

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO:

In the matter between:

CALA UNIVERSITY STUDENTS ASSOCIATION “CALUSA” Applicant
(Non-Profit Organization Registration Number 87/0038)

and

SAKHISIZWE LOCAL MUNICIPALITY First Respondent

THE ACTING MUNICIPAL MANAGER

SAKHISIZWE LOCAL MUNICIPALITY:

MR BASIL MASE Second Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LWAZI NCAPAYI

do hereby make oath and state:

1. The facts deposed to herein are, unless the context indicates otherwise within my personal knowledge and are to the best of my knowledge and belief both true and correct in all material respects.

2. Where in this affidavit, I make submissions of a legal nature I do so on the advices of my legal representatives and where I rely on information furnished to me by others, I verily believe same to be true.
3. Any submission of law which I make is on the basis of advice from the applicant's legal representatives. I accept such advice as correct.

PARTIES

4. The applicant is Cala University Students Association "**CALUSA**", an incorporated association not for gain duly registered in accordance with the laws of the Republic of South Africa with registration number 87/0038, with its business address situated at Erf 327 Corner Bashee & Umzimvubu Street, Cala 5455. Attached hereto and marked "**C1**" is the Articles of Association.
5. The first respondent is Sakhisizwe Local Municipality ("**the Municipality**"), which is –
 - 5.1. duly established in terms of and having the powers and obligations set out in the Constitution, the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) ("**the Structures Act**"), the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) ("**the Systems Act**").

- 5.2. which has its principal place of business at ERF 5556 Umthatha Road , Cala, 5455; and
- 5.3. which has the power to sue and be sued in its own name.
6. The second respondent is, The Acting Municipal Manager Sakhisizwe Local Municipality: Mr Basil Mase “**Mr Mase**”, a repository of the functions and powers set out in the Structures Act and the Systems Act. The second respondent is cited on the basis that he is the accounting officer of the Municipality and is the functionary who has the power to direct compliance with any order that this court may grant.

DEPONENTS AUTHORITY

7. I am an adult male person within the Youth Commune of the Applicant and reside at 507 Komani Avenue, Cala 5455. I conduct my duties from within our offices currently situated as per paragraph 4 above;
- 7.1. These proceedings are instituted at the instance of the members for the applicant, attached hereto and marked “**C2**” is the resolution of the applicant to launch such proceedings;

7.2. Due to the facts herein being within my knowledge I am duly authorized to depose to this affidavit on behalf of the applicant; and

7.3. My authority is derived from the resolution marked C2.

NATURE OF PROCEEDINGS

8. This affidavit is deposed to in support of an application wherein the applicant seeks, *inter alia*, an order; -

directing the second respondent to forthwith furnish the applicant with the following –

8.1. Minutes of council meetings in which council approved tenders in the records for the years 2000 to 2019;

8.2. Records of processes followed in the passing of the by-laws for the years 2000 to 2019;

8.3. Land Audit for the years 2000 to 2019;

8.4. Spatial Development Framework “**SDF**” for the years 2000 to 2019;

8.5. SDF annual audits reporting on performance against SDF targets for the years 2000 to 2019; and

8.6. Land Use Management System “**LUMS**” regulations or by-laws for the years 2000 to 2019,

As referred to in its request dated 29 August 2019 within 15 (fifteen) days of the order sought being granted; and

9. directing the first respondent to pay the costs of this application, including costs consequent upon the employment of counsel.

JURISDICTION

10. This court is clothed with the jurisdiction to entertain this application as the requester has offices within the area of this Honourable Court alternatively the relevant authority has its principle place of administration or carries on business within this area.

OVERVIEW

11. The Republic of South Africa is one sovereign, democratic state founded on, *inter alia*, human dignity, the achievement of equality and the advancement of human rights and freedoms, and supremacy of the Constitution and the rule of law. The Constitution is the supreme law of

the Republic of South Africa. Any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

12. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
13. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
14. In terms of section 32 of the Constitution of the Republic of South Africa, Act 108 of 1996 "***the Constitution***", everyone has the right of access to any information held by the state and by another person, and that is required for the exercise or protection of any rights. 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.
15. Access to information is an essential element of any well-functioning democracy. It facilitates transparency, accountability and good-governance. Access to information is thus a right that enables the public the opportunity to access information that can be used to protect, promote and fulfil other human rights.

16. National legislation has been enacted to give effect to the right to access to information. That legislation is the Promotion of Access to Information Act 2 of 2000 "*the PAIA*". The PAIA commenced its operation on 9 March 2001.
17. In terms of section 14 of the PAIA, it is incumbent on the information officer of the public body concerned to compile, within six (6) months after the commencement of the section or the coming into existence of the public body, a manual containing the information referred to in section 14(1)(a) – (i). I interject here to mention that the commencement date of section 14 was on 15 February 2002.
18. The Municipality is a public body (an organ of state) that came into existence in the year 2000 with the advent of the Systems Act.
19. The second respondent is, in terms of section 1 of the PAIA, the designated information officer.

