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IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(THE REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

CASE NUMBER: 1242/09

DATE 12.02.2013 SIGNATURE 

In the matter between:

M & G MEDIA LIMITED

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
DEPUTY INFORMATION OFFICER: OFFICE OF THE
PRESIDENCY

First Respondent

Second Respondent

MINISTER IN THE PRESIDENCY

Third Respondent

JUDGMENT

RAULINGA J.

Introduction

- [1] The Constitutional Court in its majority judgment of 29th November 2011, ordered that this case be remitted to this court for it to examine the record in terms of the provisions of section 80 of the Promotion of Access to Information Act 2 of 2000(PAIA/the Act) and to determine the application

under section 82 of the Act, in the light of the Constitutional Court judgment-
The President of RSA v M&G Media Limited 2012(3) SA 50(CC).

- [2] Subsequent to the Constitutional Court order M & G Media Limited (M&G) brought this application before this court to determine, based on the evidence, including now by direction of the Constitutional Court, whether the requested record which this court has examined, the respondents have discharged the statutory burden imposed upon them by section 81(3) of PAIA to establish that their refusal of the request for access complied with the provisions of PAIA. The merits of the exemptions claimed, as well as the legality of the refusal to disclose the record, still needed to be decided. This court was further directed by the Constitutional Court to deal with procedural matters in terms of section 80(3) relevant to the application of section 80, including receiving representations, conducting the hearing and potentially prohibiting the publication of information in relation to the proceedings. All matters that arose in the course of the hearing required further attention.
- [3] Initially the applicant sought access (under PAIA) to a report to the then President Thabo Mbeki by two senior judges to wit: Justices Khampepe and Moseneke, concerning constitutional and legal issues related to the 2002 Presidential elections in Zimbabwe. The second respondent, and thereafter the third respondent (in an internal appeal) refused the applicant access to the report.
- [4] As a consequence, M&G brought an application to the North Gauteng High Court, Pretoria (this court) which ordered the respondent to make available the report in its entirety to the applicant. The order was upheld by the Supreme Court of Appeal ("the SCA"). This culminated in an appeal which was brought by the respondents to the Constitutional Court and its subsequent order.

Factual Matrix

- [5] On 17 June 2008, the applicant applied for access to the report. The second respondent refused the request on 22 July 2008, citing sections 41(1) (b) and

44(1) (a) of the Act as grounds of refusal. Pursuant to the second respondent's refusal, on 22 September 2008, the applicant lodged an internal appeal. The internal appeal was dismissed by the third respondent on 13 November 2008 citing the same grounds of refusal as those stated by the second respondent. This resulted in the present application which has since travelled a 'vicious' circle from the High Court, the SCA, the Constitutional Court and now back to this court.

Judicial Peek in terms of section 80(1) of PAIA

- [6] On 14 June 2012 when this matter was called, the court ordered the respondents to produce the report to the court. Once the report was handed to the court in confidence, the court took a short adjournment and took a judicial peek at the record. When the court resumed, parties were afforded an opportunity to address the court on the procedure to be followed pursuant to the judicial peek. It transpired during the parties' submissions that the respondents were in favour of the ex parte representations procedure in terms of section 80(3)(a) of PAIA whereas the applicant was in favour of the in camera hearing in terms of section 80(3)(c). Section 80(3) provides as follows:

"Any court contemplated in subsection (1) may –

- (a) receive representations ex parte;*
- (b) conduct hearings in camera; and*
- (c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings."*

- [7] It is clear that the subsection creates three powers and gives discretion to the court on which procedure to follow. Ex parte representations and in camera review should only be used where absolutely necessary, and such absolute necessity exists where:

- (a) the validity of the government's assertion of exemptions cannot be beyond that contained in the public affidavits and in the records themselves, and
- (b) public disclosure of that information would compromise the secrecy asserted – *Arieff v United States Department of Navy*[1983] *USCAD* 362, 712F 2d 1462, 1470(DE CIR 1983). In *Ray v Turner* 587 F 2d 1187, 1195 (DC CIR 1978) the court holding that courts should use their discretion to engage in, in camera reviewing where inspection of the record is necessary to make a responsible *de novo* determination on the claims of exemptions.

[8] Depending on the category of the record sought to be disclosed and the nature of exemptions on which the state depends for non-disclosure, the first port of entry should be the ex parte procedure before one embarks on the in camera procedure. In my view, the in camera procedure should be used sparingly. This is so because the in camera procedure has more pitfalls than the ex parte procedure. It is for that reason that in *Hayden v National Security Agency* 608F 2d 1381(1978) the court was of the view that public affidavits plus affidavits of National Security Agency submitted for in camera review were sufficient to support determination, without an in camera inspection of documents.

[9] I have already intimated above that section 80(3) of PAIA bestows discretion on the court to determine which procedure to follow. That discretion must be exercised judiciously. The choice is in the discretion of the court and not a prerogative of the parties. Having examined the two options, I chose to follow the ex parte representations procedure. However, I made no order in terms of section 80(3) (c).

Reasons why no access to the report was granted to the applicant's legal representatives at ex parte representations stage.

