



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.:8090/2020

In the matter between:

WARREN THOMPSON

Applicant

and

**THE INFORMATION OFFICER: DEPARTMENT
OF DEFENCE AND MILITARY VETERANS**

First Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 21 MAY 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is the second judgment in Part B of the proceedings launched by the applicant in terms of the Promotion of Access to Information Act 2 of 2000 (“*PAIA*”). The order granted in the first judgment of 22 February 2024 (“*the first judgment*”) was as follows:

- a. The respondents are ordered, in terms of section 80 of the Promotion of Access to Information Act 2 of 2000, to deliver to the chambers of Mangcu-Lockwood J by end of 8 March 2024, the SANDF Board of Inquiry into the events

commonly referred to as the Battle of Bangui which took place in the Central African Republic between 22 and 24 March 2013.

b. Costs are reserved for later determination.”

[2] The respondents complied with the order and delivered a redacted version of the requested record, which comprises three Board of Inquiry (BOI) investigations that were conducted in 2013 and 2014. Bearing in mind the statutory injunction imposed by section 80 to not disclose the contents of the BOI files, they may loosely be described as investigations into firstly, the extent of personnel and equipment losses (BOI 12/2013); secondly, the circumstances surrounding the loss of certain weapons (BOI 22/2013); and thirdly, compliance with human resource policies of the Department of Defence and Military Veterans (*“the Department”*) (BOI 05/2013-2014).

[3] Having examined the record, the Court must now determine whether 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. In other words, the merits of the exemptions claimed in refusing to disclose the record remains to be considered.¹

[4] Section 80 provides as follows:

- (1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.
- (2) 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) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39(3) or 41(4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.

¹ See *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (14 February 2013) para 2.

(3) 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.”

[5] After having had sight of the requested record, I do not consider it necessary to resort to any of the options provided in terms of section 80(3)(a) to (c). There is nothing, in my view, which requires receipt of representations or the conduct of proceedings *in camera*. It must be remembered that the purpose of an order in terms of section 80 is to determine whether the record falls within the exemption claimed.² It is not to provide a further opportunity for either party to supplement its case.

[6] As stated in the previous judgment, the purpose for granting the section 80 order in this case was for the Court to be placed in a better position to assess the validity of two of the grounds relied upon by the respondents, given the paucity of information and evidence provided to justify reliance on those statutory exemptions. Those two grounds are ‘prejudice to bilateral or diplomatic relations’ based on section 41(1)(a)(iii), and ‘prejudice which may be caused to the defence or security of the Republic’ in terms of subsections (i) and (ii) of section 41(1)(a). Before discussing the respondents’ reliance on those two grounds, it is apposite to first deal with the ground on which they have steadfastly relied upon from the start, that granting access to the information requested would involve unreasonable disclosure of personal information about a third party, including a deceased individual, in terms of section 34(1).

B. REFUSAL BASED ON SECTION 34(1)

[7] Section 34(1) provides as follows:

“Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the

² *President of the Republic of South Africa and Others v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011) paras 41, 51-52.

unreasonable disclosure of personal information about a third party, including a deceased individual.”

[8] Expounding upon the respondents’ reliance on this ground, the Minister’s letter explains that, unlike the deceased soldiers, the names of the injured were not previously published and their permission would have to be obtained before publishing their names, details of their injuries and how they were injured. This information, says the letter, is considered to be private personal information which impacts directly on the injured soldiers’ persons and dignity, as well as the right of their families not to be exposed to such publicity.

[9] In part, the letter was correct that there was need to contact the affected third parties, because the reliance on section 34(1) triggered the application of sections 47 to 49 which deal with notification of affected third parties. Section 47(1) requires the information officer to “*take all reasonable steps to inform a third party to whom or which the record relates of the request*”. The notice can be verbal or in writing and must contain certain information, including the right of the third party to consent or make representations on the request.³ The third party may then either make written or oral representations supporting refusal, or consent in writing to disclosure, within 21 days. If the third party obtains knowledge of the request by means other than s 47(1), they may nevertheless make representations or so consent.⁴ If consent is given, access to the records may not be withheld.⁵ If, despite representations to the contrary, the request is granted, any third party who made representations has the right to be notified of the outcome and of the right of internal appeal available to them. If that fails, the third party has the right to approach a court under s 78(3).

