



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 20697/21

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

DATE: 14th DECEMBER 2023

SIGNATURE OF JUDGE:



In the matter between:

IZWELETHU CEMFORCE CC

1st Applicant

CEMFORCE CC

2nd Applicant

and

THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT
("the Commissioner")

1st Respondent

**BROAD-BASED BLACK ECONOMIC EMPOWERMENT
COMMISSION**
("the Commission")

2nd Respondent

JUDGMENT

De Wet AJ:

A INTRODUCTION

1. This is an interlocutory application in a pending review.
2. The following background, as appears from the review application (*"the main application"*) and the interlocutory application, is relevant:
 - 2.1. The second applicant developed a low-cost pit latrine. The first applicant was established during September 2002 to attend to the marketing, sale, installation and creation of business opportunities within local communities in respect of projects.
 - 2.2. In 2009 the first applicant became the sole provider of the product in order to increase their market share.
 - 2.3. In September 2015 after further restructuring, Ms Willis held a 20% membership interest and Mr Diedericks a 74% membership interest in the first applicant whilst Mr Diedericks held a 100% membership interest in the second applicant.
 - 2.4. On 16 September 2017, the applicants received a letter from the Commission advising that the Commission had received *"a tip-off"* that both applicants were purportedly misrepresenting their B-BBEE credentials *"and the two entities are interchangeably used as if they are the same entity in bidding for work, and thereby confusing and misleading as to the appropriate B-BBEE credentials of each of the entity"*.
 - 2.5. Notwithstanding correspondence, the applicants were unable to obtain a copy of the complaint, and on 23 November 2017 the Commission notified the applicants that it has finalised its assessment and concluded that there is merits to warrant an investigation in terms of section 13F(1)(d) and 13J(1) of the B-BBEE Act, read with regulation 15 of the B-BBEE regulations.
 - 2.6. On 12 March 2021, the Commission issued a notice in which they confirmed that it has finalised its investigations in terms of section 13J of the Act, read with regulation 15 and reached the finding that the applicants under the control and management of Mr Diedericks and Mrs Willis engaged in the arrangement or of conduct which directly or indirectly undermines and frustrates the achievements of the objectives

of the B-BBEE Act, and concluded that the arrangement involving the applicants and Mr Diedericks amounts to a fronting practice as the first applicant's BEE status was used to secure tenders, work and contracts for the benefit of the second applicant, a 100% white-owned entity.

- 2.7. On 23 April 2021, the applicants launched a review application to review and set aside the adverse findings of the Commission.
- 2.8. On 15 June 2021, a record was filed of the Commission's investigation, but it did not contain the identity of the person who purportedly lodged the "*tip-off*" complaint and/or copies of the supporting documentation, whereafter the applicants served a rule 35(13) notice that the respondents should produce "... copies of the '*The tip-off*' and supporting documents".
- 2.9. The respondents objected and/or refused to disclose the documentation on the grounds that the documents "*are privileged and/or made for the purposes of the investigation, in casu and/or contemplated*"; *alternatively the documents so requested are documents and/or statements of witnesses taken for the purpose of completing the investigative report; and further alternatively the documents so requested are a mixed privilege protecting the rights of both the state and a whistleblower.*"
- 2.10. The applicants seek an order that the respondents be directed to provide access to the "*tip-off and supporting documents*" referred to by the B-BBEE Commissioner at paragraph 7.1.1 on page 10 of the "*investigation report*" approved by her on 11 March 2021, as requested by the applicants pursuant to their notice in terms of Rule 35(13) dated 19 July 2021.
3. The application raises the question of whether the documentation sought should form part of the rule 53 record. I may mention in passing that the applicant's relief is based on the respondents' failure to file a complete record in terms of rule 53 and that the rules relating to discovery do not find application.

B THE STATUTORY MATRIX

(i) The Act:

4. In order to evaluate the parties' contentions, it is apt to at the outset give a brief overview

of the Broad-Based Black Economic Empowerment Act, 33 of 2003 (*"the Act"*) and the regulations promulgated thereunder.

5. The objectives of the Act are described in section 2 thereof:

"2 Objectives of Act

The objectives of this Act are to facilitate broad-based black economic empowerment by –

- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy;*
- (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;*
- (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;*
- (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;*
- (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;*
- (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;*
- (g) promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and*
- (h) increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support."*

6. Section 3 provides that the Act should be interpreted in light of its objectives and purposes and to comply with the Constitution.
7. Section 4 of the Act establishes a Black-Economic Empowerment Advisory Council which must advise the government on black-economic empowerment; review progress in

achieving black-economic empowerment; advise on draft codes of good practice; strategy; advise on draft transformation charters and facilitate partnership between organs of state and the private sector that will advance the objective of the Act (s 5 and s 6 – 8).

