4/6/2010

NORTH GAUTENG HIGH COURT
PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4 6 10
DATE SIGNATURE

NOT REPORTABLE

CASE NO: 1242/09

M & G MEDIA LIMITED
FIRST APPLICANT

FERRIAL HAFFAJEE
SECOND APPLICANT

V

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
FIRST RESPONDENT

THE DEPUTY INFORMATION OFFICER
OFFICE OF THE PRESIDENCY
SECOND RESPONDENT

MINISTER IN THE PRESIDENCY
THIRD RESPONDENT

OPEN DEMOCRACY ADVICE CENTRE
AMICUS

APPLICATION IN TERMS OF SECTION 78 PROMOTION OF ACCESS TO INFORMATION, ACT 2 OF 2000

CORAM: SAPIRE, A J

JUDGMENT

At the outset of the hearing, counsel for the applicants stated that the second applicant no longer sought any relief and in effect withdrew from the proceedings. Differences between the parties relating to the locus standi of the Second Applicant became irrelevant once it was so announced.

No questions of costs arose from this announcement.

I deferred the Application for Leave to make submissions as amicus curiae until the applicants and respondents had concluded their arguments, at which stage it could be gauged whether there still remained any fresh argument which could assist in the decision of the case. After counsel for the parties had completed their argument in making their submissions I heard counsel for the proposed amicus, who did not have anything new, relevant, and pertinent to add to what had already been canvassed at some length. The Respondents were opposed to the admission of the amicus. I accordingly, having had the advantage of having in fact hearing the proposed amicus' point of view, made no order on his Application for Admission of the Amicus to the case.

The application is made in terms of section 78 of the PROMOTION OF ACCESS TO INFORMATION ACT No2 of 2000, (PAIA) the operative portion of which reads

> 78 **Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies**
>
> (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.
>
> (2)* A requester-
>
> (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
>
> (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-

(i) to refuse a request for access; or

(ii) taken in terms of section 22, 26 (1) or 29 (3); or

(d) Aggrieved by a decision of the head of a private body-

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57 (1) or 60.

may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

(3) .....

The preamble to the Act makes it clear what principles and underlying considerations are to govern in construing the Act and applying its provisions. The preamble reads as follows:-

ACT

To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.

Preamble

RECOGNISING THAT-

* the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;
* section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;
* section 32 (1) (a) of the Constitution provides that everyone has the right of access to any information held by the State;
* section 32 (1) (b) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;
* and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT-

* the State must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;
* the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;
* Reasonable legislative measures may, in terms of section 32 (2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote and fulfil the right of access to information;

AND IN ORDER TO-

* foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
* actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,

It is common cause that the Applicant has fulfilled the conditions precedent to the application provided for in sub section (1) by making the appropriate application for access to the record, and pursuing the internal appeal available on refusal of the application.

The circumstances giving rise to this application are as follows:

In 2002 the then President of the Republic of South Africa, Thabo Mbeki, having obtained the concurrence thereto from, or the permission of, the then Chief Justice, dispatched two sitting judges to Zimbabwe to conduct an investigation on his behalf.. The papers are not clear what the mission of the two judges was. A precise statement of their terms of reference is not to be found in the affidavits. Trevor George Fowler, on whose affidavit the Respondents principally rely stated in this connection

"In 2002 the two justices were appointed as something in the nature of envoys (referred to in this affidavit as "envoys") of the President of the Republic of South

Africa in order to assess the constitutional and legal challenges that had emerged in Zimbabwe and to report on those matters to the President directly and in confidence."

The President was of course aware of the importance to South Africa of stability in Zimbabwe.

The emissaries reported directly in writing to the President on their findings. This report is, in the language of PAIA by definition a record in the possession of the First Respondent. Its contents have never been publicly disclosed.

The Applicant applied to the Second Respondent for access to this record but was turned down. This decision of the Second Respondent was upheld on an internal appeal being made. The Applicant now applies to this Court in terms of Section 78 of PAIA.

In the refusal of access to the record which was contained in a letter of the 28th of July 2008 addressed to the Applicant's attorneys by the Deputy Information Officer, one Trevor Fowler, stated that he was of the view that the disclosure of the contents of the Record would reveal information supplied in confidence by or on behalf of another State or an international organisation. He went on to say that PAIA entitles him to refuse a request for access to a Record of the body if the record contains an opinion, advise, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law. He concluded that access to the Record requested by the Applicant was to be justifiably refused in terms of Sections 41(1)(b)(i) and

44(1)(a) of PAIA. The letter ended by drawing the attention of the Applicant to Section 74 and 75 of PAIA which provide that an appeal against his decision was to be made within 60 days of the Notice. As we have seen this right of appeal was exercised, but the appeal was unsuccessful and the Deputy Information Officer's decision was upheld.

