IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO 5520/2016

In the matter between:

SIYAKHUPHUKA INVESTMENT HOLDINGS (PTY) LTD	Applicant

and

PORTS REGULATOR OF SOUTH AFRICA	First Respondent
TRANSNET SOC	Second Respondent
MINISTER OF PUBLIC ENTERPRISES	Third Respondent
MINISTER OF TRANSPORT	Fourth Respondent

Coram: **Koen J**

Heard: **4 May 2018**

Delivered: **21 May 2018**

ORDER

The following order is granted:

1. The First Respondent is directed, within 10 (ten) days after the date of the service of this order on its attorneys, to produce the "*separate confidential report*" sent by it to the Minister of Transport on 15 September 2016, referred to in paragraph 30 of the affidavit sworn to by Mr A Ngcobo on behalf of the First Respondent on 9 May 2017;

2. The First Respondent is directed to pay the costs of this application, such costs to include the costs of senior counsel.

JUDGMENT

KOEN J

INTRODUCTION

[1] The Applicant has in the past successfully operated a cargo terminal and container freight station at the outskirts of the port at Richards Bay. Its operations later turned to logistical services. Identifying an opportunity, it subsequently submitted an application, as required by the relevant legislation, to the Second Respondent (Transnet SOC) for the development of a container operation on an undeveloped site at the port of Richards Bay. When that application was unsuccessful (per the decision of the Second Respondent, dated 30 April 2009), it then lodged a complaint with the First Respondent (the Ports Regulator). The First Respondent is established in terms of s 29 of the National Ports Act 12 of 2005 ('the Act') and is an organ of state.[1] A panel of the First Respondent heard the Applicant's complaint on 5 and 6 March 2015 and 6, 7 and 8 May 2015. It handed down its Record of Decision on 15 July 2015 dismissing the complaint. Thereafter, and in response to correspondence from the Applicant, the First Respondent on 8 March 2016 communicated to the Applicant that it had not and did not intend to comply with s 30(5)[2] of the Act by reporting to the Minister.[3] The Second Respondent (in its division Transnet National Ports Authority) subsequently on or about 23 March 2016 seemingly decided to approve a container terminal or container handling facility at the port of Richards Bay to be operated by Transnet Port Terminals (another division of the Second Respondent).

[2] On 9 June 2016 the Applicant launched proceedings ('the review') claiming inter alia the following relief:

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[1] The Regulator carries out a number of functions in terms of the Act including hearing complaints and appeals in terms of the Act.

[2] Section 30 of the Act provides: '(5) Whenever necessary or required by the Minister, the Regulator must report to the Minister on any matter relating to the application or purposes of this Act.'

[3] The Minister responsible for the administration of the Act is the Minister of Transport.

‘1. The decision of the Second Respondent taken on or about 23 March 2016 to ‘approve’ a container terminal or container handling facility at the port of Richards Bay to be operated by the Second Respondent is reviewed and set aside;

2. It is declared that, if the Second Respondent intends to design, construct, rehabilitate, develop, finance, maintain or operate a container terminal or container facility or provide services relating to such terminal or facility at the port of Richards Bay, it is obliged to follow a procedure that is fair, equitable, transparent, competitive and cost effective in terms of section 56(5) of the National Ports Act.

3. The decision of the Ports Regulator communicated to the Applicant on 8 March 2016 in terms of which the Ports Regulator indicated that it had not and did not intend to comply with section 30(5) of the National Ports Act, which obliges the Regulator to report “*whenever necessary … to the Minister on any matter realting to the application or purposes of this Act*” is reviewed and set aside;

4. The Port Regulator is directed to report to the Minister in terms of section 30(5) in respect of its findings in Record of Decision (RC 2010/04/0017) of 15 July 2015 and, in particular, its finding that “”*it is questionable whether, due to the above factors, the Respondent can make an independent, unbiased, bone fide decision regarding such a proposal including whether same should go out on a section 56 process or not”* and its further finding that *“the current situation is creating both legal and regulatory uncertainty. An assumption and prima facie observation is being created that an environment exists (in the container terminal industry in South Africa) where Transnet SOC Ltd is possibly being treated more favourably, deriving an unfair advantage over other transport companies.”* The decision of the Ports Regulator of South Africa (“*Ports Regulator*”) of 15 July 2015 in Record of Decision (RC2010/04/0017) dismissing the Applicant’s complaint against the Second Respondent’s rejection of the Applicant’s proposal is reviewed and set aside.