[10] As the Supreme Court of Appeal (SCA) has observed⁶, what third parties have in terms of these provisions is a right to be notified of a request if reasonable steps taken

³ Section 47(3).

⁴ Section 48(2).

⁵ See s 34(2)(a), s 35(2), s 36(2)(b), s 37(2)(b) and s 42(5)(b).

⁶ *South African History Archive Trust v South African Reserve Bank and Another* (17/19) [2020] ZASCA 56; [2020] 3 All SA 380 (SCA); 2020 (6) SA 127 (SCA); 2020 (12) BCLR 1427 (SCA) (29 May 2020) para 12.

by the information officer would achieve this. If consent is given by a third party, the information officer has no discretion to refuse access. If a decision is made to refuse access, and the requester proceeds with an application to court to review that decision, Rule 3(5)(a) promulgated under PAIA⁷ requires the information officer or head of the body to give notice of such application to the third party concerned and to attach a copy of the application papers.

[11] However, section 49(1) does not grant third parties a veto power over the decision of the information officer.⁸ Their representations must simply be given the weight that they deserve. The only veto in the hands of a third party is to take away the power of the information officer to make a decision by consenting in writing. Access to the records must then be given. That interpretation is also supported by the provisions of section 49(2) which provide for a decision to be made where it is not possible to inform all third parties, despite reasonable steps being taken to do so, as follows:

‘If, after all reasonable steps have been taken as required by section 47(1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, any decision whether to grant the request for access must be made with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused.’

[12] In other words, section 49(2) creates an exception which empowers an information officer to make a decision without the third party having had an opportunity to be heard, and applies only if all reasonable steps were taken to notify a third party; and despite such steps, the third party was not informed; and the third party did not make representations in terms of section 48.⁹

[13] The legal position therefore is that, although the respondents were required to notify the affected third parties regarding the applicant’s request, the notification was not for the purposes of obtaining permission. And even if the third parties had made

⁷ Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000 GN R965 in GG 32622 of 09-10-2009.

⁸ *South African History Archive Trust v South African Reserve Bank and Another*, para 18.

⁹ *South African History Archive Trust v The South African Reserve Bank and Another* paras 19 and 20.

representations objecting to disclosure of the information, the information officer would still have been permitted to disclose the information to the applicant if the provisions above were met. The same would apply if reasonable steps were taken to notify third parties but no representations were made, or the third parties were not informed despite reasonable steps being taken to notify them.

[14] As I have already indicated previously, the outcome of the Part A proceedings was an order for compliance with the requirement to notify the third parties, and it is common ground that the respondents have since complied with that order. Thus, to the extent that the respondents seek to rely on their failure to notify the third parties as justification for reliance on section 34(1), that can no longer avail them.

[15] Furthermore, there is no indication in the papers that any response was received to that notification from any of the third parties. Instead, it is the applicant who has attached affidavits from Ms Bojane, the widow of a deceased soldier; Ms Phirimana, the sister of a deceased soldier; and Ms Molohe, the mother of a deceased soldier, indicating that they have no objection to disclosure of the requested information to the applicant. The applicant also relies on an article from the Daily Maverick dated 26 March 2021, which is said to be an open letter to President Ramaphosa from the widows and partners of those who lost their lives in the Battle, seeking, essentially, answers regarding the loss of the soldiers' lives. The contents of the Daily Maverick article are, however, not confirmed on oath, and there is no application for their admission as evidence according to the normal rules. It goes without saying that the article cannot be elevated to evidence. However, I am willing to accept that it confirms the extent of public interest in the matter, an issue which is not in dispute before me.¹⁰

¹⁰ See *The President of the Republic of South Africa and Others v M & G Media Ltd* (2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA); [2011] 3 All SA 56 (SCA)) [2010] ZASCA 177; 570/2010 (14 December 2010) para [17].

