outset of the Act as follows:

> "To give effect to the constitutional right to access to any information held by the State and any information that is held by another person and that is required for the exercise and protection of any rights; and to provide for matters connected therewith."

[6] The mischief which PAIA seeks to prevent is identified in its preamble which recognises that the pre-Constitution system of government at times resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations. PAIA's purpose in the circumstances would be to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information. The preamble to PAIA also expresses due recognition of the applicability of the limitation clause in section 36 of the Constitution. The preamble is repeated with fuller content in section 9 of PAIA which traverses the objects of the Act.

[7] In recognition of the limitation clause in the Constitution, PAIA devotes an entire chapter to grounds for refusal of access to records.[1]

[8] In a nutshell, refusal is compulsory in (*inter alia*) the following circumstances:

(a) if access involves the unreasonable disclosure of a non-consenting third party's personal information;

(b) if access would result in a breach of confidence owed to a third party in terms of an agreement.

[9] Refusal is discretionary in (*inter alia*) the following circumstances:

(a) if the record consists of a third party's confidential information, the disclosure of which could reasonably be expected to prejudice future supply of similar information and it is in the public interest that the source of information should not be quelled;

(b) if the record contains an opinion, report or recommendation or an account of a consultation, discussion or deliberation (including 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;

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1 PAIA Chapter 4 (ss 33–46).

(c) if disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body by inhibiting the candid communication of an opinion, advice, report or recommendation or the conduct of a consultation, discussion or deliberation;

(d) if the record contains evaluative material which, if disclosed would breach an express or implied promise made to the supplier of the material that the material and the identity of the supplier would be held in confidence;

(e) if the request for information is manifestly frivolous or vexatious;

(f) if the work involved in processing the request would substantially and unreasonably divert the resources of a public body.[2]

[10] The respective positions of the applicants will now be considered in the light of the relevant legislation which I have outlined.

Boniwe Belwana (case number 302/2016)

[11] The applicant is an educator stationed in Port Elizabeth. She has been an educator since 2008. She applied for two head of department posts at the Alfonso Arries Primary School, Port Elizabeth, during 2015. According to her, shortlisting for the positions closed on 24 April 2015, and the school governing body (the "SGB") interviewed the shortlisted candidates on 8 May 2015. The applicant avers that she was neither shortlisted nor advised of the outcome of the process which was followed in the filling of the posts.

[12] On 14 May 2015, the applicant wrote to the SGB requesting reasons why she was not shortlisted and in addition, asking the school to explain to her the criteria used by its governing body in its shortlisting process. She required a response within six days from the date of her letter. No response came to hand.

[13] The applicant did nothing for several months. One day, and by all accounts somewhat out of the blue, she decided to approach an attorney who wrote to the second respondent on 2 September 2015 (just short of four-and-a-half months after the applicant was not shortlisted).

[14] The letter (which acknowledges that the posts had been filled), expresses the opinion that there appears to have been no "rational reason" for the applicant not to have been shortlisted. The letter further requests "copies of all relevant documents" referred to in an attached request for access to the record of a public body. It is stated that the documents are requested for the applicant to protect her rights and her interests, to consider her position and to take legal advice. The documents listed in the request are the following:

(a) the master list of candidates who applied for the two posts;

(b) the minutes of all meetings including minutes of the shortlisting meeting of the governing body and minutes of the interview meetings in respect of the filing of the posts;

(c) the score sheets of the panellists;

2 PAIA s 33(1).

(d) the minutes of the meeting at which the governing body's recommendation was made as to the filling of the posts.

[15] Not having been favoured with a response, and on 21 October 2015, the applicant faxed a notice of internal appeal to the second respondent.

[16] On 27 October 2015 the Department's legal services responded to the letter dated 2 September 2015, stating that the request was incomplete in that it had failed to refer to a power of attorney and no proof of payment of the request fee had been attached.

[17] On 1 December 2015 (just short of five weeks later) the applicant prepared a power of attorney which was faxed to the Department's director of legal services together with proof of payment of the request fee.