5. The decision of the Ports Regulator of South Africa (“Ports Regulator”) of 15 July 2015 in Record of Decision (RC2010/04/0017) dismissing the Applicant’s complaint against the Second Respondent’s rejection of the Applicant’s proposal is reviewed and set aside.

6. The Applicant’s appeal is referred back to the Ports Regulator for reconsideration taking into account this court’s findings and the Ports Regulator’s own findings regarding the “*blurred lines”* and *“unfair advantage”* between Transnet SOC Ltd. and Transnet Port Terminals.

7. The Applicant is granted leave to introduce new and up to date references, evidence and studies to support its appeal before the Ports Regulator in its redetermination of its appeal.

8. The First and Second Respondents are to pay the costs of the application

including the costs of two counsel and such costs are to be paid jointly and severally by any other Respondent who opposes this application.

9. Further and/or alternative relief'

The Applicant would be entitled within ten days of the Registrar making the record available to it, 'to deliver a notice and accompanying affidavit, amending, adding to or varying the terms of the Notice of Motion and supplementing the founding affidavit'.

[3] The First Respondent has elected not to participate in the review. It abides by the court's decision.

[4] Pursuant to the obligation in terms of rule 53(1)(b) requiring the First and Second Respondents '…to dispatch to the Registrar of this Court the record of the proceedings in respect of the three decisions sought to be reviewed together with such reasons as it might in law be required or desire to give or make …', the First Respondent on 19 August 2016 delivered a record comprising 13 volumes, with a 14th volume containing alleged confidential material which it has agreed may be released to the Applicant's attorneys after a confidentiality agreement has been signed.

[5] In response to correspondence exchanged to determine whether a report to the Minister in terms of s 30(5) exists that would be relevant to the issues which arise in the review, a letter was received by the Applicant's former attorneys from the First Respondent's attorney dated 15 February 2017 which recorded the following in the second paragraph thereof:

'We are instructed that insofar as the annual meeting of the Regulator for the 2015/2016 year, the matter of Siyakhuphuka was reported on as finalized. The nature of the meeting did not allow for deliberation of the matter, but we are instructed that a separate confidential report dealing with the issue was sent to the Minister of Transport on 15 September 2016. This is the report contemplated in section 30(5) of the National Ports Act. This is a confidential report to the Minister, and we are not authorised to release this. We reiterate however that we do not believe this forms part of the record before our client as decision maker'.[4]

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[4] Following this correspondence, the Applicant requested access to the Report on the basis that it was clearly relevant to the main application and indicated that it would receive the report subject to a confidentiality-regime. The First Respondent however then refused to disclose the

[6] The Applicant thereafter on 20 April 2017 filed a rule 30A notice contending that the record supplied is inadequate. It reads:

'**TAKE NOTICE** that the First Respondent has failed to comply with the provisions of Rule 53 (1) (b) in that it has failed to produce all documents comprising the record in respect of the "*decision of the Ports Regulator communicated to the Applicant on 8 March 2016 in terms of which the Ports Regulator indicated that it had not and did not intend to comply with section 30(5) of the National Ports Act, which obliges the Regulator to report 'whenever necessary… to the Minister on any matter relating to the application or purposes of this Act."*

TAKE NOTICE FURTHER that the First Respondent failed to produce as part of the record (and pursuant to a regime of confidentiality if it so desires) the "*separate confidential report dealing with the issues [of the non-corporatisation of Transnet] was sent to the Minister of Transport on 15 September 2016",* and which is alleged by the First Respondent in correspondence of 15 February 2017 to be "*<u>the report</u> contemplated in section 30(5) of the National Ports Act".*'

[7] This notice was responded to by way of an affidavit by Mr Aubrey Ngcobo, a member of First Respondent who was also a member of the panel which had considered the Applicant's complaint. He inter alia:

(a) Records that the record filed 'is the full record of the decision referred to in paragraphs 5 and 6 concerning the Record of Decision dated 15 July 2015, and that the Regulator's reasons appear therein…'; and

(b) Acknowledges that on 2 March 2016 the Applicant's former attorneys wrote to the First Respondent setting out various provisions of the Record of Decision, section 30 of the Act and Directives, and which then continued to record –

'8. We assume that, since a reasonable period of time has now elapsed since the Port's Regulator's record of decision was handed down, the Ports Regulator has reported to the Minister in terms of section 30(5) of the National Ports Act. We request a copy of such report.