[16] As for the affidavits attached, I note that they do not represent all of the affected third parties but only affected persons connected to three soldiers. And the affected persons relate to deceased soldiers, not to injured soldiers, which is the category whose disclosure the respondents specifically object to. Nevertheless, it is common cause that all the affected third parties, including those of injured soldiers, have now been notified of the applicant's PAIA request and of these proceedings, and as the law set out above indicates, it is not their permission that is required but their notification, which has now been undertaken pursuant to the Part A judgment. And as I have indicated, no objection to granting access to the requested record has been received.

[17] The relevance of the affidavits is located in section 34(2), which provides as follows:

“(2) A record may not be refused in terms of subsection (1) insofar as it consists of information –

- (a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;
- (b) that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;
- (c) already publicly available;
- (d) about an individual's physical or mental health, or well-being, who is under the care of the requester and who is –
 - (i) under the age of 18 years; or
 - (ii) incapable of understanding the nature of the request, and if giving access would be in the individual's best interests;
- (e) about an individual who is deceased and the requester is –
 - (i) the individual's next of kin; or
 - (ii) making the request with the written consent of the individual's next of kin; or
- (f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to –
 - (i) the fact that the individual is or was an official of that public body;

- (ii) the title, work address, work phone number and other similar particulars of the individual;
- (iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and
- (iv) the name of the individual on a record prepared by the individual in the course of employment.”

[18] As envisaged in subsection 34(2)(e), the applicant has obtained permission from the next of kin of some of the deceased soldiers to gain access to the requested record. In addition, to the extent that the record contains names of the deceased soldiers, they are already publicly available, which is undisputed, and this means they may be made available in terms of subsection (2)(c). Further, it is not in dispute that the said soldiers were officials of a public body and that the information sought relates to those positions and functions, as envisaged in subsection (2)(f).

[19] Furthermore, the applicant invited, if not challenged, the respondents to explain their stance that the information relating to injured soldiers is private personal information whilst the information relating to the deceased is not, stating that it is bereft of logic and substantiation. There remains no explanation from the respondents for this distinction.

[20] The applicant furthermore emphasizes that he does not seek personal information relating to the soldiers’ medical records, *postmortems* and photographs of the injured and deceased persons, which may be redacted if necessary. He states, however, that the names of the deceased and injured are not private matters or personal information which justify refusal. As I have observed, no case is made out by the respondents to establish why the names of the deceased or injured are exempt from disclosure. In this regard, I note that the definition of “*personal information*” in section 1 includes “*the name of a person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person*”. There is no case made out by the respondents regarding the applicability or otherwise of this provision.

[21] It must be remembered that it falls upon the respondents to make out a case that the information sought is protected from disclosure in terms of section 34(1). Reliance on that provision requires the information officer to set out facts which cause the record to fall within the ambit of the provision – in other words, why its disclosure would be unreasonable.¹¹ This the respondents have not done, despite invitation in the supplementary affidavit to do so. It remains unexplained why any of the contents of the record is exempt from disclosure in the circumstances of this matter. Save for reciting the contents of section 34(1), the respondents have failed to discharge the evidentiary burden placed upon them to make out a case for their reliance on section 34(1). It is settled law that it is not sufficient to recite the statutory language of the exemptions claimed.¹² The mere *ipse dixit* of affidavits merely stating that a record falls within the exemptions claimed without more does not meet the evidentiary burden placed upon the respondents.¹³

[22] I am accordingly of the view that access to the record should be granted, save that details of the soldiers' medical records, *postmortems* and photographs of the injured and deceased persons, which amount to personal information as defined in section 1, should be redacted.