[18] On 1 April 2016, the Department's directorate of legal services dismissed the internal appeal. The relevant portions of the notice of dismissal read as follows:

> "Section 44 protects the record of an opinion, advice, report or recommendation or an account of a consultation, including the minutes of a meeting, if the disclosure of a record could reasonably be expected to frustrate the deliberative process in a public body.
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> Section 44(2) further protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material.
>
> The process of interviewing candidates is a confidential process. Panellists are required to sign confidentiality clauses. Applicants are encouraged to submit confidential information, and though out of the process, there is if not an express agreement of confidentiality, at least an implied agreement of confidentiality.
>
> Providing this information could reasonably be expected to frustrate the deliberative process, as panellists will be unwilling to objectively air their views. It is a reality that in many cases, that at least some of the panellists are colleagues of the applicants, and if deliberations and opinions are not protected, this could lead to the situation where panellists refuse to take part in the process.
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> After considering all of the above, the appeal is dismissed."

[19] On 13 June 2016 the applicant launched the application before me, seeking an order directing the respondents to furnish her with the information which she had originally requested from the SGB and the second respondent. The respondents oppose the application.

[20] In its answering affidavit, the Department's acting superintendent general purports to rely on the provisions of sections 34, 37, 44 and 45 of PAIA. Reference is also made to the applicant's failure to seek a review of the dismissal of her internal appeal, rather than to approach this Court in terms of PAIA. Over and above this, it is also pointed out that the advert for the post makes it clear that an application is deemed to have been turned down in the absence of any notification within three months of the closing date for applications (which was 27 February 2015) and that only shortlisted candidates would be contacted. Indeed, the application form makes it clear that forms without relevant documentation would be discarded before shortlisting is even considered.

[21] A list annexed to the answering affidavit reflects that there were 26 applications for one post and 11 for the other, totalling 37.

[22] The applicant in reply has to some extent challenged the relevance of the sections of PAIA which the Department has referred to.

[23] To my mind, the Department's reliance (in these specific circumstances) on sections 34 and 37 of PAIA is misplaced. These sections relate to the protection of the privacy of a third party and any confidential information furnished by that party (ie any other applicant for the post).

[24] The applicant does not seek access to the application forms of the other applicants. Sections 34 and 37 accordingly do not apply to this scenario. They were in any event not raised when the Department dismissed the applicant's internal appeal.

[25] The Department furthermore purports to rely on some of the provisions of section 44 dealing with the operations of public bodies. Whilst the affidavit of the Department's information officer is hardly a model of eloquence, it is clear from the letter dismissing the internal appeal that the Department purports to object in the main to the disclosure of evaluative material, which disclosure is likely to compromise an express or implied promise of confidentiality. As the letter dismissing the appeal is practically verbatim the same as the one dismissing the appeal in the *Langeveldt* matter which is discussed below, my views regarding the question of evaluative material expressed there are equally applicable to this matter.

[26] It is also the Department's contention that the applicant ought to have invoked review proceedings instead. In fact, what the Department says in its affidavit is that the applicant has failed to review the relevant authority's decision to dismiss the appeal. This contention is fallacious. In terms of section 25 read with section 78 of PAIA, the requester is entitled to approach this Court for "appropriate" relief once the internal appeal procedure has been exhausted. This is precisely what the applicant has done. The mere fact that the application has not been perfectly dressed up as a review is neither here nor there. Nor is it necessary, for that matter, for the applicant to invoke strict review proceedings. It is, after all, the function and the duty of this Court to review proceedings which have been referred to it, and not the function of the applicant as is suggested by the Department.

[27] The applicant is in essence, seeking an order which compels the Department to furnish her with certain information, which relief she has failed to obtain from the Department. Section 82 of PAIA states that this Court may grant any order that is just and equitable, including an order requiring the information or relevant officer of the public body to take such action as the court considers necessary within a period mentioned in the order. The relief sought by the applicant falls squarely into this category.

[28] Unfortunately for the applicant, this is not the end of the matter. I say so because the Department has also raised section 45 of PAIA which reads as follows:

> "The information officer of a public body may refuse a request for access to a record of the body if –
>
> (a) the request is manifestly frivolous or vexatious; or
>
> (b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."

a [29] In this regard, the respondents correctly point out that the applicant was not shortlisted for the contested posts and as such did not even make it to the interview process. The applicant now requests to be furnished with the score-sheets, minutes and the deliberations of an interview panel presiding over a process in which she did not participate. In the premises, it
b is contended by the respondents that the request is manifestly frivolous and vexatious.

[30] To my mind there is some merit in this contention. It seems that the applicant herself, has had some difficulty in disputing it. I say so because she not only ignored the allegation in her replying affidavit, but she also
c did not address it in her heads of argument. Indeed, very little can be said to sustain an argument to the contrary.