[10] After the court had made a ruling to utilise the ex parte representations procedure, the applicant launched an application to the court to make the report available to it. The reason cited by the applicant was that if the report

was made available to the applicant, then it could make a meaningful submission to the court why the report should be disclosed. In its submissions the applicant relied on section 34 of the Constitution Act 108 of 1996 ("the Constitution"). – "everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

It is my respectful view that this section does not turn on this matter. The applicant also relied on a dictum in *S v Dzukuda and others 2000(4) SA 1078 p 1100 para (37)*. In as far as fundamental rights are concerned I agree with the applicant in its submissions. However, I do not think the dictum is applicable in the present scenario. If the indulgence is rejected the principles of justice will not be invalidated, but instead they will still be protected.

- [11] The applicant tends to interpret section 80(2) of PAIA as conveying a meaning that permits access to the report by the applicant's legal representatives during ex parte submissions. I do not agree with that interpretation. A distinction exists between ex parte representations procedure and in camera hearing – See Hayden supra. A court exercises a discretion of placing limitations upon a litigant's ordinary rights of untrammelled inspection of confidential documents, when satisfied that there is a real danger that if this is done an unlawfulness may ensue – *Crown Cork & Seal COIAC and Another v Rhem South Africa (Pty) Ltd and Others 1980(3) SA 1093W*). In casu the inherent danger is that if the report is made available to the lawyers of the applicant at the stage of ex parte representations, it may defeat the purpose for which the application for disclosure has been launched. The right of access at that stage is limited by section 36 of the Constitution.

- [12] The relevant part of section 80(2) reads as follows:

"any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)

- (a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or
- (b)".

[13] *This subsection must be read together with Rule 4(2) to PAIA – "the court receiving the representations referred to in subrule (1) shall take the steps that it may deem appropriate to bring the representations to the attention of the parties to the application". One can postulate that this refers to the exchange of the parties' ex parte representations. It can never be interpreted as referring to making the report available to the applicant's lawyers. The use of the word "may" in section 80(2) of PAIA should be interpreted as meaning "shall".*

[14] Therefore the subsection does not bestow discretion on the court – in other words "the court may not disclose" meaning "the court shall not disclose to any person" including to the parties to the proceedings concerned, other than "the public or private body" referred to in subsection (1) –

The meaning of section 80(2) is therefore very clear. It excludes "any person" including the parties to the proceedings – and their lawyers of course. However it excludes the public or private body in whose possession the record is. The logic is that the party who is already in possession of the record, which is common sense, would have read the said record. There is therefore no need to deny such party access to the record. The reason for non-access at the stage of ex parte representations is understandable – in terms of section 80(2) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act.

[15] This was said in anticipation that the court may in the final stage refuse access to the said record. Section 80(2) of PAIA may not be read to exclude the respondents' lawyers from those who must not have access to the record. Instead it is an emphasis on the applicant's lawyers that they may not be able to make meaningful submissions, in the same vein one is not in a position to twist the arm of the law. In the circumstances the report could not be made available to the applicant's lawyers, which was done without compromising

the order of the court made in terms of section 80(3) (a) in order to promote the interests of justice and fairness. It must be emphasised that in doing so the court made that choice in the exercise of its discretion.

The implication of section 80 (3) (a) read with Rule 4 (1) (a) of PAIA.

- [16] I am minded to reiterate that after having had a judicial peek at the record I invited the parties to file ex parte representations in terms of section 80(3) (a) read with Rule 4(1) (a) of PAIA. In line with the audi alteram partem rule, once the ex parte submissions were made available to the court, the court in its discretion brought the contents of these representations to the attention of the opposing parties. Once the ex parte representations were exchanged the parties argued the matter based on the said representations. It transpired after the submissions were made that although the applicant's ex parte representations were in writing, they were not made under oath and therefore not in compliance with Rule 4(1) (a).
- [17] In view of this anomaly on 3 October 2012, I directed a letter to both parties in which I expressed my discomfort with the applicant's omissions in that; while the respondents' ex parte representations were made under oath, those of the applicant were not. I therefore formed a view that the applicant did not comply with Rule 4(1) (a) to PAIA and that the respondents have raised the issue of non-compliance with Rule 4 (1) (a) in their supplementary heads. I then sought responses to my letter of 3 October 2012.
- [18] In their response to my letter Counsel for the applicant contend that Rule 4 (1) (a) expressly states that, 'where applicable, representations in terms of section 80(3) (a) must be made under oath and in writing'. In their view the requirement that representations be made under oath is not "applicable" where the latter solely constitute legal argument and where there are no factual assertions requiring evidential proof. They also submit that in the present case the position is that the applicant is not able to address any factual issues in its representations, because it has not been given access in any form, or subject to any conditions, to the report. They are of the view

that Rule 4 (1) (a) is in any event a rule, subject always to the court's inherent jurisdiction. I do not agree with this averment.