The Applicant then launched the present application seeking relief which this Court in terms of Section 82 of PAIA is entitled to give. Section 82 reads as follows:

> "The court hearing an application may grant any order that is just and equitable, including orders-
>
> (a) confirming, amending or setting aside the decision which is the subject of the application concerned;
> (b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;
> (c) granting an interdict, interim or specific relief, a declaratory order or compensation; or
> (d) as to costs."

In the Founding Affidavit the factual background that has culminated in this application was fully canvassed. The Affidavit also contains a synopsis of the Constitutional role and objects of PAIA. This aspect of the information appears in the preamble to PAIA to which reference has been made.

The Affidavit also deals with the public interest concerning the activities of the Zimbabwean President and his regime's conduct prior to, during and after the

Presidential Election in Zimbabwe in 2002. It would not be unreasonable to infer that it was in this connection that the judges were sent to make their enquiries.

Lastly the Applicant examines the Respondents' grounds of refusal of access to the Record and contends that the grounds for refusal are without substance. Following on this the conclusion is reached that the Report ought to be released.

In these proceedings the Respondent opposes the granting of an order in terms of Section 82 and has advanced grounds additional to those originally relied on in refusing access, upon which the Respondents seek to justify the continued refusal to allow the Applicant access to the Record.

Section 81 of PAIA provides that for the purposes of the chapter within which the Section falls, proceedings on application in terms of Section 78 are civil proceedings. The Rules of Evidence applicable in Civil Proceedings apply to proceedings on application in terms of Section 78. Thirdly the Section provides that the burden of establishing that a refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies.

The Respondents rely on Affidavits attested by Trevor George Fowler, Mantombazana Edmie Tshabalala-Msimang, Frank Chicane, and Kgalema Petrus Motlanthe. These deponents have not indicated that they have personal knowledge of the relevant facts on which the Court is to act. None of the Deponents were privy to the appointment of the two Judges and cannot of their own knowledge describe their mandate and their terms of reference. These Deponents cannot of their own

knowledge testify as to the purpose of the mission and nor can they or any one of them say what took place in Zimbabwe and how and from whom the information in the Report was obtained.

On behalf of the Respondents it was argued that the august positions in government of the deponents were sufficient guarantee of the acceptability of what they said and that the hearsay rule did not apply to them. Clearly it was not possible to accept their evidence on crucial matters where clearly they did not have personal knowledge thereof. Where the deponents deal with the applicability of the two sections relied on for refusal of access they do little more than recite the wording of the statute, without providing any factual evidence referring to the contents of the report to support the exercise of the discretion therein afforded to refuse access.

The Respondents contend in the answering affidavits (though not in the original refusal of access or in the appeal arising there from) that the Record is excluded from the ambit of PAIA in terms of Section 12(a) of that Act, because it is a Record of Cabinet. Factually this is incorrect and there is no basis for such a contention.
The evidence is that the Judges made their report directly to the President and that it remains in the office of the President until this day without it ever being incorporated in the Records of the Cabinet. One of the Deponents was a member of the Cabinet and she did not in her Affidavit say that the Record was a Cabinet document. This particular reason for refusing access which was raised for the first time in the Respondents' Replying Affidavits cannot be sustained.

The Respondents attempted to overcome this difficulty by reference to the constitutional definition of the Cabinet which includes the President but the obvious answer to this is that the President on his own is not the Cabinet.

A point raised by the Respondents regarding the inadmissibility of allegations by the Applicants in the Founding Affidavit as hearsay was not pursued in argument. In any event the essential facts in this matter on which the Applicants rely are either common cause or matters of public knowledge, of which Judicial notice of which can be taken. What is not common cause are essential facts required by the Respondents to justify refusal of access to the Record.

I now turn to the originally cited grounds of refusal of access in terms of Section 41(1)(b)(i) and 44(1)(a).