8. Section 9 of the Act provides that the minister may by notice in the Gazette, issue codes of good practice on black economic empowerment that may, *inter alia*, include the interpretation and definition of broad-based black economic empowerment and of different categories of black-empowerment entities; qualification criteria for preferential purposes for procurement; indicators to measure broad-based black economic empowerment, the weighing to be attached to the BBBEE indicators, and the guidelines for stakeholders in the relevant sectors to draw up transformation charters and codes of good practice for their sectors [s 9(1)]. A code of good practice may specify targets and a period in which targets must be achieved [s 9(3)]. The Act furthermore provides for a strategy for broad-based black economic empowerment (s 11); and for transformation charters (s 12).
9. Section 13B establishes the Broad-Based Black Economic Empowerment Commission (*"the Commission"*) (the second respondent), an entity within the administration of the Department of Trade and Industry. The Commission is headed by a Commissioner (the first respondent), appointed by the Minister. The Commission must be impartial and perform its functions without fear, favour or prejudice and must exercise the functions assigned to it in the most cost-effective and efficient manner and in accordance with the values and principles in section 195 of the Constitution. It is clear from a reading of section 13F that the Commission is in fact the watchdog of the Act. The Commission, *inter alia*, oversees, supervises and promotes adherence to the Act; strengthens and fosters corroboration between the private and the public sector to promote and safeguard the objectives of broad-based black economic empowerment. Section 13F(1)(c) and (d) and 13F(2) provide that the functions of the Commission are, *inter alia*:

- "(c) to receive complaints relating to broad-based black economic empowerment in accordance with the provisions of this Act;
- (d) to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;

...

- (2) A complaint contemplated in subsection (1)(c) and (d) must be –
- (a) in the prescribed form; and
 - (b) substantiated by evidence justifying an investigation by the Commission."
- (own emphasis)

10. Section 13J deals with the investigation by the Commission and reads:

"13J. Investigations by Commission

- (1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any matter arising from the application of the Act, including any B-BBEE initiative or category of B-BBEE initiatives.*
- (2) The format and the procedure to be followed in conducting any investigation must be determined by the Commission with due regard to the circumstances of each case, and may include the holding of a formal hearing.*
- (3) Without limiting the powers of the Commission, the Commission may make a finding as to whether any B-BBEE initiative involves a fronting practice.*
- (4) The Commission may institute proceedings in a court to restrain any breach of this Act, including any fronting practice, or to obtain appropriate remedial relief.*
- (5) If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence in terms of this Act or any other law, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service.*
- (6) The Commission may, if it has investigated a matter and justifiable reasons exist, refer to –*
 - (a) the South African Revenue Services any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service; or*
 - (b) any regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.*
- (7) (a) The Commission may publish any finding or recommendation it has made in respect of any investigation which it had conducted in such manner as it may deem fit.*
 - (b) A decision of the Commission to publish any finding or recommendation it has made may not be put into effect –*
 - (i) before proceedings for the judicial review of the decision have been completed or were not instituted within the period allowed therefor;*
 - (ii) if the Commission has referred the matter to the National Prosecuting Authority or the South African Police Service in terms of subsection (5), and no prosecution has been instituted against the person concerned;*

- (iii) *if the person concerned has been prosecuted and acquitted following the investigation of the Commission; or*
- (iv) *where the person concerned has been convicted by a court of law, following an investigation of the Commission, before such person has in respect of the conviction exhausted all recognised legal proceedings pertaining to appeal or review."*

11. Section 13L deals with confidential information and reads:

"13L. Confidential information

- (1) *When submitting information to the Commission, a person may claim that all or part of that information is confidential.*
- (2) *Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.*
- (3) *The Commission must –*
 - (a) *consider a claim made in terms of subsection (1); and*
 - (b) *as soon as practicable make a decision on the confidentiality of the information and access to that information and provide written reasons for that decision.*
- (4) *A person who has made a claim contemplated in subsection (1) in respect of which the Commission has made a decision in terms of subsection (3), may apply to court for a review of that decision within –*
 - (a) *60 court days of becoming aware of the decision; or*
 - (b) *such longer period as a court may allow on good cause shown.*
- (5) *When making any finding in respect of an investigation, the Commission may take confidential information into account.*
- (6) *If any finding would reveal any confidential information, the Commission must provide a copy of the proposed finding to the party claiming confidentiality at least 30 court days before publishing those reasons.*
- (7) *Within 14 court days after receiving a copy of the proposed findings, in terms of subsection (6), a party may apply to court for an appropriate order to protect the confidentiality of the relevant information."*

12. Section 14 provides that the minister may *inter alia* make regulations with regard to the lodging of complaints with the Commission [s 14(a)], and the conducting of investigations by the Commission [s 14 (c)].

(ii) The regulations

13. The following definitions in section 2(4) of the regulations are important:

- “(k) **“complaint”** means either –
 - (i) a matter initiated by the Commissioner in terms of section 13J(1) of the Act; or
 - (ii) a matter that has been submitted to the Commission in terms of section 13F(1)(c) of the Act;
- (l) **“Complainant”** means either –
 - (i) a person who filed a complaint with the Commission in terms of section 13F(1)(c) of the Act; or
 - (ii) the Commission in respect of a matter that it has initiated in terms section 13J(1) of the Act; or
- (m) **“confidential information”** means information that belongs to a person and is not generally available to or known by others;”

14. Restricted or confidential information is *inter alia* described in Regulation 13(1)(a) – (c):

“13. **Restricted or Confidential information**

- (1) For the purpose of this Part 3 of these Regulations, and in terms of section 13L of the Act, the following five classes of information are restricted:
 - (a) Information –
 - (i) that has been determined to be confidential information in terms of section 13L(1) of the Act, or
 - (ii) that, in terms of section 13L(7) of the Act, must be treated as confidential information.
 - (b) identity of a complainant, in the following circumstances:
 - (i) a person who provides information may request that the Commission treat their identity as restricted information, but that person may be a complainant in the relevant matter only if they subsequently waive the request in writing;
 - (ii) if a person has requested in terms of sub-regulation 1(b)(i) that the Commission treat their identity as restricted information –
 - (aa) the Commission must accept that request; and
 - (bb) that information is restricted unless the person subsequently waives the request in writing.