[23] It would furthermore be unfair and not be in the interests of justice to take a judicial peek into the BOI record for the purposes of determining the respondents' reliance on the ground of section 34(1). In this regard, it bears repeating that judicial examination is not a substitute for the evidentiary burden placed upon the respondents to show that the statute's exemptions apply.¹⁴ As I have already made clear, it was for purposes of determining the other grounds relied upon that I requested the record, to which I now turn.

¹¹ See *South African History Archive Trust v The South African Reserve Bank and Another* para 37.

¹² *M&G 2012* para 23.

¹³ See *M&G 2012* para 24 and footnote 40.

¹⁴ *M&G 2012* para 126.

C. REFUSAL BASED ON SECTION 41(1)(a)(iii)

[24] Commencing with the respondents' reliance on section 41(1)(a)(iii), it provides:

“The information officer of a public body may refuse a request for access to a record of the body if its disclosure could reasonably be expected to cause prejudice to...subject to subsection (3), the international relations of the Republic”.

[25] It will be remembered that in relation to this ground the respondents firstly claimed that the reputation of South Africa would be damaged if the requested information were disclosed. I have already observed that no detail is provided despite invitation in the supplementary affidavit for the respondents to do so in this regard. Amongst other things, the respondents were invited to at least indicate what kind of prejudice they sought to rely upon – whether it was economic, financial, political or otherwise. No such indication was provided. But in any event, there is no provision in the PAIA, let alone section 41(1)(a)(iii), permitting refusal on that specific basis.

[26] The respondents also rely on bilateral or diplomatic relations which are said to be at stake if the information was made available. Due to the lack of detail provided by the respondents, and because of the contextual reading of the Minister's letter providing reasons, I assumed¹⁵ in favour of the respondents that the bilateral or diplomatic relations which are said to be at stake would include military and security considerations. However, from my perusal of the record there is no indication whatsoever of any bilateral or diplomatic relations with the CAR, let alone threats thereto that can be discerned. It can safely be stated that there is nothing in the files provided to me which even touches on relations with the government of the CAR, or any interactions with that government. Nor is there any indication that the investigations into the loss of military equipment and hardware, which form the subject of one of the BOI investigations, would jeopardise any such relations. Even bearing in mind that the standard required by the provision is not very high, requiring only that the information requested *'could reasonably be expected to cause prejudice'*, there is no such indication exhibited by the record. Furthermore, the respondents have not provided any indication

¹⁵ See part 1 judgment, para 33.

of how the contents of the record could reasonably be expected to cause prejudice to its relations with the CAR.

[27] In brief, not only have the respondents failed to make out a case for their reliance on the ground of ‘prejudice to bilateral or diplomatic relations’, but the contents of the record do not support their reliance on this ground. I also observe, as presaged by the applicant, that given the amount of time that has elapsed since the Battle of Bangui, there is no indication that disclosing the contents of BOI investigation findings into a battle fought over 10 years ago could jeopardize relations between South Africa and the CAR now. I state this mindful of the fact that the CAR has also been notified of these proceedings, pursuant to the first judgment, and have raised no such objection.

D. REFUSAL BASED ON SECTION 41(1)(a)(i) and (ii)

[28] I now deal with the respondents’ reliance on prejudice which may be caused to the defence or security of the Republic in terms of section 41(1)(a)(i) and (ii). It will be recalled that the Minister stated in her letter that the witness statements and evidence contained in the BOI deal with military combat strategies employed which ought not to be in the public domain. This, says the letter, includes highly sensitive information regarding the human capital involved, the military equipment used for diplomatic engagements between the South African Commanders and the Rebel Force Commanders, as well as the manner in which the soldiers died and were injured. The letter continues that the outcome of investigations into the loss of military equipment and hardware would reveal the nature of the military equipment lost in the combat, the nature and circumstances under which the equipment was lost, the nature of equipment which the military uses for certain types of combat, how many weapons of a particular calibre were dispatched to the CAR, how many were used, and how many were lost or destroyed.