- [19] On the other hand the respondents submit that there are two parts to the provisions of Rule 4(1) (a). First, the representations made must be made under oath in writing. Second, where applicable, documentary proof may be annexed to such representations. In casu the representations of the respondents were in the form of two affidavits deposed to by current President of the Republic of South Africa, Mr Jacob Zuma and former President of the Republic of South Africa Mr Thabo Mbeki. President Zuma included two annexures constituting documentary proof that supported the averments made in his affidavit. I agree that these representations are consistent with and in compliance with the requirements of Rule 4(1) (a).

- [20] It is apposite to refer first to the provisions of section 80(3) (a); "*any court contemplated in subsection (1) may –*

(a) receive representations ex parte which representations must be in terms of Rule 4(1)(a); must be made under oath in writing, and supported by documentary proof, where applicable...."

In my opinion the applicant misses a point when it lays emphasis on the words 'where applicable' in the exclusion of the words 'made under oath in writing'. Made under oath in writing is a single uninterrupted phrase – it expresses a single concept and not two. "Where applicable" although it forms part of subrule (1) (a) – it does not refer to 'made under oath in writing' but to and supported by documentary proof, where applicable. Simply put it means where documentary proof is available. The oath made in writing must be supported thereby. "Where applicable" qualifies the submissions of documentary proof if available. The interpretation is in line with a fundamental tenet of our Constitutional jurisprudence that all have, whether statute, common law, customary law or regulation, must be read in a manner that is consistent with the Constitution. This principle is not limited to consistency with the spirit, purport and object of the Bill of Rights as required by section 39(2) it is an implied principle of the Constitution as a whole that a

constitutional interpretation should always be preferred to a non-constitutional interpretation. This principle applies with equal force to the interpretation of Rule 4(1) (a). – *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007(1) SA 343(CC) at 373 para (72). As Hefer JA observed in *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997(1) SA 710 at 726H-727 A.....

"But judicial interpretation cannot be undertaken, as Shreiner JA observed in Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950(4) SA 653(A) at 664H, by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene'. The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears- *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984(3) SA 834(w) at 846G. As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable." It is now settled law that when interpreting any statute the court is bound to prefer any reasonable interpretation of legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

[21] One agrees with the respondents in their submission that Rule 4(1) (a) simply defines the ex parte representations as such that should be in a form that enables a court to accept the evidentiary value of the disposition taken. Section 80(1) read with Rule 4(1) (a) is a procedure that allows parties to make representations that can be admitted in evidence. However, the submission by the respondents that the court in its discretion should refer to the applicant's representations as additional heads of arguments requires careful consideration. There exists a two fold dilemma to this submission.

[22] First, as was raised by the Constitutional Court in *President of RSA v M & G Media Limited* supra at 63 para [35] the facts upon which the exemption is justified will invariably be within the knowledge of the holder of information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information justifying refusal of access. A

bare denial will normally not be sufficient to raise a genuine dispute of fact, and the rule in the *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984(3)SA 623(A) at 634G-635D* would require that the application be decided on the factual allegation made by the party refusing access to the record. Second, on the other hand, a holder of information who needs to rely on the contents of the record itself, in order to justify the exemption claimed, will be prevented from doing so by the provisions of ss 25 (3)(b) and 77(5)(b) of PAIA, which preclude 'any reference to the contents of the record' in order to support a claim of exemption.

[23] Confronted with this dilemma, one can still say that the applicant was barred from submitting a short affidavit in support of its case in which it could merely state the difficulty it faces. However, it can still be argued that the holder of the information is at an advantage because it has knowledge of the contents of the record although it is prevented from referring to it. In the light of these challenges, in producing and refuting evidence, the court will rely heavily on the power conferred to it by section 80 now that the record has been made available to it. The evidence of the contents of the contested record will be used to test the validity of the exemptions claimed.

[24] In any event, Rule 4(1) (a) is always subject to the court's inherent jurisdiction – 'the rules are meant for the court not the court for the rules'. In the circumstances, the Plascon Evans rule would apply. The application will be decided on the factual allegations made by the respondents in their ex parte affidavits as well as the record itself.

Respondents' application in terms of Rule 6(5) of the Uniform Rules of Court

[25] When the matter commenced on 13 June 2012 the respondents launched an application in terms of Rule 6(5) of this court to have the affidavit of former President Thabo Mbeki received as further evidence in the matter. The reasons provided by the respondents for filing the affidavit late are that:

- (i) Former President Thabo Mbeki has been busy with the tasks allocated to him by the United Nations and the African Union.

- (ii) The information set out in the affidavit of the former President constitutes exceptional circumstances in that the information is material and relevant to a just and equitable determination of the dispute between the parties.
- (iii) The new evidence may augment the merits of exemptions claimed since these need to be decided in the light of the report sought.

[26] The applicant contends that the receipt of the affidavit as further evidence is unjustified on the basis that the respondents are attempting to circumvent a proper application for admission of the affidavit. The applicant further submits that the purpose of the representations ex parte is to make legal submissions on the basis of the report itself, and it can certainly not be presented as an opportunity to tender further factual evidence in support of the grounds of refusal raised by the state.