- (c) *information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b), as follows:*
 - (i) *the description of conduct attached to a complaint, and any other information received by the Commission during its investigation of the complaint, is restricted information until the Commission issues its findings and recommendations if any, in respect of that complaint, but information provided in a completed FORM B-BBEE6 is not restricted information; and*
 - (ii) *Any information received by the Commission during its consideration of a major broad-based black economic empowerment transaction registered with the Commission prior to the transaction being made public by any of the parties to the transaction, is restricted information only to the extent that it is restricted in terms of paragraph (a)."*

15. Regulation 14 provides for access of information and reads:

"14. Access to information

- (1) *Any person, upon payment of the prescribed fee, may inspect or copy any Commission record –*
 - (a) *if it is not restricted information; or*
 - (b) *if it is restricted information, to the extent permitted, and subject to any conditions imposed, by*
 - (i) *this Regulation; or*
 - (ii) *an order of a competent court of law.*
- (2) *In a particular complaint the Commission may release otherwise restricted information, other than confidential information, relating to a possible agreement of terms of an appropriate order.*
- (3) *In addition to the provisions of sub-regulation (1) and (2), the Commission may release restricted information to, or permit access to it by only the following persons:*
 - (a) *the person who provided that information to the Commission;*
 - (b) *the person to whom the confidential information belongs; and*
 - (c) *any other person, with the written consent of the person to whom the information belongs."*

16. In order to evaluate the applicants' claims, it is apt to consider the relevant case law in respect of the documents that should be incorporated in the rule 53 record and privileged documents.

C LEGAL PRINCIPLES: THE RULE 53 RECORD OF DECISION

17. In **Helen Suzman Foundation v Judicial Service Commission** 2018 (4) SA 1 (CC), the Constitutional Court dealt with the furnishing of a record in terms of Rule 53(1)(b) of the Uniform Rule of Court. The question was whether the deliberations of the Judicial Services Commission ("JSC") should be disclosed in the record or whether such deliberations are confidential.
18. In paragraphs 13 – 17 the majority of the Court dealt with the general purpose of reviews in terms of rule 53 and the role and function of the rule 53 record. It reads:

"The content of a rule 53 record

[13] *The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.*

[14] *Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:*

"Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."

[15] *The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. This requires that 'all the parties*

have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to Court’.

[16] In *Turnbull-Jackson* this Court held:

‘Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker’s stance; and in the performance of the reviewing court’s function.’

[17] What forms part of the rule 53 record? The current position in our law is that – with the exception of privileged information – the record contains all information relevant to the impugned decision or proceedings. Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker. Zeffertt and Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence. The fact that documents contain information of a confidential nature “does not per se in our law confer on them any privilege against disclosure”.” (own emphasis)

19. The following principles can furthermore be gleaned from the judgment:

- 19.1. Insofar as the record constitutes a loose description of documents, evidence and arguments and other information, the record consists of “every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially”. (par 18)
- 19.2. Deliberations are relevant to the decision, they precede and are the most immediate and direct record of the process leading up to the decision (par 23);
- 19.3. The documentation does not have to be relevant to the grounds of review as pleaded. The applicant can supplement the papers upon being furnished with the

record and "may add to or subtract from the grounds of review": "So under Rule 35 discovery process, asking information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages grounds of review changing later. So relevance is assessed as it relates to the decision sought to be reviewed not the case pleaded in the founding affidavit." (par 26)

19.4. Correspondence as class of information may be relevant in the above broad sense and the question can then arise whether *"there is some legally recognisable basis for excluding them from the record"*. The reason for the exclusion must however be considered: it does not then follow that, because there is privilege in respect of this type of correspondence, for example, attorney-client communications, that all correspondence is exempt from inclusion in a Rule 53 record. In each instance, any claim to exemption must be founded on some legally recognisable basis "So, *within the class 'correspondence some correspondence would be included in the rule 53 record, and some excluded'*". (par 30).

19.5. The Promotion of Access to Information Act, Act 2 of 200 ("PAIA") and Rule 53 serve a different purpose as described in paragraphs 44 and 46:

"[44] ... Rule 53 helps a review applicant in the exercise of her or his right of access to court under section 34 of the Constitution. On the other hand, in one instance PAIA affords any person the right of access to any information held by the state. The person seeking the information need not give any explanation whatsoever as to why she or he requires the information. The person could be the classic busybody who wants access to information held by the state for the sake of it. ...

[46] The difference in the nature of, and purpose served by, the right of access to information in terms of PAIA, on the one hand, and the right to a record under rule 53, on the other, "underscore the reality that it is inapt simply to transpose PAJA proscriptions on access to information to the rule 53 scenario. There is a principled basis for drawing a distinction".