Report and contrary to its previous indications adopted the stance in subsequent correspondence that the '*Regulator did not make any section 30(5) report that referred to the matter of Siyakhuphuka or reported on the matter*'. Thereafter in response to the rule 35(12) notice the First Respondent however confirmed that the Report does exist, that it reports to the Minister on its performance and functions on an annual basis and does raise confidential matters with the Minister from time to time, and that the Report forms one such report filed in terms of section 30(5).

9. If the Ports Regulator has <u>not</u> reported to the Minister in terms of section 30(5) of the Act, we require confirmation of this'.

(c) Confirmed the contents of a letter from the First Respondent's legal manager dated 8 March 2016 in reply to the Applicant's former attorneys aforesaid letter which recorded:

'Insofar as the Complaint lodged by Siyakhuphuka as well as the Regulator's subsequent Record of Decision thereon is concerned, no separate report was prepared to highlight this issue as this is not required.'

(d) Added in relation to such report that '(t)he Regulator is under no obligation to do so', explaining that section 30(5) requires a report to the Minister 'on any matter relating to the application of the purposes of this Act "<u>whenever necessary or required by the Minister</u>" (My emphasis)'

(e) Nevertheless added:

'For completeness sake I record that the Regulator does report to the Minister on its performance and functions on an annual basis, and does raise confidential matters with the Minister from time to time arising from the Regulator's compliance monitoring function. The "*separate confidential report*" is one such report. I reiterate that no such report has been made concerning the Applicant's complaint, and the aforementioned report does not mention the Applicant, nor any other relevant issue of merit on which the panels Record of Decision in was based, and the *"separate confidential report"* is thus irrelevant to the record.'

[8] This affidavit resulted in the Applicant on 22 May 2017 filing a Notice in terms of rule 35(12) requiring the First Respondent 'to produce, make available for inspection and permit copies to be made of the 'separate confidential report' sent to the Minister of Transport on 15 September 2016 and which was referred to in paragraph 30 in the affidavit … dated 9 May 2017.'

[9] It is not disputed that the report in question is a document referred to in an affidavit filed by the First Respondent. When the report was not produced, the present application was launched claiming the following relief:

'1. Declaring the failure of the first respondent to comply with the provisions of Rule 35 (12) of the Uniform Rules of Court to be unlawful.

2. Directing the first respondent within 10 (ten) days after the date of this order to comply with the provisions of Rule 35(12) and to produce the documentation referred to in the applicant's Rule 35(12) Notice that was served on the first respondent on 22 May 2017

3. Granting the applicant further or alternative relief; and

4. Ordering the first respondent to pay the costs of this application, including the costs of two counsel'.

THE APPLICANT'S ARGUMENT

[10] Briefly stated, the Applicant submits that although the report was 'sent to the Minister of Transport on 15 September 2016', which is subsequent to the record of decision of the First Respondent which is sought to be reviewed, there is no indication when it came into existence (that information falling squarely within the knowledge of the First Respondent). Accordingly, it could conceivably form part of the record of the decision and therefore should be furnished.

[11] It requests this court to go behind the oath of the deponent who stated that the report 'does not concern the Applicant, its complaint nor any other relevant issue of merit on which the record of decision is based'. The Applicant argues forcefully in favour of constitutional openness and transparency. It further submits that these also underpin the request in terms of rule 35(12) that the report must be produced for inspection and copying, not only for the Applicant's benefit, but also for the benefit of the Court in the context of the main review application, so that it may decide the matter on all the facts.

THE FIRST RESPONDENT'S ARGUMENT

[12] Briefly stated, the First Respondent submits that as the report was sent on 15 September 2016, it must presumably have been created around that time and therefore could not possibly have featured as part of the record relating to the Record of Decision taken on 15 July 2015. Accordingly it contends that the entire record relating to its decision has been filed as Mr Ngcobo has stated under oath.[5] Insofar as the application is based on the provisions of rule 35(12), it maintains in its answering affidavit that the reference to the report is not in an affidavit or pleading relating to the review, that it (the First Respondent) is no longer a party to the review as it has sought to abide by the outcome of the review, that the contents of the report is confidential, and that in any event, the report is not relevant to the review.