[31] It is indeed so that unlike the position under the interim Constitution, there is no need for the requester to show that the information is in any way necessary for the exercise or protection of rights. For the most part, the public body will be constrained to release the information if it relates
d to the requester.[3]

[32] In the matter before me the information sought by the applicant does not relate to her. She was eliminated at the outset on the basis of what was contained (or what was not contained for that matter) in her application form. She did not make it out of the starting block. She was not inter-
e viewed. She was not shortlisted subsequent to or before interviews.

[33] The information which she seeks does not relate to her as a requester. It relates to interviews from which she was excluded. It relates to meetings where she was not the subject of discussion. It relates to opinions about and recommendations with respect to candidates who were interviewed
f and candidates who were shortlisted. She is not one of them.

[34] I can see no valid reason why the applicant should be entitled to information regarding a process that she was not a part of. Vacant posts are advertised on a daily basis. With the rate of unemployment in this country, posts are hungrily applied for, often when the applicants do not even meet the criteria. The applications of those who do meet the substantive
g criteria are often rejected on procedural or other grounds at the outset. This is bound to happen. Employers cannot possibly interview every candidate for every job.

[35] This is not a case where the applicant considers herself to be more suited for the position than any other applicant, or that she considers herself to
h have been unfairly prejudiced by her early exclusion. She is but one of about 35 unsuccessful candidates.

[36] To my mind, because the applicant has not distinguished her position in any way from the other candidates who were unsuccessful from the onset, to provide the applicant with minutes of a shortlisting meeting (assuming
i they exist) is likely to open up the flood gates and create expectations from all the other unsuccessful applicants in this matter, and further afar, to be provided with the same information. This cannot possibly be the purpose of PAIA. Such steps also cannot possibly transparently address the

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j 3 Cora Hoexter: *Administrative Law in South Africa*: Juta (2ed) (2012) at 98.

mischief which PAIA seeks to prevent, which is in the main that a person is entitled to any information *about him or her* (my emphasis) which is held by a State department.

[37] To do so would not only give effect to frivolous and/or vexatious demands brought under a guise of legitimacy, but the work involved in processing such requests or orders would no doubt result in a substantial and unreasonable diversion of resources as envisaged at section 45 of PAIA. Over and above this, much of the record sought is bound to contain evaluative material about other applicants as envisaged in section 44 of PAIA.

[38] Counsel for the applicant has referred me to the judgment of Smith J in the matter of *Rubuluza and the Eastern Cape MEC for Education and another* (unreported judgment in Bhisho case number 643/15 delivered on 15 November 2016), where a similar application was successfully brought. When I say similar, the matter is indeed very similar to the case which I intend dealing with after this one. It is not similar to this case at all. It is distinguishable on the facts. I mention but a few differences. In *Rubuluza*:

(a) The applicant stated that she was a post level one educator.

(b) The applicant had acted in the advertised post for 15 months. Indeed she had been doing so for a year before the position was advertised, and had continued doing so for three months after the advertisement. In the circumstances, her legitimate expectation of being successfully shortlisted clearly outweighed the reason for her not having been shortlisted (apparently an oversight with respect to attaching her qualifications to the application form).

(c) The reasons given for the Department's failure to shortlist her (that she had failed to annex to her application form a document setting forth her qualifications) were obviously harsh in her circumstances, even if she had omitted to attach these documents (which was not admitted on the papers).

(d) The reasons furnished by the Department for failing to respond to her request for information were either misconceived or not adequately addressed.

[39] This is not the case in the matter before me. In the premises, I am of the view that the application is manifestly frivolous and vexatious and falls to be dismissed on this ground alone.

Marlette Langeveldt (case number 349/16)

[40] As I have stated before, the position of Ms Langeveldt is distinguishable from that of Ms Belwana.

[41] At the time of her application, Langeveldt was occupying a post level one educator position at Brandovale Primary School in the Graaff-Reinet district.

[42] She applied for the vacant post of head of department of the foundation phase at the school, was shortlisted and was invited to attend an interview, which she did, on 29 April 2015.

[43] On 5 May 2015, she wrote a letter to the Department's district director expressing her concern and dissatisfaction regarding perceived irregularities committed before, during and after the interview process. Therein she states that the "recommendation" of the SGB was based on undue influence.

