IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No.: 16/05598

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST	Applicant
and	
THE SOUTH AFRICAN RESERVE BANK	First Respondent
THE GOVERNER OF THE SOUTH AFRICAN RESERVE BANK, L KGANYAGO	Second Respondent

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APPLICANT WRITTEN SUBMISSIONS IN REPLY

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1. It is now clear that SARB's fundamental objection to disclosure is a blanket objection, regardless of the content of the documents in issue. It contends that the disclosure of <u>any</u> document in the investigation files is likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic (s 35(1)) – <u>regardless of its content</u>. That is why SARB has not put up any proper evidence of harm that will likely be caused by disclosure. The effect of this claim, if upheld, would be that SARB's Financial Surveillance Department would be exempt from PAIA. We submit that this claim has to be roundly rejected. Section 12 of PAIA identifies records to which PAIA

does not apply. The records of the SARB Financial Surveillance Department are not on that list. And there is no evidence of the likely harm which SARB alleges.

2. **Condonation**: SARB contends that SAHA has not made a proper application for condonation. This is not correct:

2.1 Para 1 of the notice of motion (p 1) seeks an order, to the extent necessary, condoning the applicant's non-compliance with the 180-day period within which an application of this nature is to be brought.

2.2 Paras 130 and 131 of the founding affidavit (p 48) set out the grounds on which condonation is sought. The deponent notes that the SARB is deemed to have refused the request when it did not give an answer within the period prescribed by s 27 of PAIA. She points out that after that date, SARB engaged with SAHA with regard to the request, and that on 28 October 2015 SARB actually refused the request. The application was brought within 180 days of that actual refusal. She submits that to the extent that there has been non-compliance with the 180-day period, this should be condoned, because SAHA engaged with SARB during and after the 180-day period in an attempt to avoid unnecessary litigation. The delay was caused by SARB's response to the request. Under the circumstances, she submits that it is in the interests of justice that the delay in making this application should be condoned, and that an order should be made to this effect, to the extent necessary.

2.3 SARB does not deny any of this. It simply says that it *"does not take issue with the 180 day period"* (para 164, p 191).

2.4 It is therefore, with respect, difficult to understand on what basis it can be contended that SAHA has not made a proper application, or that the application should not be granted.

3. **The relief sought**:

3.1 In para 3 of the notice of motion (p 2), SAHA seeks an order *"reviewing and setting aside"* the refusal by the respondents of SAHA's request. SARB takes issue with the words *"reviewing and"*. Nothing turns on this, and the refusals can simply be set aside: see PAIA s 82(a).

3.2 In para 4 of the notice of motion (p 2), SAHA seeks an order directing the respondents to provide the records in respect of Brig Blaauw, Mr Ricci, Mr Botha and Mr Hill. SAHA persists in seeking that relief in respect of Brig Blaauw and Mr Hill.

3.3 In relation to <u>Mr Hill</u>: If the Court is not disposed to order the disclosure of all of the documents relating to Mr Hill, then we submit that the Court should (having set aside the refusal in terms of prayer 2) refer the request in respect of Mr Hill's records back to the SARB for it to make a fresh decision, with due regard to its obligation under s 28 of PAIA to provide

records which can reasonably be severed. These would be the records which are identified as of primary importance having regard to the nature of the request, without the need to examine each and every document in the file boxes.

3.4 In relation to Mr Palazzolo: para 3 of the notice of motion (p 2) asks for an order setting aside the refusal to provide Mr Palazzolo's records. Mr Palazzoli was given notice of this. Such an order can be made. If the Court finds that the notice was not sufficient to place Mr Palazzolo on notice that the Court might also order the SARB to provide the records held in respect of him, then we submit that the Court ought to

3.4.1 set aside the refusal to provide the records in respect of Mr Palazzolo;

3.4.2 refer the request back to SARB with directions that it deal with the request in light of the judgment;

3.4.3 order the SARB to give notice to Mr Palazzolo that the disclosure of records relating to him is being sought, and that if he wishes to oppose the making of such disclosure, he may do so by informing SARB of this, and of the grounds for his objection, within a period of 30 days.

4. The meaning of the PAIA request

4.1 We submit that the request is to be given its plain meaning, namely that it is a request for all records (or parts of records) of any evidence obtained by the bank at any time as part of investigations into any substantial contravention of the law. The request is not for evidence of contraventions, nor is it a request for evidence that would be relied upon by SARB or the NPA in any trial. It is for evidence collected during the course of investigations into alleged contraventions. The investigation files were opened to investigate contraventions of the Exchange Control provisions (answering affidavit para 64, p 141). The documents are in the investigation files because they are evidence collected as part of those investigations.

4.2 The investigations in respect of Mr Palazzolo were self-evidently of very serious offences.

4.3 The same applies to Mr Hill.

4.4 In respect of Brig Blaauw, the matter was sufficiently serious for the SARB to collect 3 lever arch files of documents, and to inform the SAPS (together with an affidavit which has gone missing) that it was alleged that Brigadier Blaauw has committed offences (answering affidavit para 64, p 141; para 97.1, p 160).

