

Accessing information held by the State and State institutions

Case note on *Hitschmann v City of Mutare & Anor* HH-211-16

Introduction

The right of access to information held by the State and State institutions is a fundamental democratic right. One of the main functions of this right is to ensure that public power is not abused but instead is exercised legitimately and fairly. Governments must not be able to cover up their abuses, irregularities, mistakes and excesses by keeping secret the information that would have brought these things to light. Although the right of access to State information is now constitutionally guaranteed,¹ there have been few cases in which litigants have sought to make use of this right and one of these is in re *Hitschmann*. In this case the applicant wanted a City Council to disclose information about the procedures used in selling a piece of land which he was interesting in buying because he suspected that proper procedures had not been followed thereby violating his rights.

The detailed facts

The court set out the detailed facts as follows:

“...applicant is a resident of Mutare. On 2 September 2014 the applicant applied to be allocated the above land. The respondents advised him that such land was set aside for the Zimbabwe Republic Police who intended to construct their police station thereon. Sometime in December 2014 after obtaining information that the land was no longer reserved for ZRP, the applicant again applied for the above piece of land. The respondents advised the applicant on 19 February 2015 that the land was ‘an open space not subject to sale’. The applicant now has information that the respondents went ahead and sold the above land to certain individuals. The applicant believes that since he had applied for that particular land he had a right to participate in the sale process of such land. Such right has been violated by the respondents. The applicant suspects that the respondents failed to follow its own procedures as set out in the Urban Councils Act [*Chapter 29:15*] in alienating the land. In order to ascertain whether procedures were followed the applicant has requested access to documents kept by the respondents. The applicant requires such information to enable him to assert his rights. The respondents have refused to avail such information to the applicant leading to this application.”

The request for the information

¹ Section 62(1) of the Constitution of Zimbabwe provides for access to information held by State institutions when the information is required in the interests of public accountability whereas section 62(2) provides for access to information held by any person, including the State, where that information is necessary for the exercise or protection of a right.

The applicant requested the information in terms of s 5 (1) of the Access to Information and the Protection of Privacy Act [*Chapter 10:27*]² (“AIPPA”) as read with s 62 (2) of the Constitution.

No response was received within the prescribed time limit and thus under section 54(1) of AIPPA the failure to respond was deemed to be a decision to refuse access to the information. The applicant then applied to the High Court in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*] (“AJA”) which entitles a person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief. The applicant argued that the public authority had failed as required by section 3(1) of that Act to act lawfully, reasonably and in a fair manner in taking administrative actions which may affect the rights, interests or legitimate expectations of any persons.³

Excluded areas

In terms of AIPPA there are a number of grounds upon which access to information held by public bodies may be disallowed. The court found that none of the excluded grounds claimed by the respondent applied in the present case.⁴

The basis of the right to information

The court points out that unlike the previous constitution, section 62(2) provides for the right of access to information held by the State when that information is required for the exercise or protection of a right.⁵ The court then observes that access to information held by public institutions is need to be held accountable by ensuring that they comply with the law in carrying out their obligations. The court then goes on to say,

“if the courts fail to give effect to these constitutional provisions that promotes transparency and accountability by public bodies, then the ability of citizens to hold public actors to account will be violated. Section 3(1) (a) of the Administrative Justice Act enjoin an authority as the respondent to act lawfully, reasonably and in a fair manner in taking administrative actions which may affect the rights, interests or legitimate expectations of any persons.”

The court also points out,

² Strictly speaking section 5 creates the right to information held by public bodies whereas the request for the information is made in terms of section 6.

³ The respondent argued that the applicant had failed to exhaust the internal remedy provided for in terms of section 53 of AIPPA before approaching the High Court. The court found that once the applicant had approached the High Court in terms of section 4 of AJA the issue of the applicant not having exhausted domestic remedies fell away.

⁴ There is a need to review the various excluded areas under AIPPA to ascertain the extent to which these are consistent with the constitutionally guaranteed right of access to information held by State institutions.

⁵ The constitutional provision also provides for access to information by the media to information held by State institutions. This is an important right in respect of the freedom of the media and its ability, for instance, to have access to information to defend defamation suits by government officials whom the media has accused of wrongdoing. This matter will be dealt with in a separate article.

“Zimbabwe has ratified several International and Regional Instruments that provide for the right to access to information of importance are the International Covenant on the Civil and Political rights and the African Charter on Human and People’s Rights. Article 19 of the ICCPR and Article 9 of the ACHPR are instructive on the right to information. In the current Constitution the legislature has clearly provided for the right to information even from public bodies.”

The order

The court found that the applicant’s right of access to information had been violated and that the public authority had failed to act in accordance with section 3 of AJA. Access to the required information was necessary for the exercise or protection of the applicant’s rights. The application was therefore successful and the court ordered the Council to “furnish the applicant with the records and documents showing that they complied with s 152 (b) of the Urban Councils Act, that is to say, the advertisement and the notice published relating to the sale and alienation of” the piece of land in question.

Conclusion

This case constitutes a ringing endorsement, based on the Constitution, of the need for transparency of public institutions in carrying out public duties that impact upon people. They must be held accountable for the performance of their duties and no longer should they be able to conceal wrongdoing by claiming secrecy. However, there is still a need for a comprehensive review of outmoded and unnecessarily restrictive laws such as AIPPA and the Official Secrets Act [*Chapter 11:09*] which have provisions that inhibit transparency in public institutions.⁶

⁶ It should be noted that section 62(4) provides that legislation “may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.” Regrettable governments often use a completely over extended interpretation of criteria such as public security to continue to hide away information that they do not want to be revealed.