[27] The relevant part of Uniform Rule 6(5) of this court provides that "*the court may in its discretion permit the filing of further affidavits*". However, there are requirements which must be met for the filing of further affidavits. The filing of further affidavits is an indulgence and a basis must be laid for such an indulgence to be granted. There is a well established principle that there were normally three sets of affidavits in motion proceedings: the founding affidavit, answering affidavit and replying affidavit. It is only in exceptional circumstances where a fourth set of affidavit can be received. In the absence of an explanation why the information included in the fourth set of affidavits could not have been included in the answering affidavit the indulgence must be dismissed – *Kasiyamhuru v Minister of Home Affairs and Others 1999(1) SA 643 WLD*. The discretion referred to in Rule 6(5) (e) must be exercised judiciously. As was observed by the court in *James Brown & Hammer (Pty) Ltd v Simmons N.O. 1963(4) SA 656(A) at 660 D-H* that "It is in the interest of the administration of justice that the well known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied, some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him must necessarily also be permitted. Where, as in

the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the court, he must both advance his explanation of why the affidavit is out of time and satisfy the court that, although the affidavit is late it should, having regard to all the circumstances of the case, nevertheless be received....." The nature of the proceedings and the importance of the case may play a role to avoid miscarriage of justice. The court in the exercise of its discretion must safeguard that severe prejudice does not occur to the other party. Considerations of justice and fairness are of vital importance when the court is concerned with the interpretation of procedural rules.

- [28] New evidence on appeal may be admitted in terms of section 22(a) of the Supreme Court Act 59 of 1959. "A court of appeal should exercise this power sparingly and only if the further evidence is reliable, weighty and material – presumably to be believed. In addition, there must be an acceptable explanation for the fact that the evidence was not adduced in the trial court" – Bertelsmann AJA for the majority in *Dornell Properties 282 CC v Renasa Ins Co Ltd NNO 2011(1) SA 70 SCA* quoting with approval from the judgment of Wessels CJ in *Colman v Dumba 1933 AD 141 at 162*.
- [29] Our courts have refused to admit new evidence on appeal where there is no reasonably sufficient explanation for the failure to tender the evidence earlier in the proceedings, emphasising that the admission of new evidence during an appeal hearing is likely to be permitted even more rarely – *President of the RSA v Quaglini & Two similar cases 2009(2) SA 466(CC)*.
- [30] It is crucial to note that in their affidavit filed in support of the application for receipt of further evidence, the respondent only refer to the present application and not to the initial application and the appeals thereto. They submit that the information set out in the affidavit of former President Thabo Mbeki constitutes exceptional circumstances in that the information is material and relevant to a just and equitable determination of the dispute between the parties. On the reason why the affidavit was filed late they say that the former President Mbeki was busy with the tasks allocated to him by the United Nations and the African Union. The reason that this evidence was

not tendered at an earlier stage is essentially that the request for the record was directed to the information officer. They also contend that the evidence itself is factual and in all circumstances of this case, no real prejudice will be suffered by the applicant should this evidence be received by this court. That this evidence provides some of the answers that have been raised at prior hearings with regard to the purpose of the Justices' mission to Zimbabwe and in this respect it enlightens the court on material issues.

[31] The respondents fail to give a reasonably sufficient explanation why the evidence was not tendered at an earlier stage. They also do not give details of when former President Mbeki was performing United Nations and African Union duties. There is no explanation of the real prejudice that will not be suffered by the applicant which may not amount to injustice and unfairness. The respondents merely state bold statements without substance.

[32] While one accepts that this court sits as a court of first instance in proceedings in terms of section 80(3), in the same vein one cannot be oblivious of the fact that this matter has travelled a 'vicious' circle. It started in the High Court with an appeal in the SCA and finally to the Constitutional Court on another appeal and back to this court. It therefore begs the question why the affidavit of former President Mbeki was not produced at the initial stage and in particular during appeal proceedings in the SCA and the Constitutional Court. Moreover, both the High Court and the SCA raised the issue of insufficient evidence to justify the exemptions claimed. The respondents nevertheless concede that the new evidence was filed late and that it could have been tendered at an earlier stage. It is also common cause that the hands of the applicant are tied by the fact that the record was not made available to them and as a consequence they cannot refer to its contents. In that regard the applicant is less equipped than the respondents. If the affidavit is received as new evidence the applicant will suffer real prejudice. Only the most exceptional circumstances could justify the admission of the supplementary material sought to be tendered. Such circumstances simply do not exist.

[33] In their application in terms of Rule 6(5) the respondents annexed only the affidavit of former President Mbeki, hence in my discussion above, I only referred to his affidavit. The affidavit of President Zuma was annexed without any explanatory affidavit by the attorney of the respondents. It does not seem to form part of the application. Even in the event that President Zuma's affidavit was properly filed, it wouldn't meet the muster of the procedural rules. In the first place it was filed late and there is no satisfactory explanation why it was filed late.