[29] In general terms, the record supplied to me reveals details, from various accounts, of how the Battle ensued, including engagements between the South African contingent and the rebels, as well as the aftermath. Explanation of how the Battle ensued

lies at the heart of the applicant's PAIA application, and to the extent possible, I am of the view that it should be made available. That accords with the legal position that granting access is the rule, and refusing it is the exception.¹⁶ As a result, I am of the view that the respondents' generalised objection to disclosure of the manner in which the soldiers died and were injured, and the circumstances under which equipment was lost, goes to the heart of the PAIA request, and there is no basis laid to refuse access to the record on such an indiscriminate basis. Neither the Constitution of the Republic¹⁷, nor the provisions of PAIA permit such an arbitrary approach, and the defence force is subject to the provisions of the Constitution and the rule of law.¹⁸

[30] In this regard, it is relevant to have regard to the provisions of section 41(2) of PAIA which sets out the type of information that might be exempted from disclosure under section 41(1), as follows:

“

- (2) A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information –
 - (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;
 - (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of –
 - (i) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or
 - (ii) anything being designed, developed, produced or considered for use as weapons or such other equipment;
 - (c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of –
 - (i) any military force, unit or personnel; or
 - (ii) anybody or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities;
 - (d) held for the purpose of intelligence relating to –
 - (i) the defence of the Republic;

¹⁶ *President of the Republic of South Africa and Others v M & G Media Ltd* para 9.

¹⁷ Act 108 of 1996.

¹⁸ Constitution sections 198(c), 199(5) and 199(6).

- (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; or
- (iii) another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs;
- (e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d);
- (f) on the identity of a confidential source and any other source of information referred to in paragraph (d);
- (g) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or
- (h) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic...”

[31] Because the record contains accounts of combat with the rebels, it reveals information relating to military tactics or strategy undertaken in connection with the prevention, suppression or curtailment of subversive or hostile activities, as mentioned in 41(2)(a). However, from all accounts of the attack appearing in the record, indications are that the tactics and strategies used and described in the documents were used as a reaction to what was happening at the time. There is no indication that the tactics and strategies employed are permanent tactics of the South African forces and which have remained in use. That view is supported by the accounts of the manner in which the attack erupted and was engaged with, which indicates that the opposite is the case.

[32] As a result, any tactics and strategies employed in the Battle are not the kind whose disclosure could reasonably be expected to cause prejudice to the defence or security of the Republic today. No such case is made out by the respondents in any event. And unlike subsection (1)(a)(iii) in terms of which a timeframe is prescribed for consideration of whether or not access should be granted to a record according to section 41(3)¹⁹, there is no similar statutorily prescribed timeframe in respect of subsection (1)(a)(i) and (ii). There is no sanction against refusing access if a record came into

¹⁹ Section 41(3) provides: “A record may not be refused in terms of subsection (1)(a)(iii) if it came into existence more than 20 years before the request.”

existence less than 20 years before the request. All the more reason that the respondents are required to make out a case for why the defence and security of the Republic is prejudiced by the disclosure of the requested information now.

[33] Similar considerations apply to the argument that the record reveals the nature of equipment which the military uses for certain types of combat, including equipment used for communication between the South African forces and the rebels. From a reading of the record, there is no link between equipment used in this Battle as a type of equipment used specially for these types of combat, or any other specific type of combat. That is apparent from the context of the Battle described in the record, into whose detail I may not delve, but which makes it clear that the equipment used in this Battle, including for communication, is not always associated with the kind of altercation that ensued. It also becomes clear, when reading the record, what kind of equipment the South African forces were in possession of when the Battle erupted, and there is no indication that disclosure of such information could reasonably be expected to cause prejudice to the defence or security of the Republic today. No such case is made out by the respondents.