4.5 SARB itself admits that two of the individuals *"fell within the formulation of the Applicants' PAIA request"* (para 154.2, p 183).

5. SARB relies on the judgment of Sutherland J in the 2015 *Afriforum* case (respondent's bundle p 204). Sutherland J held that if a requestor asks for a particular document and is told that it does not exist, or that its contents are not what the requestor wants, the requestor may not then revise its request to ask for another record, pursuant to that request being refused. He then added:

> *"This limitation does not, of course, mean that an inadvertent mislabelling of a record in a request shall snooker an entitlement to the record contemplated by an otherwise clear request, provided its true identity can be reasonably discerned by the information officer".*

To the extent that there is any lack of clarity in the request, which is not conceded, the true identity of the documents requested can reasonably and in fact easily be discerned. The request is not a pleading, and is not to be scrutinised as if it were (Afriforum 2016 judgment, respondent's bundle p 115 para 38).

6. **The number of PAIA applications**: SARB referred in oral submissions to 14 requests for information by SAHA. In fact, there were two sets of requests. First, there were requests made in 2013. They were refused on the grounds that sufficient particulars were not provided. SAHA did not pursue them. Thereafter,

in 2014, SARB made six fresh requests in an attempt to address this: founding affidavit para 11-12, p 9. It is one of those which is in issue in this matter.

7. **SARB's failure to provide evidence to justify PAIA exceptions**: SARB asserts that its account of the likely source of certain of the documents, based on how its system operates, is *"evidence"* of the kind which is required in terms of the Act. SAHA's principal contention, however, is the absence of evidence of likely harm of the kind which is referred to in the Act. As the cases show, a mere averment or an *ipse dixit* in an affidavit is not sufficient in this regard. SAHA submits that no *"evidence"* of this kind has been produced. It therefore does not assist SARB to rely on the *Plascon-Evans* test, because the premise of the *Plascon-Evans* test is that there is admissible and sufficient evidence put forward by the respondent. In this instance, that is not the case. There is in truth no evidence of likely harm through disclosure: there is merely assertion. That is not enough.

8. **Joinder**:

8.1 SARB submits that if any one of the parties is not properly joined, then no relief can be granted against a party which has been properly joined. We submit that neither authority nor logic supports such a proposition. As there is admittedly no need to join the late Brig Blaauw or his heirs, there is no possible obstacle to an order being made in respect of his records.

8.2 As to joinder generally: In the *BEO* case, the SCA held that formal joinder was not necessary where after the judgment in the High Court, while the appeal to the SCA was pending, the applicants' attorney wrote an informal letter to the persons affected informing them of the case, and they replied by way of informal letter stating that they abided the decision. It was held that this was sufficient to satisfy the common law requirement of joinder. What this demonstrates is that the common law rule does not require a particular procedure: whether it is satisfied, is a matter of common sense. We submit that here, too, the common law requirement of joinder is satisfied: the persons affected were sent a compulsory statutory notice; the notice was a prerequisite for the litigation, as determined by the Rules Board; the notice included a copy of the application to Court; and the persons affected did not elect to object or to participate in any manner. We submit that in these circumstances, too, the common law requirement of joinder is satisfied.

9. **Personal information**:

9.1 Section 34(1) of PAIA requires the information officer to refuse a request for access to a record *"if its disclosure would involve the <u>unreasonable disclosure</u> of personal information about a third party ..."*. SAHA pointed out in its oral submissions that SARB had repeatedly misconstrued this section, stating that records *"constitute personal information ... the information is, <u>therefore</u>, protected from disclosure in terms of s 34(1) of PAIA, subject to the public interest override ..."* [emphasis added]. In

other words, SARB contended that the mere fact that it is personal information requires non-disclosure. (See for example answering affidavit para 82.3, p 151; para 86.2, p 155; para 91.4, p 160). That however is obviously not the test: the test is whether disclosure would be unreasonable.

9.2 SARB's response to this in oral argument was to contend that it is *"not necessary to spell out in words that the disclosure is unreasonable, because this is implied by the reference to s 34(1)"*. This is, with respect, simply wrong, on two grounds.

9.2.1 First, SARB repeatedly misquotes the section, asserting that the mere fact that the document is personal information triggers protection from disclosure. This demonstrates that it has not properly appreciated the nature of the exemption.

9.2.2 But in any event, it is insufficient, for the reasons pointed out by the Constitutional Court in *President v M&G Media* and by the SCA in *BHP Billiton*: it is not enough to recite the words of the section (even if they are correctly quoted), it is necessary to provide evidence as to why the exemption is met. SARB has not done this.