20. Section 38(1) of the JSC Act provides that no person may disclose confidential information or confidential documents obtained by that person in the performance of his/her functions in terms of the Act, except, *inter alia*, when required to do so by order of a court of law. In this regard, the court held that:

- 20.1. Only confidential information or documents are hit by the prohibition.
- 20.2. Confidentiality relates to the nature of the information: *"Information cannot be confidential because the person who would like it to be regarded as such says it is."* (par 63).
- 20.3. In the absence of demonstrating that the information is of confidential nature, the prohibition is not triggered, s 38 cannot be interpreted as a blanket non-disclosure provision (par 63).
- 20.4. Where a claim to blanket non-disclosure is asserted, the court must balance the claim against the principle that the JSC is engaged in a particularly important exercise of public power which must be done lawfully and rationally:

"Generally, the only way to test the legality of the exercise of this power, completely and thoroughly is to afford an applicant for review, access to all material relevant to the exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review. That is at variance with the rule of law and our paramount values of accountability, responsiveness and openness. This affects not only the individual litigant, but also the public interest in the exercise of public power in accordance with the Constitution. It must, therefore, be in truly deserving and exceptional cases that absolute non-disclosure should be sanctioned." (par 67)

- 20.5. *"Where absolute non-disclosure is not justified, the information at issue may - in the court's exercise of discretion - be disclosed, not disclosed or disclosed subject to a confidentiality regime. The court will weigh up the interests that favour disclosure against the asserted confidentiality interests. The outcome of that exercise of discretion will depend on the circumstances of each case."* (par 70). The question arose whether a confidentiality regime should be considered under circumstances of a no fact-specific basis for non-disclosure. (par 71)
- 20.6. The court held that stringent conditions can be imposed to ensure that confidential information may only be divulged to a category of persons who should rightly have it. A similar strict confidentiality regime as imposed in **Bridon International GMBH v International Trade Administration Commission and Others** 2013 (3) SA 197 (SCA) can be considered under the correct circumstances:

"The Bridon example does not only deny access to the public, it also denies it to the parties themselves. The few individuals who do have access to sign a confidentiality undertaking not to divulge the information even to their clients. To the extent that the third judgment says that the information could be divulged even in parties' submissions, it is a matter of relative ease for the regime to address that as well. ..." (para 74).

- 20.7. The court however held that since "... no fact-specific claim of confidentiality was raised, I do not think it is necessary to pronounce on a possible confidentiality regime." (para 76)
- 20.8. The argument that an applicant will not suffer harm if it already has a substantial record and will thus not be forced to launch its review in the dark is incorrect. *"The unfairness suffered by a review applicant denied access to the deliberations lies in the fact that she or he may have been prevented from making the best possible case. The fact that a number of other relevant documents or reasons distilled from the deliberations have been provided, does not detract from the unfairness of withholding other relevant information. The information that has been withheld may provide evidence of reviewable irregularities that are not revealed by the other documentation. That is why the rule requires that all relevant documentation must be provided unless there is some recognisable basis for withholding it."* (para 77) (own emphasis)
21. In **Competition Commission of South Africa v Standard Bank of South Africa Limited** 2020 (4) BCLR, 429 (CC) (20 February 2020), the Constitutional Court held that: *"If a review application is launched in a forum that enjoys jurisdiction, then a party is entitled to the record even if their grounds of review are meritless. ... The record is essential to a party's ability to make out a case for review. It is for this reason that a prima facie case on the merits need not be made out prior to the filing of record."*
- See also: **The Public Protector v South African Reserve Bank** 2019 (6) SA 253 (CC) at para 185.
22. In **President of the Republic of South Africa and others v M&G Media Limited** 2011 (2) SA 1 (SCA), the publisher of a weekly newspaper required disclosure of a report of two judges after a visit to Zimbabwe, shortly before the 2002 elections. After having complied with the prescribed formalities in PAJA, the President declined disclosure. Justice Saphire granted an order compelling the disclosure of the report. On appeal, the SCA held:

- 22.1. That our constitutional dispensation is based on a legal culture of accountability and transparency, we moved away from "... *from a culture of authority ... to a culture of justification ... 'a culture in which every exercise of power is expected to be justified'*" (para 9 and 10).
- 22.2. Consistent with the culture of justification, the Act requires disclosure on request unless an information officer can on adequate reasons justify a refusal (par 11).
- 22.3. The public body bears the burden of proving that secrecy is justified (par 14).
- 22.4. *"If an application for information is not to be thwarted by that inequality of arms, I think that a court must scrutinise the affidavits put up by the public body with particular care and, in the exercise of its wide discretion that I referred to earlier, it should not hesitate to allow cross-examination of witnesses who have deposed to affidavits if their veracity is called into doubt."* (par 15).
- 22.5. Affidavits that assert conclusions without an evidential basis in support thereof, do not meet muster: *"The Act requires a court to be satisfied that secrecy is justified that calls for a proper evidential basis to justify the secrecy"*. (par 19)
- 22.6. A court is not bound to accept the *ipse dixit* of a witness that his or her evidence is admissible: *"... Merely to allege that the information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its right to be evaluated."* (par 38).

I am of the view that the above principles apply in this matter.

D AN EVALUATION OF THE PARTIES' CONTENTIONS

23. The respondents seemingly contend that the "*tip-off*" information and the identity of the person who furnished the information constitute confidential information and as such, need not be incorporated in the record.
24. It is difficult to determine exactly what the respondents' case is. In the discussion below, I analyse the evidence presented.

THE FOUNDING AFFIDAVIT

25. The applicants allege that they are entitled to a full record, especially in view of the fact that it is common cause that the respondents' adverse findings emanate *inter alia* from the requested documentation which forms an integral part of the subject matter of the review. Furthermore, that the purported existence of privilege in the context of the present review application, is without substance.
26. The applicants have, as a point of departure, the right to "every shred of information" pertaining to the present findings, which includes the "tip-off" information and the identity of the complainant /person who furnished the information, unless there exists justification not to disclose the information.