[34] Insofar as it is claimed that the record contains details of how many weapons of a particular calibre were dispatched to the CAR, how many were used, and how many were lost or destroyed, that is not apparent from the record, and is in fact the subject of one of the investigations, the conclusion of which does not provide a definitive outcome. I do not consider that to be reason to prevent disclosure of the record. In any event, even if it was found that the record does give such detail, the copy of the record submitted to me is redacted in so far as it provides descriptions of the equipment, and it remains intelligible, contrary to what is claimed by the respondents. Thus, I am of the view that, insofar as the file describes the equipment, it may be redacted if necessary but only to that extent.

[35] The record does display information relating to characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of military force, unit

or personnel as mentioned in section 42(2)(c)(i). It also contains similar information - vulnerabilities, performance, potential, deployment or functions - relating to bodies and persons responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities as mentioned in section 42(2)(c)(ii). However, similar to the considerations discussed above, there is no indication with regard to this exemption that any such vulnerabilities and performance of the South African forces displayed in the Battle persist or that they are able to cause prejudice to the defence and security of the Republic now. Furthermore, it would render the applicant's relief hollow if the information potentially falling within this exemption were not made available, because it is at the centre of the circumstances prevailing at the time that the Battle erupted and provides much-needed context.

[36] To summarise the above discussion, I do not consider it necessary or appropriate that the record should be withheld because, having had sight of it, I am of the view that it provides insightful information of how the Battle ensued, including circumstances under which some lives and equipment was lost. The record may, however, be redacted in the limited respects described above, and I am of the view that the limited redaction will not render the record unintelligible or otherwise affect the quality of its disclosure.

[37] There is otherwise no doubt that the subject-matter of this application holds significant national importance and public interest. I can do no better than to refer to the Parliamentary briefing by the Minister where she sought to clarify the circumstances under which the soldiers lost their lives in the Battle, an event she referred to as the *"biggest [loss] in the post-apartheid SANDF"*, and in respect of which there was *"overwhelming reaction of shock and concern"*. It was in this regard that she stated as follows: *"Let me assure all our people that, for us as a democratic government, it is absolutely essential that every South African should be allowed the space to demand accountability, and that government should provide answers that ensure such accountability"*. The Constitutional Court has expressed similar views when explaining

the importance of the constitutional right of access to information held by the State,²⁰ namely to give effect to accountability, responsiveness and openness, which are founding values of our constitutional democracy enshrined in section 1(d) of the Constitution.²¹

E. COSTS

[38] There is no reason why costs should not follow the result. In most respects the respondents have failed to make out a case for resisting the applicant's application. What is more is that, despite the statutory duty imposed upon the respondents to notify affected third parties, the respondents not only failed to comply with that requirement despite numerous requests from the applicant to do so, but also relied upon the fact that the third parties were not so informed as a defence in these proceedings. And it has taken these proceedings to ensure such compliance.

F. ORDER

[39] In the circumstances, the following order is made:

- a. The decision of the first respondent dated 25 October 2019 to refuse the applicant's request for access to information dated 23 June 2019, is reviewed and set aside (*"the PAIA request"*).
- b. The decision of the second respondent to dismiss the applicant's internal appeal against the refusal of his PAIA request, is reviewed and set aside.
- c. The respondents are ordered to provide the applicant with the information requested in the PAIA request within ten (10) days of the date of this

²⁰*Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at paras 62 - 63.

²¹ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012, para 10.

order, save that the record provided to the applicant may be redacted insofar as it contains the following:

- i. The deceased and injured soldiers' medical records, *postmortems* and photographs;
 - ii. Descriptions of the military and communication equipment used and lost in the Battle.
- d. The first and second respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved, in terms of scale C of Uniform Rule 67A, read with Rule 69, including costs of two counsel where so employed.

N. MANGCU-LOCKWOOD
Judge of the High Court