The Respondents contend that the Report is excluded from the provisions of PAIA because it contained information "supplied in confidence by or on behalf of another State or international organisation" thus bringing it within the terms of Section 41(1)(b)(i) of PAIA. This argument cannot be sustained in the absence of evidence that the record contains information obtained in confidence. The affidavits on which the Respondents rely contain no allegations made by persons who have the relevant personal first hand knowledge. In order to justify a refusal it would have been necessary for the Judges or one of them to state that information on a specified topic had been obtained from a specified person in terms of confidentiality. Furthermore there is no evidence from any source that the Report contains information supplied on behalf of another State or organisation. There is nothing to show that the mandate of

the Judges confined to them to obtaining information from another State or international organization. Moreover there is no evidence of confidentiality. To misdescribe the judges as "envoys" does not overcome this difficulty.

Section 41(1)(b)(i) of PAIA provides that:

> "The Information Officer of a public body may refuse a request for access to a record of the body if its disclosure would reveal information supplied in confidence by or on behalf of another state or an international organization."

The Section quoted contains a discretionary ground of refusal. The use of the word "may" is in this instance an indication of discretion and it is a discretion which must be exercised in favour of disclosure unless there are reasons, which must be stated, for refusal. These reasons must be identified and established by evidence. This is not so in the present case. Only the Judges themselves or the persons from whom information was received can testify as to whether it was supplied in confidence by or on behalf of another State or organisation.

It is also surprising that the contents of the Report should contain such material for on the evidence the Judges were mandated to investigate certain "constitutional and legal matters". These are not obviously or necessarily of a confidential nature.

The Respondents have in their Affidavits made it quite clear that the information in the Report was not obtained exclusively from the Zimbabwean Government or its representatives and they have accordingly failed to distinguish those parts of the Report which would fall under Section 41(1)(b)(i).

The Respondents further ground the refusal of access to the Report on the provisions of Section 44(1) (a) of PAIA. This Section provides for a further discretionary ground on which access to a Record may be refused. The ground for refusal in terms of this Sub Section is that the Report was "obtained or prepared .... for the purpose of assisting to formulate a policy or to take a decision in the exercise of a power or performance of a duty conferred or imposed by Law."

The Respondents state that when the President commissioned the Judges, their brief was to "assess the constitutional and legal issues that arose prior to the 2002 Presidential Elections in Zimbabwe."

Fowler in his Affidavit upon which the Respondents rely, says "that the President at the time, Mr Mbeki, appointed the Justices, *inter alia*, primarily to assess the constitutional and legal issues that arose prior to the 2002 Presidential elections in Zimbabwe and report to him in his capacity as President and Head of State." This indicates that the mission of the Justices was not to obtain material upon which the President could formulate policy. This is confirmed by Fowler's following statement that "A related purpose of the mission which arose once the President had sight of the Report was that he was able to utilise the Report to assist him in the formulation of policy and taking of decisions in the exercise of his powers or the performance of his duties in the aforementioned capacities in relation to the Zimbabwe situation, which powers and duties have been conferred and imposed on him by law. The Report is in the possession and control of the First Respondent and forms part of the documents

that continue to inform him as he lends support to the new Government in Zimbabwe."

Emerging from these statements is the conclusion that the Report was not initially commissioned in order to enable the then President to formulate policy. It is clear that only after he had obtained the Report that according to Fowler the President found it useful in the formulation of policy. In these circumstances it cannot be said that the Report was obtained and prepared for the purpose of assisting in the formulation of policy.

Its usefulness only became apparent to the President after he had received the Report.

The quoted paragraph confirms what has already been observed in relation to the Record not being in possession of the Cabinet.

There were contending arguments relating to the nature of the present proceedings for the Respondents it was contended that these proceedings are in the nature of a review.

The conclusion to which I have come is that the application provided for in Section 78 is sui generis. The Court is to assess from the facts placed before it whether the Record to which the Applicant seeks access should be disclosed or not. The Act places an onus on those denying access to establish their justification therefore.

In the present case the evidence placed before the Court does not establish such justification and the Applicants are entitled to relief.

In terms of section 82 of the Act I order that:

1. The refusal by the Information Officer of access to the Report, and the confirmation thereof on appeal, is set aside;
2. That the Respondents or such of them as are in possession of the Record, being the Khampepe-Moseneke Report compiled by the Honourable Judges of those names, afford access to the Applicant thereto;
3. The Respondents supply the Applicants with a copy of the Report within 7 (SEVEN) days of the date of this order;
4. That the Respondents are to pay the costs of this application including the costs attendant on the employment of two counsel, jointly and severally, the one paying the others to be absolved.

S W SAPIRE AJ

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