[34] Just as it is the case with former President Mbeki's affidavit, there is no reasonably sufficient explanation, based on allegations which may be true, why the evidence of President Zuma was not led at the hearing of the initial application. The affidavit of President Zuma cannot be said to reflect a prima facie likelihood of the truth of the evidence, since he has no personal knowledge of the facts he attested to. Although it can be accepted that the evidence is materially relevant to the outcome of the trial, same is plagued by the fact that the President bears no personal knowledge to the events. Non-fulfilment of any of these requirements is ordinarily fatal to the application. It is incumbent upon this court to mention that it is aware of the serious consequences which may ensue to the state of refusal to permit the evidence of both former President Mbeki and the current President Zuma to be received, but the due administration of justice would be greatly prejudiced if such permission were lightly granted – See *Rex v Carr 1949(2) SA 693(A)*.

[35] Section 80 does not spell out the circumstances under which the power to examine the record may be exercised. It is a discretionary power that must be exercised judiciously with regard to the constitutional right of access to information and the difficulties the parties face in presenting and producing evidence. It does not "open the floodgates" for one party to snick new evidence through the back door. *"A court should not use its powers under section 80 as a substitute for the public body laying a proper basis for its refusal". "By using its powers under section 80 to call for additional evidence.....the state is neither supplementing the state case nor making out a case for the requester"* - President of the Republic of South Africa and

others v M&G Media Ltd supra at 68 – paras 49-50. Based on the reasoning above the two affidavits cannot be admitted into evidence.

The three previous judgments in this matter.

- [36] Despite the fact that this is a de novo hearing of the application in terms of section 80 of PAIA, in the light of the report which was made available to this court, the original decision of the High Court and the decision of the SCA are relevant. I say this in the full understanding that the two judgments were overturned by the majority judgment in the Constitutional Court. Also critical to this argument is that in my view the contents of the report now in my possession resonate with the reasoning in the original High Court case, the SCA decision and the minority judgment in the constitutional case.
- [37] However on deciding the merits of the exemptions claimed this court does not only rely on the evidence which was presented before the previous courts. The emphasis has now shifted to the report placed before the court. This court has the advantage of being acquainted with the contents of the record.
- [38] Court proceedings under PAIA are governed by sections 78-82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access.
- [39] In the original application before Sapire J, the respondents raised three defences to wit: that the record is excluded from the ambit of PAIA in terms of section 12(a) of that Act, because it is a record of cabinet. This contention was rejected on the basis that it is factually incorrect in that the two justices had to report directly to the President and not to the cabinet.
- [40] The originally cited grounds of refusal of access were couched in terms of sections 41(1) (b) (1) and 44(1) (a) of PAIA. Under section 41(1) (b) (i) of

PAIA the respondents contended that the report is excluded from the provisions of PAIA because it contained information "supplied in confidence by or on behalf of another state or international organisation". This argument was rejected because of lack of evidence that the record contains information obtained in confidence. This is so because the affidavits on which respondents rely contain no allegations made by persons who have relevant personal first hand knowledge.

[41] Section 41(1) (b) (i) clothes the information officer with discretion to refuse a request for access. This ground was dismissed on the basis that no reasons established by evidence were identified. Only the Justices themselves or the persons from whom information was received can testify as to whether it was supplied in confidence by or on behalf of another state or organisation. The Justices were investigating "constitutional and legal matters". These are not obviously or necessarily of confidential nature. Further, the respondents made it quite clear in their affidavits that information in the report was not obtained exclusively from the Zimbabwean Government or its representatives. I can confirm that the report reflects the names of other organisations or institutions.

[42] The ground for refusal in terms of section 44(1)(a) of PAIA is that the report was "obtained or preparedfor the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law". Mr Fowler in his affidavit upon which the respondents relied, said "*that the President at the time, Mr Mbeki, appointed the Justices, inter alia, primarily to access the constitutional and legal issues that arose prior to the 2002 Presidential elections in Zimbabwe and report to him in his capacity as President and Head of State*". This submission was not sustained on the ground that the mission of the Justices was not to obtain material upon which the President could formulate policy. Basically, the contention was rejected because the report was not initially commissioned in order to enable the then President to formulate policy. According to Mr Fowler in his affidavit the President found the report useful in the formulation of policy only after he had obtained same. This was not his initial intention. Sapire J then concluded that as a consequence the respondents failed to

discharge the onus placed on them to establish their fabrication for non-disclosure.

[43] We know by now that the SCA upheld the decision of Sapire J in the High Court. There is no need to repeat the reasons made by the SCA in reaching its conclusions, save to say that the SCA discounted the evidence of the respondents (appellants in the appeal case) on the basis that their deponents in their affidavits made rote recitations of the relevant sections and bald assertions that the report falls within their terms. As for Mr Fowler he is said to have adopted a 'belt and braces' approach. The SCA rejected Rev Chikane's evidence because he did not give any detail of how the information was obtained, and further that the court was not concerned with probabilities. According to Nugent JA, there are three people who had direct knowledge of the mandate that was given to the justices – Former President Mbeki and the two Justices. The SCA therefore dismissed the appeal on the ground that the respondents failed to give reasons for the exemptions raised in terms of sections 41(1)(b)(i) and 44(1)(a) and that the respondents did not exercise a discretion.