[5] It is obviously no defence to an application in terms of rule 35(12) to say "*the record has been filed*". Rule 35(12) deals with an altogether different scenario, namely the production of a document which is referred to in an affidavit.

[13] During argument, Mr Dickson SC for the First Respondent stated that the First Respondent will not persist with the argument that it is no longer a party to the review. That concession is fairly made as the First Respondent clearly remains a party even if it has elected to abide by the court's decision. Further, Mr Dickson stated that the confidentiality argument would not be relied upon. That concession is also made correctly, as no evidential basis has been laid in the answering affidavit of the First Respondent for any finding that the contents of the report is confidential.[6] The high water mark on confidentiality was the deponent's conclusion that in his opinion the contents of the report was confidential.

[14] The only ground persisted with by the First Respondent in opposition to the application in argument was that the report was not relevant.

DISCUSSION

[15] Recently the Constitutional Court had occasion in *Helen Suzman Foundation v Judicial Services Commission*[7] to consider what is meant by the following two points:

(a) The record of a decision. At para 17 the CC held as follows (references omitted):

'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. <u>Information is relevant if it throws light on the</u>

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[6] Schutz AJ held in *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1100A–D that: '[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part. I trust that by holding what I have I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. <u>Practitioners would do well to remember that the normal rule is full inspection</u>.' Reference can also be made to *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and another* 1979 (2) SA 457 (W),\ at 466E–F*; ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) paras 24.3 and 29; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works, and* Others 2008 (1) SA 438 (SCA), paras 14 and 17.

[7] [2018] ZACC 8.

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".' (my underlining)

(b) And regarding relevance. At paras 25 and 26 it commented as follows (references omitted):

'[25] The JSC submitted that relevance should be determined with reference to the pleaded case. I do not agree. Rule 53 envisages the possibility of a review applicant supplementing the papers, including the very cause of action, upon being furnished with the record. That much is plain from the fact that an applicant may supplement not only the affidavits, but also the notice of motion. That means an applicant may add to or subtract from the grounds of review. Then, if information could be excluded on the basis of being irrelevant to the pleaded case, this would negate a substantial part of the purpose of the rule 53 record. What must be disclosed is information relevant to the impugned decision. Unsurprisingly, a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence.

[26] It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the 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.' (my underlining)

[16] The Applicant further submits that the adequacy of a record of a decision giving rise to a review and the relevance of a document sought to be discovered must now be assessed against the general background of the Constitutional rights to inter alia information and just administrative rights and the Constitutional values of openness and transparency in an open and democratic

society. That is undoubtedly so and I fully endorse the various dicta to which I was referred by the Applicant some of which are briefly recounted below.

[17] Litigation is aimed at establishing the truth. In *Stein Brothers v Dawood and another*[8] it was stated that 'the object of all litigation is to arrive at the truth and at a fair, just and expeditious solution'. Similarly in *S v Wessels*[9] the Court stated that: '… if the courts are prevented from arriving at the truth there can be no justice'. Particularly in regard to organs of state, the State is not an ordinary litigant. Heightened duties of accountability and transparency rest on an organ of state[10] which bears additional obligations to ensure that the principle of open justice is upheld. It is meant to be an exemplar of transparency and constitutional accountability flowing from section 7(2),[11] section 165(4)[12]and section 195[13] of the Constitution. As Cameron J remarked in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*[14]

'there is a higher duty on the State to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights'.

Likewise in *Kalil NO and others v Mangaung Metropolitan Municipality and others*[15] the Supreme Court of Appeal commented:

'where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.'

[18] It is unquestioningly so that access to information is an important aspect under our Constitution, particularly under sections 32 and 34 which guarantee

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[8] 1980 (3) SA 275 (W) at 282D.

[9] 1966 (3) SA 737 (C) at 739F. See also *Meyers v Marcus and another* [2004] 2 All SA 438 (C) para 49.

[10] *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850A-C;

[11] The duty to respect, protect, promote and fulfil the rights in the Bill of Rights. The constitutional obligation flowing from section 7(2), while referring to "the State" imposes the obligation on both the State and organs of state – see *Women's Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC) paras 17-19; *AllPay Consolidated Investment Holdings v CEO South African Social Security Agency* 2014 (4) SA 179 (CC) para 49.

[12] Which imposes a duty on organs of state to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'.

[13] Which establishes various principles applicable to all organs of state including that 'people's needs must be responded to' and that 'transparency must be fostered by providing the public with timely, accessible and accurate information'.