[44] On 11 May 2015, the Department pointed out that her grievance was premature as the recommendation for the post had not yet been processed. The Department also expressed its concern that the confidentiality of the process had been violated, and urged the applicant to divulge the names of the "transgressors" so that appropriate action could be taken.

[45] On 14 May 2015, the applicant divulged that the persons who had informed her of the so-called "transgressors" were not willing to be exposed, and that she had accordingly elected to "resolve" her situation by challenging the legitimacy of the SGB in terms of the South African Schools' Act, in that the SGB had not adopted a constitution prior to her interview, which, in her view, made the entire process illegitimate.

[46] On 13 August 2015, the applicant duly escalated her grievance by formally referring it to the Department's bargaining council. The relief she seeks in her referral form is to be appointed in a suitable/similar position in Graaff-Reinet, or to be appointed at the district office in the department of special needs.

[47] On 18 September 2015, the applicant's attorneys wrote a letter to the second respondent. Therein, it is pointed out that on 20 July 2015 it had come to the applicant's attention that the post had been filled by one Erica Hobson. The letter states that the applicant thereafter referred a dispute to the Education Labour Relations Council on 19 August 2015, and that the process was underway. Thereafter, the letter reads as follows:

> "In the interim, our client wishes to gain access to all the relevant documents relied upon by the Governing Body and the Department to procure Ms Hobson's appointment. Our client contends that she was the most qualified person for the post. In her dispute she recorded also her disquiet the expressed belief that '*new blood is needed to improve education . . .* ' at the school. To the extent that this may have been a criteria adopted by the Governing Body in its decision making process leading to the recommendation for the appointment, this would mean that our client has been prejudiced in that the selection of the candidate was an issue which had been predetermined. Our client of course reserves her rights in this regard.
>
> Would you kindly furnish us with all the documents referred to in the attached Request for Access to Record of a Public Body. This will enable our client to take advice, consider her position and thereafter make further representations or adopt such steps in law as she might be best advised to protect her rights and interests."

[48] The documents listed are the following:

(a) The master list of applicants.

(b) Minutes of the short listing meetings.

(c) Minutes of the meeting of the governing body in respect of the process involving interviews.

(d) Minutes of the meeting at which the selection panel's preference list was considered and a recommendation was made.

(e) Score sheets of panellists at the short listing and interview meetings.

(f) All correspondence and other memoranda setting out the criteria utilised in the filling of the post.

(g) Correspondence to unsuccessful candidates.

(h) All documents relating to the applicant's declared dispute.

(i) All documents relating to the appointment of Erica Hobson in terms of which consideration was given to her premature resignation from the Department of Education and the extent to which her re-entry into the system had been duly complied with.

[49] On 12 October 2015, the Department's directorate of legal services replied stating that the request was incomplete in that the attorney's special power of attorney and proof of payment had not been attached.

[50] On 22 October 2015, the applicant filed a notice of internal appeal based on a deemed refusal of the request for access.

[51] On 27 October 2015, the applicant was notified that her dispute had been enrolled for resolution through conciliation and arbitration.

[52] On 3 December 2015, the applicant forwarded proof of payment of access and appeal fees to the Department.

[53] On 27 January 2016, the parties reached a settlement culminating in the applicant's withdrawal of her grievance. Immediately thereafter, the Department identified a vacant post at Graaff-Reinet Primary School for the applicant not only in compliance with the settlement agreement, but also in accordance with the relief she had sought when she first lodged her grievance. Notwithstanding this, and somewhat contrary to expectations, the applicant, together with her school management team at Brandovale Primary School where she was teaching, voiced disapproval with the procedures that were followed regarding the signing of her release from Brandovale in order for her to occupy the post which she had requested, and demanding that the Department only releases her once it is able to give the reassurance that the position which she was exiting from would be filled with immediate effect.

[54] The letter (signed by not only the school management team but by the applicant herself) is undated. The applicant's explanation for this simultaneous approbation and reprobation is somewhat curious. She states that the letter was written because the school's management team had recognised the value of her input in foundation phase education and was reluctant to lose her. She distances herself altogether from the letter and states in her replying papers that this was the rationale behind "their" cumulative effort and joint representation to the Department.