[44] The dicta of the SCA above on the discharge of evidentiary burden was supported by the majority judgment of the Constitutional Court in *President of RSA v M&G Media* supra page 57 para 18. Ngcobo CJ writing for the majority observed, *"the state may not rely on affidavits that are conclusory, merely repeat the language of the statute, or are founded upon sweeping and vague claims. Affidavits must subscribe the justification for non-disclosure with reasonably specific detail for the requester of information to be able to mount an effective case against the agency's claim for exemption. In the United States, public policy favours disclosure of information and this requires that exemptions be construed narrowly. In addition, courts consider the burden borne by the government refusing access to information with an awareness that the requesting plaintiff is at a distinct disadvantage in attempting to controvert an agency's claims regarding the nature and contents of the record"*.

- [45] Unlike in *Hayden v National Security Agency supra*, where the court resorted to an in camera review, this court followed the ex parte representations procedure. In both the United States and South Africa courts engage in a de novo review of the lawfulness of the refusal, whereas the Canadian courts limit their review to whether or not the refusal was reasonable. In my view the test to establish de novo lawfulness of the refusal is more stringent than the reasonableness.
- [46] The Constitutional Court also agreed with the SCA that a deponent's assertion that information is within his or her personal knowledge is of little value without some indication at least from the context, of how that knowledge was acquired. An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit - *The President of RSA v M&G Media Ltd supra* at 61 para 28. The court qualified this dictum by stating that "*the opportunity to acquire knowledge may emerge from duties of the deponent and the office he or she occupies, as well as the seniority of the deponent within the office and his or her prior experience with similar activities or procedures within the office*" - *The President of RSA v M&G Media supra* page 62 para 31.
- [47] Paramount to the above dicta, the court emphasised that while the principle in *Barclays National Bank Ltd v Love 1975(2) SA 514(D)* and its progeny applies generally in civil proceedings, the principle must be applied with caution in access to information cases. What must be borne in mind is that access to information disputes are concerned with a constitutional right. In addition, the scheme of PAIA is such that information must be disclosed unless it is exempt from disclosure under one or more narrowly construed exemptions. And what is more the holder of information bears the onus of establishing that the refusal of access to the record is justified under PAIA. The say so of a deponent that he or she has personal knowledge of the facts that put the record within one or more exemptions is not sufficient without an indication, at least from the context, of how that knowledge was acquired - *The President of RSA v M&G Media supra* page 62 para 30.

[48] The Constitutional Court was alive to the challenges faced by both the appellants and the respondents in the appeal case. The state alleged that its hands were tied by the provisions of sections 25(3)(b) and 77(5) (b) in presenting evidence in support of its claims to exemptions, whereas M&G was not in a position to effectively challenge the evidence of the state, in particular with regards to the contents of the report and the personal knowledge the deponents asserted of the mandate of the judges who undertook the mission, and there was the question of severability of the report, as the state admitted that portions of it did not contain confidential information.

[49] I have already intimated above that the disclosure of the record is supported by the minority judgment of the CC which upheld the decisions of the High Court and the SCA. The reasons of Cameron J in support of the order he made appear elsewhere in the judgment. It is not necessary to repeat same in this judgment.

The exemptions claimed under sections 41(1) (b) (i) and 44(1) (a) of PAIA.

[50] The high water-mark of this case is rooted in two exemptions claimed by the respondents under sections 41(1)(b)(i) and 44(1)(a) of PAIA. The respondents contend that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to section 41(1)(b)(i) of PAIA and second, that the report had been prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe as contemplated in section 44(1) (a) of PAIA. The applicant argues that the state has not discharged its statutory burden imposed by section 81(3) of PAIA of establishing that its refusal to grant access to the report was justified by either of the exemptions it claimed under sections 41(1)(b)(i) and 44(1) (a). Both parties argue that their hands are tied. The respondents allege that it was hamstrung by provisions of sections 25(3)(b) and 77(5)(b) from presenting further evidence in support of their claim to the exemptions. As a consequence they cannot refer to the contents of the report. On the other hand, the applicant argues that since it has no access to the report it cannot challenge the evidence of

the state, in particular with regard to the contents of the mandate of the judges who undertook the mission and also in respect of the severability of the report. However, the state admits that the report contains some information that is not confidential. The issues of public interest and potential harm are also raised. All these issues will be decided in the light of the contents of the report.

- [51] The evidence of the Deputy Information Officer and the Minister in the Presidency can be discounted on the basis that they were not personally involved in the events preceding the mission of the two justices to Zimbabwe. The testimony of the Director General can be excluded on the ground that he did not provide details in his affidavit as to how his position in the Presidency afforded him the opportunity to have acquired personal knowledge of the judges' mandate. Rev Chikane, as Director-General must have had personal knowledge of such events as the Director General in the Presidency. However, this is mired by the submission on behalf of the respondents that the two justices had to report personally to the former President Mbeki who was of the view that a report made directly to him would assist him and the national executive to take policy decisions on how best to support and strengthen the quest for political and economic stability in Zimbabwe and in the region.....this therefore removes Rev Chikane from the picture as the person who bears personal knowledge to the Zimbabwean mission. Even if one were to assume that he bears personal knowledge to the facts, in the absence of the evidence of Former President Mbeki the respondents' case remains mystified. Once Sapire J, decided that there was insufficient evidence to support the withholding of the record by the respondents, the writing was on the wall for more evidence to be presented to justify the exemptions claimed. The affidavits of Former President Mbeki and the current President ought to have been filed on appeal in the Supreme Court of Appeal and later to the Constitutional Court. I say this against the backdrop that the respondents' hands are tied by sections 25(3) (b) and 77(5) (b). Despite these constraints based on the contents of the report I do not see how section 80 can support the cause of the respondents for non-disclosure.