[14] 2014 (3) SA 481 (CC) para 82.

[15] 2014 (5) SA 123 (SCA) para 30.

access to information and the right to a fair hearing. Litigants are entitled to access information under the control of another party cited in the litigation.[16] Not surprisingly then Cameron J said in *Van Niekerk v Pretoria City Council*, which dealt with a claim brought under s 23 of the interim Constitution (the precursor to s 32 of the Constitution) that:

'In my view, s 23 entails that public authorities are no longer permitted to "play possum" with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State… to a new regimen of openness and fair dealing with the public.'[17]

[19] Similarly in *Department of Transport and Others v Tasima (Pty) Limited*,[18] the Constitutional Court confirmed that when it comes to litigation, 'a state organ … bears extra constitutional obligations'. And in *Kirland Investments*,[19] it was held that a court will:

'insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

[20] The Courts can only function effectively and the administration of justice served if all material evidence is made available to the parties during preparation. Section 165(4) of the Constitution imposes a positive duty and obligation on the State to assist the Courts to place relevant and material evidence before a court and to ensure, *inter alia*, their effectiveness. Sachs J held in his concurring judgment in *Matatiele Municipality v President of the Republic of South Africa and others*[20] that

'the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though

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[16] See for example *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G-H.
[17] *Van Niekerk v Pretoria City Council* n10 at 850A-C.
[18] 2017 (2) SA 622 (CC) at para 158.
[19] *Kirland Investments* n14 para 82.
[20] 2006 (5) SA 47 (CC) para 107.

that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as s 165(4) of the Constitution requires'.

[21] So called possum-playing or anything which amounts to its equivalent, must be discouraged. In *National Energy Regulator of South Africa and Another v Borbet SA (Pty) Ltd and Others, Eskom Holdings Soc Limited and Another v Borbet SA (Pty) Ltd and Others*[21] the SCA unanimously held:

'One further aspect requires brief consideration. State owned enterprises have to resist the impulse to immediately resist constitutionally permissible judicial scrutiny. This includes resistance to making information available that rightly belongs in the public domain. After all, they are, through the State, owned by the nation. I appreciate that there might well be commercial confidentiality that attaches to certain commercial contracts but the default position should be to make information available subject to justifiable redaction. It is a pity that Eskom and NERSA did not, in the early stages when it was evident that litigation would follow, adopt that attitude.'

[22] The First Respondent accordingly has a duty to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'[22]

SHOULD THE REPORT HAVE BEEN FURNISHED AS PART OF THE RECORD

[23] Although one might assume that the report would have been created shortly before it was sent to the Minister on 15 September 2016, that might not necessarily be so, particularly as the complaint was heard by the panel of the First Respondent on 5 and 6 March 2015 and 6, 7 and 8 May 2015, and the decision was only handed down more than two months later on 15 July 2015. It is within the knowledge of the First Respondent as to when the report was created, and the deponent could easily have disclosed that fact to this court. It failed to do so. Whether that was deliberate or inadvertent is irrelevant. On what is placed before this court I cannot exclude the possibility that the report to the Minister might have existed at the time the decision was taken.

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[21] [2017] 3 All SA 559 (SCA) para 120.
[22] Section 165(4) of the Constitution.

[24] Having regard to the contents of the second paragraph of the letter from the First Respondent's attorney dated 15 February 2017, in addition and more importantly perhaps, the report appears to contain information which, in the words of the Constitutional Court, might 'throw light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.'[23] Mr Dickson has submitted that this letter must be viewed in the context of being a reply apparently to a letter from the Applicant's attorneys dated 15 February 2017, which is not contained in the court papers. Whilst the letter no doubt is such a reply, the paragraph quoted above in my view stands as a separate recordal of the factual position and must be construed for what it seeks to convey. The letter leaves little doubt at a prima facie level that 'the matter of Siyakhuphuka was reported as finalized', that the AGM 'did not allow for deliberation on the matter' (which must be a reference to the Siyakhuphuka matter), and that the 'separate confidential report dealing with the issue' (which in the context of that paragraph must be a reference to the Siyakhuphuka matter) 'was sent to the Minister of Transport on 15 September 2016… (being)… the report contemplated in terms of section 30(5) of the National Ports Act'.