10. **Severance**: SARB made two surprising submissions in order to justify its failure to address the question of severance in the answering affidavit, notwithstanding the obligation under section 28 of PAIA to sever if this is possible:

10.1 First, it submitted that the issue of severability was not raised in the founding papers, and there was therefore no need for SARB to deal with it. This is simply not true. SAHA explicitly raised this issue in the founding affidavit, under the heading *"No consideration of severance under s 28 of PAIA"*, and said (pp 33-34):

> *"97. There is no suggestion that the Reserve Bank has ever considered whether any part of record can be released, as s 28 of PAIA requires it to do ....*
>
> *99. The Reserve Bank has effectively refused access not only to every one of the requested records, but also to every part of every one of the requested records.*
>
> *100. I submit that it is inconceivable that every part of every one of the records is excluded by PAIA from disclosure. I invite the Reserve Bank, if it contends that this is the case, to produce evidence on affidavit by the person(s) who considered each of the requested records and concluded that no part of any one of them could or should be disclosed.*

10.2 In its answering affidavit, SARB did not attempt to deal with this at all: para 153 (pp 182 – 183). The only *"answer"* was in para 153.4, which stated:

> *"The applicants' averments in paragraphs 65 – 105 are denied to the extent that they are at variance with the SARB's case set out elsewhere in this affirmation"*.

10.3 The SARB claim that SAHA did not raise the issue of severability in its founding papers, and that there was therefore no need for SARB to deal with it, is therefore simply wrong.

10.4 The second surprising submission on behalf of SARB (as we understood it) was that the party which alleges that there should have been severance, must show which part should have been severed. That cannot conceivably be correct. The party requesting the record obviously cannot identify which parts should be severed, because it does not have the document.

10.5 We submit that it is plain that the onus is on the public body to demonstrate that severance is not possible. This follows both from the wording of s 28, and from the fact that the public body is the only party which is in possession of the record, and in a position to make assertions as to whether there should be severance, and if so, of what.

11. SARB submitted that Exchange Control Regulation 19, which confers powers of compulsion on SARB, is created to assist SARB, and not the public at large. It submitted that if a member of the public gets to know that information was obtained under compulsion, that undermines the functioning of the system. But that is not enough: what SARB must show is that the documents in question fall under one of the statutory exceptions. A blanket claim, simply on the basis that the documents were obtained under compulsion, is not enough.

12. **The effect of disclosure on SARB's record-keeping system:**

    12.1 SARB argues that the index cards reflecting exchange control transactions should not be disclosed because of the potential harm to the integrity of SARB's record-keeping system. (SARB relies on the sec 42(1) exemption). We have dealt previously with the lack of evidence in this regard, but we note the following in response to the submission that the disclosure of the index cards will interfere with SARB's record-keeping system:

    12.2 In the first instance, SAHA does not seek access to portions of SARB's records that are presently in use or that are required for the proper functioning of the system. The index cards are in investigation files at the Reserve Bank. Either the original, or a copy, has already been removed from SARB's formal records. The disclosure of the index cards in the investigation files will not interfere in any way with SARB's record-keeping system.

12.3 Secondly, the index cards relate to transactions that took place about twenty years ago. The disclosure of the information on those index cards is hardly likely to cause any prejudice to SARB's internal systems. No evidence was produced of any such harm.

13. **Costs**:

13.1 SARB submitted that the fact that a constitutional issue was raised, is not enough to put the matter in the *Biowatch* category if the application fails: it is necessary to look at whether the request was made to further the personal interests of a requestor, or in the broader interests of the public. We accept that is generally the test.

13.2 In its founding affidavit, SAHA repeatedly asserted that it seeks disclosure of the records in the public interest, because the public has an interest in knowing the truth of what happened under apartheid: see for example para 10 (p 9); para 26-31 (pp 15-16); para 106-112 (pp 36-38). SARB did not deny any of this in its answering affidavit.

13.3 Yet in oral argument, the submission was made that because the materials will be used in a book which will focus on procurement practices and public accountability under apartheid, this is therefore material which is sought *"for commercial gain"*. But there is not a word in the papers which suggests that this is the purpose of the activity. SARB never

suggested this in its affidavits. It did not dispute SAHA's statements that the reason why it seeks to have these records of the apartheid era made public, is to serve the public interest in disclosure of our history.

13.4 This application therefore falls squarely within the *Biowatch* principles: The application is brought by a non-governmental organisation seeking to enforce the constitutional right of access to information in the public interest, in order to make records of the apartheid era available to members of the public.

13.5 SAHA submits that in accordance with the *Biowatch* principles, SARB should be ordered to pay the costs, including the costs of two counsel (prayer 6, p 3).

13.6 From this it follows that:

13.6.1 If the application succeeds, SAHA is entitled to its costs.

13.6.2 If the application fails, SARB (an organ of state) is not entitled to an award of costs against SAHA, because the effect would be to inhibit the *bona fide* assertion and claiming of constitutional rights.

13.6.3 SAHA is on any basis entitled to the costs until after the filing of the answering affidavit. That was the first time when SARB disclosed the Harms Report, which (it is common cause) had to be disclosed. Until that time, SARB had refused to disclose it.

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15 August 2017