[52] In my view, and it is supported by the contents of the report, there are three people who have direct knowledge of the mandate that was given to the judges – Former President Mbeki and the two Justices. Questions have been raised why the two justices did not depose to affidavits. I do not wish to act as pontiff for Justices Khampepe and Moseneke. I think they accepted to act as envoys of the former President in good faith as a call to national duty. Their acceptance to act as envoys must not be seen as succumbing to an agreement to a transduction of the division of powers. This must be assessed against the background that the then late Chief Justice Arthur Chaskalson, himself a proponent of the separation of powers, had sanctioned the appointment of the two Justices as envoys on a mission in Zimbabwe. To date we do not know why their affidavits were not filed, which omission cannot be blamed on them.

[53] I disallowed the filing of the affidavits of former President Mbeki and President Zuma on the principle that they were only filed more than three years after the hearing of the first application by this court. The respondents had an opportunity to file these affidavits during the appeal hearing in the SCA and in the Constitutional Court.

[54] The Constitutional Court was at pains to emphasise in its majority judgment that when acting in terms of section 80 of PAIA, courts are empowered to call for additional evidence in the form of the contested record. – President of RSA v M&G Media supra at page 62 para 33 and at 63 para 37.....“it is proper for a court to exercise its discretion under section 80 to call for additional evidence in the form of the record”. And at 65 para 44.....“call for additional evidence in the form of the contested record”.....and at 66 para 47 “.....it would be in the interest of justice for the court to invoke section 80 in order to responsibly decide the merits on the basis of the additional evidence provided by the record”. This is an indication that evidence aliunde can only be called upon under exceptional circumstances. The only exceptional circumstance in this case is that parties are constrained by the provisions of sections 25 (3) (b) and 77(5). These constraints have been alleviated by the invocation of section 80 of PAIA. If this section does not assist the respondents then it is the end of the story.

[55] Counsel for the State during their oral argument in the Constitutional Court conceded that the mere statement by an Information officer that a record falls within the exemptions claimed is insufficient, without more to discharge the state's burden under section 82(3). The Constitutional Court itself in its majority judgment emphasised that the recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the state – *President of RSA v M&G Media* supra at 60 para 24. I am aware of the guidelines offered by the Constitutional Court in its judgment at 61- 62 paras 28, 29, 30, 31, 32 and 33. I deem these guidelines to be referring to section 80 of PAIA and how it should be invoked. The emphasis is still on the record and if the contents of the record prove otherwise then the applicant must succeed.

[56] I am satisfied that enough has been said about the reliance on the exemptions in terms of sections 4(1) (b) (i) and 44(1) (a). I find that on a balance of probabilities the state has failed to discharge the burden placed on it under section 81(3) of PAIA.

The outcome of the judicial peek:

[57] It is instructive to mention that in my evaluation of the outcome of the judicial peek, I may not disclose those material aspects of the contents of the report which may compromise any possible appeal process to the superior courts. My hands are tied thereby.

[58] I can however disclose that on the 12 February 2002 former President Thabo Mbeki appointed a Judicial Observer Mission ("Jom") to the Zimbabwe Presidential elections composed of Justices Moseneke and Khampepe. The terms of reference of Jom were to observe and to report to the President of South Africa on whether in the period before, during and shortly after the elections;

- (i) the Constitution, electoral laws and any other laws of Zimbabwe relevant to the elections ("the legislative framework") could ensure credible or substantially free and fair elections, and
- (ii) the elections had been conducted in substantial compliance with legislative framework.

[59] The contents of the report do not support the first ground that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to section 41 (1)(b)(i) of PAIA. There is also no indication that the report was prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in section 44(1)(a) of PAIA. The terms of reference above are opposite to this conclusion. It can be mentioned at this stage that the report gives a balanced overview of the events prior to, during and shortly after the elections. In fact the report criticises and gives credit to the parties concerned where it is necessary. It will therefore be disingenuous for any party to decry any lack of transparency.

[60] Citing with approval the formulation of section 11 of PAIA, the Constitutional Court in *Brümmer v Minister for Social Development and others, 2009(6) SA 323(CC)* remarked as follows: "*the importance of this rightin a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these "founding" values, the public must have access to information held by the "state". Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information*".

[61] It is common cause that the applicant complied with all procedural requirements pertaining to the request for information in possession of the state. This includes up to the appeal stage within the Presidency. Under our laws, the disclosure of information is the rule and exemption from disclosure is the exception. The default position in respect of access to information held by the state is that of disclosure.