[25] Given the wider parameter of documents forming part of a record to include documents which might 'throw light on the decision-making process and the factors that were likely at play in the mind of the decision-maker,' it seems to me on probability that the report on what has been placed before me should form part of the record of the decision.

[26] Further, and given the contradiction between the contents of the above letter and the allegations under oath that the report allegedly has nothing to do with the Applicant, this is an appropriate instance where this court should go behind the allegations under oath in the affidavit of the First Respondent that the report does not mention '…any other relevant issue of merit …and … is thus irrelevant to the record'.

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[23] *Helen Suzman Foundation* n7 para 25.

[27] On that basis the report should have been disclosed as part of the record pursuant to the provisions of rule 53.

SHOULD THE REPORT BE PRODUCED PURSUANT TO RULE 35(12)

[28] Further, and even if I was wrong in that regard, the report should also have been produced pursuant to the request in terms of rule 35(12).

[29] Although rule 35(12)[24] does not expressly[25] require that the document referred to in an affidavit must be relevant, it is established in our case law that the document requested must be relevant.[26] In accordance with the recent statement of the law by the Constitutional Court, 'under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings.' In Gorfinkel v Gross, Hendler & Frank[27] the court held:

'As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations mentioned, the *onus* would be on the recipient of the notice to set up the facts relieving him of the obligation to produce the document.'

In *Unilever PLC and another v Polagric*[28] Thring J concluded on the facts of the matter before him:

'It is clear, in my view, that the applicants have failed to discharge the *onus* which rests on them of establishing that the documents sought, other than those sought in para 6 of the notice, are irrelevant.'

The onus is accordingly on the First Respondent to prove that the report was irrelevant.

[30] In the context of discovery of documents (which would extend to rule

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[24] Rule 35(12) provides: 'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'

[25] Upon a plain reading of the subrule, the principal requirement for its application is that the pleading or affidavit in question (here, the affidavit filed in response to the Rule 30A Notice pertaining to the inadequacy of the record file) contains a cognisable reference to a document or tape recording.

[26] See *Governing Body, Hoerskool Fochville and others v Centre for Child Law* 2014 (6) SA 561 (GJ) para 25; *Universal Studios v Movie Time* 1983 (4) SA 736 (D) at 748A-C; *Gorfinkel v Ross, Hendler & Franke* 1987 (3) SA 766 (C) at 744A-C and 774F-I.

[27] *Gorfinkel* n26 at 744I-J.

[28] 2001 (2) SA 329 (C) at 340F-G.

35(12)) Lord Denning likewise observed in *Riddick v Thomas Board Mills Ltd*:[29] 'The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full disclosure … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed.'

[31] The Applicant's application is not only for a review of the First Respondent's Record of Decision.[30] It also includes inter alia a direction that '(t)he Applicant's appeal is referred back to the Ports Regulator for reconsideration taking into account this court's findings and the Ports Regulator's own findings regarding the "blurred lines" and "unfair advantage" between Transnet SOC Ltd and Transnet Port Terminals'.[31]

Underlying that relief and some of the other relief claimed in the Notice of Motion is the contention that the Transnet National Port Authority (TNPA), a division of the Second Respondent, is unable properly to adjudicate the Applicant's application for a container terminal at Richards Bay because of the TNPA's relationship with Transnet SOC, and the failure to have incorporated Transnet SOC independently from the TNPA, which it is contended has compromised the TNPA's impartiality. If the report at the level of discovery confirms such partiality thus advancing the Applicant's case or harming the respondents' case, then it should be disclosed all the more[32] as being highly

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[29] [1977] 3 All ER 677 at 687, the passage has been cited, inter alia, in *Comair Ltd v Minister of Public Enterprises and others* 2014 (5) SA 608 (GP) para 52; *Republication Technology Group and others v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) para 7.

[30] In the main application, the Applicant seeks to review and set aside three decisions of the First Respondent, namely the decision of Transnet's SOC dated 30 April 2009 rejecting its proposal for container operation at the Port of Richards Bay, the decision of 15 July 2015 dismissing the Applicant's complaint against Transnet's rejection of the proposal, and the First Respondent's failure to comply with the provisions of section 30(5) of the National Ports Act 12 of 2005 which places a reporting obligation 'whenever necessary or required by the Minister, the Regulator <u>must report</u> to the Minister on any matter relating to the application or purposes of this Act' (emphasis added). The First Respondent is required to file the Record of Decision in respect of <u>all three</u> decisions which are challenged, not only the first decision, but also the alleged failure by the First Respondent to refer the issue of the non-incorporation of Transnet to the Minister in terms of section 30(5) of the Ports Act. The Report refers to that issue.