[55] The respondents did not seek leave to deliver a further affidavit to explain whether the demands of the applicant and her present school could be, or have been met, and the position in this regard remains vague. What is clear to this Court is that the applicant has made her best endeavours to do battle with the Department with whom she is employed at as many contemporaneous levels as possible. Having expressed that impression, it is not for this Court to decide on the wisdom of such a course of conduct. All this Court is called upon to decide, is whether the applicant is entitled to the information she seeks in terms of the prescripts of PAIA.

[56] On 27 May 2016 (and according to a letter which was introduced by consent after this matter was argued before me), the Department's director of legal services acknowledged the applicant's internal appeal, advising that the appeal had been referred to the first respondent for consideration, and that she would be updated as soon as he had made his decision.

[57] On 30 May 2016, the first respondent refused the applicant's request for information and dismissed her appeal. The grounds for so doing, as I have said in the *Belwana* matter, seem to constitute the Department's standard cut-and-paste response to these internal appeals. They state that section 44 protects the record of an opinion, advice, report or recommendation or an account of a consultation, including the minutes of a meeting, if the disclosure of the record "could reasonably be expected" to frustrate the deliberative process in a public body, and that the section further protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material. Vague mention is also made to resorting to sections 34 and 37 of the Act, in the event of this becoming necessary.

[58] On 23 June 2016 the applicant launched the application before me, wherein she seeks an order compelling the respondents to furnish the following information:

(a) the master list of applicants;

(b) the minutes of the shortlisting meeting;

(c) the minutes of the meeting at which the preference list was considered and at which a recommendation was made to the Department;

(d) the shortlisting and interview score sheets;

(e) all correspondence and other memoranda setting out the criteria used in filling the post;

(f) correspondence addressed to the unsuccessful candidates;

(g) all correspondence, memoranda and other documents relating to the dispute declared by the applicant;

(h) all documents relating to the appointment of Erica Hobson to the vacant post in terms of which consideration was given to her premature resignation from the Department followed by her re-entry into the system.

[59] The application is opposed on the following grounds:

(a) that it is manifestly frivolous and vexatious in that the applicant has abandoned any previous intention she may have had to challenge the outcome of the 2015 interviews;

(b) that her request has already been internally considered and refused;

(c) that the information she seeks contains personal information about parties and would amount to a breach of confidentiality in that the other applicants have not consented to disclosure of their personal information;

(d) that the minutes, records of deliberations and the recommendations which she seeks will compromise confidentiality;

(e) that the applicant has failed to exercise her rights of review.

[60] The applicant's response to this is that:

(a) She has not entirely abandoned her intention to challenge the findings. In essence she seems to be keeping all her options open and avers that the information is necessary to enable her to protect her rights, to consider her position and to take advice;

(b) This is the first time the Department has referred to the request as frivolous and vexatious;

(c) The Department has not disclosed the nature of the personal information which it has referred to, nor has it identified the parties who have not consented to disclosure;

(d) The documents sought are in any event public records and ought to be produced as she was a participant in a process where she has been prejudiced.

[61] I agree with the argument that the Department failed to raise the contention that the complainant's request was manifestly frivolous or vexatious at the time when it dismissed her internal appeal, and at a time when, by all accounts, she had entered into a settlement with the Department to occupy a different post. Instead, the dismissal of the appeal sets forth a stock "one size fits all" response. In the premises, it is necessary for this Court to consider whether the blanket assertions made in the Department's letter of dismissal dated 25 May 2016 are sufficient to pass muster as valid grounds for refusal of the applicant's claim, as envisaged in the legislation referred to by the Department in that letter (*viz* sections 44, 34 and 37) reads with the limitation clause.

[62] It goes without saying that certain portions of the record sought are likely to contain opinions, reports, recommendations and accounts or minutes of consultations, discussions or deliberations. By virtue of the provisions of section 44(1), the information officer may refuse a request for access if the information sought was obtained:

> "for the purpose of assisting . . . to take a decision . . . in the exercise of a power or performance of a duty conferred or imposed by law; or the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body . . . by *inhibiting the candid communication of an opinion, advice, report or recommendation; or conduct of a consultation, discussion or deliberation* . . . " (my emphasis).

[63] As pointed out by the applicant's Counsel, this is not the case. The process has been completed. A candidate has been selected. This is not a premature application which, if successful, may have the effect of thwarting or derailing a process.