[62] As already stated, the state relies on the provisions of section 4(1)(b)(i) and section 44(1)(a)(i) of PAIA in withholding the report. As correctly submitted by the applicant, it is common cause on the papers that the report contains the findings of the two Justices regarding the conduct of the Zimbabwean elections, such as whether the legal requirements for the elections were met. I can now confirm that this is what the report reflects. This can never reasonably be construed as information supplied in confidence by or on behalf of another state. In my view most of the information is public knowledge. The report itself does not reveal that it was intended to be kept secret. Further, information provided by individuals who happen to be members of the public service cannot be said to be information supplied by or on behalf of another state. Moreover, the information was supplied also by persons who do not qualify as members of another state. Information was also supplied by independent lawyers.

[63] The dicta in the case of *Kuljer v EU Council (No 2)* [2002] 1 WLR 1941 (Ct of 1st Inst EC) is relevant to this application. The court held that the report did not qualify under the relevant international relations exemption, stating that:

"The mere fact that certain documents contain information or negative statements about the political situation, or the protection of human rights, in a third country does not necessarily mean that access to them may be denied on the basis that there is a risk that public interest may be undermined. That fact, in itself and in the abstract, is not sufficient basis for refusing a request for access. Rather, refusal of access to the reports in question must be founded on an analysis of factors specific to the contents or context of each report from which it can be concluded that, because of certain specific circumstances, disclosure of such a document would pose a danger to a particular public interest. As regards their contents, the reports at issue do not concern directly or primarily the relations of the European Union with the countries concerned. They contain an analysis of the political situation and of the position as regards the protection of human rights in general in each of those countries and also refer to the ratification of international treaties concerning human rights. They also contain more specific information on the protection of human rights the possibility of internal migration to escape

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persecution, the return of nationals to their country of origin and the economic and social situation'.

- [64] The applicant also argues correctly that the state concession that the use of the report in policy assistance was a *"related purpose which arose later once the President had sight of the report"*. This means that the jurisdictional requirement that the report was obtained or prepared for policy assistance is not met. The report reveals that Jom had to ensure credible or substantially free and fair elections and that the elections were conducted in substantial compliance with the legislative framework. The report in my possession also deals with issues pertaining to human rights. The respondents have therefore failed to establish a proper basis for these grounds.

The Section 46 of PAIA override

- [65] The applicant submits that the requirements of section 46 of PAIA are mandatory where access to a report is denied under, for example, section 41(1)(b)(i) or 44(1)(a). The respondents are of the view that the section 46 override must be considered with particular reference to the court's question *"whether the progress made through the Global Political Agreement (GPA) process in Zimbabwe will impact on the release or otherwise of the report. Has the facilitation progress made so far in Zimbabwe not overtaken public interest or the harm contemplated in section 46 of PAIA"* In my view the argument on the GPA has since become academic in view of the fact that the affidavit of President Zuma has been excluded from evidence. However, the role that the President of the Republic of South Africa plays through the GPA cannot be underestimated because it is vital to the economic and political stability within the region.

- [66] The relevant provision of section 46 of PAIA reads as follows:

"Despite any other provision of this chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section.....41(1)(b)(i).....or 44(1) (a) if –

- (a) *the disclosure of the record would reveal evidence of –*
- (i) *a substantial contravention of a failure to comply with, the law; or*
 - (ii) *an imminent and serious public safety or environmental risk;*
and
- (b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question”.*

[67] Without disclosing the details of the contents of the report I can reveal that the report potentially discloses evidence of a substantial contravention of, or failure to comply with the law. The question pertaining to the GPA has been rendered moot and it is not necessary to consider it. I am of the view that the public interest supersedes the harm that may ensue should the report be released.

Severability

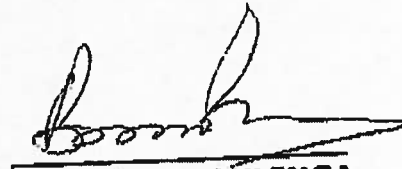
[68] It is the contention of the respondents that the report cannot be severed or redacted. This contention is not borne out by the contents of the report. The report is divided into sections and paragraphs. It is therefore possible that parts of the report can be redacted. This issue too, has become moot because I have already dismissed the other grounds for non-disclosure.

Conclusion

[69] In the circumstances I make the following order:

- (1) The refusal by the respondents for access to the report is set aside.
- (2) The respondents are ordered to make a copy of the report available to the applicant within ten days of this order.
- (3) In the event that the respondents note an appeal to this judgement, the report shall remain embargoed until finalisation of the appeal process.

- (4) The respondents are ordered to pay costs occasioned by the appearance of two Counsel.



TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

FOR THE APPLICANT: Adv J Gauntlett SC

Adv f Snykers SC

Adv Ismail

INSTRUCTED BY: Webber Wentzel

FOR THE RESPONDENT: Adv M T K Moerane SC

Adv Gcabashe

INSTRUCTED BY: State Attorney

HEARD ON: 14-15/06/12 & 06-07/08/12

DATE OF JUDGMENT: 14 February 2013