BACKGROUND

20. CALUSA is a developmental non-governmental organization based in Cala, within the jurisdiction of the first respondent and is also mandated by structures within the jurisdiction of the first respondent such as the Sakhisizwe Moral Regeneration Movement, the Cala Ratepayers

Association, Elliot Residents Association, Domestic Violence Monitoring Unit and the Siyazakha Land and Development Forum. Together they make up a community known as the Forum, a civil society which the first respondent is well aware exists.

21. The applicant under the umbrella of the Forum, is concerned with the state of governance within the crisis ridden Municipality and has sent a letter to the MEC of COGTA and the Premier of the Eastern Cape seeking intervention in terms of section 139(1)(a) and (c) of the Constitution.
22. The applicant under the umbrella of the Forum is further concerned that there is no governance within the Municipality, there is dysfunction within the various spheres of the Municipality, there has long since been an audit for the financial years and the residents are suffering. The Forum had to ensure that the Applicant brings this current application out of necessity so as to ensure that an eventual application in terms of the Constitution is made succinctly for the dissolution of the Municipality and the placement under administration.
23. On 29 August 2019 in accordance with Section 18(1) of the PAIA a letter was drawn on behalf of the applicant by myself, to the second respondent and detailed the information so requested by the Forum (with the Applicant as its designated head). The request was duly made

on Form A and accompanied by detailed correspondence for the attention of the second respondent as the designated information officer, such is attached hereto and marked “**C3**”.

24. C3 indicates specifically to the second respondent as the relevant functionary the need for the documents as listed on the second page of the covering letter which is to be read as if specifically incorporated under paragraph D of Form A.
25. This covering letter was drawn specifically to incorporate the documents and/ or the description of the records requested since paragraph D has little to no space on which such full details can be made available for the second respondents knowledge.
26. On or by 29 August 2019, various representatives for the first respondent acknowledged receipt of C3 and signed their initials and surnames as evident thereon. The members then ensured that C3 was brought to the attention of the first respondent speaker as well as to the second respondent.
27. On 3 September 2019, the first respondent sent correspondence through the office of the Speaker, Mr F Faku ,which is attached hereto and marked “**C4**” which advises of the following –

27.1. The offices of the Mayor, the Chief Whip and the Acting Municipal Manager were copied in on C4;

27.2. C3 was acknowledged; and

27.3. The political delegation of the first respondent took a decision to ensure that the Mayor as the head of the Municipality will collect the necessary information from all relevant offices and compile one document.

28. No response was forthcoming on or by 27 September 2019 (being the end of the allowed thirty day period) and no intervention was provided by either the Mayor acting for the first respondent nor the second respondent who was the functionary cited on C3. A letter was drawn to the Office of the Public Protector seeking intervention before legal proceedings were launched as a way to ensure that the documentation could be timeously provided by the respondents.

29. The thirty (30) day period as provide for in terms of section 18 of the PAIA had lapsed without a response and / or the provision of the documents as agreed to.

30. On 17 February 2020, an ordinary correspondence was drawn by myself to the second respondent as a follow up to the official request made under C3, I attach hereto a copy of the letter and mark same “C5”. This courtesy solicited no response from either the first (through

the offices of the speaker) or the second respondent. C5 therefore advises the first and second respondent of the following –

- 30.1. That an undertaking was made (by the first respondent) ensuring that the Mayor assisted by the Acting Municipal Manager would compile the information requested under C3;
 - 30.2. 30 day period to provide the information had lapsed;
 - 30.3. There is a grave concern that there is an unreasonable delay;
 - 30.4. The documents so requested where listed under page 2 thereof for ease of reference to the recipient; and
 - 30.5. A further five (5) days were afforded to the second respondent to comply with the request.
31. No response to C5 was forthcoming and a further courtesy letter was drawn on 21 February 2020 which was directed to the second respondent and the Mayor was copied in, this solicited no response either, I attach hereto a copy of same and mark it “**C6**”.
 32. I, on behalf of the applicant had tried to obtain the information without the need for resorting to an internal appeal, however no information was forthcoming.