[64] The Department further relies on section 44(2) which states that:

> ". . . the information officer . . . may refuse a request for access . . . if the record contains evaluative material . . . and the disclosure of the material would breach an express *or implied* (my emphasis) promise which was made to the person who supplied the material and to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence."

[65] In support of this ground for refusal, the Department states that (all) panellists are required to sign confidentiality clauses. Unfortunately, the nature and the extent of such a clause is not explained, nor is a copy of

such a clause annexed to the letter in order to explain to the applicant what exactly it is that a panellist is prohibited from disclosing. However, in fairness to the other applicants, a plain reading of the section makes it clear that a signed confidentiality clause makes an implied promise to the person who is the subject matter of the evaluation that the evaluative material and the identity of the person who is being evaluated would be held in confidence. That this has been the Department's stance throughout, is evident from its response to the applicant's letter dated 11 May 2015 wherein the following is stated:

> "It is with great concern that we have noted that the confidentiality of the process was violated. You are strongly urged to divulge the names of the transgressors so that the appropriate action can be taken."

[66] The applicant has criticised the Department for failing to list or expose third parties who have not consented to the disclosure of information. Indeed in the dismissal letter, the Department has not even referred to section 47 (which provides for notice to third parties). Section 47, however, makes it clear that notice need only be given to third parties when the information officer is considering a request as contemplated in sections 34(1), 35(1), 36(1), 37(1) or 43(1). The Department, in refusing the request, has made it clear that it relies on section 44(2) which has not been hit by the notice clause.

[67] Evaluative material is defined in section 1 of PAIA as being:

> "an evaluation or opinion prepared for the purpose of determining –
>
> (a) The suitability, eligibility or qualifications of the person to whom or which the evaluation or opinion relates –
>
> (i) for employment or for appointment to office;
>
> (ii) for promotion in employment or office or for continuance in employment or office;
>
> (iii) for removal from appointment or office; or
>
> (iv) for the awarding of a scholarship, award, bursary, honour or similar benefit."

[68] To my mind the Department, in placing strict reliance on the confidentiality clause signed by panellists (which is not disputed) has successfully resisted those aspects of the applicant's application which seek the provision of evaluative material prepared by panellists for the purpose of determining the suitability, eligibility or qualifications of the other applicants for the post, including the identities of the persons who furnished and obtained such evaluative material.

[69] In the premises, the application is successful to a limited extent, but falls to be dismissed regarding the aforesaid evaluative material. Having concluded thus, I am of the view that neither party should be entitled to costs.

[70] I make the following orders:

Boniwe Belwana (case number 302/16):

The application is dismissed with costs.

Marlene Langeveldt (case number 349/16):

The respondents are directed to furnish the applicant with the following information within 20 court days from the date of this order: *a*

(a) The master list of candidates who applied for the vacant head of department post at Brandovale Primary School in respect of which candidate Erica Hobson was ultimately appointed.

(b) The minutes (if any) of the meetings of the governing body of Brandovale Primary School at which the candidates for the aforementioned post were shortlisted, provided that any evaluative material as defined in section 1 of Act 2 of 2000 with respect to any candidates or evaluators (other than the applicant herein), shall be omitted from this record. *b*

(c) The minutes (if any) of the governing body's meeting at which the selection panel's preference list was considered and at which a recommendation was made to the Department of Education for the filling of the aforementioned post, provided that evaluative material as referred to in paragraph (b) of this order, shall likewise be omitted. *c*

(d) Any scores allocated with respect to the applicant only. *d*

(e) Any correspondence and other memoranda setting out the criteria used by the governing body and its selection panel in the filling of the aforesaid post.

(f) Any correspondence addressed to unsuccessful candidates, excluding any correspondence which makes reference to or includes evaluative material as referred to in paragraph (b) of this order. *e*

(g) All correspondence, memoranda and other documents relating to the applicant's dispute with respect to the process governing the filling of the aforesaid post, provided that any evaluative material as referred to in paragraph (b) of this order (including the identities of the evaluators and the identities of the subjects evaluated, other than the applicant) shall be excluded. *f*

(h) Any documents which address the successful candidate's previous resignation from the Department and her subsequent re-entry into the system, provided that any and all evaluative material as referred to in paragraph (b) of this order (including the identities of the evaluators) shall be excluded. *g*

For the applicants:
Ms *D Mostert* instructed by *Hutton & Cook*, King Williams Town

For the respondents:
M Mayekiso instructed by the *State Attorney*, King Williams Town