[31] Para 6 of the notice of motion.

[32] Discovery of documents in terms of rule 35 has been in *The MV Urgup* n16 at 513G-H 'to rank with cross-examination as one of the two mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed

relevant to the issues in the review.

[32] The First Respondent has been critical of the Applicant's application to produce the report pursuant to rule 35(12) saying that at best it is a fishing expedition for a report of which the Applicant does not know the date it was produced, or the contents thereof. That is in my view an unfair categorization of the Applicant's case. The report clearly deals 'with the issue' of the Applicant's matter. The First Respondent has described the report as '*a confidential Report dealing with the issue of non-corporatisation of Transnet*'.

[33] The report is relevant to the issues in the review as pleaded.[33] It is also relevant to the issue as to whether the reporting obligation to the Minister was complied with. It is relevant to a determination of the legality of the first and second decisions sought to be reviewed because the reporting under section 30(5) is integrally related to the question of the lack of independence of the National Ports Authority and the non-corporatisation of Transnet, being one of the grounds of review against the first and second decisions.

[34] The mere fact that the report was referred to in the affidavit in response to the rule 30A notice, albeit for the sake of 'completeness', also carries the implied recognition on the part of the First Respondent that it is relevant. As Thring J commented in *Polagric*:[34]

'Indeed, from the mere fact that Allchurch has seen fit to refer to these documents in his founding affidavit it can be inferred, in the absence of any clear disclaimer, that they are relevant'

[35] As part of a 'belts and braces' exercise the Applicant further submitted that even if this court were to find that it was not entitled to the relief sought on the basis of rule 35(12) that it is nevertheless entitled to the report on the

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where its use is called for it can be, and often is, a devastating tool.'

[33] It is not necessary, in rule 35(12) proceedings, to show either that (i) the information sought will necessarily provide a basis for challenging the impugned decisions, or that (ii) the information sought is necessary in order to have those decisions set aside. It is sufficient that the Report might assist the Applicant in advancing its case or harming the Respondent's case. This is logically so since an applicant under rule 35(12) cannot possibly know in advance of having sight of the documents requested whether they will provide a basis for challenging the decisions.

[34] *Unilever v Polagric* n28 at 340G.

grounds of fairness. Reliance was placed on the decision in *Bridon*,[35] on the strength of which it was submitted that to deny access would thwart the right to administrative fairness. In view of the conclusion to which I have come above I do not intend dealing with these submissions further in this judgment.

COSTS

[36] The Applicant has been successful. There is no reason why it should not be entitled to its costs. During argument the Applicant was represented only by Mr Du Plessis SC, although the Applicant's heads were signed by him and Ms Pudifin-Jones. She however excused herself from the hearing. The Applicant has asked for the costs of two counsel where so employed. The First Respondent was represented by only senior counsel. Stripped to its bare essentials the application was really an interlocutory one to compel furnishing of the record of decision and/or discovery with some broader constitutional considerations playing a part. It is a matter of importance to the Applicant which would justify the employment of senior counsel. In the exercise of my discretion on costs I am disposed to allowing the costs of senior counsel, but not the costs of two counsel.

ORDER

[37] Paragraph 1 of the notice of motion is in my view unnecessary and possibly incorrect.

[38] The following order is granted:

'1. The First Respondent is directed, within 10 (ten) days after the date of the service of this order on its attorneys, to produce the "*separate confidential report*" sent by it to the Minister of Transport on 15 September 2016, referred to in paragraph 30 of the affidavit sworn to by Mr A Ngcobo on behalf of the First Respondent on 9 May 2017;

2. The First Respondent is directed to pay the costs of this application, such costs to include the costs of senior counsel.'

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[35] *Bridon International GMBH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA), para 32.

Koen J

APPEARANCES

For Applicant:	Mr M du Plessis SC
Instructed by:	JACQUES ROOS ATTORNEYS
C/O	MESSENGER KING

Ref.: JI ROOS/S17

For First Respondent:	Mr A.J.Dickson SC
Instructed by:	PKX ATTORNEYS

C/O GOODRICKES ATTORNEYS

Ref.: Lizl Coppejans