33. On 25 March 2020, the applicant was left with no choice but to submit a request in accordance with Section 75 of the PAIA (an internal appeal), attached hereto and marked “**C7**”, wherein the second respondent was once again advised that the reason for such internal appeal being lodged was provided under paragraph D as there was deemed a refusal for access to the records so requested under C3.
34. The internal appeal solicited a brief response from the second respondent via electronic mail on 13 April 2020, which is attached hereto and marked “**C8**”, which advises the applicant of the following –
- 34.1. C7 was received and acknowledged; and
- 34.2. The spread of the corona virus caused the country to go into lockdown and that response would be provided only once duties were resumed.
35. C8 therefore is proof of the lodgment of the internal appeal as it was confirmed in writing by the second respondent himself.
36. On 6 May 2020, correspondence which is attached hereto marked “**C9**” was sent to the second respondent, wherein the applicant advises of the following –

- 36.1. Appreciating the Municipality's commitment to the matters relating to the Covid-19 pandemic ;
- 36.2. The declaration of a national disaster does not suspend a citizen's right to access of information; and
- 36.3. That the 30 (thirty) day period for the provision of the information lapses on 3 June 2020.
37. I reiterate herein that the relevant authority was the second respondent and that the thirty day period within which he had to decide on the appeal ended on 3 June 2020.
38. The second respondent, chose not to decide and communicate his decision on the applicant appeal on or before 3 June 2020.
39. Thus in terms of section 77(7) of the PAIA the second respondent is, for the purposes of the PAIA, regarded as having dismissed the internal appeal and I submit that there was no basis for him to have done so.
40. On 11 June 2020, a virtual meeting was held between the applicant and the MEC for COGTA regarding the state of the first respondent in that the residents where suffering due to the non-functionality of the first respondent and the issue regarding the requests made in terms of the

PAIA was raised. The meeting resolved that the second respondent would ensure the delivery of all requested documentation.

41. On or by 15 June 2020, the second respondent delivered the following documents to the offices of the applicant in accordance with the request under C3 and ensured to deliver the second and final batch of documents by 30 June 2020, the documents so delivered where only the following-

41.1. Annual Reports, Financial and Audit Reports from 2007 to 2019;

41.2. IDP Documents from 2009 – 2019;

41.3. Municipal Land Use Plans;

41.4. Valuation Reports;

41.5. Town Planning and Topographical Maps of Surrounding Towns and areas;

41.6. Municipal Tender Records;

- 41.7. By Laws ;
 - 41.8. Database Fleet Management;
 - 41.9. IDP Annual Audits reporting on performance against IDP targets; and
 - 41.10. SPLUMA by laws.
42. Confirmation was sent via electronic mail by myself on 15 July 2020, such is attached hereto and marked “**C 10**” which acknowledges receipt of the documentation as listed under paragraph 41 above, and reminds the second respondent that there was still documentation outstanding which should have been provided by 30 June 2020. Such documentation was the following-
- 42.1. Minutes of Council meetings in which the council approved the tenders in the records provided;
 - 42.2. Records of Processes followed in the passing of the by-laws;
 - 42.3. Land Audit;
 - 42.4. Spatial Development Frameworks;

- 42.5. SDF annual audit reporting on performance against SDF targets; and
- 42.6. Land Use Management System regulations and / or bylaws
43. The documents as listed under C 10 form the basis of the application before court since the second respondent has failed to provide same.
44. Prior to the launch of this application however, on 5 August 2020, I drew a courtesy letter which is attached hereto and marked “**C 11**”. The documents outstanding were once again listed for ease of reference.
45. The applicant on behalf of the entire Forum is prejudiced by this failure to provide the information so requested and while we are empathetic of the Covid-19 pandemic we are more concerned that the Municipality ceased to function (to the detriment of the residents) long before the pandemic reached our shores.
46. This application is necessitated by the fact that we have exhausted all remedies and It is apposite to mention that in terms of section 11 of the PAIA a requester must be given access to a record of a public body if that requester complies with all the procedural requirements in the PAIA relating to a request for access to that record.

47. Section 18 of the PAIA provides that a request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address. This has been complied with.
48. Mr. Mntonintshi of my attorneys of record logged onto the Municipality's website (www.sakhisizwe.gov.za), on 26 August 2020, looking for a manual compiled in terms of section 14 of the PAIA so as to make a request for access to the information referred to above. The Municipality's website did not contain any manual in terms of section 14 of the PAIA.
49. In terms of section 14 of the PAIA:
- 49.1. Within six months after the commencement of section 14 (i.e 9 March 2001) or the coming into existence of the Municipality, the information officer of the Municipality ought to have compiled in at least three official languages a manual containing-
- 49.1.1. Description of its structure and functions;
- 49.1.2. The postal and street address, phone and fax number and, if available, electronic mail address of the information officer of the Municipality and of every deputy information officer of the Municipality designated in terms of section 17 (1) of the PAIA;

