



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

Case Number: 2024-133414

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

DATE

SIGNATURE

In the matter between:

**PRETORIA HIGH SCHOOL FOR GIRLS:
SCHOOL GOVERNING BODY**

Applicant

and

THE GAUTENG DEPARTMENT OF EDUCATION

First Respondent

**THE HEAD OF DEPARTMENT: GAUTENG
DEPARTMENT OF EDUCATION**

Second Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, GAUTENG**

Third Respondent

THE MINISTER OF BASIC EDUCATION

Fourth Respondent

MDLADLAMBA ATTORNEYS INC

Fifth Respondent

MR MTHUTHEZELI MDLADLAMBA

Sixth Respondent

PRETORIA HIGH SCHOOL FOR GIRLS

Seventh Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 11 November 2025.

JUDGMENT

MOSHOANA, J

Introduction

[1] Although the present application concerns itself with procedural aspects of what may turn out to be a grotesque litigation, the dispute between the parties is blazed with what may be viewed as a political furore. At the centre of the dispute lies a well-meaning and highly regarded institution of learning known as Pretoria High Schools for Girls (PHSG). PHSG is not itself a stranger to controversy coloured with infelicitous allegations of racism, having itself been, in the recent past, embroiled in similar allegations. The genesis of the dispute relevant to the present application are allegations of racism levelled against twelve learners of PHSG. The allegations were investigated by the school and were found to be ill-founded. An institution of a high standing in society known as the Thabo Mbeki Foundation (TMF) also found, after reviewing the WhatsApp messages concerned, that the learners are not guilty of any form of racist conduct. In view of the subsequent poignant posture adopted, it is apparent that the Gauteng Department of Education (GDE) was not pleased with the outcome of the internal investigations that cleared the implicated learners.

[2] As a sequel, the Member of the Executive Council for Education, Gauteng (MEC) exercised his statutory powers envisaged in section 9(1) of the Gauteng School Education Act (GSEA)¹ and commissioned an investigation into allegations of racism at the PHSG. The School Governing Body (SGB) of the PHSG was not particularly pleased with the commissioning of this subsequent investigations given the conclusion already reached and supported as it were by the TMF. That notwithstanding, the investigations proceeded. Ultimately, a report of such investigations, which stands firmly at the centre of the present application, was generated. An extensive executive summary of the investigations was shared at a media conference summoned by the GDE and the MEC.

¹ Act 6 of 1995 as amended.

[3] However, a copy of the investigations report was not shared with the SGB. Aggrieved thereby, the chairperson of the SGB corresponded with the powers that be, seeking access to the copy of the investigations report. That plea was turned down and the chairperson was directed to the provisions of the Promotion of Access to Information Act (PAIA)².

[4] I interpose and mention that section 11(1) of PAIA affords a requester the right of access to records held by public bodies. That right was exercised by the SGB. Midstride the exercise of the section 11(1) right, the SGB launched the main application in two parts. Before Court in this instance is an interlocutory application in terms of Rule 30A of the Uniform Rules of Court. The present interlocutory application is opposed by the MEC, GDE and its Head of Department (HoD). Part A of the main application was launched to be heard on an urgent basis. The Part A of the main application emerged before my brother Motha J. After some considerable debate, as the Court transcript reveals, before Motha J, the SGB for reasons that are not altogether clear to this Court, opted to remove Part A of the main application from the urgent roll beaoned by Motha J. It is apparent form the Court transcript that the SGB toyed with an idea to seek for the recusal of Motha J. For reasons best known to the SGB that idea never eventuated. It is of course unclear whether Part A of the main application would still be enrolled before a Court or not. For all intents and purposes, Part A of the main application is still pending, unless formally withdrawn by the SGB.

Background facts

[5] Given the limited basis upon which the present interlocutory application oscillates, it shall be obsolete for this Court to punctiliously provide a full rendition of the factual matrix appertaining the dispute involving the parties before me. As already indicated above, the SGB is hot-on-the heels of the Report for the investigations as commissioned by the MEC, in the exercise of his statutory powers.

² Act 2 of 2000 as amended.

It is common cause that such a Report does exist. It is also common cause that the SGB had not set its eyes on the Report.

[6] Pertinent to the present interlocutory application, on or about 19 November 2024, the SGB caused a motion to be issued seeking reliefs in two parts. The urgent Part A of the motion was to be heard on 10 December 2024. For proper context, it behoves this Court to set out the terms of that motion in some needful details. The notice of motion read as follows:

"PART A

- 1 That the applicant's non-compliance with the rules relating to service and time periods be condoned and that the application be heard as one of urgency in terms of Rule 6(12)(a).
- 2 That the first, second, third and fifth respondents (*alternatively* the first second, third and sixth respondents) *be ordered to make available to the applicant the Investigative Report prepared and issued by the fifth respondent (alternatively by the sixth respondent) and to which reference is made in the media statement issued by the Gauteng Department of Education on 4 November 2024 ("the Report"), within 14 (fourteen) days from the date of this order.*
- 3 That the first, second and third respondents be prohibited from implementing any of the recommendations contained in the Report pending the finalisation of Part B of this Notice of Motion, subject thereto that this will fall away if the applicant fails to bring its review application as per paragraph 4 below within 40 (forty) days *from the date of receipt of the Report.*
- 4 That the applicant be directed to bring its review application envisaged in Part B hereof within 40 (forty) days *from date of receipt of the Report.*
- 5 That the costs of this Part A be costs in the cause.
- 6 Further and/or alternative relief.

PART B

- 7 Reviewing and setting aside the third respondent's *decision to institute the inquiry in terms of section 9* of the Gauteng Schools Education Act, 6 of 1995.

- 8 Reviewing and setting aside the findings and recommendations *contained in the Report*.
- 9 Reviewing and setting aside the *decision or decisions of the first, second and/or third respondents to implement the findings and recommendations contained in the report*.
- 10 ...
- 11 ...

TAKE NOTICE FURTHER THAT in terms of Rule 53(1), once the Part B review application is brought:

- (a) ...
- (b) The respondents will be required within 15 (fifteen) days after receipt of the affidavit in support of Part B initiating the review application, to dispatch to the Registrar of this Court the *record of the proceedings sought to be reviewed and set aside*, (including all correspondence, reports, memoranda, documents, evidence, transcripts of recorded proceedings and other information relied upon by the third respondent in taking the *decision to institute the enquiry* and by the fifth respondent (alternatively the sixth respondent) *in preparing the Report*, together with such reasons as they are by law required or desire to give or make, and to notify the applicant that they have done so."

[7] It is needful to interpose and mention that had the SGB succeeded with Part A, Motha J would have ordered that the Report be made available even before instituting the review application. Within 40 days of receipt of the Report being ordered to be availed, the SGB would have launched a review application. As it shall be discussed in due course, the Report was not to be part of the record of the proceedings sought to be reviewed and set aside. It would have served as a source document to base a review application. As a matter of the known review procedure, the applicant did not call upon the respondents to avail the Report in terms of Rule 53(1). The notice only called upon the respondents to avail documents relied upon to take the decision to institute the enquiry and more specifically documents in preparation of the Report. As at 19 November 2024, the SGB was minded to institute

the review application within 40 days of receipt of the Report being ordered to be availed. Surprisingly, in the present interlocutory application, the SGB's attorney Mr Marius van Staden testified that the review application was issued on 19 November 2024. This assertion is inconsistent with the notice of motion referred to above. Strange enough, the founding affidavit in support of the review application was delivered only on 13 December 2024. Mr van Staden testified that the 15 days for the despatch of the record contemplated in rule 53(1)(b) was reckoned from 13 December 2024. On 23 January 2025, being within the prescribed 15 days, the respondents delivered the rule 53 record. This, the SGB labelled a limping record, since the highly sought after Report did not find its way into the delivered record. It seems that, having abandoned the relief for its production before Motha J, the SGB was desiring to receive the Report through the rule 53(1)(b) procedure. Notably, the SGB left the PAIA request for the same Report half baked. That desire was with considerable regret dashed by the respondents.

[8] That notwithstanding, as indicated above, on or about 10 February 2025, the SGB launched the present application in terms of rule 30A of the Uniform Rules of Court. This being the third attempt, as it were, for the SGB to set its eyes on this seemingly much treasurable Report. Mr van Staden testified that the record delivered on 23 January 2025 was incomplete for reasons that the Report that was sought in the removed Part A proceedings was not included in the delivered record. Owing to that, the SGB invoked the provisions of Rule 30A by first issuing a notice contemplated in Rule 30A(1). The notice read as follows:

"KINDLY TAKE NOTICE THAT that the Applicant hereby notifies the First, Second and Third Respondents that they jointly or severally, *have failed to comply with their obligation in terms of Rule 53(1)(b) to file the record of the decisions being sought to be reviewed* (as per paragraph 6.2 of Mr Hezlett's affidavit of 13 December 2024), by failing to supply the Section 9 Report of the Sixth Respondent/Fifth Respondent ("the Report")".

[9] After the lapse of the 10 day period provided for in the Rule 30A(1) notice, the SGB launched the present interlocutory application specifically seeking compliance

with rule 53(1)(b) by despatching and uploading the Report. The interlocutory application is opposed by the first to the third respondent.

Analysis

[10] Counsel for the applicant agreed with a proposition from the bench that the present application greatly turns on whether, contrary to Rule 53(1)(b), as contended for by the SGB, the record delivered on 23 January 2025 was *incomplete* because it did not include the Report. As indicated earlier, there is no dispute that the Report does not form part of the delivered record. If the Report is, by law, required to be part of the record of the proceedings sought to be reviewed, the Rule 53(1)(b) record is, in that sense, incomplete. Counsel for the applicant submitted that Rule 53 does not have a prescribed procedure to compel compliance with its provisions. It was for that reason that the SGB sought refuge from Rule 30A.

[11] Rule 30A is there to remedy non-compliances with Rules and Court orders. In order for an applicant to succeed under this rule, the applicant must allege and prove non-compliance with a Rule. Therefore, in order to observe and appreciate the alleged non-compliance, this Court must consider the text of the Rule allegedly not complied with. At the dawn of this judgment, this Court remarked that the Report is not to be part of the record of proceedings contemplated in Rule 53(1)(b). In order to embellish that remark, strictly speaking, the review application was launched only on 13 December 2024. In terms of Rule 6(1) an application is constituted by a notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. A notice of motion alone without an affidavit does not constitute an application.

[12] Therefore, the application for review was launched on 13 December 2024. Of significance in the present interlocutory application is that before launching the review application, the SGB was in Court on 10 December 2024, seeking an order for the delivery of the Report. It must follow that the SGB needed the Report for the purposes of deciding whether to review it or not. That much is clear from the

testimony of Mr Hezlett tendered in the Part A proceedings that were before Motha J on 10 December 2024. Mr Hezlett testified as follows:

“This application also sets the scene for the relief sought in Part B of the Notice of Motion, the review application. However, the full affidavit or affidavits supporting Part B can *only be placed before court if and when the applicant has been provided with the Report* and had insight into all of the relevant documentation, including the documentation to which the MEC presumably have had regard in deciding whether to establish the Section 9 inquiry.

In terms of Part B of the Notice of Motion, *the applicant intends to bring* an application to review and set aside the decision to institute the inquiry as well as the Report...”

The ambit of Rule 53(1)(b)

[13] The question as to the ambit of this rule remains vexed in my considered view. As to what exactly this rule means, the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission*³ was compelled to produce three judgments, each of which interpreting the same rule differently. The first judgment (majority) penned by the erudite Madlanga J effectively concluded that the deliberations of the members of the Judicial Service Commission (JSC) form part of the record of proceedings contemplated in the rule. The second judgment (minority) penned by Jafta J concluded that on proper interpretation of the rule, the deliberations are to be excluded. The third judgment (dissenting minority) penned by Kollapen AJ, as he then was, concluded that the deliberations ought to be excluded. Although this Court finds much persuasion in the interpretation of the rule by Jafta J, on application of the *stare decisis et movere* doctrine, as a Court below, this Court is bound by the first judgment.

[14] This Court takes a view that the interpretation it seeks to advance in relation to the necessity of the Report for review purposes, finds support on proper reading of the first judgment. It is important to clearly delineate the issues at this stage. What the first judgment was involved with was the internal deliberations of the JSC as

³ 2018 (4) SA 1 (CC).

opposed to the recommendations (decision) of the JSC. In *casu*, the Report does not constitute deliberations. This distinction is important to bear in mind when considering the ratio of the first judgment. The erudite Madlanga J had the following to say:

“[23] Surely, deliberations are relevant to *the decision they precede* and to which they relate. Indeed, *HC SANRAL* correctly says so. They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like. Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process *leading up to the decision*.” [Own emphasis]

[15] It is crystal clear that the first judgment does not consider the deliberations as a decision but as information that precedes the decision. Undoubtedly, the sought after Report does not precede a decision, it is the decision itself. The above expressed view is not at odds with the view expressed by Jafta in the second judgment. The learned Jafta J said:

“[128] A proper reading of this text reveals that “proceedings” connotes a formal process... But in both instances “proceedings” mean a formal process. *This is buttressed by the distinction the rule draws between a decision and proceedings. The rule makes it plain that a review lies against the decision or proceedings and does not say a record of a decision must be delivered.* To this extent the drafters of the rule were aware of the fact that an application for review may be pursued against a decision where no record exists.” [Own emphasis].

[16] Rule 53(1) suggests that a notice of motion must be delivered by the party seeking to review a decision. Rule 53(2) provides that the notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by an affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected. It must be so, that a review application brought in terms of Rule 53 is constituted by a notice of motion supported by affidavit. Once a review application exists, the provisions of

Rule 53(1)(b) may be invoked. In terms of this sub-rule the decision-maker would firstly be called upon to despatch. The decision maker is ordinarily called upon by an applicant seeking to review the decision. The call is for the decision maker to despatch the “*record of such proceedings sought to be corrected or set aside*”. When regard is had to the provisions of rule 53(1) a party may seek to review (a) such decision or (b) proceedings. The Rule does not define what a decision or proceedings mean. Grammatically, the word decision means a conclusion or resolution reached after consideration. The word proceedings means an event or a series of activities involving a set procedure.

[17] Undoubtedly, in my considerably held view, the Report, being an aggregation of the investigation process, constitutes a decision and not proceedings. The word report when used as a noun means an account given of a particular matter, especially in the form of an official document after thorough investigation or consideration by an appointed person or body. It is of some immense significance to observe that Rule 53(1)(b) expressly mentions proceedings as opposed to a *decision*. Accordingly, the Rule allows a review applicant to only call for the record of the proceedings and not a decision as it were. A decision is a culmination of the proceedings and not a proceeding *per se*. In *Johannesburg City Council v The Administrator Transvaal and Another*⁴, the following was said about the words *record of proceedings*:

“The words “record of proceedings” cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, *at the time of the making of the decision* in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of *the material that was at the tribunal’s disposal*. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of the proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the

⁴ 1970 (2) SA 89 (T) at page 466-467.

announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it..." [Own emphasis]

[18] The first judgment in *Helen Suzman* only disagreed with the conclusion in *Johannesburg City Council* that the deliberations do not form part of the record of proceedings. The fact that the record of proceedings precedes the decision remains unaltered. The Report cannot be a piece of material that was before the decision maker. It did not exist as either a scrap of paper capable of throwing light on the proceedings procedurally or evidentially. It is illogical to consider the ultimate decision as a material that may find itself at the disposal of the decision maker. Such is more like stating that a Court judgment is a record of the proceedings. It cannot be. In fact, a Court judgment is an opinion of a judge and it has very limited evidentiary value⁵. Similarly, a report equates a court judgment and does not qualify to be a record of the proceedings. In *Murray and Others NNO v Ntombela and Others*⁶, the learned Petse DP writing for the majority after giving an imprimatur to *Johannesburg City Council* said the following, which supports the view of what a record means:

"[31] As Marais J rightly observed in *Johannesburg City Council*, a record as contemplated in rule 53(3) can take any form or shape. Where the decision, for example *was taken after a long and drawn-out enquiry the record may well run into multiple pages*. But there will no doubt be instances – not rare – where, as here, the record may comprise either a single document or a few pages. That will still constitute the record envisaged in rule 53(3)..."

[19] In summary, rule 53(1)(b) applies to the material that precedes the impugned decision. The impugned decision comes into being after the record of proceedings came into existence. To think that the Report (decision) is part of the record of proceedings is like putting the cart before the horses. Counsel for the applicant correctly conceded that the Report is incapable of being a record of proceedings in

⁵ See *Technology Corporate Management (Pty) Ltd and others v De Sousa and others* 2024 (5) SA 57 (SCA)

⁶ 2024 (4) SA 95 (SCA).

relation to the review of the impugned statutory decision to institute the investigations. The logical reasoning that pervades this well-made concession applies, in my considerable view, with equal vigour to the other two impugned decisions. Regrettably, this Court is unable to agree with a submission to the contrary. As far as the review of the Report is concerned, this Court finds it unfathomable for a party to review a decision that was never communicated to that party. There is a saying that what you do not know cannot hurt you. In that regard ignorance is bliss. This is not suggesting that the review of the Report is meritless. It simply points to the fact that there is no reviewable decision in law. As already stated above, the Report itself is a decision and not a record of proceedings. Regarding impugn of the decision to implement the Report, it is again unfathomable as to why the Report itself being the document to be implemented would constitute a record of proceedings. In view of the definition of the record of the proceedings, it must follow that by delivering the record on 23 January 2025, the respondents complied with Rule 53(1)(b). As an indication that a decision is not a record of proceedings, Lord Brightman in *Chief Constable of the North Wales Police v Evans*⁷, remarked as follows:

“Judicial review is concerned, not with the decision, *but with the decision-making process...*” [Own emphasis].

[20] Before this Court turns to the ambit of Rule 30A, it is apposite to consider what the SGB called the respondents to despatch in compliance with Rule 53(1)(b).

What were the respondents called upon to despatch?

[21] Correctly so, the SGB itself as an applicant for review did not call the respondents to despatch the Report. It must have dawned on the SGB that the Report is not a record of the proceedings to be reviewed but a decision. In Part A, the SGB was gunning for a compel order as opposed to calling for a despatch. To despatch means to send off to a destination or for a purpose. Rule 53(1) envisages that the call to despatch must be made in the notice of motion. Such a call is not an order *per se*. It does not constitute a relief or prayer. Where a party in a notice of

⁷ [1982] ALL ER14 [HL].

motion, as in here, seeks an order or relief for the delivery of a document, such a party is not calling for a despatch within the contemplation of Rule 53(1). That party is seeking a relief by way of enforcing an available right. By way of example, in an action situation, which situation may apply to application proceedings, if rule 35(13) is complied with, a party may rely on rule 35(3) to inspect and make copies of a document. Counsel for the applicant indicated to this Court that the SGB also invoked the provisions of rule 35(12) for production of the Report. The issue relating to the rule 35(12) was not placed before this Court for a decision of any form. The question whether rule 35(12) procedure is available for use by the SGB did not come up for the decision of this Court.

[22] If a party is not called upon to despatch, the provisions of Rule 53(1)(b) are simply not invoked. There are many instances where a decision may be reviewed without calling upon a party to despatch anything. For instance, in terms of section 6(2)(g) of PAJA, a failure to take a decision is a reviewable administrative action. In a failure to take a decision situation, a record of proceedings may not exist. In such situations, a call contemplated in rule 53(1)(b) may not be made. In *casu*, the SGB called upon the respondents firstly to despatch a record of the proceedings sought to be reviewed and set aside. This Court has already made a finding that the Report does not form part of the record of proceedings. Accordingly, this Court concludes that the respondents were not called upon to despatch the Report. Instead, for reasons best understood by the SGB, it resorted to seeking a relief in Part A for the delivery of the Report.

[23] This Court cares to ask, where does the SGB obtain a legal entitlement to a Report generated after the exercise of statutory powers? The only known legal entitlement arises from section 11 of PAIA. The SGB, under protest, it avers, half-heartedly exercised the section 11 right. For reasons best known to it, it made a *volte face* and decided not to see through the right available to it in section 11. Perhaps, there is merit in the submission unwaveringly made by the counsel for the respondents that the *volte face* was made upon realisation of legal obstacles on the way to championing the section 11 right. Such legal obstacles led the SGB to the road to Damascus. As an example, section 34(1) of PAIA provides that a request

must be refused if disclosure involves unreasonable disclosure of personal information about a third party. Such is an obstacle which cannot, in my view, be bypassed through the invocation of Rule 53(1) procedure. There are a barrage of other instances in PAIA where disclosure of the record may be refused. Like many other rights in the Bill of Rights, section 32(1)(a) right is subject to the limitations in section 36 of the Constitution.

[24] There is no doubt in the mind of this Court that the Report is a record as defined in section 1 of PAIA. In terms thereof, a record in relation to both a public or private body, means any recorded information, regardless of form or medium; in the possession or under the control of that public or private body respectively, whether or not it was created by that public or private body respectively. Where rights are availed by a statute, it cannot avail to a party to simply toss a coin, as it were, and choose what that party thinks will not be infested with legal obstacles. A party like the SGB cannot and should not be allowed to play musical chairs with the law simply for its convenience. Yes, a party has the freedom of choice, however, where the choice is actuated by a clear intention of the subversion of the law for selfish gratification, such freedom of choice is at odds with the rule of law. In fact, Jafta J in the second judgment of *Helen Suzman* expressed himself in the following perspicuous terms:

“[138] *Rule 53(1) may not be used to subvert PAIA.* If it is accepted, as it must be, that section 41 of PAIA may not be circumvented by employing rule 53 to achieve what could not be attained under the section, then by parity of reasoning, *the rule should not be used to achieve what PAIA excludes from its scope* giving effect to the right to access to information, and promoting the values of openness and transparency.” [Own emphasis]

[25] Using rule 53(1) for the subversive purpose is not far off from the doctrine of *self-help* which, in of itself, is inimical to the rule of law, so this Court opines. In *Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters*⁸, the Constitutional Court cautioned thus:

⁸ 2020 (4) BCLR 429 (CC).

[16] Section 7 of PAIA reflects the rationale that the right of access to information, as given effect to by PAIA, *should not be used to circumvent the particular rules of procedure in litigation* – litigants should not be afforded a dual system of access to information. In *PFE International SCA*, it was held that permitting “a dual system of access to information, in terms of both PAIA and the particular court rules, has the potential to be extremely disruptive to court proceedings...” [Own emphasis]

[26] This Court, as the second judgment did in *Helen Suzman*, reverberates and echo similar sentiments with regard to usage of Rule 53(1) procedure. Parties, I dare state, should not use the Rule 53(1) procedure as a safe haven, as it were, in order to scupper the provisions of PAIA. This Court fails to understand or even accept the assertion by the SGB that it resorted to PAIA under protest. In our law, no one may be forced to exercise a statutory right against his or her will. A law, be it common or statutory, exists to assert and enforce rights. Once the law is in place it must not be rendered what Charles Dickson refers to as “a law is an ass”. It cannot be used to defy common sense of justice. It is apparent to this Court that the SGB wishes to down play what happened to Part A. In Part A, the SGB was seriously minded to obtain an order for the delivery of the Report and it failed.

[27] A party who decides to remove a matter from the Court roll is juxtaposed to a party whose matter has been dismissed by a Court. He or she sojourned a Court and similarly returned empty handed. The SGB wished to obtain the Report by way of a Court order and it has failed to do so. Now that it has failed, it cannot, in my view, seek refuge under Rule 53(1). The Constitutional Court has long rejected the concept of forum shopping⁹. Seeking refuge under Rule 53 procedures is an equivalent of forum shopping. This Court asked and could not be provided with a clear answer, as to why the SGB made a *volte face* on the perfectly available statutory remedy in PAIA. In launching Court proceedings midstride the PAIA

⁹ *Chirwa v Transnet Limited and others* 2008 (4) SA 367 (CC) and *Gcaba v Minister of Safety and Security and others* 2010 (1) SA 238 (CC).

process, the SGB was inviting the section 7 of the PAIA exclusions upon itself. This was a self-inflicted exclusion. To use a sports metaphor, it handed itself a red card.

[28] Although this Court is not minded to uphold the *lis pendes* defence hoisted by the respondents, the SGB's remedy regarding access to the Report lies in PAIA as opposed to Rule 53(1)(b). *Lis pendes* as a defence is available when the same parties are involved in another litigation before a different forum staking for the same relief¹⁰. In the interest of finality and avoidance of conflicting decisions, the litigation initiated first must see its attenuation. The PAIA process has, for some unclear reasons, been attenuated midstride. Therefore, there is nothing pending. For these reasons, this Court is unable to uphold the hoisted *lis pendes* defence.

[29] Returning to the call made by the SGB in the notice of motion, secondly, the SGB called for a despatch of a host of material in preparation of the Report and not the Report itself. Regard being had to the notice of motion, the respondents were not called upon to despatch the Report. The fact that the Report did not form part of the record of the proceedings should not come as a surprise. Over and above the finding that it does not constitute a record of proceedings, the Report itself was simply not called upon for despatch. Accordingly, the conclusion to reach is that the SGB did not call upon the respondents to despatch the Report to the Registrar.

Is Rule 30A available for use?

[30] In order for Rule 30A to be invoked the following jurisdictional requirements must exist; (a) failure to comply with the rules; (b) failure to comply with a request or notice given pursuant thereto; (c) failure to comply with an order or direction made by a Court or in a judicial case management process. As confirmed by Jafta J in *Helen Suzman*, a Court dealing with a rule 30A application exercises a narrow discretion¹¹. In the present interlocutory application the SGB alleges a failure to comply with Rule 53(1)(b). The key determination to be made by this Court in the exercise of its narrow discretion and not the parties themselves is whether there was failure to

¹⁰ See *Western Assurance v Calderwall's Trustees* 1918 AD 262.

¹¹ See *Helen Suzman* para 118.

comply with Rule 53(1)(b) or not¹². Counsel for the applicant forcefully submitted that the respondents conceded that they failed to comply. In support of that submission reference was made to the pleadings where the SGB pleaded as follows:

“5.2 The Respondents through the State Attorney *delivered an incomplete Rule 53* record on 23 January 2025. It was incomplete because it did not include the Report.

[31] To that averment the deponent on behalf of the respondents testified that “*I admit the contents of this paragraph*”. The fallacy revealed by the averment made by the deponent of the SGB is that, it suggests that a Report is a record of proceedings contemplated in Rule 53. A Report is not a record of proceedings in terms of Rule 53. This Court has already expatiated as to why such is the case. It is settled law that where both parties agree on a fallacy in law, it remains the duty of a Court to state the correct legal position. Ngcobo J in *CUSA v Tao Ying Metal Industries and others*¹³, aptly stated the law to be as follows:

“[67] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers but the common approach of the parties proceeds on a wrong perception of what the law is a court is not only entitled, but is in fact also obliged *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise the result would be a decision premised on an incorrect application of law. That would infringe the principle of legality...”

[32] When this principle was canvassed with counsel for the SGB, in retort she submitted that the question whether the Report should form part of the record of proceedings is not a point of law but one of fact and such has been resolved by the admission that the record is incomplete. I disagree. Since the issue revolves around the question of compliance with a rule, it remains a point of law, which falls squarely within the remit of a Court. A point of law is a question about the interpretation or application of a law, statute, or legal principle. There can be no bifurcation between

¹² See *Helen Suzman* paras 79, 80 and 119.

¹³ 2009 (2) SA 204 (CC).

what the law states and the question of incompleteness of a rule 53(1) record. This Court is not addressing a simple factual question whether document X was omitted when it ought to have been included. The nuanced question is not whether the Report was omitted when it ought not to have been omitted, but whether the Report completes a record of proceedings in terms of rule 53(1)(b). The correct legal position is that absence of a Report does not legally mean that the record of proceedings is incomplete and its exclusion amounts to a failure to comply with Rule 53(1)(b).

[33] Additionally, the SGB pleaded that “It is common cause that the Report exists, and it can only be common cause that it is relevant (indeed highly relevant) in an application for its review”. To this averment, the respondent averred that “If the Applicant is of the view that the report should form part of the record, it should not proceed with the review application until the PAIA proceedings are finalised”.

[34] In an application of this nature, it does not take the *ipse dixit* of a party that a particular document is relevant or not. The issue of relevance, although closely related to the concept of necessity, does not necessarily feature in Rule 53. The first judgment in *Helen Suzman* made the point that information that bears no relevance to the subject of review need not form part of the record.¹⁴ What features, as decreed by Rule 53(3), is necessity. It is required of an applicant to cause copies of such portions of the record *as may be necessary for the purpose of review* to be made and shall furnish the registrar and the other parties with copies. It is true that a record of the proceedings to be reviewed and set aside benefits an applicant for review. However, such does not licence an applicant for review to demand, as it were, unnecessary documents, which are clearly not purposed for a review. According to the first judgment in *Helen Suzman*, in a PAIA situation documents may be requested for the sake of it¹⁵. Same is not the case in a Rule 53(1) situation. This Court, in this judgment has repeatedly stated that the Report given its aggregation nature is not necessary for a review application. Just to digress a bit, in terms of

¹⁴ See *Helen Suzman* para 52.

¹⁵ See *Helen Suzman* para 44 – “The person could be the classic busybody who wants access to information held by the state for the sake of it.”

PAJA, a reviewable administrative action is one that has a direct, external and adverse legal effects.

[35] Like findings and recommendations of a Commission of Inquiry, the investigative findings have no direct external and adverse legal effects¹⁶. Thus, not reviewable under PAJA. Equally, an investigative report itself is not an exercise of public or statutory power. Nowhere in section 9 of the GSA, is the MEC or the appointed investigator empowered to issue a report. Thus, a legality review may also not be available as a remedy. Something is necessary if it is required and indispensable in a sense. The SGB has never set an eye on the Report, as such it cannot vouchsafe its necessity in the review application, let alone its relevance. It is only once the SGB casts its eye over the Report that it can vouchsafe its necessity or relevance. For now, it is like wishing to buy a pig in a poke.

[36] The conclusion this Court reaches is that the respondents did not fail to comply with Rule 53(1)(b) as such the jurisdictional requirements to invoke the provisions of Rule 30A were not met in this instance.

Conclusions

[37] In summary, this Court concludes that the Report does not constitute a record of proceedings sought to be reviewed and set aside within the contemplation of Rule 53(1)(b). The record called upon and dispatched complies with the requirements of Rule 53(1)(b). The Report constitutes a record within the contemplation of PAIA and can be accessed using the rights guaranteed in PAIA. The SGB is not entitled to a dual process of access to information. The jurisdictional requirements in Rule 30A were not met. Accordingly, the SGB must fail.

¹⁶ See *Auditor-General South Africa v MEC for Economic Opportunities Western Cape and Another* 2022 (5) SA 44 (SCA) at para 32 – “In my view the exercise of the functions of the Auditor General in terms of the Constitution and the Public Audit Act does not constitute administrative action in terms of PAJA but is subject to review under the principles that stem from the rule of law.” See also *Memela v Chairperson of the State Capture Commission of Inquiry and others* (34177/22) [2025] ZAGPPHC 816(14 August 2025).

[38] Nevertheless, this Court fails to appreciate any palpable prejudice that the SGB suffers in adjudicating its already launched review application, in the absence of the Report. Particularly in the circumstances where, the extensive executive summary is at hand, as well as the media statement. Clearly, its section 34 Constitutional rights are not facing any measure of peril. Judicial review is a special remedy available for the unlawful exercise of administrative and public power. This Court suspects that the SGB requires the Report for self-gratification – the *aha* moment – no racism was found to exist, or to consider possible delictual action against various parties including the respondents. As held in *Helen Suzman* that purpose may be achieved through PAIA as opposed to rule 53(1). Such, in my considered view, is an abuse of Court processes and subversive in nature. As already stated, in action proceedings a party has at its disposal discovery procedures (rule 35). However, those are available post action and not pre-action.

Costs

[39] When it comes to costs, this Court possesses a wide discretion. Litigation between these parties is on-going and it promises to be acrimonious. A cost order at this stage may not be necessary. The appropriate order to make is one of making the costs of the present application to be costs in the cause.

Order

[40] For all the above reasons, I make the following order:

1. **The interlocutory application in terms of Rule 30A is dismissed.**
2. **Costs are costs in the cause.**

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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The State Attorney Pretoria

Date of the hearing:

30 October 2025

Date of judgment:

11 November 2025