THE ANSWERING AFFIDAVIT

The Constitution protects whistleblowers:

27. The respondents rely on the equality and the freedom of expression provision as embodied in s 9(1)] and s 16(1)(b) of the Constitution, and conclude:
- "19. The whistleblower which the applicant now wishes to expose and open to unimaginable harm by bringing this application, I am advised is protected under section 9(1) and 16(1)(b) mentioned above.
20. The whistleblower has the right to equal protection and benefit of the law.
21. It is upon these basis, that this court should take a dim view of this application and dismiss it with costs inclusive the costs of two counsel."
28. The respondents' reliance on sections 9(1) and 16(1)(b) of the Constitution is misplaced. The principle of subsidiarity entails that once legislation exists to fulfil constitutional rights, a litigant must rely on the legislation and cannot rely on the Constitution for the enforcement of the right. In **My Vote Counts NPC v Speaker of the National Assembly and others** 2016 (1) SA 132 (CC), the principle was defined in the following terms:
- "53. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role. Ultimately the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more

comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation.”

See also: **The South African Human Right Commission obo the South African Jewish Board of Deputies v Masuku and others** 2022 (4) SA 1 (CC) at para 102 – 107.

29. The respondents contend that the complainant is a whistleblower and that he is thus entitled to protection. The respondents however do not rely on the so-called “*whistleblowers’ Act*”, the Protected Disclosure Act (26 of 2000) nor on a specific form of common law privilege, for example, informer privilege. In this regard, the answering affidavit constitutes both the respondents’ evidence and their plea or basis of their defence (Refer to **Transnet Limited v Rubenstein** 2006 (1) SA 591 (SCA) at para 28 and to **Kham v Electoral Commission** 2016 (20 SA 338 at para 64). The respondents rely exclusively on the Act and regulations to justify non-disclosure. A court can only decide the issues raised and cannot venture into fields not canvassed by the parties. (**Fischer and another v Ramahlele and others** 2014 (40 SA 614 (SCA) at para 13 – 14).

Section 13L of the Act and regulation 13

30. The respondents imply that the person’s confidentiality claim was evaluated in terms of section 13L of the Act. After having quoted section 13L, the deponent continues in paragraphs 23 to 25:

- “23. *I am advised that, Regulation 13 of the BBBEEA, provides that information which has been determined confidential, in terms of Section 13(L) Is classified as restricted information. It also provides that the identity of the person or persons who provide the classified information, and have requested that their identity be requested be restricted, must be restricted.*
24. *In a proper interpretation of Section 13(L) & (5), it identifies what can constitute confidential information and provides that it includes information that can identify the complainant in the matter. Therefore, I am advised that the Respondent cannot submit the required documents mentioned in paragraph 13.6 of the founding affidavit, as it may identify the identity of the person who made the tip-off.*
25. *Whereas the complaint documents are restricted, the Second Respondent provided the Applicants with sufficient particularity to comprehend the essence and nature of the tipoff to respond to the allegations made against them to which they were afforded the opportunity to respond, in terms of the letter that was sent to the Applicants, requiring*

the Applicants to make representations regarding the findings of the Respondents, they were required to respond within 30 (Thirty) days of the receipt of the letter and in writing."

31. The Registrar in vague terms describes the import of section 13L and regulation 13. One would have expected the Registrar to adduce factual evidence to prove that the provisions of section 13L were triggered and how the confidentiality claim was processed and evaluated. There not only exists no factual basis to conclude that the complainant's/person's confidentiality claim was evaluated in accordance with s 13L of the Act. The deponent at best hints or implies that the provisions of s 13L had been complied with.
32. The deponent is the Commissioner and heads the Broad Based Black Economic Empowerment Commission in terms of section 13B(2) of the Act. The Commissioner has no firsthand knowledge of the facts. The averment that the facts are within her personal knowledge is substantiated by alleging that she is "*in control of all documents which relate to the matter*". Her lack of knowledge of the adjudication or evaluation of the confidentiality claim appears from the following "*evidence*": "*Therefore, I am advise(d) that the respondents cannot submit the required documents mentioned in paragraph 13.6 of the founding affidavit, as it may identify the person who made the tip-off.*" This opinion is obviously not her opinion but that of an unknown advisor and/or employee. The Commissioner thus relies on the unsubstantiated opinion of an unknown third party to motivate non-disclosure of the documentation.
33. It is common cause that the respondents refused to disclose the tip-off information requested. There is therefore no basis to aver in paragraph 25 above, that the applicants were provided with sufficient particularity to comprehend the essence and nature of the tip-off. One is in the dark what the nature and content of the "*sufficient particularity*" is. The question is why the documentation should not be disclosed and why the applicants should accept the respondents' say-so concerning the content of the documents. Section 13B(2) provides that a complaint must be substantiated by evidence. In the absence of facts to show that this is a truly deserving and exceptional case and that blanket non-disclosure is justified, the applicants are entitled to peruse and make copies of the documentation. (**Helen Suzman** judgment, para 67)
34. The respondents should at least have addressed the following in the answering affidavit, namely that:
 - 34.1. On a specific date a person furnished information with a description of the

information;