- 49.1.3. A description of the guide on how to use the PAIA, as referred to in section 10 of the PAIA, if available, and how to obtain access to it;
- 49.1.4. Sufficient detail to facilitate a request for access to a record of the Municipality, a description of the subjects on which the Municipality holds records and the categories of records held on each subject;
- 49.1.5. The latest notice, in terms of section 15 (2), if any, regarding the categories of records of the Municipality which are available without a person having to request access in terms of this Act;
- 49.1.6. A description of the services available to members of the public from the Municipality and how to gain access to those services;
- 49.1.7. A description of any arrangement or provision for a person (other than a public body referred to in paragraph (a) or (b) (i) of the definition of 'public body' in section 1 of the PAIA) by consultation,

making representations or otherwise, to participate in or influence-

- (i) The formulation of policy; or
- (ii) The exercise of powers or performance of duties, by the body;
- (iii) A description of all remedies available in respect of an act or a failure to act by the body; and
- (iv) Such other information as may be prescribed.

43.1.18. The Municipality ought to, if necessary, update and publish its manual referred to in subsection (1) at intervals of not more than one year.

43.1.19. Each manual must be made available as prescribed.

44. The respondent has failed to adhere to section 14 of the PAIA and as such, we are unable to comply with the specifics as required by a

manual and have brought the application in compliance with the PAIA itself as the overarching legislation.

45. While the applicant has suffered extreme prejudice by the fact that there is no manual compiled by the Municipality so as to allow the applicant to comply with section 11 of the PAIA, the result is that the requests already made (along with the information already partially provided) cannot be seen to be defective due to the fact that there has been substantial compliance with both section 18(1) and section 75 of the PAIA.

46. Regard being had to the fact that the second respondent has not published a manual, I was in a position to lodge a request in accordance with section 18 of the PAIA because my attorneys of record, and I are aware of, *inter alia* –

46.1. the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of Municipality where requests are to be made and appeals are to be lodged;

46.2. sufficient detail to facilitate a request for access to a record of the Municipality, a description of the subjects on which the

Municipality holds records and the categories of records held on each subject; and

46.3. a description of the services available to members of the public from the Municipality and how to gain access to those services.

47. Further, C4 and C8 are a further indication that the Municipality is aware of their duties in providing access of information to the residents within its jurisdiction.

48. There has already been substantial compliance with our request to access the information held by the Municipality and we urge this honourable court to take that into consideration when granting the order as prayed.

GROUND FOR DECLARATOR

49. The right of access to information held by the Municipality may be meaningless without the manual, the purpose of which is, to *inter alia*, inform the members of the public, such as myself, of the procedures to be followed when lodging a request for access to information and an appeal. However, we have been in contact with the Municipality as is evident from the annexures hereto.

50. The Municipality's lack of a manual does not necessarily limit the applicants right to access to information in that the information required was partially provided.

CONCLUSION

51. Residents of the first respondent are concerned with the following issues –

51.1. service delivery;

51.2. incomplete municipal projects;

51.3. the failure to appoint a Chief Financial Officer;

51.4. the failure by the Municipality to submit audit reports at 26 October 2018 to date;

51.5. the suspension of the Mayor and Municipal Manger as from November 2018; and

51.6. the failure of any of the council meetings of the Municipality to quorate.

52. Our service as the applicant is to ensure that the needs of the residents are met, the relevance of this information is paramount in that before we attend to bring any application before this court we are required to be informed as to how dire the situation is at the Municipality.

53. On perusal of the already obtained information, it becomes more and more necessary for national government intervention before the residents become increasingly agitated and resort to alternative forms of governance in the area and the surrounds of the Municipality.

54. Therefore I depose to this affidavit to in support of an application in terms of section 82 of the PAIA and in light of the above, I submit that the I have established that –

54.1. The applicant along with all the members of the Forum have a constitutional right to access the information requested;

54.2. We have complied with the provisions of section 18 of the PAIA in that the prescribed form was submitted to the second respondent;

54.3. The second respondent along with members of the first respondent have partially adhered to my request and provided most of the documentation requested in terms of section 18;

54.4. An internal appeal was lodged in accordance with section 75 of the PAIA and the second respondent acknowledged receipt of it but has failed to attend to it and has thus deemed to have dismissed the appeal since no response from him was forthcoming; and

54.5. The information is needed for the benefit of the community at large.

55. I have made out a case for the relief sought in the notice of motion.

56. It may accordingly please this Honourable Court to grant the relief sought in the notice of motion.

LWAZI NCAPAYI

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit which was sworn to before me at _____ on this _____ day of _____ 2020 after the provisions of the Regulation contained in Government Gazette No. R3619 dated 21 July 1972, as amended by Government Gazette No. 1648 dated 19 August 1977, having been complied with, and the deponent having declared that there is

no objection to taking the prescribed oath, and the prescribed oath is accepted as binding on the deponent's conscience.

COMMISSIONER OF OATHS

Full Names:

Capacity:

Area: