IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/26339

DELETE WHICHEVER IS NOT APPLICABLE

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

In the application of:

LEON AMOS SCHREIBER First Applicant

THE DEMOCRATIC ALLIANCE Second Applicant

and

THE AFRICAN NATIONAL CONGRESS Respondent

Coram: Wepener J

Date of hearing: 30 January 2023

Date of judgment: 2 February 2023

This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge his secretary. The date of this Order is deemed to be 2 February 2023

Summary: Access to records In terms of the Promotion of Access to Information Act 2 of 2000 – Right to gain access dependant on right which requester wishes to exercise or protect. Such right not limited to fundamental Constitutional right. Compliance with provisions of PAIA is a necessary precondition to lodge an application to Court.

JUDGMENT

Wepener, J:

[1] The first applicant is Leon Schreiber ('Schreiber'), a member of the National Assembly who represents the second applicant, the Democratic Alliance ('DA'), in the National Assembly. The second applicant is the Democratic Alliance, a registered political party and body corporate with perpetual succession and capable of suing in its own name.

[2] The respondent is the African National Congress ('ANC') a registered political party. It is common cause that the ANC is a 'private body' for purposes of the Promotion of Access to Information Act[1] ('PAIA').

[3] The applicant seeks the following relief:

> '1. That the decision of the ANC to refuse the applicant's request for access to information dated 22 February 2021 is declared unlawful and invalid and is set aside.
>
> 2. That the ANC is directed to provide all of the information and records sought in the applicants' request for access to information dated 22 February 2021 within 5 court days.'

There is also the usual requests for costs.

---

[1] Act 2 of 2000.

[4] If regard is had to the affidavits filed in the matter there are a number of disputes that can be identified, save that I could discern no serious dispute of fact that may have a bearing on the issues to be determined.

[5] During the course of last year the applicants filed a supplementary affidavit in which its sought leave from the court to file that affidavit. It was alleged that the information became available subsequent to the filing of all the affidavits and that the information obtained contradicted much of that which is contained in the answering affidavit. There was no address during argument regarding the affidavit nor was there any opposition to the court receiving the affidavit and no affidavit was sought to be filed in response thereto. In the circumstances the supplementary affidavit properly forms part of the papers before me. The ANC filed its answering affidavit late and sought condonation for the late filing. The application for condonation was not opposed and it, too, is admitted.

[6] Prior to the hearing, and at my invitation, the parties held a pre-hearing meeting and filed a revised joint practice note which limited the issues for determination to six in number. However, after hearing argument for the applicants, counsel for the ANC, at the outset of his address, limited the issues further by abandoning reliance on some of the issues and or not pursuing others. What remained was:

[6.1] whether the DA had locus standi to bring the application and the affect of the DA's locus standi on the costs of the application;

[6.2] whether the request for documents complies with s 50(1)(a) of PAIA[2] - more particularly, whether the applicants demonstrated that the records which it requested were for the exercise or protection of any rights.

[7] The first issue will not result in the matter being finalised without the second issue being determined. However, counsel for the ANC submitted that a precondition for the exercise of a right to access any records in terms of s 50(1)(a) is that the requester should have first requested the required record in terms of s 53 of PAIA.[3] Only after such

---

[2] '50(1) A requester must be given access to any record of a private body if -
(a) that record is required for the exercise or protection of any rights;

[3] '(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address.

application can a party, competently, rely on the provisions of s 58[4] of PAIA and allege that there was a refusal to furnish the record and approach a court due to such refusal. This submission was met by argument that as long as one party, in this case Schreiber, indeed has locus standi, the matter can and should be decided on the merits. For the proposition reliance was placed on *Oakdene Square Properties*.[5] In my view, it may very well be so that Schreiber has a clear case to bring the application (and his right was not disputed save to the extent set out below), but that does not permit the DA to attempt to enforce provisions of PAIA without it having complied with the prerequisites contained in PAIA to enable it to launch an application of this nature. The DA failed to follow the prerequisite steps in order to rely on a right to approach a court for relief, and thus failed to lay a basis for its right to be an applicant in this matter as it never qualified as a 'requester' in terms of s 78(1) of PAIA.[6] However, the right of Schreiber is not tainted and any relief, if granted, will be granted to Schreiber. Counsel for the ANC was unable to suggest what prejudice there may have been due to the DA being cited as a party. The submission that the law regarding the locus standi of the DA had to be researched is not convincing as the fact that the DA had not requested any records and thus had no right to utilise the provisions of PAIA, in my view, did not require any substantial research. Its irregular joinder consequently has no material bearing on the costs in this matter.

---

(2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned -
(a) to provide sufficient particulars to enable the head of the private body concerned to identify -
(i) the record or records requested; and
(ii) the requester;
(b) to indicate which form of access is required;
(c) to specify a postal address or fax number of the requester in the Republic;
(d) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right;
(e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and
v) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.'

[4] 'If the head of a private body fails to give the decision on a request for access to the requester concerned within the period contemplated in section 56(1), the head of the private body is, for the purposes of this Act, regarded as having refused the request.'

[5] *Oakdene Square Properties (Pty) Limited and Others vs Farm Botha's Fontein (Kayalami) (Pty) Limited and Others* [2013] 3 All SA 303 (SCA) para 6.

[6] '(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.'

[8] Having regard to the papers before me, the issue, although resulting in a finding in favour of the ANC, pales into insignificance. Schreiber set out all the facts in his affidavit and the DA, save for its name in the heading and a letter attached to the papers, added nothing to the matter.

[9] The only issue then is whether, by requesting the documents, Schreiber has shown that he requested it for the exercise of a particular right. In so far as there are disputes on the affidavits, these are resolved on the basis of the version of the ANC, but that the uncontested version of Schreiber is also to be taken into account. The records requested by Schreiber are those of the ANC in relation to the process and decisions of the ANC's National Cadre Deployment Committee between 1 January 2013 and 1 January 2021.

[10] These records are required because the policies and practices of cadre deployment by the ANC influence which individuals are appointed and employed by State institutions. In answer to this, the deponent on behalf of the ANC denies that the ANC has loyalty to it as a precondition for employment in the public sector. However, it is common cause that the ANC's Deployment Committee is indeed at least a recommending committee which recommends individuals for appointment by the authorised State decision makers. Counsel for the ANC submitted that there are instances where the wishes of the Deployment Committee are not taken into account. The corollary of this is that there are indeed instances where the appointments are so made.

[11] The evidence before this court goes much further. In the supplementary affidavit, which was not objected to and which I permitted to be introduced contains evidence which was placed before the Commission into State Capture ('the Zondo Commission'). During his evidence, the president of the ANC (who was also president of the country) stated that it is inappropriate for activities of the Deployment Committee to be done in dark corners and he accepted that it should instead be done openly and transparently. The Deployment Committee documents, which were disclosed at the Zondo Commission, demonstrate that not only that the Deployment Committee, inter alia, gets involved in 'judicial appointments' it recommended names of persons as judges or candidates for the Bench.

[12] The National Chairperson of the ANC gave evidence before the Zondo Commission where he said, of the deployees so recommended by the Deployment Committee that:

> 'Comrades once deployed are expected to work on behalf of the [ANC] movement in the public service and parastatals'.

In my view, such a deployment may detract from the objectivity of the person so employed who had to 'work' on behalf of the ANC.

[13] There is also the evidence of the Ms. Hogan, who is a former Minister of Public Enterprises, who stated that it was a practice of the ANC's structures which showed a sense that certain ANC committees

> 'saw it as their right to instruct a Minister who should be appointed and not appointed',

a practice which she considered to be 'an abuse of power and is usurping executive authority'. In her evidence she describes significant pressure that she faced to appoint particular candidates within State-owned enterprises. She further said:

> '(T)here was no clarity . . . I would ask now who is the Deployment Committee and who is doing what?'

She said she was left 'very confused about what is happening'. Ms. Hogan described the effect of the ANC's Deployment Committee as having the result that 'a handful of people' simply decide, without any transparency, on the appointment of a 'huge number of people' in government. She further stated that the Deployment Committee ' if captured . . . it can have a fundamental impact on government' as a result of the Committee's undue influence on appointments. Ms. Hogan stated that the internal ANC dynamics

> 'encouraged and entrenched nepotism and patronage from within the ranks of the ANC and the Tri-Partite Alliance and this would have very damaging consequences for State owned enterprises and, by extension, for the economy.'

[14] This evidence was uncontradicted. I do not deal in any detail with all the allegations in the affidavits, which reference is made to and which was led before the Zondo Commission. Not much of this was referred to during argument before me.

[15] The final question remains whether the documents were required within the context of s 50(1)(a) of PAIA and that this should be determined with regard to the particular right which is or is not inextricably bound-up with the facts of the matter.[7] What may be required of a party is based on the fact that the term 'required' is a flexible one.[8]

[16] Schreiber said that the information required is necessary for him to protect certain rights. He pointed to three purposes of rights. Firstly, that the DA (of which he is a member) in its capacity as official opposition in Parliament wishes to enact legislation to govern the practice of cadre deployment and to control its detrimental impacts on the public. In order to properly craft legislation one needs to know exactly what cadre deployment consists of and what its consequences may be. Schreiber attached a draft bill that would impact on the matter if passed by Parliament. The ANC's response was that the desire to draft a bill is not done in an exercise of any right or any fundamental right but is done as a duty of a political party that is represented in Parliament. The requirements of PAIA do not refer to any fundamental right as if such right has to appear in the Bill of Rights. It is not in dispute that Schreiber has the right to introduce a bill into Parliament, whether he may do so by virtue of his right or a duty placed on the official opposition or political party, in my view, makes no difference.

[17] Secondly, it is common cause that as a member of Parliament, Schreiber has a duty of oversight over appointments to organs of state and the performance of organs of state. In my view, it is indeed so that the parliamentary oversight is best served with full knowledge of all the factors that go into the decisions to appoint individuals. Again, the ANC submitted that no fundamental right was involved. It is not contested that Schreiber, in the aforesaid capacity, has both the right and duty of oversight in parliamentary processes, which include the appointment of individuals to serve in organs of state. That right and duty necessitates the disclosure of facts in relation to the appointment of individuals.

[18] Thirdly, Schreiber advances that a category of litigation is relevant. The category includes applicants for positions who may have been denied opportunities or who may

---

[7] *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 6.
[8] *Unitas* para 18.

wish in future to apply for opportunities in the public service who will be enabled to enforce their rights with a better understanding of how cadre deployment works. In this regard individuals using the information may be able to challenge unlawful or irregular appointments in court.

[19] I am not convinced that Schreiber's application based on these undisclosed 'thousands of applicants for positions . . .' has a proper basis. In *Unitas* it was said:[9]

> 'The real issue is, therefore, whether in the circumstances of this case, s 50 afforded Mrs. Van Wyk a right to what amounts to a pre-action discovery'

and further:[10]

> 'I do not believe that open and democratic societies would encourage what is commonly referred to as "fishing expeditions", which could well arise if s 50 is used to facilitate pre-action discovery as a general practice . . . nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any action is launched. The deference shown by s 7 to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are discoverable only if they are relevant to the litigation, while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the Legislator had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course.'

[20] I am of the view that the aggrieved persons may well take steps should they wish to take legal steps and obtain documents through discovery. Such documents would be in the possession of the official of state who took the decision in relations to the appointment. In so far as these documents may not be in that person's possession, the Rules of Court[11] provide for assistance. I am consequently not convinced that Schreiber's catch-all application on behalf of unknown persons meets the requirement that the record is either required or necessary for him. Despite my conclusion on this latter aspect, it is relevant to note that the applicant has set out the three grounds (and others) in his affidavit

---

[9] At para 20.
[10] At para 21.
[11] Rule 38. See also *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd* 2019 (1) SA 257 (GJ).

as being the reasons why the information is required for the exercise or protection of a right and will be of assistance in the exercise or protection of that right.[12] Schreiber has set out, and prima facie established, the right which is sufficient proof for an applicant to result in his entitlement to access to the record for the exercise and protection of the right.[13]

[21] There is no meaningful denial that the records are required for the purposes established by Schreiber. This strengthens the case that the documents are indeed required, at least on the basis of the first two purposes set out by Schreiber.

[22] The parties did not address me regarding a time period for compliance with nor the question of costs save for the ANC's submission that the DA caused additional research. In the circumstances, I accept that the time period for compliance to be five court days. Both parties were represented by two counsel and I accept that both parties regarded that step as being justified.

[23] In the circumstances, I issue the following order:

1. The decision of the ANC to refuse Schreiber's request for a access to information dated 22 February 2021 is declared unlawful and invalid and is set aside.
2. The ANC is directed to provide all the information and records sought in Schreiber's request for access to information dated 22 February 2021 within 5 court days of service of this order.
3. The ANC shall pay the costs of this application including the costs of two counsel.

W.L. Wepener

Judge of the High Court of South Africa

[12] See *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) para 28; *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 13.
[13] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) para 8.

Counsel for the Applicants: N. Ferreira with A. Raw

Attorneys for the Applicants: Minde Shapiro & Smith Incorporated

Counsel for the Respondent: W. Mokhare SC with A. Moodley

Attorneys for the Respondent: L Mafesta Attorneys