- 34.2. The person claimed that all of the information or a part of the information furnished and if applicable, that his identity was confidential, and that he gave reasons, why disclosure of the aforesaid information should not be made;
 - 34.3. Who on behalf of the Commission evaluated and/or considered the person's confidentiality claim;
 - 34.4. When and how the confidentiality claim was evaluated with reference to the considerations that played a role in the decision reached and the reasons for the decision;
 - 34.5. Whether the decision was conveyed to the person in writing or orally;
 - 34.6. Insofar as it may be applicable, whether the person reviewed the initial decision in terms of section 13L(4);
 - 34.7. Whether the Commission's findings were conveyed to the person claiming confidentiality and if not, why the findings were not conveyed to the person; and [s 13L(6) and s 13L(7)]; and
 - 34.8. Whether the person presently still insists that the information and his identity remain confidential/restricted and the reasons therefore.
35. In paragraphs 30.1.1 to 30.1.6, section 13L is *inter alia*, further elaborated upon:
- 30.1.1 *The information the applicants wish to have access to, is restricted information which is confidential in terms of section 13(L) of the BBBEEA;*
 - 30.1.2 *The respondents, in terms of the BBBEEA, are enjoined to protect whistleblowers;*
 - 30.1.3 *There are no exceptional circumstances in existence, that require the respondents to make discovery of confidential, privileged, and Information that was used in its Investigation, which may identify witnesses and/or whistleblowers;*
 - 30.1.4 *I am advised that the burden of proof is on the applicant, to demonstrate exceptional circumstances why these documents should be discovered;*
 - 30.1.5 *The applicants, are merely engaging in the finding expedition and*

therefore this court, should not grant the relief requested by the applicants.

30.1.6 *The documents are not necessary and are in no way relevant to the applicants' answer to the findings against them which are contained in the 12 March 2021 notice."*

36. In paragraph 30.1.1 the deponent implies that the unknown person's information was evaluated and found to be confidential in terms of section 13L of the Act, and in paragraph 30.1.2 the deponent again fails to provide any factual substantiation for the conclusion that the information was restricted in terms of section 13L of the BBEEA.
37. The allegation that the applicants are engaging in a fishing expedition is neither here nor there. The applicants are entitled to "fish" for every scrap of information or documentation that played a role in the decision-making process or in this case the decision that initiated the enquiries and/or investigation. (see the **Suzman** judgment at paras 14 – 17 above)
38. The allegation that there is a burden of proof on the applicants "... to demonstrate exceptional circumstances why these documents should be discovered" is incorrect. The position is exactly the opposite. It is for the respondents to justify non-disclosure on this basis. (refer to the **Helen Suzman** case at paragraph 64 and the **M & G Media** case at paras 9 – 11 and 14.)
39. The applicants must as a point of departure, be in a position to make out the best possible case. Information/documentation not disclosed may prevent an applicant from raising reviewable irregularities and thus the contention in paragraph 30.1.6 similarly do not hold water.

The anonymous complainant:

40. The respondents lastly contend in paragraph 33.1.2:

"33.1.2 *The form that is used to file complaints is Form B-BBEE7 which is different from Form B-BBEE10 that is used to notify respondents of the investigation in terms of which the Second Respondent is the complainant in terms of Regulation 15(8) of the BBEEA. Thus Form B-BBEE10 can be issued pursuant to an anonymous complaint in terms of which the person cannot be a complainant in the matter, and/or pursuant to daily monitoring of activities through various channels, including the media, which justify intervention based on suspected violation of the BBEEA where there is no specific*

complaint. In this case, the tip-off was received from a person who specifically requested to remain anonymous, assess and investigated..."

41. The respondents' contentions in respect of Form B-BBEE7 and how it differs from Form B-BBEE10 is difficult to follow. The respondents apparently rely on regulation 15(8) which provides: "(18)Where the Commission initiates an investigation on its own, the Commission shall initiate an investigation by issuing a notice to investigate in the prescribed Form B-BBEE10 and follow the process in sub-regulation 4(d) – (f) above."
42. The respondents contend that in "*this case, the tip-off was received from a person who specifically requested to remain anonymous, assessed and investigated.*"¹ It is seemingly contended that due to the fact that the investigation was initiated anonymously, the Commission is in fact the complainant. Insofar as it is the contention, it does not hold water. There is a distinction between a complainant who requests to remain anonymous and an anonymous complaint. In the latter case, the Commission initiates its own investigation but in the erstwhile case the investigation is initiated on the strength of the complaint by an identified individual who has requested to remain anonymous. It is impossible to divulge the identity of an anonymous person who provided the information but in the latter instance and it is highly artificial to claim that the Commission initiated an investigation and not the complainant (and that the applicants are therefore aware of the identity of the complainant).

Regulation 13(1)(b)

43. The only provision that can potentially assist the respondents is regulation 13(1)(b) which provides that the identity of a complainant must be treated as restricted information if the person/complainant so requests. It is however the respondents' case that regulation 13(1)(b) must be read in conjunction with section 13L: only a person who claims that his identity is confidential and has furnished acceptable written motivation to the Commission, is entitled to claim that his identity should be restricted. However, the respondents failed to present any evidence that the procedures and evaluation provided for in section 13L of the Act, were indeed followed and/or implemented. That notwithstanding the fact that the respondents bear the onus to justify non-disclosure.

¹ The words "... assessed and investigated" do not fit in with the rest of the sentence, and it is uncertain what the deponent intends to convey.

THE REPLYING AFFIDAVIT

44. In the replying affidavit, the applicants:

44.1. Correctly notes that the respondents apparently no longer rely on the privilege but on the provisions of section 13L of the Act "*on the basis that the information is confidential and as such classified as restricted information;*", and that the respondents failed to submit any evidence to demonstrate compliance with the provisions of section 13L of the Act; and

44.2. The respondents previously in response to the applicants' PAIA application indicated that the "*tip-off*" information falls within the ambit of regulation 13(1)(c) of the regulations and that the information thus remains restricted until such time as the Commission issued its findings and due to the fact that it is common cause that the Commission has issued findings that the information is thus no longer restricted.

45. It is difficult to adjudicate the regulation 13(1)(c) contention as it is raised in the replying affidavit. It is however common cause that the respondents initially in these proceedings contended that the documents were made for purposes of investigation and/or that the statements or documentation were taken for purposes of completing the investigative report. It would mean that once the investigation is completed the applicants would be entitled to the said documents. This version has been abandoned, being inconsistent with the present section 13L argument.

An interpretation of regulation 13(1)(b)

46. On a normal reading of regulation 13(1)(b) a complainant is on request of right entitled to have his identity treated as restricted information. Regulation 13(1)(b) does not refer to or incorporate the provisions of section 13L of the Act. It is a self-standing provision and the validity of the regulation is not under attack.

47. During argument I raised the principles in respect of informer privilege with the parties in light of the respondents' initial notice which relies on a "*mixed privilege protecting both state and the whistleblower*". The said privilege is according to the respondents' answering affidavit founded on s 13L of the Act and/or regulation 13(1)(b). The question remains whether regulation 13(1)(b) does not constitute a restatement of the common law principles relating to informer privilege or if not, whether the complainant's identity should be disclosed if the disclosure test applicable to informers theoretically applies.

Informer privilege:

48. In **Khala v Minister of Safety and Security** 1994 (4) SA 218 WLD, informer privilege was described in the following terms:

"To all intents and purposes, the only privilege the law recognised in respect of a police docket was 'informer privilege'. The rule was that the identity of informers should not be disclosed as a matter of public policy. The object of the rule was to remove possible deterrents to the detection and punishment of crime. The theory was that an informer be protected because otherwise persons would be discouraged from giving information. The rule was not a rigid one, however: it could be relaxed, for example, (i) when it was material to the ends of justice, (ii) when it was necessary or right to do so to show the accused's innocence, and (iii) when the reason for secrecy no longer existed, for example, when the informer was known: R v van Schalkwyk 1938 AD 573; Ex parte Minister of Justice: In re R v Pillay and Others 1945 AD 653; Suliman v Hansa 1971 (2) SA 437 (D); Suliman v Hansa 1971 (4) SA 69 (D).

49. In *ex parte Minister of Justice: R v Pillay* 1945 AD 653 at 658, the court found that the privilege was based on public policy and operate:

"... when public policy requires the name of the informer or his information to be kept secret, because some confidential relationship between the state and the informer, or because the state desires its sources of information to be kept secret for the reason that the informer's information relates to matters in respect of which he might not inform if he were not protected, or for the reason that the candour and completeness of his communications might be prejudiced if he were not protected, or for some other good reason. To give a comprehensive definition which will include all such cases would be impossible."

50. In **Swanepoel v Minister van Veiligheid and Sekuriteit** 1999 (2) SACR 284 (T) it was held that an informer has a substantive right not to have his identity disclosed, particularly when the informer had specifically requested anonymity. The court found that subject to considerations of public policy, the informer may even enforce his right of non-disclosure against the State and that the unlawful and malicious and intentional disclosure of the identity of an informer to suspects, discloses a cause of action.

51. In **Shabalala and Others v Attorney-General of Transvaal and Another** 1996 (1) SA

275, the Constitutional Court ruled that: "A blanket docket privilege is inconsistent with the Constitution." In this regard, paragraphs 40, 50, 51 and 52 of the judgment are instructive:

"[40] The approach to the constitutionality of the rule in Steyn's case, insofar as it pertains to witnesses' statements, involves an analysis of what that rule seeks to protect. It seems to me that the following is included in the protection –

- (1) the statements of witnesses which need no protection on the grounds that they deal with State secrets, methods of police investigation, the identity of informers, and communications between a legal advisor and his client;
- (2) the statements of witnesses in circumstances where there is no reasonable risk that such disclosure might lead to the intimidation of such witnesses or otherwise impede the proper ends of justice;
- (3) the statements of witnesses made in circumstances where there is a reasonable risk that their disclosure might constitute a breach of the interests sought to be protected in paragraph 1; and
- (4) the statements of witnesses made in circumstances where their disclosure would constitute a reasonable risk of the nature referred to in paragraph 2.

[50] If the conflicting considerations are weighed, there appears to be an overwhelming balance in favour of an accused person's right to disclosure in those circumstances where there is no reasonable risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to intimidation or obstruction of the proper ends of justice. The 'blanket docket privilege' which effectively protects even such statements from disclosure therefore appears to be unreasonable, unjustifiable in an open and democratic society and is certainly not necessary.

[51] What about statements falling within items 3 and 4 of paragraph 40? The claim of the accused to the statements referred to in these categories, however justifiable on its own for the purposes of a fair trial, must be weighed against conflicting interests of real substance. The result of affording access to such statements to the accused in these circumstances may indeed impede the proper ends of justice and lead to the intimidation of witnesses. An open and democratic society based on freedom and equality is perfectly entitled to protect itself against such consequences. These dangers clearly exist during the trials of members of crime syndicates who sometimes use organised tactics of terror to prevent witnesses coming forward to give evidence.

[52] In such circumstances it might be proper to protect the disclosure of

witnesses' statements and the State might succeed in establishing that such a restriction is reasonable, justifiable in an open and democratic society based on freedom and equality and that it is necessary and does not negate the essential content of a right to a fair trial. Even in such cases, however, it does not follow that the disclosure of the statements concerned must always be withheld if there is a risk that the accused would not enjoy a fair trial. The fair trial requirement is fundamental. The court in each case would have to exercise a proper discretion balancing the accused's need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice." (own emphasis)

52. The court found that sufficient evidence has to be placed before a court to determine the issues:

- "(d) Inherently there might be some element of uncertainty as to whether the disclosure of the relevant documents might or might not lead to the identification of informers or to the intimidation of witnesses or the impediment of the proper ends of justice. The judgment of the prosecuting and investigating authorities in regard to the assessment of such risks might be a very potent factor in the adjudication process. Police officers with long experience and acquired skills and with access to sources which can sometimes not be disclosed, quantified and identified, have an advantage which the Court does not always have. What the prosecution must therefore be obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice. It is an objective test. It is not sufficient to demonstrate that the belief is held bona fide. It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief. (own emphasis)
- (e) If the State is unable to justify its opposition to the disclosure of the relevant information on these grounds, its claim that a refusal of access to the relevant documents is justified, should fail." (p750G – B) (own emphasis)

53. In **Els v Minister of Safety and Security** 1998 (2) SACR 93 (NC), the applicant sought disclosure of an informer's identity for purposes of instituting a civil action. Justice Kriek found that the approach followed in the Shabalala judgment "... is relevant, not only to

docket privilege, but also to informer privilege." (98C)

54. The court found that the informer gave the police "... *information prejudicial to others whose eminently he may have provoked, and that information was of a kind which may have or has resulted in criminal prosecutions*" and that he was therefore an informer.
55. The evidence was furthermore that the information was given "*on trust that his (the informer) identity would be confidential*" and not disclosed; the disclosure of confidentiality would terminate the relation between the police and the informer; the informer would not have divulged the information if he was aware that his identity would be disclosed and that he could be a party or be involved in civil litigation; the specific informer has given information that led to the successful prosecution; the police rely heavily on information supplied by the informers and informers play a leading role in the opening of new cases and new arrests and as appears from statistics and informers have played a prominent role in the investigation of and prosecution of a crime syndicate reported on in the media, and that the police endeavours to ensure that the informers are reliable and generally trustworthy.
56. The court concluded:

"I accept that there will be cases in which it will be in the public interest or render interests of justice to order the disclosure of the identity of an informer, but I consider that such orders should not be made lightly. The informer system is one of the cornerstones of the battle against organised crime, and when the identity of one informer is made known, other informers, or would-be informers, will not engage upon an exercise in legal niceties in order to distinguish their position from that of the informer whose identity has been revealed; they will desist from 'informing' or reconsider their position as informers, not only to avoid retaliatory action, but also to avoid civil actions being instituted against them" (101a – c), and

further found there is no evidence that the informer was 'mendacious' and malicious and "... *the opportunity which the applicant will have of exercising in protecting his rights, and of being awarded damages (which he may or may not be able to recover) if the identity of the informer is disclosed, cannot in my view be of greater public importance than the protection, insofar as it legally permissible, of the privileged attaching to informers, and this, in my view, is a case in which it ought to be protected.*" (101g – h)

E EVALUATION

57. The tip-off is not made to the police or officers of justice but to officials in the employ of the respondents.
58. A complainant who divulges information on the assurance embodied in regulation 13(1)(b) that his identity will not be disclosed unless he weights his right to have his identity classified as restricted, is aware that his identity may be disclosed if the court so orders and that the Commission may release restricted information other than confidential information, relating to a possible agreement in terms of an appropriate court order. The complainant is thus aware that although his information is classified as restricted, it may nevertheless be divulged in certain circumstances.
59. I am of the view that in the light of the aforesaid regulation 13(1)(b) is not a restatement of common law. Informer privilege relates to information given to the police or the prosecuting authority and the privilege can normally not be waived if the information relates to a crime of a public nature.
60. The applicant has a right to a full and proper record to, *inter alia*, ensure an equality of arms to enable the court and the applicant to assess the lawfulness and fairness of the administrative process followed and the other factors referred to above. A complete record ensures a fair trial/adjudication of the review application in the context of section 34 of the Constitution.
61. Lastly insofar as the respondents' case may be that the complainant's identity and the contents of the statements/documents are protected in terms of section 13L of the Act, a party's mere say-so that information is confidential does not make the information confidential. In the absence of a factual basis and/or admissible evidence to support non-disclosure, this contention cannot be upheld. The result would have been the same if the principles concerning informer privilege applied in this matter.
62. I have considered whether the non-disclosure of the identity of the complainant can thwart the applicants' right to a fair trial in the context of the pending review application. The problem is that one simply does not know, it may or may not turn out to be relevant. On the other hand, there is no evidence that any prejudice will befall the respondents or the complainant if disclosure is ordered. I am thus also of the view that a confidentiality regime is not called for. In the light hereof, I grant the order below. Insofar as the order also discloses the identity of the complainant, such disclosure is hereby authorised.

63. In the light of the foregoing the following order is made:

63.1. The respondents are hereby ordered to provide the applicants access to the "tip-off" and supporting documents, referred to by the first respondent in paragraph 7.1.1 on page 10 of the *"investigation report approved by her on 11 March 2021"* and as requested by the applicants pursuant to their notice in terms of rule 35(13) dated 19 July 2021.

63.2. The first and second respondents are ordered to pay the applicants' costs, the one paying the other to be absolved.


HJ DE WET

Acting Judge of the High Court

Gauteng Division, Pretoria

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Date of hearing: 25 January 2023

Date of judgment: 14 December 2023